

POLICY ROUNDTABLES

Relationship between Regulators and Competition Authorities

1998

Introduction

The OECD Competition Committee debated the relationship between regulators and competition authorities in June 1998. This document includes an executive summary, an analytical note by Mr. Gary Hewitt for the OECD and submissions from Australia, Canada, Denmark, the European Commission, Finland, France, Germany, Hungary, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Norway, Spain, Sweden, the United Kingdom and the United States, as well as an aide-memoire of the discussion.

Overview

The introduction of greater competition in regulated sectors has required establishing new regulators or seriously rethinking what existing regulators were doing, bringing to the fore important questions concerning the proper relationship between sector specific regulators and economy-wide competition agencies.

On the one hand, competition agencies have a comparative advantage over regulators when it comes to ensuring that anti-competitive conduct and mergers do not undo the benefits expected to flow from introducing greater competition into regulated sectors. There should be a strong presumption in favour of leaving these functions in the hands of a competition agency. On the other hand, sector-specific regulators have a comparative advantage in obtaining and analysing the cost data needed for economic regulation and for some aspects of access regulation. This favours leaving regulatory functions to sector-specific regulators.

The assessment should also consider synergies and the ability to resist regulatory capture. In sectors expected to soon become competitive, transitory economic and access regulation might be better left to an economy-wide competition agency. At the same time, in sectors where there is likely to be a long term need for regulation, that task should probably be left to sector-specific regulators.

Related Topics

OECD Guiding Principles for Regulatory Quality and Performance (2005)
Regulating Market Activities by Public Sector (2004)
Competition Issues in the Electricity Sector (2003)
Recommendation of the Council concerning structural separation in regulated industries (2001)
Restructuring Public Utilities for Competition (2001)

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

OLIS : 24-Jun-1999
Dist. : 29-Jun-1999

English text only

DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS
COMMITTEE ON COMPETITION LAW AND POLICY

RELATIONSHIP BETWEEN REGULATORS AND COMPETITION AUTHORITIES

DAFFE/CLP(99)8
Unclassified

English text only

79571

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Relationships between Regulators and Competition Authorities which was held by the Committee on Competition Law and Policy in June 1998.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of several published in a series entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur la relation entre les responsables de la réglementation et les autorités chargées de la concurrence, qui s'est tenue en juin 1998 dans le cadre de la réunion du Comité du droit et de la politique de la concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE afin de porter à la connaissance d'un large public, les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

Visit our Internet Site -- Consultez notre site Internet

http://www.oecd.org/daf/clp

OTHER TITLES

SERIES ROUNDTABLES ON COMPETITION POLICY

1.	Competition Policy and Environment (Roundtable in May 1995, published in 1996)	OCDE/GD(96)22
2.	Failing Firm Defence (Roundtable in May 1995, published in 1996)	OCDE/GD(96)23
3.	Competition Policy and Film Distribution (Roundtable in November 1995, published in 1996)	OCDE/GD(96)60
4.	Competition Policy and Efficiency Claims in Horizontal Agreements (Roundtable in November 1995, published in 1996)	OCDE/GD(96)65
5.	The Essential Facilities Concept (Roundtable in February 1996, published in 1996)	OCDE/GD(96)113
6.	Competition in Telecommunications (Roundtable in November 1995, published in 1996)	OCDE/GD(96)114
7.	The Reform of International Satellite Organisations (Roundtable in November 1995, published in 1996)	OCDE/GD(96)123
8.	Abuse of Dominance and Monopolisation (Roundtable in February 1996, published in 1996)	OCDE/GD(96)131
9.	Application of Competition Policy to High Tech Markets (Roundtable in April 1996, published in 1997)	OCDE/GD(97)44
10.	General Cartel Bans: Criteria for Exemption for Small and Medium-sized Enterprises (Roundtable in April 1996, published in 1997)	OCDE/GD(97)53
11.	Competition Issues related to Sports (Roundtable in October 1996, published in 1997)	OCDE/GD(97)128
12.	Application of Competition Policy to the Electricity Sector (Roundtable in October 1996, published in 1997)	OCDE/GD(97)132
13.	Judicial Enforcement of Competition Law (Roundtable in October 1996, published in 1997)	OCDE/GD(97)200

14.	Resale Price Maintenance (Roundtable in February 1997, published in 1997)	OCDE/GD(97)229
15.	Railways: Structure, Regulation and Competition Policy (Roundtable in October 1997, published in 1998)	DAFFE/CLP(98)1
16.	Competition Policy and International Airport Services	DAFFE/CLP(98)3
17.	Enhancing the Role of Competition in the Regulation of Banks	DAFFE/CLP(98)16
18.	Competition Policy and Intellectual Property Rights	DAFFE/CLP(98)18
19.	Competition and Related Regulation Issues in the Insurance Industry	DAFFE/CLP(98)20
20.	Competition Policy and Procurement Markets	DAFFE/CLP(99)3/FINAL
21.	Regulation and Competition Issues in Broadcasting in the Light of Convergence	DAFFE/CLP(99)1

TABLE OF CONTENTS

EXECUTIVE SUMMARY OF THE DISCUSSION 7
SYNTHÈSE DE LA DISCUSSION 11

BACKGROUND NOTE 17
NOTE DE RÉFÉRENCE 51

SECRETARIAT'S SUGGESTIONS FOR SUBMISSIONS 91
SUGGESTIONS DU SECRÉTARIAT POUR LES SOUMISSIONS 97

NATIONAL CONTRIBUTIONS

Australia 105
Canada 113
Denmark 125
Espagne 131
Finland 141
France 147
Germany 157
Hungary 161
Italy 165
Japan 169
Korea 175
Mexico 181
Netherlands 187
New Zealand 211
Norway 219
Sweden 235
United Kingdom 241
United States 261
Commission européenne 277

OTHER

"Making the transition from Regulation to Competition:
Thinking about merger policy during the process of electric power restructuring" 282
US Department of Justice, address by Joel Klein

AIDE-MEMOIRE OF THE DISCUSSION 291
AIDE-MÉMOIRE OF THE DISCUSSION 311

EXECUTIVE SUMMARY OF THE DISCUSSION

by the Secretariat

In the light of the written submissions, the background note and the discussion, the following points emerge:

- *A large and growing number of OECD Members are undertaking major reforms aimed at narrowing the scope of economic regulation and ensuring that regulations better serve public interests. Many competition agencies have played and continue to perform important advocacy and consumer protection roles in the regulatory reform process.*

Although there are significant differences across countries and industries, major regulatory reforms have generally included: market opening privatisation; rethinking universal service obligations; liberalising restrictions on entry, prices and normal business practices; and taking measures to ensure consumers are properly informed and protected. One of the principal objectives behind such economic reforms has been to broaden the scope for private markets to allocate resources thereby improving general economic efficiency. Competition agencies are vitally interested in and affected by the reforms.

Competition agencies have important expertise in identifying and helping to eradicate market power which, if left unchecked, would greatly reduce the benefits of regulatory reform. This is especially necessary because firms which are used to operating as monopolies or being co-ordinated by regulators may find it "normal" and highly attractive to continue in their pre-regulatory reform modes of doing business. In addition to opposing that tendency, competition agencies are in a good position to contribute to the reform process itself. Their input is particularly valuable on matters of industry structure (i.e. the need to horizontally or vertically split dominant incumbent firms), and on issues involving stranded costs or the implementation of universal service obligations. Competition agencies can help ensure that the methods for recovering stranded costs and for assuring universal service do not produce unnecessary competitive distortions. They may also be able to assist in eradicating deceptive marketing practices which directly harm consumers and tend to distort the competitive process in markets being liberalised.

- *Regulatory reform has often induced important debates about the scope of regulation needed in sectors being opened up to greater competition, i.e. should such sectors be subject to anything more than the general competition laws enforced by the same competition agency responsible for protecting competition in other sectors of the economy.*

In practice, regulatory reform has rarely consisted simply of abolishing regulations and leaving everything up to market forces operating within general framework competition law. In a great number of situations policy makers have adopted the view that competition must be fostered by a new kind of regulation which may or may not be strictly transitory. Many new or existing sector-specific regulators are being mandated to promote competition and sometimes being charged with formulating and/or applying general or sector-specific competition laws or rules. In a smaller number of countries, competition agencies have been assigned tasks that had previously been performed by government departments (acting as owners) or by sector-specific or general regulators. Whatever the current division

of labour between competition agencies and regulators, there are few, if any, countries where that division can be regarded as finally settled, especially since the transition to greater competition is far from complete.

- *Introducing competition in sectors previously dominated by state owned or heavily regulated vertically integrated firms and protecting consumers from supracompetitive pricing are difficult tasks. requiring a very broad range of expertise and experience.*

In addition to dealing with the earlier mentioned structural, stranded cost and universal service issues, there are four tasks typically needing careful attention during and after the transition from government ownership or heavy regulation to much greater reliance on market forces:

1. "competition protection" - controlling anti-competitive conduct and mergers;

2. "access regulation" - ensuring non-discriminatory access to necessary inputs, especially network infrastructures;

3. "economic regulation" - adopting cost based measures to control monopoly pricing; and

4. "technical regulation" - setting and monitoring standards so as to assure compatibility and to address privacy, safety, and environmental protection concerns.

- *Technical regulation requires on-going monitoring and application of sector-specific expertise having little direct relevance to competition questions. It can be safely assumed that this function will almost always be conferred on a set of sector-specific regulators. Once such a regulator is in place in a particular sector, the question may arise as to which, if any, of the other three functions should be assigned to it. The answer depends on a complex mix of comparative advantage and synergy issues. It is also heavily influenced by a country's general legal framework and regulatory history, hence the "optimal" solution could certainly vary from country to country and even across industries within the same country.*

Compared with sector-specific regulators, competition agencies seem better suited by their accumulated expertise, experience and basic institutional characteristics ("institutional culture") to protect competition from anti-competitive behaviour and mergers. For the same reasons, it seems generally true that compared with competition agencies, sector-specific regulators are better suited to undertaking economic regulation. Such regulation is on-going rather than periodic in nature, and heavily based on sector-specific knowledge. Things are not so clear when it comes to access regulation. The objective of such regulation is to promote as well as protect competition in certain situations where access to a portion of a vertically integrated incumbent firm's assets is vital to the development of a satisfactory level of competition. On the one hand, because of experience with abuse of dominance cases, competition agencies are more suited to performing this task than are sector-specific regulators. On the other hand, ensuring a level playing field requires processing a large volume of cost data in order to set access terms, and then following up with continuous monitoring to ensure compliance with those terms. These are functions that seem more in tune with what sector-specific regulators normally do.

Although both sector-specific regulators and competition agencies should presumably be able to hire appropriate expertise, the experience and institutional cultural differences between them are not so quickly and easily eradicated. Moreover there is a significant risk that trying to change or mix institutional cultures could compromise abilities to perform core functions. Five aspects of experience and institutional culture seem particularly important. First, sector-specific regulators are often charged

with attenuating the effects of market power, whereas competition agencies basically focus on reducing such power. This tends to produce quite different views on the extent to which market power can be managed for the public good. Second, sector-specific regulators typically impose and monitor various behavioural conditions whereas competition agencies are more likely to opt for structural remedies. Third, sector-specific regulators generally apply an *ex ante* prescriptive approach while competition offices, except in the important area of merger review, apply an *ex post* enforcement approach. Fourth, sector-specific regulators typically intervene more frequently and require a continual flow of information from regulated entities, while competition offices rely more on complaints and gather information only when necessary in connection with possible enforcement action. Finally, sector-specific regulators are typically assigned a considerably broader range of goals than competition agencies are asked to pursue, so they may become more adept at trading off conflicting goals.

Assigning competition protection to competition agencies and economic regulation to sector-specific regulators, as static comparative advantage considerations might suggest, means that important synergies might be lost. Synergies exist between competition protection and economic regulation and also between both of those functions and access regulation. They arise largely because the same staff expertise can be applied to a number of related problems, and because combining several policy instruments in the same agency increases the chances that they will always be used in tandem rather than sometimes at cross purposes.

- *Static comparative advantage and synergy considerations should be supplemented with a dynamic view of a sector. Where the need for both economic and access regulation is expected to be temporary and the main task is to introduce competition, it might make sense to confide both access and economic regulation to the general competition agency. On the other hand, where access and economic regulation are expected to be permanently required, as with natural monopoly transmission and distribution networks, it might be best to confide these tasks to sector-specific regulators. In either case, responsibility for competition protection should rest with the general competition agency.*

Whenever the principal task is arguably to manage the evolution to ever greater competition, general competition agencies should enjoy certain advantages over sector-specific regulators. In particular, competition agencies should be more:

1. attuned to pursuing static and dynamic economic efficiency which are the principal reasons for introducing competition;

2. convinced that competition truly will produce significant benefits, and motivated to demonstrate this in as many sectors as possible;

3. familiar with what constitutes a competitive market and what threatens it;

4. likely to rely on structural remedies which would probably prove to be a better instrument for developing competition than dependence on a set of behavioural prescriptions;

5. willing to wind down both access and economic regulations as and when competition becomes sufficiently strong (the fraction of resources devoted to such regulation of a specific sector should never be as high in a general competition agency as it would be in a sector-specific regulator); and

6. able to persuade the private sector, i.e. prospective investors, that the government is committed to making the transition.

The competition agency probably enjoys an overwhelming comparative advantage in competition protection, especially in investigating and prosecuting anticompetitive conduct such as cartel behaviour and reviewing mergers. Such functions should likely always be the responsibility of the competition agency.

- *When dividing tasks between competition agencies and sector-specific regulators, attention must also be paid to the potential for each type of institution to fall prey to regulatory capture, and problems inherent in subjecting competing firms to different sector-specific regulation.*

General, economy-wide agencies are more immune to regulatory capture than sector-specific regulators. The desire to avoid distorting competition through subjecting competitors to very different regulatory regimes also works in favour of general as opposed to sector-specific agencies, as does a closely related legal certainty argument. Wherever there is sector-specific regulation there will be a need to define jurisdictional boundaries among regulators and this will create legal expenses, delay and uncertainty. None of these problems arise where regulation is carried out either by a general competition agency or a multi-sector regulator.

- *If competition protection is separated from access and economic regulation, co-operation and co-ordination are vitally needed to avoid inconsistent, investment discouraging application of the two sets of policies.*

The country submissions revealed a large variety of ways to do this ranging from informal co-operation, to rights to make submissions, and on to legally required consultation. If informal co-operation does not work particularly well, it may be wise to reserve certain functions, such as defining markets or determining whether or not a company enjoys market power, to the competition agency. An alternative might be to give a degree of general oversight power to the competition office.

- *There is also a need for co-operative links to be forged between competition offices and sector-specific technical regulators.*

Co-operative links are needed not just to avoid resource duplication, but also to ensure that technical regulators take proper account of the ways in which the adoption and enforcement of technical standards can be used to distort or restrict competition.

- *Whenever access and economic regulation functions are located outside the competition agency, that agency should be extensively involved in any periodic reviews of whether such regulation is justified by continued market power.*

Competition agencies should be better placed than regulators to decide this question and should have less self-interest in unnecessarily continuing regulation. It follows that they should play an important role in administering any sun-setting provisions. It is noteworthy that in a small number of countries, regulators are statutorily required to forbear regulating once a sector is sufficiently competitive, and competition agencies are involved in determining whether that threshold has been met.

SYNTHÈSE DE LA DISCUSSION

par le Secrétariat

Des contributions écrites, de la note de synthèse et des débats, il ressort les points suivants :

- *Un nombre élevé et croissant de Membres de l'OCDE engagent des réformes majeures visant à réduire le champ de la réglementation économique et à faire en sorte que les réglementations soient plus conformes à l'intérêt public. De nombreux organismes chargés de la concurrence ont joué et continuent de jouer un important rôle de sensibilisation et de protection des consommateurs au cours du processus de réforme de la réglementation.*

Bien qu'il existe des différences notables de pays à pays et d'un secteur à l'autre, les principales réformes réglementaires ont été généralement les suivantes : ouverture des marchés et privatisation ; redéfinition des obligations de service universel ; libéralisation des barrières à l'entrée, des prix et des pratiques commerciales normales ; mesures destinées à faire en sorte que les consommateurs soient correctement informés et protégés. L'un des principaux objectifs de ces réformes économiques a été d'élargir les possibilités d'allocation des ressources par les marchés privés, ce qui a permis d'améliorer l'efficience économique générale. Les agences de la concurrence sont intéressées et concernées de manière cruciale par les réformes.

Les agences de la concurrence sont particulièrement bien armées pour mettre en évidence et combattre le pouvoir de marché qui, s'il n'était pas contrôlé, amoindrirait considérablement les avantages d'une réforme de la réglementation. Cette action est d'autant plus nécessaire que les entreprises habituées à fonctionner comme des monopoles ou à être régulées par des organes de tutelle peuvent trouver "normal" et extrêmement souhaitable de conserver leurs pratiques antérieures à la réforme de la réglementation. Les autorités chargées de la concurrence peuvent non seulement contrer cette tendance, mais aussi contribuer au processus de réforme lui-même. Leur apport est particulièrement précieux dans le domaine de la structure sectorielle (nécessité d'un démantèlement horizontal ou vertical des entreprises dominantes en place) et pour les questions concernant les coûts échoués ou la mise en œuvre des obligations de service universel. Les autorités de la concurrence peuvent contribuer à faire en sorte que les méthodes de récupération des coûts échoués et de maintien du service universel n'engendrent pas de distorsions inutiles de la concurrence. Elles peuvent aussi aider à éradiquer les pratiques de commercialisation trompeuses qui nuisent directement aux consommateurs et tendent à fausser le processus concurrentiel dans les marchés en voie de libéralisation.

- *La réforme de la réglementation a souvent suscité d'importants débats quant au champ de la réglementation nécessaire dans les secteurs ouverts à une plus large concurrence ; autrement dit, les secteurs doivent-ils être soumis à d'autres dispositions que les lois générales de la concurrence appliquées par l'autorité chargée de protéger la concurrence dans les autres branches de l'économie.*

Dans la pratique, la réforme de la réglementation s'est rarement bornée à supprimer simplement les réglementations et à laisser jouer pleinement les mécanismes de marché dans le cadre général du droit de la concurrence. Dans un grand nombre de situations, les décideurs publics ont estimé que la

concurrence doit être favorisée par un nouveau type de réglementation qui peut ou non être strictement transitoire. Beaucoup de régulateurs sectoriels nouveaux ou établis sont chargés de promouvoir la concurrence et parfois de formuler et/ou d'appliquer des lois ou règles de concurrence générales ou sectorielles. Dans un nombre plus restreint de pays, les autorités de la concurrence se sont vu confier des tâches auparavant dévolues aux départements ministériels (agissant en qualité de propriétaires) ou à des organismes de réglementation sectoriels ou généraux. Quelle que soit la répartition actuelle des tâches entre les autorités de la concurrence et les responsables de la réglementation, il n'y a quasiment pas de pays dans lesquels cette répartition peut être considérée comme immuable, d'autant plus que la transition vers une concurrence accrue est loin d'être achevée.

- *Instaurer la concurrence dans des secteurs auparavant dominés par des entreprises verticalement intégrées contrôlées par l'État ou étroitement réglementées et protéger les consommateurs contre une tarification abusive constituent des tâches difficiles qui exigent des compétences et une expérience étendues.*

Outre les problèmes déjà cités - aspects structurels, coûts échoués et service universel - quatre tâches exigent une grande attention pendant et après le processus de transition de la propriété d'État ou d'une réglementation étroite à un recours beaucoup plus large aux mécanismes du marché :

1. "protection de la concurrence" : combattre les agissements anticoncurrentiels et examiner les fusions ;

2. "réglementation de l'accès" : assurer un accès non discriminatoire aux intrants nécessaires, en particulier aux infrastructures de réseau ;

3. "réglementation économique" : adopter des mesures de contrôle des prix de monopole ; et

4. "réglementation technique" : élaborer des normes et en surveiller l'application en veillant à les concilier avec les objectifs visés de respect de la vie privée, de sécurité et de protection de l'environnement.

- *La réglementation technique suppose une surveillance permanente et la mobilisation de compétences sectorielles qui n'ont pas de lien direct avec les questions de concurrence. Cette fonction sera presque toujours dévolue à un ensemble d'instances sectorielles de réglementation. Dès qu'un tel organisme est mis sur pied dans un secteur particulier, on peut se demander lesquelles des trois autres fonctions il conviendrait éventuellement de lui confier. La réponse repose sur une combinaison complexe d'aspects qui touchent à l'avantage comparatif et à l'existence de synergies. Elle est également fortement déterminée par le cadre juridique du pays et par l'historique de sa réglementation. C'est dire que la solution "optimale" peut varier d'un pays à l'autre et entre les différents secteurs d'un même pays.*

Comparées aux organismes sectoriels de réglementation, les autorités de la concurrence apparaissent mieux armées, de par leur expertise accumulée, leur expérience et leurs caractéristiques institutionnelles fondamentales ("leur culture institutionnelle"), pour défendre la concurrence contre les fusions ou les pratiques anticoncurrentielles. Pour les mêmes raisons, les organismes sectoriels de réglementation sont plus susceptibles de posséder l'expertise sectorielle requise pour la réglementation économique, laquelle tend par nature à être plus continue que périodique et à reposer en grande partie sur un savoir sectoriel. Il n'en est pas de même de la réglementation de l'accès, dont l'objectif est de favoriser et de protéger la concurrence dans les situations où l'instauration d'un degré satisfaisant de concurrence nécessite que l'entreprise historique partage l'accès à une partie de ses actifs. En un sens, du fait de leur

expérience en matière d'abus de position dominante, les organismes chargés de la concurrence sont mieux placés pour y veiller que ne le sont les organismes sectoriels. D'un autre point de vue, pour veiller à ce que tous les acteurs soient sur un pied d'égalité, il faut pouvoir traiter un volume important de données de coûts afin d'établir les modalités de l'accès et de s'assurer de leur respect. De telles fonctions correspondent mieux aux attributions habituelles des organismes sectoriels de réglementation.

Certes, les agences de la concurrence comme les organismes sectoriels de réglementation devraient sans doute être en mesure de recruter les experts nécessaires, mais les différences qui les séparent en matière d'expérience et de culture institutionnelle ne peuvent pas être effacées aussi rapidement et aussi aisément. De surcroît, à vouloir modifier ou mélanger des cultures institutionnelles, on risque fort de compromettre la capacité d'exercer les fonctions centrales. Cinq aspects de l'expérience de la culture institutionnelle apparaissent particulièrement importants. Premièrement, les organismes sectoriels de réglementation sont souvent chargés d'atténuer les effets du pouvoir de marché, alors que les autorités de la concurrence s'efforcent essentiellement de réduire celui-ci. Il en résulte en général des points de vue très différents sur la possibilité de gérer le pouvoir de marché dans l'intérêt général. Deuxièmement, les organismes sectoriels de réglementation imposent généralement diverses normes de comportement et en surveillent le respect, alors que les agences de la concurrence sont plus susceptibles d'opter pour des remèdes structurels. Troisièmement, les organismes sectoriels appliquent généralement une démarche prescriptive *ex ante* tandis que les autorités de la concurrence - à l'exception notable de l'examen des fusions - optent pour une mise en application *ex post*. Quatrièmement, en règle générale, les organismes sectoriels interviennent plus souvent et exigent un flux continu d'informations de la part des entités réglementées, tandis que les autorités de la concurrence travaillent davantage à partir des plaintes reçues et ne réunissent des informations que lorsque c'est nécessaire pour une mesure d'exécution éventuelle. Enfin, les organismes sectoriels de réglementation se voient généralement assigner un éventail d'objectifs plus large que les autorités de la concurrence, de sorte qu'ils finissent par devenir beaucoup plus compétents en matière d'arbitrages délicats.

Si la protection de la concurrence est dévolue aux seules autorités de la concurrence et que la réglementation économique est réservée aux organismes sectoriels de réglementation, comme il paraît souhaitable au vu des avantages comparatifs statiques, d'importantes synergies peuvent être perdues. Il existe des synergies entre la protection de la concurrence et la réglementation économique, de même qu'entre ces deux fonctions et la réglementation de l'accès. En effet, dans un certain nombre de problèmes voisins, le même type de compétences peut s'appliquer, et le regroupement de plusieurs instruments d'action au sein d'un même organisme accroît les chances que ces instruments soient toujours utilisés de manière cohérente plutôt que dans des directions contraires, comme c'est parfois le cas.

- *Outre l'avantage comparatif statique et les synergies escomptées, il faut tenir compte d'une perspective dynamique. Lorsque l'on peut prévoir que la réglementation économique et la réglementation de l'accès ne seront nécessaires que temporairement et que la principale tâche consiste surtout à instaurer la concurrence, il peut être judicieux de confier la réglementation de l'accès et la réglementation économique à l'organisme généraliste chargé de la concurrence. A l'inverse, si l'on anticipe que la réglementation économique et celle de l'accès seront nécessaires de manière permanente, comme c'est le cas des monopoles naturels basés sur des réseaux de transmission et de distribution, il peut être plus avisé de confier ces tâches à des organismes sectoriels de réglementation. Dans un cas comme dans l'autre, la protection de la concurrence doit être dévolue à l'organisme généraliste chargé de la concurrence.*

Lorsque l'on peut considérer que l'objectif principal est de faciliter la transition vers une concurrence accrue, les autorités de la concurrence doivent jouir de certains atouts par rapport aux organismes sectoriels de réglementation. En particulier, les autorités chargées de la concurrence doivent être :

1. plus soucieuses d'efficience économique statique et dynamique, principale motivation pour instaurer la concurrence ;

2. plus convaincues des importants bienfaits que peut apporter la concurrence, et déterminées à en apporter la preuve dans un maximum de secteurs :

3. plus accoutumées aux caractéristiques qui font qu'un marché est concurrentiel, et aux facteurs qui peuvent mettre en péril cette concurrence ;

4. plus susceptibles de recourir à des instruments structurels, probablement plus indiqués pour instaurer la concurrence que l'application d'un ensemble de règles de conduite ;

5. plus désireuses d'alléger les réglementations d'accès et d'ordre économique à mesure que la concurrence se raffermit sur ses bases (la part des ressources consacrées à ce type de réglementation dans un secteur donné doit être inférieure chez un organisme chargé de la concurrence à ce qu'elle peut être chez un régulateur sectoriel) ;

6. plus à même de convaincre le secteur privé (c'est-à-dire les investisseurs potentiels) de la détermination des pouvoirs publics à amener cette transition.

L'organisme chargé de la concurrence est susceptible d'être considérablement mieux armé en matière de protection de la concurrence, particulièrement pour conduire les enquêtes et les poursuites en cas de conduite anti-concurrentielle - ententes, notamment - et examiner les fusions. Ces fonctions seront probablement toujours confiées à celui-ci.

- *Dans la division des tâches entre l'organisme chargé de la concurrence et les régulateurs sectoriels, il faut également tenir compte des risques respectifs de " capture" des deux types d'organismes et des inconvénients qui peuvent survenir si l'on soumet des entreprises à différentes réglementations sectorielles.*

Les organismes généralistes couvrant l'ensemble de l'économie présentent moins de risques de "capture" par de puissantes entités de réglementation que les organismes sectoriels. De même, le recours à un organisme unique permet d'éviter les distorsions de la concurrence qui risquent d'apparaître si la réglementation est confiée à plusieurs organismes sectoriels de réglementation, et simplifie l'application de la réglementation : un ensemble de régimes réglementaires sectoriels entraîne en effet la nécessité de délimiter les domaines de compétence entre les différents régulateurs, ce qui entraîne des frais judiciaires, des retards et des incertitudes. Aucun de ces inconvénients n'existe si la réglementation est dévolue à une autorité générale de la concurrence ou à un régulateur multisectoriel.

- *Lorsque la protection de la concurrence ainsi que la réglementation en matière d'accès et la réglementation économique sont exercées par des entités séparées, la coopération et la coordination sont absolument indispensables pour éviter que l'application des deux séries de mesures ne soit incohérente et ne décourage l'investissement.*

Les contributions des pays ont mis en évidence des moyens très divers d'y parvenir, depuis la coopération informelle, jusqu'au droit de formuler des avis en passant par des consultations légalement requises. Si la coopération informelle ne fonctionne pas particulièrement bien, il peut être judicieux de réserver certaines fonctions à l'autorité de la concurrence, notamment lorsqu'il s'agit de définir les marchés ou de déterminer si une société détient ou non une position de force sur le marché. Une autre solution consisterait à accorder un droit de regard à l'organisme chargé de la concurrence.

- *Il est également indispensable de forger des liens de coopération formels et informels entre l'autorité de la concurrence et les régulateurs sectoriels.*

Les liens de coopération sont nécessaires non seulement pour éviter le double emploi des ressources, mais aussi pour faire en sorte que les organismes de réglementation technique tiennent dûment compte des manières dont l'adoption et l'application des normes techniques peuvent servir à fausser ou restreindre la concurrence.

- *Dès lors qu'une réglementation économique est localisée à l'extérieur de l'autorité chargée de la concurrence, celle-ci devrait participer étroitement à des réexamens périodiques en vue de déterminer si cette réglementation est justifiée par la persistance d'un pouvoir de marché.*

Les organismes de la concurrence devraient être mieux placés que les organismes de réglementation pour trancher cette question et seraient sans doute moins intéressés personnellement à maintenir une réglementation économique sans justification. Par conséquent, ils devraient jouer un rôle important dans l'administration des règlements à validité temporaire. Il est intéressant de noter que dans un petit nombre de pays, les organismes de réglementation sont tenus statutairement de s'abstenir de réglementer dès lors qu'un secteur est suffisamment concurrentiel, et que les autorités chargées de la concurrence interviennent pour déterminer si ce seuil a été atteint.

BACKGROUND NOTE

1. Introduction/Context, i.e. ongoing regulatory reform

A large and growing number of OECD members are undertaking major reforms aimed at narrowing the scope of regulation and ensuring that regulations better serve public interests. These reforms have been particularly concentrated in the following industries: communications, electricity, natural gas, water/sewerage, transportation, financial services, professional services and agriculture. Although there are important differences across countries and industries, the reforms have generally included market opening privatisation, rethinking universal service obligations, and liberalising restrictions on entry, prices and normal business practices.[1] One of the principal objectives behind the reforms has been to broaden the scope for private markets to allocate resources thereby improving general economic efficiency. Given this thrust, it is not surprising that competition agencies are vitally interested in and affected by the reforms.

In many Member countries regulatory reform has induced important debates about the degree to which sectors being opened up to greater competition should also be subject to general competition laws enforced by the same competition agency responsible for protecting competition in other sectors of the economy. In practice, regulatory reform has rarely consisted simply of abolishing regulations and leaving everything up to market forces operating within general framework competition law. In a great number of situations policy makers have adopted the view that competition must be fostered by a new kind of regulation which may or may not be intended to be strictly transitory.[2] There are many examples of new or existing regulators being given mandates to promote competition and even being charged with formulating and, or applying general or customised competition "laws" ("rules" might be more appropriate in this context) in various sectors. In a considerably smaller number of countries, competition agencies (references to "competition agency" or "competition authority" apply to the national level competition office) have been assigned tasks that had previously been performed by government departments (acting as owners) or by sector-specific or general regulators. Whatever the current division of labour between competition agencies and regulators, there are very few countries where it can be regarded as finally settled, especially since the transition to greater competition is far from complete.

This paper explores the factors that government decision-makers should take into account when deciding the appropriate division of tasks between competition agencies and regulators in sectors being opened to greater competition. Included within this question is an important assumption. We are taking competition agencies and regulators essentially as we find them today. We will not deal with how both might evolve in the long run depending on the tasks they are assigned and any appropriate changes that legislators might eventually wish to make in their overall mission statements, powers and structures. Given a sufficiently long time and a growing similarity in functions, competition agencies and regulators could presumably converge so much that it would make little sense to discuss an optimal division of labour between them (perhaps the only immutable might be that the competition agencies would remain practically economy-wide in coverage, while regulators would continue to focus on one or a small set of sectors). To make things more concrete, this paper assumes one is dealing with two possible prototype agencies:

- **competition agencies** - practically economy-wide in coverage, these agencies administer framework laws primarily intended to protect consumer interests by prohibiting firms from reducing competition through colluding or merging with their rivals, or seeking to eliminate competitors by means other than offering superior products to consumers; and

- **regulators** - these cover one or a small number of sectors where the government believes the public interest would not be adequately advanced merely by relying on private markets supervised by a competition agency, and decides therefore to empower an individual or institution to directly specify acceptable technologies, marketing methods and/or prices charged.

To better address what seem to be the most difficult issues, we will concentrate on what are often described as network infrastructure industries, i.e. the telecommunications, electricity, natural gas, railways and water/sewerage industries. Such industries have commonly been subject to government ownership or regulation and have a number of features which make regulatory reform especially attractive, difficult and interesting to competition authorities.[3]

Despite this paper's concentration on network infrastructure industries it should be noted that important regulatory reforms are underway in some other economic sectors and competition agencies have played a significant role in that process. In particular, they have been instrumental in drawing attention to how regulation has unnecessarily restricted competition and how part of the solution to this problem may lie in withdrawing exemptions from the application of the general competition law. For example, some countries have removed such exemptions applying to the financial services sector and others have taken steps to rationalise regulation so as to permit greater competition among banks, insurance companies, pension funds and mutual funds. In some sectors of the economy, regulation has even condoned or expressly provided for anticompetitive behaviour. In professional services, for instance, there have been cases where regulation has been used to set common fees and to prohibit advertising prices. The links between such practices and advancing consumer interests in higher quality services seems to be very weak or non-existent.[4] The air and road transport industries and agricultural sectors can also be cited to illustrate how overly broad regulation significantly harms consumer interests without apparently offering sufficient off-setting improvements in safety or reduction in environmental damage.[5]

Before turning to the principle issues of this paper, we will briefly enumerate the general forces driving market opening regulatory reform in order to better appreciate what the reform is supposed to achieve. The paper then proceeds to identify what may generally be required to introduce greater competition into a network infrastructure industry that was previously government owned or closely regulated. In the course of doing that, we will indicate which of the necessary tasks could probably best be addressed through direct government action. That will still leave an important set of tasks which should probably be undertaken by either a competition agency or a regulator. The rest of the paper focuses on the considerations that will probably influence how that subset of tasks will be apportioned.

2. Forces Driving Regulatory Reform

There are at least five reasons why a trend has developed in favour of regulatory reform (including market opening privatisation) in network infrastructure industries. The first and most important is a growing appreciation that significant efficiency gains can be realised by giving greater play to market forces through relaxing governmental restraints on technology choice and on new entry or new forms of competition.[6] Regulators simply lack the information and incentives to encourage the use of best available technologies and the discovery of improved technologies.[7] Worse, regulators might even end up

regulating more in the interest of some or all of the regulated firms than for the welfare of the public they are ostensibly mandated to protect.[8] Finally, regulators may often have difficulty making the kind of credible long term policy commitments required to minimise costs of capital in regulated industries.[9]

Alongside the growing recognition that regulation can reduce economic efficiency, there is an accompanying realisation that in many network infrastructure industries, technological change has altered the natural monopoly aspect of the network (e.g. the local loop in telecommunications). Moreover, once the possibility of "regulatory failure" is admitted, economies of scope might seem less important. For example, in electricity generation, economies of scope obtained through combining electricity generation and distribution and subjecting both to regulation, may be less important than the efficiency gains that could be obtained by splitting generation from distribution and relying on competition instead of regulation in the generating sector.

A third reason for the trend towards regulatory reform is growing resistance on the part of business to pay rising compliance costs. This is closely related to a fourth source of pressure for regulatory reform which is rooted in growing globalisation.[10]

There is yet one more source of pressure for regulatory reform, at least in the sense of moving away from sector-specific regulation. Markets composed of a number of substitute products could extend across two or more regulated industries thus creating a potential for competitive distortions arising from different sectoral regulation. This problem is now being aggravated by a growing tendency for the same company to be involved in more than one regulated sector. Telecoms companies, cable TV firms and internet service providers are increasingly engaged, or often would like to be, in offering services extending across the three areas. Similarly, electricity and natural gas suppliers would like to enter each others' businesses or at least parts of them (e.g. metering), and there is increasing competition among various portions of the financial sector (e.g. long term savings products provided by insurance companies, pension funds, and mutual funds). Sector-specific regulators have sometimes resisted such tendencies, or have found it far from easy to assure level playing fields for competitors subject to different regulatory regimes. We will have more to say about these important issues later in the paper.[11]

Before leaving this section it is well to note that the OECD has recently urged its Members to adopt market opening and competition enhancing regulatory reform, and to reinforce this with wider, more effective application of competition law.[12]

3. Introducing greater competition to network infrastructure industries - what should be done by either competition agencies or regulators

The steps required to foster competition in a network infrastructure industry clearly depend on the starting point. To ensure nothing is omitted, we will assume reform begins with a vertically integrated firm enjoying a government mandated monopoly position and obligated to supply a certain bundle of services at below cost prices to some of its customers (i.e. it is subject to a universal service obligation). Some of these tasks are better performed outside either competition agencies or regulators and this clearly includes the very first step of removing legal barriers to entry. It also extends to the following important tasks:

1. where the incumbent is publicly owned, taking steps to assure new entrants that it will operate as a commercial entity and in particular will not benefit from having its deficits automatically and continually underwritten by the government;

2. abolishing any favoured access the incumbent may enjoy to government controlled or owned scarce inputs such as radio spectrum, and ensuring that such resources will eventually be allocated to the producers who can make most efficient use of them;

3. making any vertical and horizontal splits deemed advisable to help deal with situations where the incumbent owns "essential facilities" which new entrants require to compete but cannot economically duplicate;[13]

4. dealing with stranded costs and abandoning or restructuring universal service obligations so that incumbents do not lose business to less efficient new entrants;[14] and

5. taking measures to offset artificial incumbent advantages (other than those linked to ownership of crucial inputs).[15]

Although these five functions are not particularly suited for performance by a competition authority or a regulator, they would certainly be handled more effectively if the government sought the advice of such bodies.

There appear to be five competition enhancing tasks left that could be assigned to either the competition agency, a regulator or both:

1. ensuring non-discriminatory access to necessary inputs, especially "essential facility" networks;

2. controlling other anticompetitive behaviour and reviewing mergers;

3. "technical regulation", i.e. setting or continuing to apply standards so as to assure compatibility and to address privacy, safety, and environmental protection concerns;

4. "economic regulation", i.e. adopting measures to control monopoly pricing and otherwise to assure appropriate levels of consumer protection; and

5. periodically reassessing the scope and degree of remaining market power in markets where competition is being introduced in order to recommend whether such power justifies continuation of any sector-specific competition law or regulations (other than technical regulation).

The reason technical and economic regulation are included here, despite not being strictly tied to introducing greater competition, is that their proper performance might be critical for building and maintaining public support for continued greater reliance on competitive markets. Not everyone would agree however to this being said about economic regulation. The supposed need to control "monopoly" pricing has been challenged in at least one OECD Member, i.e. New Zealand. Its system, which we will refer to as "light-handed" regulation, is described and briefly commented on in the Appendix to this paper. Much of what follows does not apply to a country which renounces institutionalised control of pricing of network services. Moreover, the paper's references to "economic regulation" are intended to refer to something a good deal more interventionist than light-handed regulation.

4. Apportionment of competition enhancing tasks between a country's general competition agency and one or more regulators

Having identified the competition enhancing tasks that would likely be assigned to either the competition agency or one or more regulators, we now proceed to outline how such an apportionment might typically unfold paying particular attention to important synergy issues. Although the "story" is developed with reference to opening an infrastructure industry to greater competition, it will eventually lead to generalisations that probably extend to competition enhancement in other regulated industries as well.

When greater competition is being introduced into a network infrastructure industry, policy makers may sometimes begin with a relatively simple scenario, i.e. there exists a general competition agency but no sector-specific or general regulator. In such a situation, assuming a country's competition statute contains appropriately strong prohibitions governing abuse of dominance and anticompetitive agreements, the competition agency could end up being assigned the bulk of the work associated with three of the five competition enhancing tasks previously identified.[16] The competition authority may have valuable expertise and experience, gained primarily in abuse of dominance cases, that it could apply to prevent incumbents from using control of bottleneck networks to block or disadvantage rivals. The same is broadly true of controlling other anticompetitive behaviour and reviewing mergers. The government might also decide that the competition agency is uniquely well placed to periodically review remaining market power in the sector being opened up. How things actually turn out, however, will probably depend a lot on how technical and economic regulation are organised.

Technical regulation presents a quite different set of tasks than those involved in ensuring non-discriminatory access, controlling other anticompetitive behaviour and reviewing mergers, or assessing the degree of remaining market power. As such it does not match particularly well with the kind of work that competition agencies might typically do, although there is some overlap as concerns possible anticompetitive effects flowing from setting and enforcing standards.[17] To properly execute the technical regulation function, a competition agency would have to acquire a considerable number of new staff, the bulk of whom would probably have training in engineering, rather than the law and economics backgrounds more common among competition agency professional staff. Giving technical regulation to a competition agency could risk diverting too much top management attention away from what should be its main line of work as well as altering the agency's general culture.[18]

If a technical regulator exists or will be set up outside the competition agency, consideration should probably be given to possible synergies available through combining technical and economic regulation. The most obvious one revolves around detailed familiarity with the industry. This may not prove to be as important as might be expected since technical regulators tend to approach the industry from an engineering perspective and economic regulators from an accounting viewpoint. Be that as it may, there are sufficient synergies between technical and economic regulation that the latter should probably not be organised as a stand-alone function. Before deciding, however, to combine technical and economic regulation, consideration should also be paid to the possible gains that could be obtained by instead locating economic regulation within the competition agency.

There are several advantages to locating economic regulation within a competition agency rather than a sector-specific technical regulator and all emanate from the non-sector-specific nature of the former. They are: less chance of "capture"; less resistance to eventually losing a function (at least some of the economic regulation should be temporary); no danger of introducing jurisdictional uncertainty; and, assuming all economic regulators are included, a greater chance of formulating regulations which are the same for all competitors in the market.

There are also, however, two drawbacks to locating economic regulation within a competition office. First, price setting tends to run against most competition agencies' natural desire to leave that function as much as possible to private markets.[19] Second, economic regulation would involve the agency in decisions having very important distributional as well as efficiency implications. As such, it is inherently more political than might be considered optimal for a body that in its general enforcement functions wants and needs to be regarded as an impartial overseer intent on advancing general public welfare rather than dividing a pie among competing interests.

In dwelling on whether economic regulation should be organised within a competition agency, or combined with technical regulation, we have so far ignored an important third option. The government might also consider giving economic regulators shared or exclusive power to formulate and enforce competition "law" in their sector, i.e. the tasks of assuring non-discriminatory access to essential networks plus controlling other forms of anticompetitive conduct and reviewing mergers.[20]

Where a network infrastructure industry is being opened to greater competition and will be subject to an economic regulator located outside the competition agency, such a regulator will usually be asked to play some role in advancing the transition to greater competition and that could well include some competition law enforcement power. This has certainly been the case in the United Kingdom where concurrent powers to enforce some parts of the country's competition law have already been given to various network infrastructure industry regulators and where concurrency is expected to continue in a reinforced competition statute now before Parliament.

Concurrency in enforcing the general competition law might not be all economic regulators should have in the way of competition policy functions. Most competition laws are designed principally to protect rather than promote competition.[21] In addition, former monopolists will probably enjoy significant advantages over incumbents in network infrastructure industries.[22] Bringing these two points together, the case can be made that special competition provisions are needed for network infrastructure industries being opened to greater competition. For example, the United Kingdom's Office of Telecommunications (Oftel) has stated:

> "Inherent characteristics of electronic media and communications mean that some market failures are endemic - i.e. a competitive market would not redress these failures. Such failures are not necessarily the result of firms'abusive behaviour and are therefore not caught by the prohibitions in the Competition Bill. They arise out of the nature of the industries in question. Accordingly, specific rules are required to cover particular bottlenecks, notably call terminations on telephony networks and access control systems on all electronic networks.
>
> Such *ex ante* rules are required for those who act as "gatekeepers" but escape the legal/economic definition of dominance (although they have the clear potential to become dominant). Control of access gateways can distort downstream markets. If such distortion occurs it would be extremely difficult to redress after the event. In order to prevent such distortions *ex ante* rules should apply where the consumer, or other end-user of services, faces significant switching costs in moving to another supplier or service."

In the same document, Oftel also identified a number of "Transitional rules for ex-monopolists", including rules for dealing with interconnection issues:

> These special rules are required for a limited period to establish conditions for competitors to enter, develop and stay in the market. Competition law, with its emphasis on waiting until an abuse has occurred and focusing remedies on individual abuses, is inappropriate to deal with the

> long-term and widespread advantages enjoyed by historically incumbent firms. As markets become more competitive, regulation through these special rules should wither away in favour of the exercise of powers defined under the Competition Bill.[23]

Finally Oftel elaborated some "Rules to deal with joint dominance, to the extent that these are not effectively dealt with under general competition law". The concern here was to prevent conscious parallelism which could flourish in oligopolistic market structures protected by high barriers to entry but which is not usually prohibited by competition law since there is no agreement between firms.

Whether or not supplementary competition provisions are in fact necessary, a combination of economic regulation and competition law enforcement might appear to be a good use of existing expertise and could lower compliance costs for subject firms. In addition it should eliminate the possibility of inconsistent application of competition and regulatory policies, thereby lowering the cost of capital for regulated firms.[24] Finally, as Oftel's former Director General has pointed out, combining those functions could also facilitate applying a changing optimal blend of competition law and regulatory approaches:

> "By allowing Oftel and the other sectoral regulators to choose the most appropriate regime [under regulatory statute or competition law] to tackle a particular problem, the [proposed Competition Bill] will ensure that decisions under the two regimes are consistent, not contradictory.
>
> If regulators lost these concurrent powers, they would have to rely only on the regulatory rules in licences to deal with problems in the industries they regulate.
>
> The inevitable result is that regulators would cling on to detailed, over-intrusive rules for too long, with serious implications for innovation and competition. And the regulated companies could then face real double jeopardy: sectoral regulators investigating a particular activity using their sectoral licence enforcement powers, while the Office of Fair Trading investigates the same behaviour under general competition law.
>
> .....
>
> It is important to recognise that, as competitive pressures begin to make themselves felt in some of the privatised industries, the role of sectoral regulators is increasingly that of a specialist competition authority. To deny them the most effective tools we have to deal with anti-competitive behaviour would merely perpetuate old-style monopoly regulation."[25]

On closer examination, it turns out that the case for giving economic regulators power to enforce general or sector-specific competition law is not equally strong for the two functions we have been lumping together inside the rubric of competition law. To begin with, the fact that most competition laws are more suited for protecting rather than promoting competition is much more relevant to problems of incumbents discriminating in providing access to essential networks than it is to controlling other anticompetitive behaviour and reviewing mergers. In addition, detecting and prosecuting horizontal agreements, appreciating and balancing the "pro" and anticompetitive effects of vertical agreements, and prospectively determining whether a merger will create or enhance the ability to collude or to unilaterally exercise market power, are all matters making heavy use of the specific types of expertise that competition agencies have a strong comparative advantage in developing and applying.[26] Before an economic regulator is given a lead role in enforcing laws on anticompetitive agreements or in reviewing mergers, careful thought should be devoted to ensuring the regulator will tap and give proper weight to the competition agency's expertise in these domains. The alternative of separately developing such expertise within one or more sector-specific agencies not only involves unnecessary duplication of resources, it

might also impose needless delays and uncertainties greatly inhibiting the transition to increased competition.

The reasons developed above for combining economic regulation and competition law enforcement would apply equally well to combining these functions within either an economic regulator or the competition agency. In any case, the reasons reviewed plus a desire to reduce an economic regulator's presumed reluctance to phase out its main task as greater competition is introduced, may explain why there are an increasing number of such economic regulation/competition law combinations being tried in OECD Members.[27] Most appear to be in the direction of combining the functions within sector-specific regulators.[28] Evaluating that trend requires widening the scope beyond possible resource synergies to consider significant differences in how competition agencies and economic regulators exercise their principal mandates - the topic of the next section.

In discussing the wisdom of combining competition policy and economic regulation and the related question of how this should be done, we should not ignore another possible option - give competition policy to the general competition agency and economic regulation to one or more regulators. Although sacrificing possible synergies and requiring measures to ensure firms are not subjected to inconsistent demands, such a division of labour would ensure that both policies are administered by agencies thoroughly understanding them and having cultures suited to their implementation.

5. Competition agencies and regulators - compared and contrasted

Some readers might question the relevance of considering how the two types of agencies conduct their principal mandates. Should it not be possible to organise one or more regulatory divisions within a competition office, or a competition division within a regulator, then mandate and staff the division so as to achieve much the same performance as if the division were in fact a separate organisation? In theory this certainly can be done, but in practice competition or regulatory divisions will be significantly influenced by the outlook, expertise and experience of the persons they report to and work with. Moreover, there are good reasons to expect that the institutional cultures of competition agencies and regulators could differ in ways that might affect their effectiveness in using each other's policies to speed the transition towards greater competition.

The comparison to follow is somewhat simplified in that the hypothetical regulator is assumed to be industry specific rather than general, cross-sectoral in nature - more will be said later about the possible advantages/disadvantages of a sector-specific versus general regulatory body. Our comparison, with one exception coming at the end, has a general validity extending beyond policies applied to network infrastructure industries.

5.1 Goals/objectives

Both competition agencies and regulators usually share a concern for economic efficiency. Their empowering statutes and administrative practices usually differ though on the weight that must be assigned to this objective and the number and diversity of other objectives which must be considered. Many competition agencies generally concentrate on the economic efficiency objective and give it clear primacy over objectives like ensuring small businesses have "fair" access to markets, or contributing to balanced regional development.[29]

Regulatory agencies on the other hand usually are assigned or adopt a much wider set of policy concerns rooted in distributional issues or a desire to correct for various market failures (besides the existence of market power). Indeed, sometimes these other concerns might even lead regulators to tolerate or encourage anticompetitive market structures as where cross-subsidies are believed necessary to ensure universal service obligations are met.[30]

In the course of elucidating some general principles applying to the process of opening a heavily regulated industry to market forces, a senior antitrust official had this to say about the goals issue:

> "...regulatory bodies may have non-competition policy goals that warrant consideration in the transition to a competitive environment. In some regulated industries, for example, universal lifeline service at low cost is an important public policy goal. Another important policy goal in the electric power industry is environmental protection. Antitrust policy does not incorporate these goals. Some continuing regulation or other special provisions may be necessary to be certain that those policy goals are fully taken into account. Antitrust enforcement seeks to prevent co-ordinated private firm decisions that can lead to anticompetitive behaviour while distinguishing behaviour that promotes legitimate goals without harming competition."[31]

5.2 Basic method or approach

Most competition agencies see their primary job as enforcing a set of economy wide prohibitions that, together with other framework laws of general application, constitute a type of market constitution. The prohibitions set important boundaries and are designed to deter firms from suppressing competition either by colluding with rivals or eliminating or disadvantaging them by means which are at odds with long term consumer welfare. The underlying assumption behind competition law enforcement is that, absent important externalities, healthy competition can ensure maximum consumer welfare.

Sector-specific regulation in contrast is generally adopted in situations where direct government intervention is deemed to be required because markets are either inherently imperfect or will not produce a desirable distribution of benefits. It follows that regulation usually seeks not so much to change or fine-tune market incentives, as to replace them with direct control. The difference has been well expressed as follows:[32]

> "In general, competition law seeks to safeguard the operation of market forces, by preventing or providing remedies for specific behaviour that can impede such forces. Moreover, intervention is focused on the maintenance of competition as a process, rather than on the survival of individual competitors. In contrast, regulation even where it does not actively seek to suppress competition, often serves as a substitute for market forces, in that it involves stipulating a fairly complete set of prices and accompanying commitments regarding supply and quality of service."

There is a danger that this difference can be overplayed. Commentators have noted that there are several important grey areas where competition agencies may share aspects of the regulatory mode particularly when they:

1. adopt self-binding guidelines which function much like regulations;[33]

2. supervise access to certain essential or bottleneck facilities;[34]

3. monitor and in some cases set prices found to be so high or low that they constitute an abuse of dominance;[35] and

4. resort to negotiated consent agreements or issue advisory opinions.[36]

5.3 Timing (ex ante vs. ex post), frequency of intervention, and information available

Competition policy is chiefly *ex post* (merger review excepted) whereas regulation is primarily *ex ante* and continuous. When regulation is applied there will typically be a pre-supposition that market forces cannot be relied on to produce a satisfactory outcome and this cannot be rectified merely by trying to change firms' incentives. In such situations, firms may be better served through *ex ante* instructions rather than by being surprised with unexpected requirements once sunk cost investments have been made. Consumers should also benefit if consequent lower costs of capital are passed on in the form of reduced prices or better products.

Instead of being involved in monitoring firms on a continuous basis, competition offices usually begin to acquire information only when they receive a complaint or otherwise believe that the competition law has been broken or a merger requires review. In contrast, because they are seeking to change behaviour without altering market based incentives, regulators have little choice but to continually monitor regulated firms.

The type of information required is also different. Regulators need much more in the way of accounting information than is usually required in competition cases.[37] Regulators may also need the power to specify accounting systems to ensure they have relevant, understandable information, especially if they wish to engage in comparison, or "yardstick" regulation.

In addition, with their wider set of objectives, regulators will typically need a greater variety of information than competition agencies. This is especially true in connection with ensuring that universal service obligations are met and safety and environmental protection rules followed.

5.4 Preference for structural versus behavioural remedies

Given the above noted differences in basic approach, timing and frequency of intervention, plus information likely to be available, it should come as no surprise that competition agencies and regulators display important differences in their use of structural as opposed to behaviour remedies. Generally speaking, regulators are much more confident that they can alter behaviour despite leaving incentives unchanged, and in any case, they are certainly in a better position to undertake the continuous close monitoring required of such an interventionist approach. They might also be less concerned about the propensity of rules to unnecessarily impinge on market conduct. A basic difference in preferred remedies appears to persist even when a regulator exercises significant competition powers as is the case with the United States Federal Energy Regulatory Commission (FERC).[38]

A senior United States antitrust official has recently offered this advice to FERC:

> "While I recognise, of course, that the Commission is a regulatory agency, and that the electric power industry has long been highly regulated, restructuring obviously is intended to move away from that paradigm. We at the Department hope and expect that market forces will become the primary determinants of wholesale electric power rates. And, in that context, mergers that

> substantially lessen competition should be allowed to proceed only if a court-imposed consent decree, or set of Commission-imposed merger conditions, offers a permanent, preferably structural remedy for the anticompetitive effects of the merger. More specifically, I would urge the Commission to reject rate freezes or rate roll-backs as conditions for approval of mergers creating structural competitive problems in generation. Such remedies typically are short-term, and do not in any way address the real competitive effects of the merger. Even in the short term, there will often be reason to doubt that the frozen rates would be as low as competitive rates.
>
> Finally, based on a century of experience, I would further emphasise that the Department is also highly sceptical of any relief that requires judges or regulators to take on the role of constantly policing the industry. Relief generally should eliminate the incentive or the opportunity to act anticompetitively rather than attempt to control conduct directly. We are institutionally sceptical about code-of-conduct remedies. The costs of enforcement are high and, in our experience, the regulatory agency often ends up playing catch-up, while the market forces move forward and the underlying competitive problems escape real detection and remediation." [emphasis added][39]

The energy sector is not the only one where United States competition and regulatory officials may tend to see the same merger quite differently. A study of airline deregulation in that country noted:

> "In 1986, mergers between TWA and Ozark, and between Northwest and Republic Airlines were permitted to proceed, over the protests of the Department of Justice, by the Department of Transportation, which had final authority over airlines mergers at that time. Ozark had overlapping hubs at St. Louis, and Northwest and Republic Airlines had overlapping hubs at Minneapolis-St. Paul. The merging carriers had significant feed advantages over early all other carriers on city-pair routes out of the common hubs...[T]he results of these actual mergers (unhappily for the public interest) confirmed the antitrust analysis."[40]

Moreover, the same issue of attaching different importance to getting industry structure right has shown up in the United States railways sector where mergers are exempt from antitrust liability if the Surface Transportation Board (STB) approves them. That has produced a significant problem in the largest merger in US rail history, i.e. between the Union Pacific and Southern Pacific railroads:

> These were two of only three major railroads in the western United states. The Antitrust Division made a formal appearance in the STB proceeding, contending that the merger would significantly reduce competition in many markets where the number of competing railroads would decline from two to one or from three to two....[the Antitrust Division urged blocking the merger but the STB instead allowed it subject to some behavioural conditions]....Within a year, severe and persistent operating problems and capacity limitations developed on the merged system, many of them where the Antitrust Division had pointed out the problems that would result if parallel operations were no longer available to shippers as competitive alternatives. The breakdown in rail service has persisted and has become a major controversy, with shippers'groups calling for regulatory intervention.[41]

5.5 Instruments/powers (investigation, prosecution, adjudication) and expertise required

Many competition agencies are required to go to court to obtain orders or levy fines, whereas regulators typically combine investigative, prosecutorial and adjudicative functions. In addition, even where regulators' decisions are subject to judicial review, their decisions are typically accorded greater deference than rulings by competition authorities. This difference arises from the fact that competition

agencies are charged with enforcing a law of general application, as opposed to drawing up and enforcing industry or even firm specific rules presumably based on information and expertise extending beyond what a court could appreciate and apply.

With their focus on regulating entry and lines of business, setting prices, ensuring appropriate levels of product quality, and policing universal service obligations, regulators clearly require legal, economic and accounting expertise, with the accent probably on accounting. Competition agencies also require these three types of expertise, but they would have relatively less need of accounting expertise since, except for predatory pricing cases, they are not normally involved in judging the appropriateness of particular prices. At the same time, competition agencies will need relatively more in the way of legal and economics skills. The former are extensively required in conducting case specific investigations and, for many agencies, in persuading courts to take action. Economic skills are especially necessary in undertaking market definition, determining whether a firm is dominant, and estimating the anticompetitive potential of a particular practice or merger.

5.6 Proclivity for capture plus rights of appeal and private actions

To ensure their powers are used to advance public instead of private interests, both competition authorities and regulators vitally require independence from the firms they oversee. Considerable care is taken to ensure such independence, but there is reason to fear that "regulatory capture" remains a real problem.[42] In particular, sector-specific regulators may be more prone to capture than are general agencies such as competition authorities.[43] Compared with sector-specific regulators, senior decision-makers at agencies covering the whole economy are less likely to have the kind of in-depth industry specific knowledge, contacts, and outlook that would make them particularly valuable later on as employees with or lobbyists for those they are currently influencing. There is also the higher degree of ongoing interdependence between regulators and regulated firms which tends to make capture a greater risk for regulators.

With the passage of time, there is a risk that along with sharing similar information about an industry, regulators will come to share the industry's perspective. This could include its fear of fostering greater competition which could make it harder for regulators to run cross-subsidisation schemes, or to promote things like environmental protection and energy security.[44] Over the long haul, these contributions could be just as important for the regulator's own survival as ensuring that a large group of poorly organised consumers enjoys reasonable service quality and prices.

There are two other aspects of "capture" which also deserve mention and apply particularly to network infrastructure industries. Both are rooted in undue political interference with agency decision-making. The first occurs when the political process is manipulated by special interest groups. The second, just as dangerous, arises out of three characteristics of network infrastructure industries: huge, mostly sunk investments; services which are regarded as public necessities; and customer lists which are practically identical with the voter's list. If politicians successfully pressure for post-investment changes in the rules of the game against the interests of private investors, the long term result will be higher costs of capital and under investment in network infrastructure industries.[45] The possibility of political capture was mentioned here because it may be true that competition agencies and regulators are not equally prone to yield to political pressures.[46]

Paradoxically, the capture possibility will be a more important factor weighing in favour of giving the combined functions to a competition agency in situations where there is an actual as opposed to

a potential (i.e. newly organised) economic regulator. A new regulator is obviously not yet captured and it may never be given that it may be wound up before capturing forces have had sufficient time to work.

To some extent, the risks of regulatory capture can be reduced by full transparency in regulatory decision-making. More effective, however, are means of involving affected third parties (consumers or competitors) in regulatory decision-making, preferably backed up with formal rights of appeal.

In many countries, governmental enforcement of competition laws is significantly supplemented with private actions.[47] Almost by definition this cannot apply to the same degree for regulation, although regulators often take great care to involve affected third parties in their decisions. Since the United Kingdom regulators of network infrastructure industries already have various degrees of duties to promote competition and are contemplating receiving concurrent powers to enforce a strengthened competition statute, their views about third party appeals are particularly interesting. The Office of Gas Supply (Ofgas), for example, has stated:

> "Ofgas supports, in principle, the merits of permitting third party appeals to the [Monopolies and Mergers Commission (MMC) - which plays a key role in both regulatory and competition cases], though it may be difficult to devise a practical system without creating a right of appeal so wide as to frustrate effective regulation.
>
> An alternative possibility is for the Regulator to be required to consult explicitly on whether any interested party considered that a particular proposed licence modification should be referred to the MMC for independent scrutiny before being implemented, and to explain her reasons for accepting or rejecting such a request."[48]

Appraisal

From the above six part comparison plus some related considerations, several conclusions can be drawn concerning the allocation of combined competition law and economic regulation functions to either competition agencies or to regulators. These are tentative, however, because they are based much more on logical deductions than on empirical fact. There appears to be no systematic research on the crucial questions of (1) whether competition agencies charged with economic regulation systematically perform that task differently than economic regulators and (2) whether economic regulators charged with competition law enforcement systematically discharge that function differently than competition agencies?[49] There is, however, some important anecdotal evidence of such differences.[50] In particular, where regulators have been given power to review mergers there appears to have been insufficient appreciation of the superiority of structural over behavioural remedies and, generally speaking, a tendency to be more permissive than a competition authority would have been.[51]

Our first conclusions apply to sectors of industries being opened to greater competition where the responsible agent will be expected to help introduce competition, i.e. the transition sectors. In these sectors, it appears that competition agencies may have certain potential advantages over sector-specific regulators because they should be more:

1. attuned to pursuing economic efficiency which is arguably the principle reason for introducing competition;

2. convinced that competition truly will produce significant benefits, and have a greater self-interest in demonstrating this in as many sectors as possible;

3. familiar with what constitutes a competitive market and what threatens it; and

4. likely to rely on structural remedies which would probably prove to be a better instrument for developing competition than dependence on a set of rules.

It is also relevant that competition agencies stand to lose a smaller proportion of their total resources when economic regulation is eventually eliminated in transition sectors so they should be more willing to allow that change.

The potential advantages just mentioned would have to be weighed against a regulator's presumed greater willingness to design and work with systems to obtain and use sector-specific information, and its assumed greater familiarity with making certain policy trade-offs. The significance of this advantage will be greater the longer and more complex the transition will probably be, which in turn depends on:

1. the importance and probable durability of economies of scale and scope which together work to maintain the vertically integrated incumbent's market power, and mitigate against making simple competition enhancing structural splits; and

2. the importance of political sensitivities involved in dealing with inherited universal service obligations and stranded costs.

Focusing now on the non-transition sectors, where economic regulation will presumably be required for a considerable period of time, the balance may swing towards giving economic regulators the combined functions, at least as regards ensuring non-discriminatory access to necessary inputs. This is again due to the regulatory approach's supposed informational advantages plus greater ease with applying *ex ante* instruments.

Because of their apparent comparative advantage in the pertinent domains, competition agencies should retain exclusive jurisdiction, even in non-transition sectors, over enforcing competition law prohibitions of anticompetitive agreements and conducting merger reviews. As a second best alternative, competition agencies should retain concurrent powers in those domains. This is advisable in order to facilitate and encourage information exchange between the agencies in domains that heavily depend on the particular kinds of investigative, prosecutorial and economic expertise highly concentrated in competition agencies. This applies with still greater force if, as may well be desirable, the regulators will be charged with enforcing exactly the same competition law as applies to the rest of the economy.

It almost goes without saying that whatever combination is chosen for economic regulation and competition law enforcement, it is essential that formal and informal co-operation links be forged between the technical regulator and the other relevant institution(s). These are needed not just to avoid resource duplication, but also to ensure that technical regulators take proper account of the ways in which the adoption and enforcement of technical standards can be used to distort or restrict competition.

Whenever the decision is made to locate economic regulation, with or without competition law enforcement functions, outside the competition agency, it would seem wise to give that agency extensive, perhaps even veto power in any periodic reviews of whether economic regulation is justified by continued market power. Competition agencies should be better placed than regulators to decide this question and in addition, under the assumed circumstances, they will have a lesser self-interest in unnecessarily continuing such regulation. As an alternative or in addition to such sunsetting provisions, regulators could

be statutorily required to forbear regulating once a sector is sufficiently competitive.[52] Once again, it would be a good idea to involve the competition agency in the application of such forbearance rules.

What we have concluded about transition and non-transition sectors agrees with the seeming good sense of awarding combined functions to the agency whose natural policy approach is more appropriate for the principal function to be performed. In transition portions of industries being opened to greater competition, the most important task would usually be to ensure that a transition to competitive markets actually takes place. Closely connected to that, and just as critical, will be the need to persuade the private sector that the government is committed to making the transition. Both these needs are probably better addressed by putting a competition agency in charge of the combined functions. On the other hand, in the non-transition sectors, the most important task might well be continuing economic regulation. In those sectors, unless the conditions are propitious for light-handed regulation, the combined functions of economic regulation and ensuring non-discriminatory access to essential networks are likely best performed by an agency steeped in using a regulatory approach. As for controlling other anticompetitive conduct and undertaking merger review, these functions should be performed in a way that makes proper use of the competition agency's strong expertise in these areas, preferably reinforced by giving concurrent jurisdiction to that agency.

There is one advantage that competition agencies probably enjoy over regulators that was not referred to above - their supposed tendency to be more resistant to capture. The significance of this advantage depends on two questions: how long will the distinction persist if the competition agency takes on regulatory functions; and how much of the capture advantage could be erased by organising regulation within general as opposed to sector-specific regulators? Answers to these questions lie beyond this paper, but we can suggest factors to consider, in addition to the already discussed capture issue, when deciding whether regulators should be organised as general (probably multi-divisional to better organise pertinent sector expertise) rather than sector-specific agencies.

6. Sector-specific Versus General Regulators

Sector-specific regulation by definition creates a need to define jurisdictional boundaries, and that in turn could produce three important problems:

1. uncertainty concerning which regulations will apply for firms operating in several distinct markets, and even a risk that they will be subject to inconsistent regulatory demands such as conflicting accounting requirements;

2. competitive distortions and consequent misallocation of resources caused by competing firms being subjected to different regulatory regimes; and

3. further competitive distortions due to regulators trying to preserve their jurisdiction over firms by restricting the businesses that regulated entities can engage in.[53]

The seriousness of these three problems could be significantly increased if sector-specific regulators also acquire competition law enforcement functions and proceed to elaborate different competition "laws" for each sector.[54]

There are three important areas which illustrate the problems that sector-specific regulation can create. The first arises in the financial sector where there is increasing competition in the long term savings market from firms primarily based in the insurance, pensions, and securities industries. All three

of these are often subject to separate regulation having the potential to create competitive distortions.[55] Such problems could presumably be resolved or at least made more manageable by merging the sector-specific regulators into an overarching financial sector regulator. The second involves the electricity and natural gas industries because these are alternative competing energy sources whose suppliers have, in some countries, proven their ability to provide consumers with one-stop energy shopping. They have also demonstrated their capacities to provide metering and related services in both sectors.[56] The third area of particular interest, warranting some development here, is found in the converging telecommunications, broadcasting and personal computer services sectors.[57]

The OECD's Committee for Information, Computer and Communications Policy's Working Party on Telecommunications and Information Services Policy has recently held a Roundtable on Communications Convergence. The Roundtable's background paper urged rejection of asymmetric regulation designed to help new entrants overcome incumbents' advantages at the local loop level and went on to comment:

> "The requirement for regulatory symmetry is particularly important during convergence. This is because part of the process of convergence is in itself a process of companies experimenting with different infrastructure platforms, with different combinations of services and service characteristics. Their ability to determine the most efficient platform and the best service combination for customers can be severely constrained by existing sector definitions and restrictions on joint-provision of services. Regulatory asymmetry tends to bias technological choices whereas using the best technology for a given application or purpose requires 'technological neutrality'."[58]

The same paper identified digital TV and the development of the Internet and Internet based services as two areas where regulated firms are faced with unregulated or differently regulated firms. This may not, however, create much in the way of competitive distortions, if as the background paper argues, regulated firms can, "...[i]n many cases...[by-pass] the definitional boxes regulators have placed on them."[59]

Referring to the same converging industries, the United Kingdom's telecommunications regulator has commented:

> "...public policy goals which require a supplier to behave in a way that is not in its commercial interests can no longer be secured by attaching highly specific conditions to the licences of particular suppliers - since doing so disadvantages the licensed firms relative to competitors using alternative delivery means (and which are not constrained by similar licence conditions). Where companies face effective competition, their inability to finance additional obligations means that the regulator is often unable to enforce obligations prescribed in licences if the firm in question either petitions for licence conditions to be eased or simply decides to ignore the licence requirements. Anticipation of this result weakens the effectiveness of the obligations even further. This is not to say that the old regime has, or will, disappear overnight. Only that it cannot provide a long term basis for fair, consistent and effective regulation in the future."[60]

The OECD background paper referred to above clearly stated that the answer to the problems faced by regulators in converging industries should not be to extend regulation to presently unregulated sectors.[61] Hopefully Member states will follow that advice, but if they do not, it would seem to make sense at least to apply the same regulations to all competing firms, preferably enforced by the same general regulator.

Reducing the risk of capture and distorted competition are not the only reasons for possibly preferring general over sector-specific regulators. There is also the previously mentioned advantage of the general competition agency which could just as well apply to a generalist economic regulator, i.e. a general regulator would have a lower fraction of its resources at risk from decisions to cease economic regulation in any one sector. Finally there could be advantages resulting from the regulator having an economy wide perspective, and there might also be some significant resource savings and greater balance in decision-making.[62]

7. Final Observations

History and inherited institutions make an enormous difference to how competition enhancing tasks should be apportioned in specific industries as between competition agencies and regulators. In addition, different countries will probably display different willingness to rethink existing regulatory or competition approaches (both laws and agencies) so as to better suit them to contribute to the liberalisation process. Despite that, there are some generalisations that seem reasonably certain to apply in most industries and countries:

1. it might not always be necessary to employ economic regulation to address problems arising from alleged market power either because such power could be too transitional to be worth worrying about or because light-handed regulation may possibly be a superior alternative;

2. technical regulation will not likely fit well within competition agencies;

3. since there are advantages in combining economic regulation with technical regulation, economic regulation should probably not be organised as a stand alone function;

4. given what has been said about technical and economic regulation, there seem to be three practical alternatives:

   - combine technical and economic regulation in a sector specific regulator and leave competition law enforcement entirely in the hands of the competition agency;

   - organise technical regulation as a stand-alone function and include economic regulation within the competition agency;

   - combine technical and economic regulation in a sector specific regulator and give it all or some competition law enforcement functions.

5. separating competition law enforcement from regulation means sacrificing certain synergies and having to adopt measures ensuring firms are not subjected to inconsistent demands, but it also ensures that both policies are administered by agencies thoroughly understanding them and having cultures suited to their implementation;

6. if a decision is made to combine competition law enforcement and economic regulation, serious attention should be paid to differences in how competition agencies and regulators conduct their principal functions because this could significantly influence how they would carry out a combined mandate;

7. in sectors expected to evolve reasonably quickly to being workably competitive (i.e. transition sectors), assuming a decision has been made to combine economic regulation with competition law enforcement, it would probably be better to locate these functions within the competition agency than within a sector-specific regulator;

8. in non-transition sectors, if it is decided to combine economic regulation with responsibility for ensuring non-discriminatory access to necessary inputs, this is probably better done within a regulator than within the competition agency;

9. because competition agencies appear to have a comparative advantage over regulators when it comes to enforcing prohibitions of anticompetitive behaviour and reviewing mergers, such agencies should have exclusive jurisdiction in those domains, or at least retain concurrent jurisdiction along with a regulator;

10. there seem to be good reasons for organising regulators as general rather than sector-specific agencies (moreover some of the difference in performance expected from competition agencies and regulators would likely disappear if the regulator were general instead of being sector-specific in nature); and

11. economic regulation, especially that being applied to markets in process of liberalisation, should be subject to sunsetting, and should not be renewed unless the competition agency believes that is justified by continued market power - thought should also be given to requiring regulatory forbearance in any market which is workably competitive, and once again the competition agency could usefully be involved in that determination.

Appendix

BRIEF DESCRIPTION OF NEW ZEALAND'S "LIGHT-HANDED" REGULATION

One author has described the New Zealand system as having the following four components:

* the natural monopoly and contestable elements of the incumbent firm's business are separated, if not under different ownership, at least by accounting "ring-fencing" for information disclosure purposes;

* a reliance is placed on general competition law, as expressed in the Commerce Act 1986, under s.36 of which dominant firms must not (in broad terms) seek to deter or to eliminate actual or potential competitors;

* industry-specific regulations require the disclosure of information designed to make transparent the operations of companies possessing market power; and

* stronger action is threatened through the provision for the introduction of price control in Part IV of the Commerce Act, or, more vaguely, through new forms of regulation which the Government may introduce.

The same author immediately proceeded to comment:

The last element is important because it provides the only limit on monopoly pricing in the regulatory regime. However, in the absence to date of any use of Part IV, the degree of restraint imposed upon monopolists may depend upon their assessment of such factors as the political repercussions of over-stepping the mark, where that mark might lie, and their ability to pass off monopoly rents as rewards for superior efficiency.[63]

The following points should also be borne in mind regarding New Zealand's regime:[64]

1. when New Zealand Telecom was privatised, the government retained a "Kiwi Share" empowering it to assure the availability of free local call options for residential users, limit increases in line rentals to the rate of inflation (provided this did not "unreasonably impair"Telecom's profitability), and keep residential line rentals equal in both rural and urban areas;

2. the Commerce Act's s.36 is supplemented by the Minister of Communication also having the power to reintroduce more intrusive regulation into telecommunications;

3. in addition to s.36 and Part IV, the Commerce Act prohibits anticompetitive arrangements (sec. 27), arrangements between competitors that restrict the operation of other firms (sec. 29), horizontal price fixing (sec. 30);

4. the *Commerce Act* has no sector-specific competition rules for one or more network infrastructure industries; and

5. New Zealand does have what we have labelled government run or supervised "technical regulation", e.g. in electricity there are sector-specific standards and safety regulation, and in telecommunications, an important role is played by the New Zealand Telecommunications Numbering Advisory Group.

The New Zealand system is still evolving, hence difficult to assess.[65] In particular, it seems too early to gauge the significance of the government's threat to regulate and whether the threat will remain credible if never even temporarily used.[66] Perhaps this will prove to be a non-issue if, as some commentators expect, various developments considerably erode any remaining natural monopoly elements in the network infrastructure industries.[67] It could also prove to be unimportant if the evidence strongly suggests that the New Zealand system, despite real or imagined shortcomings, equals or outperforms practical alternatives.

NOTES

1. For a good overview of what is entailed in regulatory reform and surveys of reforms in OECD countries in telecommunications, financial, and professional business services plus the distribution, electricity and agro-food sectors, readers are directed to OECD, The OECD Report on Regulatory Reform (Paris: OECD, 1997).

2. For insights into this intriguing development, see Werner Sichel and Donald L. Alexander, editors, Networks, Infrastructure, and the New Task for Regulation (Ann Arbor: The University of Michigan Press, 1996), a book focused chiefly on United States experience in the telecommunications and electricity industries. In their introduction, on pages 8 and 9, the editors observe:

   "One of the issues that emerges from the essays presented in this volume is that it is probably best for policy makers to seek a balance between deregulation and regulatory oversight. The authors of this volume are in agreement that market forces can be used to make resource allocation decisions, and that regulations should be designed to insure that competitive forces are likely to emerge and flourish in the network-related sectors. This, however, requires that regulators and legislators are willing to take major steps along the path of regulatory reform and to consider alternative means to achieve social goals that have heretofore served as the raison d'être for extant regulatory policy. Moreover, given the rapid pace of technological advance, policy makers must keep in mind the various ways that existing regulations have affected the evolution of networks and enact alternative regulations that are flexible and that can accommodate, not determine, the varied directions that technology will take in future years.

   . . . . .

   The emerging public policy theme that stems from the essays in this volume is that as technological advances improve the efficiency of network systems and increase competition in various sectors of the economy, the entire regulatory structure, which was designed for a different era, will have to be changed dramatically. Fundamental changes must take place to allow the new technologies and increased competition to provide the full benefits to consumers. This may compel us to design new and innovative regulatory strategies that sustain the competitive process, and to abandon old regulatory strategies that attempt to determine the outcomes in the marketplace."

   See also Michael Tyler and Susan Bednarczyk, "Regulatory institutions and processes in telecommunications - An international study of alternatives", Telecommunications Policy, Vol. 17 (December 1993), pp. 650-76, where it is stated (at p. 650):

   "New regulatory structures have often been established where no explicit regulatory mechanism previously existed. This may seem paradoxical in an environment that increasingly favours what is loosely called 'deregulation'. However, governments have generally found that policies favouring increased competition or privatisation, if they are to be fully effective, require new or significantly modified regulatory institutions or processes. This has been the case, for example, in Argentina, Mexico, Australia and the UK."

3. In addition to being built around networks illustrating significant network economies, these industries are characterised by: high capital intensity combined with long-lived assets entailing high sunk costs; significant economies of scale and scope; a possible need to expropriate in order to acquire necessary rights of way; services regarded as essential or at least very important; and customer lists that are practically co-extensive with the voter's list.

4. For a good discussion of the competition implications of professional services regulations, see The OECD Report on Regulatory Reform, op.cit., Volume I, chapter 3 ("Regulatory Reform and Professional Business Services") , pp. 117-154 (especially pp. 125-128).

5. See Ibid., Volume I, chapter 5 ("Regulatory Reform and the Agro-Food Sector"), pp. 235-274 (especially 252-255); and Volume II, chapter 1 ("Economy-Wide Effects of Regulatory Reform"), pp. 23-192 (especially pp. 37-46).

6. OECD estimates of economy-wide gains from regulatory reform in five important sectors (electricity, airlines, road transport, telecommunications and distribution) in eight countries (France, Germany, Japan, Netherlands, Spain, Sweden, United Kingdom, and United States) range from a low of 0.9% of GDP in the United States to 5.6% in Japan and Spain. These estimates were essentially based on assumptions that deregulation in one country would permit it to realise improvements in productivity already achieved in another country which had gone further down the road of regulatory reform. See Ibid.,Volume II, page 11.

7. For a good discussion of the economic efficiency advantages of competition over regulation, see chapter 4 of Mark Armstrong, Simon Cowan and John Vickers, Regulatory Reform: Economic Analysis and British Experience (London: The MIT Press, 1994). For an example of how regulation may reduce innovation (although it must be admitted that stringent regulation has sometimes fostered it), see Henry G. Grabowski, John M. Vernon and Lacy Glenn Thomas, "Estimating the Effects of Regulation on Innovation: An international comparative analysis of the pharmaceutical industry", The Journal of Law and Economics, Vol. 21, No. 1 (April 1978), pp. 133-163.

8. For a brief description of regulatory "capture", see Oliver E. Williamson, The Mechanisms of Governance (New York: Oxford University Press, 1996), pp. 205-207. As concerns the point that regulation can have differential effects on competing firms and can even amount to a competitive weapon, see Ann P. Bartel and Lacy Glenn Thomas, "Predation through regulation: the wage and profit effects of the Occupational Safety and Health Administration and the Environmental Protection Agency", The Journal of Law and Economics, Vol. 30, No. 2 (October 1987), pp. 239-264; Lacy Glenn Thomas, "Regulation and firm size: FDA impacts on innovation", Rand Journal of Economics, Vol. 21, No. 4 (Winter 1990), pp. 497-517; Michael Ollinger and Jorge Fernandez-Cornejo, "Regulation, Innovation, and Market Structure in the US Pesticide Industry", Economic Research Service, US Department of Agriculture, Agricultural Report No. 179 (1995); and Michael, Ollinger and Jorge Fernandez, "Sunk costs and regulation in the US pesticide industry", International Journal of Industrial Organisation, Vol. 16, No. 2 (March 1998), pp. 139-168.

9. For an explanation and some empirical demonstration of the importance of regulatory commitment to the willingness of private investors to commit funds to regulated industries, see Brian Levy and Pablo Spiller, "The Institutional Foundations of Regulatory Commitment: A Comparative Analysis of Telecommunications Regulation", Journal of Law, Economics & Organisation, Vol. 10, No. 2 (October 1994), pp. 201-246.

10. A European study noted:

"The *impact of globalisation*, and the sharpening of the competitive climate due to freer world trade and investment as well as the completion of the single market, is mainly that of greater insistence and impatience by business customers. For them, goods and services supplied by utilities are inputs. They require these inputs to be as close as possible to "best-practice" levels in Europe, if not world-wide....Dissatisfaction prompts businesses to shop around, if possible, and to lobby for regulatory change, allowing more competition."

Towards a Single Market in Utilities - Report of the CEPS Working Party on Utilities (Chairman: Jacques Lesourne; Rapporteurs: Jacques Pelkmans and Ole Jess Olsen) (Brussels: Centre for European Policy Studies, 1996) page 20.

In addition, various international treaties, most notably in telecommunications, are opening network service providers to competition from foreign based networks which may enjoy the benefits of lower regulatory compliance costs and greater freedom to make commercial decisions. For some European examples of this trend, see Ibid., page 21.

11. Supplementing the five forces mentioned in the body of the paper, there has been a move to leaner government in an era of rising resistance to paying higher taxes. This shows up in a desire to get rid of money losing government owned enterprises (which could be considered a form of regulation) and to reduce expensive and expansive regulatory bureaucracies. Concurrently there is growing ability for some users to avoid paying the cross-subsidies required to finance low priced universal access, and their refusal to do so is undermining such policies.

12. In specific, it is has recommended that Members:

"Reform economic regulations in all sectors to stimulate competition, and eliminate them except where clear evidence demonstrates that they are the best way to serve broad public interests.

* *Review as a high priority those aspects of economic regulations that restrict entry, exit, pricing, output, normal commercial practices, and forms of business organisation.*

* *Promote efficiency and the transition to effective competition where economic regulations continue to be needed because of potential for abuse of market power. In particular: (I) separate potentially competitive activities from regulated utility networks, and otherwise restructure as needed to reduce the market power of incumbents; (ii) guarantee access to essential network facilities to all market entrants on a transparent and non-discriminatory basis; (iii) use price caps and other mechanisms to encourage efficiency gains when price controls are needed during the transition to competition.*

Review and strengthen where necessary the scope, effectiveness and enforcement of competition policy

* *Eliminate sectorial gaps in coverage of competition law, unless evidence suggests that compelling public interests cannot be served in better ways.*

* *Enforce competition law vigorously where collusive behaviour, abuse of dominant position, or anticompetitive mergers risk frustrating reform.*

* *Provide competition authorities with the authority and capacity to advocate reform"*

The OECD Report on Regulatory Reform - Synthesis [C/Min(97)10/ADD], May 22, 1997, pp. 28-29.

13. The essential facilities we have principally in mind are the basic networks around which the industries are organised (e.g. the local loop in the telecommunications industry, the long distance transmission and local distribution networks in electricity, natural gas, and water/sewerage sectors, and some commuter railway tracks).

There are complex trade-offs that should be considered before policy makers determine that competition should be encouraged in say the electricity generating business, but economies of scope in generating and transmitting should also be preserved as much as possible. Allowing the incumbent to remain vertically integrated and using regulation or competition policy to try to control self-dealing may prove to be a very rocky road indeed. A much cleaner solution is simply to renounce the economies of scope and maximise the gains from competition by insisting on an ownership separation.

Regarding horizontal splits, here the trade-off is between economies of scale and the informational advantages of yardstick regulation.

British experience in natural gas demonstrates that although concerted action by competition authorities can bring about the advisable structural divisions where a government privatises without doing so, this can take an inordinately long time. See Catherine Waddams Price, "Competition and Regulation in the UK Gas Industry", Oxford Review of Economic Policy, Vol. 13, No. 1 (Spring 1997), pp. 47-63.

Further caution regarding depending on the competition agency to set things right would be suggested from the following observation:

"The antitrust agencies face some challenges in dealing with long-standing market power, because the antitrust laws were not meant to address monopoly power that is the result of "innocent" phenomena such as economies of scale, and mergers that may have been approved long ago under a regulatory regime likely would be difficult to unravel, if they could be challenged at all. Those kinds of situations are perhaps better dealt with through regulatory reform, with antitrust doing what it does best -- focusing on anticompetitive conduct or behaviour."

"FTC Perspectives on Competition Policy and Enforcement Initiatives in Electric Power" - William J. Baer...before the Conference on the New Rules of the Game for Electric Power: Antitrust & Anticompetitive Behaviour, Washington, December 4, 1997, pp. 3-4.

14. These politically charged tasks involve important distributional issues that governments would normally find difficult to delegate to "non-political" institutions.

Not everyone would agree that universal service obligations matters should be left exclusively to direct government action. Included in a recent review of British utility regulation we find:

"In theory the Government should finance social policy aims and public goods through general taxation and income support/direct subsidies rather than trying to manipulate the operation of the utilities. However, utility regulation appears to offer the possibility of targeting certain kinds of social benefits (such as universal service or subsidised service to disadvantaged groups) very precisely and therefore governments will remain under pressure to use utility regulation for such purposes."

The Hansard Society and European Policy Forum, The Report of the Commission on the Regulation of Privatised Utilities, December 1996, page 43.

The British regulators themselves appear to have a different opinion. For example, in a submission to the recent review of utility regulation, we read:

"In Ofgas'view, for an unelected Regulator to be taking decisions involving, for example, the extent of any levies on consumers to subsidise particular groups of consumers or to subsidise energy efficiency schemes, would raise serious concerns over the legitimacy of the Regulator's position. Such decisions basically involve political choices, and in Ofgas'view are the proper preserve of Ministers, subject to the normal processes of accountability of Ministers to Parliament. Money-raising for such purposes, which has all the characteristics of taxation, should not in Ofgas' view be a matter within the discretionary power of Regulators, if the system of independent utility regulation is not to risk coming into disrepute."

"Review of Utility Regulation - Submission of the Office of Gas Supply" - November 1997, mimeo, pages 8-9. For similar views, see "Review of Utility Regulation - Submission of the Director General of Electricity Supply" - October 1997, pages 3 & 10-12, and "Review of Utility Regulation - Submission of the Director General of Telecommunications" - September 1997, pages 14-15.

The same lack of enthusiasm for getting involved with universal service obligations and environmental protection issues can be observed among competition authorities:

"We might be able to take account of those kinds of factors in choosing between alternative remedies that are otherwise suitable to the task, but they are outside the scope of the antirsut laws when determining there is a law violation in the first place. Therefore, some continuing regulation or other special provisions may be necessary to ensure that those policies are served."

"FTC Perspectives on Competition Policy... op. cit., page 6.

15. Principally, these are:

1. access at zero or artificially low cost to necessary inputs that new entrants may be expected to pay for - examples: radio spectrum and airport landing slots;
2. entry inhibiting economies of scale linked to substantial sunk costs - these undermine new entrants' confidence that greater cost efficiencies will necessarily or rapidly be rewarded with the market shares they require to justify large, risky investments;
3. learning economies and economies of scope (in addition to those associated with a "natural monopoly" network);
4. customer inertia arising out of familiarity with the incumbent and sometimes reinforced by switching costs (such as incomplete telephone number portability);
5. substantial accumulated information regarding the tastes and preferences (i.e. demand elasticities) of virtually all customers; and
6. where the incumbent continues to own or operate any essential networks, continuing superior information as to who is switching to whom and when - armed with this information, the incumbent is much better placed than its usually smaller competitors to employ entry inhibiting price discrimination and perhaps even predatory pricing.

See Armstrong, Cowan and Vickers, op. cit., chapter 4 for a good discussion of incumbent advantages.

There are a host of things governments could consider in order to offset some or all of these possible advantages. Most commonly, governments have decided simply to exempt new entrants from contributing to the costs of universal service obligations, or to leave incumbents saddled with important stranded costs.

16. The United Kingdom provides a possible example of how task allocation could be influenced by the perceived strength of the competition law currently in force. In examining why sectoral regulators were set up following the privatisation of various utilities (and given mandates to promote competition), John S. Bridgeman (Director General, Office of Fair Trading) stated: "For a number of very valid reasons, our general competition law was not always thought adequate or appropriate to deal with the problems which would arise as nationalised industries were privatised."

"The appropriate roles of the different regulators and regulatory bodies" - a speech to IBC UK's conference on the future of utility regulation - February 10, 1997, page 2.

17. There could also be a potential competition problem if the former monopolist is permitted to set and enforce industry standards. We are in effect assuming that this is not the case.

18. To better illustrate this point we note that as of June 30, 1996, the Australian Telecommunications Authority (Austel), combining technical and economic regulation of telecommunications, had a total operative staff of 139. Its "Competition Branch", responsible for "Industry Services" and "Pricing and Economic Strategy" had at least 10 persons working in it, meaning that a minimum operative staff of 129 was engaged in technical regulation - see Australian Telecommunications Authority Annual Report, 1996 (Canberra: Australian Government Publishing Service, 1996) pages 5 & 70. The estimated minimum number of staff devoted to economic regulation is based on information (supplied by Hank Spier, General Manager of the Australian Competition and Consumer Commission, ACCC, on May 18, 1998 to David Parker of the Australian Permanent Delegation to the OECD), that when the economic regulation function

was transferred from Austel to the ACCC on July 1, 1997, ten persons were transferred with it. As of June 30, 1997, again according to information supplied by Hank Spier, ACCC's total staff stood at 317. Based on these numbers, it appears that if the ACCC were to be given all technical regulation pertaining to all the network infrastructure industries, something like half of its total staff would be so employed.

19. For the ideas that price caps and terms of access (which of course influence final prices) are better left to regulators, see: **"**Competition Policy in Communications Industries: New Antitrust Approaches" - Prepared Remarks of Robert Pitofsky, Chairman, Federal Trade Commission - Glasser Legal Works Seminar on Competitive Policy in Communications Industries: New Antitrust Approaches - Washington, March 10, 1997, pages 2 and 4.

A report commissioned by the European Commission's DGII agrees:

"The control of monopoly prices and profits requires high intensity monitoring, control rights to regulate prices and returns, and a combination of ex ante oversight and guarantees against regulatory takings that provide some assurance to the firm that its efficiency gains and investments will not be expropriated. The antitrust institution does not exhibit any of these features."

Institut d'Economie Industrielle, "Network Industries and Public Service", Final Report, December 1997, page 95.

20. This seems particularly germane in situations where economic regulators exist before liberalisation is begun, but the issue could also arise where regulators are being organised concurrently with liberalisation. For example, when various utilities were privatised in the United Kingdom, sector-specific regulators were set up and were given various mandates to promote, facilitate or encourage competition. In the case of the Office of Telecommunications, the eventual organisational response was to modify licences to include competition rules very similar to those found in the European Union's Articles 85 and 86.

21. Not surprisingly, the generalisation about promoting not just protecting competition tends to be least accurate in describing the competition statutes of the formerly centrally planned economies.

22. See note 15 infra.

23**.** OFTEL, "Beyond the telephone, the television and the PC - Regulation of the electronic communications industry", OFTEL's Second Submission to the Culture, Media and Sport Select Committee Inquiry into audio-visual communications and the regulation of broadcasting - March 1998, pp. 17 & 19.

24. The earlier referred to comprehensive review of regulation of British utilities has sided with those who would give competition policy exclusively to existing sectoral regulators, which they would like to see evolve into "...industry-specific competition authorities, as general rules against anti-competitive behaviour replaced detailed regulation." (page 72). In addition to being more suited to achieving that replacement, the reviewers felt that existing regulators had important expertise and information which presumably could be applied to enforcing competition policy. They went on to add:

"A final but crucial reason for the industry DGs being responsible for the enforcement of competition legislation on the utilities lies in the relationship between prohibitions of anti-competitive practices and licences. The proposed combination of licences and competition law might lead to the danger that suppliers would face 'double jeopardy', whereby their licence conditions might conflict with general law concerning anticompetitive practices. That problem can be resolved not only by giving priority to one (namely general competition law), but also by the DGs being responsible for the enforcement of both licences and competition law on the utilities."

The Hansard Society and European Policy Forum, op. cit., page 74.

For a discussion of the problems that could follow from separating competition law enforcement and economic regulation (with particular reference to the latter's distributional functions), and a recommendation that both functions be given to sector-specific regulators, see Michael Grenfell, "Can competition law supplant utilities regulation?", paper prepared for the Oxford Law Colloquium Conference (pre-colloquium version), "Regulation and Deregulation - Policy and Practice", March 1998.

For some preliminary interesting thoughts on the broader question of whether antitrust and regulation are best treated as substitute or complementary policies, see Institut d'Economie Industrielle, op. cit., pp. 98-99.

25. "Competition on the line" - Personal View - Don Cruickshank - Financial Times (UK edition) , February 19, 1998, p.12.

It is interesting that when OFTEL incorporated the "fair trading condition" (roughly reflecting the European Union's Articles 85/86) into various telephone company licences, it did not give up its regulatory powers enabling it to address abuse of dominance. See OFTEL, "Guidelines on the Operation of the Fair Trading Condition", March 1997 (mimeo), pages 5-6.

26. This plus a desire to ensure that nothing fell through jurisdictional cracks may explain why the United Kingdom refrained from giving anything more than concurrent competition law enforcement powers to its sector regulators. It is also noteworthy that in the highly complex merger review area, the Office of fair Trading continues to have exclusive competence and this is not slated to be changed in the new Competition Bill. For more details on how competition law enforcement was shared, see John S. Bridgeman, op. cit.

27. For further discussion of the arguments for combining the functions, or more specifically for giving concurrent competition law enforcement powers to British sectoral regulators and the Office of Fair Trading, see Margaret Bloom, "The Impact of the Competition Bill", mimeo paper for the Oxford Law Colloquium Conference, "Regulation and Deregulation - Policy and Practice", March 1998, pp. 3-5. That paper also contains arguments against concurrency - see pp. 5-7.

28. See Einar Hope (Director General, Norwegian Competition Authority), "EC Competition Law: The Millenium Approaches", presented at the 24th Annual Conference, Fordham Corporate Law Institute, October 16-17, 1997, page 8.

29. The Competition Law and Policy Committee held a roundtable discussion on the objectives of competition policy at its April 1992 meeting. For the Secretariat's background note, see DAFFE/CLP(92)2. There has always been some tension between a growing emphasis on economic efficiency and the populist roots of many countries' competition laws. For a recent critique of confining concern to economic efficiency, reflected in particular in some countries'adoption of a total surplus standard to mergers etc., see Tim Hazledine, "Rationalism Rebuffed? Lessons from Modern Canadian and New Zealand Competition Policy", mimeo, October 1996 - forthcoming in the Review of Industrial Organisation, 1998.

30. In contrasting competition policy and regulation, Robert D. Anderson, Abraham Hollander and Joseph Monteiro (all three were at the time associated with the Canadian Competition Bureau) wrote that competition policy was intended "...to ensure the efficient and competitive functioning of markets, for the sake of advancing wider objectives related to the welfare of consumers and the overall efficiency of the economy." They also expressed the view that the goals of regulation are more complex and, from a competition angle, even suspect:

"Although regulation has often been touted as protecting the interests of consumers (and is certainly an appropriate public policy response to genuine situations of natural monopoly), historically, much economic regulation particularly in the non-natural monopoly sectors of the Canadian and US economies has served to cartels industries and protect incumbent firms from competitive entry. Indeed, delineating the

institutional mechanisms through which governments confer such "producer protection" or regulation-to-enforce-cartelisation was the focus of Stigler's theory of economic regulation."

"Regulatory Reform and the Expanding Role of Competiion Policy in the Canadian Economy, 1986-1996", mimeo, October 22, 1996, pages 5-6.

31. Prepared Statement of the Federal Trade Commission - Presented by Robert Pitofsky, Chairman - Before the Committee on the Judiciary (United States House of Representatives), June 4, 1997, page 2. For insights into regulatory goals see Michael Tyler and Susan Bednarczyk, op. cit., pp. 650-76 at 651-652.

32. Anderson et al., op. cit., page 8.

33. See Spencer W. Waller, "Prosecution by Regulation: The Changing Nature of Antitrust Enforcement", mimeo of an address presented at the association of American Law Schools meeting, January 5-9, 1998, San Francisco.

Note though that guidelines can be defended as merely interpreting the law rather than making new rules.

34. For a discussion of the essential facilities doctrine, reasons why it is very difficult to properly apply, and an admission of close parallels between it and regulation, see "Competition Policy in Communications Industries: New Antitrust Approaches", op. cit., pp. 3-4.

35. Not all competition laws would treat high or low pricing as an abuse of dominance. Even where they do and competition agencies have the power to order changes in such prices, such power is infrequently used.

36. A. Douglas Melamed, currently Principal Deputy Assistant Attorney General, Antitrust Division, United States Department of Justice, has argued that consent decree proceedings tend to move antitrust enforcement away from law enforcement and towards regulation because they:

1. focus more on the remedy than on the wrong;

2. require a kind of regulatory prior approval before the defendant can alter his behaviour in response to changing market conditions; and

3. avoid litigation with the result "...that the development of antitrust law, and the exegesis of the broad language of the antitrust statutes, is achieved, not by a process of adjudication with the attendant common law rigor, but rather through negotiated agreements between individual defendants and the government."

See "Antitrust: The New Regulation", Antitrust, Vol. 10, No. 1 (Fall 1995), pp. 13-15 (the quote appears on page 14). Two related articles in the same issue of Antitrust may also be of interest: Harry First, "Is Antitrust "Law"?"; and "Antitrust and the Rise of the Regulatory Consent Decree", pp. 4-8, and 9-12 respectively.

37. Once again, too much can be made of this difference. Competition agencies also require considerable accounting information in predatory or discriminatory pricing cases, or when reviewing mergers involving claimed efficiencies or firms that may go bankrupt if the merger is blocked.

38. It has shown up, for example, in questions involving mergers and access to power grids. On the access issue, FERC has favoured "operational unbundling" while the FTC has argued for the more radical "functional unbundling" approach. See "FTC Perspectives on Competition Policy and Enforcement Initiatives in Electric Power", op. cit., page 6-8.

39. Before the FERC Department of Energy, Washington, D.C., "In the matter of Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities, Making the Transition from Regulation to Competition: Thinking About Merger Policy During the Process - Electric Power Restructuring"- An Address by Joel Klein to FERC, Distinguished Speaker Series, Washington, D.C., January 21, 1998, pages 9-10.

40. Robert D. Willig, "Antitrust Lessons from the Airline Industry: The DOJ Experience", Antitrust Law Journal, Volume 60, Issue 2, pp. 695-703, at 702-703. Professor Willig supported his statement with a reference to an Antitrust Division study: Gregory J. Werden, Andrew S. Joskow and Richard L. Johnson, "The Effects of Mergers on Price and Output: Two Case Studies from the Airline Industry, Managerial & Decision Economics, Volume 12, Number 5 (October 1991), pp. 341-352.

41. "The United States Country Review", OECD Reform Project - Phase 2, DAFFE/CLP(98)9, June 1998, chapter 3, page 25.

42. For a good introduction to regulatory capture including references to the literature, see Jean-Jacques Laffont and Jean Tirole, A Theory of Incentives in Procurement and Regulation (Cambridge, Mass.: The MIT Press, 1993), chapter 11.

43. Outright capture may be rare, but there is evidence that regulation has been applied at times to protect certain firms from competition. For example, a US study provided evidence, plus cited other corroborating studies, for the point that not all firms oppose regulation. Some apparently may support it because the associated increase in their costs is more than counterbalanced by a lessening of competition in their favour. Readers are again referred to Ann P. Bartel and Lacy Glenn Thomas, op. cit..

Competition agencies may also display some aspects of capture - see Anderson et al, op. cit., at page 10 where a study of European competition policy is cited to support that proposition, i.e. Damien Neven, Robin Nuttal and Paul Seabright, Merger in Daylight: The Economics and Politics of European Merger Control (London: Center for Economic Policy Research, 1993). This study also apparently showed that, "[w]hether a particular agency is seen to be captured or not may depend as much on factors such as statutory independence, institutional transparency and accountability as it does on a sectoral focus."

44. A United States telecommunications commentator has remarked:

"The experience with competition in industries subject to weak regulation generally shows a strong tendency for both politicians and regulators to prefer selecting and managing competitors than promoting an open competitive marketplace, thereby creating a comfortably closed market for the chosen 'competitors', not the open one intended by competition policies. This tends to lead to duopoly/oligopoly behaviour and the establishment of very high artificial barriers to entry for any new players."

William H. Melody, "On the meaning and importance of 'independence' in telecom reform", Telecommunications Policy, Vol. 21, No. 3 (1997), pp. 195-199, at p. 195.

45. Readers are again referred to Levy and Spiller, op. cit., for a good discussion of why political interference can be expected in network infrastructure industries. Their paper includes a survey of developments in Argentina, Chile, Jamaica, the Phillipines and the UK which shows how important it is to reduce administrative uncertainty in order to encourage private investment. A US telecommunications expert has come to similar conclusions:

"It is absolutely essential that the 'competition' among the major industry players be moved from the arenas of politics and bureaucracy to the marketplace, and to achieving the industry performance objectives of government policy. This will only happen if regulatory decisions are made on their substantive merits, not on the basis of political favouritism or the backdoor influence of the most powerful industry players. Only

an independent, transparent regulatory process that is seen to be so by all affected parties and the public can achieve this."

William H. Melody, op. cit., p. 199.

46. A recent study commissioned for the European Union's DGII stated:

"Antitrust authorities are traditionally described as being more independent than regulatory agencies. While this view is generally correct, it is important to distinguish among forms of regulation and competition policy: An antitrust authority located within a ministry is more likely to be influenced by politics than an independent regulatory agency."

Institut d'Economie Industrielle, op. cit., pp. 91-92.

47. For a discussion of the contribution that private actions can make to competition law enforcement, see Karen Yeung, "The Private Enforcement of Competition Law", mimeo paper for the Oxford Law Colloquium Conference, "Regulation and Deregulation - Policy and Practice", March 1998.

48. The Office of Gas Supply (Ofgas), Submission to the Review of Utility Regulation, op. cit., page 42.

49. There is even very little experience to investigate as concerns how competition agencies perform as economic regulators. The Australian Competition & Consumer Commission (ACCC) is the only competition agency we know of which has been given economic regulatory functions.

50. For example:

1. The ACCC regulates access to telecommunications networks and will soon play a similar role in natural gas pipelines and electricity transmission. At least as regards telecommunications, the ACCC seems intent on intervening as little as necessary, but it is too early to tell how things will actually turn out. For insights into ACCC regulation policies, see: "Access Pricing Principles - Telecommunications", mimeo, July 1997; and Allan Asher (Deputy Chairman, ACCC), "Network Industry Regulation and Convergence in Service Delivery: Challenges for Suppliers, Users and Regulators", paper prepared for March 1998 Annual Conference of the Australian Petroleum Production and Processing Association (APPEA), published in APPEA Journal 1998, pp. 799-814.

2. In the United Kingdom, there appears to have been some debate about the wisdom of leaving the post deregulation development of competition in the bus industry entirely up to the competition authorities enforcing general competition law. See Lord Borrie's "Submission to the Report of the Commission on the Regulation of Privatised Utilities" (conducted by the Hansard Society and European Policy Forum), pages 2-3 (Lord Borrie is a former Director General of the Office of Fair Trading); Department of the Environment, Transport and the Regions, "Developing an integrated transport policy - an invitation to contribute"; and "OFT Response to DETR Paper", November 1997.

3. For a critique of how the United Kingdom's Ofgas is regulating price discrimination and predation with perhaps insufficient regard to the economic complexities of pricing in industries having large, sunk, common costs, see Derek Ridyard, "Regulation of Price Discrimination and Predation by Dominant Firms - Lessons from the OFGAS Valueplus decision" - mimeo, paper for the Oxford Law Colloquium Conference, "Regulation and Deregulation - Policy and Practice", March 1998.

4. Ofgas may be insufficiently aware of what constitutes effective competition and how its methods of discouraging price discrimination may facilitate collusion. See Catherine Waddams Price, "Competition and Regulation in the UK Gas Industry", Oxford Review of Economic Policy, Vol. 13, No. 1 (Spring 1997), pp. 47-63, at page 60.

5. Finland has an interesting history in terms of competition law and regulation applied to its financial sector. From 1958 to 1964 its general competition statute applied, but was disapplied for the next fourteen years. From 1988 until 1992, the statute was again applied but was primarily enforced by a sector regulator. After 1992, the general competition agency was given independent powers to investigate competition restraints within the banking and insurance sectors, but the sector supervisors retained concurrent power to make proposals to the Competition Council. The draft competition law presented in December 1997 proposed to do away with parallel enforcement. See "Estimate of the Working Group Revising the Act on Competition Restrictions on the Parallel Control of the Office of Free Competition and the Financial Supervision Authority (30 January 1997)", Appendix 3 of the Finnish Submission to the OECD's Competition Law and Policy Committee, Working Party 2 (Competition and Regulation) meeting on February 19, 1998 - DAFFE/CLP/WP2/WD(98)2. Appendix 3 also contains the Office of Free Competition's assessment of this experience.

51. See paragraphs 44ff, supra. There is similar evidence of a different institutional approach to mergers in the case of Italy. An Italian submission to the OECD's Competition Law and Policy Committee's Working Party 2 noted that after hearing from the Competition Authority, but not being bound by what it says, the Bank of Italy enforces the provisions of the Italian Competition Act concerning agreements, abuse of dominance and concentrations in the banking sector. There apparently have been a few cases where the two authorities reached different views, "...for instance, with respect to the acquisition of control of Banca Popolare di Sassari by Bankco di Sardegna, the Competition Authority deemed that the remedies proposed by the Bank of Italy did not eliminate all competition concerns." See Enhancing the Role of Competition in the Regulation of Banks - Italy, Submitted to WP2 meeting of February 19, 1998 - (DAFFE/CLP/WP2/WD(98)16, page 10.

52. Canada provides an example of such forbearance in its telecommunications regulation. See Hudson N. Janisch, "At last! A New Canadian Telecommunications Act", Telecommunications-Policy, Volume 17, Number 9 (December 1993), pp. 691-98.

53. This needs to be distinguished from "ring fencing" designed to ensure that regulated firms do not enter related, unregulated businesses in order to use cross subsidisation and price discrimination to circumvent regulatory restraints on their profits (in the process severely distort competition).

54. The United Kingdom is currently proposing to strengthen its general competition law and the competition policy functions of its sector regulators. To mitigate the problems we have referred to, it is anticipated that all the agencies will be enforcing the same law using substantially similar guidelines, and appeals from competition decisions by all the various agencies will go to the same appeals body. See: Margaret Bloom, op. cit., pages 7-8; and "Competition on the line" - Personal View - Don Cruickshank - Financial Times (UK edition) , February 19, 1998, p.12.

A recent British review of the utilities industries would support the wisdom of applying a standardised law:

"...formulating general prohibitions against anti-competitive behaviour as licence conditions has a number of disadvantages, including: the degree of generality, if not vagueness; the absence of an appeals procedure; the lack of binding precedents and hence uncertainty; issues of sanctions and enforcement procedures....Oftel's DG, Don Cruickshank, has himself said publicly that the condition is only a second best to changes in legislation on anti-competitive behaviour."

The Hansard Society and European Policy Forum, The Report of the Commission on the Regulation of Privatised Utilities, December 1996, p. 72. This Report, at page 89, also supported the use of a common appeals body for all competition law decisions including those made by the regulators.

55. See OECD, "Competition Issues Arising in the Insurance and Financial Services Industries", Background Note by the Secretariat, Working Party No. 2 (Competition and Regulation) of the Competition Law and Policy Committee - DAFFE/CLP/WP2(98)11.

56. The United Kingdom provides some interesting insights regarding competition between electricity and gas firms and the competitive distortions that differences in sector-specific regulation can produce. See: "Electricity competition delayed" and "OFFER and OFGAS cannot agree", in the NEWS section of The Utilities Journal (February 1998), pages 3 and 9 respectively; and Catherine Waddams Price, "Competition and Regulation in the UK Gas Industry", Oxford Review of Economic Policy, Vol. 13, No. 1 (Spring 1997), pp. 47-63, at p. 61. The story revolves around distorted competition, due to quite different liberalisation timetables, between gas and electricity suppliers who would like to market both fuels to consumers and are also offering competing metering services. Interestingly, the UK's Office of Gas Supply (Ofgas) has urged that it be merged with the Office of Electricity Regulation. The latter has looked at the pros and cons of such a merger but seems somewhat less enthusiastic. See Ofgas, "Submission to the Review of Utility Regulation", November 1997, pp. 30-31; and "Submission by the Director General of Electricity Supply to the Review of Utility Regulation, October 1997, pp. 19-20.

57. For good discussions of what is entailed in convergence in these sectors and what it will mean for regulation, see: OFTEL's first submission to the Cultural, Media and Sports Select Committee Inquiry into audio-visual communications and the regulation of broadcasting - Beyond the Telephone, the Television and the PC - II - January 1998; OFTEL, "Beyond the telephone, the television and the PC - Regulation of the electronic communications industry", OFTEL's Second Submission to the Culture, Media and Sport Select Committee Inquiry into audio-visual communications and the regulation of broadcasting - March 1998; and OECD, "Towards Next Generation Regulation" (March 24, 1998), DSTI/ICCP/TISP(98)5.

58. OECD, "Towards Next Generation...", op. cit., page 9

59. Ibid., page 10.

60. OFTEL, "Beyond the telephone, the television and the PC - Regulation of the electronic communications industry", OFTEL's Second Submission to the Culture, Media and Sport Select Committee Inquiry into audio-visual communications and the regulation of broadcasting - March 1998, p. 9.

61. Specifically the paper stated:

> "Arguments concerning symmetry must not be used to impose regulations in areas which are already open to market forces. For example, Internet protocols allow for a range of services to be supplied over existing packet switched networks which are similar in characteristics to services subject to a number of regulatory requirements. Voice telephony is one example of a service which can be provided over the Internet or on existing public switched telecommunication networks. Similarly, there are a range of new webcasting services (e.g. Internet Protocol multicasting) which are similar to some broadcast services. Symmetric regulation should not in such instances be interpreted as extending the regulatory reach to cover Internet-based services. Rather symmetry would argue for trying as rapidly as possible to reduce the existing regulatory burdens on players in the traditional sectors."
>
> OECD, "Towards Next Generation...", op. cit., p. 9.

62. In considering the resources required by British regulatory bodies, one expert recommended merging some of them and stated this would:

> "...significantly reduce the total administrative and technical demands, cutting out duplication of generic work on issues such as the cost of capital, asset valuation and approaches to comparative efficiency."

Dr. Dieter Helm, Submission to the Commission on the Regulation of Privatised Utilities, January 22, 1996, page 13.

In a submission to the same review of British utilities, Lord Borrie (former head of the Office of Fair Trading), noted that the regulators shared some common objectives and should be combined in a general Commission having industry specific divisions:

"Let them gain strength by being brought together. There would at the same time be a check on individual excess or waywardness through the industry specific heads of division having to get their proposals approved by, say, three or five Commissioners, who would comprise a shared decision-making body ranging over several industries."

Submission (January 6, 1996) to The Report of the Commission on the Regulation of Privatised Utilities, page 3.

For an interesting overview of the advantages and disadvantages of the general versus sector-specific institutional approaches, see National Competition Policy - Report by the Independent Committee of Inquiry (F. G. Hilmer, Chairman) (Canberra: Commonwealth of Australia, 1993), pp. 325-328. This report basically came down on the side of having a general regulator.

The matter was also considered in a recent British review of regulation. See The Hansard Society and European Policy Forum, op. cit., pp. 6-7. This report saw some merit in combining Ofgas and Offer and also in giving a wider communications sector remit to Oftel. It also concluded, "...that the existence of four or five [sector regulators] strikes a good balance between the advantages of diversity and uniformity."(page 6)

63. Michael Pickford, "Information Disclosure, the Baumol-Willig Rule, and the "Light-Handed" Regulation of Utilities in New Zealand", New Zealand Economic Papers, Vol. 30, No. 2 (December 1996), pp. 199-218, at 202.

64. See Mario E. Bergara and Pablo T. Spiller, op. cit.; Mario Bergara, "Network Access Pricing and "Light Handed" Regulation: A Comparative Institutional Analysis", mimeo kindly supplied by Mr. Bergara; and "No need for a regulator? PNE - Asia Pacific, December 1994/January 1995, pp. 59-61.

65. That includes a current review of the Commerce Act expected to be completed in September 1998.

66. This threat played an important part in ensuring that New Zealand Telecom granted suitable access to its network to its first major competitor. See Michael Pickford, op. cit., p. 204 and David Galt, "The telecommunications industry', in A. Bollard and M. Pickford, editors, The Structure of New Zealand Industry, (Palmerston North: Dunmore Press, 1997). For further information and assessment concerning the New Zealand system, see: "The long (and drawn out) arm of the Law" and "In the market..." in PNE - Asia Pacific, December 1994/January 1995, pp. 62-64 and 64-66; and Sir Geoffrey Palmer (legal counsel to CLEAR Communications), "Reflections Upon Telecommunications and the Light-Handed Regulatory Model", Address to Interconnection and Interoperation: A Blueprint for Public Policy - Majestic Hotel, Wellington, October 19, 1995; Gordon Campbell, "Tough Calls", Listener, May 17, 1997; and the following papers presented at the TUANZ conference "Future of Competition Symposium", Wellington, N.Z., April 7-8, 1998 - John Belgrave, "Has the Commerce Act Outlived its Usefulness?" (February 1998); Michael Carter and Julian Wright, "Bargaining over Interconnection: The Clear-Telecom Dispute" (1997); and Ross Patterson, "Light-Handed Regulation in New Zealand Telecommunications Ten Years On: Stimulus to Competition or Monopolist's Charter?", mimeo, February 1998.

67. In telecommunications, it is possible to envisage up to five sources of local loop competition: traditional copper wire; cable TV; and three types of mobile telephony. In electricity and natural gas, inter-modal

competition may prove significant and this is already happening in most of the railway sector. Even in water and sewerage there are interesting attempts underway to introduce greater competition, though all fall short of facilities based competition - see Simon Cowan, "Competition in the Water Industry", Oxford Review of Economic Policy, Vol. 13, No. 1 (Spring 1997), pp. 83-92.

NOTE DE RÉFÉRENCE

1. Introduction/contexte, c'est-à-dire réforme réglementaire en cours

Des réformes majeures visant à réduire le champ de la réglementation et à faire en sorte que cette dernière réponde mieux aux besoins du public sont entreprises dans un nombre important et croissant de pays de l'OCDE. Les secteurs économiques suivants sont particulièrement concernés par ces efforts de réforme: communications, électricité, gaz naturel, eau et assainissement, transports, services financiers, services professionnels et agriculture. En dépit de différences importantes selon les pays et les branches d'activité, ces réformes ont généralement comporté une ouverture du marché, des opérations de privatisation, une nouvelle approche des obligations d'universalité du service et une libéralisation des restrictions affectant l'entrée sur le marché, les tarifs et les pratiques commerciales normales[1]. L'un des principaux objectifs qui sous tend ces réformes est de laisser une place plus importante aux marchés privés en matière d'affectation des ressources, améliorant ainsi l'efficience économique générale. Il n'est donc pas surprenant que les organismes chargés de la concurrence soient intéressés et affectés au premier chef par ces réformes.

Dans un grand nombre de pays membres, la réforme de la réglementation a suscité d'importants débats portant sur la mesure dans laquelle les secteurs faisant l'objet d'une plus grande ouverture à la concurrence devaient être également soumis au droit général de la concurrence appliqué par l'organisme chargé de la protection de la concurrence dans les autres secteurs de l'économie. En pratique, la réforme de la réglementation s'est rarement bornée à supprimer les réglementations et à laisser les forces du marché opérer dans le cadre général du droit de la concurrence. Dans un grand nombre de cas, les responsables publics ont estimé que la concurrence devait être nourrie par un nouveau type de réglementation de caractère strictement transitoire ou définitif[2]. De nombreux responsables de la réglementation nouveaux ou anciens se sont vus confier la mission d'encourager la concurrence ou même de formuler ou d'appliquer des “législations” (ou plutôt des “règles”) de concurrence générales ou spécifiques dans divers secteurs. Dans un nombre beaucoup plus faible de pays, les organismes chargés de la concurrence (on entend par là les services responsables de la concurrence au niveau national) se sont vus assigner des tâches qui étaient auparavant accomplies par les administrations de l'État (agissant en qualité de propriétaires) ou par des organismes de réglementation à compétence générale ou sectorielle. Quelle que soit la division du travail actuelle entre les organismes chargés de la concurrence et les organismes de réglementation, il existe très peu de pays dans lesquels elle peut être considérée comme définitive, dans la mesure, en particulier, où la transition vers une concurrence renforcée est loin d'être achevée.

La présente étude examine les facteurs que les décideurs publics devraient prendre en compte pour décider de la division des tâches appropriée entre les organismes chargés de la concurrence et les organismes de réglementation dans les secteurs qui font l'objet d'une ouverture plus grande à la concurrence. Un point important à noter à cet égard est que nous considérons ces organismes dans leur état actuel sans tenir compte de la manière dont ils pourraient évoluer à long terme en fonction des tâches qui pourraient leur être dévolues ou des modifications que le législateur pourrait juger appropriées en ce qui concerne la définition de leurs missions, de leurs compétences et de leurs structures. Si l'on se place dans une perspective suffisamment longue et en supposant une similitude croissante des fonctions, la

convergence entre les organismes chargés de la concurrence et les organismes de réglementation pourrait être telle qu'il serait inutile d'examiner une division du travail optimale entre eux (ce qui resterait peut-être inchangé, ce serait l'étendue de la compétence des uns et des autres, celle des premiers couvrant l'économie dans son ensemble tandis que celle des seconds resterait limitée à un secteur ou à un petit nombre de secteurs). Pour être plus concret, on supposera dans la présente étude que l'on a affaire à deux types possibles d'organismes :

- **les organismes chargés de la concurrence -** dont la compétence s'étend pratiquement à l'économie dans son ensemble et qui administrent un cadre législatif principalement destiné à protéger les intérêts des consommateurs en empêchant les entreprises de limiter la concurrence par des ententes ou des fusions avec des concurrents ou d'éliminer des concurrents autrement qu'en proposant de meilleurs produits aux consommateurs ; et

- **les organismes de réglementation** qui couvrent un secteur ou un petit nombre de secteurs dans lesquels l'intérêt public ne serait pas suffisamment protégé s'il était confié aux marchés placés sous la surveillance d'un organisme chargé de la concurrence et où le gouvernement estime qu'il doit confier à un individu ou à une institution le pouvoir de spécifier directement les technologies, les méthodes de commercialisation et/ou les tarifs acceptables.

Pour mieux aborder les questions qui paraissent les plus difficiles, nous concentrerons notre attention sur ce que l'on qualifie souvent de secteurs d'infrastructures de réseaux (en anglais “network infrastructure industries”), c'est-à-dire les télécommunications, l'électricité, le gaz naturel, les chemins de fer et le secteur de l'eau et de l'assainissement. Ces secteurs, qui font souvent l'objet d'une appropriation ou d'une réglementation publique comportent un certain nombre de caractéristiques qui en font des candidats particulièrement attractifs, difficiles et intéressants à la réforme de la réglementation pour les autorités publiques[3].

Bien que l'on s'intéresse principalement ici aux secteurs d'infrastructure de réseau, il convient de noter que d'importantes réformes de la réglementation sont en cours dans certains autres secteurs économiques et que les organismes chargés de la concurrence ont joué un rôle important dans ce processus, notamment en attirant l'attention sur les restrictions inutiles de la concurrence résultant de certaines réglementations et sur la possibilité de résoudre, en partie, ce problème par la suppression des dérogations au droit général de la concurrence qu'elles impliquent. Ainsi, des dérogations de ce type s'appliquant au secteur des services financiers ont été supprimées dans certains pays tandis que des mesures de rationalisation de la réglementation ont été prises dans d'autres pays afin de permettre un renforcement de la concurrence entre les banques, les sociétés d'assurances, les fonds de pension et les organismes de placement collectif. Dans certains secteurs de l'économie, la réglementation tolère ou prévoit expressément les comportements anticoncurrentiels. Dans les professions libérales, par exemple, la réglementation fixe parfois les honoraires et interdit la publicité. La relation entre ces pratiques et l'incitation à offrir de meilleurs services aux consommateurs paraît ténue sinon inexistante[4]. Le transport aérien et le transport routier et l'agriculture peuvent également être cités comme exemples de secteurs dans lesquels une réglementation trop large défavorise de manière significative le consommateur sans véritable contrepartie apparente en termes de renforcement de la sécurité ou de diminution des atteintes à l'environnement[5].

Avant d'aborder les principales questions qui constituent le sujet de la présente étude, on énumérera brièvement les forces générales qui animent les réformes réglementaires visant à une ouverture des marchés afin de mieux évaluer les résultats que la réforme est supposée atteindre. On examinera ensuite les conditions générales qui sont requises pour introduire davantage de concurrence dans un

secteur d'infrastructure de réseau qui était auparavant détenu ou étroitement réglementé par l'État. On indiquera, ce faisant, celles des tâches indispensables qui devront, de préférence, continuer à être assurées directement par l'État, ce qui laissera, néanmoins une place importante aux tâches qui devront probablement être confiées à un organisme chargé de la concurrence ou à un organisme de réglementation. Le reste de la note sera consacré aux considérations qui devront probablement influencer la répartition de cette dernière catégorie de tâches.

2. Les forces motrices de la réforme de la réglementation

Il existe au moins cinq raisons qui expliquent le développement d'une tendance favorable à la réforme de la réglementation (y compris par la privatisation par ouverture du marché) dans les secteurs d'infrastructure à réseaux. La première et la plus importante découle de la prise de conscience croissante de la possibilité de réaliser des gains d'efficience significatifs en laissant jouer davantage les forces du marché grâce à un assouplissement des contraintes imposées par l'État au choix des technologies et à l'entrée de nouveaux acteurs ou à de nouvelles formes de concurrence[6]. Les organes de réglementation ne disposent pas des informations et des incitations nécessaires pour encourager l'utilisation des meilleures technologies disponibles et la découverte de technologies améliorées[7]. Pire encore, la réglementation peut finir par être édictée davantage dans l'intérêt de certaines ou de l'ensemble des entreprises visées que pour le bien-être du public qu'elle est chargée officiellement de protéger[8]. Enfin, les organismes de réglementation ont parfois des difficultés à prendre les engagements à long terme qui seraient nécessaires pour minimiser les coûts du capital dans les secteurs soumis à la réglementation[9].

La reconnaissance croissante du fait que la réglementation peut avoir pour effet de réduire l'efficience économique s'accompagne de la prise de conscience du fait que dans de nombreux secteurs d'infrastructures en réseau, le changement technologique a altéré l'aspect monopolistique du réseau (par exemple la boucle locale dans les télécommunications). Qui plus est, une fois admise la possibilité d'une "défaillance" de la réglementation, les économies de gamme peuvent apparaître moins importantes. Par exemple, dans la production d'électricité, les économies de gamme obtenues en combinant la production et la distribution du courant et en soumettant les deux activités à une réglementation peuvent être moins importantes que les gains d'efficience qui peuvent être obtenus en séparant la production et la distribution et en faisant appel à la concurrence plutôt qu'à la réglementation dans le secteur de la production.

Le développement d'une tendance à la réforme de la réglementation s'explique aussi par la résistance croissante opposée par les entreprises à l'augmentation des coûts occasionnés par le respect de la réglementation. Ce facteur est étroitement lié à une quatrième source de pression en faveur de la réforme de la réglementation qui tient à la mondialisation croissante de l'économie[10].

Une autre source de pression en faveur de la réforme de la réglementation ou du moins d'un abandon d'une réglementation spécifique à un secteur existe dans la mesure où des marchés composés d'un certain nombre de produits substituables s'étendent sur deux secteurs réglementés ou davantage ce qui crée un risque de distorsions de la concurrence découlant de l'application de réglementations sectorielles différentes. Ce problème est aggravé actuellement par une tendance croissante des sociétés à opérer dans plusieurs secteurs réglementés. Les sociétés de télécommunications, les cablo-opérateurs et les fournisseurs de services sur Internet s'engagent ou souhaiteraient s'engager dans la prestation de services qui couvrent ces trois domaines d'activités. De même, les fournisseurs d'électricité et de gaz naturel souhaiteraient opérer dans les deux domaines ou du moins dans certaines parties d'entre eux (comme la fourniture de compteurs) et il existe une concurrence de plus en plus forte entre différentes branches des services financiers (par exemple, fourniture de produits d'épargne à long terme par les sociétés

d'assurance, les fonds de pension et les organismes de placement collectif). Les organismes de réglementation sectoriels ont parfois résisté à ces évolutions ou ont eu des difficultés pour assurer une égalité devant la concurrence d'opérateurs soumis à des régimes de réglementation différents. Nous reviendrons ultérieurement sur cet important problème[11].

Avant de quitter cette section, il convient de noter que l'OCDE a récemment invité instamment ses membres à adopter des réformes de la réglementation visant à l'ouverture des marchés et au renforcement de la concurrence et à renforcer ces mesures par une application plus large et plus efficace du droit de la concurrence[12].

3. Le renforcement de la concurrence dans les secteurs d'infrastructures de réseaux - la mission des organismes chargés de la concurrence ou des organismes de réglementation

Les mesures requises pour renforcer la concurrence dans les secteurs d'infrastructures dépendent, à l'évidence, du point de départ. Afin de s'assurer que l'on n'oublie aucune étape, on supposera que la réforme débute dans un secteur où une entreprise verticalement intégrée bénéficie d'un monopole conféré par l'État et est tenue de fournir un certain ensemble de services à des tarifs inférieurs aux prix de revient à une partie de sa clientèle (autrement dit, elle est obligée de proposer un service universel). Il est préférable de confier certaines des tâches à accomplir à des organismes autres que les organismes chargés de la concurrence ou les organismes de réglementation et l'une d'entre elles qui constitue la toute première étape est celle qui consiste à supprimer les obstacles à l'entrée. Les importantes tâches suivantes font également partie de cette liste :

1. lorsque l'entreprise en place est une entreprise publique, prendre des mesures pour garantir aux nouveaux entrants qu'elle fonctionnera selon les pratiques commerciales normales et en particulier qu'elle ne bénéficiera pas d'aides automatiques et permanentes de l'État pour couvrir ses déficits ;

2. supprimer l'accès privilégié de l'entreprise en place à des moyens de production rares contrôlés ou détenus par l'État tels que le spectre radio et faire en sorte que ces ressources soient attribuées aux producteurs qui peuvent en faire l'usage le plus efficace ;

3. procéder aux divisions verticales et horizontales jugées nécessaires pour faire face à des situations dans lesquelles l'entreprise en place détient des "installations essentielles" qui sont nécessaires aux nouveaux entrants pour opérer mais qu'ils ne peuvent pas reproduire dans des conditions économiques [13];

4. traiter les dépenses à fonds perdus et abandonner ou restructurer les obligations concernant le service universel afin d'éviter que les entreprises en place ne perdent des clients au profit de nouveaux entrants moins efficients [14];

5. prendre des mesures pour neutraliser les avantages artificiels des entreprises en place (autres que ceux liés à la détention de moyens de production essentiels)[15].

Bien que ces cinq fonctions ne soient pas particulièrement de la compétence d'une autorité responsable de la concurrence ou d'un organisme de réglementation, elles seraient certainement exercées plus efficacement si l'avis de ces organismes était sollicité.

Il apparaît qu'il subsiste cinq tâches de renforcement de la concurrence qui pourraient être confiées soit à l'autorité de la concurrence soit à un organisme de réglementation ou aux deux instances :

1. assurer un accès non discriminatoire aux moyens de production nécessaires, en particulier aux réseaux d'"installations essentielles" ;

2. contrôler les autres comportements anticoncurrentiels et examiner les fusions ;

3. "réglementation technique", consistant à fixer ou à continuer à appliquer des normes visant à assurer la compatibilité et à répondre aux préoccupations de préservation de la vie privée, de sécurité et de protection de l'environnement ;

4. "réglementation économique" consistant à adopter des mesures de contrôle des prix de monopole et d'assurer par ailleurs des niveaux appropriés de protection du consommateur ;

5. revoir périodiquement l'ampleur et le degré de la position de force sur le marché qui subsiste lorsque la concurrence est instaurée afin de recommander le maintien éventuel d'une législation ou d'une réglementation de la concurrence spécifique au secteur considéré (autre que la réglementation technique).

Si la réglementation technique et la réglementation économique sont incluses dans la présente note bien qu'elles ne soient pas strictement liées à un renforcement de la concurrence, c'est parce que leur bon fonctionnement peut être très important pour obtenir et maintenir le soutien du public au maintien et au renforcement de la concurrence sur les marchés. Certains contestent, toutefois, que cette description s'applique à la réglementation économique. L'idée qu'il faudrait contrôler les tarifs "de monopole" a été contestée dans au moins un pays de l'OCDE, à savoir la Nouvelle Zélande dont le système que l'on pourrait qualifier de réglementation "peu contraignante" est décrit et brièvement commenté en annexe à la présente note. Ce qui suit ne s'applique pas pour l'essentiel à un pays qui renonce à opérer un contrôle institutionnalisé des services en réseau. Par ailleurs, les références faites ici à la "réglementation économique" concernent des systèmes beaucoup plus interventionnistes qu'une réglementation peu contraignante.

4. Répartition des tâches de renforcement de la concurrence entre l'organisme généralement responsable de la concurrence et un ou plusieurs organismes de réglementation

Après avoir identifié les tâches de renforcement de la concurrence qui devraient être assignées soit à l'organisme chargé de la concurrence soit à l'organisme de réglementation, nous nous attacherons maintenant à définir les grandes lignes de la répartition de ces tâches en accordant une attention particulière aux questions importantes de synergie. Bien que la description se réfère à l'ouverture d'un secteur d'infrastructure à la concurrence, elle conduira finalement à des généralisations dont le champ d'application s'étend probablement au renforcement de la concurrence dans d'autres secteurs réglementés.

Pour introduire une concurrence plus forte dans un secteur d'infrastructure à réseau, les décideurs peuvent parfois commencer par un scénario relativement simple dans lequel il existe un organisme général responsable de la concurrence mais pas d'organisme de réglementation général ou sectoriel. Dans une telle situation, si l'on suppose que le droit de la concurrence d'un pays contient des dispositions suffisamment vigoureuses interdisant l'abus de position dominante et les ententes anticoncurrentielles, l'organisme responsable de la concurrence pourrait finir par se voir assigner l'essentiel du travail au titre de trois des cinq tâches identifiées précédemment[16]. L'autorité responsable de

la concurrence peut disposer d'une expertise et d'une expérience acquises principalement à l'occasion du traitement des cas d'abus de position dominante qu'elle peut utiliser pour empêcher l'entreprise en place d'utiliser la maîtrise des réseaux constituant des goulets d'étranglement pour bloquer ou désavantager des concurrents. Il en est généralement de même en ce qui concerne le contrôle des comportements anticoncurrentiels et l'examen des fusions. Le gouvernement peut décider aussi que l'autorité chargée de la concurrence est la mieux placée pour examiner périodiquement les positions de force sur le marché qui subsistent dans le secteur ouvert à la concurrence. Les résultats dépendront, toutefois, beaucoup du mode d'organisation de la réglementation technique et économique.

La réglementation technique implique un ensemble de tâches très différent de celles qui visent à assurer un accès non discriminatoire au marché, à contrôler les comportements anticoncurrentiels et à examiner les fusions ou à évaluer la position de force qui subsiste sur le marché. Elle ne s'adapte pas particulièrement bien, en tant que telle, au type d'activité des organismes chargés de la concurrence bien qu'il existe un certain recouvrement des compétences en ce qui concerne les effets anticoncurrentiels possibles de la fixation et de l'application des normes[17]. Pour remplir correctement la fonction de réglementation technique, l'organisme chargé de la concurrence devrait se doter d'effectifs supplémentaires très importants dont la formation et les compétences devraient se situer davantage dans le domaine de l'ingénierie que dans ceux du droit et de l'économie qui sont plus courants parmi le personnel de ces organismes. Confier la réglementation technique à un organisme responsable de la concurrence risquerait de détourner à l'excès les dirigeants de cet organisme de leurs tâches normales et d'altérer la culture de l'organisme[18].

S'il existe ou s'il est prévu un organisme de réglementation technique extérieur à l'organisme chargé de la concurrence, il conviendrait probablement d'examiner les synergies pouvant exister du fait de la combinaison de la réglementation technique et de la réglementation économique. Les plus évidentes sont celles qui concernent la connaissance détaillée du secteur. Cet aspect peut ne pas s'avérer aussi important que l'on pouvait s'y attendre dès lors que les responsables de la réglementation technique ont une approche du secteur fondée sur l'ingénierie tandis que les responsables de la réglementation économique adoptent un point de vue comptable. Quoi qu'il en soit, il existe probablement des synergies suffisantes entre la réglementation technique et la réglementation économique pour que cette dernière ne soit pas organisée comme une fonction isolée. Toutefois, avant de décider de combiner la réglementation technique et la réglementation économique, il convient d'examiner les gains pouvant être réalisés en localisant la réglementation économique au sein de l'organisme chargé de la concurrence.

Cette solution présente plusieurs avantages qui tiennent tous au caractère non spécifique à un secteur de l'organisme chargé de la concurrence: moindre risque de "capture", moindre résistance à la perte d'une fonction (une partie au moins de la réglementation économique devrait avoir un caractère temporaire), pas d'incertitude sur l'organisme compétent et, sous réserve de l'inclusion de l'ensemble des responsables de la réglementation, plus grande chance de formuler des réglementations qui sont les mêmes pour l'ensemble des concurrents opérant sur le marché.

La localisation de la réglementation économique au sein de l'organisme chargé de la concurrence présente, toutefois, deux inconvénients. En premier lieu, la fixation des tarifs tend à aller à l'encontre du souhait naturel de la plupart des organismes responsables de la concurrence de laisser cette tâche autant que possible aux marchés privés[19]. En second lieu, la réglementation économique amènerait l'organisme à s'impliquer dans des décisions ayant des conséquences très importantes en termes de redistribution et d'efficience. Ces décisions sont de nature plus politique que ne le sont normalement les fonctions générales d'application de la législation d'un organisme qui a besoin d'être regardé comme exerçant une

surveillance impartiale et comme soucieux de promouvoir le bien-être général plutôt que comme assurant le partage d'un gâteau entre des intérêts concurrents.

En examinant seulement si la réglementation économique devait être organisée au sein d'un organisme chargé de la concurrence ou combinée avec la réglementation technique, nous avons ignoré jusqu'à présent une troisième option importante. Le gouvernement pourrait aussi envisager de confier aux organismes chargés de la réglementation économique un pouvoir partagé ou exclusif de formulation et d'application du "droit" de la concurrence dans leur secteur, c'est-à-dire la tâche d'assurer un accès non discriminatoire aux réseaux essentiels et de contrôler d'autres formes de conduites anticoncurrentielles et d'examiner les fusions[20].

Lorsqu'un secteur d'infrastructure de réseau qui fait l'objet d'une ouverture à la concurrence doit être soumis à un organisme de réglementation économique extérieur à l'organe chargé de la concurrence, cet organisme devra généralement contribuer à faciliter le passage à une concurrence renforcée, ce qui pourra impliquer un certain pouvoir d'application du droit de la concurrence. Il en a certainement été ainsi au Royaume Uni où des compétences d'application de certaines dispositions du droit de la concurrence ont déjà été conférées concurremment aux organismes de réglementation de divers secteurs des infrastructures de réseau et où cette coexistence devrait persister en vertu d'un projet de loi qui renforce le droit de la concurrence actuellement examiné par le parlement.

Le pouvoir d'intervenir dans l'application du droit général de la concurrence ne devrait pas être la seule fonction conférée aux organismes de réglementation économique en matière de politique de la concurrence. La plupart des législations de la concurrence sont destinées principalement à protéger plutôt qu'à encourager la concurrence[21]. Par ailleurs, les anciens titulaires de monopole disposeront probablement d'avantages substantiels par rapport aux entreprises en place dans les secteurs d'infrastructure de réseau[22]. On peut soutenir, à partir de la conjugaison de ces deux points, qu'il est nécessaire d'adopter des dispositions spéciales en matière de concurrence dans les secteurs d'infrastructures de réseaux faisant l'objet d'une ouverture plus grande à la concurrence. On peut citer, par exemple, l'Office des télécommunications du Royaume Uni (Oftel) :

> "Les caractéristiques inhérentes aux secteurs des moyens électroniques d'information et des communications confèrent un caractère endémique à certaines défaillances du marché qui ne peuvent donc être redressées par la seule concurrence. Ces défaillances ne sont pas nécessairement le résultat de comportements abusifs des entreprises et ne tombent donc pas sous le coup des dispositions restrictives de la loi sur la concurrence. Elles découlent de la nature même des secteurs concernés et des règles spécifiques sont donc nécessaires pour couvrir des goulets d'étranglement particuliers notamment en matière d'aboutissement des appels sur les réseaux de téléphone et de systèmes de contrôle des accès sur l'ensemble des réseaux électroniques.
>
> De telles règles *ex ante* doivent être appliquées à ceux qui agissent comme « gardiens des accès » tout en échappant à la définition juridique/économique de la position dominante (bien qu'ils soient clairement en mesure d'occuper une telle position). Le contrôle des accès peut entraîner sur les marchés d'aval des distorsions qui seraient extrêmement difficiles à corriger après coup. Pour prévenir ces distorsions, il serait nécessaire d'appliquer des règles *ex ante* lorsque le consommateur ou l'utilisateur final devrait supporter des coûts de transfert importants pour changer de fournisseur ou de service".

Dans le même document, l'Oftel a identifié aussi un certain nombre de "règles transitoires applicables aux anciens titulaires de monopoles" concernant notamment les problèmes d'interconnexion:

> Ces règles particulières sont nécessaires pendant une période limitée pour instituer les conditions permettant aux concurrents d'entrer sur le marché, de s'y maintenir et de s'y développer. Le droit de la concurrence qui ne s'applique que lorsqu'un abus a été constaté et qui se concentre sur les mesures visant à corriger les abus individuels est incapable de faire face aux avantages à long terme de grande portée dont jouissent les entreprises en place depuis longtemps. Le renforcement de la concurrence sur ces marchés devrait s'accompagner d'un affaiblissement de la réglementation découlant de ces règles spéciales au profit de l'exercice de pouvoirs définis par le projet de loi sur la concurrence.[23]

Enfin l'OFTEL a élaboré certaines "règles visant les positions dominantes communes, dans la mesure où elles ne sont pas traitées de manière efficace par le droit général de la concurrence". Il s'agissait dans ce cas, de prévenir le parallélisme délibéré des pratiques qui peut se développer dans des structures de marché oligopolistiques protégées par des barrières à l'entrée élevées mais qui ne sont généralement pas interdites par le droit de la concurrence dès lors qu'il n'existe pas d'entente entre les entreprises.

Que des dispositions supplémentaires sur la concurrence soient ou non nécessaires, une application combinée de la réglementation économique et du droit de la concurrence pourrait apparaître comme une bonne utilisation des compétences disponibles et entraîner une diminution des coûts résultant du respect de la réglementation pour les entreprises visées. Par ailleurs, cette solution devrait supprimer la possibilité d'une incohérence entre les politiques de la concurrence et de la réglementation ce qui réduirait le coût du capital des entreprises soumises à la réglementation[24]. Enfin, comme l'a souligné l'ancien Directeur général de l'Oftel, la combinaison de ces fonctions pourrait aussi faciliter l'application d'une combinaison optimale des approches du droit de la concurrence et de la réglementation :

> "En permettant à l'Oftel et aux autres organismes de réglementation sectoriels de choisir le régime le plus approprié, (de la réglementation ou du droit de la concurrence) pour traiter un problème particulier, le (projet de loi sur la concurrence) assurera la cohérence entre les deux régimes et évitera qu'ils se contredisent.
>
> Si les responsables de la réglementation sont dépourvus de ces pouvoirs concurrents, ils devront s'en remettre aux seules dispositions réglementaires découlant des licences pour traiter les problèmes des secteurs qu'ils sont chargés de réglementer.
>
> Les responsables de la réglementation seront inévitablement amenés, de ce fait, à se cramponner pendant trop longtemps à des règles détaillées et trop inquisitoriales ce qui risque d'avoir de graves conséquences sur l'innovation et la concurrence. Par ailleurs, les entreprises soumises à la réglementation pourraient être confrontées à un double danger de la part des organismes de réglementation sectoriels qui enquêteraient sur une activité particulière en vertu des pouvoirs d'application de la loi découlant des contrats de concession tandis que l'office de la loyauté des pratiques commerciales enquêterait sur le même comportement en vertu du droit général de la concurrence.
>
> .....
>
> Il est important de reconnaître qu'au fur et à mesure que les pressions de la concurrence se font sentir dans certains des secteurs privatisés, le rôle des organismes de réglementation sectorielle devient de plus en plus celui d'une autorité de la concurrence spécialisée. Leur refuser la

disposition des outils les plus efficaces qui existent actuellement pour traiter les comportements anticoncurrentiels ne ferait que perpétuer le style ancien de réglementation des monopoles"[25].

Un examen plus attentif révèle que l'argument en faveur de l'octroi aux organismes de réglementation économique du pouvoir d'appliquer le droit de la concurrence général ou spécifique à un secteur n'a pas la même vigueur pour les deux fonctions que nous avons réunies à l'intérieur de la rubrique du droit de la concurrence. Tout d'abord, le fait que la plupart des dispositions du droit de la concurrence sont plutôt destinées à protéger qu'à promouvoir la concurrence est beaucoup plus pertinent à l'égard de la discrimination dans l'accès aux réseaux essentiels de la part des entreprises en place que vis-à-vis des contrôles d'autres comportements anticoncurrentiels et de l'examen des fusions. Par ailleurs, la détection des ententes horizontales et les poursuites contre ces ententes, l'appréciation et l'évaluation des effets favorables et défavorables à la concurrence des ententes verticales et la détermination prévisionnelle des effets des fusions sur la création ou le renforcement de la capacité de collusion ou d'exercice d'une position de force sur le marché impliquent des compétences spécifiques pour le développement et l'application desquels les organismes chargés de la concurrence disposent d'un avantage comparatif[26]. Avant de confier à un organisme de réglementation économique un rôle directeur dans l'application de la législation sur les ententes anticoncurrentielles ou dans l'examen des fusions, il convient de s'assurer qu'il fera appel à la compétence de l'organisme chargé de la concurrence dans ces domaines et qu'il lui accordera le poids adéquat. L'autre solution qui consisterait à développer cette compétence au sein d'un ou plusieurs organismes sectoriels impliquerait non seulement une duplication inutile de moyens mais risquerait aussi d'imposer des délais et des incertitudes inutiles qui compromettraient la transition vers un renforcement de la concurrence.

Les raisons qui conduiraient à combiner l'application de la réglementation économique et du droit de la concurrence qui sont développées ci-dessus s'appliqueraient aussi bien à une combinaison des deux fonctions au sein d'un organisme de réglementation économique ou de l'organisme chargé de la concurrence. En toute hypothèse, les raisons exposées s'ajoutant au désir de diminuer la réticence présumée des organismes de réglementation économique à renoncer progressivement à leur principale activité avec le renforcement de la concurrence peuvent expliquer qu'un nombre croissant d'expériences de combinaison du droit de la concurrence et de la réglementation économique aient actuellement lieu dans les pays membres de l'OCDE[27]. Dans la plupart d'entre eux, les fonctions sont combinées au sein d'organismes de réglementation spécialisés dans certains secteurs[28]. Pour évaluer cette tendance, il faudrait élargir le champ de l'étude au delà des synergies possibles entre les ressources pour examiner les différences significatives existant entre les modalités d'exercice de leurs principales missions par les organismes chargés de la concurrence et les organismes de réglementation, question qui fait l'objet de la section suivante.

Lorsque l'on examine s'il y a lieu de combiner la politique de la concurrence et la réglementation économique et comment ce résultat pourrait être obtenu, il convient de ne pas ignorer une autre solution possible consistant à confier la politique de la concurrence à l'organisme ayant une compétence générale dans ce domaine et la réglementation économique à un ou plusieurs organismes de réglementation. Bien qu'elle puisse conduire à sacrifier certaines synergies et qu'elle exige des mesures visant à éviter que les entreprises soient soumises à des exigences incompatibles, une telle division du travail garantirait que les deux politiques soient administrées par des organismes ayant une parfaite connaissance de ces dernières et des cultures adaptées à leur mise en oeuvre.

5. Organismes chargés de la concurrence et organismes de réglementation: similitudes et différences

Certains lecteurs pourraient mettre en doute la pertinence d'un examen des conditions d'exercice de leurs missions principales par les deux types d'organismes. Ne pourrait-on organiser une ou plusieurs divisions de la réglementation au sein d'un office de la concurrence ou une division de la concurrence au sein d'un organisme de réglementation et doter ces divisions du personnel et des compétences nécessaires pour atteindre un niveau de performance comparable à celui d'organismes séparés ? Une telle solution est certes concevable en théorie mais en pratique les divisions de la concurrence ou de la réglementation seront influencées de manière significative par les perspectives, les compétences et l'expérience des personnes dont elles dépendent ou avec lesquelles elles travaillent. Qui plus est, on peut raisonnablement s'attendre à ce que les cultures institutionnelles des organismes chargés de la concurrence et des organismes de réglementation comportent des différences susceptibles d'affecter l'efficacité avec laquelle ils utilisent leurs politiques réciproques pour accélérer la transition vers une concurrence renforcée.

La comparaison qui suit est quelque peu simplifiée dans la mesure où l'on a supposé que l'organisme de réglementation était spécifique à un secteur donné plutôt qu'à compétence générale et multisectorielle. On reviendra plus tard sur les avantages/inconvénients respectifs d'un organe à compétence générale ou sectorielle. Sous réserve d'une exception présentée in fine, notre comparaison a une valeur générale s'étendant au delà des secteurs d'infrastructures de réseaux.

5.1 Finalités/objectifs

Les organismes chargés de la concurrence et les organismes de réglementation partagent généralement un souci d'efficience économique bien que leurs statuts et leurs pratiques administratives diffèrent habituellement sur le poids accordé à cet objectif et quant au nombre et à la diversité des autres objectifs qui doivent être pris en compte. L'efficience économique est souvent le principal objectif des organismes chargés de la concurrence et il prédomine nettement sur d'autres objectifs tels que celui d'assurer aux petites entreprises un accès "équitable" aux marchés ou de contribuer à un développement régional équilibré[29].

De leur côté, les organismes de réglementation se voient généralement assigner ou adoptent un éventail beaucoup plus large de préoccupations qui concernent des problèmes de redistribution ou le désir de corriger diverses défaillances du marché (à côté de l'existence d'une position de force sur le marché). En fait, ces autres préoccupations peuvent même parfois conduire les organismes de réglementation à tolérer ou encourager l'existence de structures de marché anticoncurrentielles comme par exemple dans les cas où une péréquation tarifaire est jugée nécessaire pour assurer l'exécution des obligations d'universalité du service[30].

Cherchant à dégager certains principes généraux applicables au processus d'ouverture à la concurrence d'un secteur fortement réglementé, un haut fonctionnaire responsable de la concurrence s'exprimait ainsi à propos de la question des finalités :

> "... les organismes de réglementation ont des finalités autres que celles de la politique de la concurrence qui méritent d'être prises en considération lors du passage à un environnement concurrentiel. Dans certains secteurs réglementés, par exemple, la fourniture d'un service universel essentiel à faible coût constitue un important objectif des pouvoirs publics. Il en est de même, dans le secteur de la production d'électricité, de la protection de l'environnement. La

politique antitrust n'incorpore pas ces objectifs dont la prise en compte intégrale peut nécessiter une réglementation permanente ou d'autres dispositions spéciales. L'application de la législation antitrust vise à empêcher des décisions concertées des entreprises privées qui pourraient entraîner des comportements anticoncurrentiels tout en distinguant les comportements qui ont pour objet de promouvoir des objectifs légitimes sans dommage pour la concurrence"[31].

5.2 Méthode ou approche de base

La plupart des organismes chargés de la concurrence considèrent que leur tâche primordiale consiste à appliquer un ensemble de règles d'interdiction qui représentent avec d'autres lois cadres d'application générale, une sorte de constitution du marché. Ces interdictions fixent des limites importantes et sont destinées à dissuader les entreprises de supprimer la concurrence soit en concluant des ententes avec des concurrents soit en les éliminant ou en les désavantageant par des moyens qui sont contraires au bien-être à long terme des consommateurs. L'hypothèse qui sous tend l'application du droit de la concurrence est qu'en l'absence d'externalités importantes, une concurrence saine peut assurer le bien-être maximum du consommateur.

En revanche, la réglementation sectorielle spécialisée est généralement adoptée dans des situations où une intervention directe de l'État est jugée nécessaire parce que les marchés sont imparfaits par nature ou ne produiront pas une distribution souhaitable des bénéfices. Il s'ensuit que la réglementation cherche généralement non pas tant à modifier les incitations du marché ou à opérer un réglage fin de ces dernières qu'à les remplacer par un contrôle direct. La différence a été bien exprimée comme suit[32] :

> "En général, le droit de la concurrence cherche à sauvegarder le fonctionnement des forces du marché en empêchant ou en corrigeant les comportements particuliers qui peuvent entraver ces forces. Par ailleurs, l'intervention est centrée sur le maintien de la concurrence en tant que processus plutôt que sur la survie de tel ou tel concurrent. A l'inverse, la réglementation, même lorsqu'elle ne cherche pas activement à supprimer la concurrence, tend souvent à se substituer aux forces du marché dans la mesure où elle implique la fixation d'un ensemble assez complet de tarifs et d'engagements connexes concernant l'offre et la qualité des services".

Cette différence ne doit, toutefois, pas être surestimée. Les commentateurs ont noté qu'il existe plusieurs zones grises dans lesquelles les organismes chargés de la concurrence peuvent adopter certains aspects du mode réglementaire, en particulier lorsqu'ils :

1. adoptent des lignes directrices d'autodiscipline qui fonctionnent de manière très semblable à la réglementation[33] ;

2. surveillent l'accès à certaines installations essentielles ou constituant des goulets d'étranglement[34] ;

3. surveillent et dans certains cas fixent des tarifs si élevés ou si bas qu'ils constituent un abus de position dominante[35] ; et

4. recourent à des accords amiables ou formulent des avis consultatifs[36].

5.3 Moment (ex ante ou ex post) et fréquence des interventions et informations disponibles

La politique de la concurrence intervient essentiellement *ex-post (*sauf en ce qui concerne l'examen des fusions) tandis que la réglementation intervient principalement *ex ante* et de manière permanente. L'application de la réglementation présuppose généralement que l'on ne peut pas s'en remettre aux forces du marché pour produire un résultat satisfaisant et que le problème ne peut pas être corrigé par une simple tentative de modification des incitations des entreprises. Dans des situations de ce genre, il est préférable pour les entreprises d'être prévenues par des instructions préalables que d'être surprises par des exigences inattendues après la réalisation d'investissements à fonds perdus. Cette solution peut également être plus favorable pour les consommateurs si les moindres coûts en capital sont répercutés sous forme d'une diminution des prix ou d'une amélioration de la qualité des produits.

Les services de la concurrence n'exercent pas une surveillance permanente des entreprises: ils n'interviennent généralement que lorsqu'ils reçoivent une plainte ou lorsqu'ils considèrent que la législation sur la concurrence a été violée ou qu'une fusion doit faire l'objet d'un examen. En revanche, les organismes de réglementation qui cherchent à modifier les comportements sans toucher aux incitations provenant du marché n'ont guère d'autre choix que de surveiller en permanence les entreprises soumises à la réglementation.

Le type d'informations requises est également différent. Les organismes de réglementation ont besoin d'un volume d'informations comptables beaucoup plus important que les organismes chargés de la concurrence dans la plupart des affaires qu'ils traitent[37]. Parfois aussi, les organismes de réglementation doivent pouvoir spécifier les systèmes comptables à utiliser afin de pouvoir disposer d'informations pertinentes et compréhensibles, notamment s'ils souhaitent effectuer des comparaisons entre les réglementations ou instituer des dispositions "de référence".

Par ailleurs, compte tenu de leur éventail plus large d'objectifs, les organismes de réglementation ont généralement besoin d'une gamme d'informations plus variée que les organismes chargés de la concurrence. Il en est particulièrement ainsi lorsqu'il s'agit de vérifier le respect des obligations d'universalité du service et des règles de sécurité et de protection de l'environnement.

5.4 Préférence pour les remèdes structurels ou pour les remèdes influant sur les comportements

Compte tenu des différences notées ci-dessus en matière d'approche de base, de moments et de fréquence des interventions ainsi que d'informations probablement disponibles, on ne s'étonnera pas que les organismes chargés de la concurrence et les organismes de réglementation diffèrent sensiblement quant à l'utilisation qu'ils font des remèdes structurels ou des remèdes agissant sur les comportements. En règle générale, les organismes de réglementation ont beaucoup plus confiance dans leur capacité à modifier les comportements sans modifier les incitations et ils sont certainement mieux placés pour exercer en permanence la surveillance étroite exigée par une approche aussi interventionniste. Par ailleurs, ils sont probablement moins préoccupés par la propension des règles à empiéter sur la conduite du marché. Une différence fondamentale entre les remèdes préférés semble subsister même lorsque l'organisme de réglementation exerce des pouvoirs significatifs en matière de concurrence comme c'est le cas pour la Commission fédérale pour la réglementation de l'énergie (FERC) des États Unis[38].

Un responsable antitrust de haut niveau des Etats Unis a récemment proposé le conseil suivant à la FERC :

> "Je reconnais évidemment que la Commission est un organisme de réglementation et que le secteur de la production d'électricité a été pendant longtemps très réglementé mais la restructuration a naturellement pour objet de s'écarter de ce modèle. Du côté du ministère, nous espérons et attendons que les tarifs de l'électricité soient déterminés principalement par les forces du marché. Dans ce contexte, les fusions qui ont pour effet de réduire substantiellement la concurrence ne devraient être autorisées que si un accord amiable sanctionné par les tribunaux ou un ensemble de conditions imposé par la Commission offre un remède permanent et de préférence structurel aux effets anticoncurrentiels de ces opérations. Plus précisément, j'invite instamment la Commission à ne pas imposer des gels ou des réductions de tarifs comme conditions de l'approbation de fusions qui créent des problèmes structurels de concurrence dans la production d'électricité. Ces mesures qui sont généralement à court terme ne traitent pas les effets réels des fusions sur la concurrence. Même à court terme, on pourra souvent légitimement douter que le gel permette d'obtenir des tarifs aussi bas que la concurrence.
>
> Enfin, je dois souligner qu'un siècle d'expérience a rendu le ministère très sceptique sur toute mesure qui oblige le juge ou l'autorité réglementaire à surveiller en permanence le secteur. L'on doit normalement éliminer l'incitation à agir de manière anticoncurrentielle ou la possibilité d'agir ainsi plutôt que tenter de contrôler directement la conduite visée (c'est nous qui soulignons). Nous sommes institutionnellement sceptiques sur les mesures reposant sur des codes de conduite. Les coûts d'application sont élevés et notre expérience montre que l'organisme de réglementation en est souvent réduit in fine à tenter de rattraper son retard tandis que les forces du marché vont de l'avant et que les problèmes de concurrence sous-jacents échappent à la détection et aux mesures correctrices"[39].

L'énergie n'est pas le seul secteur dans lequel les fusions sont considérées de manière tout à fait différente par les responsables de la concurrence et de la réglementation des Etats Unis. Une étude de la déréglementation du transport aérien dans ce pays notait :

> "En 1986, le ministère des transports qui disposait, à cette époque, du pouvoir de statuer en dernier ressort sur ces opérations, a autorisé les fusions entre TWA et Ozark et entre Northwest et Republic Airlines en dépit des protestations du ministère de la justice. (TWA et) Ozark disposaient de plates formes faisant double emploi sur l'aéroport de Saint Louis et Northwest et Republic Airlines à Minneapolis-Saint Paul. Les compagnies qui fusionnaient disposaient d'avantages significatifs d'approvisionnement sur la quasi totalité des autres compagnies aériennes sur les navettes intérieures à partir de ces plates formes communes... Les résultats de ces fusions ont confirmé (malheureusement du point de vue de l'intérêt public) les conclusions de l'analyse antitrust"[40].

Par ailleurs, le même problème tenant à l'importance différente attachée à la qualité de la structure d'un secteur est apparu dans le secteur ferroviaire des Etats Unis où les fusions échappent à la réglementation antitrust si elles sont approuvées par le Conseil des transports de surface (STB). Cette situation a soulevé un problème important à l'occasion de la fusion la plus importante de l'histoire des chemins de fer des Etats Unis, à savoir celle entre les sociétés Union Pacific et Southern Pacific :

> Il s'agissait de deux des trois grandes sociétés de chemins de fer de l'ouest des Etats Unis. La Division antitrust a fait une apparition officielle au cours de la procédure devant le STB pour

faire valoir que la fusion réduirait de manière significative la concurrence sur de nombreux marchés où le nombre de sociétés ferroviaires concurrentes passerait de deux à une ou de trois à deux... [La division antitrust a instamment demandé un blocage de la fusion mais le STB l'a autorisée sous réserve de certaines conditions de comportement]... Dans l'année qui a suivi, le système fusionné a connu des problèmes de fonctionnement et des limitations de capacité graves et persistants dont un grand nombre se sont produits là où la Division Antitrust avait signalé que des difficultés apparaîtraient si les expéditeurs ne trouvaient plus de solutions alternatives concurrentes. La rupture du service de transport ferroviaire a persisté et a soulevé une controverse très importante, les groupements d'expéditeurs réclamant une intervention des autorités réglementaires[41].

5.5 Instruments/pouvoirs (d'investigation, de poursuite, de jugement) et compétence exigés

Un grand nombre d'organismes chargés de la concurrence doivent s'adresser aux tribunaux pour obtenir des décisions ou percevoir des amendes tandis que les organes de réglementation sont généralement dotés de pouvoirs à la fois d'investigation, de poursuite et de sanction. Par ailleurs, même lorsque les décisions des organismes de réglementation sont susceptibles de recours devant les tribunaux, elles sont dotées d'un pouvoir exécutoire plus important que celles des organismes chargés de la concurrence. Cette différence tient au fait que ces derniers sont chargés de l'application d'une législation de portée générale et non pas de la rédaction et de l'application de règles spécifiques à un secteur voire à une entreprise qui sont probablement basées sur des informations et une expertise qui dépassent les moyens d'appréciation et d'intervention des tribunaux.

Compte tenu de la nature de leurs activités qui consistent principalement à réglementer l'entrée sur le marché et les genres d'activités, à fixer les tarifs, à assurer le niveau approprié de qualité des produits et à contrôler l'exécution des obligations en matière d'universalité des services, les organismes de réglementation ont besoin, à l'évidence, de compétences juridiques, économiques et surtout comptables. Les organismes chargés de la concurrence ont aussi besoin de ces trois catégories de compétences mais ils ont relativement moins besoin de compétences comptables dans la mesure où, sauf dans les affaires de prix d'éviction, ils ne sont pas normalement amenés à juger du caractère approprié de tel ou tel tarif. Dans le même temps, les organismes chargés de la concurrence ont un besoin plus important de compétences juridiques et économiques. Les premières sont particulièrement requises pour les enquêtes sur des affaires spécifiques et nombre d'organismes en ont besoin pour convaincre les tribunaux d'intervenir. Les compétences économiques sont particulièrement nécessaires pour entreprendre la définition d'un marché, pour déterminer si une entreprise occupe une position dominante et pour estimer les effets anticoncurrentiels potentiels d'un pratique ou d'une fusion.

5.6 Propension à la capture, droits de recours et actions privées

Pour que leurs pouvoirs soient utilisés pour la promotion des intérêts publics et non pas des intérêts privés, les organismes chargés de la concurrence et les organismes de réglementation ont absolument besoin d'être indépendants des entreprises qu'ils surveillent. Une attention considérable est accordée au maintien de cette indépendance mais il existe des raisons de craindre que la "capture de la réglementation" reste un problème réel[42]. En particulier, les organismes de réglementation sectoriels peuvent être plus exposés à la capture que les organismes à compétence générale tels que les organismes chargés de la concurrence[43]. Il est peu probable que, par rapport aux organismes de réglementation dont la compétence est limitée à un secteur, les décideurs des organismes couvrant l'économie dans son ensemble

soient dotés de la connaissance technique approfondie d'un secteur et des contacts et des perspectives qui les rendraient particulièrement précieux en tant qu'employés ou lobbyistes pour ceux qu'ils influencent actuellement. Le degré croissant d'interdépendance entre les responsables de la réglementation et les entreprises soumises à cette dernière tend aussi à renforcer le risque de capture pour les organismes de réglementation.

A plus long terme, les organismes de réglementation risquent, à force d'échanger des informations similaires sur un secteur, de finir par partager la perspective de ce secteur, ce qui peut les conduire à redouter un renforcement de la concurrence qui rendrait plus difficile la gestion de systèmes de péréquation des tarifs ou la promotion des actions de protection de l'environnement ou de sécurité énergétique[44]. A long terme, ces contributions pourraient s'avérer tout aussi importantes pour la survie de l'organisme de réglementation que le fait d'assurer à des consommateurs mal organisés la jouissance de prix et d'une qualité de service raisonnables.

Il existe, par ailleurs, deux aspects du phénomène de "capture" qui méritent d'être notés ici et qui s'appliquent particulièrement aux secteurs d'infrastructures de réseaux. L'un et l'autre trouvent leur origine dans une intervention indue du politique dans les décisions de l'administration. Un premier cas est celui dans lequel le processus politique est manipulé par des groupes de pression particuliers. Le second, tout aussi dangereux, résulte de trois caractéristiques des secteurs des infrastructures de réseaux: investissements considérables pour l'essentiel à fonds perdus, services considérés comme d'utilité publique et clientèle pratiquement identique aux inscrits sur les listes électorales. Si les politiciens font pression avec succès, après la réalisation des investissements, en faveur de modifications des règles du jeu défavorables aux investisseurs privés, les effets à long terme seront une augmentation des coûts du capital et une insuffisance de l'investissement dans les secteurs des infrastructures de réseaux[45]. La possibilité de capture politique a été mentionnée ici parce qu'il peut se faire que les organismes chargés de la concurrence et les organismes de réglementation ne soient pas également sensibles aux pressions politiques[46].

Paradoxalement, la possibilité de capture constitue un facteur qui joue de manière plus importante en faveur de l'octroi de fonctions combinées à un organisme chargé de la concurrence dans des situations où il existe un organisme de réglementation économique effectif par opposition à potentiel (c'est à dire nouvellement institué). Un organisme de réglementation nouveau n'est évidemment pas encore capturé et il est possible qu'il ne le soit jamais, étant donné qu'il peut être liquidé avant que les forces responsables de la capture aient eu le temps d'opérer.

Les risques de capture de la réglementation peuvent être, dans une certaine mesure, réduits par une transparence totale de la procédure de prise de décision en matière réglementaire. Une méthode plus efficace est, toutefois, celle consistant à associer les tierces parties affectées (consommateurs ou concurrents) à la prise de décision en matière de réglementation de préférence en prévoyant des voies de recours formelles.

Dans un grand nombre de pays, l'application du droit de la concurrence par l'administration est complétée de manière significative par les actions privées[47]. Presque par définition, cette méthode n'est pas applicable au même degré à la réglementation bien que les organismes de réglementation soient souvent très soucieux d'associer les tiers à leurs décisions. L'opinion des organismes de réglementation des infrastructures de réseau du Royaume Uni sur les recours des tierces parties est particulièrement intéressante dans la mesure où ces organismes sont déjà chargés de diverses missions d'encouragement de la concurrence et où l'on envisage de les doter de pouvoirs concurrents d'application d'une législation de la concurrence renforcée. L'Office of Gas Supply (Ofgas) par exemple, a indiqué :

> "L'Ofgas est favorable, en principe, à la possibilité pour les tierces parties de présenter des recours devant la [Monopolies and Mergers Commission (MMC) - qui joue un rôle essentiel à la fois dans les affaires de réglementation et de concurrence], bien qu'il soit parfois difficile de concevoir un système pratique sans créer un droit de recours si étendu qu'il compromette l'efficacité de la réglementation.
>
> Une autre possibilité consisterait à obliger l'organisme de réglementation à consulter expressément toute partie intéressée sur la transmission éventuelle d'une proposition de modification d'un contrat de concession à la MMC pour un examen indépendant avant sa mise en oeuvre et à motiver l'acceptation ou le refus de la demande"[48].

Examen préalable

Plusieurs conclusions relatives à l'attribution des fonctions combinées d'application du droit de la concurrence et de la réglementation économique aux organismes chargés de la concurrence ou aux organismes de réglementation peuvent être tirées de la comparaison en six parties ci-dessus et de certaines considérations connexes. Ces conclusions sont, toutefois, préliminaires car elles reposent davantage sur des déductions logiques que sur des constatations empiriques. Il n'existe pas, semble-t-il, de recherche systématique sur les questions cruciales de savoir (1) si les organismes chargés de la concurrence chargés d'une fonction de réglementation économique accomplissent systématiquement cette tâche de manière différente des organismes de réglementation économique et (2) si les organismes de réglementation économique chargés de l'application du droit de la concurrence exercent systématiquement cette fonction différemment des organismes chargés de la concurrence[49]. On dispose, néanmoins de nombreux témoignages anecdotiques de telles différences[50]. En particulier, lorsque les organismes de réglementation se sont vus accorder le pouvoir d'examiner les fusions, il semble qu'ils ont n'ont pas été suffisamment conscients de la supériorité des remèdes structurels sur les remèdes tendant à une modification des comportements et qu'ils aient manifesté, en général, une tendance à se montrer plus accommodants que ne l'aurait été une autorité chargée de la concurrence[51].

Notre première conclusion s'applique à des secteurs qui font l'objet d'une ouverture à une concurrence plus large dans lesquels on attend de l'agent responsable qu'il contribue à introduire la concurrence. Il s'agit des secteurs en transition où il apparaît que les organismes chargés de la concurrence peuvent avoir certains avantages potentiels sur les organismes de réglementation dont la compétence est limitée à un secteur parce qu'ils seraient :

1. plus exercés à rechercher l'efficience économique qui est la principale raison de l'introduction de la concurrence ;

2. convaincus que la concurrence produira réellement des avantages significatifs et qu'ils auraient un intérêt personnel à le démontrer dans un nombre de secteurs aussi grand que possible ;

3. familiarisés avec ce qui constitue un marché concurrentiel et ce qui le menace ; et

4. probablement enclins à utiliser des mesures structurelles qui s'avéreraient sans doute constituer un meilleur instrument pour développer la concurrence que le recours à un ensemble de règles.

Il est également à noter que les organismes chargés de la concurrence sont exposés à perdre une part moins importante de leurs ressources totales lors de la suppression de la réglementation économique dans les secteurs en transition, ce qui devrait faciliter leur acceptation de ce changement.

Les avantages potentiels qui viennent d'être mentionnés devraient être comparés à ceux que l'on prête aux organismes de réglementation: plus grande disposition à concevoir des systèmes visant à obtenir et à utiliser des informations sectorielles spécifiques et à travailler avec ces systèmes et plus grande habitude des compromis entre les politiques. L'importance de ces avantages sera d'autant plus grande que la transition sera plus longue et plus complexe, ce qui dépend de :

1. l'importance et la durabilité probable des économies d'échelle et de gamme qui oeuvrent ensemble au maintien de la position de force sur le marché de l'entreprise en place ayant opéré une intégration verticale et qui freinent la réalisation de divisions structurelles simples permettant de renforcer la concurrence ; et

2. l'importance des sensibilités politiques attachées au traitement de l'héritage des obligations d'universalité du service et des coûts irrécupérables qui en résultent.

Si l'on se concentre maintenant sur les secteurs autres que les secteurs en transition dans lesquels la réglementation économique devra sans doute être maintenue pendant une période très longue, la tendance sera plutôt à confier aux organismes de réglementation économique les fonctions combinées au moins pour ce qui est d'assurer un accès non discriminatoire aux moyens de production nécessaires. Ceci est dû une fois de plus aux avantages supposés de l'approche réglementaire dans le domaine de l'information et à la facilité plus grande avec laquelle elle applique les instruments *ex ante*.

En raison de leur avantage comparatif apparent dans les domaines pertinents, les organismes chargés de la concurrence devraient conserver une compétence exclusive, même dans les secteurs autres qu'en transition, en matière d'application des dispositions du droit de la concurrence qui interdisent les ententes anticoncurrentielles et en matière d'examen des fusions. Une solution de deuxième choix consisterait à confier aux organismes chargés de la concurrence des pouvoirs concurrents dans ce domaine, ce qui permettrait de faciliter et d'encourager les échanges d'informations entre les organismes responsables dans des domaines qui dépendent fortement de l'expertise en matière économique, d'enquête et procédurale qui est fortement concentrée dans les organismes chargés de la concurrence. Cette considération est encore plus valable si, comme c'est souhaitable, les organismes de réglementation sont chargés d'appliquer exactement le même droit de la concurrence que celui qui s'applique au reste de l'économie.

Il va presque de soi que, quelle que soit la combinaison choisie pour l'application de la réglementation économique et du droit de la concurrence, il est essentiel que soient établis des liens de coopération formels et informels entre le responsable de la réglementation technique et (la ou les) autres institutions compétentes. Ces liens sont nécessaires non seulement pour éviter les doubles emplois dans l'utilisation des ressources mais aussi pour garantir que les responsables de la réglementation technique tiennent dûment compte des diverses utilisations qui peuvent être faites de l'adoption et de l'application des normes techniques pour fausser ou limiter la concurrence.

Si l'on décide de localiser la réglementation économique avec ou sans missions d'appliquer le droit de la concurrence en dehors de l'organisme chargé de la concurrence il semblerait qu'il soit sage de donner à ce dernier des pouvoirs très larges et peut-être un droit de veto lors des examens périodiques sur

le point de savoir si le maintien de la réglementation économique est justifié par la persistance d'une position de force sur le marché. Les organismes chargés de la concurrence devraient être mieux placés que les organismes de réglementation pour se prononcer sur cette question; ils ont par ailleurs dans les circonstances supposées un intérêt personnel moins fort à un maintien inutile de cette réglementation. A la place ou en plus de ces dispositions d'extinction, les organismes de réglementation pourraient être tenus de cesser d'appliquer la réglementation lorsque le secteur serait suffisamment concurrentiel[52]. Une fois encore, il serait judicieux d'associer l'organisme chargé de la concurrence à l'application de ces règles.

Notre conclusion concernant les secteurs en transition et les autres rejoint l'observation qui semble de bon sens selon laquelle il convient d'attribuer les fonctions combinées à l'organisme dont l'approche naturelle est la plus appropriée au regard des tâches à exercer. Dans les parties en transition des secteurs faisant l'objet d'une ouverture à la concurrence, la tâche la plus importante sera le plus souvent de faire en sorte qu'une transition vers des marchés concurrentiels ait effectivement lieu. A cet objectif se rattache étroitement la nécessité, tout aussi vitale, de persuader le secteur privé que les pouvoirs publics sont déterminés à opérer la transition. La meilleure réponse à ces exigences est probablement de confier les fonctions combinées à un organisme chargé de la concurrence. D'autre part, dans les secteurs autres qu'en transition, la tâche la plus importante pourrait bien être de continuer à appliquer la réglementation économique et sauf si les conditions d'une réglementation légère sont réunies, les fonctions combinées de réglementation économique et de garantie d'un accès non discriminatoire aux réseaux essentiels seront probablement mieux exercées par un organisme rompu à l'utilisation de l'approche réglementaire. S'agissant de contrôler les autres comportements anticoncurrentiels et de procéder à l'examen des fusions, ces tâches devraient être accomplies dans des conditions telles que les compétences étendues dont dispose l'organisme chargé de la concurrence dans ce domaine soient utilisées de manière adéquate, de préférence en lui confiant des compétences concurrentes ce qui renforcerait les effets de cette utilisation.

Les organismes chargés de la concurrence disposent probablement sur les organismes de réglementation d'un avantage qui n'a pas été mentionné ci-dessus, à savoir leur tendance supposée à être plus résistants à la capture. L'importance de cet avantage dépend de deux questions: combien de temps la distinction va-t-elle persister si l'organisme chargé de la concurrence assume les deux fonctions de réglementation et quel sera l'effet d'érosion de l'avantage en termes de résistance à la capture qui résultera de l'organisation de la réglementation au sein d'organismes à compétence générale plutôt que sectorielle? Les réponses à ces questions débordent le cadre de la présente étude mais on peut suggérer des facteurs à examiner, en plus du problème déjà abordé de la capture, pour décider si les organismes de réglementation doivent être organisés pour exercer une compétence générale (probablement selon une division en plusieurs services afin de mieux organiser les compétences sectorielles) ou une compétence limitée à un secteur.

6. Organismes de réglementation à compétence générale ou sectorielle

Les réglementations spécifiques à un secteur créent, par définition, un besoin de délimitation des champs d'application, ce qui peut poser trois problèmes importants :

1. une incertitude sur la réglementation applicable à des entreprises opérant dans plusieurs marchés distincts et même le risque qu'elles soient soumises à des exigences réglementaires contradictoires, par exemple en matière de présentation des comptes ;

2. des distorsions de la concurrence et une mauvaise affectation des ressources dues au fait que des entreprises concurrentes sont soumises à des réglementations différentes ; et

3. des distorsions supplémentaires de la concurrence tenant aux efforts déployés par les organismes de réglementation pour préserver leur tutelle sur les entreprises en limitant les activités dans lesquelles les entités soumises à la réglementation peuvent s'engager[53].

La gravité de ces problèmes peut être sensiblement accentuée si les organismes de réglementation sectoriels acquièrent aussi des fonctions d'application du droit de la concurrence et se mettent à élaborer des "droits" de la concurrence différents pour chaque secteur[54].

Les problèmes que peut créer une réglementation s'appliquant uniquement à un secteur sont illustrés dans trois domaines différents. Le premier est le secteur financier dans lequel se développe une concurrence sur le marché de l'épargne à long terme de la part de firmes appartenant principalement aux secteurs de l'assurance, des organismes de retraite et des valeurs mobilières. Ces trois secteurs sont souvent soumis à des réglementations distinctes qui sont potentiellement créatrices de distorsions de la concurrence[55]. Ces problèmes pourraient probablement être résolus ou du moins atténués par une fusion des organismes de réglementation du secteur au sein d'une instance de réglementation couvrant l'ensemble du secteur financier. Le second domaine est celui de l'électricité et du gaz naturel qui constituent des sources d'énergie substituables et concurrentes dont les fournisseurs ont montré, dans certains pays, leur capacité à proposer aux consommateurs des guichets pour les deux types d'énergie. Ils ont aussi démontré leur aptitude à offrir des services d'installation de compteurs et des services connexes dans les deux secteurs[56]. Le troisième domaine qui présente un intérêt particulier et qui mérite certains développements ici est constitué par la convergence des secteurs des télécommunications, de la radiotélévision et des ordinateurs personnels[57].

Le Groupe de travail sur les politiques en matière de télécommunications et de services d'information du Comité de la politique de l'information, de l'informatique et des communications de l'OCDE a organisé récemment une table ronde sur la convergence dans le secteur des communications. La note de référence préparée pour cette réunion demandait instamment le rejet de la réglementation asymétrique destinée à aider les nouveaux entrants à surmonter les avantages des entreprises en place au niveau des boucles locales et poursuivait par les observations suivantes :

> "Le respect de la symétrie dans la réglementation est particulièrement important dans le cadre de la convergence. Ceci tient au fait qu'une partie de ce phénomène est en soi un processus durant lequel les entreprises expérimentent diverses plates formes pour leur infrastructure avec plusieurs combinaisons de services et différentes caractéristiques pour ces derniers. Leur capacité à déterminer la plate forme la plus efficiente et la meilleure combinaison de services pour leurs clients peut être sérieusement entravée par les définitions et les restrictions sectorielles actuelles sur la fourniture collective de services. La réglementation asymétrique tend à fausser les choix technologiques alors que l'emploi de la meilleure technologie pour une application ou un objectif donné exige en fait une 'neutralité technologique'"[58].

Le même document a identifié la TV numérique et Internet et les services basés sur Internet comme deux domaines dans lesquels les entreprises soumises à la réglementation se trouvent en face d'entreprises non réglementées ou soumises à une réglementation différente. Cette situation n'est sans doute pas susceptible de créer de graves distorsions de la concurrence si, comme le note le document de référence, les entreprises réglementées sont à même "dans de nombreux cas ... de passer outre les étiquettes qui leur ont été accolées par les organes de réglementation."[59]

Se référant aux mêmes secteurs en convergence, l'organisme de réglementation des télécommunications du Royaume Uni a formulé les remarques suivantes :

> "... les objectifs de la politique publique qui exigent d'un fournisseur des comportements qui ne sont pas conformes à ses intérêts commerciaux ne peuvent plus être atteints en assortissant les concessions accordées à certains fournisseurs de conditions très spécifiques - dans la mesure où cette solution désavantage les entreprises concessionnaires qui utilisent des moyens différents pour assurer le service (moyens qui ne sont pas soumis à des contraintes similaires). Lorsque les entreprises sont confrontées à une concurrence effective, leur incapacité à financer des obligations supplémentaires signifie que l'organisme de réglementation est souvent incapable de faire respecter les obligations prescrites dans les contrats de concession si l'entreprise en question soit réclame un allégement des conditions de la concession soit décide d'ignorer les obligations qu'elle impose. L'efficacité des obligations prescrites est encore affaiblie si ce résultat est anticipé, ce qui ne veut pas dire que le régime ancien a disparu ou va disparaître du jour au lendemain mais qu'il ne peut pas offrir une base à long terme pour une réglementation équitable, cohérente et efficace pour l'avenir"[60].

Le document de référence de l'OCDE mentionné ci-dessus affirme clairement que la solution des problèmes auxquels sont confrontés les organismes de réglementation dans les secteurs en convergence ne devrait pas consister à étendre le champ d'application de la réglementation à des secteurs qui ne sont pas actuellement réglementés[61]. On espère que les Etats membres vont suivre cet avis, mais dans le cas contraire, la solution de bon sens consisterait au moins à appliquer la même réglementation à l'ensemble des entreprises concurrentes, en faisant appel de préférence au même organisme de réglementation.

La réduction du risque de capture et de distorsion de la concurrence n'est pas la seule raison pour laquelle un organisme de réglementation à compétence générale est préférable à un organisme spécialisé dans un secteur. Il faut y ajouter l'avantage de l'organisme à compétence générale mentionné auparavant et qui peut s'appliquer tout autant à un organisme de régulation économique généraliste, à savoir le fait que la fraction des ressources d'un organisme à compétence générale qui serait menacée en cas de suppression de la réglementation économique dans un secteur serait moins importante. Enfin, certains avantages pourraient résulter du fait que l'organe de réglementation a une perspective macro-économique et cette solution pourrait comporter aussi des économies significatives de moyens et un plus grand équilibre au niveau de la prise de décision[62].

7. Remarques de conclusion

L'histoire et l'héritage institutionnel sont à l'origine de différences considérables dans la manière dont les tâches de renforcement de la concurrence doivent être réparties dans certains secteurs entre les organismes chargés de la concurrence et les organismes de réglementation. Par ailleurs, tous les pays ne montrent sans doute pas la même disposition à repenser leurs approches de la réglementation ou de la concurrence (tant au niveau de la législation que des organismes) afin de pouvoir mieux contribuer au processus de libéralisation. Il est néanmoins possible de présenter quelques réflexions de portée générale dont on peut estimer avec une certitude raisonnable qu'elles s'appliquent dans la plupart des secteurs et des pays :

1. il n'est pas toujours nécessaire de recourir à une réglementation économique pour traiter les problèmes résultant d'une plainte faisant état d'une position de force sur le marché soit parce que cette situation peut être trop provisoire pour mériter que l'on s'en inquiète, soit parce

qu'une réglementation peu contraignante pourrait constituer une meilleure solution de rechange ;

2. la réglementation technique ne fera probablement pas bon ménage avec les organismes chargés de la concurrence ;

3. compte tenu des avantages qu'il y a à combiner la réglementation technique et la réglementation économique, cette dernière ne devrait probablement pas faire l'objet d'une organisation autonome ;

4. Compte tenu de ce qui a été dit sur la réglementation technique et la réglementation économique, il semble qu'il existe, en pratique, trois solutions alternatives :

   - combiner la réglementation technique et la réglementation économique au sein d'un organisme spécialisé dans le secteur et laisser l'application du droit de la concurrence entre les mains de l'organisme chargé de la concurrence ;

   - organiser la réglementation technique comme une fonction autonome et inclure la réglementation économique au sein de l'organisme chargé de la concurrence ;

   - combiner la réglementation technique et la réglementation économique au sein d'un organisme de réglementation sectoriel spécialisé et lui confier tout ou partie des fonctions d'application du droit de la concurrence.

5. séparer les fonctions d'application du droit de la concurrence et celles de réglementation conduit à sacrifier certaines synergies et à devoir adopter des mesures garantissant que les entreprises ne sont pas soumises à des exigences contradictoires mais cette formule garantit que les deux politiques sont administrées par des organismes qui en ont une connaissance approfondie et ayant des cultures adaptées à leur mise en oeuvre ;

6. si l'on décide de combiner l'application du droit de la concurrence et la réglementation économique, il convient d'accorder une grande attention aux différences dans la manière dont les organismes chargés de la concurrence et les organismes de réglementation exercent leurs principales fonctions parce que ceci peut avoir une influence significative sur la manière dont ils accompliraient un mandat commun ;

7. dans les secteurs dont on peut penser qu'ils seront assez rapidement concurrentiels (c'est-à-dire les secteurs en transition), si l'on suppose que l'on a décidé de combiner la réglementation économique avec l'application du droit de la concurrence, il serait probablement préférable de localiser ces fonctions au sein de l'organisme chargé de la concurrence qu'au sein d'un organisme de réglementation à compétence purement sectorielle ;

8. dans les secteurs autres qu'en transition, s'il est décidé de combiner la réglementation économique avec la responsabilité du maintien d'un accès non discriminatoire aux moyens de production nécessaires, il est préférable de confier ces tâches à un organisme de réglementation qu'à l'organisme chargé de la concurrence ;

9. du fait que les organismes chargés de la concurrence semblent bénéficier d'un avantage comparatif par rapport aux organismes de réglementation lorsqu'il s'agit de faire respecter

l'interdiction des comportements anticoncurrentiels et d'examiner les fusions, ces organismes doivent avoir une compétence exclusive dans ces domaines ou au moins une compétence concurrente avec un organisme de réglementation ;

10. il existe, semble-t-il, de bonnes raisons d'organiser les organismes de réglementation sous la forme d'organismes à compétence générale plutôt qu'à compétence limitée à un secteur (qui plus est, certaines des différences en termes de performances attendues entre les organismes chargés de la concurrence et les organismes de réglementation disparaîtraient probablement si l'organisme de réglementation avait une compétence générale et non pas sectorielle par nature) ;

11. la réglementation économique, en particulier celle appliquée aux marchés en cours de libéralisation devrait comporter une clause d'extinction automatique et ne devrait pas être renouvelée sauf si l'organisme chargé de la concurrence estime que ce renouvellement est justifié par le maintien d'une position de force sur le marché - il faudrait également penser à demander l'abrogation de la réglementation dans un marché où la concurrence fonctionne et une fois encore l'organisme chargé de la concurrence pourrait utilement être impliqué dans cette détermination.

Appendice

BREVE DESCRIPTION DE LA REGLEMENTATION "PEU CONTRAIGNANTE" DE LA NOUVELLE ZÉLANDE

Le système néo-zélandais a été décrit par un auteur comme ayant les quatre composantes suivantes :

- les activités de l'entreprise en place relevant d'un monopole naturel et celles concernant des éléments soumis à contestation sont séparées sinon entre les mains de propriétaires différents, du moins par un "cloisonnement" comptable à des fins de publication des informations ;

- il est fait appel au droit général de la concurrence, tel qu'il ressort de la loi sur le commerce de 1986 dont l'article 6 stipule que les entreprises occupant une position dominante ne doivent pas (en termes généraux) chercher à dissuader ou à éliminer des concurrents actuels ou potentiels ;

- des réglementations propres à certains secteurs prévoient la diffusion d'informations destinées à assurer la transparence des opérations des sociétés qui occupent une position de force sur le marché ;

- la Partie IV de la loi sur le commerce comporte la menace de mesures plus vigoureuses sous la forme de l'institution de contrôles des prix ou plus vaguement de nouvelles réglementations que le gouvernement pourrait mettre en place.

Le même auteur ajoute immédiatement les commentaires suivants:

Le dernier élément est important parce qu'il constitue le seul moyen de limiter la fixation de prix de monopole prévu par la réglementation. Toutefois, en l'absence de toute utilisation de la Partie IV jusqu'à présent, la contrainte imposée aux détenteurs de monopoles dépend de facteurs tels que l'évaluation qu'ils font des répercussions politiques que pourrait avoir un dépassement de la limite, du niveau où se situe cette limite et de leur aptitude à faire passer les rentes de monopole pour des récompenses d'une efficience supérieure[63].

Les points suivants doivent aussi être gardés à l'esprit en ce qui concerne le régime de la Nouvelle Zélande[64] :

1. lors de la privatisation de New Zealand Telecom, le gouvernement a conservé une action dite "Kiwi share" qui lui donne le pouvoir de garantir la disponibilité d'options d'appels gratuits pour les usagers locaux, de limiter les augmentations des tarifs d'abonnements au niveau du taux d'inflation (à condition que ceci "ne compromette pas de manière déraisonnable" la rentabilité de NZ Telecom) et de maintenir l'égalité des tarifs d'abonnement entre les zones urbaines et rurales ;

2. l'article 36 de la loi sur le commerce est complétée par le pouvoir accordé au ministre des communications de réintroduire une réglementation plus interventionniste dans le secteur des télécommunications ;

3. outre l'article 36 et la partie IV d'autres dispositions de la loi sur le commerce interdisent les accords anticoncurrentiels (article 27), les ententes entre concurrents qui limitent les activités d'autres entreprises (article 29) et les ententes horizontales pour la fixation des prix (article 30) ;

4. la loi sur le commerce ne comporte pas de disposition sur la concurrence sectorielle applicable à un ou plusieurs secteurs d'infrastructures de réseaux ;

5. la Nouvelle Zélande dispose de ce que nous avons appelé une « réglementation technique » gérée ou supervisée par le gouvernement; par exemple, dans l'électricité, il existe des normes et des règles de sécurité sectorielles et dans les télécommunications, un rôle important est joué par le Groupe consultatif sur la numérotation des télécommunications de Nouvelle Zélande.

Le système néo-zélandais est encore en cours d'évolution et donc difficile à évaluer[65]. En particulier, il semble qu'il soit trop tôt pour juger de la réalité de la menace d'intervention gouvernementale sous forme de réglementation et du maintien de la crédibilité de cette menace si elle n'est jamais utilisée, même temporairement[66]. Il est possible qu'il s'agisse d'un faux problème si comme le prévoient certains experts, diverses évolutions conduisent à une érosion considérable des éléments de monopole naturel subsistant dans les secteurs des infrastructures de réseaux[67]. Le problème pourrait aussi s'avérer sans importance si l'on disposait de données démontrant que le système néo-zélandais, en dépit de certains défauts réels ou supposés, égalait les autres systèmes possibles ou leur était supérieur.

NOTES

1. Pour un bon aperçu général du contenu de la réforme de la réglementation et une étude des réformes opérées dans les pays de l'OCDE dans les secteurs des télécommunications, des services financiers et des services professionnels ainsi que dans la distribution, l'électricité et l'agro-alimentaire, les lecteurs sont invités à se reporter à la publication de l'OCDE intitulée Rapport sur la réforme de la réglementation (OCDE, Paris, 1997).

2. Pour un aperçu de ces évolutions surprenantes, voir Werner Sichel et Donald L. Alexander Networks, Infrastructures and the New Task for regulation (Ann Arbor, The University of Michigan Press, 1996), ouvrage consacré essentiellement à l'expérience des Etats Unis dans les secteurs des télécommunications et de l'électricité. Dans leur préface, aux pages 8 et 9, les éditeurs observent:

   "L'une des conclusions qui ressort des articles présentés dans ce volume est qu'il est probablement préférable pour les décideurs de rechercher un équilibre entre la déréglementation et la surveillance réglementaire. Les auteurs de cet ouvrage s'accordent sur le fait que les forces du marché peuvent être utilisées pour prendre les décisions d'affectation des ressources et que les réglementations doivent être conçues pour faciliter l'émergence et le développement des forces de la concurrence dans les secteurs liés à des réseaux. Ceci exige, toutefois, que le législateur et les autorités réglementaires soient disposés à accomplir des efforts importants de réforme de la réglementation et à envisager d'autres moyens de réaliser les objectifs sociaux qui ont servi jusqu'à présent de raison d'être à la politique réglementaire existant encore. Par ailleurs, compte tenu du rythme rapide du progrès technologique, les décideurs doivent garder à l'esprit les divers effets que la réglementation en vigueur a eus sur l'évolution des réseaux et mettre en place d'autres règles qui soient flexibles et capables d'accompagner et non de déterminer les diverses directions que prendra la technologie dans les années à venir.

   .....

   Le thème général qui ressort des articles du présent ouvrage du point de vue de l'action des pouvoirs publics est que l'amélioration de l'efficience du système de réseaux et le renforcement de la concurrence dans différents secteurs de l'économie qui résultent des avancées technologiques nécessitent une révision drastique de l'ensemble de la structure réglementaire qui a été conçue pour une autre époque. Des modifications fondamentales devront intervenir pour permettre aux consommateurs de profiter pleinement des effets des nouvelles technologies et du renforcement de la concurrence, ce qui pourrait nous obliger à concevoir des stratégies réglementaires nouvelles et innovantes favorables à la concurrence et à abandonner les anciennes stratégies qui s'efforçaient de déterminer les résultats des activités de marché"

   Voir aussi Michael Tyler et Susan Bednarczyk, "Regulatory Institutions ans processes in telecommunications - An international study of alternatives" Telecommunications Policy, vol. 17 (décembre 1993), pages 650-76 où l'on trouve les indications suivantes (à la pahe 650):

   "De nouvelles structures réglementaires ont souvent été établies dans des secteurs où aucun mécanisme réglementaire explicite n'existait auparavant, ce qui peut paraître paradoxal dans un environnement de plus en plus favorable à ce que l'on appelle de manière approximative la "déréglementation". Les autorités publiques ont, toutefois, considéré généralement que, pour être efficaces, les mesures visant à favoriser un renforcement de la concurrence ou la privatisation exigent des institutions ou des procédures réglementaires nouvelles ou sensiblement modifiées. Il en a été ainsi, par exemple, en Argentine, au Mexique, en Australie et au Royaume Uni."

3. Outre le fait qu'ils sont construits autour de réseaux qui permettent des économies significatives, ces secteurs se caractérisent par: une forte intensité capitalistique combinée à des actifs à durée de vie longue qui impliquent des dépenses à fonds perdus élevées, la possible nécessité de recourir à l'expropriation pour acquérir les droits de passage nécessaires; la prestation de services considérés comme essentiels ou au

moins très importants et une clientèle qui se confond pratiquement avec les personnes inscrites sur les listes électorales.

4. Pour une bonne analyse des effets sur la concurrence des réglementations applicables aux professions libérales, voir le Rapport de l'OCDE sur la réforme de la réglementation, op. cit. volume 1, chapitre 3, ("Réforme de la réglementation et professions libérales"), pages 117-154, (notamment les pages 125-128)

5. Voir ibid. volume I, chapitre 5 ("La réforme de la réglementation et le secteur agro-alimentaire"), pages 235-274 (en particulier les pages 252-255) et le volume II, chapitre 1 ("Effets macro-économiques de la réforme de la réglementation"), pages 25-213 (en particulier les pages 37-46)

6. Les estimations de l'OCDE concernant les gains d'efficience résultant de la réforme réglementaire dans cinq secteurs importants (électricité, transport aérien, transport routier, télécommunications et distribution) dans huit pays (Allemagne, Espagne, Etats Unis, France, Japon, Pays Bas, Royaume Uni et Suède) vont de 0,9% du PIB aux Etats Unis à 5,6% au Japon et en Espagne. Ces estimations sont basées essentiellement sur des hypothèses selon lesquelles la déréglementation opérée dans un pays lui permettrait de réaliser les améliorations de productivité déjà obtenues dans un autre pays qui est allé plus loin sur la voie de la réforme de la réglementation. Voir ibid., volume II, page 11.

7. Pour une bonne analyse des avantages de la concurrence sur la réglementation en termes d'efficience économique, voir le chapitre 4 de l'ouvrage de Mark Armstrong, Simon Cowan et John Vickers, Regulatory Reform: Ecnomic analysis and British Experience (Londres The MIT Press, 1994). Pour un exemple de freinage de l'innovation par la réglementation (bien que la rigueur de la réglementation ait parfois, il faut l'admettre, encouragé l'innovation), voir Henry G. Grabowski, John M. Vernon et Lacy Glenn Thomas, "Estimating the effects of Regulation on Innovation: An International Comparative Analysis of the Pharmaceutical industry" The Journal of Law and Economics, vol. 21, n° 1 (avril 1978) p. 133-163

8. Pour une brève description de la « capture » de la réglementation, voir Oliver E. Williamson, The Mecanisms of Governance (New York, Oxford University Press, 1996), pp. 205-207. En ce qui concerne le point selon lequel la réglementation peut avoir des effets différenciés sur les entreprises concurrentes et peut même être utilisée comme arme dans la concurrence, voir Ann P. Bartel et Lacy Glenn Thomas, "Predation through regulation: the wage and profit effects of the Occupational Safety and Health Administration and the Environment Protection Agency" The Journal of Law and Economics, vol 30 n° 2 (octobre 1987) pp. 239-264, Lacy Glenn Thomas "Regulation and Firm size: FDA impacts on innovation" Rand Journal of Economics, vol. 21 n° 4 (hiver 1990) pp. 497-517; Michael Ollinger et Jorge Fernandez-Cornejo "Regulation, Innovation and Market Structure in the US Pesticide Industry" Economic Research Service US Department of Agriculture, Agricultural Report n° 179 (1995) et Michael Ollinger et Jorge Fernandez, "Sunk Costs and regulation in the US Pesticide Industry", International Journal of Industrial Organization, vol. 16, n° 2 (mars 1998) pp. 139-168.

9. Pour une explication et une démonstration statistique de l'importance des engagements pris en matière de réglementation au regard de la volonté des investisseurs privés d'engager des fonds dans les secteurs soumis à réglementation, voir Brian Levy et Pablo Spiller, « The Institutional Foundations of Regulatory Commitment: A comparative Analysis of Telecommunications Regulation » Journal of Law, Economics and Organization, vol. 10, n° é (octobre 1994) pp. 201-246.

10. Une étude des communautés européennes note les points suivants :

"La mondialisation et le renforcement de la concurrence dus à la libéralisation du commerce et de l'investissement mondiaux ainsi que la réalisation du marché unique se traduisent par une insistance et une impatience croissantes de la part de la clientèle des entreprises pour lesquelles les biens et les services fournis par les services publics constituent des moyens de production. Elles exigent que ces derniers se rapprochent autant que possible des niveaux des « meilleures pratiques » en vigueur en Europe sinon au

niveau mondial. .. Le mécontentement incite les entreprises à rechercher, si possible, d'autres fournisseurs et à faire pression en faveur de modifications de la réglementation permettant un renforcement de la concurrence"

Towards a single market in Utilities - Rapport du Groupe de travail du CEPS sur les services d'utilité publique (Président Jacques Lesourne, rapporteurs: Jacques Pelkmans et Ole Jess Olsen) (Bruxelles, Centre d'étude de la politique européenne, 1996), page 20

Par ailleurs, divers traités internationaux, plus particulièrement dans le secteur des télécommunications, ouvrent le marché des services de réseau à la concurrence de réseaux étrangers qui peuvent bénéficier de coûts inférieurs au titre de l'application de la réglementation et d'une liberté plus grande en matière de décisions commerciales. Pour certains exemples européens de cette tendance, voir Ibid, page 21.

11. Aux cinq forces mentionnées dans le corps de la présente note s'est ajouté un mouvement de réduction de la taille de l'Etat dans un contexte de résistance croissante à l'augmentation des prélèvements fiscaux. Cette tendance se manifeste par le désir de se débarrasser d'entreprises publiques déficitaires (qui peuvent être considérées comme une forme de réglementation) et de réduire l'importance de bureaucraties coûteuses et en expansion. Concurremment, on observe que certains utilisateurs ont la possibilité d'échapper au paiement des aides de péréquation exigées pour financer un service universel à tarif réduit, ce qui affaiblit cette politique.

12. Plus particulièrement, elle a recommandé aux membres :

"de réformer les réglementations économiques dans tous les secteurs afin de stimuler la concurrence et les éliminer, sauf celles qui s'avèrent être le meilleur moyen de répondre aux intérêts généraux de la collectivité :

- *Examiner, en toute priorité, les dispositions des réglementations économiques qui apportent des restrictions à l'entrée sur le marché, à la sortie du marché, à la tarification, à la production, aux pratiques commerciales habituelles et à diverses formes d'organisation de l'activité industrielle et commerciale.*

- *Promouvoir l'efficience et le passage à une situation de concurrence effective dans les cas où les réglementations économiques restent nécessaires à cause d'un risque d'abus de position de force sur le marché. En particulier, (i) séparer les activités potentiellement concurrentielles des réseaux de services d'utilité publique réglementés et procéder, par ailleurs, aux restructurations requises pour réduire l'influence économique des entreprises en place, (ii) garantir l'accès aux réseaux essentiels à tous les entrants sur le marché dans des conditions de transparene et de non discrimination (iii) recourir au plafonnement des prix et à d'autres mécanismes pour encourager les gains d'efficience si des mesures de contrôle des prix s'imposent pendant la période de transition vers une situation de concurrence.*

Réexaminer et renforcer, le cas échéant, le champ d'application et l'efficacité de la politique de la concurrence et les moyens de faire respecter les obligations qui en découlent.

- *Combler les lacunes d'ordre sectoriel que peut comporter le champ d'application du droit de la concurrence sauf à prouver que les intérêts primordiaux de la collectivité ne peuvent être servis par des moyens plus efficaces.*

- *Faire respecter énergiquement le droit de la concurrence en cas de comportement de collusion, d'abus de position dominante ou de fusions anticoncurrentielles susceptibles de compromettre la réussite de la réforme.*

- *Doter les autorités responsables de la concurrence des pouvoirs et des moyens nécessaires pour convaincre du bien fondé de la réforme"*

Le rapport de l'OCDE sur la réforme réglementaire - Sommaire [C/MIN(97)10/ADD], 22 mai 1997, pp. 34 et 36

13. Les installations essentielles auxquelles nous pensons principalement sont constituées par les réseaux de base autour desquels les secteurs sont organisés (par exemple, le réseau de distribution local pour les télécommunications, les réseaux de transport et de distribution pour les secteurs de l'électricité, du gaz naturel et de l'eau et de l'assainissement et certains réseaux ferroviaires)

Des arbitrages complexes sont à effectuer par les décideurs pour déterminer que la concurrence doit être encouragée par exemple dans le secteur de la production d'électricité tout en préservant autant que possible les économies de gamme dans la production et la distribution. Permettre le maintien de l'intégration verticale de l'entreprise en place et utiliser la réglementation ou la politique de la concurrence pour tenter de contrôler les opérations effectuées avec un lien de dépendance peut constituer une voie semée d'embuches. Une solution beaucoup plus claire consiste simplement à renoncer aux économies de gamme et à maximiser les gains procurés par la concurrence en insistant sur une division de la propriété.

En ce qui concerne la division horizontale, le choix est entre les économies d'échelle et les avantages en termes d'information d'une réglementation fixant des normes de référence.

L'expérience du Royaume Uni en matière de gaz naturel démontre qu'une action concertée des autorités de la concurrence peut certes aboutir aux divisions structurelles souhaitables qui n'ont pas été opérées lors de la privatisation mais que ceci peut nécessiter des délais excessivement longs. Voir Catherine Waddams Price "Competition and Regulation in the UK Gas Industry" Oxford Review of Economic Policy, vol. 13 n° 1 (printemps 1997) pp. 47-63.

L'observation suivante incite à faire preuve d'une prudence supplémentaire à l'égard d'une solution consistant à s'en remettre à l'autorité de la concurrence pour régler le problème :

"Les organismes antitrust se heurtent à certaines difficultés lorsqu'ils doivent faire face à des positions dominantes sur le marché qui durent depuis longtemps dans la mesure où la législation antitrust n'a pas été conçue pour traiter les situations de monopole résultant de phénomènes "innocents" tels que des économies d'échelle ou des fusions qui ont été approuvées il y a longtemps en vertu d'un certain régime réglementaire et qui probablement difficiles à dénouer si du moins il est possible de les contester. Il est peut-être préférable de traiter les situations de ce type par une réforme de la réglementation et de laisser la réglementation antitrust opérer là où elle réussit le mieux, c'est-à-dire dans le traitement des conduites ou des comportements anticoncurrentiels"

"FTC Perspectives on Competition Policy and Enforcement Initiatives in Electric Power" William J. Baer ... devant la conférence sur les nouvelles règles du jeu dans l'énergie électrique: législation antitrust et comportements anticoncurrentiels, Washington, 4 décembre 1997, pp. 3-4.

14. Ces tâches qui ont des incidences politiques impliquent des problèmes de redistribution que le gouvernement hésitera normalement à déléguer à des institutions "non politiques".

L'intervention directe du gouvernement dans les problèmes ayant trait aux obligations de service universel ne fait pas l'unanimité. On trouvera ci-après diverses analyses de la réglementation britannique:

"En théorie, les objectifs de la politique sociale et les biens d'utilité publique devraient être financés par l'impôt et par des aides directes de l'Etat au titre de la garantie de ressources plutôt que par des mesures visant à influencer le fonctionnement des services publics. La réglementation des services publics semble,

toutefois, offrir la possibilité de cibler avec précision certaines prestations sociales (telles que le service universel ou les tarifs réduits pour les catégories défavorisées) et le gouvernement continuera donc à être soumis à des pressions en faveur de l'utilisation de la réglementation des services d'utilité publique à ces fins."

The Hansard Society and European Policy Forum, The Report of the Commission on the Regulation of Privatised Utilities, décembre 1996, page 43.

Les organismes de réglementation britanniques eux-mêmes semblent être d'un avis différent. On lit, par exemple, dans une contribution à un examen récent de la réglementation des services publics:

"De l'avis de l'Ofgas, il est difficile de considérer comme légitime qu'un organisme de réglementation non élu prenne des décisions concernant, par exemple, les tarifs à appliquer pour subventionner certaines catégories de consommateurs ou certains programmes d'économie d'énergie. Ces décisions impliquent des choix politiques et relèvent, selon l'Ofgas, de la responsabilité des ministres qui doivent rendre compte normalement de leurs décisions devant le parlement. La collecte de fonds à cet effet qui présente toutes les caractéristiques de l'impôt ne devrait pas, de l'avis de l'Ofgas, relever du pouvoir discrétionnaire des organismes chargés de la réglementation sauf à compromettre la réputation et l'indépendance du système de réglementation des services publics."

"Review of Utility Regulation - Submission of the Office of Gas Supply", novembre 1997, texte dactylographié, pages 8-9. Pour des opinions similaires, voir " Review of Utility Regulation - Submission of the Director General of Electricity Supply" - octobre 1997, pages 3 et 10-12 et " Review of Utility Regulation - Submission of the Director General of Telecommunications" - septembre 1997, pages 14-15.

On observe le même manque d'enthousiasme à s'impliquer dans les problèmes d'obligations de service universel et de protection de l'environnement de la part des autorités chargées de la concurrence:

"Nous pourrions être en mesure de tenir compte de facteurs de ce genre dans le choix entre diverses mesures possibles qui sont par ailleurs adaptées à la tâche à accomplir mais ils se situent en dehors du champ de la législation antitrust lorsqu'il s'agit de déterminer s'il y a violation de la législation en premier lieu. Une réglementation permanente ou d'autres dispositions spéciales sont donc nécessaires pour assurer la mise en oeuvre de ces politiques"

"FTC Perspectives on Competition Policy.... op. cit., page 6.

15. Il s'agit principalement de :

1. l'accès gratuit ou à un coût artificiellement faible aux moyens de production nécessaires que les nouveaux entrants devront probablement acquérir, par exemple, un spectre radio ou un droit d'atterrissage sur un aéroport ;

2. les économies d'échelle liées à des dépenses à fonds perdus importantes qui constituent des obstacles à l'entrée - ce facteur conduit les nouveaux entrants à douter de la possibilité d'obtenir rapidement grâce à une plus grande efficience les parts de marché nécessaires pour justifier des investissements importants et risqués ;

3. les économies d'apprentissage et de gamme (outre celles résultant d'un réseau constituant un "monopole naturel") ;

4. l'inertie des consommateurs découlant de la familiarité avec l'entreprise en place, parfois renforcée par les coûts du changement de fournisseur (tels que ceux dus à la difficulté de transfert de la numérotation téléphonique) ;

5. l'importance des informations accumulées sur les goûts et les préférences (c'est-à-dire sur l'élasticité de la demande) de la quasi totalité des consommateurs ;

6. lorsque l'entreprise en place continue à détenir ou à exploiter un réseau essentiel, elle continue à détenir des informations sur les bénéficiaires et les dates des changements de fournisseurs ce qui la met en bien meilleure position que ses concurrents généralement plus petits pour appliquer des tarifs discriminatoires visant à empêcher l'entrée sur le marché voire même des tarifs d'éviction ;

Pour une bonne analyse des avantages des entreprises en place, voir Amstrong, Cowan et Vickers, op. cit., chapitre 4.

Les pouvoirs publics disposent de nombreux moyens pour neutraliser ces avantages possibles ou certains d'entre eux. Le plus souvent, ils ont décidé simplement d'exempter les nouveaux entrants de la contribution aux coûts de la fourniture du service universel ou de laisser à la charge des entreprises en place d'importantes dépenses à fonds perdus

16. Le Royaume Uni fournit un exemple possible de l'influence que peut exercer sur la répartition des tâches la force perçue du droit de la concurrence en vigueur. Examinant les raisons pour lesquelles les organismes de réglementation sectoriels ont été mis en place à la suite de la privatisation de divers services publics (et pourquoi ils ont reçu mandat d'encourager la concurrence), John S. Bridgeman ('Directeur général de l'Office of Fair Trading) a déclaré "Pour un certain nombre de raisons très valables, notre droit général de la concurrence n'était pas toujours considéré comme adéquat ou approprié pour faire face aux problèmes qui se poseraient lors de la privatisation d'entreprises nationalisées"

" Les rôles appropriés des différents responsables et organismes de réglementation", intervention devant la conférence de l'IBC du Royaume Uni sur l'avenir de la réglementation des services d'utilité publique, 10 février 1997, page 2.

17. Un problème de concurrence peut également se poser si l'ancien titulaire d'un monopole est autorisé à fixer et à appliquer des normes industrielles. Nous supposons, en fait, qu'il n'en est pas ainsi.

18. Afin de mieux illustrer ce point nous observerons que l'Autorité australienne des télécommunications qui est chargée à la fois des réglementations économique et technique du secteur disposait, au 30 juin 1996, d'un effectif de 139 personnes. Sa "division de la concurrence" qui est responsable des "services aux entreprises" et de la "stratégie économique et de tarification" avait des effectifs d'au moins dix personnes, ce qui signifiait qu'au moins 129 membres du personnel opérationnel étaient affectés à des tâches de réglementation technique. Voir le rapport annuel de l'autorité australienne des télécommunications pour 1996 (Canberra, Australian Government Publishing Service, 1996) pages 5 et 70. L'estimation du personnel minimum affecté à des tâches de réglementation économique est basée sur des informations fournies par Hank Spier, Directeur général de la Commission australienne de la concurrence et de la consommation, ACCC, le 18 mai 1998 à David Parker, de la Représentation permanente de l'Australie auprès de l'OCDE selon lesquelles lorsque la fonction de réglementation économique a été transférée de l'Austel à l'ACCC le 1er juillet 1997, dix personnes ont été également transférées à cette dernière. Les effectifs totaux de l'ACCC s'élevaient au 30 juin 1997 à 317 personnes, toutjours selon les informations communiquées par Hans Spier. Sur la base de ces chiffres, il apparaît que si l'ACCC devait se voir confier la totalité de la réglementation technique applicable aux secteurs d'infrastructure de réseau, cette tâche absorberait autour de la moitié de ses effectifs totaux.

19. Pour des opinions selon lesquelles il est préférable de laisser aux organismes de réglementation la fixation des tarifs maximum et des conditions d'accès, voir "Competition Policy in Communications Industries: New Antitrust Approaches". Observations préparées par Robert Pitofsky, président de la Federal Trade Commission - Glasser Legal Works Seminar on Competitive Policy in Communications Industries: New Antitrust Approaches - Washington, 10 mars 1997, pages 2 et 4.

Un rapport commandé par la DGII de la Commission Européenne est du même avis :

"Le contrôle des tarifs et des bénéfices des monopoles exige une surveillance très intense, des droits de contrôle permettant de réglementer les tarifs et les bénéfices et une combinaison de surveillance préalable et de garanties contre les prélèvements réglementaires qui offre à l'entreprise une certaine assurance contre l'expropriation de ses investissements et de ses gains d'efficience. L'institution antitrust ne présente aucune de ces caractéristiques.

Institut d'économie industrielle, "Secteurs de réseaux et service du public" rapport définitif, décembre 1997, page 95.

20. Ceci semble se rapporter particulièrement à des situations dans lesquelles les organismes de réglementation économique préexistent au démarrage de la libéralisation mais le problème peut aussi se poser lorsque la mise en place des organismes de réglementation est parallèle à la libéralisation. Par exemple, au Royaume Uni, lors de la privatisation de diverses entreprises publiques, des organismes de réglementation spécifiques ont été créés et se sont vus confier diverses tâches visant à encourager, à faciliter ou à promouvoir la concurrence. Dans le cas de l'Office des télécommunications, la solution organisationnelle a consisté à modifier les contrats de licence pour y inclure des règles de concurrence très similaires à celles figurant dans les articles 85 et 86 du traité de l'Union européenne.

21. Cette généralisation concernant la promotion plutôt que la protection de la concurrence tend à être moins exacte à propos des droits de la concurrence des anciennes économies planifiées, ce qui n'est pas surprenant.

22. Voir la note 15 ci-dessus.

23. OFTEL, "Beyond the telephone, the television and the PC - Regulation of the electronic communications industry", Deuxième contribution de l'OFTEL à l'enquête de la commission spéciale sur la culture, les médias et le sport sur les communications audio-visuelles et la réglementation de la radio télévision - mars 1998, pages 17 et 19.

24. Les conclusions de l'enquête exhaustive sur la réglementation des services d'utilité publique britanniques mentionnée ci-dessus rejoignent les idées de ceux qui souhaiteraient confier la politique de la concurrence exclusivement aux organismes de réglementation sectoriels existants qu'ils voudraient voir se transformer en "autorités de la concurrence à compétence sectorielle dès lors que les règles générales visant à réprimer les comportements anticoncurrentiels se substituent à une réglementation détaillée" (page 72). Les enquêteurs ont estimé que les organismes de réglementation existants, outre qu'ils sont mieux placés pour accomplir ce remplacement, disposaient d'une compétence et d'informations importantes probablement susceptibles d'être utilisées pour l'application du droit de la concurrence. Ils ajoutent :

"Une dernière mais essentielle raison de confier aux DG (?) la responsabilité de l'application du droit de la concurrence aux services d'utilité publique tient à la relation entre l'interdiction des pratiques anticoncurrentielles et la délivrance de concessions. La combinaison proposée entre les concessions et le droit de la concurrence pourrait exposer les fournisseurs à un double risque, résultant d'un conflit entre les conditions des concessions et le droit général concernant les pratiques anticoncurrentielles. Ce problème peut être résolu non seulement en accordant la priorité à un aspect (à savoir le droit général de la concurrence) mais aussi en confiant au DG la responsabilité de l'application de la réglementation des concessions et du droit général de la concurrence aux services d'utilité publique. "

The Hansard Society and European Policy Forum, op. cit., page 74.

Pour un examen des problèmes pouvant résulter d'une séparation de l'application du droit de la concurrence et de la réglementation économique (avec une référence particulière aux fonctions redistributives de cette

dernière) et une recommandation de confier les deux fonctions à des organismes de réglementation sectoriels spécialisés, voir Michael Grenfeld, « Can competition law supplant utilities regulation? » rapport préparé pour la conférence colloque sur le droit d'Oxford (version antérieure au colloque), « Regulation and Deregulation - Policy and Practice », mars 1998.

Pour certaines réflexions préliminaires sur la question plus large de savoir s'il est préférable de traiter la politique antitrust et la réglementation comme complémentaires ou substituables, voir Institut d'économie industrielle, op. cit., pages 98-99.

25. "Competition on the line" - Opinion personnelle - Don Cruickshank - Financial Times (édition du Royaume Uni) 19 février 1998, p. 12.

Il est intéressant de noter que lorsque l'Oftel a introduit la « condition de loyauté des pratiques commerciales » (qui reflète à peu près les articles 85 et 86 du traité de l'Union européenne) dans les contrats de licence de diverses sociétés de téléphone, il n'a pas renoncé à ses pouvoirs réglementaires de répression des abus de position dominante. Voir Oftel « Guidelines on the operation of the Fair Trading Condition », mars 1997 (texte ronéoté) pages 5-6.

26. Ce facteur s'ajoutant au désir d'éviter des problèmes de frontières entre organismes peut expliquer que le Royaume Uni ait renoncé à confier des pouvoirs autres que ceux de l'application concurrente du droit de la concurrence à ses organismes de réglementation sectoriels. Il est à noter aussi que dans le domaine très complexe de l'examen des fusions, l'Office of Fair Trading continue à détenir une compétence exclusive et il n'est pas prévu de modifier cette situation dans le nouveau projet de loi sur la concurrence. Pour plus de détails sur les conditions du partage de l'application du droit de la concurrence, voir John S. Bridgeman, op. cit.

27. Pour une analyse supplémentaire des arguments en faveur d'une combinaison des fonctions ou plus précisément de l'octroi de pouvoirs concurrents d'application de la loi aux organismes de réglementation sectoriels britanniques et à l'Office of Fair Trading, voir Margaret Bloom "The impact of the Competition Bill " rapport ronéoté préparé pour le colloque juridique d'Oxford "Regulation and Deregulation - Policy and Practice ", mars 1998, pages 3-5. Ce rapport contient aussi des arguments contre la coexistence des pouvoirs - voir pages 5-7.

28. Voir Einar Hope (Directeur général de l'autorité de la concurrence norvégienne) " EC Competition Law: The Millenium Approaches" note présentée à la 24ème conférence annuelle, Fordham Corporate Law institute, 16-17 octobre 1997, page 8.

29. Le Comité du droit et de la politique de la concurrence a organisé une table ronde pour examiner les objectifs de la politique de la concurrence lors de sa réunion d'avril 1992. La note du Secrétariat qui a servi de base à la discussion porte la référence DAFFE/CLP (92)2. La priorité croissante accordée à l'efficience économique s'est toujours heurtée aux racines populistes du droit de la concurrence de nombreux pays. Pour une critique récente de la priorité exclusive accordée à l'efficience économique qui se reflète en particulier dans l'adoption par certains pays d'une norme d'excédent total pour les fusions etc., voir Tim Hazledine « Realism Rebuffed? Lessons from Modern Canadian and New Zealand Competition Policy », dactylographié, octobre 1996, à paraître dans la Review of Industrial Organization, 1998.

30. Pour faire apparaître les différences entre politique de la concurrence et réglementation, Robert D. Anderson, Abraham Hollander et Joseph Monteiro (qui étaient tous les trois à l'époque associés au Bureau de la politique de la concurrence canadien) écrivaient que la politique de la concurrence était destinée à " ... assurer un fonctionnement efficient et concurrentiel des marchés dans le but de faire progresser des objectifs plus larges ayant trait au bien-être des consommateurs et à l'efficience globale de l'économie". Ils étaient d'avis, par ailleurs, que les buts de la réglementation étaient plus complexes et même suspects du point de vue de la concurrence :

"Bien que l'on ait souvent vanté les mérites de la réglementation du point de vue de la protection des intérêts du consommateur (et qu'elle constitue certainement une réaction appropriée des pouvoirs publics à des situations réelles de monopole naturel), historiquement, la réglementation économique a souvent servi, notamment dans les secteurs autres que les monopoles naturels des économies du Canada et des Etats Unis à cartelliser certains secteurs et à protéger les entreprises en place contre l'arrivée de concurrents. En fait, la délimitation des mécanismes institutionnels par lesquels l'Etat confère une telle « protection aux producteurs » ou institue une réglementation faisant respecter les ententes a constitué l'objet principal de la théorie de la réglementation économique de Stigler."

"Regulatory Reform and the Expanding Role of Competition Policy in the Canadian Economy, 1986-1996", texte dactylographié, 22 octobre 1996, pages 5-6.

31. Déclaration préparée de la Federal Trade Commission présentée par Robert Pitovsky, président devant la commission de la justice (Chambre des représentants des Etats Unis) 4 juin 1997, page 2. Pour des indications sur les finalités de la réglementation, voir Michael Tyler et Susan Bednarczyk, op. cit. pages 650-76 notamment 651-652.

32. Anderson et al, op. cit., page 8.

33. Voir Spencer W.Waller, « Prosecution by Regulation: The Changing Nature of Antitrust Enforcement » texte dactylographié d'une intervention présentée lors d'une réunion de l'association des Ecoles de droit américaines qui a eu lieu du 5 au 9 janvier 1998 à San Francisco.

On notera toutefois que ces lignes directrices ont plutôt pour objet d'interpréter la législation que de formuler des règles nouvelles.

34. Pour une étude de la doctrine des installations essentielles, des raisons pour lesquelles elle est très difficile à appliquer correctement et une reconnaissance de l'existence d'un parallélisme étroit avec la réglementation, voir "Competition Policy in Communications Industries: New Antitrust Approaches", op. cit., pages 3-4.

35. Les tarifs élevés ou bas ne sont pas toujours considérés comme constituant un abus de position dominante par le droit de la concurrence. Même s'ils sont considérés comme tels et si les organismes chargés de la concurrence ont le pouvoir d'ordonner une modification de ces tarifs, ce pouvoir est rarement utilisé.

36. A. Douglas Melamed qui est actuellement assistant adjoint principal de l'Attorney General de la Division Antitrust du ministère de la justice des Etats Unis a fait valoir que la procédure d'accord amiable tend à éloigner l'application de la législation antitrust de l'application de la loi et à la rapprocher de la réglementation parce qu'elle :

1. se concentre davantage sur le remède que sur la faute ;

2. exige une sorte d'approbation préalable de caractère réglementaire avant que le défendeur puisse modifier son comportement face à l'évolution des conditions du marché ; et

3. évite les procès ce qui a pour résultat "que le développement de la législation antitrust et l'interprétation de ses principes généraux sont assurés non pas par une procédure judiciaire avec la rigueur qui est celle de la jurisprudence mais plutôt par des accords négociés entre les défendeurs individuels et les autorités publiques".

Voir "Antitrust: The new Regulation" Antitrust vol. 10 n° 1 (automne 1995) pages 13-15 (la citation se trouve à la page 14). Deux autres articles du même numéro de Antitrust peuvent également être intéressants à consulter: Harry First "Is Antitrust « Law?" et "Antitrust and the Rise of the Regulatory Consent Decree", pages 4-8 et 9-12 respectivement.

37. Une fois encore, il ne faudrait pas exagérer ces différences. Les organismes chargés de la concurrence ont aussi besoin d'un volume considérable d'informations dans les affaires de prix d'éviction ou de tarifs discriminatoires ou lorsqu'ils examinent des fusions justifiées au nom de l'efficience ou impliquant des entreprises qui risquent de faire faillite si la fusion est bloquée.

38. Ceci apparaît par exemple, à propos de questions ayant trait aux fusions et à l'accès au réseau électrique. Sur la question de l'accès, la FERC s'est montrée favorable au "dégroupage opérationnel" tandis que la FTC préconisait l'approche plus radicale du "dégroupage fonctionnel". Voir "FTC Perspectives on Competition Policy and Enforcement Initiatives in Electric power" op. cit. pages 6-8.

39 "In the matter of promoting Wholesale Competition Through Open Access non Discriminatory Transmission Services by Public utilities, Making the Transition from Regulation to Competition: Thinking About Merger policy During the Process - Electric power Restructuring" Intervention de Joel Klein devant la FERC, Distinguished Speaker Series, Washington DC, 21 janvier 1998, pages 9-10.

40. Robert D. Willig "Antitrust Lessons from the Airline Industry: The DOJ Experience" Antitrust Law Journal, volume 60, numéro 2, pages 695-703. Le professeur Willig a fait référence, à l'appui de sa déclaration, à une étude de la Division Antitrust: Gregory J. Werden, Andrew S. Joskow et Richard L. Johnson "The Effects of Mergers on Price and Output: Two Cases Studies from the Airline Industry, Managerial and Decision Economics, volume 12, numéro 5 (octobre 1991) pages 341-352.

41. “Examen des Etats Unis”, Projet de réforme de l'OCDE - Phase 2, DAFFE/CLP(98)9, juin 1998, chapitre 3, page 25.

42. Pour une bonne introduction à la question de la capture de la réglementation, comprenant des références à la littérature, voir Jean-Jacques Laffont et Jean Tirole A Theory of Incentives in Procurement and Regulation (Cambridge Mass: The MIT Press, 1993), chapitre 11.

43. La capture pure et simple est sans doute rare mais on constate que la réglementation est appliquée parfois pour protéger certaines entreprises de la concurrence. Par exemple, une étude des Etats Unis a fourni certaines preuves et cité d’autres études qui corroborent le fait que toutes les entreprises ne s’opposent pas à la réglementation. Certaines la soutiennent apparamment parce les coûts supplémentaires qu’elle leur occasionnent sont plus que compensés par la réduction de la concurrence qu’elle entraîne en leur faveur. Les lecteurs sont renvoyés une fois encore à Ann P. Bartel et Lacy Glenn Thomas, op. cit.

Les organismes chargés de la concurrence peuvent également faire l’objet d’une certaine capture - voir Anderson et al. op. cit. page 10 où une étude de la politique européenne de la concurrence est citée à l’appui de cette proposition, Damien Neven, Robin Nuttal et Paul Seabright, Merger in Daylight The Economics and Politics of European Merger Control Center for Economic Policy Research, 1993). Cette étude montre aussi semble-t-il que “le fait qu’un organisme puisse être victime d’une capture dépend autant de facteurs tels que l’indépendance statutaire, la transparence institutionnelle et la responsabilité que de sa concentration sur un secteur ”.

44. Un commentateur du secteur des télécommunications des Etats Unis a observé :

"L'expérience de la concurrence dans des secteurs soumis à une réglementation peu développée montre généralement que les hommes politiques et les responsables de la réglementation ont fortemment tendance à préférer la sélection et la gestion des concurrents plutôt que la promotion d'un marché concurrentiel, créant par là un marché confortablement fermé pour les concurrents "choisis" et non pas le marché ouvert que visent les politiques de la concurrence. Ceci tend à conduire à des comportements de monopole/duopole et à l'établissement de barrières à l'entrée très artificielles pour les nouveaux acteurs.

William H. Melody "On the meaning and importance of 'independance' in telecom reform" Telecommunications Policy, vol. 21, n° 3 (1997) pages 195-199 à la p. 195.

45. Pour une bonne analyse des raisons pour lesquelles on peut s'attendre à une interférence politique dans les secteurs des infrastructures de réseaux, le lecteur est renvoyé, une fois de plus, à Levy et Spiller, op. cit. dont l'étude comporte une enquête sur les évolutions observées en Argentine, au Chili, en Jamaïque, aux Philippines et au Royaume Uni qui montre l'importance de la réduction de l'incertitude administrative pour l'encouragement de l'investissement privé. Un expert américain des télécommunications est arrivé à des conclusions similaires:

"Il est absolument essentiel que la "concurrence" entre les principaux acteurs du secteur se déplace de l'arène politique et bureaucratique vers le marché et que l'on réalise les objectifs de la politique gouvernementale en ce qui concerne les performances du secteur. Ceci ne se produira que si les décisions réglementaires sont prises en fonction de leurs mérites substantiels et non pas sur la base du favoritisme politique ou de l'influence souterraine des acteurs les plus puissants du secteur. Seule une procédure réglementaire indépendante et transparente perçue comme telle par l'ensemble des parties visées et par le public peut parvenir à ce résultat.

46. Une étude récente commandée par la DGII de l'Union européenne observe:

"Les autorités antitrust sont généralement considérées comme plus indépendantes que les organismes de réglementation ce qui est généralement exact mais il est important de distinguer les formes que revêtent la réglementation et la politique de la concurrence: une autorité antitrust faisant partie d'un ministère est probablement plus exposée à l'influence politique qu'un organisme de réglementaiton indépendant."

Institut d'économie industrielle, op. cit., pages 91-92

47. Pour un examen de la contribution que peuvent apporter les actions privées à l'application du droit de la concurrence, voir Karen Yeung "The Private Enforcement of Competition law", texte dactylographié préparé pour le colloque juridique d'Oxford sur le thème "Regulation and Deregulation - Policy and Practice", mars 1998.

48. Office of Gas Supply (Ofgas), Submission to the Review of utility Regulation, op. cit., page 42.

49. Il existe même très peu d'expérience de la manière dont les organismes chargés de la concurrence exercent les tâches de réglementation économique. La Commission australienne de la concurrence et de la consommation (ACCC) est, à notre connaissance, le seul organisme chargé de la concurrence auquel aient été confiées des fonctions de réglementation économique.

50. Par exemple :

1. L'ACCC réglemente l'accès au réseau de télécommunications et jouera prochainement un rôle similaire à l'égard des gazoducs et du transport de l'électricité. Au moins en ce qui concerne les télécommunications, l'ACCC semble décidée à n'intervenir qu'en cas de nécessité mais il est trop tôt pour savoir comment les choses vont réellement se passer. Pour un aperçu des politiques de réglementation de l'ACCC, voir "Access Pricing Principles - Telecommunications, texte dactylographié, juillet 1997 et Allan Asher (vice président de l'ACCC) "Network Industry Regulation and Convergnece in Service Delivery: Challenges for Suppliers, Users and Regulators", document préparé pour la conférence annuelle de l'Association australienne des producteurs et transformateurs de pétrole publié dans APPEA Journal 1998, pages 799-814.

2. Au Royaume Uni, il semble que l'on se soit interrogé sur l'opportunité de confier entièrement le développement de la concurrence postérieur à la déréglementation du secteur des bus aux autorités

chargées d'appliquer le droit général de la concurrence. Voir Lord Borrie "Submission to the Report of the Commission on the Regulation of Privatised Utilities" (réalisée par la Hansard Society et European Policy Forum) pages 2-3 (Lord Borrie est un ancien Directeur général de l'Office of Fair Trading); Ministère de l'environnement des transports et des régions "Developing an integrated transport policy - an invitation to contribute" et "OFT response to DETR Paper", novembre 1997.

3. Pour une critique de la manière dont l'Ofgas réglemente les prix discriminatoires et les prix d'éviction avec, peut-être, une prise en compte insuffisante des complexités économiques de la fixation des tarifs dans des secteurs comportant d'importants coûts communs à fonds perdus, voir Derek Ridyard "Regulation of Price Discrimination and Predation by Dominant Firms - Lessons from the Ofgas Valueplus Decision - texte dactylographié, préparé pour le colloque juridique d'Oxford sur le thème "Regulation and Deregulation - Policy and Practice", mars 1998.

4. L'Ofgas n'est peut-être pas suffisamment conscient de ce qu'est une concurrence effective et du fait que ses méthodes de dissuasion de la discrimination par les prix risquent de faciliter la collusion. Voir Catherine Waddams Price "Competition and Regulation in the UK Gas Industry" Oxford Review of Economic policy, vol. 13, n° 1 (printemps 1997), pages 47-63 à la page 60)

5. L'évolution historique du droit et de la réglementation de la concurrence du secteur financier en Finlande est intéressante. La législation générale de la concurrence s'est appliquée entre 1958 et 1964 mais ne l'a plus été au cours des 14 années suivantes. Elle s'est appliquée à nouveau entre 1988 et 1992 mais sous la responsabilité d'un organisme de réglementation sectoriel. Après 1992, l'organisme généralement compétent en matière de concurrence s'est vu confier des pouvoirs indépendants d'enquête sur les limitations de la concurrence dans les secteurs bancaire et des assurances mais les organismes de contrôle du secteur ont conservé concurremment le pouvoir de présenter des propositions au Conseil de la concurrence. Le projet de loi sur la concurrence présenté en décembre 1997 a proposé de mettre un terme à la compétence parallèle d'application de la loi. Voir "Estimate of the Working Group Revising the Act on Competition Restrictions on the parallel Control of the Office of Free Competition and the Financial Supervision Authority (30 janvier 1997)" Appendice 3 de la contribution finnoise présentée lors de la réunion du 19 février 1998 du Groupe de travail 2 (Concurrence et Réglementation) du Comité du droit et de la politique de la concurrence de l'OCDE - DAFFE/CLP/WP2/WD(98)2. L'appendice 3 contient aussi une évaluation de cette expérience par l'Office of Free Competition.

51. Voir les paragraphes 44 et suivants ci-dessus. On observe une différence d'approche semblable des fusions en Italie. Dans une contribution de l'Italie au groupe de travail n° 2 du Comité du droit et de la politique de la concurrence de l'OCDE, il était indiqué que la Banque d'Italie est chargée de l'application des dispositions de la loi sur la concurrence concernant les ententes, les abus de position dominante et les concentrations dans le secteur bancaire après avoir entendu les avis de l'autorité de la concurrence qu'elle n'est pas tenue de suivre. Il semble que les deux autorités ont parfois eu des opinions différentes "... par exemple en ce qui concerne l'acquisition du contrôle de la Banca popolare di Sassari par la Banca di Sardegna, l'autorité de la concurrence estimait que les mesures proposées par la Banque d'Italie ne supprimaient pas tous les problèmes de concurrence." Voir Enhancing the Role of Competition in the Regulation of Banks - Italie rapport présenté à la réunion du 19 février 1998 (DAFFE/CLP/WP2/WD(98)16, page 10)

52. Le Canada fournit un exemple d'une telle renonciation dans sa réglementation concernant les télécommunications. Voir Hudson N. Janisch « At Last! A New Canadian Telecommunications Act » Telecommunications Policy volume 17, n° 9 (décembre 1993), pages 691-698.

53. Il convient de distinguer cette pratique de celle du « cloisonnement » qui consiste à empêcher les entreprises soumises à la réglementation d'exercer des activités connexes non réglementées afin d'utiliser la péréquation tarifaire et les tarifs discriminatoires pour tourner les limitations imposées par la réglementation à leurs bénéfices (en faussant gravement la concurrence)

54. Le Royaume Uni propose actuellement de renforcer son droit général de la concurrence et les fonctions de ses organismes de réglementation sectoriels en matière de politique de la concurrence. Pour atténuer les problèmes auxquels nous nous sommes référés, il est prévu que tous les organismes appliqueront la même législation en utilisant des directives sensiblement similaires et les recours à l'encontre de décisions en matière de concurrence de l'ensemble des différents organismes seront jugés par les mêmes instances d'appel. Voir Margaret Bloom, op. cit., pages 7-8 et « Competition on the line » Personnal View - Don Cruickshank - Financial Times (édition du Royaume Uni), 19 février 1998, p. 12.

Un examen récent des entreprises d'utilité publique mené au Royaume Uni confirme le caractère judicieux de l'application d'un droit normalisé:

" ... la formulation d'interdictions générales à l'encontre des comportements anticoncurrentiels présente un certain nombre d'inconvénients parmi lesquels: le degré de généralité sinon le flou de ces interdictions, l'absence de voies de recours, le manque de précédents faisant jurisprudence qui est un facteur d'incertitude, les problèmes des sanctions et des procédures d'application forcée... Le DG de l'Oftel, Dan Cruickshand a lui-même déclaré publiquement que la condition n'est qu'une solution de deuxième choix par rapport à des modifications de la législation relative aux pratiques anticoncurrentielles. "

The Hansard Society and European Policy Forum, The Report of the Commission on the Regulation of Privatised Utilities, décembre 1996, p. 72. Ce rapport à la page 69 était également favorable au recours à une instance d'appel commune pour l'ensemble des décisions ayant trait au droit de la concurrence, y compris celles prises par les organes de réglementation.

55. Voir OCDE "Competition Issues Arising in the Insurance and Financial Services Industries" note du Secrétariat, Groupe de travail n° 2 (Concurrence et Réglementation) du Comité du droit et de la politique de la concurrence - DAFFE/CLP/WP2(98)11.

56. Le Royaume Uni offre certains aperçus intéressants sur la concurrence entre les entreprises d'électricité et de gaz et sur les distorsions de la concurrence que peut entraîner l'existence de différences entre des réglementations sectorielles. Voir « Electricity competition delayed » et « OFFER and Ofgas cannot agree » dans la section NEWS de The Utilities Journal (février 1998), pages 3 et 9 respectivement et Catherine Waddams Price « Competition and Regulation in the UK Gas Industry » Oxford Review of Economic Policy, vol. 13, n° 1 (printemps 1997) pages 47-63 à la page 61. Il est question dans ces études des distorsions de concurrence résultant de calendriers de libéralisation différents entre les fournisseurs de gaz et d'électricité qui souhaiteraient commercialiser ces deux sources d'énergie et qui offrent aussi des services d'installation de compteurs. Il est intéressant de noter que l'Office du gaz du Royaume Uni a demandé à être fusionné avec l'Office de l'électricité, lequel a examiné les avantages et les inconvénients d'une telle fusion qui ne semble pas l'enthousiasmer. Voir Ofgas « Submission to the Review of Utility Regulation », novembre 1997, pages 30-31 et « Submission by the Director General of Electricity Supply to the Review of Utility Regulation », octobre 1997, pages 19-20.

57. Pour une bonne analyse des implications de la convergence dans ces secteurs et de ses effets sur la réglementation, voir la première contribution de l'OFTEL à l'enquête de la Commission spéciale de la culture, des médias et des sports sur les communications audio-visuelles et la réglementation de la radiotélévision - Beyond the Telephone, the Television and the PC - II - janvier 1998; OFTEL « Beyond the Telephone, the Television and the PC - Regulation of the electronic communications industry » Deuxième contribution de l'OFTEL à l'enquête de la Commission spéciale de la culture, des médias et des sports sur les communications audio-visuelles et la réglementation de la radiotélévision, mars 1998 et OCDE « Les cadres réglementaires de demain » (24 mars 1998) DSTI/ICCP/TISP(98)5.

58. OCDE "Les cadres réglementaire de demain..." op. cit. page 9

59. Ibid, page 10

60. OFTEL “Beyond the Telephone, the Television and the PC - Regulation of the electronic communications industry” Deuxième contribution de l’OFTEL à l’enquête de la Commission spéciale de la culture, des médias et des sports sur les communications audio-visuelles et la réglementation de la radiotélévision, mars 1998, p. 9.

61. Plus précisément, le document indiquait :

> Les arguments favorables à la symétrie ne doivent pas être utilisés pour imposer des réglementations dans des domaines dans lesquels s’exerce déjà le jeu de la libre concurrence. Par exemple, les protocoles Internet permettent de fournir une gamme de services via les actuels réseaux de communication par paquets, services similaires sur le plan des caractéristiques à des services soumis à de nombreuses dispositions réglementaires. Ainsi, le service vocal est un exemple de prestation qui peut être fournie aussi bien par l’Internet que par les actuels réseaux publics de commutation par paquets. Parallèlement, il existe une gamme de services de diffusion sur le Web (protocole Internet de multidiffusion, *par exemple*) similaires aux services de radiodiffusion. Dans les cas de ce type, il ne faudrait pas considérer la symétrie comme un moyen d’étendre la réglementation aux services fournis par l’Internet. La symétrie devrait plutôt être vue comme un élément permettant de réduire aussi rapidement que possible les réglementations qui pèsent sur les acteurs des secteurs traditionnellement réglementés.
>
> OCDE, “Les cadres réglementaire de demain... ” op. cit. page 9

62. Examinant les ressources requises par les organismes de réglementation britanniques, un expert a recommandé une mise en commun de certaines d’entre elles en indiquant que ceci permetttrait :

> “ ... de réduire de manière significative le total des demandes de moyens administratifs et techniques en supprimant les doubles emplois en matière de travaux génériques sur des sujets tels que le coût du capital, l’évaluation des actifs et les approches de la comparaison de l’efficience. ”
>
> Dr Dieter Helm, Submission to the Commission on the Regulation of privatised Utilities, 22 janvier 1996, page 13.
>
> Dans une contribution au même examen des services d’utilité publique britanniques, Lord Borrie (ancien directeur de l’Office de la loyauté des pratiques commerciales) notait que les organismes de réglementation partageaient certains objectifs communs et devaient être réunis au sein d’une Commission générale comportant des divisions spécialisées par secteur:
>
> “ Renforçons les en les regroupant. Ceci permettrait aussi d’avoir un contrôle sur les excès ou l’entêtement individuels à travers l’obligation faite aux chefs de division de faire approuver leurs propositions par exemple par trois ou cinq commissaires qui constitueraient un organe de décision commun couvrant plusieurs secteurs.”
>
> Submission to the Report of the Commission on the Regulation of Privatised Industries, page 3.
>
> Pour un aperçu général intéressant des avantages et des inconvénients des approches institutionnelles générales par opposition à celles limitées à un secteur, voir National Competition Policy - Report by the Independant Committy of Inquiry (F.G. Hilmer, président) (Canberra, Commonwealth of Australia, 1993) pages 325-328. Ce rapport se prononçait dans l’ensemble en faveur d’un organisme de réglementation général.
>
> La question a également été examinée dans une étude récente de la réglementation britannique. Voir The Hansard Society and European Policy Forum op. cit. pages 6-7. Ce rapport voyait certains mérites à un rapprochement entre l’Ofgas et l’Offer ainsi qu’à l’attribution d’un champ de compétence plus large à l’Oftel dans le secteur des communications. Il concluait aussi que “l’existence de quatre ou cinq

[organismes de réglementation] permettait de maintenir un bon équilibre entre les avantages de la diversité et de l'uniformité." (page 6)

63. Michael Pickford "Information Disclosure, the Baumol-Willig Rule and the "Light-Handed " Regulation of Utilities in New Zealand " New Zealand Economic Papers, volume 30 n° 2 (décembre 1996) pages 199-218, à la page 202.

64. Voir Mario E. Bergara et Pablo T. Spiller op. cit.; Mario Begara « Network Access Pricing and « Light-Handed » Regulation: A Comparative Institutional Analysis » texte dactylographié communiqué par M. Begara et « No Need for a regulator? » PNE - Asia Pacific, décembre 1994/janvier 1995, pages 59-61.

65. Ceci inclut un examen en cours de la loi sur le commerce qui devrait être achevé en septembre 1998.

66. Cette menace a joué un rôle important dans l'octroi par New Zealand Telecom d'un accès approprié à son réseau à son premier concurrent majeur. Voir Michael Pickford, op. cit. p. 204 et David Galt « The telecommunications industry » dans l'ouvrage publié par A. Bollard et M. Pickford The Structure of New Zealand Industry (Palmerston North: Dunmore Press, 1997). Pour des informations et une évaluation supplémentaires concernanr le système néo zélandais, voir « The Long (and drawn out) arm of the Law » et "In the market.. " dans PNE Asia Pacific, décembre 1994/janvier 1995, pages 62-64 et 64-66 et Sir Geoffrey Palmer (conseiller juridique de CLEAR Communications) « Reflections Upon Telecommunications and the Light-Handed Regulatory Model » Address to Interconnection and Interoperation: A Blueprint for Public Policy - Hotel Majestic Wellington, 19 octobre 1995; Gordon Campbell "Tough Calls" Listener, 17 mai 1997 ainsi que les documents suivants présentés à la conférence TUANZ sur l'avenir de la concurrence, Wellington NZ, 7-8 avril 1998: John Belgrave "Has the Commerce Act Outlived its usefulness?" (février 1998) Michael Carter et Julian Wright "Bargaining over Interconnection: The Clear-Telecom Dispute" (1997) et Ross Patterson "Light Handed regulation in New Zealand Telecommunications Ten Years On: Stimulus to Competition or Monopolist's Charter? » texte dactylographié, février 1998.

67. Dans les télécommunications, il est possible d'envisager jusqu'à cinq sources de concurrence sur les boucles locales : fil de cuivre traditionnel, cable TV et trois types de téléphones mobiles. Dans les secteurs de l'électricité et du gaz naturel, la concurrence intermodale peut s'avérer significative comme le montre l'exemple du secteur ferroviaire. Même dans le secteur de l'eau et de l'assainissement, on assiste à des tentatives intéressantes pour introduire davantage de concurrence bien qu'elles restent toutes en deçà d'une concurrence au niveau des installations - voir Simon Cowan "Competition in the Water Industry" Oxford Review of Economic Policy, volume 13, n° 1 (printemps) pages 83-92.

SECRETARIAT'S SUGGESTIONS FOR SUBMISSIONS*

The questions/issues suggested below are set out in five separate parts corresponding to five general ways of governing the interface between regulators and competition authorities. One or more of these general approaches, or a close variant, probably applies either throughout your economy or to certain specific sectors. In brief, the five approaches are: extend regulators' powers to include enforcing competition law; assign economic regulation to the competition agency(ies); abolish economic regulation; allocate competition policy to the competition agency(ies) and economic regulation to regulatory bodies; or give regulators and competition agencies concurrent powers to enforce competition law(s) in the regulated sectors.

Throughout what follows, "general competition agency" should be read as applying to the office applying the general, national competition law(s). In addition, the following definitions hold (though you are free to critique this particular way of dividing the subject):

- **technical regulation** - setting and enforcing product and process standards designed to deal with safety, environmental and switching cost "externalities"; and allocating publicly owned or controlled resources such as spectrum or rights of way;

- **economic regulation** - directly controlling or specifying: production technologies (other than those linked with setting common technical product standards); eligible providers (granting and policing licences); terms of sale (i.e. output prices and terms of access); and standard marketing practices (e.g. advertising and opening hours);

- **competition law and policy** - adopting, interpreting and enforcing framework rules designed to ensure that markets are and remain as efficiently "self-regulating" as possible. In particular this involves preventing firms making anticompetitive agreements, abusing dominant positions and carrying out anticompetitive mergers.

A. Regulators are the principal enforcers of competition laws, if any, applying to their sectors

Please identify sectors, if any, in your economy which are subject to technical or economic regulation by an agency, other than a competition agency, which has also been given exclusive powers to apply significant portions of the competition laws applying to such sectors.

1. where regulators are applying sector specific as opposed to an economy wide competition law, why was such customisation of the applicable law believed necessary? What key

* Extracted from pre-roundtable guidance provided to Members to assist in the preparation of their written submissions. This is reprinted here because some of the submissions included in this publication make reference to such guidance.

differences among sectors might justify a sector specific approach? What are the perceived costs of applying sector specific instead of general competition law provisions?

2. Why was it believed that a regulator rather than a competition agency would be the preferred way to enforce competition law (either general or customised) in one or a collection of sectors? Were there perceived complementaries between regulatory and competition policies, or reasons for fearing that independent application of economic regulation and competition law might subject firms to incompatible demands? If so please describe those perceptions or reasons.

3. Is it explicitly envisaged that competition law enforcement will be transferred from the regulators to a competition agency if and when the relevant sectors become sufficiently competitive? Who will decide when this transition is sufficiently complete, and what are the criteria that will guide the decision?

4. Please describe any notable differences, using specific examples, between how regulators have enforced competition law and how the general competition agency probably would have handled the same case or problem. Examples might be found in a different willingness to use behavioural as opposed to structural remedies to solve competition problems, or in regulators tending to adopt narrower market definitions or over/underestimating the strength of barriers to entry. To what do you attribute any such differences?

5. Please describe, again using specific examples, how the possession of competition policy instruments has altered how a regulator has carried out its regulatory functions. It would be especially interesting to identify cases where a regulator, in the absence of having a competition law remit, would have adopted an inferior regulatory solution to the problem.

6. Please describe any notable successes or problems arising through giving regulators exclusive powers to enforce significant portions of the competition law in the sectors they cover. What reforms, if any, are being planned to improve the system?

B. Competition Agencies are also the Principal Economic Regulators

Please identify sectors, if any, in your economy where economic regulation (see definition above) is largely the responsibility of the competition agency(ies) (in federal countries there could be more than one) . Exclude from consideration under this rubric, sectors where regulation amounts to enforcing general competition law provisions pertaining to anticompetitive agreements, abuse of dominance, or merger review (these are better discussed under Part C below).

1. Was the competition authority the original economic regulator, or were these functions transferred to it from another agency?

    a) Where a transfer did occur, what motivated it (some possible reasons include: desire to accelerate or make more credible the transition to greater reliance on competition; perceived failure or rising direct and indirect cost of regulation; desire to replace sector specific regulation with a cross-sector or generic approach; and growing awareness of and greater importance attached to complementarities between regulation and competition policies)?

b) Where a transfer did not occur, why was it believed that the competition agency(ies), rather than regulators, should be responsible for economic regulation? Were there perceived complementaries between regulatory and competition policies, or reasons for fearing that independent application of economic regulation and competition law might subject firms to incompatible demands? If so please describe those perceptions or reasons.

2. Please describe how the competition office was empowered to exercise economic regulatory functions. Specifically, does the general competition law contain customised provisions for telecommunications, energy, water/sewerage, railways or other industries commonly subject to economic regulation in other countries? Examples of such customisation are sector specific rules or procedures applying to predatory pricing and price discrimination, or a special "essential facilities" doctrine intended to ensure access or interconnection. If applicable, please flag the transitional nature of any such customised provisions or the application of other laws empowering the competition office to act as an economic regulator. Where there are transitional provisions, who will decide when the transition is complete and what criteria will be applied to determine that?

3. Please describe any notable differences, using specific examples, between how the competition office has applied economic regulation to the sector compared to how a regulator would probably have done the same job. To what do you attribute such differences?

4. How have the staff (number and expertise), culture and political profile of the competition agency(ies) been changed as a result of combining both economic regulation and competition policy? Why should these changes be regarded as helpful, neutral or detrimental to the formulation and enforcement of competition policy?

5. Using specific examples, please describe how the possession of dual competition and regulatory policy instruments has altered the way in which the competition agency has carried out both its economic regulation and competition policy functions. To what do you attribute such differences?

6. Please describe any notable successes or problems arising through combining economic regulation and competition policy within the competition agency(ies). What reforms, if any, are being planned to improve the system?

C. There is no economic regulation in one or more sectors subject to such regulation in most other countries; instead the competition agency(ies) apply(ies) general competition law to accomplish some or all of the objectives commonly associated with economic regulation

Please identify any of the sectors in your economy for which the above description applies. Kindly include within the rubric of this part, sectors where economic regulation is not actually applied, but the government stands ready to introduce such regulation if the situation warrants it (e.g. if companies having natural monopolies or something close to it raise prices to politically unacceptable levels).

1. Was economic regulation abolished in these sectors, or simply never existed? In any case, why was it believed advisable to rely exclusively on general competition law(s) (some of the possible reasons might include: desire to accelerate or make more credible the transition to greater reliance on competition; perceived failure or high direct and indirect costs of

regulation; and desire to replace sector specific regulation with a cross-sector or generic approach)? Please describe how subsequent experience has generally confirmed or rendered suspect the wisdom of exclusive reliance on competition law.

2. In connection with deciding to rely on competition law to address problems commonly handled by economic regulation in many other countries, was (were) your country's general competition law(s) strengthened [**excluding** incorporation within it(them) of specific provisions to deal with enumerated sectors - a situation falling within Part B above], and if so, how? Were other measures, such as mandatory disclosure, adopted to improve the functioning of private markets in the enumerated sectors? If so, please describe these supplementary measures and comment on their apparent efficacy.

3. Where reliance is being placed on the threat of introducing regulation to induce companies to set prices below what they would otherwise charge:

   a) Has that threat been used or carried out, and if so, in what sectors? Where resort was indeed made to economic regulation, was this done as a strictly temporary measure with a pre-set sunset provision in place, and if so, was the sunset clause actually effective?

   b) What, if anything, has been done to enhance the credibility of a threat to introduce economic regulation?

   c) Is there evidence that the credibility of a threat to regulate will inevitably weaken over time?

4. Even though there are no special provisions in the country's competition law(s) to deal with supposed special problems arising in one or more sectors often subject to economic regulation in other countries, has the competition office issued guidelines or done anything else (beyond publishing and explaining specific case decisions) to clarify how portions of the law will be applied in such sectors? Please describe such guidelines or other measures.

5. Please describe any notable successes or problems (including court induced expense, delay or uncertainty) arising through reliance on general competition law in place of applying economic regulation. What reforms, if any, are being planned to improve the system?

D. General Mandate Driven Division of Labour [i.e. competition law(s) is(are) exclusively applied by the competition agency(ies), and regulation exclusively by technical and economic regulators]

Please identify any sectors in your economy to which the above description applies.

1. Please describe what steps are being taken or are under active consideration to ensure that companies are not subject to significant uncertainty concerning whether their actions will be subject to economic regulation or competition law (or worse, be subject to incompatible demands from the regulatory and competition policy agencies). You may wish to note that some of the more general approaches for doing this are as follows:

a) a. regulated conduct or state action defence - the general competition law applies to regulated sectors, but companies cannot be prosecuted for behaviour mandated or explicitly authorised by a duly empowered regulator acting within its mandate;

b) regulated conduct or state action defence plus a requirement that regulators forbear from regulating in sectors where competition has grown to the point that consumers no longer need regulatory protection (if this applies in your jurisdiction, kindly describe who makes the decision that regulatory protection is no longer warranted and what criteria are applied in reaching that decision);

c) published concordats between the regulators and competition agencies setting out how overlapping situations will be addressed; and

d) normally competition law and economic regulation fully apply to a sector but either the competition agency or the regulator has the power to arrogate to itself sole jurisdiction on an exceptional case by case basis.

2. Excepting general informal consultation, please describe any means which either the regulatory and competition authorities use to benefit from each other's expertise or otherwise to capitalise on complementaries existing between regulatory and competition policies.

3. Please describe any formal role that the general competition agency plays in reaching decisions on adopting or abolishing regulation, and determining its scope and nature. Specific examples drawn from sectors being opened to greater competition would be especially welcome.

4. Please describe any particularly important successes or problems associated with the general approach of assigning regulation to regulators and competition law to competition agencies. What reforms, if any, are being planned to improve the system?

E. Regulators and Competition Authorities Concurrently Enforce Competition Law(s) (excluding situations where regulators are merely given a general duty to promote competition, but no specific instruments to carry out that mandate)

Please identify any sectors in your economy to which the above description applies.

1. Please describe why the concurrent approach was adopted in your country. Possible reasons might include desires to: make full use of industry specific expertise while at the same time ensuring that everything is covered by competition law; to lower regulators' self-preservation based resistance to introducing greater competition in their sectors; and to ensure regulators do not apply regulatory solutions to problems better solved using competition law.

2. What measures have been taken to ensure consistent application of competition law to the affected sectors? In specific, which of the following apply:

a) the economic regulators and general competition agency enforce exactly the same competition law provisions;

b) lead agencies have been clearly defined and announced;

c) common guidelines have been worked out and published; and

d) there are common channels of appeal from competition law decisions.

Have these measures proved adequate? If not, please give specific examples where problems have arisen and describe what additional measures, if any, are being proposed as remedies.

3. Please describe any notable differences, using specific examples, between how regulators have enforced competition law and how the general competition agency probably would have handled the same case or problem. Examples might be found in a different willingness to use behavioural as opposed to structural remedies to solve competition problems, or in regulators tending to adopt narrower market definitions or over/underestimating the strength of barriers to entry. To what do you attribute any such differences?

4. Please describe, again using specific examples, how the possession of competition policy instruments has altered how the regulator has carried out its regulatory functions. It would be especially interesting to identify cases where a regulator, in the absence of having a competition law remit, would have adopted an inferior regulatory solution to the problem.

5. Please describe any particularly important successes or problems (including evidence of duplication of resources) associated with the concurrent approach as practised in your country. What reforms, if any, are being planned to improve the system?

SUGGESTIONS DU SECRÉTARIAT POUR LES SOUMISSIONS*

Les questions évoquées ci-après sont regroupées en cinq points correspondant aux cinq approches générales des interactions entre les autorités réglementaires et les autorités chargées de la concurrence. Une ou plusieurs de ces approches générales, ou une variante très similaire, sont sans doute valables pour votre économie ou pour certains secteurs. En résumé, ces cinq approches sont les suivantes : élargir les pouvoirs des autorités réglementaires à l'application du droit de la concurrence ; confier la réglementation économique à l'autorité ou aux autorités chargées de la concurrence ; supprimer la réglementation économique ; confier la politique de la concurrence à l'autorité ou aux autorités chargées de la concurrence, et la réglementation économique aux autorités réglementaires ; conférer aux autorités réglementaires et aux autorités chargées de la concurrence des pouvoirs concurrents pour l'application de la ou des réglementations de la concurrence dans les secteurs réglementés.

Dans le texte qui suit, on entendra par "autorité générale chargée de la concurrence" l'autorité appliquant la ou les réglementations générales nationales de la concurrence. En outre, on s'en tiendra aux définitions suivantes (bien entendu, vous avez toute liberté pour critiquer ce type de subdivision) :

- **réglementation technique** - il s'agit de fixer et de faire appliquer des normes de produit et de procédé visant à faire face à des externalités en matière de sécurité, d'environnement et de coût de changement de système technique, et d'attribuer des ressources détenues ou contrôlées par les autorités publiques, par exemple des fréquences ou des droits d'emprise ;

- **réglementation économique** - il s'agit de contrôler ou d'imposer des technologies de production (autres que celles liées à la fixation de normes techniques pour les produits), les conditions à remplir pour fournir certains biens ou certaines prestations (octroi d'autorisations et réglementation de ces autorisations), les conditions de vente (prix à la production et conditions d'accès) et les pratiques normales du commerce (par exemple publicité et heures d'ouverture) ;

- **droit et politique de la concurrence** - il s'agit d'adopter, d'interpréter et de faire respecter des règles-cadres ayant pour but de faire en sorte que les marchés soient et restent aussi efficacement "autoréglementés" que possible. Cela suppose en particulier d'empêcher les accords anticoncurrentiels, l'abus de position dominante et les fusions anticoncurrentielles.

A. Les autorités réglementaires sont chargées au premier chef de veiller au respect des réglementations de la concurrence applicables, le cas échéant, dans leur secteur

Veuillez indiquer quels sont, le cas échéant, les secteurs de votre économie qui sont soumis à des réglementations techniques ou économiques émanant d'un organisme, autre qu'une autorité chargée de la

* Extrait du guide préliminaire à la table ronde procuré aux Membres pour aider à la préparation de leurs contributions écrites. Il est réimprimé ici car quelques soumissions incluses dans cette publication font référence au guide.

concurrence, qui s'est vu également conférer des prérogatives exclusives pour l'application de larges pans réglementations de la concurrence applicables dans ces secteurs.

1. Lorsque des autorités réglementaires appliquent une réglementation de la concurrence à caractère sectoriel, et non à caractère général, pourquoi a-t-on jugé nécessaire cette individualisation du droit applicable ? Quelles sont les principales différences d'un secteur à l'autre pouvant justifier une approche sectorielle ? L'application d'une réglementation sectorielle de la concurrence, au lieu de la réglementation générale, a-t-elle un coût ?

2. Pourquoi a-t-on pensé qu'une autorité réglementaire serait préférable à une autorité chargée de la concurrence pour appliquer la réglementation de la concurrence (générale ou individualisée) dans un ou plusieurs secteurs ? A-t-on jugé qu'il existait certaines complémentarités entre la politique réglementaire et la politique de la concurrence, ou a-t-on craint qu'une application, par des autorités distinctes, de la réglementation économique et de la réglementation de la concurrence puisse se traduire pour les entreprises par des exigences incompatibles ? Dans l'affirmative, indiquer quels sont les points de vue ou les motifs qui ont prévalu.

3. Envisage-t-on expressément de transférer l'application de la réglementation de la concurrence de l'autorité réglementaire à l'autorité chargée de la concurrence dès lors que les secteurs concernés seront suffisamment concurrentiels ? Qui prendra la décision lorsque ce degré de concurrence suffisant aura été atteint et quels sont les critères qui présideront à cette décision ?

4. Veuillez, à partir d'exemples précis, indiquer, le cas échéant, les différences notables entre la façon dont les autorités réglementaires ont appliqué la réglementation de la concurrence et la façon dont l'autorité chargée de la réglementation générale de la concurrence aurait probablement réglé la même affaire ou le même problème. Ces exemples pourraient traduire une volonté différente de recourir, pour régler les problèmes de concurrence, à des mesures se situant au niveau des comportements et non au niveau structurel, ou par une tendance, de la part des autorités réglementaires, à adopter une définition plus étroite du marché ou à surestimer ou sous-estimer l'intensité des barrières à l'entrée. A quoi attribuez-vous ces éventuelles différences ?

5. Veuillez indiquer, également avec des exemples précis, comment le fait de pouvoir s'appuyer sur des instruments de la politique de la concurrence a modifié l'exercice, par une autorité réglementaire, de ses fonctions réglementaires. Il serait très intéressant d'identifier les cas où une autorité réglementaire qui ne s'est vu conférer aucun mandat en matière de droit de la concurrence, a réglé le problème par une solution de moindre qualité.

6. Veuillez indiquer, le cas échéant, les principaux succès ou problèmes observés du fait qu'ont été confiés aux autorités réglementaires des pouvoirs exclusifs de mise en oeuvre de pans importants du droit de la concurrence dans les secteurs relevant de leur compétence. Quelles sont les réformes envisagées, le cas échéant, pour améliorer le système ?

B. Les autorités chargées de la concurrence sont également les principales autorités de réglementation économique

Veuillez préciser quels sont, le cas échéant, les secteurs de votre économie pour lesquels la réglementation économique (voir la définition ci-dessus) relève essentiellement de la compétence de

l'autorité ou des autorités (il peu y avoir plusieurs autorités dans un pays fédéral) chargées de la concurrence. Vous voudrez bien ne pas prendre en compte dans cette rubrique les secteurs pour lesquels la réglementation consiste à appliquer les dispositions du droit général de la concurrence relatives aux accords anticoncurrentiels, à l'abus de position dominante ou au contrôle des fusions (voir la partie C).

1. L'autorité chargée de la concurrence était-elle initialement l'autorité de réglementation économique, ou bien ces fonctions étaient-elles confiées à un autre organisme et lui ont été transférées ?

   a) Dans le cas d'un tel transfert, quelles en ont été les motifs (ces motifs pourraient être, par exemple, les suivants : souci d'accélérer ou de crédibiliser le passage à une action davantage fondée sur la concurrence ; constat d'échec de la réglementation ou coût élevé, direct ou indirect, de cette réglementation ; volonté de substituer à une réglementation sectorielle une approche transectorielle ou générique ; prise de conscience de l'importance des complémentarités entre la politique réglementaire et la politique de la concurrence) ?

   b) En l'absence d'un tel transfert, pourquoi a-t-on considéré que la réglementation économique devait être du ressort de l'autorité ou des autorités chargées de la concurrence, et non des autorités réglementaires ? A-t-on agi ainsi pour tirer parti de complémentarités entre la politique réglementaire et la politique de la concurrence, ou parce qu'on craignait, en dissociant l'application de la réglementation économique et l'application du droit de la concurrence, de soumettre les entreprises à des exigences incompatibles ? Dans l'affirmative, veuillez commenter ces points de vue ou motifs.

2. Veuillez indiquer dans quelles conditions les autorités chargées de la concurrence ont été habilitées à exercer des fonctions de réglementation économique. Plus précisément, la réglementation générale de la concurrence contient-elle des dispositions spécifiquement adaptées aux télécommunications, à l'énergie, à l'eau/l'assainissement, aux chemins de fer ou aux autres secteurs faisant généralement l'objet d'une réglementation économique dans les autres pays ? Comme exemples de cette adaptation spécifique, on peut citer les règles ou procédures particulières applicables aux prix d'éviction et à la discrimination par les prix, ou la mise en oeuvre d'une doctrine spéciale fondée sur la notion de "facilités essentielles", dont le but est d'assurer l'accès ou l'interconnexion. Le cas échéant, veuillez signaler le caractère transitoire de ces dispositions spécialement adaptées ou l'application d'autres lois confiant aux autorités chargées de la concurrence des prérogatives en matière de réglementation économique. Lorsqu'il s'agit de dispositions transitoires, qui décide que la transition est achevée et quels sont les critères utilisés pour cette décision ?

3. Veuillez indiquer, le cas échéant, à partir d'exemples précis, toute différence notable entre la façon dont les autorités chargées de la concurrence ont appliqué la réglementation économique au secteur concerné et la façon dont une autorité réglementaire aurait probablement appliqué cette réglementation. A quoi attribuez-vous ces différences ?

4. En quoi le personnel (effectif et expertise), la culture et le profil politique de l'autorité ou des autorités chargées de la concurrence se sont-ils modifiés du fait de ce regroupement de la réglementation économique et de la politique de la concurrence ? Ces modifications doivent-elles être considérées comme utiles, neutres ou préjudiciables pour la formulation et l'application de la politique de la concurrence ? Pourquoi ?

5. A partir d'exemples précis, veuillez indiquer comment une double compétence en matière de concurrence et de politique réglementaire a modifié la façon dont l'autorité ou les autorités chargées de la concurrence ont exercé à la fois leurs fonctions réglementaires et leurs fonctions en matière de politique de la concurrence. A quoi attribuez-vous ces modifications ?

6. Veuillez indiquer, le cas échéant, quels sont les succès ou les problèmes observés du fait qu'ont été confiées, à l'autorité ou aux autorités chargées de la concurrence, les compétences en matière de réglementation économique et de politique de la concurrence. Quelles sont, le cas échéant, les réformes envisagées pour améliorer le système ?

C. Il n'y a pas de réglementation économique dans un ou plusieurs secteurs faisant l'objet d'une telle réglementation dans la plupart des autres pays ; l'autorité ou les autorités chargées de la concurrence appliquent la réglementation générale de la concurrence pour mettre en oeuvre certains ou tous les objectifs généralement liés à la réglementation économique

Veuillez indiquer quels sont les secteurs de votre économie pour lesquels cette situation est valable. Veuillez mentionner dans cette partie les secteurs dans lesquels il n'est pas appliqué en fait de réglementation économique, mais le gouvernement est prêt à mettre en place une telle réglementation si les circonstances le justifient (par exemple si des entreprises bénéficiant d'un monopole naturel ou se trouvant dans une position similaire augmentent leurs prix à des niveaux politiquement inacceptables).

1. Est-ce qu'on a supprimé la réglementation économique dans ces secteurs, ou n'y en a-t-il jamais eu ? Quoi qu'il en soit, a-t-il paru judicieux de s'appuyer exclusivement sur une ou des réglementations générales de la concurrence (par exemple, pour les motifs suivants : souci d'accélérer ou de crédibiliser le passage à une action davantage fondée sur la concurrence ; constat d'échec de la réglementation ou coût élevé, direct ou indirect, de cette réglementation ; volonté de substituer à une réglementation sectorielle une approche transsectorielle ou générique) ? Veuillez indiquer si l'expérience ultérieure a généralement confirmé ou infirmé le caractère judicieux d'un recours exclusif à la réglementation de la concurrence.

2. Dans le contexte de la décision de s'appuyer sur la réglementation de la concurrence pour régler les problèmes généralement traités par la réglementation économique dans un grand nombre d'autres pays, votre réglementation générale ou vos réglementations générales de la concurrence ont-elles été renforcées [en dehors de l'inclusion, dans cette réglementation ou ces réglementations, de dispositions particulières applicables aux secteurs indiqués, situation relevant de la partie B ci-dessus] et, dans l'affirmative, comment ? D'autres mesures, par exemple des obligations d'information, ont-elles été adoptées pour améliorer le fonctionnement des marchés privés dans les secteurs indiqués ? Dans l'affirmative, veuillez décrire ces mesures supplémentaires et commenter leur efficacité apparente.

3. Lorsqu'on s'appuie sur la menace de mise en place d'une réglementation pour inciter les entreprises à fixer leurs prix à un niveau inférieur à celui qu'elles pratiqueraient autrement :

   a) Cette menace a-t-elle été utilisée ou mise à exécution et, dans l'affirmative, dans quels secteurs ? Lorsqu'on a eu effectivement recours à une réglementation économique, est-ce qu'il s'est agi d'une mesure strictement temporaire, dont la date limite de validité

a été fixée à l'avance et, dans l'affirmative, cette validité limitée a-t-elle été réellement efficace ?

b) Qu'a-t-on fait, le cas échéant, pour rendre plus crédible la menace de mise en place d'une réglementation économique ?

c) La crédibilité d'une menace de réglementation paraît-elle s'affaiblir inéluctablement au fil du temps ?

4. Même s'il n'y a pas de dispositions spéciales, dans la réglementation ou les réglementations de la concurrence de votre pays, pour régler les problèmes particuliers qui sont censés se poser dans un ou plusieurs secteurs faisant souvent l'objet d'une réglementation économique dans d'autres pays, les autorités chargées de la concurrence ont-elles adopté des directives ou pris d'autres mesures (en dehors de la publication de décisions d'espèce et de commentaires de ces décisions) pour clarifier comment certaines dispositions de la ou des réglementations de la concurrence seront appliquées dans ces secteurs ? Veuillez décrire ces directives ou autres mesures ?

5. Veuillez indiquer quels sont les principaux succès ou problèmes (notamment les dépenses, retards ou incertitudes de nature judiciaire) observés du fait qu'on s'est appuyé sur la réglementation générale de la concurrence et non sur la réglementation économique. Quelles sont, le cas échéant, les réformes envisagées pour améliorer le système ?

D. Division absolue du travail [la ou les réglementations de la concurrence sont exclusivement appliquées par l'autorité ou les autorités chargées de la concurrence et la réglementation est exclusivement appliquée par les autorités réglementaires techniques ou économiques]

Veuillez indiquer quels sont les secteurs de votre économie pour lesquels cette situation est valable.

1. Veuillez indiquer quelles sont les mesures qui sont actuellement prises ou activement envisagées pour faire en sorte que les entreprises ne soient pas confrontées à de grandes incertitudes sur le point de savoir si elles seront soumises à la réglementation économique ou à la réglementation de la concurrence (ou pire, seront soumises à des exigences incompatibles de la part des autorités réglementaires et des autorités chargées de la concurrence). Peut-être serait-il utile de noter que les méthodes les plus générales utilisées à cet effet sont les suivantes :

a) possibilité d'invoquer l'obligation de se conformer à une réglementation ou à une mesure d'une autorité publique : la réglementation générale de la concurrence s'applique aux secteurs réglementés, mais les entreprises ne peuvent pas être poursuivies lorsque les actes qu'elles accomplissent sont imposés ou expressément autorisés par une autorité réglementaire dûment habilitée agissant dans le cadre de ses compétences ;

b) possibilité d'invoquer l'obligation de se conformer à une réglementation ou à une mesure d'une autorité publique, à laquelle s'ajoute l'obligation faite aux autorités réglementaires de ne pas intervenir dans les secteurs où la concurrence atteint le stade auquel les consommateurs n'ont plus besoin d'une protection réglementaire (si tel est le cas dans

votre pays, veuillez préciser qui décide qu'une protection réglementaire n'est plus justifiée et quels sont les critères appliqués pour prendre cette décision) ;

c) accords rendus publics entre les autorités réglementaires et les autorités chargées de la concurrence, précisant comment seront réglés les cas de chevauchement des compétences ;

d) en principe, la réglementation de la concurrence et la réglementation économique s'appliquent pleinement à un secteur, mais l'autorité chargée de la concurrence ou l'autorité réglementaire peut s'arroger la compétence à titre exclusif, exceptionnellement et au cas par cas.

2. En dehors des consultations informelles à caractère général, veuillez indiquer quels sont les moyens utilisés par les autorités réglementaires et les autorités chargées de la concurrence pour tirer parti de l'expertise mutuelle ou des complémentarités entre la politique réglementaire et la politique de la concurrence.

3. Veuillez préciser le rôle formel que joue éventuellement l'autorité chargée de la concurrence dans le processus aboutissant à une décision d'adoption ou de suppression d'une réglementation et dans la détermination de la portée et de la nature des réglementations. Nous souhaiterions en particulier des exemples précis concernant des secteurs dans lesquels on s'efforce actuellement d'intensifier la concurrence.

4. Veuillez indiquer quels sont les principaux succès ou problèmes observés en cas d'approche dichotomique (la réglementation aux autorités réglementaires et le droit de la concurrence aux autorités chargées de la concurrence). Quelles sont le cas échéant les réformes envisagées pour améliorer le système ?

E. Les autorités réglementaires et les autorités chargées de la concurrence mettent en oeuvre concurremment la ou les réglementations de la concurrence (en dehors des cas où les autorités réglementaires n'ont qu'une mission générale de promotion de la concurrence, mais ne disposent d'aucun instrument particulier pour s'acquitter de cette mission)

Veuillez indiquer quels sont, le cas échéant, les secteurs de votre économie pour lesquels cette situation s'applique.

1. Veuillez préciser pourquoi cette approche de la compétence concurrente a été adoptée dans votre pays. Ce pourrait être parce qu'on veut tirer pleinement parti de l'expertise sectorielle, tout en veillant à ce que le droit de la concurrence s'applique partout, faire en sorte que les autorités réglementaires soient moins réticentes, dans un souci d'auto-préservation, à introduire plus de concurrence dans les secteurs relevant de leur compétence, et garantir que les autorités réglementaires n'appliquent pas des solutions réglementaires à des problèmes qui seraient mieux réglés en utilisant le droit de la concurrence.

2. Quelles sont les mesures qui ont été prises pour assurer une application cohérente du droit de la concurrence dans les secteurs concernés ? Plus précisément, quels sont les éléments suivants qui ont été retenus :

a) les autorités chargées de la réglementation économique et l'autorité ou les autorités chargées de la concurrence appliquent exactement les mêmes dispositions de droit de la concurrence ;

b) on a clairement désigné et fait connaître les organismes pilotes ;

c) des directives communes ont été élaborées et rendues publiques ;

d) les voies de recours sont les mêmes pour toutes les décisions en matière de droit de la concurrence.

Ces mesures se sont-elles révélées adéquates ? Dans la négative, veuillez donner des exemples précis de difficultés et indiquer quelles sont les mesures correctrices qui sont envisagées le cas échéant.

3. Veuillez indiquer, le cas échéant, les différences essentielles, en les illustrant par des exemples précis, entre la façon dont les autorités réglementaires ont appliqué le droit de la concurrence et la façon dont l'autorité chargée de la réglementation générale de la concurrence aurait probablement traité la même affaire ou le même problème. Ces exemples pourraient être les suivants : une volonté différente de recourir, pour régler les problèmes de concurrence, à des mesures se situant au niveau des comportements et non au niveau structurel, ou une tendance, de la part des autorités réglementaires, à adopter une définition plus étroite des marchés ou à surestimer ou sous-estimer l'intensité des barrières à l'entrée. A quoi attribuez-vous ces éventuelles différences ?

4. Veuillez indiquer, en donnant également des exemples précis, comment le fait, pour les autorités réglementaires, de disposer d'instruments relevant de la politique de la concurrence, a modifié la façon dont elles ont exécuté leurs fonctions réglementaires. Il serait très intéressant d'indiquer les cas dans lesquels une autorité réglementaire, si elle n'avait pas été compétente en matière de droit de la concurrence, aurait adopté une solution réglementaire de qualité inférieure.

5. Veuillez indiquer les principaux succès ou problèmes (y compris les cas de double emploi des ressources) observés avec l'approche de la compétence concurrente telle qu'elle est pratiquée dans votre pays. Quelles sont, le cas échéant, les réformes envisagées pour améliorer le système ?

AUSTRALIA

1. Introduction

There has been significant debate in Australia as to the most appropriate framework for administering economic, technical and competition regulation. Among the issues debated have been the merits of general versus industry specific competition regulators and of integrated versus separate administration of economic, technical and competition regulation. This paper outlines Australia's approach to this debate and its attempts to improve the interaction between its competition and regulatory authorities.

2. General regulatory framework

Australia has a general competition law, the *Trade Practices Act 1974* (TP Act), that applies across all industries and is administered by a single competition authority, the Australian Competition and Consumer Commission (ACCC). The Australian Competition Tribunal is an appellate body able to review certain adjudication decisions made by the ACCC.

The ACCC and the National Competition Council (NCC) also perform several important economic regulatory functions. For example, the ACCC has various responsibilities in relation to the terms and conditions of access to certain essential infrastructure facilities such as telecommunications, gas and electricity and in monitoring prices in industries where competition is weak. It also has a quality of service monitoring role in respect of airports. These responsibilities reflect a government view that there are advantages in placing these economic regulatory functions with the general competition agency. In the case of the NCC, the main regulatory function is in relation to establishing rights of access to the services of certain essential infrastructure facilities. Other significant aspects of economic regulation (as defined in the issues paper)[68] such as the granting of licences are typically administered by industry specific regulators or by more general government regulators. Technical regulatory issues (as defined in the issues paper) that do not have a significant competition element are typically administered by industry specific regulators or may be subject to goods and services standards set by Australia's principal standards organisation, Standards Australia.

3. General v. specific competition regulation

As noted above, Australia has a national competition law that is consistently applied across all industries and is administered by a single independent regulator (the ACCC). This general approach promotes consistency, certainty and fairness in the universal application of the competition law. It also enhances the regulator's ability to take an economy-wide perspective; reduces the risk of regulatory 'capture' by industry; and minimises duplication. There may also be administrative savings.

There may be advantages in having industry-specific competition regulation in industries characterised by complex technology or having natural monopoly or other special elements. In the case of telecommunications, specific competition laws are contained in Part XIB of the TP Act, which is administered by the ACCC and which complements rather than replaces general competition law. The

regulation of telecommunications in Australia is covered in detail as a case study in the second half of this paper.

Industry specific competition provisions are also contained in Part X of the TP Act, which provides a regime for regulating the conduct of those international liner cargo shipping companies which collaborate as conferences under agreements registered with the Australian Department of Workplace Relations and Small Business (which has responsibility for maritime policy). Part X provides special (but conditional) exemption for exporters from the competitive conduct provisions of the TP Act without the need for authorisation by the ACCC. Failure on the part of conferences to meet Part X conditions and provide efficient and economical services can result in an investigation by the ACCC and a recommendation to the Minister for Workplace Relations and Small Business. The Government will be reviewing Part X as part of its legislative review program during 1998-99 (see paragraph 19 below).

3.1 Integrated v. separate administration of economic, technical and competition regulation

Technical regulation and some significant aspects of economic regulation (as defined in the issues paper)[69] are administered in Australia by industry specific bodies or more general government regulators. This recognises that the national competition authority should focus on anti-competitive conduct and not become embroiled in overly detailed or complex regulatory matters unless they have a clear connection with competition issues in, for example, network industries.

Separation of regulatory duties between competition, technical and economic regulators does entail the risk that competition regulators will not always have the same level of technical knowledge that can be achieved by an integrated industry regulator. This has not been a serious problem to date in Australia and the risks are less in industries where the ACCC has both an economic regulatory role as well as its normal competition role. In addition, various mechanisms are in place to improve co-ordination between regulators (see paragraphs 15 to 17 and 30 and 31 below).

3.2 Role of the ACCC

The ACCC is the independent statutory body responsible for administering and enforcing the TP Act and the *Prices Surveillance Act 1983*. The TP Act are the primary regulatory mechanism for dealing with anti-competitive and unfair market practices, including misuse of market power, secondary boycotts and anti-competitive mergers. The Prices Surveillance Act provides for the surveillance and monitoring by the ACCC of prices in industries identified for prices oversight by the Government.[70]

While the ACCC is responsible for enforcing the TP Act, individuals and companies may commence their own legal proceedings and seek damages and other remedies against parties that allegedly breach the Act.

In addition to its core ‘competition’ function, the ACCC has a number of key ‘economic regulatory’ functions. Under the general or ‘economy wide’ access regime for essential infrastructure facilities established in Part IIIA of the TP Act, the NCC advises the Government as to rights of access and, where these are established, the ACCC acts as an ‘arbitrator of last resort’. That is, the ACCC has the power to arbitrate access disputes and determine the final terms of access (including price) if access seekers and owners of essential facilities fail to reach a commercially negotiated settlement.

More specific 'economic regulatory' functions are performed by the ACCC under the access regimes for telecommunications (discussed below) and for gas transmission pipelines (with the exception of those in the State of Western Australia). The gas role includes monitoring compliance with ring fencing obligations and approving access arrangements (covering services, reference tariffs, trading and expansions) in accordance with an industry code. In addition, from 1999 the ACCC will assume the role of transmission regulator for the electricity industry. This will involve setting a revenue cap for electricity transmission networks.

There is a strong emphasis in all these areas on the desirability of commercially negotiated outcomes. Generally speaking the regimes establish frameworks within which industry participants operate commercially and the role of the regulator is as light-handed as possible.

4. State regulators

Economic regulation of State based markets mainly occurs at the State government level. This State based regulation is moving toward more general regulators such as the New South Wales Independent Pricing and Regulatory Tribunal and the Victorian Office of the Regulator General. These bodies have responsibilities, including technical ones, across a range of industries and, as discussed below, have a close association with the ACCC.

4.1 Addressing regulatory uncertainty

With the 'division of labour' between various regulators, there is potential for some degree of overlap of functions between the ACCC, which administers competition regulation across all sectors of the economy, and those technical and economic regulators that operate within specific industries or within certain States across a number of industries. For this reason, a number of steps have been taken to minimise uncertainty regarding the jurisdiction of particular regulators and avoid confusion for consumers and the business community.

For example, the ACCC has frequent information exchanges with a variety of economic and technical regulators through regular liaison meetings and the exchange of publications and other information. The ACCC also has a significant public and business education role. In addition, chairpersons of various Commonwealth and State economic regulators (such as the Australian Broadcasting Authority, the New South Wales Independent Pricing and Regulatory Tribunal and the Victorian Office of the Regulator General) are associate members of the ACCC; and certain members of the ACCC are appointed as associate members of the Australian Communications Authority and the Australian Broadcasting Authority. This helps to bridge the 'knowledge gap' that can arise when competition, economic and technical regulators are separate bodies.

Further, in conjunction with a number of Commonwealth and State regulatory agencies and policy advisers, the ACCC publishes a quarterly newsletter, the *Public Utility Regulators Forum.* The *Forum* was established in recognition of the need for co-operation among the various state-based regulators. It aims to focus understanding of similar issues and concepts faced by different regulators; minimise regulatory overlap for large users operating across jurisdictions; provide a means of exchanging information; and enhance the prospects for consistency in the application of regulatory functions.

4.2 Exemptions from Australia's competition law

Australia's competition law provides some scope for exemptions from the anti-competitive provisions of the TP Act to be made by State and Commonwealth legislation. Such legislative exemptions must be clearly expressed in order to exclude the operation of the TP Act and, hence, the competition role of the ACCC. This exemption mechanism acts as a 'regulated conduct' or 'state action defence' as defined in the issues paper. In addition, provisions of the TP Act allow the ACCC to authorise certain forms of anti-competitive conduct where the public benefits of such conduct outweigh the associated anti-competitive detriment. Parties gaining authorisation from the ACCC are granted immunity from legal proceedings under the TP Act in relation to the authorised conduct.

4.3 Review of regulation that restricts competition

As part of a series of inter-governmental agreements on competition policy signed in April 1995, the Commonwealth, State and Territory governments undertook to review by the year 2000 all legislation restricting competition or exempting conduct from the anti-competitive provisions of the TP Act. Subsequently, legislation that restricts competition is to be systematically reviewed at least once every ten years. The NCC oversees this review process and publishes annually a report on the reforms introduced by each government. The ACCC does not have a formal role in this regulation review process but may be asked to comment on government proposals to amend legislation which restricts competition.

4.3.1 Telecommunications case study

On 1 July 1997, the Commonwealth Government introduced a new legislative reform package designed to introduce full and open competition in the telecommunications industry in Australia. These reforms substantially increased the ACCC's regulatory role in the telecommunications sector.

4.3.1.1 Background

Prior to 1992 Telstra (formerly Telecom) was the wholly Government owned monopoly provider of telecommunications services.[71] Telecom also performed the role of regulator prior to this function being transferred in 1989 to an independent industry regulator, Austel. In 1991 the Government decided to issue a second carrier licence (to create a 'managed duopoly') and to expand Austel's role to include telecommunications industry competition matters. During this time the ACCC's role was for the most part limited to consumer protection issues.

Optus acquired the second carrier licence and began providing services in competition with Telstra in November 1992. Soon afterwards a legislated triopoly in mobile telephony was formed with Vodafone commencing services in October 1993. Limited opportunities for resale of Telstra's services were also allowed from 1991.

With the introduction of full and open telecommunications competition in Australia on 1 July 1997, telecommunications was brought within the reach of the general anti-competitive provisions of the TP Act. Because of uncertainty, however, as to whether these general provisions would deal effectively with the complexity and limited level of competition in some telecommunications markets, it was also decided that additional industry specific provisions should be introduced into the TP Act to regulate anti-competitive conduct in the industry. The industry specific provisions in Part XIB of the TP Act give

the ACCC powers to issue competition notices to carriers and service providers engaging in anti-competitive conduct. These notices are enforced through the courts and, if carriers are found to have contravened the provisions, they face significant pecuniary penalties and restitution orders.

The ACCC is also responsible for administering an industry-specific access regime for telecommunications under Part XIC of the TP Act. The aim of this regime is to provide for the long term interests of end users of telecommunication services through ensuring 'any-to-any connectivity' (maximising positive network externalities); promoting diversity and competition in the supply of carriage, content and other services; and promoting the efficient use of, and investment in, network infrastructure. The new telecommunications access regime provides a framework for regulated access rights to be established for specific carriage services and related services, and establishes mechanisms within which the terms and conditions of access to the network service can be determined.

There will always, however, be a primary reliance on commercially negotiated outcomes. Arbitration by the ACCC is a fall back option.

The TP Act provides extensive information gathering powers and the ACCC is able to make record keeping rules for specified industry participants to assist it in the administration of the telecommunications specific provisions. It is intended that these industry specific anti-competitive provisions will eventually be aligned, to the fullest extent practicable, with the general trade practices law. Finally, it should be noted that the ACCC is responsible for administering price cap arrangements applying to Telstra.

Technical regulation for telecommunications, such as spectrum management, has been transferred from Austel to a new independent regulator known as the Australian Communications Authority (ACA). The ACA also administers economic regulation in respect of licensing, carrier and service provider rules, numbering and universal service arrangements.

4.3.1.2 Reasons for regulatory changes in telecommunications

As noted above, it was considered that the special nature of the telecommunications industry warranted adoption of non-generic competition regulation for a transitional period. As competition in the telecommunications sector increases over time, there is an expectation that the need for special provisions will decline and reliance on the general competition law will be more likely to suffice. To assist this movement towards reliance on general competition law, it was decided to have the industry specific competition provisions administered by the ACCC under the TP Act and to leave technical and licensing issues to the ACA. It should be emphasised that the industry specific competition provisions are broadly consistent with the general provisions of the TP Act and complement rather than replace the general law.

The ACCC's role in telecommunications brings an 'economy wide' perspective to competition regulation in a sector experiencing rapid integration or 'convergence' with other industries such as information technology, financial services, broadcasting and, more recently, participants in the energy reticulation markets. This convergence has seen new service forms develop, while existing forms are merging to create new hybrid services. Hence, it is increasingly difficult to categorise services in traditional terms which may involve a simple linkage between a particular service and a particular technology used to deliver that service. Clearly, the convergence phenomenon has implications for the roles of different regulators and increases the arguments for general rather than industry specific regulation**.**

4.3.1.3 Interaction between the ACA and ACCC

Some telecommunications issues involve areas of overlap between the ACA and the ACCC. In general, where one agency has responsibility for a particular issue that may overlap with the other agency, there are legislative requirements for consultation and notification. For instance, while the ACA is generally responsible for specifying technical standards, where such standards are integral to competition within the market, the ACCC may assume primary responsibility for their issue. Moreover, given the telecommunications access regime is inextricably linked to technical matters within the industry, the ACCC must consult the ACA on various matters, such as the model terms and conditions to apply to telecommunications services subject to an access regime.

The chairperson of the ACA is currently an associate member of the ACCC, which enables the ACCC to call on relevant technical expertise when dealing with complex competition issues in the telecommunications industry. Further, as already mentioned, a member of the ACCC is an associate member of the ACA, which further reduces the possibility that conflicts or overlaps will exist or develop to any significant degree.

4.3.1.4 Personnel changes in the ACCC

When the new telecommunications regime commenced in July 1997, a number of Austel's experienced personnel were moved to the ACCC, along with its competition functions, so that the ACCC would have sufficient technical expertise to deal with the 'specifics' of the telecommunications industry. In addition, the ACCC has appointed a full time member of the Commission to be responsible for telecommunications issues.

4.3.1.5 Experience to date

Reform of the telecommunications market since July 1997 has seen a number of new carriers commence operations and offer competing services.

Two aspects of the regulatory regime have contributed to their success. First, the ACCC has additional powers to intervene if necessary in the marketplace and respond to anti-competitive conduct. Secondly, the legislated access regime provides the ACCC with discretion, after public consultation, to declare network services that it considers should be made available to all market participants. A number of basic network services essential for competition were declared from 1 July 1997, including originating and terminating access for fixed and wireless services, certain trunk transmission services, digital data access, and a conditioned local loop service. Further, the mere threat of regulatory intervention through mandated arbitration by the ACCC provides an incentive for access providers and seekers to come to a negotiated settlement. Recently, the ACCC has (amongst other things) raised the issue of declaring ISDN access services and sought public input into whether it should also declare local call resale as a service to which the access regime applies.

As noted above the new regulatory regime has seen the entry of a number of new carriers. There have also been price reductions and service enhancements for consumers and Telstra's market shares in international, domestic long distance and mobile telephony have declined. Notwithstanding these successes, Telstra retains a near monopoly position in local telephony and controls a large proportion of the telecommunications infrastructure. Reflecting this situation, there have been calls in the industry from new entrants for some additional regulatory initiatives to further assist in the development of competition.

The issues most commonly raised are the need for improved cost information disclosure requirements by the incumbent (to assist access seekers in the access negotiation process) and the need for an improved form of regulatory scrutiny of the incumbent's internal cost allocation. The question of whether these proposals should be accepted will require the Government to balance the claims of new entrants for additional regulatory assistance with the need to ensure that Telstra is not unreasonably constrained in responding to its competitors. The benefits to consumers from the new regime come as much from the actions of Telstra in responding to competition as from the initiatives of the new entrants themselves.

5. Conclusion

Australia has generally adopted a 'mandated' division of labour approach to regulation on the basis that having a general competition law administered by a single independent statutory body, the ACCC, promotes consistent application of competition regulation across all sectors of the Australian economy. However, governments have recognised the desirability of the ACCC having 'economic regulatory' roles in some industry sectors, in particular, essential infrastructure and network industries. Industry specific competition regulation has been employed sparingly (currently telecommunications and conference shipping).

In the longer term, as competition increases in industries previously exempt from the TP Act or otherwise benefiting from legislative barriers to competition, and convergence between industries such as information technology and telecommunications continues, greater reliance will be placed on general competition laws rather than industry specific regulation. This will mean that the ACCC will need to continue to develop its in-house expertise in relation to a number of industries and continue to consult frequently with industry-specific regulators to assist in the smooth operation of competition, economic and technical regulation.

NOTES

68. Issues paper attached to Mr Phillips' letter (CLP/98.38) of 1 April 1998.

69. *ibid.*

70. The ACCC absorbed this price monitoring or 'economic regulation' function, when the Prices Surveillance Authority and the Trade Practices Commission merged in 1995 to form the ACCC. However, use of prices surveillance has decreased considerably in Australia over the past few years.

71. Telstra was partly privatised in November 1997.

CANADA

1. Introduction

This paper sets out the Canadian experience regarding the evolution in thinking and approach to regulation in the telecommunications sector. Interventions by the Director of Investigation and Research ("the Director"), and the decisions of the Canadian Radio-television and Telecommunications Commission ("CRTC") have played a pivotal role in this regulatory reform process, and in turn, dramatically changed the competitive landscape of the Canadian telecommunications industry.

There has been an ongoing debate in Canada and other countries on the approach to take with respect to the need and appropriate scope of regulation in the telecommunications sector. Up to the late 1980s the prevailing view in most countries was that the telecommunications sector was a natural monopoly. Under this regime, regulatory policy promoted: (1) the maintenance of universal access at affordable rates; and (2) permitted cross-subsidisation by allowing the monopolist to use revenues from public long distance services and, to a lesser extent, from local services to offset the costs of providing subscriber access.

Starting in the 1990s, the structural and economic assumptions that had been the bases of regulation of the telecommunications industry were being undermined by technological change. In addition, domestic markets were opening up to foreign competition, as evidenced by the commitments made by countries in the GATS Agreement in Telecommunications. The combination of technological change and expanded choice through trade and investment has eroded the ability of telecommunications operators to maintain monopoly control over the delivery of telecommunications services. These influences have engendered a sea change in attitudes: advocates of regulation must clearly demonstrate that regulation is superior to market forces with respect to the price, quality, and scope of service provided by the telecos. The focus has shifted to how best maximise the long run efficiency of the sector and to realise gains from competitive markets. As a result, competition law has increasingly taken centre stage as the guarantor of competitive markets in the telecommunications sector.

2. Background

The CRTC is an independent agency operating at arm's length from government and reporting to Parliament through the Minister of Canadian heritage. The CRTC is fundamentally a sector regulator in the sense that it regulates two sectors of the telecommunications industry? broadcasting and telecommunications. The objective of the CRTC is "to regulate and supervise all aspects of the Canadian broadcasting system," with a view to implementing the broadcasting policy set out in the *Broadcasting Act*, to "regulate rates and other aspects of telecommunications in Canada," so as to implement the policy set out in the *Telecommunications Act*, and to "balance the interests of consumers, the creative community, and distribution industries."

In contrast, the Competition Bureau is responsible for the administration of framework competition law. Unlike the CRTC, which has diverse economic and social policy goals not related to

competition, the overarching purpose of the Bureau is the promotion of efficient and competitive markets, and enforcement of the *Competition Act* to prevent anti-competitive behaviour in all sectors of the economy. Unlike economic regulation, competition law does not involve prior approval for a course of business conduct. The Competition Bureau is principally an investigative agency, charged with enforcing the *Act*. The Bureau does not regulate levels of service, quality, prices or profits. Rather, these outcomes, where they are not specific to regulatory intervention, are determined by the influence of market forces.

3. The Relationship between Competition and Economic Regulation

Free market forces, operating under competitive conditions, are widely recognised as the best means of enhancing efficiency and maximising total economic welfare. Vigorous and effective competition encourages firms to lower costs, reduce prices, improve services and develop new products. Optimising opportunities for competition to generate these benefits is particularly important for an open, market-based economy like Canada's.

In certain situations, where market forces fail to produce economically efficient outcomes or achieve other social policy goals, regulation may be required. Regulation, however, is not without costs. Not only are there administration and compliance costs to a regulatory regime, but there are also costs related to the distortions it produces in the marketplace.

Experience in the telecommunications sector suggests that, in practice, regulation has not been an effective way to promote economic efficiency since: (1) the incentives to reduce cost and innovate are distorted; (2) relative prices and costs are misaligned in order to achieve social policy objectives; (3) costs are imposed in terms of pricing inflexibility and delays in the introduction of new products and services; and (4) once social policy objectives are achieved, such as universal telephone service at affordable rates, it has proven very difficult to realign prices and costs when returning to competition.

These distortions and costs are particularly damaging in a dynamic sense because regulators, no matter how well intentioned, cannot respond to technological change as fast as the marketplace. Such regulatory lags at best slow the rate of innovation and the introduction of new technologies, and at worst, prevent new technologies or innovation from emerging. Consequently, consumers may be denied the benefits of products which never come to market. Regulation also inhibits competitors by denying regulated firms the full pricing flexibility needed to respond to competitive pressures in the market.

This process is compounded in an industry like telecommunications which is characterised by rapid technological change and where the boundaries between telecommunications, computing and television distribution are disappearing. The costs to the economy as a whole become even greater when the regulatory scheme is out of step with technological advancements.

The debate with respect to the relationship between competition authorities and the regulator in the telecommunications sector is intensified by convergence. Broadcasting and telecommunications worlds are penetrating each others markets because of the major impact of digital technology and the increasingly wide array of new products and services it brings. This means that as convergence evolves, competition authorities and the regulators are increasingly forced to navigate their way through highly complex issues in order to come to grips with the issue "if competition, then how much and how soon". Ultimately, how competition authorities and regulators work out accommodations with each other will determine the shape of the telecommunications sector and thereby the extent to which users will benefit from a modern telecommunications system, and by extension, therefore, the impact on economic growth and adaptability of the economy.

3.1 Sections 125 and 126 of the Competition Act (the "Act")[72]

Sections 125 and 126 of the *Act* provide the Director of Investigation and Research (the "Director") with independent authority to advocate competition before regulatory bodies in certain circumstances. These two sections of the *Act* are the primary loci where the regulator, in this case the Canadian Radio-television and Telecommunication Commission (CRTC), and the Director of Investigation and Research (the "Director") interact. Section 125 of the *Act*[73] enables the Director to make representations in respect of competition before any federal board, commission or other tribunal where such representations are relevant to the matters under consideration and the factors that can be taken into consideration by the board, commission or other tribunal in making its decision. Section 126 of the *Act*[74] allows the Director to make such representations to provincial boards, commissions or tribunals, with the consent of the relevant body.

The Competition Bureau has made extensive contributions to regulatory and other proceedings regarding the evolution of the Canadian telecommunications sector. Between 1975 and 1996 the Competition Bureau made 82 interventions or representations, of which 48 were in the telephone sub-sector, eleven on radio common carrier, ten on cable common carriers and radio broadcasting.[75] Sixty-six of the representations were made to federal boards or bodies and sixteen to provincial boards or bodies. The interventions have addressed broad matters relating to the opening of markets to competition, reforming the regulatory framework to facilitate a transition to competitive markets and arguing for forbearance on competition grounds.

In its submissions, the Bureau has advocated that certain fundamental principles should govern the regulatory framework for the development of competition in communications services. In summary, these principles are:

- first: maximise the reliance on competition and market forces at the outset;
- second: as a corollary to the first, minimise regulation for incumbents and avoid imposing economic regulation on the new entrants;
- third: adopt market-based pricing as soon as possible in local telecommunications and, if necessary, introduce specific, targeted mechanisms to address social policy objectives;
- fourth: establish clear rules governing incumbents' obligations to provide access to their networks by competitors and adopt appropriate pricing principles to induce efficient competition;
- fifth: establish timely and effective dispute resolution mechanisms to ensure incumbents do not attempt to delay access to their networks; and
- sixth: liberalise foreign ownership rules for communications networks to assist in the rapid construction and development of communications networks.

3.2 Regulated Conduct Defense (RCD)[76]

In a number of competition regimes, firms which engage in practices which may be considered anti-competitive have sought protection in the courts by advancing a legal "regulated conduct" doctrine.

In effect, this doctrine allows firms, if taken to court, to argue that their specific actions were carried out within the ambit of allowable regulated behaviour.

Jurisprudence, developed primarily under the criminal provisions of the *Competition Act*, has held that, in certain circumstances, parties who have breached the *Competition Act* may have a defence if those activities are undertaken pursuant to valid regulatory legislation. This "regulated conduct defence" is limited to specific conduct authorised by valid legislation and is not a defence for all types of behaviour in a regulated industry. The rationale for the defence is that valid regulation properly applied is deemed to be in the public interest and firms cannot be found culpable under the *Competition Act* for activities authorised by the regulator.

The mere fact that government regulation exists in a given sector does not in itself preclude the application of the *Competition Act*. Furthermore, whether or not such a defence may be applicable depends upon a careful examination of the nature of regulation and the facts of the particular case under review. The Director of Investigation and Research has identified four elements necessary for the defence to be considered: the relevant provincial board or federal legislation must be validly enacted; the activities must both fall within the scope of the relevant legislation, but also be specifically authorised; the authority of the regulatory body must have been exercised; and finally, the activity or conduct in question cannot have frustrated the exercise of authority by the regulatory body.

The RCD was primarily developed in the context of the criminal law provisions. The applicability in the context of the non-criminal provisions of the *Act* is less clear. In a recent case involving the Law Society of Upper Canada, the court accepted the regulated conduct defence in a civil case.[77] As a result, it has been pointed out that the civil provisions may be concurrently applicable to particular conduct, along with relevant regulatory statutes. The issue of the applicability of the regulated conduct defence has not been completely resolved, as there is a belief by some that its applicability should be further delineated according to whether the statute is federal or provincial, and that different tests may be applicable.

3.3 Forbearance[78]

A related concept to the RCD is regulatory forbearance, which is of significance to the work of the Competition Bureau in the telecommunications sector. Regulatory forbearance may be generally defined as the doctrine and practice of reducing or possibly eliminating rules or practices imposed on an industry. In this particular circumstance, the regulator explicitly withdraws from regulation of a specific activity, normally pursuant to specific legislative provisions that permits it to do so, and based on a determination on the regulator's part that such action serves best the purposes of the relevant legislation.[79] The regulator may determine that market forces and outcomes serve the purposes of the relevant legislation as well if not better than regulation. By forbearing, the regulator does not abdicate or transfer his responsibilities but merely refrains from certain forms of market intervention. If this decision turns out to be incorrect, the *status quo ante* can be restored. As a result, forbearance may be conditional or unconditional, further, it may apply to some sellers in a market or to all of them.

The *Telecommunications Act*[80] makes a distinction between the two conditions under which the Canadian Radio-television and Telecommunications Commission (CRTC) may forbear, and where forbearance is mandatory. Under section 34(1) of the *Telecommunications Act*, 34 (1):

> "The Commission *may* make a determination to refrain, in whole or in part and conditionally or unconditionally, from the exercise of any power or the performance of any duty under sections

24 (conditions of service), 25 (rate approvals), 27 (just and reasonable rates), 29 (approval of working agreements on interconnection) and 31 (limitations on liability)[81] in relation to a telecommunications service or class of services provided by a Canadian carrier, where the Commission finds as a question of fact that to refrain would be consistent with the Canadian telecommunications policy objectives."

Under section 34(2), by contrast, forbearance is mandatory when the:

"Commission finds as a question of fact that a telecommunications service or class of services provided by a Canadian carrier is or will be subject to competition sufficient to protect the interests of users, the Commission shall make a determination to refrain, to the extent that it considers appropriate, conditionally or unconditionally, from the exercise of any power or the performance of any duty under sections 24, 25, 27, 29 and 31 in relation to the service or class of services."

However, section 34(3) has a constraining effect on the regulator whereby:

"The Commission shall not make a determination to refrain under this section in relation to a telecommunications service or class of services if the Commission finds as a question of fact that to refrain would be likely to impair unduly the establishment or continuance of a competitive market for that service or class of services."

The issue of whether a decision to forbear, in whole or in part, is sufficient to eliminate the availability of the RCD has not been resolved. There is support in some quarters for this interpretation (i.e., that the *Act* does apply),[82] Hunter *et al* argue that there may be some uncertainty particularly in cases of partial rather than total forbearance from regulation of particular activities.[83] Furthermore, the CRTC retains the authority to review, rescind or vary its forbearance orders, thereby raising the possibility of re-regulation. Experience with this concept and jurisprudence on the matter will provide essential insights on how the RCD applies to such situations.

4. Competition Bureau Interventions in the Telecommunications Sector

The following section discusses some of the more significant interventions of the Competition Bureau which facilitated an opening up of telecommunications markets to competition.

4.1 Long Distance Competition (CRTC 92-12)[84]

In June 1992, the CRTC issued a directive that has had significant impacts on the scope, variety and prices of telecommunications services available to Canadians, The decision was driven by an application by Unitel Communications Inc. (Unitel) and B.C. Rail Telecommunications/Lightel (BCRL) consortium to interconnect with the networks of several Canadian telephone companies. In its proceedings, the CRTC took the opportunity to seek the views of interested parties on a number of factors that went beyond the issue of lower long distance rates vs. higher local rates applications of Unitel and BCRL to include views on the regulatory regime that would "maximise any advantages or reduce any disadvantages associated with approval of either or both applications ..." The Commission examined *inter alia* alternative types of interconnection, the basis for rates to be paid for interconnection and their relationship to costs, existing tariffs, productivity, and quality of interconnection.

The principal theme of the Director's intervention was that competition was feasible and in the public interest, and that an open entry model establishing interconnection would create competition where members of Telecom Canada currently enjoyed a monopoly position. The Director's submission argued that "a single integrated monopoly provider had failed to respond fully to the diverse needs of its customers," and that competition would expand consumer choice, stimulate productivity gains, and enhance network efficiencies without necessarily jeopardising the affordability of local telephone services.

The Commission's report indicates a real concern about the importance of telecommunications as a productivity enhancer, and that choice is fundamental to Canadian businesses obtaining "network services and prices that best conform to their needs". The Commission concluded that "competition (in the long distance telecommunications market) will result in greater choice, supplier responsiveness and services diversity, particularly in the business sector and on high density routes ... (and that competition) not only can be expected to increase pressure to reduce rates, but increase choice and supplier packages tailored to address the specific needs and application of a greater variety of user groups."

4.2 Long Distance Forbearance

In November 1996, the Director intervened in a proceeding established by the CRTC to determine if the market for long distance telephone services was sufficiently competitive to warrant forbearance from regulation by the CRTC of the services provided by dominant carriers. As noted above, under section 34 of the *Telecommunications Act*, the CRTC is required to forbear from regulation where it finds that a service or class of service is sufficiently competitive to protect the interests of users and forbearance would not unduly impair the development of a competitive market. The Competition Bureau submitted that the market for long distance services was sufficiently competitive to warrant broad forbearance of these services. With the exception of ensuring that access to transmission capacity be made available for resale and sharing for a period of two or more years, the Bureau advocated full deregulation of long distance services.

In its analysis, the Commission adopted the concept of market power[85] as the standard by which to determine whether a market is, or is likely to become, workably competitive. The Commission found that "a determination to forbear from regulation of the services provided by the Stentor companies[86] ... would, under subsection 34(1) of the (*Telecommunications*) *Act*, be consistent with the Canadian telecommunications policy objectives, including section 7(c) of the Act - to enhance the efficiency and competitiveness of Canadian telecommunications, and section 7(f) of the *Act* - to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective." In addition, the Commission expressed the view that it would be appropriate under subsection 34(2) of the Act to forbear as it found that the toll and toll free markets were subject to a level of competition sufficient to protect the interests of users of toll and toll free services, and that "to forbear would not impair unduly the establishment or continuance of a competitive market for toll or toll free services." The Commission did find "that the retention of a ceiling on basic toll rates would be appropriate ... (as this) ... would preclude the Stentor companies from generating increased revenues from the basic toll sector of the toll market which could be used to finance below cost pricing in areas of the market which are highly competitive. The retention of a ceiling would also provide consumers in the less competitive non-equal access areas with an additional safeguard against unjust or unreasonable rate increases in a de-tariffed environment." In an effort to ensure that basic long distance rates continued to be "just and reasonable", the Commission placed a ceiling on the telephone companies' overall rates for basic long distance service for the next four years. In addition, it required telephone companies to provide

reasonable advance notice to subscribers of any price increases to basic long distance rates, and to publish those rates.

4.3 Local Competition and Interconnection and Unbundling (Open Entry Model)

4.3.1 Rate Rebalancing

On 16 December 1992, the Commission announced its intention to review the approach it was taking in the regulation of telephone companies that provide telephone service in order to ensure that " the manner in which it regulates is efficient, effective and in the public interest."[87] At the time, the Commission noted that "technological change and increasing competition (had) significantly altered the nature of the telecommunications industry (and that) changes had allowed the telephone companies under its jurisdiction that provide local exchange service to develop a wide range of new audio, video and high-speed data services to satisfy the demands of both business and residence consumers in the local and long distance markets." However, despite the fact that Commission decisions had allowed more competition in a number of market segments, the telephone companies continued "to maintain effective control of the provision of network access and local services and to dominate the public long distance market."

The Commission sought proposals dealing with *inter alia* the most appropriate form of monopoly regulation, alternatives to traditional rate base rate of return regulation, and incentives for telephone companies to be innovative. In seeking views, the Commission noted that changes to the regulatory framework would have to be conducive to universal accessibility to basic telephone services at affordable prices, opportunity for telephone company shareholders to earn a reasonable return on their investment, and equitable treatment of subscribers in terms of service and price and assurance that telephone companies do not unfairly take advantage of their monopoly or dominant market positions in dealings with competitors.

In his submission, the Director stressed that (1) pricing based on costs is necessary in order to improve economic efficiency, deter uneconomic entry, send proper investment signals and ensure that competition in local markets is not precluded by below-cost pricing; (2) a pricing system that subsidises users regardless of need is inefficient; and (3) rate restructuring is unlikely to significantly affect the goal of universality, given the extremely low percentage of household income spent on local telephone service, relative to the value derived, and the offsetting effects of lower long distance rates on subscribers' monthly bills.

The Director also stated that the Commission should forbear from regulation as soon as possible in markets that are workably competitive. Further, if there is some question as to the degree of sufficiency of competitive forces in a particular market, the Commission should err on the side of forbearance, i.e., it should cease regulating and allow competition to unfold. The Director also noted that section 34 requires the Commission to forbear not only when it finds that a market is workably competitive, but also when it finds that a market will likely become competitive in the future. The Director also submitted that public policy should not concern itself with market power per se, but rather with the abuse of market power.

In its decision,[88] the Commission concluded that the subsidy from long distance to local service is substantially larger than necessary to maintain affordable access to telecommunications and imposes an inequitable and unnecessary burden on many long distance users. In its view, "meaningful regulatory reform (could not be) undertaken without a significant reduction in the subsidy that users of long distance services are currently providing in order to keep rates for local/access service low." The Commission observed that "the objective under the (*Telecommunications*) *Act* of affordable telecommunications

applies to long distance services, as well as local services, and is of the view that maintaining contribution and toll rates at higher levels than necessary would be inconsistent with the achievement of that objective." The Commission stated that while productivity improvements and revenues from new optional services would help to reduce the local/access shortfall, these factors alone would not be sufficient to bring the subsidy down to a more appropriate level.

The Commission expressed concern that while penetration is the most reliable indicator of affordability, many low-income subscribers, particularly the majority who do not make substantial use of long distance service, will have less disposable income after rate rebalancing. As a result, the Commission constrained the increase on the local side to a specific dollar amount, even though that may not be enough to fully eliminate the shortfall. Moreover, rate rebalancing was implemented over a transitional period to further mitigate the impact on subscribers.[89]

4.3.2 Interconnection and Unbundling

On 9 April 1996, the Commission initiated proceedings to establish the necessary frameworks for co-location, local number portability, unbundling and interconnection.[90] The purpose of the proceedings was to give effect to the conclusions reached by the Commission in Decision 94-19 that increased local competition is in the public interest.

In his submission, the Director argued that the objective of interconnection and unbundling must be the maximisation of the benefits to the public that flow from competition. The Director submitted that the sharing of the costs of facilities between two interconnecting networks provides an incentive to co-operate in minimising the costs of joint interconnection.

In its decision, the Commission set out the framework for facilitating entry of new providers into the residential and business local service market. The thrust of the Commission's decision was to create conditions for robust and genuine the competition, thereby encouraging industry to offer new services which will better respond to the needs of consumers.

The main features of the decision are:

- telephone companies required to "unbundle" components of their local networks so that new entrants can have access to these components at reasonable rates. As well, to encourage new entrants to invest in their own network, the Commission permitted resale of certain facilities to allow early competitive entry;

- establishment of a "portable subsidy" plan allowing the new entrants to provide service in high cost and rural areas by having access to the same subsidy currently used by the telephone companies;

- implementation of price cap regulation, effective January 1, 1998, for an initial period of four years. Consumer rates charged by the new entrants will not be regulated and price cap regulation will apply to the dominant telephone companies;

- introduction of a number portability scheme which will allow consumers to keep their existing telephone number regardless of the service provider they choose;

– effective immediately cable companies would be allowed to enter the local telephone market, and that effective June 16, 1997, telephone companies, were permitted to apply for broadcasting licences to enter the distribution market as of January 1, 1998.

4.4 Broadcasting

Broadcasting has two components: the broadcasting itself, which deals with speciality channels etc., and which is heavily regulated for Canadian content, diversity of opinion etc., and the distribution of broadcasting services, which used to be dominated by large cable operators, but is now open to competition.

On August 6, 1996 the Government of Canada issued its Convergence Policy Statement, which established broad policy objectives for telecommunications and broadcasting in an era of convergence. In particular, the statement established a framework for competition between telecommunications carriers and cable television companies in their core markets. A cornerstone of the convergence policy was the adoption of a "no head starts" rule, providing that telecommunications carriers can enter broadcasting distribution only after the CRTC has set the regulatory framework for competition in local telephone service and the necessary tariffs have been approved by the Commission. As noted above, the Commission set January 1, 1998 as the target date for telco entry into broadcast distribution.

In recent years, a number of wireless means of distribution have emerged which are capable of competing with cable technology, specifically low power satellite delivery, either directly to the home or to satellite master antenna television systems ("SMATV") installed in apartment buildings, and multipoint distribution systems ("MMDS") which use frequencies in the microwave range. MDS, LMCS, and DTH are providing broadcasting services that are beginning to have a competitive impact in the Canadian broadcasting sector.[91]

In light of the competitive environment that is rapidly emerging with respect to the distribution of broadcasting services in Canada, the Commission initiated a public process to review and update its regulatory framework for distribution undertakings.[92] In his submission to the Commission, the Director supported a number of the Commission's proposals, for example the elimination of price regulation. As well, the Director's submission addressed a number of other issues, *inter alia*, that economic viability of the licence applicant or the incumbent should not be a criterion in granting broadcasting distribution licences, licence transfers should be as unrestricted as possible, and that mandatory subscription to basic services should not be a precondition to the purchase of discretionary service.

Finally, during the Commission's proceedings, representatives of the telephone industry raised a concern regarding the possibility that cable distributors might resort to anti-competitive pricing practices as a means to forestall the introduction of competing distribution undertakings in their markets. In a second stage submission, the Director specifically addressed this question of predatory pricing. In the Director's view, given the current market dominance of the cable companies, the possibility of predatory pricing behaviour could not be totally ruled out, but the potential for such behaviour is low. The Director also cautioned that putting in place rigid price floors or other pricing rules such as those proposed by some parties, in anticipation of predatory pricing, could have the undesirable effect of dampening price competition.

In its decision, the Commission established a new policy framework applicable to all distributors of broadcasting services in Canada, including both terrestrial distributors using wireline or wireless technologies and DTH satellite distributors. The new policy framework is intended to guide the transition

to a competitive environment by treating all distributors fairly and equitably, thereby fostering "fair competition in the broadcast distribution market in a way that will benefit consumers and strengthen the presence of high-quality Canadian programming in the Canadian broadcasting system."

The main features of the new framework are as follows:

- as a general rule, new entrants must meet the same signal carriage and substitution requirements that are imposed on the incumbent competitors.

- new competitors have guaranteed access to all licensed programming services. Distributors are prohibited from employing anti-competitive practices, e.g., exclusive contracts, in relation to the acquisition or distribution of programming service.

- subscriber fees of new undertakings entering into competition with existing distributors will not be regulated. Once full competition becomes established in the distribution market, the basic monthly fee of a Class 1 cable distribution undertaking will be deregulated.[93]

- distributors are not required to own the equipment and facilities used to deliver their services to subscribers. This will enhance competition by providing distributors with the option of sharing existing network infrastructures.

- distributors must offer customers wishing to switch to another service provider the option of purchasing their inside-the-premises wire for a nominal charge.

5. Conclusion

The entire Canadian telecommunications market, from local calling to long distance and international calling, and the market for broadcast distribution, is in the process of opening up to competition. This has been accompanied by a substantial change in the regulatory framework governing the sector.

The advocacy role provided under Canada's *Competition Act* has permitted the Competition Bureau to successfully promote competition principles as a key focus in the Commission's decision-making process. In addition, the Commission has been willing to forbear in a number of key decisions. This is a natural response to rising demands for greater competition in the telecommunications sector. The nature and thrust of the pro-competitive case of the Bureau is found in the Commission's conclusions and decisions. The old approach of rigid regulation of the sector has given way to a regulatory framework that is increasingly influenced by competition. Increasingly, the *Competition Act* is the guarantor of competition in the sector.

NOTES

72. The following draws from Joseph Monteiro and G. Robertson, Competition Policy Activities in Canada Related to the Telecommunications Sector, 1976-1996, internal working paper, Competition Bureau, Ottawa, 1998.

73. Section 125 was added in 1976 (as section 27.1 of the Combines Investigation Act, predecessor to the Competition Act).

74. Section 126 was added in 1986.

75. Joseph Monteiro, "Regulatory Interventions by the Competition Bureau of Competition Policy," in R.S. Khemani and W.T. Stanbury (eds.), Canadian Competition Law and Policy at the Centenary, Halifax: Institute for Research on Public Policy, 1991, 451-461.

76. The following is based on Robert D. Anderson, Abraham Hollander and Joseph Monteiro, "Regulatory Reform and the Expanding Role of Competition Policy in the Canadian Economy, 1986-1996," Review of Industrial Organisation (forthcoming); Gerald Robertson, W. T. Stanbury, Gernot Kofler and Joseph Monteiro," Competition Policy, Trade Liberalisation and Agriculture", a paper prepared for the Third Agricultural and Food Policy Systems Information Workshop, Tuscon, Arizona, 1997; and Monteiro and Robertson, supra, note 1.

77. Mercer, op cit. In this case, the applicants alleged that the Law Society's scheme did not permit members from buying insurance competitively on the open market which was contrary to the abuse of dominant position and tied selling provisions of the Competition Act. The Court found that the Ontario Law Society Act contained specific authority to operate an insurance scheme and therefore the regulated conduct defence applied. The Director decided to not proceed with the inquiry even though it involved the civil provisions.

78. The following is based on Monteiro and Robertson, supra, note 4.

79. See Richard J. Schultz and Hudson Janisch, Freedom to Compete: Reforming the Telecommunications Regulatory System, (Bell Canada Corporate Affairs, March 1993).

80. Telecommunications Act, S.C., 1993.

81. This includes the following: promoting the development of telecommunications in Canada; giving access to Canadians in all regions to affordable quality services; promoting the use of Canadian installations; and stimulating R&D. Also, included is the objective of increasing reliance on market forces for the provision of telecommunications services.

82. Please see Don Mercer, The Regulated Conduct Defence and the Telecommunications Industry (Ottawa: Competition Bureau, September 1995). Mercer notes that the Bureau would consider three approaches in challenging the RCD. "These were to demonstrate that: (1) the behaviour of those under regulation was hindering the regulator; (2) the regulator has not exercised its authority. (sometimes described as abdication or forbearance by the regulator); and (3) the regulatory legislation may be subject to the Act."

83. Lawson A.W. Hunter et al, All We Are Saying, Is Give Competition A Chance ? The Role of Competition in Industries in Transition from Regulation to Competition (Paper presented at a Roundtable on the Competition Act, Ten Years On: A Stocktaking, University of Toronto Faculty of Law, December 8, 1995).

84. The Canadian Radio-television and Telecommunications Commission, Telecom Decision 92-12, Ottawa: June 12, 1994. The Commission's decision also liberalised previously established rules governing resale and

sharing of private lines, extending them throughout all Canada, and also permitting the resale of Wide Area Teleohone Service. Please see http://www.crtc.gc.ca for a full listing of CRTC public notices, decisions, and press releases.

85. The Commission cited as an accepted definition of market power the ability of a firm to impose unilaterally and profitably a significant, non-transitory price increase within the relevant market .In assessing whether carriers possess market power, the Commission considered a number of factors: (i) market shares of the dominant and competing firms; (ii) demand conditions; (iii) supply conditions; and (iv) evidence of rivalrous behaviour.

86. AGT Limited, now TELUS Communications Inc. (TCI), BC TEL, Bell Canada (Bell), The Island Telephone Company Limited (Island Tel), Manitoba Telephone System, now MTS NetCom Inc. (MTS), Maritime Tel & Tel Limited (MT&T), The New Brunswick Telephone Company, Limited (NBTel) and Newfoundland Telephone Company Limited, now NewTel Communications Inc. (NewTel) (collectively, the Stentor companies, i.e., incumbent local exchange carriers (ILECs)).

87. Telecom Public Notice CRTC 92-78 (Public Notice 92-78).

88. CRTC Telecom Decision 1994-19.

89. Effective January 1, 1995 rate rebalancing called for three annual increases of $2 per month in rates for local service, with corresponding decreases in rates for basic toll service.

90. Implementation of Regulatory Framework - Local Interconnection and Network Component Unbundling - Oral Hearing, Telecom Public Notice CRTC 96-11 The Commission held an oral public hearing to receive views in August - September 1996.

91. MMDS (Microwave Multipoint Distribution System), LMCS (Local Multipoint Communications Systems or wireless broadband distribution), DTH (Direct to Home). The CRTC has licensed five DTH service providers of which two have now commenced service. number of MMDS service licenses have been awarded and commercial services have been launched in Western Canada with other markets to follow in 1998. LMCS licenses have been awarded in 66 major markets and 127 smaller communities with service providers installing facilities and conducting market tests and technical trials. Early competitive inroads via DTH and MMDS have occurred mostly in rural, non-cabled areas.

92. Public Notice CRTC 1996-69, 17 May 1996.

93. Class 1 - 6000 or more subscribers; Class 2 - 2000 or more, but fewer than 6000 subscribers; and Class 3 - fewer than 2000 subscribers and all existing Part III licensees as defined in the Cable Television Regulations, 1986 (the existing regulations), regardless of size.

DENMARK

1. Introduction

Concurrently with the liberalisation of the public owned monopolies there is a need for regulations governing the process of liberalisation. The regulations shall secure the success of the transition from public monopolies to competitive markets without harming important social considerations.

In many cases the overall competition regulations may be adequate to provide the framework for a competitive market. In other cases it may be necessary to introduce sector-specific competition rules supplementing the overall competition rules.

But which authority should monitor the sector specific competition rules? Should the sector-specific competition rules be administered by the overall competition authority or by the sector authority?

The Danish Government appointed in early 1997 a committee in order to establish the most appropriate division of work between the Competition Authority and the Sector Authorities with a mandate to submit a number of recommendations.

The purpose of this paper is to present, in a very short form, the principles regarding the administration of sector specific competition rules recommended by the Committee. As shown, the recommendations had a significant impact on the specific wording of the telecommunications and railway laws.

2. Considerations behind sector-specific competition regulations

The Committee found that competition issues should normally be administered by The Competition Authority. The recommendation was motivated by the advantages involved in:

- using the available expertise of the Competition Authority;
- limiting the total combined expenses of the regulatory authorities;
- ensuring an equal treatment of competition issues, no matter which sector it concerned.

Next, the Committee investigated sector-specific competition regulations already introduced in order to determine which types of sector rules should be monitored by the Competition Authority and which rules more adequately could be monitored by the Sector Authority. The following three main considerations behind sector-specific competition regulations were identified:

- regulations concerning quality, safety and environment;

- regulations ensuring public services at fair prices (PSO);
- regulation ensuring access to infrastructure facilities.

2.1. Regulations concerning quality, safety and environment

The objective of this kind of regulation is to safeguard social considerations, for example by ensuring flight safety and the quality of foodstuffs. Also, different modes of production in the energy sector affect the environment differently and could justify regulation of the use of fuel.

Although regulations concerning quality, safety and environment can have an indirect effect on competition the purpose is not to regulate competition. The administration of the sector regulation was therefore recommended to be dealt with by the Sector authority.

2.2. Regulations ensuring public services at fair prices (PSO)

For reasons of distribution policy, including regional policy, it may be found reasonable that users enjoy equal access to important services, such as being able to mail or receive letters. Therefore, when liberalising a sector it can be necessary to introduce regulations defining the PSO, that is to which kind of services the users should be given equal access. At the same time regulation should define prices and other conditions concerning the services.

It is evident that rules determining prices normally impede competition. In some cases it can be a political demand that prices be set very low, for example for reasons of distribution policy. Obviously, the overall competition rules cannot be used to require undertakings to set their prices below average costs. In other cases, the rules for setting prices and other terms could align so closely with the principles of competition law that the supervision corresponds to supervision normally done by the Competition Authority.

In brief, the Committee recommended that the Sector Authority should be responsible for overall supervision, including monitoring that the undertaking in question observes its public service obligations.

The Competition Authority, on the other hand, should monitor a public service provider's compliance with prices or price calculations laid down by sector-specific regulation. However, if the task of supervising prices forms an integral and coherent part of the Sector Authority's other duties concerning the industry, it could be more efficient also to let the Sector Authority monitor the prices.

In addition, the Competition Authority should monitor any attempted cross subsidisation.

2.3. Regulation ensuring access to infrastructure facilities

Often, liberalising an industry implies that the former public monopoly will maintain a strong position on the newly liberalised market. Especially, if it has control of the infrastructure. Therefore, to ensure upstream or downstream operating competitors access to the infrastructure at fair prices and terms, it could be necessary – at least in the short run – to introduce some sector-specific competition rules.

When regulating access to infrastructure one can distinguish between considerations concerning efficiency and considerations concerning competition. Considering efficiency, from a macro economic point of view, one should utilise the infrastructure in the most efficient way in order to avoid duplicating the infrastructure (building parallel rail tracks, parallel harbours etc.). Therefore, it could be desirable to compel the owner of the infrastructure to lease the infrastructure at long run marginal costs.

From a competition point of view, if the owner of the infrastructure also operates upstream, low prices for access to the infrastructure make it easier for new companies on the upstream market to compete with the owner of the infrastructure.

However, prices based on long run marginal costs will normally not cover the costs. Often public monopolies are "natural" monopolies with large fixed costs and small marginal costs. If the natural monopolist is forced to base its prices on marginal costs it will make negative profits.

Therefore, in order to secure investments in and modernisation of the infrastructure in dynamic industries it can be necessary to allow the owner of the infrastructure to lease at a price covering the necessary costs.

Furthermore, if it is considered pro-competitive to have a parallel infrastructure, competitors should be given an incentive to build new infrastructure. In that case, one should consider allowing the owner of the existing infrastructure to charge relatively high prices for access to the infrastructure.

It is clear that sector specific rules on pricing can have effects clashing with the principles of the overall competition rules. Therefore, the Committee recommended that the Competition Authority should monitor rules in relation to efficiency and competition, unless the purpose of the rules clearly deviates from the principles of the Competition Act.

Table 1
Outline of the Committees recommendations
on principles concerning monitoring sector-specific competition regulations

Area	Authority
• Standard competition laws • Sector-specific laws based on the principles of competition law	• The Competition Authority
• Regulations concerning quality, safety and environment	• The Sector Authority
• Regulations ensuring provision of public services at fair prices (PSO)	• Supervision by the Sector Authority • Prices normally by the Competition Authority • The Competition Authority should monitor cross subsidising
• Regulations on infrastructure access	• Normally the Competition Authority - However, the Sector Authority if monitoring is of a very technical nature or the principles clearly deviate from the Competition Act.

3. The principles used in telecom and railway legislation

As earlier noted, the Committee's recommendations significantly affected the specific wording of the telecommunications and railways laws. However, it could be useful to give an overview of the process of liberalisation in Denmark, especially in the railway sector. Telecommunications liberalisation in Denmark has been implemented in accordance with the EU rules and will therefore be presented only very briefly.

3.1 The telecommunications and railway laws in a liberalisation context

3.1.1 Telecom

Through the 1990s a political consensus of opinion has paved the way for a total liberalisation of the Danish telecommunications sector. The liberalisation process has been implemented in compliance with the requirements and recommendations specified by the EU Commission, and resulted in a total liberalisation of the Danish telecommunications sector six months prior to EU's deadline of 1 January 1998.

3.1.2 Railway

In 1996 the Danish State Railways - DSB – were divided into an operator and an infrastructure undertaking. The infrastructure section under DSB was established under the name of the Danish National Railway Agency as an independent government undertaking by an Act of Parliament on 1 January 1997. Under the Act, the Agency manages the government-owned railway infrastructure. The Agency owns main tracks, shunting tracks, certain depot tracks, platform units, and information and telecommunication systems.

In connection with the establishment of the Agency, the operator DSB was allotted various assets that provide it clear advantages over potential new competitors. DSB has for example been granted the property in stations, preparation units and engine sheds. Furthermore, DSB has kept its rolling stock. This creates a need for regulatory provision regarding the access of other operators to these facilities.

3.2 Principles of monitoring sector specific competition rules used in telecom and railway laws

Table 2.
Principles on monitoring used in telecom and railways

Sector regulations concerning:	Authority monitoring telecom	Authority monitoring railways
Quality, safety and environment	**Sector Authority** **Comp.Authority**: • Opinion on prices related to PSO • Cross-subsidising	**Sector Authority** **Comp.Authority:** • No competition issues

Table 2. (cont'd)
Principles on monitoring used in telecom and railways

Sector regulations concerning:	Authority monitoring telecom	Authority monitoring railways
Public services at fair prices (PSO).	**Sector Authority:** • Co-ordination • Prices related to PSO	**Sector Authority:** • Prices and other terms
	Comp.Authority: • Binding opinion on interconnection agreements[1] • Service provision agreements	**Comp.Authority:** • Prices and other terms related to railway stations and to DSB's obligation to lease rolling stock
Infrastructure access	**Sector Authority**: • Prices • Administration and Mediation	**Sector Authority**: • Allocation of access • Payment by operators for use of rail network

1. In this connection, "binding opinion" means that the Sector Authority has to comply with the opinion of the Competition Authority.

As seen from table 2, the principles had a significant impact on the telecom and railway laws. In telecom the Competition Authority has an important say in relation to PSO prices. In railways the PSO prices and other terms connected to PSO are political questions decided by the Minister of Transport. As to access to the telecommunication infrastructure, the Competition Authority is responsible for monitoring all interconnection agreements, and in railways the Competition Authority shall monitor prices and other terms in relation to access to the infrastructure owned by the dominant Danish operator DSB.

4. Conclusion

It appears that the main objectives of the general principles are to ensure that sector-specific competition regulation shall not prevent the Competition Authority from intervening in conditions that are materially contrary to competition laws.

The recommendations of the Committee formed a significant basis of the specific wording of the telecommunication and railway laws. Today, the Danish Competition Authority has a substantial influence on competition in telecommunication and railways. In this connection, it should be noted that the Danish Competition Act contains a provision, by which the Competition Authority always has the opportunity to approach the competent authority, point to potentially detrimental effects on competition and make recommendations for promotion of competition in the area concerned.

Finally, it should be mentioned that the Committee - due to a desire for a one-stop-shop model - stressed the importance of very close co-operation between the Competition Authority and the Sector Authorities.

ESPAGNE

1. Introduction

L'introduction de la concurrence dans des secteurs traditionnels à structure monopolistique ou oligopolistique, nécessite une régularisation et une surveillance particulièrement complexes. Ceci a amené à adopter un nouveau modèle institutionnel de contrôle qui s'appuie sur l'existence d'agences régulatrices.

Ces entités sont des organes de nature publique dont la fonction ultime est d'assurer le développement de la concurrence dans les marchés qu'elles contrôlent et de contribuer à leur réglementation. En définitive, les spécificités de certains marchés, généralement dynamiques et en voie de libéralisation, porte les pouvoirs publics à créer des départements super spécialisés pour leur transmettre certaines fonctions de régularisation, de surveillance et d'arbitrage.

Outre cette spécialisation des tâches de régularisation, il y a une autre raison fondamentale qui justifie la création de ce genre d'organes. Dans les secteurs susmentionnés, qui démarrent d'une situation monopolistique ou oligopolistique, il existe fréquemment des entreprises publiques fortes jouissant de l'avantage de leurs rapports étroits avec les pouvoirs publics, notamment avec le département ministériel correspondant. La création d'agences régulatrices à caractère indépendant, prétend assurer un traitement plus ou moins neutre aux différents opérateurs économiques.

Les traits caractéristiques de ces organismes publics peuvent être résumés comme suit :

- indépendance ;
- personnalité juridique et patrimoine propres ;
- régis par un organe collégial ;
- exercent des compétences sur un secteur donné.

L'indépendance des agences ou entités régulatrices limite souvent le pouvoir du gouvernement au moment de désigner ou de destituer les cadres de l'entité régulatrice. Les techniques restrictives vont de l'inclusion de formalités pour dépolitiser les désignations jusqu'à l'établissement d'un délai du mandat des organes directeurs, en passant par l'acceptation du principe d'association dans la prise de décisions et la fixation d'une liste de raisons pour accorder une destitution.

En somme, les entités citées ou agences régulatrices que constituent ce que l'on appelle les Administrations indépendantes, remplissent des fonctions propres du pouvoir exécutif, mais leurs organes gardent une certaine indépendance par rapport à l'action du Gouvernement.

2. Cadre régulateur

Dans le modèle d'Administration des pays continentaux, il est rare de trouver des *entités* indépendantes du Gouvernement. Ainsi, par exemple, l'article 97 de la Constitution espagnole indique que le Gouvernement exerce la fonction exécutive et le pouvoir réglementaire en accord avec la Constitution et les lois. Ceci implique, en principe, que l'exécutif a le pouvoir de la libre désignation et du changement des titulaires des organes directeurs de toutes les organisations qui intègrent formellement l'administration publique.

En conséquence, l'activité de supervision de l'administration, devra être normalement exercée par le biais des Directions Générales (DG), ou Organismes Autonomes (OA). La création d'une entité régulatrice pour remplir cette fonction, n'est possible que dans des cas exceptionnels. En fait, la plupart des entités existantes sont issues des DG.

Depuis l'approbation de la loi 6/1997 d'Organisation et de Fonctionnement de l'Administration Générale de l'État (LOFAGE), ces agences doivent respecter les exigences de l'article 43 sur la classification et l'affectation des organismes publics.

3. Entités régulatrices en Espagne

Nous pouvons citer les suivantes entités ou agences régulatrices :

- Commission Nationale du Marché des Valeurs (CNMV) ;
- Commission du Marché des Télécommunications (CMT) ;
- Commission du Système Électrique National (CSEN).

La **Commission Nationale du Marché des Valeurs,** crée par la loi 24/1988, a pour mission de superviser et d'inspecter les marchés des valeurs et l'activité des personnes physiques et juridiques qui y agissent. La CNMV surveille aussi la transparence des marchés, la formation correcte des prix et la protection des investisseurs.

La CNMV peut prendre les mesures nécessaires pour le développement et l'exécution des normes contenues dans les Décrets Royaux approuvés par le Gouvernement ou dans les Ordres du Ministère des Finances. Ces mesures, dites circulaires, doivent être publiées sur le Bulletin Officiel de l'État pour qu'elles prennent effet.

Les résolutions adoptées par la CNMV, au titre de ses compétences, peuvent faire l'objet d'appel sauf dans le cas des sanctions de procédure contentieux-administrative. La CNMV est régie par un Conseil dont les membres sont désignés par le Gouvernement pour un mandat de quatre ans. La Loi 24/1988 règle les conditions de leur destitution.

Les ressources de la CNMV sont issues des biens et des valeurs de son patrimoine, des taxes qu'elle perçoit de ses activités et des transferts des budgets de l'État.

La **Commission du Marché des Télécommunications,** créée par le Décret-loi Royal 6/1996, a pour objet de sauvegarder, au bénéfice des citoyens, les conditions de concurrence réelle dans le marché des télécommunications et des services audiovisuels, télématiques et interactifs, de surveiller la formation correcte des prix et d'intervenir, en tant qu'organe arbitral, dans les conflits pouvant surgir dans le secteur. La CMT, affectée au Ministère des Travaux Publics, jouit de personnalité juridique et de pleine capacité publique et privée.

La CMT exerce les fonctions suivantes :

a) arbitrage dans les conflits entre les opérateurs de réseaux et de services dans le secteur des télécommunications et des services cités ci-dessus ;

b) octroi de titres d'habilitation à prêter les services susmentionnés à des tiers, dans des conditions de concurrence ;

c) veiller à la libre concurrence dans le marché des télécommunications, en attribuant la numérotation aux opérateurs par le biais des résolutions opportunes ;

d) contrôle du respect des obligations de service public ;

e) résolution des conflits entre les opérateurs en matière d'interconnexion de réseaux ;

f) adopter les mesures nécessaires à la sauvegarde de la libre concurrence sur le marché, notamment en ce qui concerne la pluralité de l'offre des services, l'accès des opérateurs aux réseaux de télécommunications et l'interconnexion des réseaux. La politique des prix et de commercialisation des opérateurs sont autant de tâches où l'on pourrait adopter des mesures pour sauvegarder la libre concurrence ;

la Commission peut, à ces effets, dicter des instructions pour les entités opérant dans le secteur. Ces instructions sont obligatoires une fois publiées sur le Bulletin Officiel de l'État ;

g) exercer le contrôle des processus de concentration des entreprises, des participations au capital et des accords entre les agents du marché des télécommunications et des services cités. Ces fonctions doivent être interprétées sans préjudice des compétences des organes de défense de la concurrence et du Conseil des Ministres. La CMT doit rédiger un rapport informatif non obligatoire ;

h) informer des propositions de tarifs ;

i) fixer les prix maximum d'interconnexion ;

j) conseiller le Gouvernement et le Ministre des Travaux Publics ;

k) exercer le pouvoir sanctionneur en cas de non respect des instructions dictées de façon à sauvegarder la libre concurrence.

La CMT est régie par un Conseil dont les membres son désignés par le Gouvernement pour une période de six ans. Les causes de leur destitution sont indiquées dans la loi citée.

La CMT a un patrimoine propre, indépendant de celui de l'État et ses ressources sont issues, comme dans le cas de la CNMV, des biens et des valeurs de son patrimoine, des revenus des taxes, des redevances et des sanctions, ainsi que des transferts du Ministère des Travaux Publics à la charge des Budgets Généraux de l'État.

La **Commission du Système Électrique National**, créée par la Loi 40/1994, est un organe consultatif ayant certaines fonctions exécutives et certains traits comme régulateur. Parmi ses nombreuses fonctions, nous pouvons citer son caractère consultatif dans les initiatives législatives, la planification électrique et l'élaboration de tarifs.

Nous pouvons de même citer, parmi ses fonctions, son action comme organe arbitral, notamment dans les affaires concernant l'accès aux réseaux de transport et de distribution. Elle doit également veiller à ce que les activités des sujets évoluent sans qu'il y ait des pratiques restrictives de la concurrence ou abus de position dominante sur le marché.

La CSEN est une entité de droit public, avec personnalité juridique et patrimoine propres attachée au Ministère de l'Industrie et l'Énergie. Elle est régie par un Conseil d'Administration dont les membres et le Président sont désignés par le Gouvernement moyennant un Décret Royal. Leur mandat a une durée de cinq ans et ils peuvent être destitués, comme dans des cas similaires, par fin de mandat, par rennonciation, incapacité, incompatibilité postérieure à la désignation ou condamnation pour délit dolosif.

Les ressources de la CSEN ont la même origine (biens y valeurs de son patrimoine, taxes, transferts budgétaires) que celles de la CNMV et de la CMT.

4. Relation Gouvernement-Agence

Comme nous venons de voir, les caractéristiques de toutes les entités coïncident avec les traits génériques (organismes publics, personnalité juridique, patrimoine propre, organe collégial, compétences sur un secteur spécifique, certaine indépendance) indiquées au point 1.

Cependant, les entités ou agences régulatrices génèrent une problématique autour de leur justification légale et de leur indépendance présumée.

Celle-ci compte deux éléments incontestables :

- les entités, bien qu'attachées à un Ministère donné, ne s'intègrent pas hiérarchiquement dans les Administrations de l'État ;

- les membres des organes qui régissent les entités sont désignés par le Gouvernement, pour un délai légalement fixé. Il ne peuvent être destitués que pour causes graves légalement établies.

Les lois constitutives de certaines entités (CSEN, CMT) insistent sur cette caractéristique d'indépendance, en l'indiquant explicitement. Cependant, dans sa partie strictement réglementaire, c'est à dire, dans ses articles, rien ne figure sur leur obligation à exercer ses fonctions avec indépendance. Cet aspect est très important, surtout s'il est comparé à ce que stipule la loi 16/1989 de Défense de la Concurrence au sujet du Tribunal de Défense de la Concurrence dans son article 20: “Le TDC, organiquement attaché au Ministère compétent, exerce ses fonctions avec pleine indépendance et est soumis à l'ordonnancement juridique”.

La désignation des membres de ses organes collégiaux suscite aussi des doutes sur son indépendance absolue et sur sa nature technique. A titre d'exemple, nous pouvons dire que la désignation des membres de certains Conseils d'Administration, comme ceux de la CSEN et de la CMT, semble soumise à la comparution préalable du Gouvernement devant la Chambre des Députés. Ce fait, qui semble réaffirmer en principe la neutralité des désignations, peut cacher un élément négatif quant à l'indépendance des membres, dans le cas où leur désignation serait le résultat d'accords entre des formations politiques pour le partage du pouvoir.

D'autre part, la possibilité que le Ministre de l'Industrie assiste aux réunions, avec voix, mais sans vote, de la CSEN et l'existence d'un recours ordinaire devant lui contre les résolutions de la Commission, sont autant d'éléments qui conditionnent l'indépendance de ces présumées entités régulatrices.

La base légale de ces organismes se trouve, comme indiqué, à l'article 43 de la LOFAGE. Nonobstant, étant donné que ces entités émettent des instructions obligatoires adressées aux entités opérant dans le secteur, certains auteurs ont noté que cette décentralisation fonctionnelle du pouvoir réglementaire serait difficile à cadrer dans l'article 97 de la Constitution, puisque ce dernier stipule clairement que le Gouvernement est tenu d'exercer la fonction exécutive et le pouvoir réglementaire.

Cependant, la sentence 135/1992 du 5 octobre du Tribunal Constitutionnel (TC) a prouvé la constitutionnalité de la décentralisation du pouvoir cité dans les termes suivants: "La déconcentration du pouvoir réglementaire est formellement possible et, en maintes occasions, nécessaire du point de vue du contenu de la norme. En effet, l'habilitation du Gouvernement de la nation contenue dans l'article 97 de la Constitution, ne peut être interprétée avec un critère strict et littéral sans limiter l'invocation du titulaire à un organe collégial spécifique, le Conseil des Ministres, mais aussi à ceux qui le composent et à d'autres institutions ...."

Nonobstant, le Gouvernement a cédé avec une prudence extrême, les fonctions réglementaires à ce genre d'organes, de telle sorte que les départements ministériaux correspondant gardent maintes compétences dans la proposition et l'approbation des normes.

Selon certains auteurs, quelques unes des entités susmentionnées, semblent être conçues comme des surveillants plutôt que comme des régulateurs. La solution pour en faire de vraies autorités régulatrices, impliquerait de leur attribuer, dans une plus grande mesure, les fonctions réglementaires subordonnées (approbation de circulaires, instructions et directives) et de leur assigner, avec une plus grande autonomie, les tâches exécutives essentielles (octroi des concessions ou des autorisations, approbation des tarifs, accord des droits et des obligations, arbitrage des intérêts, rédaction des compte-rendus de l'inspection sanction, etc.).

En tout cas, la plupart des juristes se montrent hostiles à la prolifération de ce genre d'entité et mettent en question la délégation des fonctions réglementaires. Ils considèrent en outre que la personnalité juridique et le patrimoine propres ne sont pas, en principe, des formalités essentielles à l'exercice des fonctions de supervision. Il ne serait possible de les accepter que dans des cas exceptionnels déterminés par des facteurs comme le volume du secteur et son importance dans l'économie, la sensibilité du secteur et la possible incompatibilité des fins de l'entité avec celles du Ministère en question.

5. Relation entre les entités régulatrices et les organes de la concurrence

En principe, la fonction des agences est d'assurer le fonctionnement correct du marché. A cet effet, elles ont reçu des capacités réglementaires de surveillance et même de sanction et d'arbitrage. Cependant, assurer le fonctionnement du marché suppose de promouvoir et d'assurer le développement de la concurrence. Cela peut être interprété dans le sens que les agences régulatrices ont la capacité de poursuivre les pratiques restrictives de la concurrence, et , en général, d'appliquer la réglementation de défense de la concurrence.

En fait, dans la mesure où dans certains cas, les agences régulatrices ne reçoivent pas une capacité réglementaire et exécutive aussi large qu'elle le souhaiteraient, elles cherchent de plus grands pouvoirs d'action en matière de défense de la concurrence.

La délimitation des fonctions entre les organes de défense de la concurrence et les agences régulatrices peut être un peu diffuse étant donné que, dans le cas espagnol du moins, il s'est traduit par une série de problèmes concurrentiels survenus entre les entités régulatrices et les organes de défense de la concurrence.

Ainsi par exemple, la Loi 40/1994 indique que la CSEN a, entre autres fonctions, celle de “veiller à ce que les sujets réalisant les activités prévues au Système Électrique National, le fassent sans mettre en place des pratiques restrictives de la concurrence ou abusives de la situation dominante du marché”. Vu que la façon d'exercer cette concurrence n'était pas décrite, il y a eu des situations compliquées entre les organes de défense de la concurrence (Service de Défense de la Concurrence et Tribunal de Défense de la Concurrence) et l'entité régulatrice, au moment d'examiner l'existence de possibles pratiques restrictives dans le secteur électrique.

Cette situation a été corrigée grâce aux réformes introduites par la Loi 54/1997 qui indique que la CSEN doit communiquer au Service de Défense de la Concurrence (SDC) toutes les pratiques restrictives qu'elle aura repérées dans le secteur électrique. De cette façon, la CSEN respecte son objectif de “veiller à la concurrence effective” dans le marché électrique. Elle doit en outre apporter tous les éléments à sa portée ainsi qu'un avis non obligatoire de son estimation des faits.

La CSEN doit également informer de toutes les opérations de concentration d'entreprises du secteur électrique dans les cas où elles devront êtres soumises à l'approbation du Gouvernement de conformité avec la législation en vigueur en matière de concurrence.

Les modifications introduites par la Loi 54/1997 susmentionnée ont donc permis une délimitation plus nette des compétences entre les organes de défense de la concurrence et l'entité régulatrice.

Dans le secteur des télécommunications il n'existait pas ce genre de problèmes puisque, dès le début, la CMT comptait parmi ses fonctions celle d'intenter l'action des organes de défense de la concurrence, ainsi que celle d'adopter les mesures nécessaires pour sauvegarder la libre concurrence dans le marché. Pour remplir cette dernière fonction elle peut dicter des instructions qui seront obligatoires une fois publiées sur le Bulletin Officiel de l'État.

Nonobstant, la Loi 12/1997 sur la Libéralisation des Télécommunications, a introduit une série de modifications qui n'ont rien éclaircit, puisque la CMT a bénéficié de compétences pouvant empiéter franchement le domaine naturel d'action du SDC et de la TDC. Concrètement, la Loi 12/1997 a introduit

une certaine ambiguïté sur la possibilité que la CMT instruise et résolve les dossiers santionnateurs pour cause de pratiques restrictives de la concurrence et contrôle les concentrations d'entreprises.

Ce système est à l'origine de nombreux conflits, qui se sont traduit par une grande insécurité juridique pour le opérateurs. En effet, on peut se demander si les nouvelles fonctions de la CMT entraîneraient une perte de compétences pour le SDC et du TDC ou si, au contraire, elles peuvent s'exercer conjointement.

Cette difficile situation a été résolue par la Loi 11/1998 Générale des Télécommunications. Ses articles indiquent que la CMT remplira ses fonctions dans le respect des compétences que la Loi 16/1989 de Défense de la Concurrence attribue au SDC et au TDC. Cependant, la CMT doit obligatoirement informer de toutes les concentrations soumises au Gouvernement de conformité avec la LDC, sans préjudice de l'avis du TDC, et communiquer au SDC l'existence d'indices de pratiques restrictives, en apportant, en même temps, un avis non obligatoire.

En somme, les conflits qui ont surgis en Espagne entre les organes de la concurrence et les entités régulatrices sont issus de :

- une lutte pour les compétences ;
- une délimitation peu claire du nombre de leurs compétences ;
- le manque de collaboration entre les deux ;
- par conséquent, l'analyse de la relation entre les entités régulatrices et les organes de la concurrence, aboutit à la vérification de deux situations distinctes :
  - -- les régulateurs remplissent leurs fonctions sans préjudice de celles des organes de défense de la concurrence ;
  - -- les entités régulatrices ont la faculté d'appliquer la législation de défense de la concurrence.

De notre point de vue, nous pouvons dire qu'il n'existe pas un modèle unique et que, de toutes façons, la délimitation des fonctions et des compétences entre les régulateurs et les organes de la concurrence devrait s'appuyer sur les points suivants :

5.1 Entités régulatrices

- elles doivent être les organes de réglementation du marché et axer leur activité sur la régulation de ce marché avec les instructions reçues, conseiller le Gouvernement et le Parlement sur la législation de base et développer des fonctions exécutives concernant, par exemple, l'octroi de concessions, de licences, de registres, etc. ;
- elles doivent surveiller l'application des instructions qu'elles auront dictées ;
- elles doivent avoir le pouvoir de sanctionner pour punir le non respect, de la part des opérateurs, des instructions qu'elles auront dictées, de conformité avec la procédure administrative commune ;

- elles doivent être les organes pour la résolution de conflits et veiller à la transparence du marché.

5.2 Organes de défense de la concurrence

- ils doivent appliquer la réglementation de défense de la concurrence en ce qui concerne les conduites interdites, les autorisations singulières et les concentrations.

Cette séparation des fonctions doit être accompagnée d'une étroite collaboration entre organes; autrement, l'aboutissement de la fin ultime, qui est la réalisation de la concurrence dans les marchés, serait paralysé.

Les organes sectoriels ont sans doute une connaissance plus approfondie et étendue des marchés qu'ils contrôlent. Leur intervention dans les dossiers de défense de la concurrence est donc inestimable pour la résolution des cas. En outre, les organes de défense de la concurrence ont meilleure disposition pour surveiller le comportement des agents du marché qui doit s'ajuster à des principes de base et généraux, et pour le sanctionner si ce n'est pas le cas.

Ce dernier aspect est très important puisque la politique de défense de la concurrence doit être de nature horizontale, de façon à ce que les règles applicables aux agents opérant sur les différents marchés, soient intérieurement cohérentes. Des normes générales doivent donc exister pour déterminer quelles pratiques doivent être considérées interdites et dans quels cas elles peuvent être autorisées. Ces normes doivent de même s'appliquer avec des critères consistants. Pour cet objectif, il conviendrait de centraliser la responsabilité d'appliquer les normes dans des organes qui analysent les cas de façon cohérente. Dans le cas espagnol, ces organes sont le Service et le Tribunal.

Le travail réalisé par les organes de défense de la concurrence, qui consiste à créer et à assurer la continuité d'une concurrence réelle dans les cadres régulateurs en vigueur, se complète par le rôle qui doit être attribué aux agences de régulation ou aux commissions sectorielles. Ces organes doivent également contribuer au développement d'une concurrence réelle en exerçant leurs fonctions de régulation et de réglementation du marché outre celle de médiateur dans la résolution de conflits. En définitive, ces organes doivent concevoir le cadre réglementaire sectoriel pour permettre et encourager la concurrence, à la fois que les organes de défense de la concurrence veillent à ce que les conduites des agents économiques opérant dans les différents secteurs n'agissent pas à l'encontre des principes généraux de la concurrence et de l'intérêt public.

Cette distinction des fonctions peut contribuer à un renforcement mutuel de l'efficacité de ces deux genres d'organes dans l'exercice de leur tâche, ainsi qu'à éviter de possibles “captures”, tout aussi bien du régulateur que des organes de défense de la concurrence. Si dans un secteur donné, l'action de l'organe instructeur en matière de défense de la concurrence n'était pas suffisamment belligérant, l'organe régulateur proche à la réalité de ce marché, devra le repérer et pourra invoquer l'action du Service. De la même façon, si le Service est souvent alerté de l'existence de conduites anticoncurrentielles, cela peut être un symptôme d'un défaut dans la régulation ou alors encore d'une situation susceptible d'être réglée ou corrigée par l'organe régulateur.

De la même façon que l'application horizontale de la politique de défense de la concurrence doit être assurée, son intégrité au niveau territorial doit être garantie. Le principe constitutionnel de l'unité du marché exige le respect de normes homogènes de défense de la concurrence dans tout le territoire national. Autrement, la compartimentation et la segmentation des marchés serait favorisée à niveau

géographique. Ce n'est pas en vain qu'un des principaux piliers de la construction du Marché Intérieur Unique Européen est la politique de la concurrence que la Commission Européenne applique avec diligence. Elle a sa base dans les articles du Traité de l'Union.

En conclusion, le succès et l'efficacité de la politique de défense de la concurrence exige, entre autres facteurs, d'assurer que celle-ci ne soit ni fragmentée, ni compartimentée sectoriellement ou géographiquement.

L'Espagne a tendu vers ce modèle dans une voie qui n'a pas été sans problèmes, principalement à cause du manque de collaboration. Cependant, comme nous avons déjà indiqué, il n'existe pas de modèle unique et, dans le domaine espagnol, il ne faut pas rejeter la possibilité que dans l'avenir, la réglementation prévoie que certains organes régulateurs s'occupent de l'instruction de cas dans leurs secteurs spécifiques.

FINLAND

1. Introduction

This document is the contribution of the Office of Free Competition (OFC), the Finnish competition authority, to the *Mini-Roundtable on Relationships Between Regulatory and Competition Authorities* at the meeting of the OECD Committee on Competition Law and Policy on 11-12 June 1998. The document specifically involves the institutional issues arising from the interaction of regulation and competition policies, and the regulatory and competition authorities.

In view of current institutional conditions in Finland, the list of industries or sectors discussed in this document is not fully exhaustive: the paper covers the telecommunications, electricity and railway industries, and the production and distribution of alcoholic beverages. The industries or sectors covered have been chosen to illuminate some Finnish particularities regarding the institutional subject matter of this Mini-Roundtable.

A special characteristic of the relationships between competition and regulatory authorities in Finland is that the interface between regulators and competition authorities seems to be exclusively governed by what is called the "General Mandate Driven Division of Labour" approach, i.e. competition law is exclusively applied by the competition agency, and regulation exclusively by technical and economic regulators (see approach D. in the “Secretariat’s Suggestions for Submissions”]. Thus, the discussion below particularly serves to highlight the special features and the pros and cons of this option. Correspondingly, a relevant item for a concluding discussion in the document is why Finland has failed to apply other ways or options.

In the following, each of the above-mentioned sectors is discussed separately in view of the four questions presented in the “Secretariat’s Suggestions for Submissions” under approach D. A concluding section takes stock of the conditions in and experience gained from these industries or sectors.

2. The Telecommunications Sector

The Finnish competition authorities have full jurisdiction to apply the Act on Competition Restrictions (480/1992) to the telecommunications sector. As to regulatory authorities, according to the Telecommunications Market Act (396/1997), the general supervision and promotion of telecommunications shall be a duty of the Ministry of Transport. Additionally, the Telecommunications Administration Centre shall control compliance with the Act and with the provisions and orders issued by the Ministry of Transport thereunder. The Telecommunications Administration Centre has, however, been mainly concerned with technical questions.

According to the Telecommunications Market Act, if the matter under review of the Ministry of Transport or the Telecommunications Administration Centre relates to an action which may be in violation of the Act on Competition Restrictions, the Ministry/the Telecommunications Administrations Centre can refer the matter, for the part relating to competition restrictions, to be handled by the OFC in accordance with the Act on Competition Restrictions.

(D.1.) In order to ensure that companies are not subject to uncertainty as to whether their actions will be subject to economic regulation or competition law, the OFC and the regulatory authorities in the telecommunications sector have, in practice, agreed on how overlapping situations are addressed. They have not, however, published any concordats. Usually, when the regulatory authority applies the Telecommunications Market Act in a specific case, it explicitly states in its decision the issues which have not been addressed on the basis of the Act and also states that these issues may be addressed by the competition authorities.

(D.2.) The telecommunications authorities and competition authorities regularly benefit from each other's expertise by requesting a written statement from the other authority regarding pending cases and/or the other authority's opinion on a draft decision. The confidentiality of business secrets, however, sets limits on this co-operation, as companies' business secrets shall not be disclosed to another authority unless the company involved grants a waiver or unless there are specific provisions in the legislation on the disclosure of confidential business secrets (in this field there are no such provisions).

(D.3.) The formal role of the competition authority, the OFC, in adopting new regulation or abolishing or amending existing regulations is based on Section 1 of the Decree on the Office of Free Competition (66/1993) where it is stated that the Office shall "follow the preparation of economic legislation and give statements about questions within its domain". It shall also "take initiatives to promote competition and to dismantle any restrictive rules and regulations". Additionally, the Prime Minister's General Instruction from 1989 stipulates that an opportunity shall be given to the Office of Free Competition to give its statement on all bills affecting competition.

The Ministry of Transport also organises public hearings regarding significant legislatory/regulatory proposals where the competition authorities may also make their views known.

(D.4.) There may still be some uncertainty pertaining to the division of competence between the the telecommunications authorities and the general competition authority. It seems that companies are not quite certain regarding the occasions on which the Telecommunications Market Act is applied. On the other hand, companies are better informed of the fact that the competition act applies to the telecommunications sector.

The liberalisation of telecommunications is well advanced in Finland. The process of liberalisation has not encountered any significant problems, and the regulatory and competition authorities have shared the same goals in this respect. This has, of course, facilitated co-operation between the two authorities and enabled a workable division of tasks.

3. The Electricity Sector

Finnish competition authorities may fully apply the Act on Competition Restrictions to electricity production and distribution. The Electricity Market Act (386/1995), which substantially deregulated the electricity sector in Finland, provided for the establishment of the Electricity Market Authority (EMA) particularly to supervise the compliance of the Electricity Market Act. The EMA is also empowered to issue licences to electricity grid activity. The concurrent jurisdiction of the EMA and the OFC concerns pricing decisions taken by producers and distributors of electricity, pricing policies by dominant transmission companies and dominant retail sellers of electricity, in particular.

(D.1.) As far as the electricity sector is concerned, firms have evidently not faced substantial uncertainty concerning which law is applicable to their particular action, and the OFC is not aware of any

case in which contradictory decisions had been taken by the OFC and the EMA. Each of the two authorities informs the other of newly opened files. They also consult each other concerning pending cases. It is also customary for each authority to reserve the other an opportunity to make a written comment on its draft decisions. According to the Electricity Market Act, the EMA may decide not to assess any issue which is liable to the Act on Competition Restrictions, and turn such a case or elements of such a case to the assessment of the OFC. There thus exists a reasonable and stable agreement among the two authorities concerning their division of labour although no formal concordat exists to date.

(D.2.) As explained, it is customary to ask for a written statement from the other authority if the issue considered seems to fall under the special expertise of the other. Additionally, as provisions on merger control have been adopted as an Amendment to the Act on Competition Restrictions - the amendment will come into force on 1 October 1998 - the OFC will be obliged to ask for a statement of the EMA in merger cases related to the electricity sector. This is not, however, designed to compromise the jurisdiction of the OFC but, rather, the system is designed to enable the OFC to receive statistical background information from the EMA for the assessment of the merger.

(D.3.) As to the role of the competition authority in deregulation, see the corresponding answer given concerning the telecommunications sector.

(D.4.) Co-operation with the two authorities appears to be satisfactory and does not seem to raise substantial uncertainty as to the policy towards their acts on the electricity market. The core issue concerning the electricity sector is how the joint efficiency goals of the Electricity Market Act and the Act on Competition Restrictions are attained in view of the continuing change in the price structure of the electricity sector.

4. The Alcohol Sector

According to the Alcohol Act (1143/1994), the retail sales of alcoholic beverages with an alcoholic content in excess of 4.7 percent in volume - with the exception of restaurant sales and special vineyard shops - is the legal monopoly of the state-owned company Alko. The retail sales operations of Alko (as well as production, import, export and wholesale of such alcoholic beverages) are supervised by the Control Authority of Social and Health Care (hereinafter the Control Authority) which is also the supreme licence authority in this field. The OFC maintains jurisdiction under the Act on Competition Restrictions and the provisions on abuse of market dominance. Concurrent jurisdiction of the OFC and the Control Authority concerns, in particular, the inclusion of new beverages in Alko's sales selection, the exclusion of beverages therefrom, and the consistency of the retail prices charged by the monopoly.

In the context of negotiations for Finland's entry into the European Union, the Finnish Government and the European Commission agreed that Finland should report annually to the Commission on the non discriminatory nature of the retail monopoly's policy. The report is devised by the Control Authority but a statement by the OFC is annexed to it. The letter by the Ministry of Trade and Industry in which this demeanour is announced is the only written document concerning the division of labour between the OFC and the Control Authority.

(D.1.) In practice, the OFC and the Control Authority have received complaints concerning the same discriminatory and unreasonable conduct by the retail monopoly. In such cases, the two authorities have carried out joint investigations, and one authority has consulted the other before issuing decisions. While no formal concordats currently exist, the OFC has recently proposed that the Control Authority should focus on cases related to the inclusion of new beverages to the product assortment of the retail

monopoly, and on the exclusion of beverages therefrom as well as on the arrangements by the monopoly for carrying out retail distribution through special outlets.

(D.2.) The OFC and the Control Authority regularly benefit from each other's expertise by asking for written statements from the other regarding individual cases.

(D.3.) As to deregulation, see the corresponding answer given concerning the telecommunications sector.

(D.4.) There appear to be few technical or economic grounds to justify special regulation in the alcohol sector but the grounds for the regulation are, rather, based on social and health policy considerations.

5. The Railway Sector

According to the Act on the State Railway Network and Its Maintenance and Use (721/1995), the special regulatory authority in the field, responsible for the control and maintenance of the railway network, including construction and direction of traffic, is the Railway Track Authority. Under the Act on Competition Restricitions, the OFC maintains jurisdiction in this field.

As only the State Railroad Company (VR) currently carries on railroad traffic in Finland, there is no actual problem at present of concurrent jurisdiction concerning the railroad sector between the regulatory and competition authorities. A working party appointed by the Ministry of Transport recently issued its report and proposed that the railway sector be opened up to competition for goods traffic in the whole country and passenger traffic in limited regions within the country. According to the proposal, the Railway Track Authority would be empowered to decide on the allocation of track capacity to competing firms and to settle disagreements concerning the use of passenger terminals and train yards. Concurrent jurisdiction would thereby be realised.

While it is thus not relevant to answer questions D.1.-D.4. in this context, it is notable that the deregulatory development in the railroad sector, too, is about to lead to the system of concurrent competition and regulatory laws and of competition and regulatory authorities.

6. Concluding Discussion

It is a common feature of the sectors presented in this paper that there have been substantial regulatory reforms (or will be, in the case of the railway industry). This deregulatory impetus and the economic significance of these sectors justify their inclusion in this document. The deregulatory developments and the resulting regime in each of these sectors do certainly display particular features of their own but it is remarkable that the type of institutional regime developed has always followed what is called "option D", "the General Mandate Driven Division of Labour", in OECD Paper CLP/98.38.

The first issue to be tackled is whether the deregulatory development in these sectors has genuinely created a need for a regulatory law and authority. It appears that only in the alcohol sector is there little economic justification for separate regulatory surveillance. In the electricity sector, especially, the deregulatory development has created a need for regulatory control which requires a profound knowledge of the technological particularities of the sector. The resources of the OFC are ill-suited to constant supervision of an industry where complex technological conditions play a decisive role.

The control of potentially monopolistic (or monopsonistic) pricing is particularly interesting in view of the relative effectiveness of competition and regulatory authorities. The OFC is best engaged in cases of fundamental importance on this score. If myriad manifestations of monopolistic pricing may be expected under technologically complex conditions as a result of deregulatory reform, and consequently if a great number of complaints are likely to be received under conditions where the industry is at a stage of substantial structural change, a regulatory authority is best placed to deal with such problems (under the general guidelines created by the competition authorities' application of competition law).

As a need for special regulation has arisen, it is interesting to find out why the regulatory authority has not been authorised to apply competition law in its field as well, thereby excluding the OFC, and why applicability of competition law has not been excluded altogether in these fields. Should the regulatory authorities have been authorised to apply competition law, the problem of the consistency of competition policy would arise. The problem is particularly acute under circumstances where competition policy itself is rapidly developing. In the case of the sectors discussed in this paper, the precedents on which other authorities could firmly rely in applying competition law are just being developed.

The fact that Finnish lawmakers have been extremely reluctant over the last few years to exempt sectors from the coverage of competition law, is explicable in view of the historical background of competition policy in Finland. It is only since the late 1980s that competition policy has assumed any real significance in Finland (with the competition act of 1988 and the establishment of the OFC). It could be said that Finland formerly had a relatively corporatist model of society where restrictive practices among businesses and among and within their associations were deemed natural and instrumental. The increasing importance of competition policy marks a substantial systemic change in Finland, from corporatism towards rugged individualism and a functioning market order.

The increasing role of competition policy has, of course, led to vocal criticisms, especially by businesses and social groups that had enjoyed a particularly high level of protection from competition through their restrictive practices and otherwise. It is obvious that exceptions from the scope of competition law for the sectors discussed in this paper would have created a hazardous momentum for other industries and groups to lobby for further exemptions. This would have seriously undermined the policy pursued by successive governments and parliaments in Finland to strengthen the market economy and price system, and to abolish over-centralised and co-operative features in the economy.

While the resulting interplay of competition law and regulatory law, and of competition authorities and regulatory authorities, is intelligible in view of the relative effectiveness of competition authority and regulatory authority organisation and the general tenor of the systemic development of the Finnish economy, this is not to deny that problems of co-ordination among the laws and authorities and uncertainty among businesses active in these sectors have been met with. The case of Finland does suggest, however, that both the authorities and businesses have learnt to cope with the institutional complexity fairly well and fairly rapidly, too. Certainly, this is partly explained by the limited size of the Finnish economy and the limited number of companies active on the markets concerned.

As only a few years have lapsed since the deregulatory reforms in the sectors discussed, it is too early to judge whether the rather informal patterns of division of labour between the competition authority, the OFC, and the regulatory authorities are going to be stable or whether more formal arrangements are called for. Increasing technological complexity and the increasing pace of technological change will doubtless put the co-operative patterns under great strain. Moreover, and more importantly, the very foundation of the current regimes may collapse.

FRANCE

1. Introduction

L'activité des industries basées sur des infrastructures en réseau relève en France de la notion de service public industriel et commercial. Cette notion s'est développée avec l'affirmation de la compétence de l'État pour définir dans des secteurs d'activité essentiels à la vie de la nation, des obligations à la charge des opérateurs afin de garantir à tous les usagers continuité et adaptation du service, égalité d'accès et péréquation tarifaire. Toutefois une certaine souplesse existe et diverses modalités de gestion de ces services ont eu cours: depuis la régie directe par des collectivités publiques jusqu'à des formes associant des personnes privées au service public (affermage, concessions). Les circonstances existant à l'issue de la seconde guerre mondiale ont fait prévaloir pour certains de ces services -notamment les services publics nationaux- la gestion par des entreprises publiques exerçant leur activité en situation de monopole. Mais d'autres services, notamment les services régionaux ou locaux, ont pu présenter une certaine diversité dans leur mode de gestion, en recourant largement au régime de la concession.

La notion de service public industriel et commercial est donc la forme correspondant à la tradition institutionnelle française d'intervention des autorités publiques dans la gestion des services reposant sur des infrastructures de réseau, comme l'est dans les pays anglo-saxons, la notion de régulation, qui reconnaît la compétence des autorités d'État pour contrôler les politiques tarifaires des producteurs de *publics utilities* et, plus généralement pour édicter des dispositions réglementaires à leur égard.

Dans l'un et l'autre contexte institutionnel et juridique, les modalités des interventions des autorités publiques doivent s'adapter au contexte de libéralisation économique, caractérisé par la disparition du monopole naturel dans certains domaines, la convergence des technologies, l'internationalisation des services, la création d'un cadre juridique favorable à la concurrence.

En France, cette évolution se traduit par un déclin des fonctions de tutelle que l'État exerçait auparavant sur les entreprises publiques en même temps que ses fonctions de réglementation. L'ouverture de ces secteurs à une pluralité d'opérateurs entraîne la dissociation de cette fonction régulatrice de celle de la gestion des intérêts de l'État actionnaire et sa transformation en une vaste mission de régulation technico-économique.

Le développement de cette nouvelle régulation emprunte d'une part à la tradition juridique et institutionnelle française, notamment au principe selon lequel seuls les pouvoirs légitimés par le suffrage universel (Parlement et Gouvernement) disposent du pouvoir de réglementation des activités économiques. Ce principe ne permet la délégation à des autorités indépendantes que de pouvoirs réglementaires subsidiaires. Mais, d'autre part, il partage certaines caractéristiques avec la plupart des pays qui connaissent des évolutions comparables, notamment celle qui consiste à accorder une large place

à la régulation concurrentielle des marchés concernés et celle qui réside en l'établissement d'un juste équilibre entre la régulation opérée *ex ante* par des autorités spécialisées et celle effectuée *ex post*, par la mise en oeuvre du droit commun de la concurrence.

* * *

La régulation paraît comporter trois aspects essentiels: une fonction de réglementation, des fonctions d'organisation, de gestion et de contrôle ; une fonction de régulation concurrentielle des marchés proprement dite.

La fonction de réglementation consiste en la définition d'un cadre permettant l'exercice pluraliste des droits et des obligations des opérateurs, qui ne sont plus seulement des entreprises publiques mais une pluralité d'opérateurs privés.

Les fonctions d'organisation, de gestion et de contrôle recouvrent l'ensemble des modalités (formalisées par des décisions) qui permettront aux opérateurs agissant dans le cadre réglementaire de rendre le service attendu et de l'assurer dans des conditions de qualité et de continuité exigées par la collectivité.

Plus précisément, il s'agit par exemple de l'attribution des droits à produire ou à rendre des services et de l'allocation des ressources rares qui conditionnent l'exercice des activités en cause (et le cas échéant de leur réallocation) ; de la formalisation des obligations d'intérêt général imposées à chaque catégorie d'opérateurs et du contrôle du respect de ces obligations. Ces obligations concernent aussi bien les relations que ces opérateurs doivent entretenir avec les utilisateurs que celles qu'ils doivent avoir les uns avec les autres pour que le service soit correctement rendu. Elles constituent le "cahier des charges" que chaque opérateur se verra imposé avec les droits qu'il se verra reconnaître.

La fonction de régulation concurrentielle des marchés proprement dite doit s'inspirer du droit commun de la concurrence. Elle s'exerce à deux niveaux : en amont, elle a une visée structurelle, elle tend à créer les conditions de la concurrence souhaitée et souhaitable ; en aval elle vise à s'assurer que les comportements des acteurs autorisés ou enregistrés répondent bien aux exigences d'un ordre concurrentiel.

Ces trois fonctions de régulation sont très proches les unes des autres et ont des influences réciproques. Elles posent le problème de leur répartition entre les différentes organes institutionnels.

En France, le partage de ces missions est organisé entre le Parlement, le Gouvernement, les autorités de la concurrence et les autorités de régulation sectorielles.

Il existe aujourd'hui deux autorités de régulation sectorielles, l'une pour l'audiovisuel, l'autre pour les télécommunications.

Pour présenter de façon simplifiée le schéma général de l'articulation entre autorité de la concurrence et autorités de régulation, on pourrait indiquer que le fondement du choix des missions dévolues à chacune de ces autorités a été la distinction entre les compétences de ces deux types d'autorités :

- les autorités de régulation, une fois le cadre réglementaire défini pour l'exercice de cette concurrence, ont la tâche de mettre en oeuvre les modalités pratiques du bon fonctionnement

du secteur, notamment au regard des questions principales, que sont l'allocation des ressources rares, la mise en oeuvre d'une politique culturelle, l'accès aux réseaux essentiels, la tarification de cet accès et les conditions relatives aux services connexes à cet accès, la sauvegarde du pluralisme, la protection des mineurs ;

- tandis que les autorités de la concurrence conservent la mission d'appliquer le droit de la concurrence.

Néanmoins ce schéma est peut être trop rapide pour expliquer les expériences menées avec la création des autorités de régulation sectorielles. Le partage des attributions n'a pas obéi strictement à ce schéma. Il a répondu à des nécessités pragmatiques. C'est pourquoi il existe des variations par rapport à ce modèle "idéal", établissant les compétences des autorités sectorielles.

2. Présentation de quelques autorités de régulations sectorielles

2.1 les raisons à l'origine de la création des autorités de la régulation

La création des autorités de régulation sectorielles a obéi à diverses motivations plutôt qu'à la mise en oeuvre pratique d'une conception formalisée des autorités de régulation sectorielles. C'est pourquoi, avant de présenter l'articulation des relations entre les autorités de la concurrence et les différentes autorités de régulation, il peut paraître utile de rappeler brièvement les différentes motivations qui ont prévalu pour la création de ces dernières.

La première autorité de régulation sectorielle est née dans le secteur de l'audiovisuel. La justification en a été politique : il s'agissait de soustraire à l'emprise du pouvoir exécutif la mise en oeuvre de la liberté d'expression. Dans un domaine où la rareté de l'offre était la règle, et où l'influence du pouvoir politique ne devait pas interférer avec la mise en oeuvre de cette liberté publique, il fallait qu'une autorité indépendante du pouvoir politique puisse veiller à la sauvegarde du pluralisme, à l'égalité de traitement, à la libre concurrence, à la qualité et à la diversité des programmes, au développement de la production audiovisuelle, à la défense et à l'illustration de la langue et de la culture françaises.

C'est ainsi qu'a été créée en 1982 la Haute Autorité de communication audiovisuelle, transformée par la suite en Commission Nationale de la Communication et des Libertés puis en Conseil Supérieur de l'Audiovisuel (CSA) .

Dans le domaine des télécommunications, la suppression du monopole de France Télécom et l'ouverture complète du marché de la téléphonie dans le cadre de la législation communautaire, ainsi que, dans ce contexte, la relative rareté des infrastructures permettant le développement des services de télécommunication et le risque de conflit d'intérêts entre opérateurs publics et privés ont conduit à la création de l'Autorité de Régulation des Télécommunications (ART) par la loi du 26 juillet 1996.

2.2 Compétences et pouvoirs de ces autorités

Les autorités de régulation sont des autorités indépendantes : le législateur a fixé les règles de composition et de recrutement de ces autorités, créées et investies par lui d'une mission spécifique. Elles sont indépendantes du pouvoir exécutif et ne sont pas soumises au pouvoir hiérarchique.

Mais ce sont des autorités administratives. Le Conseil Constitutionnel a en effet eu l'occasion dans une décision relative au CSA de rejeter l'idée selon laquelle ces autorités seraient des autorités "*sui generis*", qui ne seraient rattachables ni au pouvoir législatif, ni au pouvoir exécutif. Ces autorités sont "rangées" parmi les administration de l'État. En tant que telles, leurs décisions ressortissent en principe au contrôle du juge administratif.

Le pouvoir réglementaire dont elles disposent dépend de l'habilitation législative: il est limité en surface et en profondeur; en surface: l'étendue de leur pouvoir réglementaire est déterminée par la loi en fonction de leur mission et en profondeur : les autorités administratives indépendantes ne peuvent arrêter que les mesures pratiques après que le pouvoir réglementaire a défini les éléments essentiels.

Mais ce pouvoir réglementaire, même limité existe. Il consiste par exemple pour l'ART à élaborer les règles techniques permettant l'interopérabilité des réseaux mais aussi à définir un certain nombre de règles relatives aux obligations des opérateurs et de leurs "cahiers des charges". Pour le CSA, il s'agira de la même façon de préciser les règles sur lesquelles seront élaborés les cahiers de charges définissant les modalités d'exercice du service de diffusion audiovisuelle. Elles préciseront les obligations du titulaire de l'autorisation relatives par exemple à la diffusion de programmes éducatifs, culturels, artistiques, la durée maximum de la publicité.

En outre, les autorités administratives indépendantes disposent de la compétence pour prendre des décisions individuelles. Cette compétence est essentielle au regard de leur mission principale: l'organisation du secteur. Elle se manifeste par la délivrance des autorisations ou l'octroi de licences, l'allocation aux opérateurs des ressources rares (fréquences herziennes, numéros, préfixes, etc.) et la détermination des obligations individuelles qui leur sont attachées (notamment dans le domaine de la concentration audiovisuelle, la politique culturelle, la protection des mineurs, la sauvegarde du pluralisme, etc.).

La mission du CSA est organisée autour des attributions suivantes: gestion de l'ensemble des supports audiovisuels, nominations, avis, gestion et attribution de fréquences, autorisations, autorisations, bilans, contrôle et sanctions, pluralisme politique, éthique des programmes, etc. Ainsi, les fréquences appartenant au domaine public de l'État, toute utilisation privative qui en est faite est soumise à autorisation du CSA. Leur rareté impose une procédure d'appel d'offres aux candidatures. En outre, une convention passée entre le CSA au nom de l'État et le titulaire de l'autorisation, définit les obligations particulières applicables au service de radio ou de télévision concerné. L'autorisation peut être retirée en cas de modification substantielle des données au vu desquelles elle a été délivrée.

Pour l'ART, l'organisation du secteur dans le contexte de l'ouverture à la concurrence du secteur des télécommunications signifie permettre l'accès à de nouveaux entrants et leur offrir des conditions d'interconnexion équitables, éventuellement en établissant des conditions asymétriques. Il s'agit notamment de mener à bien les appels à candidature, de procéder à l'allocation des identificateurs d'accès et des éléments du spectre hertzien.

À coté du pouvoir réglementaire et de prise de décisions individuelles, les autorités de régulation sectorielle détiennent également un pouvoir de sanction ainsi que dans certains cas, d'intervention dans les litiges entre opérateurs.

Leur pouvoir de sanction est essentiellement de trois types :

- le premier permet de suspendre, de réduire la durée de l'autorisation ou de la retirer.

  Le CSA peut notamment prononcer ce type de mesure, en fonction de la gravité du manquement lorsqu'il constate que les obligations prévues au « cahier des charges » ne sont pas respectées. Par ailleurs, le retrait de l'autorisation peut être prononcé lorsqu'est constaté une modification non notifiée et non approuvée de la composition du capital social de l'opérateur.

  L'ART a des compétences similaires en cas de non respect des obligations.

- Ces pouvoirs de sanctions relatifs à l'autorisation ont été complétés par la possibilité d'infliger des sanction pécuniaires, dont le montant est proportionné à la gravité du manquement (le montant maximum est trois pour cent du chiffre d'affaire hors taxe du dernier exercice clos, ou cinq pour cent en cas de récidive).

  La reconnaissance de ce pouvoir de sanction, notamment pécuniaire, aux autorités de régulation, autorités administratives, a été longtemps controversé. Il est aujourd'hui reconnu,[94] bien qu'encadré par toute une série de dispositions. Celles-ci visent à respecter les principes de légalité des délits et des peines (il faut que ces peines soient définies par la loi), le principe de nécessité des peines, le principe de non rétroactivité de la loi pénale d'incrimination plus sévère et le principe de respect des droits de la défense. Enfin, ces dispositions doivent également permettre la proportionnalité entre le délit et la peine.

  Le principe du respect des droits de la défense prévoit notamment que les décisions de ces autorités soient prises en vertu du principe contradictoire (les parties doivent être entendues), qu'elles soient motivées, et qu'un recours contre ces décisions soit possible.

- À ces pouvoirs peut être rattaché celui de prononcer des injonctions, y compris, en cas d'urgence, des injonctions exécutoires immédiatement à titre conservatoire.

  Un tel pouvoir est prévu pour l'ART. Cette autorité peut en faire usage lorsqu'elle est saisie pour trancher les litiges en matière d'interconnexion, ceux relatifs à la mise en conformité des conventions concernant le réseau câblé ou ceux relatifs au partage des installations concernant le domaine public.

  La loi a donc doté l'ART de pouvoirs permettant la solution rapide des différends opposant les opérateurs pour l'accès au réseau. Elle peut être saisie également d'une demande de conciliation pour régler d'autres types de différends survenant entre les opérateurs.

  Les autorités de régulation ont donc le statut d'autorités administratives pouvant prendre des sanctions ou des décisions quasi-juridictionnelles qui coexistent avec une autre autorité de même statut, le Conseil de la Concurrence. Cette coexistence exige une bonne articulation des compétences et des missions.

3. L'articulation des relations entre les autorités de régulation et les autorités de la concurrence

3.1 Les pouvoirs respectifs de ces autorités en matière de respect du droit de la concurrence

Le schéma d'organisation des relations entre ces deux types d'organismes est variable selon les secteurs :

En matière audiovisuelle, l'articulation des compétences du CSA avec les autorités de la concurrence fonctionne selon le modèle suivant :

- Le contrôle des opérations sur le capital des opérateurs de communication audiovisuelle au regard de leurs effets sur le pluralisme et la concentration mono- et multimédia ne ressortit pas à la compétence des autorités de la concurrence.

  Le contrôle des opérations de concentration des opérateurs audiovisuels relève de la compétence du CSA par le biais d'un dispositif anti-concentration étendu, et applicable à l'ensemble des supports et des services de communication audiovisuelle. Ce dispositif vise à préserver le pluralisme externe des opérateurs. Il se compose de dispositions visant à assurer la transparence, à limiter la détention en capital, à limiter le nombre d'autorisations monomédia et le nombre d'autorisations multimédias.

  Les autorités françaises de la concurrence, la DGCCRF comme le Conseil de la Concurrence conservent leurs compétences pour examiner les effets de ces opérations sur la concurrence entre les entreprises sur tous les marchés connexes, en amont ou en aval de la communication audiovisuelle (marché publicitaire, marché des droit, supports d'accès) .

  Ainsi, dans l'affaire CLT/Fun Radio, qui concernait une concentration entre deux opérateurs de station de radio, les autorités de la concurrence n'ont pas examiné les effets de l'opération sur le marché radiophonique mais sur le marché de la vente des espaces publicitaires sur les média radiophoniques.

  De même, dans l'affaire Canal+/Nethold, qui concernait une opération entre deux opérateurs de télévision payante, les autorité de la concurrence ont étudié les impacts de cette concentration sur tous les marchés adjacents comme la vente des espaces publicitaire, les capacités satellitaires, la vente des droits sportifs et cinématographiques, les supports d'accès (décodeurs).

- Le contrôle des comportements relève intégralement des autorités de la concurrence.

  Le CSA a l'obligation de déférer au Conseil de la concurrence les abus de position dominante dont il peut avoir connaissance dans son secteur.

  Le Conseil de la Concurrence, lorsqu'il a fait l'objet d'une saisine contentieuse concernant le secteur audiovisuel recueille l'avis du CSA. Dans deux affaires en cours, le Conseil a d'ailleurs sollicité un avis de cette autorité.

  Outre ce rôle quasi-juridictionnel, le Conseil de la Concurrence a un rôle consultatif : il peut délivrer des avis sur tout problème de concurrence intéressant le secteur audiovisuel.

En matière de télécommunications, l'Autorité de Régulation des Télécommunications (A.R.T) dispose, ainsi qu'il a été indiqué, du pouvoir de trancher les litiges relatifs à l'interconnexion. Une telle compétence a été octroyée à l'ART pour faciliter la résolution rapides de ce types de litiges. La nécessité de trancher, dans des délais brefs, les conflits pouvant opposer des opérateurs était particulièrement cruciale, eu égard à la situation de monopole de fait détenu par France Télécom sur les infrastructures et par sa position dominantes sur les services.

Nonobstant cette procédure, le conseil de la concurrence comme les juridictions civiles conservent une compétence de droit commun pour apprécier les comportements des opérateurs. L'ART elle-même saisit le Conseil lorsque, notamment à l'issue d'une tentative de conciliation, elle observe des faits relevant de la compétence de ce dernier.

De son côté, le Conseil saisit l'ART pour avis lorsqu'il est lui-même saisi d'un litige dans le secteur des télécommunications.

Différents mécanismes visent à prévenir les conflits éventuels entre les autorités de la concurrence et l'ART au moyen de saisine ou d'avis réciproque, ou encore à y remédier grâce aux modalités du contentieux de l'appel de ces décisions devant les autorités qui seront présentés *infra.*

3.2 La répartition des compétences en matière de régulation

La répartition des compétences en matière de régulation est délicate : il est plus facile de distinguer les compétences qui constituent des fonctions de régulation spécifique, qu'il conviendrait le cas échéant de confier à une autorité spécialisée, des compétences qui relèvent de la régulation sectorielle de droit commun, que l'on peut partager entre autorités de régulation sectorielles et autorités de la concurrence.

S'agissant des fonctions de régulation spécifiques, il faut essayer de respecter les spécificités de chacun.

En matière de communication, ce qui tend au pluralisme, à la protection de l'indépendance éditoriale et à la garantie d'accès des programmes au réseau de diffusion relève des règles spécifiques qui peuvent être confiées à une autorité spécifique.

En matière de télécommunication ou en matière énergétique, la mise en oeuvre du service universel doit relever en particulier d'une régulation spécifique.

S'agissant de la régulation concurrentielle, il faut d'abord indiquer que l'application des règles de la concurrence doit être uniforme. Le droit de la concurrence est indivisible. Son application doit être la même selon les secteurs. Le droit de la concurrence a vocation à s'appliquer à la totalité des intervenants dans un secteur économique, tout en tenant compte des particularités économiques et des réglementations sectorielles.

Pourtant, bien que complémentaires, les compétences de ces deux types d'autorité se chevauchent dans certains cas.

Même si l'on essaie de réserver à l'autorité de régulation sectorielle la résolution de certaines questions techniques, (par exemple celles relatives aux conditions de l'interconnexion), celles-ci ont nécessairement des conséquences sur le plan de la concurrence et surtout, les principes auxquels doit se référer cette autorité de régulation sectorielle sont inspirés par le droit de la concurrence.

Il importe donc de trouver des solutions à d'éventuelles différences d'appréciation. Deux types de solutions apparaissent. Le premier type de solution est mis en oeuvre *a priori*: il s'agit préalablement d'éviter les conflits en favorisant une collaboration étroite entre autorités de régulation sectorielle et autorité de la concurrence. Le second type de solution consiste en l'unification *a posteriori* de la jurisprudence par le moyen du recours contre les décisions de ces deux types d'autorité devant une instance unique, comme par exemple en France la Cour d'Appel de Paris.

4. Les solutions retenues pour organiser les relations entre les deux types d'autorités

4.1 Une consultation réciproque des deux types d'autorités

Cette collaboration entre les autorités peut être développée au moyen de différents mécanismes.

Le premier consisterait à multiplier les cas de consultation réciproque.

Un tel mécanisme de consultation réciproque est prévu par les lois françaises qui instituent le CSA et l'ART. Il s'exerce différemment selon qu'il s'agit d'une saisine pour avis (consultatif) ou d'une saisine contentieuse.

En matière audiovisuelle, le Conseil de la Concurrence consulte le CSA lorsqu'il rend des avis consultatifs.

Lorsqu'il est saisi au contentieux, le Conseil de la Concurrence peut recueillir, en tant que de besoin les avis du CSA

Par ailleurs le CSA doit saisir le Conseil de la Concurrence des abus de position dominante dont il pourrait avoir connaissance.

En matière de télécommunications, L'ART est consultée sur les projets de lois, de décret ou de règlement relatif au secteur des télécommunications et participe à leur mise en oeuvre ;

Le Conseil de la Concurrence, quant à lui peut être consulté par le gouvernement pour toute question de concurrence se posant lors de la préparation de textes réglementaires.

Les dispositions combinées de ces deux textes font que les deux instances seront consultées successivement pour donner leur avis pour tout projet de loi ou de décret portant sur le secteur des télécommunications où des questions de concurrence se poseront.

S'agissant de la saisine contentieuse, il existe également un mécanisme permettant d'assurer la consultation réciproque.

Ce mécanisme impose à l'ART de saisir le Conseil de la Concurrence dans deux cas de figure :

- dès lors qu'il s'agit d'une question de droit de la concurrence relevant de l'Ordonnance et donc du Conseil de la concurrence. L'ART a obligation de saisir ce dernier. Cette saisine contentieuse peut en outre être introduite dans le cadre d'une procédure d'urgence, auquel cas le Conseil de la concurrence est appelé à se prononcer dans les trente jours ouvrables suivant la saisine ;

- suite à l'échec de la conciliation intervenue pour régler des litiges dont l'ART peut connaître. L'ART doit alors saisir le Conseil de la Concurrence, si le litige relève de sa compétence.

L'ensemble de ce dispositif est de nature à favoriser une convergence des solutions en matière de concurrence appliquée au secteur particulier des télécommunications.

En matière de contentieux, l'expérience de l'ART est encore trop récente pour dire si ce dispositif fonctionnera de manière efficace, c'est à dire si l'ART saisira effectivement le Conseil. En matière consultative, le dispositif fonctionne effectivement.

Il existe par ailleurs une autre solution envisageable pour résoudre la question de l'unification du droit de la concurrence appliqué par deux instances. Cette solution consiste en le choix d'une instance supérieure unique, devant laquelle sont introduits les recours contre les décisions des deux types d'autorités.

4.2 L'harmonisation du droit par une instance devant laquelle sont exercés les recours

Pour assurer la cohérence des décisions de l'ART en matière d'interconnexion avec le droit commun de la concurrence, le mécanisme d'un recours unique devant la Cour d'appel de Paris contre les décisions de l'autorité de régulation des télécommunications, l'ART, a été instauré.

Une telle solution n'allait pas de soi. L'ART est une autorité administrative et il aurait concevable de prévoir le recours contre les décisions de cette dernière devant le Conseil d'État, qui a vocation a connaître du contentieux des décisions des organismes administratifs.

C'est d'ailleurs la solution qui a prévalu pour le CSA. Ainsi, le recours contre les décisions de retrait de l'autorisation doit être formé devant le Conseil d'État.

Il en est de même pour l'ART. Seuls les recours contre les décisions de cet organisme relatives aux litiges en matière d'interconnexion, d'accès ou de partage d'installations sont exclus de la compétence du juge administratif. On a considéré que les décisions devaient être rendues conformément au droit commun de la concurrence En outre, sa compétence n'est pas exclusive: les tribunaux judiciaires et le Conseil de la Concurrence pourront connaître des mêmes litiges. Il était donc conforme à une bonne administration de la justice d'assurer l'homogénéité de la procédure et du type de contrôle des décisions prises en matière d'interconnexion, ainsi que l'unité de la jurisprudence sous le contrôle de la Cour de Cassation.

Le critère matériel plutôt que le critère organique a ainsi prévalu, assurant ainsi l'unification *a posteriori* de l'application du droit de la concurrence.

NOTE

94. Sous réserve de deux limites précisées dans la décision du conseil constitutionnel relative au CSA : "*attribution d'un pouvoir de sanction est possible à une autorité administrative si d'une part la sanction susceptible d'être infligée est exclusive de toute privation de liberté et d'autre part si l'exercice du pouvoir de sanction est assorti par la loi de mesures destinées à sauvegarder les droits et les libertés constitutionnellement garantis*".

GERMANY

1. General remarks

AD A/B.: In Germany regulators are not the principal enforcers of competition law in their sector nor competition agencies are principal economic regulators. In general both tasks are clearly separated. Only for the field of telecommunications and railway transports regulatory and competition competencies partly overlap. Even then competition authorities keep the exclusive powers to apply rules about ban on cartels, abuse of dominant positions and merger control.

Adding sector-specific regulatory instruments to the competition law standards can cause complex problems, especially with regard to the abuse supervision of market-dominating enterprises:

- the creation of new sector-specific regulatory authorities can lead to a sectionalisation of competition policy. This involves the danger of competition law enforcement in these sectors being separated from the development of general competition law.

- sector-specific authorities whose decisions are reviewed by different courts (regulatory authority: administrative courts; Federal Cartel Office: ordinary courts) will in the end lead to the loss of uniform legal enforcement practice.

Therefore the creation of regulatory authorities with powers in the field of competition law should be strictly limited.

AD D.: In several sectors i.e. in the insurance and banking sectors exist regulators. Incompatible demands are mostly prevented by the duty of the regulator to give notice to the Federal Cartel Office before taking steps that could lead to a restriction of competition by agreements of enterprises.

AD E.: This is only the case for the Regulatory Authority for Telecommunications and Posts

Most of the issues explored in the outline were subject to the liberalisation of the telecommunication sector. The German approach to the relationship between regulator and competition authority is therefore described for this sector.

In the field of telecommunications, Germany has opted for a sector-specific, asymmetric system of supervision which goes further than the general supervision of abuse under the Act against Restraints of Competition (Cartel Act). This is because it was felt that the task of regulating the industry requires such a degree of specialisation and expertise beyond the mere regulation of markets that the instruments of general competition law were insufficient. The legislator therefore decided to transfer these tasks not to the Federal Cartel Office but to the Regulatory Authority for Telecommunications and Posts, which was established on 1 January 1998.

It is important however that the regulation and the regulator will lose their “raison d´être” if the tetecommunication sector is successfully transformed into markets characterised by effective competition.

For this reason § 81 (3) of the Telecommunications Act requires the need for regulation provisions to be examined at regular intervals by the advisory monopoly commission.

2. Relationship between the FOC and the Regulatory Authority for Telecommunications and Posts

The relevant legislation is the Telecommunications Act, which is a *lex specialis* compared with the Cartel Act: the latter applies only when the Telecommunications Act does not provide any specific arrangement. Where the Telecommunications Act grants the Regulatory Authority powers to monitor the industry, the rules contained in the act therefore take precedence over the rules of sections 22 and 26 paragraph 2 of the Cartel Act. This means that the following provisions of the Telecommunications Act displace those of the Cartel Act:

- The right for telecommunications services and universal services requiring an operating licence to challenge Standard Terms and Conditions pursuant to section 23 of the Telecommunications Act.

- Ex ante fee regulation (section 25 paragraph 1, sections 27 and 28 of the Telecommunications Act) and ex post fee regulation (section 25 paragraph 2, section 30 of the Telecommunications Act) for services by dominant companies.

- Specific supervision of abuse pursuant to section 33 of the Telecommunications Act regarding the duty of dominant companies to permit access to the system for their competitors without discrimination (horizontal restraints of competition) and regarding violations of EC rules on open access to the system (section 34 paragraph 1 of the Telecommunications Act).

- Granting of access to the system under section 35 of the Telecommunications Act, according to which the dominant company can be required to enable other users to access its telecommunications system.

- Interconnection of systems pursuant to section 37 of the Telecommunications Act when contractual negotiations between the companies fail.

- Supervision of pre-existing agreements on access to systems which restrict competition, pursuant to Section 38 of the Telecommunications Act.

The Federal Cartel Office cannot act in these areas on the basis of the Cartel Act.

The Federal Cartel Office is responsible for the supervision of activities of dominant suppliers of telecommunications services in relation to customers who are not competitors. Both section 33 paragraph 2 and section 37 of the Telecommunications Act refer solely to horizontal restraints of competition. This applies with the sole restriction that the case must not refer to a fee regulation under sections 24 ff of the Telecommunications Act or a challenge against the Standard Terms and Conditions under section 23 of the Telecommunications Act. These tasks are reserved by law for the Regulatory Authority. A further area in which the Federal Cartel Office has competence is abuse of dominant positions with regard to telecommunications services not intended for the public (e.g. data and voice transmission for specific user groups).

If a dominant provider abuses its position to the disadvantage of competitors, the Federal Cartel Office will act when the Regulatory Authority considers that it has no legal basis for intervention:

In early April 1998, the Federal Cartel Office instituted proceedings under section 22 (4) of the Cartel Act against Deutsche Telekom AG concerning the provision of directory information. The competent decision-making division of the Federal Cartel Office examines whether Deutsche Telekom AG, based on its pricing structure, has abused its dominant position in the market for directory information in the field of voice telephony. For comparison the decision-making division intends to use the fees charged by British Telecom for the sale of its directory information in the United Kingdom. In the meantime the decision-making division has contacted the Office of Telecommunications (OFTEL) with a view to obtaining information on the conditions of competition and pricing in the UK.

The German Regulatory Authority has declared itself not to be competent for examining the fees. In its opinion, the Telecommunications Act has not provided for the legal basis because the provision of directory information is not a telecommunications service within the meaning of the Telecommunications Act. The question of who is competent is also pending before the Cologne Administrative Court.

Where both the regulator and the Federal Cartel Office conduct control, the co-ordination of tasks is laid down in the Telecommunications Act. With respect to co-operation, the Telecommunications Act provides for the following:

In its own proceedings, the regulator has to give the Federal Cartel Office an opportunity to be heard. Conversely, the Federal Cartel Office has to hear the regulator before issuing decisions in its own abuse proceedings. The Federal Cartel Office's legal position is strongest as regards the geographic and product market definition and market dominance. In both fields the regulator may only decide in agreement with the Federal Cartel Office.

3. Application of European competition law

At national level the Federal Cartel Office is responsible for applying European competition law, in particular Article 86 of the EC Treaty. The Telecommunications Act allocates no powers to the regulator to apply European competition rules. As a result a case may simultaneously come:

- within the regulator's responsibility under the Telecommunications Act;
- within the Federal Cartel Office's responsibility in the context of the decentralised application of European competition rules; and
- within the European Commission's responsibility under Community law.

So far the regulator and the Federal Cartel Office have made no arrangements to ensure that the regulator's measures are not in conflict with European competition rules. However, in the context of its right to be heard the Federal Cartel Office will examine the regulator's decisions to see whether they are compatible with European competition rules.

HUNGARY

The "Secretariat's Suggestions for Submissions" set out five general approaches for governing the co-operation and division of work between regulatory and competition authorities. Approach D best describes the approach adopted in Hungary. In order to ensure legal security the Hungarian legislature strives to establish a clear division of labour between the authorities concerned with a particular issue. This means that competition law may be applied exclusively by the competition authority and regulation exclusively by the authorities which are responsible for the technical and economic regulation.

Act LVII of 1996 "On the Prohibition of Unfair and Restrictive Market Practices (Competition Act) stipulates that its rules shall apply to the market practices of all undertakings except where differently regulated by other statutes. This half sentence, allowing exceptions, creates the possibility of substituting sector specific regulation for general competition rules presumably where the market is inherently limited or does not function at all. As an example, maximum prices are established for activities carried out based on exclusive rights. In consequence, the Office of Economic Competition (OEC), forwards cases involving alleged abuse of dominance in regulated sectors to the appropriate regulatory body. This typically applies to the following service markets:

- domestic rail transport of passengers;
- domestic scheduled long-distance coach transport;
- scheduled local transport of passengers;
- domestic letter-post service;
- phone service;
- drinking water supply;
- district heating;
- natural gas supply;
- supply of electricity.

On the other hand, in cases where abusive practices are alleged as regards non-regulated parts of a market, the investigation of the case is performed in the framework of competition supervision proceedings.

Some of the sectorial statutes impose, in addition to the merger control rules of the Competition Act, further limits based on professional aspects. In such situations both authorities have to approve the mergers before they are permitted to proceed.

Examples for this are given by the Acts applying to gas supply, generation, transport and supply of electricity, and radio and television broadcasting.

The Acts governing gas supply and generation, transport and supply of electricity stipulate, under "Separation, combination, amalgamation", the following limitations, which are additional to those provided for by the merger control rules of the Competition Act:

> "In order to prevent capital concentrations which pose a threat to the security of supply and the observation of the principle of minimum costs, the acquisition by one person or one group of owners of a higher than 25 percent ownership may be put into the stock register only after getting the approval of the authority responsible for the authorisation."

According to the Act governing radio and television broadcasting, changes in the ownership of programme providers have to be notified to the National Radio and Television Corporation and the observance of limitations provided for by the Act in respect of the ownership has to be declared. Such a limitation is a.o. the following:

> "Persons entitled, based on contracts or notifications, to provide programmes may be entitled concurrently to operate at most:
>
> *a)* one nation-wide programme supply, or
> *b)* two regional and four local programme supplies, or
> *c)* twelve local programme supplies."

This division of labour does not preclude the regulatory authority from soliciting and considering the views of the OEC. It is desirable that competition policy principles penetrate the regulation.

With the amendment of the gas and electricity Acts, a step has been taken in this direction: concerning mergers and acquisitions of control, which do not reach the threshold established by the Competition Act, the Hungarian Energy Office is obliged to solicit the opinion of the OEC.

Recently regulators have shown a great degree of interest in competition law. OEC-experts participate indirectly in rethinking and improving various regulations. They also make presentations and consult concerning competition policy aspects of interest to regulatory authorities.. OEC staff members take part in the work of professional fora where they can meet specialists dealing with technical regulation and improve their related knowledge.

The OEC is frequently concerned that reasonable framework rules reflecting specific sectoral requirements have not yet been substituted for competition inhibiting rules which were annulled at the beginning of the change of the political system. Because of this failing, some markets are still unable efficiently to regulate themselves. In certain cases some signs of anarchy are seen. Examples include funeral services and the Budapest taxi services markets. It happened that in these markets a regulatory reform was launched on the OEC's initiative. As a result, a decision was taken to give local governments the power to regulate taxi tariffs. An Act pertaining funeral services is currently being prepared.

The market of GSM 900 mobile telephony illustrates a move in the opposite direction, i.e. towards less regulation. Due to limited spectrum availability, entry here was awarded to two companies

after a competitive auction. The two competitors are now each obliged to build networks covering all of Hungary. At first the prices of their services were regulated. Active rivalry between them made it possible to abolish the price regulation as from the beginning of 1998. In this case, even duopolistic competition seems to create "better" market prices than regulation could.

ITALY

In Italy, the general approach followed in governing the interaction between regulators and competition authorities has been to allocate the enforcement of competition policy in all sectors to the Antitrust Authority (Autorità garante della concorrenza e del mercato) and regulatory tasks to various sectorial regulatory bodies. More specifically, law no. 287 of October 10th 1990 (the Competition Act) fully applies to all economic sectors and the Antitrust Authority is responsible for enforcing it on an exclusive basis.

The only exception to this division of tasks is represented by the banking sector, where the sectorial supervisory authority, the Bank of Italy, was given responsibility for enforcing competition rules with respect to agreements, abuses of dominant position and mergers which involve banks. The Antitrust Authority simply gives a prior non binding advice to the Bank of Italy on such decisions (law no. 287/90, section 20, paragraphs 2-3). The substantive competition rules which the Bank of Italy is required to apply with respect to the banking sector are the general provisions contained in the Competition Act. The only special provision concerns agreements in the banking sector: the Bank of Italy may authorise, when certain conditions are met, otherwise anticompetitive agreements in order to guarantee the stability of the monetary system. Such authorisation requires the consent of the Antitrust Authority, which shall judge whether or not the considered agreement impedes competition (law no. 287/90, section 20, paragraph 5). So far, this provision has never been applied. In order to improve the co-operation between the Antitrust Authority and the Bank of Italy and to increase the effectiveness of the enforcement of antitrust rules, in March 1996 the two institutions signed an agreement directed to clarify and rationalise procedures relating to mergers involving banks.

In recent years, many economic sectors have experienced a wide and far-reaching process of deregulation, often fostered by EU interventions. In some public utility sectors, regulatory tasks previously carried out by Ministries have been transferred to independent sector regulators.

In particular, a new agency, called "*Autorità per l'energia elettrica e il gas*", was given regulatory powers over the electricity and gas sectors (law no. 481 of November 14th 1995). The new regulatory authority has, among others, the following duties: to fix and update tariffs; to check network access conditions; to assess complaints filed by consumers regarding companies conduct; to issue guidelines regarding the unbundling and the quality level of services. The law no. 481/95 provides for a clear-cut division of tasks, allocating regulatory functions in the electricity and gas sectors to the regulatory agency, and leaving the enforcement of competition rules in such sectors to the Antitrust Authority.

More recently, law no. 249 of July 31st 1997 has established the communications, publishing and broadcasting regulatory authority, called the "Autorità per le garanzie nelle comunicazioni". The communications regulatory authority has, among others, the following duties: to identify universal service obligations and conditions for the allocation of costs; to define a set of objective and transparent criteria for network interconnection and access; to issue general authorisations and individual licenses; and to adopt guidelines regarding the quality level of services.

As in the case of the electricity and gas regulatory agency, the statute provides for a functional division of tasks, giving the communications agency only regulatory functions, while the Antitrust Authority is competent to apply competition rules in the telecommunications, publishing and broadcasting sectors. It must be stressed that, before the establishment of this new communications authority, competition law enforcement in the publishing and broadcasting sectors was attributed to the former Publishing and Broadcasting Authority, now suppressed. Therefore, these developments confirm the general trend towards a separation of tasks between competition and regulatory authorities based on functional criteria rather than on specific sectorial expertise.[The enumerated questions below apply to Section D of the Secretariat's Suggestions for Submissions - General Mandate Driven Division of Labour (i.e. competition law(s) is (are) exclusively applied by the competition agency(ies), and regulation exclusively bly technical and economic regulators)]

1. What steps are being taken or are under active consideration to ensure that companies are not subject to significant uncertainty concerning whether their action will be subject to economic regulation or competition law?

The general competition law applies to all undertakings, irrespective of their private or public nature. It specifies, however, that competition rules do not apply to undertakings which, by law, are entrusted with the operation of services of general economic interest or operate on the market in a monopoly situation, in so far as this is indispensable to perform the specific tasks assigned to them (law no. 287/90, section 8, paragraph 2). The Antitrust Authority has applied a narrow interpretation of this provision, stating that the antitrust rules are excluded only as regards specific conduct constituing aunique and approved way to achieve institutional goals entrusted by the law to a specific undertaking. Therefore, the conduct has to be strictly necessary and proportional in relation to the correct fulfilment of an enterprise's duties. In this sense, it has to represent, among the various possible alternatives, the one which is less restrictive of competition.

However, legal provisions in a number of sectors (such as public utilities, agriculture, professional services) require or authorise conducts that may result in anticompetitive effects. Under the domestic law, undertakings cannot be prosecuted for behaviour mandated or explicitly authorised by a legislative or regulatory prescription, unless they enjoy a certain margin of discretion in the choice of the means and conditions in the achievement of what it is prescribed.

In these situations, the Antitrust Authority may use its consultative powers to notify the Government, Parliament or any concerned public bodies, of any existing or draft rules or measures that introduce restrictions on competition which are not justified in terms of the general interest (law no. 287/90, section 21 and 22).

2. Excepting general informal consultation, describe any means which either the regulatory and competition authorities use to benefit from each other's expertise or otherwise to capitalise on complementarities existing between regulatory and competition policies.

Apart from general informal consultation, in some sectors co-operation between regulatory and competition authorities in the fulfilment of their respective duties has been institutionalised by the provision of prior non binding advises, delivered by regulatory authorities to the competition authority, and *vice versa*.

More specifically, the Antitrust Authority is required by law no. 287/90 to ask a prior non binding advice to:

- the insurance regulatory agency (ISVAP), on decisions concerning agreements, abuses of dominant position or mergers which involve undertakings operating in the insurance sector. If the advice is not delivered within 30 days, the Antitrust Authority is allowed to proceed (law no. 287/90, section 20, paragraph 4);

- the communications regulatory authority on decisions concerning agreements, abuses of dominant position or mergers which involve undertakings operating in the communication industry. If the advice is not delivered within 30 days, the Antitrust Authority is allowed to proceed (law no. 249/97, section 1, paragraph 6, letter *c*), point 11);

On the other hand, the Antitrust Authority is required to issue a prior non binding advice to:

- the communications regulatory authority, on the following aspects: the identification of undertakings active in the telecommunications sector with significant market power; the conditions of interconnection and of access to the network; decisions concerning accounting separation (Presidential Decree no. 318/97, respectively section 1, letter *am*); section 4, paragraph 9; section 4, paragraph 17; section 9, paragraph 2);

- the competent public administrations, on the definition of public franchises and other means which regulate the exercise of public utility services (law no. 481/95, section 2, paragraph 34);

Moreover, the energy and communications regulatory authorities are required by law to notify the Antitrust Authority of any alleged violation of the competition rules they may come to know of (law no. 481/95, section 2, paragraph 33).

3. Describe any formal role that the general competition agency plays in reaching decisions on adopting or abolishing regulation, and determining its scope and nature.

As mentioned before, the Antitrust Authority is empowered to notify the Government, Parliament or any concerned public administrations of any existing regulations or draft rules or measures that introduce restrictions on competition that are not justified in terms of the general interest (law no. 287/90, sections 21 and 22). Since 1990, the Antitrust Authority has exercised its competition advocacy powers with respect to a wide range of economic sectors, where regulations unduly prevent or restrict entry on the markets, or otherwise distort competition. Half of the reports issued by the Authority refer to legislation concerning transport, telecommunications and energy.

Although it is not easy to accurately assess the effective impact of the Authority's advocacy activity in relation to the complex system of laws and regulations which distort competition, it happens that in about one third of the cases, the Authority's positions have been broadly taken up by Parliament and/or by the competent authorities, which in some cases have repealed rules and regulations imposing unjustified restrictions on competition or, more frequently, have amended certain anti-competitive provisions of draft legislation. As far as the relations between the Antitrust Authority and the competent regulatory body are concerned (generally the Ministry, since the sectorial regulatory authorities have only recently being instituted or are in process of being established), the experience developed so far shows that the intervention of the Antitrust Authority is more likely to be effective when it involves issues that

have already been dealt with, in some degree, by the European Union, in the form of directives, resolutions, infringement procedures or judgements from the Court of Justice. On the other hand, where the Antitrust Authority has addressed issues of purely domestic relevance, its recommendations have often been ignored.

There is also a link between the activity of the Antitrust Authority in the enforcement of competition rules and its advocacy activity. Investigations of alleged abuses of dominant position or anti-competitive agreements provide, in fact, a golden opportunity to carry out a thorough examination of the regulatory context, making it possible to identify obstacles to competition stemming from it. Furthermore, the effectiveness of the Authority's advocacy interventions can be considerably enhanced when carried out simultaneously with one or more investigations of conducts restricting competition on related relevant markets.

This is particularly evident from the Authority's experience in the telecommunication and transport sectors. With reference to telecommunications, regulations governing value-added services and mobile telephony have been changed as a result of many advocacy reports together with a number of major proceedings. Also in the road transport and port industry, the synergies between advocacy and investigation activities have brought about the abolition of rules and provisions imposing unjustified restrictions on competition.

4. Describe any particularly important successes or problem associated with the general approach of assigning regulation to regulators and competition law to competition agencies. What reform, if any, are being planned to improve the system?

In the enforcement of general competition rules in different sectors, competition authorities take into account the economic characteristics and specificities of each market. In addition, regulatory authorities usually have much less expertise in the field of competition policy.

Moreover, also due to the removal of some regulatory line of business restrictions, it is becoming increasingly difficult to design an effective and stable system in which a subset of markets or undertakings is not under the jurisdiction of the economy-wide competition authority, but of a sector-specific competition law enforcer. In particular, product market boundaries are not stable over time, but change as a result of changes in technologies and in demand.

Therefore, the general approach of assigning regulatory tasks to sectorial regulatory agencies and tasks of competition law enforcement to the Antitrust Authority involves several advantages. The most important of them is that it guarantees a consistent interpretation and enforcement of the antitrust rules. An often neglected quality of a functional division of tasks between regulatory and competition authorities is that it would significantly simplify the institutional framework with respect to the international aspects of competition policy.

JAPAN

1. Introduction

Reviewing government regulations from the viewpoint of competition policy is an essential ingredient for opening up and liberalising the Japanese economy on an international scale on the basis of self-responsibility and market principles.

The Japan Fair Trade Commission (JFTC) actively pursues (1) reform of the government's regulatory scheme, (2) co-ordination of administrative practices and of laws and ordinances, and (3) effective elimination of violations of the Antimonopoly Act (the Japanese competition law, hereafter referred to as the AMA) in government-regulated sectors with a view to promoting free and fair competition .

2. Reform of the Government's Regulatory schemes

There are many industrial sectors in Japan in which economic and business activities concerning entry, facilities, volumes, prices, and other factors are regulated by the government for social or economic reasons.

Although it is believed that these regulation policies have played a certain role in the process of the Japanese economy's development, changes in socio-economic conditions have reduced the need for government regulations. Moreover, several government regulations have in fact caused various problems such as inefficient management, a lack of entrepreneurial spirit, and further restraints on competition.

The JFTC has long been conducting surveys and studies on problems in government regulations and the direction of reform from the viewpoint of competition policy, the results of which have been made public. It has also pointed out to the administrative agencies concerned problems in government regulations from the viewpoint of competition policy, urging them to improve their regulations. In this way the JFTC has been heavily involved in competition advocacy. Furthermore, the JFTC organises study groups (made up of academics and other experts) to examine these issues, publicising the results in the form of study group reports.

The "Second Revised Deregulation Action Plan" adopted by the Cabinet on March 1997 states that "from the viewpoint of the competition policy which promotes deregulation, the JFTC will actively conduct surveys and submit proposals. This is intended to facilitate fair and free competition amongst entrepreneurs both inside and outside Japan and to safeguard the interests of the consumer" The role to be played by the JFTC in deregulation is thus very clear.

One of the JFTC sponsored study groups published a report on domestic air passenger transport in March 1997 and another on the electricity and gas industries in April 1997. Other initiatives to promote competition have also been vigorously pursued.

The report on the electric power and gas industry, for example, emphasises the need for comprehensive regulatory reform from three points of view: promoting deregulation, fostering competitive conditions and strictly enforcing the AMA. The report proposes the following reforms with regard to injecting more competition into electric power generation and retailing:

1) improvement of the bidding system and its actual implementation so that it functions as pressure on the power generation division of electric power companies to initiate greater efficiency and cost reductions;

2) expansion of retail supply, including the active utilisation of household power generation, together with the promotion of direct competition with electric power companies;

3) legalisation of self-consignment to promote new entries, in addition to actively utilising the wholesale consignment system .

The report also stresses the need for the strict enforcement of the AMA when competition is restricted in deregulated fields and crucial blocked sectors.

The report also refers to the following as future issues for discussion: liberalisation of retail supply; review and verification of efficiency of vertical integrations of power generation, transmission and distribution and examination of the proper role of regulation through industrial laws, taking into account the development of competition between energy sectors.

The gas industry report proposes to reduce the minimum size of large-scale supply in urban gas services where pricing has been liberalised, with the aim of deregulating entry to city gas services and fostering competitive conditions. It also proposes that the consignment of city gas services be legalised and that small gas operators be permitted to form small-scale networks within the supply districts of urban gas operators.

The study group's report also cites the following as future issues for discussion: the reform of standard regulations for the city gas industry; examination of the framework for supply districts of city gas operators; reform of the vertical integration of production, transmission and retailing in city gas services, and the possibility of crossover entry between the electricity and gas industries.

2. Administrative Co-ordination

With regard to the relationships between competition agencies and regulatory agencies in Japan, it is the sole responsibility of the JFTC to enforce the AMA, apart from exceptional cases when the JFTC must consult or notify the relevant ministries concerning certain administrative procedures. On the other hand, economic and technical regulations are implemented exclusively by regulatory agencies. The JFTC, as a competition agency, does not implement economic regulations.

The exemption system of the AMA clearly defines the relationship between competition agencies and regulatory agencies. If a minister intends to approve an exempted cartel under certain requirements, it must generally consult with or obtain consent from the JFTC. Exemption systems have been subject to many reviews, and as a result, exemptions have been not only implemented in a limited manner but are also decreasing in number.

Both regulatory laws and the AMA are applied to certain industries, except where there are specific exemption clauses. The AMA cannot be applied to acts mandated by regulatory laws .

However, Japan's regulatory laws are basically structured in such a way that individual firms are required to make applications first; they apply to engage in certain business activities based on their own decisions, and regulatory agencies decide whether to grant approval based on the requirements stipulated by regulatory laws. Even when regulatory agency approval is obtained, actions are based on the decisions of the firms themselves, and business activities are not dictated by regulatory agencies. Therefore, although business activities can be said to be regulated, a certain level of competition is expected. Most obviously, the AMA is applied to acts that restrain competition in this regard. A typical example is a cartel formed by firms or a trade association to police the content of applications for approval of such matters as fares. To date, there have been many instances of violations of this sort.

With regard to the setting of prices for which individual firms must obtain approval from regulatory agencies, it is generally stipulated that, as criteria for approval, the firms should not set below cost or unfairly discriminatory prices. In principle, it is difficult to envisage prices which have received approval ever being construed as unfair price-cutting, discriminatory treatment, or other illegal conduct under the AMA.

Economic regulations have been relaxed, and many systems requiring prior approval of prices have been abolished. Regulations requiring only notification have been increasing, where the necessary corrective order can be issued *ex post facto*. Corrective orders, seemingly drawing inspiration from the AMA, frequently cite "unfair or discriminatory treatment" and "unfair competition". However, whereas regulatory laws ostensibly seek to protect consumers directly, the objective of the AMA is the maintenance of competition which indirectly benefits consumers. Regulatory laws and the AMA clearly have similar objectives but very different methods whose comparative advantages differ according to whether a sector is or is not inherently competitive.

Moreover, procedures have not been established to resolve problems that arise between competition agencies and regulatory agencies. The usual "administrative co-ordination" has been effected in an attempt to achieve appropriate resolutions to these problems.

In June 1994, the JFTC publicised "Guidelines for Administrative Guidance under the Antimonopoly Act" in order to clarify interpretation concerning administrative guidance under the AMA, based on cases where the JFTC had already co-ordinated with the administrative agencies concerned and made investigations. The aim was to prevent administrative agencies from distorting free and fair competition and violating the AMA.

The following cases serve as model examples of co-ordination based on the Guidelines:

a) Administrative Co-ordination for Improvement of the Silver Mark System

The Elderly Service Providers Association (a public corporation) prescribed uniform standards for firms supplying goods and services essential for maintaining the health and well-being of senior citizens (commonly known as *silver service operation providers*), and established the "silver mark" system, which conferred a silver mark on firms that met these standards. Through memoranda and other methods, the Ministry of Health and Welfare and others provided guidance which suggested: (1) that firms should acquire a silver mark as a condition for entry to *silver service* operations, (2) that municipalities, towns and villages should commission firms that carry a "silver mark" for delivery of certain goods and

services, and (3) that they should limit the number of firms eligible for receiving public subsidies for welfare equipment under the jurisdiction of the Social Insurance Agency and other agencies to those which have obtained a "silver mark" and are members of the Japan Welfare Equipment Suppliers Association (also a public corporation). The Elderly Service Providers Association also employed a variety of methods of favouritism towards the Elderly Service Providers Association and certain specific trade associations in the granting of a "silver mark". Due to concern that this conduct may have the effect of restricting entry, the JFTC requested that the Ministry of Health and Welfare, the Social Insurance Agency and the Elderly Service Providers Association review the "silver mark" system. Consequently, all the above administrative guidelines were either abolished or reformed.

b) Administrative Co-ordination for Opening Health and Medical Service Facilities for the Elderly

From the viewpoint of ensuring co-operation between healthcare facilities for the elderly and general medical services, several local governments required local medical associations to submit their written opinions on documents outlining the member companies' planned facilities in their applications for being granted approval for opening healthcare facilities for the elderly, based on the "Health and Medical Service Law for the Elderly."

Due to concern that this kind of management could encourage relations amongst firms which may conflict with the AMA, the JFTC requested that the Ministry of Health and Welfare issue a memorandum addressed to local governments, stating that the written opinions of local medical associations were no longer necessary as application documents. A memorandum was subsequently issued as a result of this administrative co-ordination.

In recent years, deregulation has also broadened the range of regulated industries in which competition functions, which means that the AMA operates on a wider scale than previously.

It has been decided by the Cabinet that "the relevant ministries and government agencies will, bearing in mind the aim of the *Antimonopoly Act Guidelines regarding Administrative Guidance*, have sufficient prior consultation with the JFTC to ensure that government regulations are not replaced by anti-competitive administrative guidance after deregulation."

As stated above, regulatory agencies do not intervene in procedures when the JFTC implements measures based on the AMA.

3. Co-ordination of Laws and Ordinances

In Japan, when a bill based on a Cabinet decision is submitted to the Diet, the customary practice is for government agencies to carry out the necessary co-ordination in advance. This process ensures that the JFTC's opinion is taken into account when there are concerns that regulatory provisions in these bills may create exemptions to the Antimonopoly Act or lead to a restraint of competition.

The non-life insurance sector is a recent example of the introduction of competition. The Fire and Marine Insurance's Rating Association of Japan currently calculates commercial insurance premium

rates, and these rates are of mandatory use for members. The Association's actions are exempt from application of the AMA. However, a bill to reform this exemption was submitted to the Diet after consultation between the JFTC and the Finance Ministry. It is currently under consideration in the Diet. It would allow the Association to calculate only net rates as reference rates (with the exception of specialised government-subsidised insurance), and the exemption to the AMA would be repealed (enactment is anticipated in July 1998).

4. Recent Cases in Government-Regulated Sectors

The JFTC strives to ensure fair and free competition through strict, impartial enforcement of the AMA when cartels and other violations occur in sectors in which regulation has been relaxed. This is to secure the effects of deregulation and ensure compliance in those sectors. Recent noteworthy cases in government-regulated sectors are listed below:

a) Case Against the Japan Medical Food Association and Nissin Medical Food Co., Ltd. (Decision issued on May 8, 1996)

(Description of violation)
The Japan Medical Food Association and Nissin Medical Food Co., Ltd. collaborated to restrain competition in sectors dealing in medical food products within Japan by eliminating the business activities of enterprises which manufacture or sell hospital food. These actions were made possible because the Association had been designated as the sole hospital food inspection agency for the Minister of Health and Welfare, and implemented a manufacturing plant certification system and vendor certification system for hospital food.

b) Case Against the Union of Machinery Insurers of Japan (Decision issued on February 5, 1997)

(Description of violation)
When insurance companies wish to revise premium rates and other conditions of insurers, they must obtain the approval of the Minister of Finance under the provisions of the Insurance Business Act. The Union of Machinery Insurers of Japan (UMIJ) determined the contents of approval applications, which are to be applied for by member firms, and established the rate with regard to the insurance premium for machinery insurance and assembly insurance. The UMIJ also made their members underwrite machinery insurance at fixed rates and implemented a system which determined these rates according to an integrated standard which set various provisions including the insurance rate. The UMIJ was thus found to have substantially restricted competition in the field of machinery insurance and assembly insurance.

c) Fukushima District Taxi Co-operative (warning issued on October, 24, 1997)

(Summary of Warning)
When setting or revising taxi fares, general passenger automobile transport firms (commonly known as "taxi companies") must obtain the approval of the Minister of Transport under the provisions of the Road Transportation Law. However, in April 1997, a zone allowing a 10 percent range of variance between the maximum and minimum fare rate, and a zoned fare system allowing for automatic approval of all applications within that zone were implemented. The Fukushima District Taxi Co-operative issued prepaid taxi coupons as

receipt of payment from any taxi firms in the district, and collected a commission on the coupons from co-operative members. The Co-operative attempted to raise the commission rate for some co-operative members who used the zoned fare system to reduce taxi fares, and requested them to refrain from using designated taxi stands in train stations and other areas. The JFTC issued a warning that such conduct could constitute a violation of the AMA.

KOREA

1. Introduction

The OECD Committee on Competition Law and Policy classifies the relationship between the regulatory authorities and the competition authorities into the following five models:

- Model A: the Competition Authority is the principal enforcer of the competition laws in each sector monitored by the Sector Authority;
- Model B: the Competition Authority is the principal enforcer of economic regulations for certain areas;
- Model C: the Competition Authority pursues the government's regulatory goals by enforcing the competition laws in sectors subject to government regulation;
- Model D: the competition laws and regulations are administered exclusively by the Competition Authority and the Sector Authorities are the exclusive regulators of the related areas;
- Model E: the Sector Authorities and the Competition Authority have an equal authority to enforce competition laws.

The overall relationship between the Regulatory Authority(the related ministries) and the Competition Authority(the Fair Trade Commission) in Korea falls under Model D. The Fair Trade Act is enforced solely by the Fair Trade Commission. Each ministry has the exclusive authority to enforce government regulations in the related sector based on the relevant laws and regulations.

However, there are some sectors where the KFTC is a partial regulator, so Model B also applies to the relationship between the Regulatory Authority and the Competition Authority in Korea. For example, the KFTC directly regulates the large enterprise groups (chaebols) to curb "economic concentration".

Recently, government regulation in certain sectors has been drastically reduced as a result of the massive deregulation efforts, and with the vigorous implementation of competition policy, many of the goals sought through the government economic policies have been achieved. Therefore, there have been some cases which would fall under Model C ; liberalisation of the commercial air fare, deregulation of petroleum distribution (stimulated competition among petroleum stations), abolition of the limits on the sales period of department stores, etc.

Therefore, this report will deal mainly with Model D which describes the general relationship between the Regulatory Authority and the Competition Authority in Korea and also present some cases of Models B and C.

2. The overall relationship between the Regulatory Authority and the Competition Authority in Korea

2.1 The role of regulations in the 1960s and 1970s

In the early stages of economic development, competition policies based on the market principles had little ground in Korea since there was heavy government intervention in the economic sector under the widely shared perception that government-led economic policies were most effective. The economic strategy led by the government has contributed to economic growth in size, but has made enterprises heavily dependent on government protection and assistance. Moreover, the economy was fragmented into the sectors which received government support and those that did..

2.2 The 1980s : Effectuation of the Fair Trade Act and the continuous conflict with the Regulatory Authorities

Recognising the negative side-effects of its industrial policies, the government enacted the Fair Trade Act in 1980, manifesting its move toward a market economy. The Act, through clear stipulation of "free and fair competition", fully demonstrates the shift toward a complete market economic structure. The Act prohibits abuse of dominant market position, economic concentration, unfair concerted actions and unfair trade practices.

Despite the introduction of competition laws and policies, government regulations continue to exist, thereby intensifying the conflict between the Regulatory Authority and the Competition Authority. Therefore, the complete transition into a market economy as envisaged by the KFTC is yet to be fully accomplished.

2.3 General Trend since the IMF's bail-out fund

Coping with the global trend, the Korean economy should have been re-established according to market principles. However, regulation and intervention by the government have continued. In an era of borderless competition, trade and economic policies should be centred around competition policy. Ministries related to certain industries tend to adopt policies that are competition-restrictive to promote growth of the given industry. Therefore, it is crucial that the competition authority adhere to market principles.

2.4 The role of the Korea Fair Trade Commission in the government

In Korea, by law, the competition agency, only the Korea Fair Trade Commission enforces the competition laws and regulations (the Fair Trade Act), and economic regulatory authorities are given the exclusive authority to implement government regulations for each sector. All sectors subject to government regulations are regulated by the related supervisory authority, but when the contents of the regulations contravenes the spirit of the Fair Trade Act (e. g. the principles of free competition and fair trade) the KFTC will actively intervene in the introduction, modification and abolition of the regulations in question to ensure that the spirit of the Fair Trade Act is fully reflected.

2.5 Measures to avoid friction between regulatory and competition authorities

Certain sectors are excluded from application of the Fair Trade Act. The reasons and legal basis for such exclusion are stated clearly to avoid confusion within a given industry. It should be noted, however, such cases are decreasing in their numbers. For instance, the finance and insurance industries are covered by the Fair Trade Act.

Government regulations that are competition-restrictive are being reformed by the Deregulation Task Force, operated under the KFTC. The Deregulation Task Force which is composed of civilians and experts of different industries has been very successful. The operation of the task force is an experience unique to Korea and it may serve as an important example to other member states.

Article 63 of the fair Trade Act stipulates that consultation with the Fair Trade Commission must precede the legislation of new laws and regulations that may have an anti-competitive effect.

Different from competition authorities of other states, the Korea Fair Trade Commission regulates certain economic sectors. For example, to improve economic efficiency, the Korea Fair Trade Commission regulates activities of the large enterprise groups (chaebols) with high economic concentration. The chaebols are also governed by other regulatory authorities through finance and real estate regulations, but the Korea Fair Trade Commission is the most important regulator. The Korea Fair Trade Commission’s annual designation of the 30 largest enterprise groups is to promote market competition among the chaebols.

3. Cases in which the Competition Authority had accomplished goals previously pursued with government regulations

The Korean government's years-long regulatory reform efforts are beginning to bear fruit through enhanced market competition. Government regulations have been abolished in some sectors on the grounds that competition has reached a certain level in those sectors and that there was clear evidence that the government regulations imposed burden on consumers.

The requirements for entry into the freight transport industry has been eased. Now new entrants do not have to acquire a license. They can enter into the industry simply through registration. Moreover, freight transport companies are now free to charge any amount as long as the price is reported to the Korea Fair Trade Commission. As a result, the price has stabilised at a lower level, and the companies are offering a wide variety of services, clearly enhancing consumer benefits.

In Korea, there are two airline companies; The Korean Air and Asian Air. Currently, for domestic flights, they are obligated to report any changes in air fares. The system is soon to be changed to allow more freedom to the companies regarding air fares for domestic flights. For international fares, the companies are required to receive an approval. However, the approval system for international flights is expected to be replaced with a reporting system. The Korea Fair Trade Commission believes that the introduction of the new system is not likely to result in a sharp increase in international air fare. However, the commission will closely watch for any price collusion between the two companies. The fall in air fare took place even before the abolition of the government regulations due to competition between the two companies.

The petroleum distribution sector including petroleum stations have traditionally been subject to heavy restrictions regarding new entries, price and business practices. With the government's regulatory

reform efforts, the petroleum distribution industry is now engaged in practically free competition. To promote price competition, each petroleum station is obligated to making posting of their prices so that the drivers can see them clearly. It is deemed that further regulations are unnecessary in this sector unless enterprises engage in collusion or other restrictive business practices.

Department stores in Korea were under regulations which restricted the number and the period of discount sales. (Four discount sales a year and no more than 60 days.) Such restrictions were imposed to protect consumers from excessively competitive market and false advertisements of discount rates. The restrictions were abolished as of April 1998 on the grounds that they do more harm than good in terms of consumer protection.

Apparently, there are concerns that relying solely on market competition accompanies some risks. However, it is deemed that competition in a given sector has reached a considerable level. So far, the regulatory reform measures by the government are deemed very successful.

The adoption of reform policies have been implemented by the Fair Trade Commission and other government institutions responsible for regulatory reforms. There has been strong resistance by the regulating ministries and some government institutions. However, there is still a possibility that traditional regulations might be reinstated should such reform measures result in negative side-effects or the public opinion calls for the reinstatement of the traditional regulations. The corporations and the related ministries of a given industry want to return to the protectionist government policies of the past. Therefore, it is crucial that the Competition Authority stay alert to prevent any competition-restrictive activities. It is also important that the related ministries realise the merits of market competition.

The related ministries and corporations have a tendency to exaggerate what they see as negative effect of competition. For instance, they say that low quality oil is being distributed due to fierce competition. Also there is an argument that department stores' discount sales motivated by competition are causing impulsive spending by consumers. There are many other examples including the claim that the airline companies are in the red for the domestic lines due to free competition concerning air fares for domestic flights and that the quality of service by unregulated moving service providers has deteriorated.

4. Conclusion

In Korea, competition laws are executed exclusively by the Korea Fair Trade Commission and the government regulations for each industry are enforced by the related ministries. The Korea Fair Trade Commission was installed in the early 1980s, and has executed competition policies by itself only recently. Therefore, the KFTC's authority to demand improvements in regulations in sectors supervised by the related ministries can be seen as 'revolutionary'. The uncooperative behaviours and strong resistance by the related ministries have been a major stumbling block to competition authority's pursuit of its goals.

In the 1990s, despite such resistance, the Korean government had endowed the Korea Fair Trade Commission with the power to enhance productivity in the economic sectors through the promotion of competition and deregulation. The clause in Fair Trade Act which states that all ministries planning to enact a new law which may have a competition-restrictive effect must consult with the Fair Trade Commission, has played a pivotal role in maintaining the balance between the Regulatory Authority and the Competition Authority in Korea.

It can also be pointed out that the establishment of the Deregulation Task Force has been highly successful as it incorporated a third-person perspective in examining government regulations. This may be an important point to be considered for countries with similar backgrounds with Korea where the roles of the Competition Authority and the Regulatory Authority are clearly distinguished.

Finally, regulators of industries must realise that transparency and rationality must be guaranteed in the process of enforcing regulations. Moreover, regulations should be minimal and temporary by introducing systems such as the sunset law, regulatory effect analysis, etc.

MEXICO

1. Introduction

In recent years, the Mexican government has introduced competition and private participation in several activities some of which were traditionally viewed as natural monopolies. These are mainly activities referring to the financial services, telecommunications, transport and energy sectors. The functioning of market forces in those sectors is now simultaneously regulated:

i) by the 1993 Federal Law of Economic Competition (the Competition Law), enforced by the Federal Competition Commission (the Competition Commission); and

ii) by sector-specific laws and regulations containing both technical and economic rules, and enforced either by an independent regulatory entity or by a federal ministry.[95]

The main purpose of this contribution is to describe the division of tasks between the Competition Commission and regulators, as well as the experience up to now as regards the co-ordination between these entities. The following section deals with the relationships of the Competition Commission with regulators in general. Section 3 deals with certain specific sectors where the experience with such relationships has been most important.

2. The relationship between the Competition Commission and regulatory agencies in general

The approach taken in Mexico clearly falls under model D as identified by the OECD [see "Secretariat's Suggestions for Submissions"]. That is, in Mexico there exists a general mandate driven division of labour, whereby the Competition Law is exclusively applied by the Competition Commission and sector-specific laws and regulations by technical and economic regulators.

Under the Competition Law, the Commission may act against monopolistic practices and anticompetitive mergers. The Competition Law fully applies to all sectors, including sector-specific regulated ones . Strategic economic areas are not considered monopolies under the Constitution. These areas are, money coinage and the issuance of paper money, the postal system, telegraphs and radiotelegraphy, crude petroleum and other hydrocarbons, basic petrochemicals, radioactive minerals and nuclear energy, and electricity.[96] Recently, satellite communications and railroads were excluded from the list of strategic areas, precisely in order to introduce private participation and competition. The above implies that the Competition Commission is fully empowered to investigate and sanction anticompetitive practices and mergers in all non-strategic sectors, even if they have their own specific economic regulations. None of those regulations provides for an exemption from the Competition Law.

In turn, sector-specific technical and economic regulations are enforced by regulators. Independent regulatory agencies exist for, among other sectors, telecommunications (the Federal Telecommunications Commission, although the Ministry of Communications and Transport also has certain powers and responsibilities), electricity and natural gas (the Energy Regulatory Commission, though its role in electricity is limited because that sector is still largely state-owned), insurance (the

National Insurance Commission) and pension funds (the National Pension Fund System Commission). Sectors such as transport and pharmaceuticals are directly regulated by federal ministries. The financial sector is regulated both by the Ministry of Finance, the National Banking and Securities Commission and the Mexican central bank.

While the Competition Commission is not empowered to apply economic regulations, it does have an important role to play in the design and implementation of sector-specific regulatory mechanisms. This role follows from two factors.

First, the Competition Law itself empowers the Competition Commission to give its opinion on changes in other laws and regulations that concern competition. Often the communication and co-ordination between the Competition Commission and other authorities on these matters takes place through one of the Intersecretarial Committees. In practice the opinions and recommendations of the Competition Commission have mostly been taken into account by the relevant authorities.

Second, a number of sector-specific laws and regulations explicitly provide for a role for the Competition Commission. These are, principally, the Seaport Law, the Law on Roads, Bridges and Road Transport (both of 1993), the Navigation Law of 1994, the Railroad Services Law, the Federal Telecommunications Law, the Civil Aviation Law and the Airport Law (all of 1995), and the regulations on natural gas and on pension funds (of 1995 and 1996, respectively). The role for the Competition Commission under these provisions basically refers to:

i) the determination of the competitive situation of a market. For certain activities the Competition Commission may determine whether effective competition exists or whether one of the agents has substantial market power. Thereupon the relevant regulator may impose or abolish extra regulations. Until now this has only happened in the market for telephony, as discussed in the next section;

ii) the authorisation of economic agents to participate in privatisation's or in public auctions for concessions, licenses and permits. Here the Competition Commission normally applies standards similar to those of merger reviews. So far, the Commission has reviewed requests for participation in the privatisation of communications packages, rural storage facilities and railroads, and in public auctions for the licensing of seaport services, of natural gas transportation, storage and distribution, and of the use of radio spectrum, among others.

The next section explains this role of the Competition Commission in further detail for the telecommunications, air transport and natural gas sectors.

It is worth noting that the active role of the Competition Commission in helping to design regulations has made it possible to avoid conflicts between regulations and competition policy. Contradictions that could give rise to legal uncertainty have largely been suppressed and duplications have been reduced in order to create a clear separation of functions and tasks between the agencies.

Yet, in practice there may still be some important overlaps, especially referring to the treatment of monopolistic practices. For example, a number of specific regulations explicitly prohibit practices such as discrimination or cross-subsidisation. These kinds of practices are addressed generally under the Competition Law. As discussed below in the context of telecommunications, the standards applied in these cases by the Competition Commission and by the regulators may differ.

The experience of the Competition Commission as regards its coexistence with industry regulators is still limited, and mostly concerns the initial stages of regulatory reform (i.e., the design of regulations and the authorisation of new market participants). As competition in the deregulated sectors evolves further, new and different mechanisms of co-ordination among the Competition Commission and regulators are expected to develop.

3. The relationship between the Competition Commission and regulatory agencies in a number of specific sectors

3.1 Telecommunications

The Ministry of Communications and Transport and the Federal Telecommunications Commission (created in 1996) are the regulators with which the Competition Commission has to co-ordinate when dealing with competition aspects of telecommunication law. The 1995 Federal Telecommunications Law contains technical and economic provisions. The latter include rules that seek to enhance competition, such as the obligation to provide non-discriminatory access to public networks, or the provision that licenses for the use of radio spectrum must be assigned through a competitive bidding process. The Telecommunications Commission and the Ministry of Communications and Transport are entrusted to enforce the law.

The Telecommunications Law also provides for a role for the Competition Commission. For one, it states that participants in the public auctions for concessions for wireless services need the Competition Commission's authorisation. For another, if the Competition Commission determines that an operator has substantial market power, the Telecommunications Commission may impose extra regulations concerning tariffs, service quality and information upon that operator. These regulations are asymmetric since they do not apply to the other operators. This avoids excessive regulations of firms which do not have the power to significantly distort competition anyway.

There is some overlap between the Telecommunications Law and the Competition Law, which, as mentioned earlier, also fully applies to the telecommunications sector. The Telecommunications Law contains a per se prohibition of cross-subsidisation between activities and of discriminatory treatment. Such per se prohibition does not recognise possible mitigating circumstances, nor does it distinguish between small and large operators. From a competition policy point of view, cross-subsidisation and discrimination may be procompetitive or efficient under certain circumstances, and should therefore be analysed under a rule of reason. In fact, the Competition Law and its 1998 Regulations consider cross-subsidisation and discriminatory treatment as relative monopolistic practices, for which a rule of reason approach is required.

The division of labour between the Competition Commission, on one hand, and the two regulators, on the other, requires extensive co-ordination and consultation. Since 1993 the Competition Commission has actively participated in the design of the Telecommunications Law and several related regulations, mainly through the relevant Intersecretarial Committee. Until now no specific consultation channels between the Competition and the Telecommunications Commissions have been implemented, although both entities have been in close contact through regular administrative channels.

During the second half of 1997 the Competition Commission, in accordance with the Telecommunications Law, carried out an *ex-officio* investigation on whether or not the incumbent telephone operator Telmex has substantial market power. The investigation was initiated upon the request

of a competing long distance carrier. The Competition Commission judged that Telmex does indeed have substantial market power in five different relevant markets (local telephony, interconnection services, national long distance, international long distance and the resale of long distance). The Competition Commission's judgement is currently being challenged by Telmex. Within this context the Telecommunications Commission determined recently new interconnection tariffs and applied some other measures provided in the Telecommunications Law and regulations.

3.2 Air transport

As in the case of telecommunications, the Competition Law fully applies to the air transport sector, which is regulated by the Ministry of Communications and Transport and where important regulatory reforms took place in recent years. The Competition Commission has a number of powers and responsibilities under the sector-specific regulations.

The 1995 Civil Aviation Law, which implied an important deregulation of the sector, establishes that the Ministry of Communications and Transport or some affected agent may ask the Competition Commission's opinion on whether effective competition exists between concessionaires. Where the Competition Commission finds a lack of effective competition, the Ministry may impose tariff regulations. Those tariff regulations are abolished once the Competition Commission determines that effective competition has developed. A similar provision is contained in the 1995 Airport Law. The Ministry of Communications and Transport may impose price and tariff regulations if the Competition Commission rules that no reasonable competitive conditions exist for some airport service.

Currently, the Ministry of Communications and Transport is working on additional regulatory reforms for the civil aviation sector in consultation with the Competition Commission. In this process, the Competition Commission has insisted on the elimination of barriers to entry and on reducing discretion in the licensing and permit granting process. It has also supported the suppression of unnecessary regulations that could hinder competition and investment. Furthermore, the Competition Commission is now participating in the design of an airport privatisation scheme through the Intersecretarial Committee. Currently an agreement between the Ministry and the Competition Commission is being prepared with the objectives enhancing co-ordination between the two.

3.3 Natural gas

The Competition Commission played an important role in the regulatory reform of the natural gas sector in 1995, which made private participation in the transportation, storage and distribution of natural gas possible. Exploitation of natural gas reserves is still the exclusive domain of state-owned Petróleos Mexicanos. The new rules on natural gas are enforced by the Energy Regulatory Commission.

These rules provide that parties interested in obtaining a permit for the transportation, storage or distribution of natural gas need authorisation from the Competition Commission. Until now several regional transportation and distribution markets have been opened up to private sector participation, and the Competition Commission has reviewed the potential participants in each of them.

The regulations also include a role for the Competition Commission in judging the competitive situation of a market. There is an interesting difference with respect to the cases of telecommunications and air transport mentioned above. In the natural gas sector, the prices and tariffs of the private license holders in principle continue to be regulated. This is because in most cases these agents obtain a

temporary monopoly for the service. However, if the Competition Commission determines that effective competition exists, the terms of sale of the gas may be freely negotiated. If the Competition Commission finds that such free negotiations lead to undue discriminatory treatment, the Energy Regulatory Commission will re-establish regulation of prices and sales conditions.

In most telecommunications and air transport markets, tariff setting is liberalised unless the Competition Commission determines that there is no effective competition (or that there is one firm with substantial market power). In turn, in the natural gas sector price regulation remains unless the Competition Commission finds that effective competition does exist.

Until now, contact between the Competition Commission and the Energy Regulatory Commission has been limited. More communication is expected in the near future as additional licenses are granted and competition increases.

4. Final remarks

Competition policy and sector-specific regulation reinforce each other. It is important that competition authorities and regulators work together in close co-ordination. For Mexico this is especially true for the coming years since many regulatory reform mechanisms are still being designed or have just been implemented.

In the medium or long run, the regulatory grip on markets may loosen as effective competition develops, thus increasing the role of competition policy in those markets. This also requires close collaboration between competition and regulatory authorities.

NOTES

95. Independent means independent from a federal ministry, but not from the federal executive.

96. It should be noted that the electricity sector has been opened up to a small extent to private participation, despite its status as a strategic area. Under certain circumstances, private parties may now generate electricity for their own use or for exclusive sale to the state-owned electricity monopoly.

NETHERLANDS

1. General Overview

1.1 Introduction

This written contribution aims to clarify the Dutch approach to the relationships between regulatory and competition authorities.

In this first part, a general overview is presented. Under 1.2, some important policy issues are highlighted, not to narrow the discussion but to clarify some of the considerations that play a role in the discussions in the Netherlands. Under I.3 the approach in the Netherlands will be summed up. Paragraph 1.4 regards the international dimension. Part 2 provides an explanation of the approach in the Netherlands.

Under 2.1, a few preliminary remarks will be made about the context of the issue in the Netherlands. These remarks will be made because it seems to be important to take notice of some of the differences in approaches.

Paragraph 2.2 provides the Cabinet's View of the organisation of supervision of public utility sectors. In January 1998, the Dutch Cabinet has presented principles for the organisation of supervision of privatised utilities. The changes in Dutch competition law and the liberalisation of a number of public utility sectors made it desirable to formulate such principles. Without clear principles, there is a real risk that supervision will become fragmented and that inconsistencies will creep into the application of competition terms. These principles are also necessary to make sure that the competition rules are effective as a tool for reform. The Cabinet attaches great importance to the consistent application of the competition rules. The Competition Act applies to all sectors, even if sector-specific competition rules have been formulated. It is important to ensure that competition terms are not applied in specific sectors in a manner that is inconsistent with their application in the general national and European competition regimes.

Part 3 contains the answers to suggested issues and questions, attached to the letter to all CLP delegates [see "Secretariat's Suggestions for Submissions"].

1.2 Policy issues

The relationship between competition authorities and regulators is an important issue, but even more fundamental is the relationship between general competition law and specific regulations. Regulatory reform raises the question how to regulate transitions: is it necessary to create specific rules in a transition period, to create or to improve a market situation (competition engineering)? How can it be ensured that specific regulation will not last longer than necessary and will not frustrate 'normal' competition? Which are the criteria to decide whether specific rules are still necessary? How to connect

general competition policy and specific regulations? How to organise supervision on general and specific rules?

The following diagram shows some differences between competition policy and sector specific (competition) rules:

Differences between competition policy and sector specific (competition) rules

Competition policy	**Sector specific competition rules**
Competition as a process	Substituting market forces
Philosophy: intervention only needed if competition is restricted	Philosophy: intervention needed to achieve acceptable performances
Definite solutions	Continuous regulation
Permanent	Temporary
"Re-active"	"Pro-active"
General competition knowledge and skills	Specific knowledge and skills
Low risks of "capture"	Higher risks of "capture"

In competition policy, interventions aim to ensure efficiency in the functioning of goods and services markets by preventing or taking action against restrictions on competition. These interventions regard competition as a process, whereas specific regulations substitute for market forces, e.g. regulations on price-caps.

The philosophy of competition policy is to take action against restrictions on competition. Solutions are meant to be "definitive", restoring the "normal" functioning of markets. Sector specific regulation tends to continuously intervene to correct the practices of undertakings. Sector specific regulations, in general, are meant to be temporary, to engineer competition. Competition policy is permanent. Of course, an important question to answer is what the possibilities of general competition law are. On the one hand, we are not too eager to create sector specific provisions within competition law (because competition law should be general). On the other hand, if we do not use the possibility to create specific provisions (e.g. sector specific policy rules, based on general competition law), we will provoke a call for specific rules outside general competition law. Of course, there may be specific rules that do not 'overlap' competition law (e.g. technical rules). Sectoral competition rules may be linked to these rules.

Specific competition regulations often require dominant undertakings to submit their conduct for approval. It may be considered necessary to create specific rules because they clarify, in advance (*ex ante)*, what the behaviour of undertakings, often with dominant positions, should be. Are these pro-active rules necessary because undertakings need them (legal security, certainty needed to be able to invest) or because politicians want certainty? Competition law, in general, relies on selective interventions afterwards (*ex post)*. Of course, competition policy is pro-active too. First, concentrations may need advance approval. Practices restricting competition are in principle prohibited. These rules are laid down in law, so undertakings know what their behaviour should be. Decisions and jurisprudence will provide "pro-active" certainty too. And, last but not least, policy guidelines will be able to answer even specific questions.

Specific supervision may be considered to be necessary because sector specific knowledge and skills are needed to cope with (technically) complicated specific problems. However, on the one hand,

sector specific expertise is needed to be able to apply any law to a sector, but on the other hand, the need for competition expertise may often predominate, depending on the type of issues at hand.

How can we prevent a regulator from being "captured" by a sector or a dominant undertaking in the sector? The competition authority has to apply the general rules to the economy, as a whole. The risk of 'capture' seems to be smaller for a general competition authority than for a sector specific regulator.

The differences, mentioned above, raise the question of how to design the relationships between general competition law and specific regulations, and between competition authorities and specific regulators.

The Dutch Cabinet has stated: "The tail must not be allowed to wag the dog": sectoral competition rules should not become dominant over general competition rules. This one-liner aims to express the importance of consistency. Of course, it does not mean to falsely label either competition authorities or regulators It is important to guarantee the consistent application of competition law. Therefore, proliferation in the enforcement of competition law should be avoided. It is important that the application of competition law is organised to promote consistency and agreement with international (especially, European) law. Giving the competition authority and various sectoral regulators similar powers would risk sacrificing the central and consistent application of competition law.

An other risk pertains to "forum-shopping". When a regulator has been created, one can often provoke a decision from either the regulator or the competition authority. The risk, of course, is that decisions diverge and that a regulator and competition authority could be played off against each other. Therefore, there is a need to create a 'one stop shop'. A decision on a complaint should provide certainty and not the risk that another authority will take a contrary decision.

From the point of view of checks and balances (of powers), it may seem desirable to spread powers among competition authority and regulators. (This issue may be linked to the issue of which minister is responsible for the transition process in a sector). However, this way it is more difficult to reach consistency in the application of rules. It should also be noted that regulators tend to regulate. Though the objective is to minimise regulation and to maximise competition, we could instead reach the opposite result. This could be dangerous not only for competition but also for the balance of powers, because regulation would be created by non-legislative bodies.

I.3 Dutch approach

Summing up, the Netherlands approach is to use restraint in the introduction of (sector) specific regimes. This means that the Netherlands plans to rely on general competition law as much as possible.

1.3.1 No sector specific rules when there is no need to introduce them

The Competition Act applies to all sectors, whether or not sector-specific competition rules have been formulated. Sector specific rules should only be introduced if general competition law (or specific regulations within the framework of the general Competition Act if the desired result can not be realised via the general competition regime) These rules should be periodically reassessed. The required evaluation term is related to the pace of the liberalisation process and the steps involved. In principle, evaluations should be made every three years.

1.3.2 No regulators (or: supervisory authorities) when there is no need to introduce them

Supervision of sector specific rules will be assigned to a specific regulator, to a chamber at the NMa (the Dutch Competition Authority) or to the NMa itself. This means that there will be no regulator when the national competition authority NMa is considered to be able to enforce the rules, even when the rules are not established within the framework of general competition law.

Proper defining of the (administrative) relationship between the NMa and a regulator

When a specific regulator is believed to be necessary, it is also necessary to ensure that sector-specific supervision does not become inconsistent with general competition policy. The interpretation of terms in, or based on competition law in specific sectors must not be at variance with the interpretations commonly applied in general supervision of competition. The NMa evidently has a heavier responsibility to ensure a consistent policy in the interpretation of similar terms by different supervisory authorities.

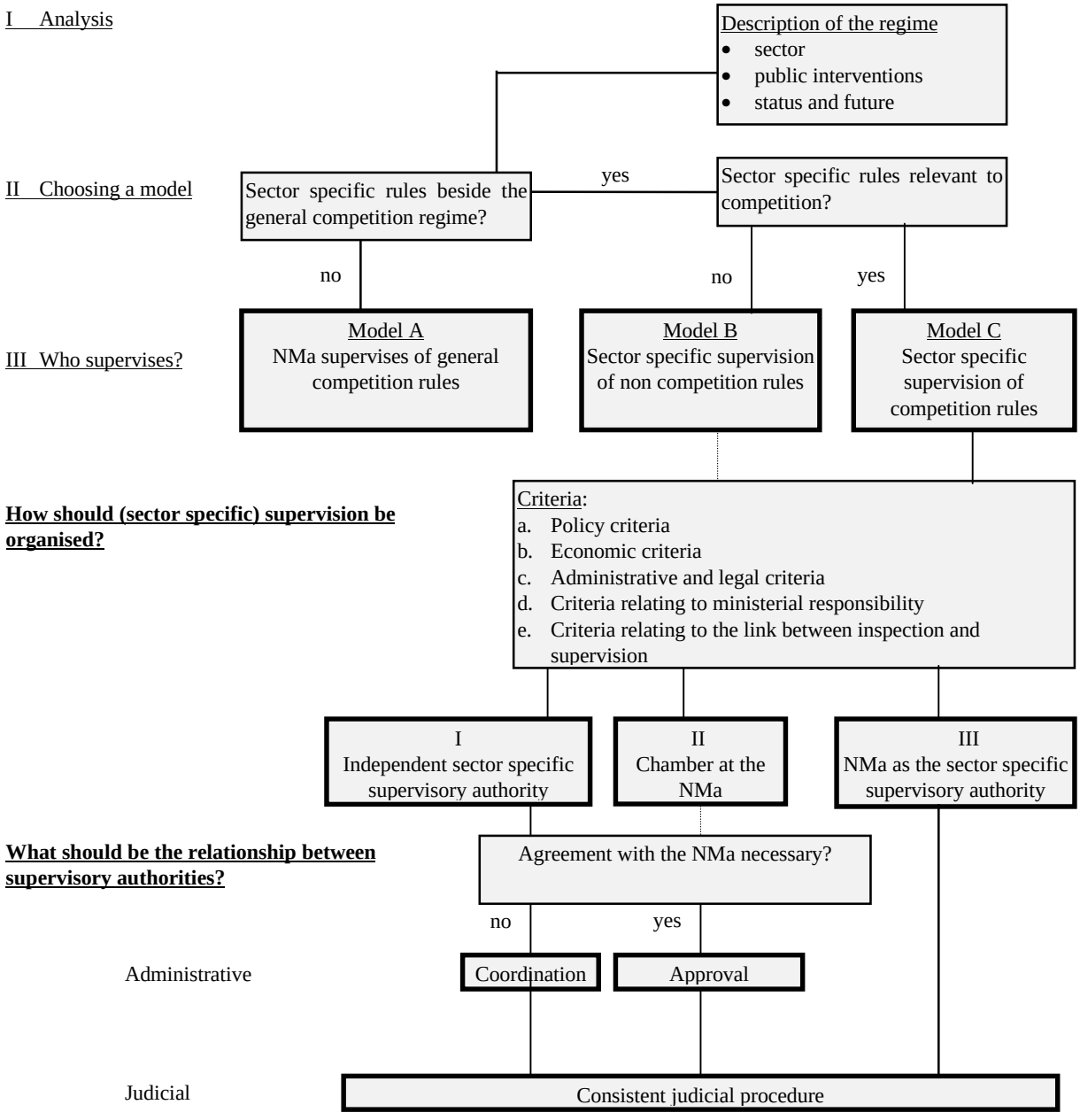
Therefore, the approval requirement may be necessary. Whenever there is a risk of differences of opinion between supervisory authorities on the interpretation of terms relevant to competition, it is necessary that the regulator reaches agreement with the NMa. This does not mean that each decision needs an explicit approval by the NMa. There will be general agreements between the regulator and the NMa. In many cases, the regulator will be able to take decisions on the basis of the general agreements. Ultimately however, the NMa has to agree with each decision.

Under 3, the approach in the Netherlands will be explained more extensively.

The next page contains a diagram, which was created by the MDW Working Group, advising the Dutch Cabinet of Ministers.

Diagram 'Vision of Supervision'

What supervisory authority should supervise?



I.4 Matching approaches

Of course, there is an international dimension to the issue of relationships between regulators and competition authorities.

In the European Union relationships between national competition authorities and regulators are strongly influenced by European legislation. The choices that are made at the European level will have consequences on the national level. Often, directives that regulate liberalised markets stipulate that Member States establish "national regulatory authorities" (NRAs) (e.g. telecom, postal services, electricity, etc.). Such prescriptions, even if not mandatory, are not particularly supportive of the option of empowering national competition authorities to enforce sectoral regulations. In this respect, EU directives that prescribe NRAs may well contribute to the problem of proliferation and supra-national remedial actions could be necessary.

Outside the scope of the EU , the issue of relations between regulators is also important. Where the OECD is advocating widening the scope of general competition laws (cf the Regulatory Reform recommendations), it could work out to be unhelpful if a vast diversity of specific competition rules would be substituting for traditional regulations, and authorities end up competing on competence/jurisdiction issues.

Another issue which comes into play relates to international co-operation between competition authorities which is increasingly important, due to market integration and globalisation. Smooth arrangements as to mutual assistance between competition authorities over the border might well be hampered if there are multiple national regulators in one sector, all dealing with competition regulations. National approaches will influence international relationships. Differences in national approaches will have effects on co-operation between authorities; their counter-parts may not be a similar authority (a regulator may have to co-operate with a competition authority from abroad, and vice versa). Differences in approaches could damage this international co-operation.

There seems to be evidence that not only national policy interests are involved in the organisation of supervision.

2. Explaining the Dutch Approach

2.1 Dutch context

A few preliminary remarks must be made about the Dutch context. Of course, definitions and distinctions are always somewhat arbitrary. It is, however, important to acknowledge the differences, to fully understand the various approaches.

2.1.1 Competition policy

On 1 January 1998, the Dutch Competition Act took effect. This may have been a minor step for mankind, but was a major step for the Netherlands. Since then, competition policy has been placed on a new footing. The abuse system has been replaced by a prohibition system. This has lead to a fundamental change in the implementation of competition policy. An institution at arms' length from the Minister of Economic Affairs - the Netherlands Competition Authority (NMa) - has been made responsible for the implementation of the prohibition system.

Great importance is attached to the consistent application of the competition rules. The Competition Act applies to all sectors, even if sector-specific competition rules have been formulated. It is considered to be essential that there is only one central competition authority. There are no other agencies assigned to apply the Competition Act. (Of course, judges do have the power to apply competition law too.) It is important to ensure that competition terms are not applied in specific sectors in a manner that is inconsistent with their application in the general national and European competition regimes.

2.1.2 Regulators

Dutch regulators are not to legislate - they may not make generally binding regulations. Of course, the difference may be hardly noticeable. Still, constitutionally it is important to note that regulators generally do not make the rules; they apply them. Legislation is established by the legislative bodies (Cabinet and Parliament). However, in enforcing legislation regulators have the power to make policy rules, but only within the framework of the legislation.

Of course, 'regulator' is not a Dutch term. The Dutch term would be "toezichthouder", literally 'supervisor'. In the Netherlands, the supervisor is an (administrative, non-judiciary) authority, assigned to apply law. This supervisor can be a specific authority, at a distance from ministers or ministries.

2.1.3 Technical, economic and competition rules

The OECD list of suggested issues/questions [see "Secretariat's Suggestions for Submissions] distinguishes technical, economic and competition rules. During the discussion on the relationships between regulatory and competition authorities in the Netherlands, a quite similar distinction has been made. However, there seem to be somewhat different definitions.

The MDW Working Group, which advised the Cabinet on this issue, has distinguished between rules that are not relevant to competition (technical rules) and rules that are relevant to competition. Rules that are relevant to competition are rules that also refer to dominant positions and agreements between enterprises. Specific competition rules overlap with general competition rules. Within the category of rules that are relevant to competition, we distinguish between rules that make it necessary to apply competition terms (e.g. abuse of dominant positions, reasonable pricing, third party access) and rules that do not. For instance, when legislation provides for a fixed price, this legislation could be considered to be relevant to competition. However, enforcing this rule, there is no need to apply competition terms. Therefore, in the OECD system this may be called economic regulation rather than competition law.

This explains that there may be some differences between the OECD and the Dutch approach. Terms of access to networks, for instance, are believed to be a part of the OECD category of economic regulation. In the Netherlands, terms of access are in general considered to be rules relevant to competition. Often, we call these rules competition rules, because they overlap with general competition law (and therefore, the application of competition terms is needed). However, it all depends on the nature of the rule because a term of access may well be a technical rule by nature.

In this contribution we follow the 'OECD system' as much as possible. We consider competition regulation to be regulation that specifies general competition law. Economic regulation may be using competition terms but includes more than just a specification of general competition law.

2.2 Cabinet's view

On 12 January 1998 the Dutch Cabinet published its view on the organisation of supervision of public utility sectors:

The Supervision of Privatised Utilities project, part of the Market Function, Deregulation and Quality of Legislation (MDW) Project, began at the end of 1996. There were two reasons for the project: the upcoming changes in competition law and the liberalisation of a number of public utility sectors.

The Competition Act took effect on 1 January 1998. Since then, competition policy has been placed on a new footing. The abuse system has been replaced by a prohibition system. This will lead to a fundamental change in the implementation of competition policy. Under the abuse system, the Minister of Economic Affairs took decisions on complaints submitted - by agreement with the relevant fellow-Minister where necessary. An institution at arms' length from the Minister of Economic Affairs - the Netherlands Competition Authority (NMa) has been made responsible for the implementation of the prohibition system.

The second reason for the project was the liberalisation process that is taking place, or soon to take place in a number of public utility sectors. In these sectors, supervisory procedures need to be designed for the developing market process. The question arises of whether sectoral supervision should be organised for aspects that are generally also the subject of supervision by the NMa, and if this is desirable, which allocation of tasks and responsibilities should be agreed between the NMa and the sectoral supervisory authorities.

Both developments make is desirable to formulate clear principles for the organisation of supervision. Without clear principles, there is a real risk that supervision will become fragmented among different supervisory authorities and that inconsistencies will creep into the application of competition terms. Clearly, there are objections to this: enterprises will not know where they stand, supervisory authorities could be played off against each other, and inconsistencies with European law could arise. The inconsistent application of competition terms could even give rise to liabilities for the State.

Members of both houses of Parliament are also requested to consider the relationships between general and specific supervision.

On behalf of the Cabinet, we hereby present the final report of the Visser Working Group[97]. This also serves to inform you of the Cabinet's view of the Working Group's recommendations.

2.2.1 Recommendations of the Visser Working Group

In accordance with its mandate, the Working Group developed an assessment framework that can be applied to decision-making on the design and implementation of supervision. It focused specifically on the following issues:

a. Is sectoral supervision necessary?
b. How should supervision be organised?
c. What should be the relationship between supervisory authorities?
d. Which judicial procedure should be followed?
e. What is the relationship between the Minister (Ministers) and the supervisory authorities?

a. Is sectoral supervision necessary?

In the light of the risks of fragmented supervision, as outlined above, the Working Group finds that restraint should be exercised in the formulation of sector-specific competition rules[98]. The Working Group shows how the assessment should proceed, applying the principle of 'from light to severe'. If the desired result can be realised via the general competition regime, no sector-specific rules are necessary. This is the case if the market is functioning well, with completely free access. However, if the process towards more competition has just begun, the number of providers is still small and access to the market is not free, there may be grounds for sector-specific rules. Supervision must then be exercised on, for example, market access or price movements in the sector. In this transitional phase, it may be preferable to temporarily base supervision on sector-specific rules, in addition to the supervision pursuant to the Competition Act. If the application of sector-specific rules in unavoidable, overlap with the general competition regime should be reduced as far as possible. The relationship between the sector-specific rules and general rules should be defined as precisely as possible.

According to the Working Group, a decision to introduce sectoral competition rules should not be a 'once and for all' decision. The rules must be reviewed from time to time, since they serve to keep the transitional process towards a normal market situation on the right track. The actual circumstances to which they refer will change fast. They must therefore be updated from time to time. This is also made necessary by the fact that the European and Dutch competition regimes are changing, and this will have consequences for sector-specific rules.

For these reasons, sector-specific rules should include a term within which they will be evaluated. The evaluation should also cover the position of the sectoral supervisory authority.

b. How should supervision be organised?

Once it has been decided that sectoral competition rules will be introduced, the question arises of how supervision should be organised. Different criteria play a role here: political, economic, administrative and legal criteria, criteria relating to the Minister's responsibility and criteria relating to the link between inspection and supervision.

On the basis of these criteria, a choice must be made for one of the following modalities:

- Independent sector-specific supervision [note: independent = independent from the NMa]

  This modality may be appropriate if sectoral competition rules are inextricably linked to other rules, if sectoral rules mean that the competition regime is not effective in a particular area or if intensified supervision is needed on a temporary basis in relation to the transition to a 'normal' market situation.

- Supervision in chambers at the NMa

  This chamber modality is conceivable where, on the basis of sectoral rules, highly specialised knowledge and skills are needed in order to exercise the required supervision of competition, and if there is a given relationship with general supervision of competition. For a sector that is moving towards a normal market situation, the chamber affords the advantage that it will later be possible to switch to general supervision of competition by the NMa without much in the way of organisational complications. The Working Group notes that the design of the chamber modality will require further consideration and does not regard it as feasible for an autonomous administrative organisation (ZBO) to serve as a chamber within a non-ZBO.

- NMa as the sector-specific supervisory authority

  Assigning responsibility for sectoral supervision to the NMa itself becomes a more obvious choice as the market proceeds towards the 'normal' situation. If there are no reasons for independent sector-specific supervision or for a 'chamber' acting as a sector-specific supervisory authority, sector-specific supervision should be assigned to the NMa.

c. What should be the relationship between supervisory authorities?

If an independent supervisory authority or a chamber within the NMa is assigned responsibility for supervising sectoral competition rules, the administrative relationship between this authority/chamber and the NMa must be defined with care. The sector-specific supervisory authority may then take decisions on conduct which is supervised by the NMa pursuant to the Competition Act. It is necessary to ensure that sector-specific supervision does not become inconsistent with general competition policy.

A satisfactory exchange of information is needed to ensure effective co-operation, and will also promote the effectiveness of the regulatory and competition legislation. The Working Group distinguishes two requirements, of differing levels of severity, with regard to the relationships between the supervisory authorities: co-ordination and approval.

If the co-ordination requirement applies, the NMa will be involved in the decisions of the sectoral supervisory authority, but no formal approval is necessary. Co-ordination does not rule out conflicting decisions. The approval requirement goes one step further. If this requirement applies, the NMa must approve the decisions of a sectoral supervisory authority.

The Working Group again applies the principle of "from light to severe" in the design of the administrative relationships. In order to avoid competence issues and unnecessary burdens for the organisations as far as possible, the approval requirement should apply only if co-ordination alone is not enough to ensure the uniform interpretation of competition terms. The reason why it is necessary to reach agreement on this with the NMa is that the interpretation of terms in, or based on competition law in specific sectors must not be at variance with the interpretations commonly applied in general supervision of competition. This involves a situation in which the legislators were aiming to introduce a form of competition in a particular sector. The NMa evidently has a heavier responsibility to ensure a consistent policy in the interpretation of similar terms by different supervisory authorities.

To avoid a situation in which every decision must actually be endorsed if the approval requirement applies, approval will be realised at the level of general agreements between the supervisory

authorities as far as possible. It is in the interests of both supervisory authorities to reach agreements of this kind. It is necessary to ensure that decision-making is not delayed in individual cases. If, in practice, it is found that there are persistent differences of opinion between the supervisory authorities with regard to specific issues, attributable to shortcomings in the legislation, consultation with the relevant Ministers is called for, in order to realise amendments of the law.

d. Which judicial procedure should be followed?

A standard judicial procedure should be chosen for the decisions of supervisory authorities on the interpretation of competition terms. This means that there should be an opportunity for appeal to the Industrial Appeals Board, either directly or via the Rotterdam District Court. A consistent judicial procedure is a minimum requirement for the effective organisation of supervision. A uniform judicial procedure will help to ensure the uniform application of standards and terms; supervisory authorities will aim to avoid the risk of correction by a court.

e. What is the relationship between the Minister (Ministers) and the supervisory authorities?

The relationship between the Minister and the supervisory authorities should primarily be regulated in law.

In the design of this relationship, the liability of the Dutch State for the application of European law must be taken into account. If supervisory authorities breach European rules, the Dutch State will be liable for this, even if the supervisory authorities have been made independent. It is therefore desirable to ensure that supervisory authorities comply with the European rules.

If the administrative form of autonomous external supervision (by a ZBO) is chosen, the Visser Working Group believes that the legislation should provide for the possibility that the relevant Minister can ensure that the supervisory body performs a particular study, in order to realise justifiable Parliamentary and public requirements regarding supervision. The choice of the ZBO form means that this can in no case involve influencing the methods, content or outcome of the study, but only an assurance that the study is actually conducted. In the Working Group's view, this would not impair the character of a ZBO. However, in view of the required independence of a ZBO, considerable restraint should be exercised in issuing such instructions in individual cases. The nature of a ZBO also means that in the relationships between the government and Parliament, a Minister can only promise to promote the performance of a study: this is the limit of the Ministerial responsibility in a specific case.

In view of the required distance between policy-making and supervision, and the Minister's political responsibility, both Chambers of Parliament should be notified of the Minister's involvement with the supervisory authority.

2.2.2 The Cabinet's view

The Cabinet attaches great importance to the consistent application of the competition rules. The Competition Act provides the general legal framework for competition law issues. In addition, there are European rules. It is important to ensure that competition terms are not applied in specific sectors in a manner that is inconsistent with their application in the general national and European competition regimes.

The Visser Working Group's report makes it clear that it is important to exercise the greatest possible care in decisions on the organisation of supervision. The Cabinet endorses the assessment framework developed by the Working Group.

The Cabinet shares the Working Group's view that restraint is called for in the introduction of specific rules relevant to competition. The Cabinet welcomes the 'light to severe' principle that the Working Group applies here.

If sectoral supervision is necessary, the 'lightest' possible administrative allocation of tasks that effectively ensures the desired result - i.e. the consistent application of competition rules - should be chosen. Sector-specific rules should be periodically reassessed. The required evaluation term is related to the rate of the liberalisation process and the steps involved. On average, terms of three years are likely.

The Cabinet endorses the criteria developed by the Working Group for the choice between independent sectoral supervision and the organisational forms that assign responsibility for sector-specific supervision to a chamber at the NMa or to the NMa itself. The Cabinet regards the chamber modality as an interesting option which should be studied in more detail in relation to its application in specific fields, taking into consideration the responsibilities of the Ministers concerned.

The "light to severe" principle should also be applied in the design of the administrative relationships between the NMa and sectoral supervisory authorities or a chamber at the NMa. If there is no risk of differences of opinion between supervisory authorities on the interpretation of terms relevant to competition, the co-ordination requirement will suffice. If this risk does exist, an approval requirement will apply, as recommended by the Working Group.

The Cabinet shares the Working Group's view that, where there are risks of difference of opinion on the interpretation of terms relevant to competition, the NMa evidently bears the heaviest responsibility to ensure consistency in the interpretation of similar terms by different supervisory authorities. It is no formality, but of material importance that different sectors receive equal treatment. This consistency should also exist if sector-specific rules apply, in addition to the general competition regime. The tail must not be allowed to wag the dog!

In these cases, the Cabinet considers it necessary that the sectoral supervisory authority reach agreement with the NMa on the interpretation of general competition terms in the application of sector-specific rules. This need does not detract from the fact that the sectoral supervisory authority takes its decisions, on the basis of the sectoral law.

The Cabinet envisages the following formula, which does justice to the need for effective decision-making and for uniform application of competition terms, partly in view of the European rules and jurisprudence :

- at the general level, consensus on the interpretation of general competition terms on the basis of sectoral rules will be reached in agreements between the sectoral supervisory authority and the NMa. This will help to ensure consensus with the NMa on the interpretation of competition terms;

- in many cases, the sectoral supervisory authority will be able to take decisions on the basis of the general agreements;

- in some cases, the sectoral supervisory authority will probably come to the conclusion that the general agreements are insufficient, so that a decision cannot be taken immediately. The sectoral supervisory authority must then reach agreement with the NMa on the interpretation of competition terms in individual decisions, such as the one at issue;

- the Cabinet fully expects that the sectoral supervisory authority and the NMa will then reach agreement, after which the sectoral supervisory authority can complete its decision-making process. This could then lead to modification of the agreements referred to above;

- if it is not possible to reach agreement on the interpretation of competition terms in individual decisions, both supervisory authorities (or one of them) should refer the case to the Ministers concerned. After all, in this situation, the rules that apply to them will prove to be inadequate to realise a decision. The Ministers will jointly issue a general rule for the application of the competition term in question in the sector concerned, which will serve as a binding interpretation of the terms. Individual cases will be assessed on the basis of this general rule, including the case that gives rise to the introduction of the rule.

A uniform judicial procedure should be chosen with regard to decisions by supervisory authorities on the interpretation of competition terms.

Finally, the Cabinet agrees that the Ministers concerned should have an opportunity, as a last resort, to invite a supervisory authority in the form of a ZBO to perform a particular study. Naturally, in practice, administrative talks will be conducted between the Minister and the ZBO before such a step is taken. The Cabinet recognises that such an invitation represents the limit of what is appropriate in the relationships between a Minister and a ZBO. It is clear that the Minister's influence may not extend to the method, content or outcome of the study performed by the ZBO. As the Working Group notes, the nature of a ZBO means that the Minister `should exercise great restraint in using this power.'

The principles described will be applied to new proposals relating to public utilities. The consequences that should be attached to the report for the relationship between the general competition regime and other legislation relating to public utilities will be assessed.

3. Answers to suggested issues/questions [see Secretariat's Suggestions for Submissions]

Please take notice of the preliminary remarks (see 2.1) about the categories of regulations.

In the Netherlands, a distinction is made between three approaches:

a. no sector specific rules, only general competition law;
b. sector specific rules not relevant to competition (technical rules);
c. sector specific rules relevant to competition; these rules may be economic and competition rules.

General competition law is exclusively enforced by the NMa. Specific rules may be applied by a specific regulator (independent from the NMa), by a chamber at the NMa or by the NMa itself. Every supervisory authority has its own legislation to apply.

When there is a risk of differences of opinion between supervisory authorities on the interpretation of terms relevant to competition, an approval requirement is needed. This requirement means that the NMa approves of the interpretation of competition terms by the regulator.

A. Regulators are the principal enforcers of competition laws, if any, applying to their sectors [one of the approaches presented in the "Secretariat's Suggestions for Submissions"]

General competition law is exclusively applied by the NMa. Specific competition law may be applied by a specific regulator. If the application of sector-specific rules is unavoidable, overlap with the general competition regime should be reduced as far as possible. The relationship between the sector-specific rules and general rules should be defined as accurately as possible and sector-specific rules should be periodically reassessed. Examples of such sector-specific rules can be found in the new Telecommunications Act and Electricity Act. The Electricity Bill and the Telecommunications Bill are currently proceeding through the First Chamber of Parliament.

According to the Telecommunications Bill, the Independent Post and Telecommunications Authority (OPTA) will be applying sector specific competition law. According to the Electricity Bill, the Electricity Act Administration and Supervision Department (DTE) will be also be applying sector specific competition law.

1. In general, if the desired result can be realised via the general competition regime, no sector-specific rules are necessary. This is the case if the market is functioning well, with completely free access. However, if the process towards more competition has just begun, the number of providers is still small and access to the market is not free, there may be grounds for sector-specific rules. Supervision must then be exercised on, for example, market access or price movements in the sector. In this transitional phase, it may be preferable to temporarily base supervision on sector-specific rules, in addition to the supervision pursuant to the Competition Act.

   In the telecommunications sector, specific rules are considered (in the Netherlands and in the European Union) necessary at this time because of the imperfection in parts of the telecommunications market. Achieving a sufficient level of competition would take too long if only the general competition law was applied. This is why the Telecommunications Bill contains specific rules which apply 'ex ante' to undertakings (competition engineering).

   The same arguments have been used to make sector specific rules in the electricity sector. Specific rules are needed in relation to network operators during the liberalisation of the market. This way, undertakings know what is expected of them.

2. In general, the Dutch Cabinet endorses the criteria developed by the MDW Working Group for the choice between a specific regulator and the organisational forms that assign responsibility for sector specific supervision to a chamber at the NMa or to the NMa itself. A regulator may be appropriate if sectoral competition rules are inextricably linked tot other rules, if sectoral rules mean that the competition regime is not effective in a particular area if intensified supervision is needed on a temporary basis in relation to the transition to a 'normal' market situation.

   In telecommunications, the regulator OPTA has the task to apply the specific rules (competition engineering). The specific character of the rules is believed to justify the

existence of a specific regulator. It is also considered necessary to create an **autonomous** regulator, independent from the dominant undertaking in the sector.

According to the Electricity Bill, the application of sector specific (customised) competition law (as well as technical and economic regulation) will be assigned to the regulator DTE because it is believed to be necessary that the regulator concentrate on the electricity sector in the transition sector. Electricity is - technically and because of its public utility character - a special product. Undertakings in the electricity sector are not used to working in a very competitive sector. By assigning the DTE, the NMa, being the new competition authority, can focus on applying the new Competition Act.

However, the Cabinet has stated that the 'chamber modality' would appear to be most appropriate here; specific competition law would then be applied by a chamber within the organisation of the NMa. The Minister of Economic Affairs is considering whether the chamber modality can be applied for the Electricity Act.

3. The Cabinet has stated that sector specific rules should be periodically reassessed. The required evaluation term is related to the rate of the liberalisation process and the steps involved. On average, terms of three years are likely. It is noted in respect of both sectors that specific regulations and supervision may be withdrawn once competition in the market has reached the stage where the normal competition regime will suffice.

   It is explicitly envisaged that competition law enforcement will be transferred from the OPTA to the NMa if and when the relevant sector becomes sufficiently competitive. It is the legislator (Cabinet and Parliament) who will decide when this transition is sufficiently complete. Within five years the minister will evaluate the effectiveness and efficiency of the OPTA and will report whether the OPTA will stay or not considered from the perspective of whether the competitiveness of the sector is such that the general competition law is sufficient.

   According to the Electricity Bill, the Minister of Economic Affairs will report whether specific rules or application of these rules by a specific agency will still be needed. The decision will be made by the legislator (Cabinet and Parliament). The criterion that will guide the decision is again whether the competitiveness of the sector is such that the general competition law is sufficient.

4. The new Telecommunications Act and Electricity Act have not taken effect yet. However, on the basis of former legislation, there have been some problems and doubts. The most famous sector in this respect is the sector TV cable networks. Conflicts used to be solved by both the Minister of Economic Affairs and a special media regulator. First question was, of course, to what office should one go to with a complaint. Second, how to guarantee that these decisions are consistent with one another. There have been some differences of opinion, for instance about the admissibility of discounts on access tariffs.

   In the future, the Cabinet wishes to avoid these problems. Therefore, the Cabinet decided that conflicts about the access to TV cable networks should be solved by the NMa. However, the Second Chamber of Parliament has also assigned the telecommunications regulator OPTA to solve conflicts.

5. One should distinguish between the rules and the instruments/powers.

The Telecommunications Act, as well as the Electricity Act, contains technical, economic and (specific) competition rules. The OPTA and the DTE use these specific competition rules to make decisions on conduct that is also covered by the general competition regime. The regulators cannot apply the general competition rules. The general competition law is exclusively applied by the NMa, the specific regulation exclusively by regulators.

The regulators OPTA and DTE will have their own instruments to apply specific competition rules. Some of the instruments, such as licensing, are different from the instruments of the NMa. Other instruments resemble the instruments of the NMa. For instance, the Telecommunications Act will give OPTA the power to solve certain conflicts between undertakings. The Competition Act, likewise, gives the NMa the power to act on a complaint.

Not only when the powers/instruments of the DTE and the OPTA resemble the powers/instruments of the NMa, but whenever there is an 'overlap' with the general competition regime, the administrative relationship between the regulator and the NMa must be defined with care. It is necessary that sector-specific supervision does not become inconsistent with general competition policy.

6. Whenever a regulator is created, which has the power to apply competition or economic rules and which therefore will interpret competition terms, there is a risk that differences of opinions will arise with regard to the interpretation of terms relevant to competition. In these cases, the Cabinet considers it necessary that the regulator reach agreement with the NMa on the interpretation of general competition terms in the application of sector-specific-rules.

Pursuant to the Telecommunications Bill, the OPTA should apply competition terms; this involves supervision of undertakings with a dominant position. The Cabinet takes the view that in this specific sector, there is a risk that differences of opinion will arise with regard to the interpretation of terms relevant to competition. It is important to ensure a uniform interpretation of these terms in such cases. The Cabinet takes the view that there would not be sufficient assurance of this if the OPTA merely co-ordinated its decisions with the NMa, without the need for the NMa's approval. After all, in that case, the risk would remain that the interpretation of competition terms - which must take place on a case by case basis and which cannot be summarised in general rules - will begin to show variations. Evidently, the NMa bears the heavier responsibility here, in view of its task of applying the Dutch and European competition rules, for ensuring that the same interpretation is given to similar terms. Therefore, in the administrative relationship between the NMa and the OPTA, the approval requirement should be imposed for the application of rules relating to undertakings with a dominant position. Pursuant to the Bill, decisions in which competition terms are applied must be taken by agreement with the Director General of the NMa, on the basis of the Competition Act.

However, the Second Chamber has decided otherwise. According to an amendment by the Second Chamber, the NMa should not approve of individual decisions by the OPTA, but only of general guidelines of the OPTA.

In the Electricity Bill, the Cabinet has used the same arguments for choosing the approval requirement for the application of rules relating to undertakings with a dominant position. The

regulator DTE will take the decisions referred to here on the basis of the Electricity Act with the approval of the NMa. The Second Chamber has supported this view. However, maybe approval will not be necessary if and when the DTE becomes a chamber within the NMa.

B. Competition Agencies are also the Principal Economic Regulators [one of the approaches presented in the "Secretariat's Suggestions for Submissions"]

The Minister of Economic Affairs and the Minister of Transport, Public Works and Water Management have recently agreed to assign the application of specific rules in the local and regional public transport sector to the NMa. A Bill to this extent is being prepared. According to the new Act, the undertakings in the local and regional public transport sector need to have an approval by the NMa before they can get a licence for public transport.

1. The decision to assign the NMa has been made as a consequence of the general principles, formulated by the Cabinet. A Bill to liberalise the local and regional transport sector is now being prepared.

   It is believed that general competition law is not sufficient to reach the goals. The Competition Act does not provide the power to prevent dominant positions to be caused by licensing. Then, there is neither a cartel nor an abuse of a dominant position. The rules on concentration control (merger review) do not apply because the dominant position is not caused by a concentration but by licensing. This is why sector specific rules are considered to be necessary. A licence for public transport is not to be issued when the market share of the undertaking exceeds a certain level.

   The reason to not establish these rules within the framework of the Competition Act is that the control of dominant positions caused by licensing is an integral part of the re-structuring of the public transportation sector. Specific legislation is believed to be needed. Of course, this specific legislation does not prevent the Competition Act from being applicable.

   The application of the specific rules implies a judgement of competition aspects such as market shares. Deciding by whom these rules should be applied, not only the importance of re-structuring but also the importance of consistency of the specific supervision with the general competition policy has been considered. Of course, the supervisory authority needs to know the public transport sector, but there is no need for very specialised knowledge. The competition judgement is considered to present the more important difficulties; the rules imply the need to apply competition terms (especially, market share). It is more efficient to assign responsibility for sectoral supervision to the competition authority than to a specific regulator. This way, a consistent policy and a consistent application of competition terms can be achieved. The NMa is assigned to approve of the issuing of a licence to an undertaking with a certain market share.

   Whenever the Minister of Transport, Public Works and Water Management wishes to issue general instructions to the NMa on the application of competition terms, the Minister needs to seek approval by the Minister of Economic Affairs. This too promotes a consistent policy and application.

2. The NMa is empowered to approve of a licence for public transport to be issued to an undertaking having a certain market share. To be exact, the NMa has the power to raise objections to the licensing. Whenever the NMa raises objections, the undertaking will not get a licence for public transport.

   This approval system is not a part of the general Competition Act but will be a part of the new Public Transport Act. Of course, the new Act will not prevent the Competition Act from being applicable to this sector.

   The new Act will be evaluated after five years.

3. Given the contemporary state of the liberalisation, of course, there are no specific examples of differences in the application of regulation by the competition office and a regulator. It is to be expected that the competition authority will apply the specific regulation consistently with the application of general competition law.

4. The NMa is yet to be sufficiently staffed to be able to apply the public transport rules. The Minister of Transport, Public Transport and Water Management will (still) be responsible for the application of these rules. This is why this Minister will be the one responsible for the sufficient staffing of the NMa. Ultimately, the director-general is the one to take both types of decisions (applying general competition regulation and specific public transport regulation). The application of the specific rules will profit by the expertise and experiences developed by applying the Competition Act. The risk to be tackled is the risk that too much energy would be needed to apply the specific rules and that not enough energy is available to apply general competition law (of course, the core business). This is why specific staffing and accommodations are necessary whenever specific rules are to be applied.

5. As mentioned above, until now the NMa has only had general competition law to apply. However, we already can predict some changes, especially in the instruments available to the NMa. The regulatory policy instruments may differ from the instruments that are at hand for the application of general competition law.

   For instance, the Competition Act provides the NMa with the power to issue a licence to establish a concentration (merger review). The Public Transport Bill does not provide the NMa but regional authorities (provinces, municipalities) with the power to issue a licence for public transport. Before they are allowed to issue a licence, they need to have proof (a 'declaration') that the NMa does not object to the licensing.

   This declaration is a new NMa instrument. This means that the activities of the NMa are put forward. The NMa has to make a decision whether licensing can be allowed. This decision somewhat resembles the decision whether or not a concentration license can be granted.

6. Again, there are no specific examples of successes or problems (see under 4). Equipping the NMa with new instruments brings new responsibilities to the NMa. For instance, the NMa will have the power to approve of decisions of the electricity regulator DTE. Until now, the NMa has not had the power to "approve" of decisions by other offices. According to the new Electricity Bill, the NMa needs to approve of decisions on the terms of access to a network. This is also new to the NMa because the NMa will need to apply the specific rules, related to the prohibition of abuse of dominance, "beforehand". The NMa will not judge behaviour by

the prohibition of abuse after the behaviour was conducted, but before it will be conducted. In this respect, the decision of approval resembles the NMa decision whether or not a concentration license will be granted.

C. There is no economic regulation in one or more sectors subject to such regulation in most other countries; instead the competition agency(ies) apply(ies) general competition law to accomplish some or all of the objectives commonly associated with economic regulation [one of the approaches presented in the "Secretariat's Suggestions for Submissions"]

The Cabinet has stated that restraint is called for in the introduction of specific rules relevant to competition. No specific rules when there is no need. See for instance Article 24 of the Competition Act, that prohibits abuse of dominant positions. To avoid abusing its dominant position, an undertaking with a dominant position faces certain obligations. For example, abuse exists when the dominant position is exploited in order to gain benefits which could not be realised in a situation of adequate competition, such as extremely high prices. Article 24 demands an objective, transparent, reasonable and non-discriminatory conduct. Thus, the prohibition regulated in Article 24 also prohibits denial of network access. The undertaking that has, because of the network, a dominant position, is obliged to offer objective, transparent, reasonable and non-discriminatory prices and other conditions for network access.

If the Competition Act itself is considered to be not specific enough, the Director General of the NMa can issue policy rules (guidelines) on the application of this Competition Act. This principle has been and will be applied in specific sectors. For instance:

- there are no specific rules (for instance, on pricing) for the access to cable networks. The NMa will apply the general Competition Act (but recently, the Second Chamber has decided that also the OPTA should supervise the access to cable networks by TV companies). The government relies on the general competition law, but stands ready to introduce pricing regulation should the prices for consumers be raised to politically unacceptable levels. However, the Second Chamber of Parliament has decided that access to cable TV networks should (also) be supervised by the telecommunications regulator OPTA. This is in contradiction with the Cabinet's view;

- the Electricity Bill contains specific rules, but certain disputes between the network manager and anyone who seeks connection to the network, will be settled pursuant to the Competition Act, by the Netherlands Competition Authority;

- the Minister of Economic Affairs plans to minimise specific competition rules in the gas sector. General competition law is considered to accomplish many of the objectives.

1. The general principle is that if the desired result can be realised via the general competition regime, no sector-specific rules are formulated. This principle has been formulated in the light of the risks of fragmented supervision and of inconsistencies creeping into the application of competition terms. Otherwise, clients will not know where they stand, supervisory authorities could be played off against each other, and inconsistencies with European law could arise.

   In the cable sector, general competition law is considered to be sufficient to accomplish the objectives. Before this decision, it was not very clear who should apply what rules. Until now, there is no experience indicating that the reliance on competition law is wrong. The Second Chamber has decided that also the regulator OPTA should supervise the access to cable

networks by TV companies, because this task is considered to be linked to other tasks in the telecommunications sector.

In the electricity and gas sector the same arguments are being used to exercise restraint in the formulation of sector-specific competition rules. As far as general competition law is sufficient, no specific rules are formulated.

2. In the new Competition Act which took effect on 1 January 1998, competition policy in the Netherlands has been placed on a new footing. The NMa has been made responsible for the implementation of the new prohibition system. Of course, this fundamental change have made it more possible to rely on general competition law.

3. Until now, in the cable sector the threat of introducing regulation tot induce companies to set prices below has not been used.

   The new legislation on electricity and gas has not taken effect yet. There will be a set of economic rules in the electricity sector.

4. The NMa has issued a concept for guidelines in the cable sector. The guidelines are meant to clarify how portions of the law (the prohibition of abuse of dominant positions) will be applied in the cable sector. The NMa has the power to issue guidelines in regard to every sector.

5. The NMa has already commissioned a report on the access to program information of broadcasting companies. This report was commissioned on the basis of the Competition Act (the prohibition abuse of dominant positions).

D. General Mandate Driven Division of Labour [i.e. competition law(s) is(are) exclusively applied by the competition agency(ies), and regulation exclusively by technical and economic regulators] [one of the approaches presented in the "Secretariat's Suggestions for Submissions"]

As mentioned above, general competition law is exclusively applied by the NMa. The Competition Act, as well as the European competition rules, provide the general legal framework for competition law issues. The general rules are applicable to all sectors.

In addition, there are specific technical, economic and competition rules. The existence of a specific rule does not stop the general competition rules from being applicable.

1. First, the heart of the matter is in the legislation. If there is no specific regulation, there is no need for a specific regulator. Therefore, restraint is called for in the introduction of specific rules relevant to competition. If the application of sector-specific rules is unavoidable, overlap with the general competition regime should be reduced as far as possible. Criteria have been formulated for the choice between specific sectoral supervision and the organisational forms that assign responsibility for sector-specific supervision to a chamber at the NMa or to the NMa itself.

   When there are specific rules and a specific regulator, the Competition Act itself contains some specific provisions to determine the relationship between the Competition Act and other legislation:

- Article 24, prohibiting the abuse of a dominant position, provides for a way to prevent or remedy problems of market power, such as high prices or denial of network access. This article corresponds to Article 86 of the EC Treaty. Article 25 provides for an exception to the rule of Article 24 in connection with the performance of special tasks. The director general of the NMa may, on request, declare Article 24 inapplicable to a specifically defined practice as far as the application of this Article prevents the provision of a service of general economic interest, entrusted to an undertaking by law or by an administrative agency. This Article corresponds with Article 90, Clause 2, of the EC Treaty and has the same way of balancing findings based on competition principles against other policy interests;

- there is no abuse of a dominant position when the practice of the undertaking is demanded by other legislation. When there is regulation on prices, the demanded price cannot be considered as an abuse;

- Article 6 of the Competition Act prohibits anti-competitive agreements. However, Article 16 states that other Acts take precedence over the Competition Act. This applies if the other Act specifies that a particular agreement must be concluded, if it grants prior approval for a certain agreement or if it provides for the dissolution or termination of an agreement. For example, medical insurers and care providers are obliged to conclude agreements under the terms of the General Exceptional Medical Expenses Act and the Dutch Compulsory Health Insurance Act. Such agreements may also be covered by Article 85 of the EC Treaty. It is also theoretically possible for a decision to approve or to declare an agreement binding or non-binding to conflict with the ban on the abuse of positions of economic dominance. Although in such cases the Competition Act applies in principle, in practice it is doubtful whether a judge would in fact allow the Competition Act to take precedence;

  Article 16 is however a transitional provision which will be withdrawn in five years' time. At present, a stock-taking exercise is being carried out to determine which laws will need to be revised. The following are examples from this stock-taking exercise:

  – the Electricity Act obliges grid managers to submit a joint proposal concerning charging structures and conditions;

  – the Natural Gas Prices Act specifies that the minister must set a minimum price for the supply of natural gas within and beyond the Netherlands;

  – the Energy Distribution Act states that if two or more legal entities are providing electricity, gas and heat to at least 5,000 of the same users, they must enter into co-operation. The co-operation agreement concerned must be approved by the minister;

  – the Aviation Act states that the landing fees charged by airports to airlines must be approved by the minister (in accordance with the Chicago Aviation Treaty);

  – the Passenger Transport Act states that the minister must approve the rates and models of transport passes;

- the Erosion Act (agricultural sector) states that co-operation agreements between companies involved in the production and distribution of surface minerals are mandatory under certain circumstances on technical and organisational grounds;

- the Media Act states that an institution which has been allocated broadcasting time for regional programmes must conclude an agreement with the company concerning the use or transfer of ownership of goods required for broadcasting.

There are specific exemptions for certain sectors and the EC Treaty also provides for the exemption of undertakings which are entrusted with the operation of services of general economic interest. These exemptions have been incorporated in the Act (see Articles 10, 11 and 12).

The realisation of certain agreements or decisions that may involve competitive restraints may be desirable from the point of view of policy objectives other than those of competition policy, or there may be grounds for a certain form of control of such agreements or decisions, such as an approval requirement or the possibility of invalidation, prohibition or nullification.

If legislation providing for such a requirement of such formal control is contemplated in the future, its demarcation with the Competition Act must be considered in advance. A solution must then be found in accordance with the importance attached to the relevant policy objectives and the importance of competition.

Until the above-mentioned demarcation between the Competition Act and other existing legislation has taken place, a temporary provision avoids the collision of powers of different administrative bodies from different points of view. Article 16 provides that prohibition of competition agreements shall not apply to competition agreements which are subject to approval of, or can be invalidated, prohibited or nullified by an administrative agency, or which have arisen pursuant to any statutory requirement. Article 16 will lapse in 2003. In the meantime, provisions for a final demarcation will be made.

- The Minister of Finance also vets proposed mergers, namely those between banks and insurers. Such an evaluation concentrates initially on the notion of 'solvency' and secondly on the criterion of 'effect on market relations'. However, the Competition Act applies to all sectors, which is why it contains an Article which states that in two years' time, its provisions will also extend to banks and insurers, so that the full Competition Act will also apply to these sectors.

The Dutch Cabinet has formulated some principles for the organisation of supervision, to prevent supervision from becoming fragmented and inconsistent. When there is a regulator the administrative relationship with the competition authority must be defined with care:

- Where there are risks of difference of opinion on the interpretation of terms relevant to competition, it is considered necessary that a regulator reach agreement with the NMa on the interpretation of general competition terms in the application of sector-specific rules. (see part A). If there is no risk of differences of opinion between supervisory authorities on the interpretation of terms relevant to competition, the co-ordination requirement will suffice. This means for instance that these authorities have to consult one another.

- At the general level, consensus on the interpretation of general competition terms on the basis of sectoral rules will be reached in agreements between the sectoral supervisory authority and the NMa. This will help to ensure consensus with the NMa on the interpretation of competition terms.

A uniform judicial procedure should be chosen with regard to decisions by supervisory authorities on the interpretation of competition terms. A consistent judicial procedure is a minimum requirement for the effective organisation of supervision. A uniform judicial procedure will help to ensure the uniform application of standards and terms; supervisory authorities will aim to avoid the risk of correction by a court.

2. Apart from the approval or co-ordination requirement, there are contacts between the competition authority and regulators periodically and 'ad hoc', every time it seems appropriate to either the competition authority or the regulator. For instance, they inform each other about cases and they consult each other when they are preparing guidelines.

3. First, the NMa is not a legislative body, but has the power to issue guidelines. Apart from this, there is no legislation assigning the NMa to play a formal role in reaching decisions on adopting or abolishing regulation. However, the NMa advises the Minister of Economic Affairs on decisions that he can make on adopting or abolishing regulation. These advice's are especially meant to determine what the role of general competition law and therefore the role of the NMa should be.

4. A problem than can be associated with the general approach of assigning regulation to regulators and competition law to competition agencies is the problem how to make a distinction between regulation and competition law. Making this distinction, there might be a problem that contradictory decisions will be taken by the regulator and the competition authority. As mentioned above, the Dutch Cabinet has formulated principles in order to minimise these risks.

E. Regulators and Competition Authorities Concurrently Enforce Competition Law(s) (excluding situations where regulators are merely given a general duty to promote competition, but no specific instruments to carry out that mandate) [one of the approaches presented in the "Secretariat's Suggestions for Submissions"]

There are no sectors to which the above description applies. Each one of both - competition authority and regulator - has its own legislation to apply.

NOTES

97. Named after the Working Group Chairman, R.K. Visser.

98. Sector-specific competition rules are rules that overlap with general competition rules.

NEW ZEALAND

1. Introduction

Arguably, the regulation of utilities poses more complex problems than any other regulatory issue. The option of promoting economic efficiency solely through the means of exposing utilities to competitive forces is not available. A 'hands off' policy would allow incumbent firms the scope to set monopoly prices, misallocate resources and perform poorly, to the detriment of the economy and of consumers.

At the other extreme, direct regulation may curb some of the excesses of monopoly power, but is likely to create other inefficiencies. Potentially the most serious detriments are the dynamic losses caused by industry regulators making decisions which, although well-intentioned, may inhibit entry, competition and innovation. Other costs include the costs of the regulatory body, compliance costs, opportunistic behaviour, regulatory error arising out of imperfect information and the costs associated with regulatory creep and regulatory capture.

The design of a regulatory regime must therefore weigh up the potential costs and benefits involved with the different approaches.

2. Utility regulation in New Zealand

The overarching objective is to promote fair and efficient conduct of business and the operation of utility markets which rewards innovation, promotes efficiency and enhances business confidence. The general approach is to open up utility markets to competition where that is possible (e.g. by removing statutory barriers to entry) and to apply a light-handed approach where regulation is needed.

The two main elements are discussed in more detail below.

2.1 Split between natural monopoly and competitive activities

The first element of the regime is a recognition that not all parts of utility businesses are natural monopolies. In some cases this has led to structural separation decisions. However, there have been some markets where such splits have not occurred because of:

- concerns about whether the loss of economies of scope and scale outweigh the benefits; and
- difficulties in identifying which parts of a business are a natural monopoly, particularly where the scope of the natural monopoly is likely to reduce over time.

2.2 Light-handed regulation

A defining feature of light-handed regulation is that access to essential facilities is determined by negotiations between the parties rather than being imposed by a regulator. It is aimed at keeping pressure on costs and prices without the need for more traditional forms of regulation, such as price control. The main elements of light-handed regulation are:

- general reliance on the competition law (the Commerce Act 1986) to control anticompetitive behaviour;
- industry-specific information disclosure regulations, which are designed to make transparent the operations of firms with monopoly power; and
- the threat of heavier-handed regulation, such as price control, if monopoly power is abused.

2.2.3 Competition law

The Commerce Act is a typical modern competition law which, among other things, prohibits the use of a dominant position in a market for exclusionary purposes and agreements that substantially lessen competition. The abuse of dominance provisions do not extend to prohibiting monopoly pricing.

While relatively few cases have reached the courts, there are increasing numbers of out of court settlements which have been resolved in accordance with the competition framework provided by the Act and accumulated precedent.

2.2.4 Information disclosure regulations

The requirements under information disclosure regulations vary from industry to industry depending on the scope and scale of the market failure they aim to address. In telecommunications the regulations are aimed at requiring the disclosure of information that will promote competitive entry and provide information which may assist in identifying anticompetitive conduct.

In the case of electricity, the aim is to discourage monopoly pricing, promote competition, discourage uneconomic electricity generation and discourage excessive cross subsidies within line services markets. Accordingly, the regulations feature a high level of transparency of line business activities by way of accounting separation requirements.

2.2.5 The threat of regulation

The main threat is use of the price control provisions under the Part IV of the Commerce Act. These provisions allow the Government:

- to introduce price control if the Minister of Commerce[99] considers that there is a market power problem in the relevant market and it is necessary or desirable to introduce price control to protect the interests of consumers; and
- to instruct the Commerce Commission (the independent competition authority) to investigate whether it would be desirable for the Government to introduce price control.

2.3 Institutional arrangements

Under this approach New Zealand has not found any need to establish industry-specific regulators. The main reason for this is that access to essential facilities is determined by negotiations between the parties with recourse to the High Court to stem anticompetitive behaviour.

The information disclosure regulations are administered by the relevant Government departments, mainly the Ministry of Commerce. Monitoring of the information disclosed is carried out by the Ministry of Commerce, the Commerce Commission and by participants in the relevant industries.

3. Comment on how light-handed regulation has worked in practice

3.1 Telecommunications

The first industry in which light-handed regulation was adopted was telecommunications. The Government privatised the dominant State-owned enterprise, Telecom Corporation, as a fully integrated telecommunications business in 1989. The Government did not split the company into natural monopoly and competitive businesses because it was satisfied that, subject to satisfactory interconnection agreements, competition in network services was possible and sustainable and that any losses in economies of scope and scale would be small and would be outweighed by the dynamic gains arising from greater pressures on Telecom to be efficient, to offer better service and be more competitive.

Since the introduction of light-handed regulation in the late-1980s, interconnection agreements have been agreed to between Telecom and new entrants and among those new entrants themselves. As a result, competition has emerged in most segments of the telecommunications industry. This has led to substantial improvements in productivity and service quality and substantial reductions in prices. In particular, long distance prices have fallen sharply in 1997/98.

Several interconnection agreements were negotiated during the early stages of regulatory reform including in the tolls and cellular services markets. There has been effective competition in those markets for a number of years. However, competition been slower to emerge in some telecommunications markets. A dispute on interconnection for local access between Telecom and new entrant, Clear Communications, led to litigation under the Commerce Act which, as a result of two appeals, took four years to complete. At the heart of the dispute was whether the Baumol-Willig rule[100] (the 'BW rule), which was advocated by Telecom, could be used for interconnection pricing . The Privy Council concluded that use of the rule did not amount to a misuse of a dominant position.

Nevertheless, the BW rule was never used because the Government publicly stated that it was inappropriate in the context of light-handed regulation. The BW rule originated in a regulatory context in which the final prices of the monopolist are controlled. In this context economically efficient interconnection pricing can be achieved solely by ensuring that inefficient firms do not enter the market. However, the absence of final product price control in New Zealand meant there would have been no restraint on the monopolist charging monopoly rents on the natural monopoly portion of the business.

In addition, the focus of the BW rule is on static productive efficiency. The Government was more comfortable with the notion that if the downstream market can support more than a few firms, the normal forces of competition could be relied upon to drive inefficient firms out of the market.

Shortly after the Government stated its views and made it clear that it was growing impatient with the slow speed of negotiations for this particular agreement, Telecom and Clear entered into an interconnection agreement for local service (March 1996). This agreement appears to have been something of a watershed with new interconnection agreements having been concluded since then for several long distance operators; Saturn Communications, a local access operator and BellSouth for cellular services. Clear and other players are providing local access competition in urban business areas, while Saturn has launched a competing local access service for residential users in Wellington.

Competition disputes continue to be aired publicly, especially over numbering issues. The Minister of Communications has initiated a review of the regulatory framework for numbering.

The Government is satisfied that competition is increasing at a good rate. Nevertheless, it is continuing to monitor developments closely as there continue to be disputes, particularly in the area of number portability. Telephone number portability was introduced in January 1998 but is still under negotiation in relation to 0800 and cellular numbers.

3.2 Electricity

New Zealand's experience with centrally planned approaches to electricity generation prompted a search for more effective ways to promote industry performance. Electricity industry reform has occurred within the same light-handed regulatory framework as for telecommunications. However, there have been some differences in emphasis due to the more limited opportunities for competition in the electricity industry competition compared with telecommunications. This has prompted the extensive information disclosure requirements for electricity.

The key reforms since the 1980s have been:

- the transfer of the Government's generation and transmission business from the Ministry of Energy to a newly created State-owned enterprise, the Electricity Corporation of New Zealand Ltd (ECNZ) in 1987;

- the separation of the State-owned transmission business Transpower NZ Ltd from ECNZ in 1994;

- the creation of a new State-owned generation company, Contact Energy, which acquired about 25% of the generation assets of ECNZ in 1996;

- the establishment of a wholesale electricity market, with spot market prices being determined by the marginal price of the marginal station in 1996;

- a requirement for all electricity businesses to be set up as stand-alone companies in 1993; and

- the removal of statutory monopolies in the distribution and retailing sectors in 1994.

These reforms are incomplete and the Government has announced further proposals for reform which are outlined below.

3.2.1 Wholesale market

1. The 1995-96 reforms have delivered a range of benefits including lower wholesale prices, reductions in controllable generation costs and significantly improved information flows. However, the current generation structure also has a range of problems and limitations which arise from ECNZ's continuing dominance in the generation market. Hence, ECNZ will be split into three separate State-owned companies.

3.3 Distribution and retail

Under present arrangements, there are insufficient pressures on costs and profits in distribution and barriers to retail competition remain. Local electricity companies have incentives to deter competition in retailing by failing to provide low cost systems to enable customers to switch retailers, unreasonably restricting access by competing retailers to their distribution network and cross subsidising retail customers through monopoly line business profits. Local electricity companies also have incentives to cross-subsidise generation investments from distribution and retail customers not subject to competition.

In order to deal with these problems the Government has, *inter alia*:

- strengthened the information disclosure requirements;
- required the industry to deliver, by mid-1999, a low cost option to enable small consumers to switch electricity supplier. If this is not delivered, the Government will regulate for a mandatory default switching system;
- announced that it intends to require lines businesses to be under separate ownership from retail and generation businesses. This is currently being considered by Parliament.

4. Conclusions

The costs and benefits of light-handed regulation have to be compared with other likely imperfect regulatory options, rather than with the first best ideal but unreal world. It also needs to be considered against the likelihood that natural monopolies are probably more widespread in small countries like New Zealand where markets are typically smaller.

Our general conclusion is that there are no alternative regulatory approaches which would offer clear improvements to what has been achieved so far. Like any novel approach to regulation, there were some initial design faults with light-handed regulation. The general approach has been to correct those faults rather than to move away from the policy of leaving the key decisions on terms and conditions for access to market participants. However, the intention to enforce ownership separation of electricity distribution and retail/generation is a more direct structure solution to regulatory concerns in that market.

Light-handed regulation has generally been successful in the telecommunications industry notwithstanding the Clear/Telecom dispute. It has led to significant competitive entry, prices falling at a rate that is comparable with OECD averages and adoption of innovative products and services on a timescale that is comparable with other OECD countries.

More specifically, the main lessons that have been learnt in terms of making light-handed regulation work are outlined below.

4.1 The competition law must be effective

Light-handed regulation has placed a major burden on competition legislation and the institutions that apply it. In order to be successful:

- The competition law must cover the full range of anticompetitive behaviour and have an effective prohibition on anticompetitive mergers. It is also important to include an efficiency exception in the law. The Commerce Act does all these things.

- The penalty and remedy provisions in the law should promote general deterrence. There are weaknesses in the Act at present. In addition, the courts have tended to adopt a non-economic and conservative view with regard to the imposition of injunctions, pecuniary penalties, damages and costs, thereby reducing the deterrence effect. Officials will present proposals to the Government later this year aimed at strengthening the law in this respect.

- The institutions must be able to produce effective solutions. New Zealand's experience has been that the Commerce Commission has been effective at continuously monitoring industry developments and investigating more serious breaches. The courts are generally effective in providing broad signals about what conduct is or is not lawful but are most reluctant to become involved in ongoing supervision. There are differing views on whether closer supervision is required but concerns about this tend to be expressed by persons who are more concerned about processes than outcomes.

- Processes must be efficient. In general the courts have stronger incentives to ensure that their decisions are not judicially reviewed than to be efficient. In addition, there have been delays in court cases as a result of counsel seeking to use the system for their own strategic purposes. These matters are also currently under review.

4.2 The threat of heavy-handed regulation must be real

Experience in both industries is that market participants (incumbent monopolists and new entrants alike) will test the boundaries of what the Government is prepared to tolerate. In telecommunications the speed of concluding interconnection agreements increased dramatically after the Government clearly stated that it was running out of patience in the Telecom/Clear dispute. The use of the threat has had ongoing benefits in terms of promoting competition and providing benefits to consumers.

One area of weakness in the current regime is that the threat of price control is not perceived as real. A major factor is that the existing price control process cannot be invoked quickly. Hence, monopolists are aware that, in the event that they sell at prices that include monopoly rents, it will take some time for that to be detected and for price control to be introduced. The Government's electricity reform package includes an instruction to officials to find ways of remedying this problem.

4.3 Other issues - regulatory creep and regulatory capture

The potential problem of regulatory creep is a risk in any regulatory regime. This has not proven to be a serious problem in New Zealand to date. The regulatory regime for telecommunications is essentially the same as it was ten years ago and the key decisions about terms and conditions for access continue to be made by the industry by means of negotiation within the broad framework set by the regulatory regime.

In the electricity industry disclosure rules have been increasing, reflecting the fact that reform has been implemented in stages. This increased regulation has been largely aimed at promoting competition and making monopoly rents more transparent.

In addition, the Commerce Commission has not been seeking an enhanced role under the regime, preferring instead to concentrate on its core antitrust role rather than becoming the de facto regulator of the relevant industries. Careful selection of Commission members using open processes and making appointments on merit may have been a significant contributing factor.

The absence of industry-specific regulators has also discouraged regulatory capture. As a competition agency, the Commerce Commission has an interest in having a consistent pro-efficiency enforcement policy across the economy. The greatest risks of regulatory capture lie with officials in the government departments that administer the information disclosure regulations and any other industry-specific regulations. However, those risks are not high because the departments are not charged with making the key decisions on terms and conditions for access to essential facilities.

NOTES

99. The Minister of Energy in the case of electricity and gas.

100. Essentially, the BW rule (or the ‘efficient component pricing rule’) states that a firm seeking access should pay the incumbent a sum sufficient to compensate it for the opportunity cost of customers lost to the entrant, including its foregone profits, if any. Hence, it may include the monopoly profit that the incumbent loses by selling access in place of retail services.

NORWAY

The relationship between a general competition law and policy and sector specific laws and policies is in our opinion one the most important topics to be discussed and settled in the years to come. On the one hand, there will be a competition authority, in principle covering all sectors of the economy. On the other hand, there will be sector-specific authorities and a regulatory regime for the respective sectors, deriving from a process of deregulation and market orientation of the sectors.

It is important to adopt a comprehensive competition policy approach to the new developments taking place in the almost global process of deregulation and market orientation of traditionally tightly regulated sectors of the economy. There is a need to design an overall policy framework for competition and regulation that establishes a clear and operational demarcation of the responsibility and the division of labour between competition authorities and sector-specific regulatory authorities. It may be argued that these issues have been given surprisingly little attention through all stages of the legal process, from the law formation and enactment stages to enforcement and sanction procedures.

Below we first provide a summary sketch of the developments that are taking place in this area under a deregulation process. In 1997 the Competition Authority asked a group of academic specialists to prepare a report which among other things should discuss the organisation of the competition and sector specific regulatory authorities. The second chapter provides a summary of this report. In the third chapter we give you some examples of the relationship between the sector specific and the competition authority in some industries.

1. Main developments in Norway

From a structural point of view, four development characteristics of the sectors under consideration may be distinguished:

The first is the “traditional” development of a specific sector, e.g. electricity, which is being deregulated and exposed to competition. Here, one should make a distinction between, on the one hand, those activities that can be market-based and, on the other hand, those that have natural monopoly characteristics and where a natural monopoly or a hierarchy of such monopolies remains even after the structural change of the sector has taken place.

The natural solution in such a case would be to adopt model D in the secretariat’s paper (general mandate driven division of labour), at least as a minimum solution. This would give the competition authority exclusive competence to supervise competition in the competitively exposed part of the industry, while the sector specific authority may be entrusted with the natural monopoly regulation of that part of the industry. This presupposes, though, that a proper organisational and legal demarcation has been drawn.

A second structural development is integration of economic activities from various sectors into economic entities, activities that have some common characteristics to make integration interesting from a strategic business perspective, and maybe also from an economic efficiency perspective. One example can

be integration of electricity and natural gas, and possibly also district heating and water. After the structural change, there would still be a competition and a natural monopoly component within each part.

From a regulatory point of view, the regulation adopted to address such developments may be described as “across-sector specific regulation”. In such a case, it is important that the same regulatory regime applies to all sectors that are being integrated so that regulated enterprises are submitted to the same mechanism across activities. Model D can be applied in this case too, alternatively model E (regulators and competition authorities concurrently enforce competition laws) if a sufficiently clear division of labour and responsibility between the competition authority and the across-sector specific authority, or sector specific authorities, can be established.

In Italy, an across-sector specific authority has recently been established – The Regulatory Authority for Electricity and Gas. This authority has apparently been given fairly wide powers for competition supervision within those sectors. In Norway, there is a regulator for electricity and water, but since water has not yet been deregulated, mainly technical regulation is undertaken. Then there is the “joint” regulatory authority for post and telecommunications, which will be discussed in chapter 3.

A third structural development is diversification. Oil companies diversify into electricity and gas to become energy companies. Electricity companies do the same, and they also diversify into telecommunications, using the excess capacity of the telecommunications system they already have in place and building new capacity in competition with telecommunications companies. Railway companies do the same, and telecommunications companies diversify into information technology, media, financial services and the like.

These developments present quite different and possibly more complex regulatory problems than the first two mentioned.

A fourth structural development is the exposure to competition of economic activities that typically have been within the realm of the public sector, at least in Europe, either at state, regional or local levels, like e.g. waste disposal, fire protection, medical services, education etc. Currently, Europeans debate intensely to what extent and how such services should be exposed to competition, and how they should be supervised. In the Netherlands, for instance, a government-appointed committee has recently proposed to establish an independent supervisory authority for public sector activities being exposed to competition.

From a regulatory point of view, one may distinguish between two development aspects. The first is a movement away from technical regulation, by means of e.g. licensing, concessions and technical supervision to economic regulation, or at least a clearer distinction between the two types of regulation. The second, and this is the most important one in this context, is from direct economic regulation of prices and other economic parameters to incentive regulation.

The basic idea of incentive regulation is to introduce competition-like instruments in the form of incentive mechanisms to induce the entities under regulation to behave in ways that lead to economic efficiency, but simultaneously permit them to achieve their own business objectives, e.g. profit maximisation, within the regulatory regime. In a sense, one attempts to mimic competition behaviour. It is therefore necessary to have a solid understanding of competition regulation in order to implement an incentive regulatory regime optimally.

A final remark in the context of sector regulation concerns the problem of regulatory capture. A situation where industry-specific authorities have the responsibility for supervising competition in the

markets often contains the seed for regulatory capture. This means that the regulating authority during its work develops such close ties with the industry that the authority may adopt the industry's perception of reality and thus may develop an inclination towards favouring the views of the industry above defined governmental policies, for instance competition policy. Where the industry is opposed to liberalisation and being exposed to competition, this situation obviously presents a real dilemma.

Regulatory capture may develop due to the authority's close contact with the industry. The aspect of "cross-hiring" may strengthen the development; when either the authority hires people from the industry because of their technical competence, or where career opportunities in the industry provide an incentive for the regulator to adopt views more positive towards the industry than would otherwise have happened. The industry may also have a role in the education of the regulating authority, since the industry possesses the relevant technical knowledge. The situation may arise particularly in sectors where the public authority previously has functioned both as regulator and owner of the market participant. In these situations it is in imperative to ensure that the industry and the authority function as two entirely independent entities after deregulation.

Regulatory capture is not a specific Norwegian problem, but since the Norwegian state owns a controlling share in a number of major Norwegian companies, regulatory capture might present a more pressing problem in Norway than elsewhere. However, it can be difficult to quantify or even prove the influence that regulatory capture may have.

Regulatory capture and other issues with relevance to the division of tasks between sector specific and competition authorities have been addressed in the report prepared by the before-mentioned group. The next chapter summarises the findings of the report.

2. The Experts' Report

The expert group was among other things asked to discuss the relationship between competition policy and regulatory and how this relationship will influence the possibilities for achieving economic efficiency. The relationship was to be analysed in a Norwegian context, which is an administrative system for enforcing the competition law as opposed to a court system.

The experts' report noted that there are two questions that should be raised with respect to the relationship between the competition authority and the sector specific authorities. To what extent should responsibility for competition policy be delegated to subordinated authorities? And how should competition and regulatory enforcement tasks be allocated between the competition authority and the sector specific authorities?

Thus, the enforcement system could be divided both vertically and horizontally. A vertical division means a delegation of enforcement responsibility to subordinated authorities. This may lead to faster enforcement procedures. On the other hand there is a danger that decisions being made by subordinated authorities are not in accordance with important policy goals.

2.1 Vertical division

There are three alternatives:

2.1.1 VA: Independent Competition Authority

This alternative puts the competition authority in the same position as the courts; decisions can not be appealed to the ministry or the government. Such a model calls for particular enforcement requirements and appeal procedures within the competition authority itself.

2.1.2 VB: Limited Independence

The Competition Authority is a separated independent administrative body but its decisions may be appealed to the Ministry.

2.1.3 VC: Integrated Competition Authority

The competition authority is executed by one or several ministries.

The Norwegian Competition Authority is organised in accordance with the category VB. All decisions may be appealed to the Ministry. In addition the Ministry has the right to instruct the NCA. Sector specific authorities having competition policy duties are organised in a similar way but they are subordinated different ministries. With respect to the primary industries (agriculture, forestry and fisheries) the competition policy is to a large extent integrated with the other tasks of the respective ministries.

A horizontal division means that tasks and responsibilities are allocated between different authorities. The division may be made according to enforcement tasks or to particular sectors. Competition authorities have task-specific responsibilities covering in principle all sectors. Sector specific authorities have wider and possibly different tasks than competition authorities and they often have responsibility for achieving other objectives than merely economic efficiency.

2.2 Horizontal division

There are three alternatives:

2.2.1 H1: Centralised Competition Authority

The competition authority has the responsibility for all competition tasks. The activities of the sector specific authorities are delineated in such a way that competition issues are not one of their tasks.

2.2.2 H2: Decentralised Competition Authority

The competition policy tasks within a sector are integrated with the other tasks of the sector specific authority.

2.2.3 *H3: Concurrent Competition Authority*

The responsibility of the competition policy is shared between the competition authority and the sector specific authority. This category may be divided into two subcategories; parallel and divided competition authority. In those circumstances where the two authorities disagree a superior authority must make the final decision.

The relationship between the Norwegian Competition Authority and the sector specific authorities falls within category H3, although, as will be discussed later, there are variations between the different sectors.

The different options are summarised in the table.

	VA: Full Independence	VB: Limited Independence	VC: Integrated
H1: Centralised	X	X	
H2: Decentralised	X	X	X
H3: Concurrent		X	X

Two options are unlikely. One can hardly imagine a concurrent competition authority unless it is combined with some appeal possibility to a superior authority (excluding alternative H3-VA). It is also hard to imagine an integrated competition authority without some type of horizontal sharing of responsibility with sector specific ministries.

None of the models can solve all problems. Vertical delegation leads to faster and more expedient decisions, but also makes the necessary weighing of different goals more difficult. Horizontal division of tasks gives efficiencies of specialisation and unambiguous incentives, but makes it impossible to decentralise all decisions. Overlapping competence gives less room for mistakes and misuse of authority, but at the same time leads to a duplication of expertise.

One of the conclusions of the report is the importance of letting subordinated bodies with an authority to make decisions have clear and unambiguous goals. One reason for this is that it is difficult to communicate political considerations when weighing different goals. It might be a tendency to choose the least controversial solution. A sector specific authority having the responsibility for both competition and product quality will probably prioritise quality rather than competition – not because quality always is most important, but because a lack of quality is obvious while the losses from a lack of competition is hard to estimate.

The chances for regulatory capture are greater the closer and the more frequent are the contacts between the public authorities and the interested parties. Therefore, the sector specific authorities are more exposed to capture than authorities with a general field of responsibility. Personal ties between the regulator and the regulated enterprise may for instance arise because public employees are recruited from the enterprises in the sector – and vice versa.

In order to secure the credibility of the regulatory and competition authorities there must be no doubt that they treat different enterprises equally, no matter the ownership. The more imprecise and divergent goals the regulatory authorities have, and the more diverse is the responsibility for competition, the more questionable will be the discretion of the regulatory authorities. It is important that possible conflict of roles between the state as an owner and the state as a regulator is not concealed.

The conclusion is therefore that competition policy should be centralised within the Competition Authority. This solution gives the best utilisation of expertise and will secure a credible and consistent enforcement policy across sectors.

Consistency across sectors becomes more important in a rapidly changing economy. This is particular relevant to industries such as telecommunications and media where the technological development changes or eliminates sector boarders. By having a general competition law and an integrated competition authority one avoids the difficult task of delineating the fields of responsibility for the various sector specific authorities.

Such an organisation implies that the Norwegian Competition Authority should be vested with the authority of more tasks and means than presently. It should be an integrated part of competition policy to regulate directly when it is not possible, or at least not suitable for the purpose to create the means for efficient competition. In the present situation the competition authority's special expertise is neither fully utilised when deciding when competition suffices or other means is necessary, nor when it comes to the proper design of the regulatory means. The competition authority should therefore be transferred monopoly regulation tasks from the sector specific authorities, and the sector specific tasks should be delineated against the tasks of the competition authority.

A centralised model does not provide all the solutions and at least two potential problems should be addressed. The first concerns the possibility to utilise the sector specific expertise of the sector specific authorities. For the same reasons it is inconvenient to have the sector specific authorities to achieve competition policy expertise, will it be inconvenient for the competition authority to gain the type of expertise that is normally possessed by the sector specific authorities. A prerequisite for a division of tasks is therefore that the Competition Authority establishes close co-operation with sector specific authorities.

The other issue concerns the weighing between competition policy goals and other goals. The choice of a centralised competition authority implies that it is not possible to vest the Competition Authority with full authority to decide on competition policy issues. Both sector specific and competition authorities should have limited and clearly defined goals. But then the weighing of different goals should be made at a superior political level. This model therefore presumes an appeal procedure to the ministries. There should also be an opportunity for other public bodies to appeal decisions made by the competition authority, and vice versa.

However, the appeal procedure to a political level should be limited to decisions involving political considerations. Decisions based solely or primarily on competition policy considerations should be delegated to the competition authority with a possibility to appeal to an independent appellate body, which is in a position to handle the cases quickly.

3. Sector Studies

3.1 Electricity

Under the Energy Act of 1990 the sector specific electricity authority (the NVE) is vested the authority to grant concessions for the sales of electricity. The concession system is meant to be a means to supervise monopolies and secure efficient competition in the energy market. The Energy Act contains no formal limitations on the purview of the Competition Act. The legislator acknowledged that the NCA and the NVE would have overlapping competence. The problem was not commented any further but it was called for the agencies to agree on a proper division of labour.

According to an informal agreement between the two agencies, the NVE should have sole responsibility for regulating the provision of network services as a natural monopoly. The prohibitions of the Competition Act were fully applicable. The NVE had the main responsibility to intervene against anticompetitive behaviour that was not covered by the prohibitions of the Competition Act. The NCA could intervene against the behaviour if the NVE found they lacked the authority to do so.

The informal agreement resembled model E of the secretariat's paper (regulators and competition authorities concurrently enforce competition law. The NCA felt that this system created considerable insecurity – both for enterprises and within the two agencies – about what is the proper agency to intervene against behaviour that are not covered by the prohibitions of the Competition Act. This was partly due to the NVE lacking experience with how to handle competition policy issues, partly that the NVE seemed to depend on political signals about how apply the concession system.

The NCA questioned the wisdom of having the NVE as a parallel competition authority. At the outset the agency had an expertise on an entirely different type of cases than competition cases. The division of labour implied that the agency had to build up a type of competence that already the NCA possessed. Of course, certain competition cases require expertise on both competition and technical matters. However, the NCA must to a certain degree possess the latter skills anyway, in order to enforce the prohibitions of the Competition Act.

In addition, the electricity sector had certain characteristics that made the NVE exposed to regulatory capture, although there was indications that this had actually been the case. Another relevant point was that the NVE is subordinated the Ministry of Industry, which also is the owner of Statkraft (the biggest Norwegian producer of electricity).

These objections to the informal agreement lead to a change of the roles of competition policy enforcement between the agencies. On initiative from the respective ministries the two agencies issued in 1996 a joint report on the delineation of the competencies of the two agencies. Under the new agreement the model still resembles model E, but now it also has elements of model D (general mandate driven division of labour) since NCA clearly is the primary competition policy agency. The main conclusions of the report are summarised in the following:

3.2 Prohibited restraints to competition

The Norwegian Competition Act prohibits price fixing, market sharing and collusive tendering. The NCA may grant exemptions from the prohibition. The aims of the Energy Act can necessitate conditions for granting concessions, among other things with respect to concessionaires' co-operation

with other market participants. Furthermore, co-operation on sales in terms of a joint sales company is depended on a sales concession.

The two agencies agreed on the following:

- Joint meeting shall be held on cases that are conditional on both an exemption and a concession;

- in order to secure expedient case handling within a reasonable time limit such cases shall be handled in parallel by the two agencies. However, it is presumed that the NCA shall reach a decision before the NVE. The reason is that it is appropriate that the narrowest issues are handled first and that the NVE subsequently can bring into bearing other issues than those related to competition.

3.3 Interventions against otherwise legal restraints to competition

Regulations under the Energy Act limit the ability of the concessionaire to enter into exclusive sales agreements between the concessionaire and its distributors of electricity. The NCA may on a case-by-case basis intervene against such arrangements. The agency considering actions against such agreements shall as early as possible contact the other agency in order to clarify whether actions should best be taken under the Competition Act or under the Energy Act.

The NCA may intervene against other anticompetitive terms, agreements or actions that are not covered by the prohibitions of the Competition Act. The NCA shall not intervene against conduct concerning the operation of the transmission grids. The NVE shall normally not stipulate conditions in concessions for such conduct of significance for competition on sales of electricity.

3.4 Mergers

The NCA may intervene against mergers or acquisitions that creates or strengthen a significant restriction of competition. Acquisition of the assets of an enterprise requires a renewed concession treatment. If both agencies handle the same case they shall keep in close touch with each other. The order of decisions shall be agreed upon in each case.

3.5 Regulations and guidelines

Both the NVE and the NCA may stipulate regulations or guidelines under the laws. The NVE shall consult the NCA on large or principal changes of the regulations and guidelines. The NCA shall consult the NVE concerning regulations or guidelines with respect to exemptions or interventions.

3.6 International matters

Interesting issues arise with respect to imports and exports of electricity, which may only take place when the Energy Department has granted a concession to do so, and concessions have been granted to permit producers to establish quota arrangements for the export of electricity to Sweden and Denmark. The producers must comply with certain conditions, for instance with regard to export tariffs, and the Energy Department must approve the agreements concluded between the exporting company and

authorities in the importing country. The sector authority supervises compliance, but since the agreements may influence competition in Norway as well as in the importing country, the Competition Authority needs to follow the developments closely. This requires a close co-ordination between the sector authority and the Competition Authority.

The NVE shall consult the NCA about the impacts on competition of international agreements on imports and exports.

3.7 Telecommunications

Norway adopted a new telecommunications act in 1995. In the act, the main responsibility for so-called market regulation was placed with the Post and Telecommunications Authority (the PT). The PT is a directorate reporting directly to the Ministry of Transport and Communications. The NCA took an initiative to clarify the relationship between the authorities with respect to market supervision, along the lines that were agreed upon with the electricity regulator, and an agreement was worked out - though many issues were left unsettled.

Some of the main responsibilities of the PT are:

- regulation of network operators and service suppliers, including monitoring under the regulation pertaining to open network services;
- standardisation and drafting of regulations;
- surveillance of dealers and equipment;
- advises to the Ministry of Transport and Communications;
- inspection of and permission for the establishment /modification of cable networks;
- regulation of postal services.

The PT makes decisions concerning Norwegian telecommunications regulations. The formal appellate body is the ST (“Statens teleforvaltningsråd”). In matters of political nature or fundamental importance the Ministry of Transport and Communications is the appellate body.

The Ministry of Transport and Communications is also the owner of Telenor AS. The close ties between the Ministry, the PT and Telenor were inappropriate. It was therefore decided that the Ministry of Labour and Government Administration should be the appellate body for the PT’s individual decisions with competitive aspects. The Ministry of Transport and Communications is still the appellate body in cases of political nature or fundamental importance. This means that the Ministry of Labour and Government Administration handles complaints on decisions in the telecommunications sector made both by the Norwegian Competition Authority and the PT.

This division of authority sector is a result of an attempt to strengthen the confidence of the appeal procedure at a ministerial level. Furthermore it can be appropriate that decisions concerning competition are placed under the same Ministry that generally is the final authority in cases concerning competition.

The Telecommunications Act has been revised to accommodate regulations of access to telecommunications networks as part of the full liberalisation of telecommunications from 1 January 1998. The main purpose of the Telecommunication Act is “to achieve efficient resource utilisation by providing conditions for effective competition.” This is exactly the same objective as is stated in the

Competition Act of 1994. Furthermore, suppliers with a strong market position, i.e. above a market share of 25 percent, need a license from the PT.

The NCA welcomes that competition is brought forward as the means to achieve efficiency in telecommunications. The obvious implication, however, is that the NCA is charged with the responsibility for market supervision. However, the Competition Act and the NCA were not even mentioned in the proposal given by the Ministry of Transport, which simply placed the responsibility for access regulation with the PT.

The proposed system thus leads to a high degree of overlapping competence, duplication of supervisory resources and, first and foremost, to a high degree of legal and administrative uncertainty with respect to the rules and regulations that actually apply in a given situation and which authority is responsible.

In a comprehensive reply to a hearing of the proposal, the Competition Authority has said that the time is ripe for drawing a dividing line between technical regulations on the one hand, and economic or competition regulations on the other. The Competition Authority should be entrusted with the latter, including access regulation, and a sector-specific technical regulatory agency with the former.

One may ask if the same principles of technical and competition regulation demarcation should be equally applied to other sectors under deregulation, including natural monopoly sectors like for instance electricity. Probably they should, at least as a medium-term proposition. The arguments supporting such a solution are: the introduction of incentive regulation, the need to apply the same regulatory regime across sectors and entities under regulation, vertical integration as a typical organisational form in those industries, avoiding duplication of supervisory resources, reducing the problem of regulatory, and securing legal certainty and a clear division of responsibility and competence among supervisory authorities.

Thus, our opinion is that in the telecommunication sector the NCA should handle all types of economic regulation. The proper model is model B (competition agencies are also the principal economic regulators). The chosen model, however, resembles model E (regulators and competition authorities concurrently enforce competition laws). The relations between the NCA and the PT are currently under revision.

3.8 Financial Services

The importance of financial institutions and financial markets is reflected both in special legislation through the establishment of a separate supervisory body in this area, and in regulatory systems requiring separate approval of take-overs and mergers etc. Historically speaking the authorities have sought to conduct a separate policy on structural developments in financial markets. Under current legislation the Norwegian Banking, Insurance and Securities Commission (the NBISC) prepares cases in this field. A number of other considerations have to be safeguarded in addition to competition policy and considerations of efficient use of resources. As a rule the NBISC also assesses structural policy, the financial strength and cash position of the institutions involved, as well as considerations of financial stability.

The majority of cases dealt with by the NBISC do not have a significant bearing on competitive conditions. In some cases, however, the NBISC may take competitive assessments into account. Pertinent examples are collaboration agreements, mergers, take-overs etc. coming under the financial legislation. In

such cases the Ministry of Finance is empowered to include competitive assessments in its overall appraisal of whether or not authorisation should be given.

In 1996 the Minister of Finance and the Minister of Government Administration decided to appoint a working group, which was requested to study the need to co-ordinate practical aspects of the procedures of the NCA and the NBISC in cases that have a bearing on competitive conditions in the financial market. Based on the report from the working group the director-generals signed an agreement on the relations between the two institutions. A translation of the agreement and the report is annexed to this paper.

The agreement contains a description of the areas of overlapping competence between the two authorities. The agreement does not, however, restrict the operating area of either Authority. Due to this, we have in the financial markets a surveillance system with substantial overlapping competence, duplication of personnel and legal uncertainty. The two authorities do not have identical criteria for assessing the effect of for instance a merger between two financial institutions. The objective of the Competition Act is efficient utilisation of society's resources, whereas the NBISC emphasise financial strength, financial stability and competition aspects. The different approaches could very well imply that the authorities would draw different conclusions from an investigation of a merger.

This overlapping competence combined with different criteria might lead to unfortunate results. It is, for instance, possible that the NBISC would grant a licence for a merger that would strengthen the new unit's financial position, while the competition Authority would intervene against a merger that would be anticompetitive. The conflict of interests would then have to be dealt with during the appeal procedure. In evaluating mergers, the NBICS prepares the case for the Ministry of Finance, which decides the case in the first instance. The appellate body is the government. The appellate body concerning decisions made by the Competition Authority is the Ministry of Labour and Government Administration.

The other way around, it could in principle be a conflict of interest if the Competition Authority decides not to intervene against a merger because it is pro-competitive, while the NBICS finds that the merger could imply less financial strength for the institution(s) and therefore decides to intervene. In such cases, the Competition Authority would not make any formal decision, so the only appellate procedure is based on the decision of the Ministry if Finance.

Appendix 1

RELATIONS BETWEEN THE NCA AND THE NBISC

The NBISC (The Norwegian Banking, Insurance and Securities Commission)

Ministry of Finance, Norway

The NCA (The Norwegian Competition Authority)

Ministry of Government Administration, Norway

20 December 1996

1. Relations between the Norwegian Competition Authority and the Norwegian Banking, Insurance and Securities Commission

1.2 Practical co-ordination of work on cases with a bearing on competitive conditions in financial markets

Reference is made to identical letters of 4 July from the Ministry of Finance and the Ministry of Government Administration to the NBISC and the NCA respectively, requesting the two institutions to study the need to co-ordinate practical aspects of their procedures in cases which have a bearing on competitive conditions in financial markets.

The NCA and directors representing the NBISC decided in the light of the above request to appoint a joint working group to study the matter. 29 November the working group delivered its report. The NBISC's board of directors dealt with the matter 19 December.

The NBISC and the NCA essentially endorse the working group's description of the formal basis for the two institutions' work and the account of practices. They note that some areas overlap. The competence of the two institutions can not however be characterised as overlapping. The NCA has authority to intervene or grant exemption, while the NBISC prepares cases and submits recommendations to the Ministry of Finance.

The fact that some areas of operation of the two institutions overlap areas does not imply that their basis for evaluation will be identical in all cases dealt with. Whereas the NCA puts the main emphasis on competitive conditions, other factors such as the financial strength and cash position of the financial institutions involved, as well as considerations of financial stability, play an important role for the NBISC.

Against the background of the report it is agreed that future collaboration between the NCA and the NBISC should be based on the following four basic principles:

1. Safeguarding the institutions' independent role

   Allowance must be made for the two bodies to act as independent institutions, each making an independent assessment on the basis of the same facts. The NCA is authorised to render decisions in its own right, whereas the NBISC prepares cases for the Ministry of Finance, which then renders a decision. Collaboration should not necessarily aim for complete congruence of position but should help to ensure that differing perceptions are not based on misunderstandings or on differences in the facts of cases dealt with.

2. Effective and satisfactory case-handling procedures

   An aim is to avoid unnecessary duplication of work and to develop modes of collaboration that ensure that the two bodies make decisions on the basis of the same facts.

3. Predictability for market participants

   Market participants must have necessary information and guidance on which institution they should relate to, and on when it may be necessary to approach both institutions.

4. Preparation of cases for superior bodies

   Collaboration between the two supervisory authorities should seek to establish arrangements to ensure that the Ministry of Finance will be apprised of the NCA's assessments when dealing with licence applications. The Ministry of National Planning and Co-ordination should likewise be apprised of the NBISC's assessments in concrete cases concerning competitive conditions in financial markets, for instance in connection with appeals against decisions rendered by the NCA.

Based on the above principles, the following guidelines for future collaboration have been agreed:

1.2 Corporate acquisitions and mergers

The NBISC will forward a copy of all incoming licence applications to the NCA for its information, but not for formal consultation as was often the case previously. Issuing a statement could entail that the NCA assumes a prior position in cases taken up under the competition legislation. If the NCA finds reason to assess a take-over or merger more closely, it will contact the NBISC forthwith to exchange information and clarify the progress made in the case. Where such cases are referred to the NBISC's board of directors, the NCA will be contacted immediately beforehand to clarify the position of the case.

1.3 Collaboration agreements

The NBISC will likewise be required to forward a copy of incoming licence applications to the NCA for its information, so that the NCA can decide whether the agreement should be given exemption from the Competition Act. The NCA will give a preliminary response on the matter to the NBISC within two weeks, indicating when a final reply can be expected. The deadlines for responding will be set taking into account the interests of the parties. The NCA will indicate to the parties whether the collaboration in

question is contrary to the prohibition provisions of the Competition Act, whether dispensation can be expected and, if so, subject to what conditions. The NCA will not normally grant exemption before the Ministry of Finance grants a licence.

1.4 Product packages

The NBISC will forward applications for dispensation to the NCA for its information. If the NCA finds reason to make a closer assessment, the NBISC will be contacted forthwith in order to exchange information and clarify the progress made in the case.

Any decisions or minutes of meetings on product packages with financial institutions can be forwarded to the NCA for its information.

1.5 Information requirement

There should be extensive collaboration between the two institutions with a view to achieving harmonised enforcement of the provisions on information requirements and effective interest rate.

1.6 Work on legislation

Proposals for new provisions drawn up by either institution that have a bearing on competitive conditions in financial markets will be submitted to the other supervisory authority for comment.

1.7 International matters

Each institution is required to inform the other about international matters of significance to competition in financial markets.

1.8 General analyses

General analyses prepared by either institution on changes in financial markets and in particular on competition should be made available to the other institution. The NBISC will be interested in benefiting from the NCA's spearhead expertise in competition matters in general. It is therefore important to maintain good relations and communication. The working group considers that the NBISC and the NCA should also endeavour to keep each other informed about other matters of importance.

1.9 Information to other market participants

Where the NBISC receives applications for approval of collaboration agreements that include sections referring to market sharing or price agreements which require exemption from the Competition Act, it is a particularly important to inform market participants that an application for exemption must also be sent to the NCA.

In cases calling for intervention under the Competition Act, the NCA will itself take the initiative and establish contact with the parties involved.

Beyond what is entailed by its obligation to provide guidance in a concrete case, the NBISC will in collaboration with the NCA draw up an information document to be kept available to market participants. This will give detailed information on what is required of market participants in the various types of cases. The NBISC will send market participants a circular containing the information document.

1.10 Further details on practical follow-up

Responsibility for contact between the institutions will rest with the staff responsible for dealing with the cases in question. The names of the persons responsible will be exchanged together with an overview of organisation charts etc.

Regular liaison meetings will be held every six months between the two director-generals in order to exchange views and to oversee that the collaboration is functioning satisfactorily. Other participants will attend the liaison meetings depending on the cases to be discussed.

SWEDEN

1. Deregulation in Sweden

In Sweden many important industries have been deregulated in the last ten years. Within the transport area, the markets for taxis, bus transport, commercial road transport, domestic aviation and railway freight transport have been deregulated, in many cases by removing controls over the establishment of enterprises and the regulation of prices. In the postal and telecommunications markets the former state monopolies have lost their exclusive rights. From 1996, the electricity market has also been deregulated. The new "regime" means that both production and trade in electricity takes place in competitive markets.

It is important to emphasise that deregulation of a market is by no means easy. The Competition Authority’s experiences from many cases of deregulation is that shortcomings in implementing deregulation may have serious negative consequences, which on many occasions may be difficult to remedy afterwards. For this reason, the need for information, special legislation and structural measures to name a few areas, should be thoroughly examined in advance.

Many competition problems that have emerged on deregulated markets can be traced to the former monopolist's control over infrastructure and competitive advantages of joint operations from different activities. Therefore, one of the most important issues to discuss is how to guarantee that all players have access to the infrastructure that is necessary for their operations on the market.

In particular four different markets had many characteristics of a natural monopoly - telecommunications, postal services, electricity and railway transport. A common feature of these markets is that access to infrastructure is a prerequisite for effective competition. When deregulation took place, different strategies (sector specific regulation and structural separation) were used.

In the electricity sector structural separation took place before deregulation. Transmission and access to the networks remained a monopoly and is run in a special company separate from the distribution of electricity.

In the railway transport sector, the dominant operator (Swedish State Railways) was divided and a special Authority (National Rail Administration) responsible for investment and maintenance of infrastructure was established. In addition, the railway network was divided into one national and several regional networks. However, the dominant operator still has control over different strategic resources such as workshops and stations, which means that players considering competing with the dominant operator in public procurement, must be able to resolve issues concerning the use of these resources by reaching an agreement with their competitor. As a result, the dominant operator gets a competitive advantage.

In the telecommunications sector, the government took the view that new players must be ensured access to the network controlled by the dominant player. No structural separation took place but, according to the Telecom Act that entered into force 1993, a licensee was required to allow any other licensed operator to interconnect and the charges for interconnection should be fair and reasonable, taking into account the costs involved. However, conditions for interconnected traffic were to be determined in

negotiations and the Supervisory Authority (PTS) could act as a mediator. According to the new Telecom Act that entered into force 1997, the Supervisory Authority has been given more powers to intervene.

In the postal sector, neither any specific regulation regarding access conditions for postal infrastructure nor any structural separation was implemented when the last remaining monopoly, the monopoly on letter distribution, was abolished. As a result, several complaints have been lodged with the Competition Authority and lengthy negotiations between the incumbent operator have taken place.

The following chapters comment briefly the electricity sector and focus on the telecommunications and postal services sectors.

2. The electricity sector

On the 1st of January 1996, a new Electricity Act came into force. The new legislation means that competition is introduced into the trade in electricity, thus increasing freedom of choice for electricity consumers and creating the conditions for greater pressure on prices and costs in the electricity supply. The main principle of the reform is the creation of a separation between production and sale of electricity on the one hand and transmission or network activities of electricity on the other.

A new authority, the Electricity Network Authority (from January 1998 Swedish National Energy Administration), has the task of monitoring network tariffs and other conditions within the monopoly part of the sector. Complaints regarding tariffs from companies or private households are handled by the regulatory authority, which thereby applies the Electricity Act.

The Competition Authority applies the Competition Act in all sectors of the economy, that is to say, also in the energy sector. The Competition Authority is also monitoring the competitive conditions of production and trading in electricity. It was given the special task by the Government of following up the electricity market during the first six months after the deregulation in 1996. In addition to this, the Authority has given the Network Authority assistance in its work of following up development of market conditions in the electricity sector on a yearly basis, in 1996 and 1997.

The Government or the Network Authority regularly invites the Competition Authority to submit its views on reports from the Network Authority. Informal meetings also take place as a complement to formal communication.

3. Telecommunications and postal services

This chapter deals, *inter alia*, with competition problems that have emerged in the telecom and postal sectors in Sweden since deregulation in 1993 and 1994 and focuses on problems connected with pricing on both inputs and outputs. The problems can be traced to the incumbent operators' control over infrastructure and competitive advantages of joint operations from different activities. It is important to analyse what may need to be done to introduce greater competition to network infrastructure industries. In the view of the Swedish Competition Authority, structural measures directed towards the dominant incumbent operators' activities could improve the conditions for effective competition to the benefit of consumers.

The Swedish Competition Act is fully applicable to the telecommunications and the postal services sectors. The application of the competition rules to issues of access and interconnection has been

of crucial importance in these sectors in Sweden, i.e. sectors where no structural separation yet has taken place. A brief outline of some important cases from these two sectors will be given in the following.

3.1 The telecommunications sector

The Swedish telecommunications market is one of the most liberal markets in the world. The provision of telecommunications services is open to competition including network operation.

In 1993 a Telecom Act was introduced in Sweden. At the same time the public utility, The Swedish Telecommunications Administration (Televerket), was transformed into a wholly owned State commercial enterprise - Telia AB. The aim of the Telecom Act was to establish the conditions for an open telecommunications market where the State could steer and control activity in the telecommunications area. The Act lays down the framework for telecommunications operators in Sweden. All operators except those with activities of minor importance must have a licence, which may contain special conditions imposed by the supervisory authority - The National Post and Telecom Agency (PTS) - within the telecommunications sector. The Act also contains special provisions for interconnection and numbering plans.

The background to the deregulation in the sector was the rapid development of technology in conjunction with increased demand and international liberalisation. This was expected to lead to a significant increase in competition on the Swedish telecommunications market. The number of operators, both Swedish and foreign, was expected to increase. These changes imply a completely new situation within the telecommunications sector.

As a result of the Telecom Act, the telecommunications market in Sweden can be said to have been transformed from an unregulated monopoly to a situation that can be described as regulated competition. It is certainly true that there has never been - in contrast to what has been the case in most other countries - any legal monopoly or obligation to apply for a licence to establish a telecommunications network or to provide telecommunications services in Sweden. However, the former Swedish Telecommunications Administration for a long time enjoyed a de facto monopoly within large parts of the market. The basis for this monopoly was different types of monopolies for connecting terminals to the public network. Although these monopolies have been gradually phased out, Telia has retained a strong position on the Swedish telecommunications market.

3.1.1 The tasks of the regulatory authority

A revised Telecom Act entered into force July 1 1997, based upon the experience gained since the introduction of the Telecom Act in 1993 and the mandatory EC rules that entered into force in 1998. According to the new Telecom Act, PTS has been given more powers to intervene regarding conditions for interconnection. PTS may, at the request of either party concerned, set a time limit for the conclusion of interconnection negotiations. PTS must within six months make the decisions necessary for interconnection to be effected at the request of either party. In the preparatory works of the revised Telecom Act, it has also been stated that PTS to a greater extent should act as sector authority. In order to attain effective supervision, it is important that PTS extends co-operation with other authorities that are of significance to telecommunications. Therefore, PTS has been given a co-ordinating and unifying function in relation to the Competition Authority and the Consumer Protection Agency. PTS shall take the initiative for regular liaison meetings between the authorities and also assume responsibility for gathering information and accumulating knowledge concerning developments in the telecommunications sector based on the experience of the three authorities.

In addition, the price cap regulation has been revised. A price cap is now placed on rental charges of dominant operators (i.e. Telia) regarding subscriptions for households and companies with direct telephone lines. During the period 1993 (middle) - 1997 (middle) a price cap was put on Telia. The regulation stated that the price based of a basket of Telias services must not increase in any year by more than the rate of Net Price Index (Consumer Price Index minus taxes plus subsidies) minus 1 percentage point. Included in the price cap were rental charges, connection charges and the prices of local, national and international calls for households and smaller companies. Telia was free to change its relative prices of the services included in the price cap. According to the Competition Authority, a problem with this price cap was that it was to broad and incorrectly designed. It distorted competition by rewarding the dominant company's price reduction in competitive markets, since these reductions automatically allowed price increases in other markets.

3.1.2 The financial conditions for interconnection

A fundamental problem when setting interconnection charges is that they consist only of a variable element, i.e. a certain amount per interconnection. Competitors of the state-owned dominant operator, Telia, which are also users of Telia's network, therefore run the risk of being squeezed between the interconnection charge and a low variable call charge. For Telia's part a low variable call charge is balanced by a relatively high rental charge. However, it is not reasonable that the cost basis justifies a high ratio between fixed and variable fees for end-customers as well as a low ratio (no fixed element at all) for interconnection buyers.

The Competition Authority has taken two decisions concerning the financial conditions for interconnection with Telia´s network. Both decisions by the Competition Authority obliged the incumbent operator Telia not to charge such high prices as it wished for interconnected calls with its competitor (Tele2). In the view of the Competition Authority the high interconnection charge applied by the incumbent in relation to its charges for calls had the effect of excluding competing operators from the market, both actual and potential.

3.1.3 Asymmetric end-customer pricing

In 1996, the Competition Authority made another decision addressed to the dominant incumbent network operator. This time it concerned the dominant operator's plans to introduce asymmetric pricing with respect to its own end-customers. Having control of the infrastructure through the access network made it possible for the incumbent operator to determine prices of different network services and to steer the development.

The Competition Authority stated that such a pricing arrangement would have major negative effects on competition in the national telecommunications market. If it were more expensive for a subscriber connected to the dominant operator's fixed network to make a local, regional or long distance call to a subscriber connected to the fixed network of another operator compared to a subscriber in the dominant operator's own network, different customers would have very limited incentives to subscribe to fixed networks other than the dominant operator's own. This applies particularly to companies strongly dependent on incoming calls for their business activities. Such an asymmetric end-customer pricing by the dominant network operator was considered as an abuse of a dominant position.

3.2 The postal sector

Sweden is one of the few countries in the world to have implemented far-reaching liberalisation in the postal market. The changes that have taken place in the market, for example the abolition of the legal monopoly on mail, have been forced through or at least accelerated by new companies establishing themselves on the market.

Nowadays the State owned Sweden Post meets competition both at the market for company mail (pre-sorted mail from companies) and from about 90 postal operators who run limited activities in local markets.

Developments in recent years on the market have been extremely turbulent. The Competition Act, and the Competition Authority, has played an important role in the struggle between the players on the market. It could be said that the rules of play on the market have largely been determined, and will be so in the future, by the application of the rules of competition. Currently there are a number of important cases either under review by the Competition Authority or being examined at a higher legal instance. This makes it difficult to state how effective the Competition Act is in ensuring a level playingfield for all operators on the postal market.

As a former monopoly in parts of the postal market and with a clearly dominant position in many sub-markets, Sweden Post possesses advantages which create obstacles for new players. The advantages which Sweden Post has, apart from its dominant position, are for example the advantages of joint operations from different activities and control over the postal infrastructure.

In a memorandum from the Swedish Government, postal infrastructure has been defined as equipment which is essential for carrying out efficient and reliable postal services and which therefore, for as well economic as practical reasons, should be accessible to all post operators. The systems for post-office boxes, forwarding of letters and changing of addresses are for example considered as postal infrastructure, but not the post operators terminals and sorting machines. A common feature for the postal infrastructure is that it is owned by the Sweden Post.

Conditions for access to postal infrastructure are not regulated in the Postal Act. Instead, conditions for access are to be determined in bilateral agreements between Sweden Post and other post operators. A current case concerns the system for post-office boxes owned by Sweden Post.

3.2.1 The system for post-office boxes

The Competition Authority has taken a decision where it is stated that the system for post-office boxes is an essential facility in the postal market. The most important arguments behind the decision were the following:

- the post-office boxes and the "system" for using them are owned and controlled by the dominant incumbent player (Sweden Post) in the market;

- the system was constructed during a period when the incumbent had a legal monopoly on the market;

- it is essential for any post operator involved in letter distribution to have access to the post-office boxes, and

– it is not really possible for competitors to build a parallel system of post-office boxes.

As a consequence of the decision taken by the Competition Authority the dominant operator must allow all operators in the market to have access to the post-office boxes. Access conditions must be objective and non-discriminatory, i.e. the conditions must not be less favourable for competitors than for the dominant operator's own activities.

4. Conclusions and proposals

To conclude, many competition problems on deregulated markets can be traced to the former monopolist's control over infrastructure that competitors need to be able to carry out their activities. If the infrastructure could be regarded as an essential facility, the owner of the infrastructure (which is also active on secondary markets) has every incentive to either exclude competition by refusing access or, failing that, to minimise the effectiveness of competition by fixing access charges at as high a level as possible. The determination of the terms of access therefore cannot be left to the dominant player - the former monopolist. Instead, both the technical and economic conditions for access need to be regulated. This is of crucial importance in the initial phase of deregulation. Perhaps the term regulated competition is a better expression for this deregulatory process.

The Swedish Competition Act has proven to be a powerful instrument for dealing with competition problems such as excessive pricing for access to a dominant players network or discriminatory pricing. In practice, it has shown to be difficult to design socially efficient price regulation. However, it must be underlined that the socio-economic cost could be important, e.g. in general it tends to be the dominant incumbent who benefits from lengthy legal proceedings.

Therefore, in many areas, structural separation of certain activities or facilities would be the best way of attaining the conditions for effective competition to the benefit of consumers. Structural measures would be a means of significantly reducing the need for special regulations and control. In general, structural separation is a powerful tool for influencing market behaviour.

UNITED KINGDOM

1. Introduction

In the United Kingdom there are a number of regulated sectors, but in none of these is the regulator the sole enforcer of competition law. Nor does the principal competition authority - the Director General of Fair Trading (DGFT) - normally act as an economic regulator. At present, the sectors in which the regulators have concurrent powers with the DGFT under competition law are telecommunications, electricity supply, water services, gas supply and the railways. So far, the regulators have rarely used their concurrent competition powers. There are other sectors in which, following privatisation, no sectoral regulation was introduced. Over the past 15 years, the UK has privatised state-owned undertakings in the ports, long distance haulage and the bus and coach industry, British Airways and many more.

2. Sectors not subject to economic regulation

The main example of an unregulated sector in the United Kingdom which in other countries might be subject to economic regulation is the bus and coach industry. The Transport Act 1985 removed constraints on fares and restrictions on the supply of bus services in England and Wales outside London. It also provided for the privatisation of the National Bus Company and for municipal bus operations to be established as public transport companies operating at arms length from the local authorities. This regime was extended to Scotland in 1989.

The main reasons for this were that there was evidence of wide differences in cost and efficiency between operators, with little or no opportunity for efficient, low cost operators to expand operations at the expense of the less efficient, and also of extensive cross-subsidy, so that prices were well above costs on busier routes, with resulting supernormal profits used to support services on lower volume routes. Although the level of concentration in most local bus markets was high, it was thought that each market was easy to enter and the existing instruments of competition policy would be sufficient to deter anti-competitive behaviour. No other measures were introduced, nor was competition law in any way strengthened, specifically to deal with deregulation in this sector.

Since 1985, there have been a number of cases under competition legislation of all kinds some of which have resulted in undertakings involving price controls (controls on frequency of services were also involved in some instances). In other cases a variety of undertakings has been given to deal with differing forms of anti-competitive behaviour. In these cases the DGFT has, in effect, become a bus regulator.

The threat of legislation to induce companies to set prices below what they would otherwise charge has not been introduced in this or any other deregulated sector. Nor have specific guidelines been produced or other measures taken.

3. Regulated sectors where competition law is applied exclusively by the competition authority

There is only one aspect of competition law which is applied exclusively by the DGFT in all regulated sectors - merger control. The one exception to this is water, where mergers over a certain size are automatically referred to the Monopolies and Mergers Commission (MMC). However, where a merger affects a regulated industry the industry regulator is always consulted by the Office of Fair Trading (OFT) and, indeed, the OFT may leave the regulator to undertake the bulk of third party consultation. The regulator may decide to publish consultation documents (not a practice followed by the OFT concerning mergers) before giving the OFT their views. However, the terms of the advice to the Secretary of State are determined by the DGFT. There is no concordat, published or otherwise, on merger control but there are understandings as to how the regulators' views will betaken into account by the OFT.

Utility mergers have tended to be of particular concern. Over recent years the OFT has examined eighteen prospective mergers involving the electricity industry, nine acquisitions in the water industry, two cross-utility mergers and well over a hundred prospective acquisitions of rail franchises or other parts of British Rail.

4. Sectors where regulators and competition authorities concurrently enforce competition law

At present, the seven regulators which have concurrent powers with the DGFT in their areas of operation are the Directors General of Telecommunications, Electricity Supply, Electricity Supply for Northern Ireland, Water Services, Gas Supply and Gas for Northern Ireland, and the Rail Regulator. They have concurrent powers in respect of monopoly references (under the Fair Trading Act 1973) to the Monopolies and Mergers Commission (MMC) and references of anti-competitive practices (under the Competition Act 1980). They have no powers under the Restrictive Trade Practices Act 1976 which covers restrictive agreements (although the Act was disapplied at privatisation to gas supply and certain electricity and rail agreements.) Annex A sets out the respective powers of each regulator.

While there are currently no formal guidelines to ensure consistency, there are informal consultation arrangements between the DGFT and regulators and, in some instances, concordats between the DGFT and the regulator as to the handling of cases. An example is at Annex B.

Only the Director General of Gas Supply (DGGS) has used his concurrent competition powers to make a reference. In July 1992 he made two references; one into the conveyance and storage of gas and another into the fixing of tariffs for the supply of gas. The Director General of Electricity Supply (DGES) has, on at least one occasion, formally and publicly threatened to make a monopoly reference, which enabled him to gain undertakings from the major generators relating to the disposal of plant and restraints on bidding behaviour in the Electricity Pool. The Director General of Telecommunications (DGT) has contemplated action under the Competition Act or Fair Trading Act a number of times but in each case he concluded that enforcement action was either possible only under the Telecommunications Act or that the Telecommunications Act provided the better remedy.

At the time of the utility privatisations it was recognised that the existing competition law on its own would not be sufficient to look after the interests of customers, hence the privatisation legislation introduced licensing regimes with their additional controls. These licensing regimes provided the regulators with more effective tools for handling anti-competitive conduct and practices than their powers under the competition legislation. However, the licensing regimes are of limited use in tackling structural problems.

A Competition Bill is currently in Parliament which will introduce wide-ranging reform of UK competition law. The Bill will replace the Restrictive Trade Practices Act with two prohibitions modelled on Articles 85 and 86. With the introduction of the Competition Bill, the question of concurrent powers was again considered. The Bill gives the regulators concurrent powers with the DGFT in their special areas. The merger powers remain reserved to the DGFT. The arguments which were put forward for and against concurrent powers are set out in Annex C. The most important argument in favour is that the extent of overlap between competition law and licence conditions addressing market power is such that the same body should enforce both competition law and the licence regime. The most important issue raised questioning concurrent powers is whether the new regime will deliver consistent decisions given the number of bodies with the new competition powers. However, as Annex C sets out, the new regime is being established in such a way as to deliver consistency through, for example, one set of statutory rules and one set of guidelines under which all the bodies will apply the new law. It has also, for example, been proposed that the case officers in all the bodies should be able to take part in the substantial training scheme which OFT is planning for the new regime. The OFT and the regulators are well aware of the importance of ensuring that the new regime works well with the concurrent powers and delivers clear, consistent and predictable decisions and advice.

Annex A

SPECIAL REGULATORY RÉGIMES

	FAIR TRADING ACT 1973 MONOPOLY PROVISIONS (Part IV)	**FAIR TRADING ACT 1973 MERGERS PROVISIONS (Part V)**	**COMPETITION ACT 1980**	**RESTRICTIVE TRADE PRACTICES ACT 1976**	**LICENCE MODIFICATION**
TELECOMMUNICATIONS TELECOMMUNICATIONS ACT 1984 (extends to NI)	DGFT has concurrent powers with DGT to consider, make or vary a monopoly reference, and concurrent responsibility to ensure MMC recommendations are implemented (s.50). Reference may not be made by DGT or DGFT in respect of running of telecommunications systems (FTA Sch 5 para 7) - SoS may do so.	Normal mergers provisions apply, involving DGFT, SoS and (possibly) MMC.	DGT has concurrent powers with DGFT to investigate anti-competitive practices in respect of this sector.	No specific exemption - RTPA Sch. 3 para 1(1) (agreements pursuant to statutory scheme) has operated to exempt certain agreements. DGT has no powers in relation to agreements registrable under the RTPA.	DGT may agree licence modification or refer question to MMC and make modifications necessary in light of MMC report. Modification of licence also possible by order of SoS after FTA/CA report.
WATER WATER INDUSTRY ACT 1991 (does not apply in Scotland or NI)	DGWS has concurrent powers (s.31); similar to telecommunications.	Normal merger provisions apply, involving DGFT, SoS and (possibly) MMC, but special mergers régime for water industry only (ss. 32-35); proposed merger of 2 or more water enterprises must be referred to MMC if assets of company to be acquired and of at least one of the water enterprises of the acquirer are over £30m (ss32 and 33 and SI 1994/73). MMC has to bear in mind: (i) the desirability of the DGWS's being able to make comparisons between different enterprises (s.34(3)(a) as substituted by s.39 of the CS(U)A); and (ii) to the achievement of other purposes which do not conflict with or outweigh (i) (s.34(3)(b)).	DGWS has concurrent powers with DGFT to investigate anti-competitive practices in respect of this sector.	No specific exemption. DGWS has no powers in relation to agreements registrable under the RTPA.	DGWS involved in similar régime to telecommunications

SPECIAL REGULATORY RÉGIMES (cont'd)

	FAIR TRADING ACT 1973 MONOPOLY PROVISIONS (Part IV)	FAIR TRADING ACT 1973 MERGERS PROVISIONS (Part V)	COMPETITION ACT 1980	RESTRICTIVE TRADE PRACTICES ACT 1976	LICENCE MODIFICATION
ELECTRICITY ELECTRICITY ACT 1989 ELECTRICITY (NORTHERN IRELAND) ORDER 1992	DGES/DGESNI has concurrent powers (s.43); similar to telecommunications.	Normal mergers provisions apply, involving DGFT, SoS and (possibly) MMC.	DGES/DGESNI has concurrent powers with DGFT to investigate anti-competitive practices in respect of this sector.	S.100 - Specific exemption for agreements falling under Orders made by SoS. DGES/DGESNI has no powers in relation to agreements registrable under the RTPA.	DGES/DGESNI involved in similar régime to telecommunications
GAS GAS ACT 1986 Amended by GAS ACT 1995 GAS (NORTHERN IRELAND) ORDER 1996	DGGS/DGGSNI has concurrent powers under FTA in relation to monopoly situations which exist or may exist in relation to commercial activities connected with the carrying on of the following activities: the conveying of gas through pipes to premises or to a public pipe-line system; the supplying of gas which has been conveyed through pipes to premises; the arranging of the introduction of gas to, conveyance of gas in, or taking out of gas from, pipe-line systems; or activities ancillary to the preceding activities (such as gas storage, provision and reading of meters, and pre-payment facilities) (ss.5(1) and 36A(2) of the 1986 Act as amended and inserted by s.3 of, and para 43 of Schedule 3 to, the 1995 Act).	Normal mergers provisions apply, involving DGFT, SoS and (possibly) MMC.	DGGS/DGGSNI has concurrent CA powers with DGFT in relation to courses of conduct which may prevent distort or restrict competition in connection with the carrying out of the activities referred to on the left. (S. 36A(3) of the 1986 Act, inserted by para. 43, Sch 3, 1995 Act).	S.62 of 1986 Act (amended by s.11 of 1995 Act) - SoS may make orders setting out conditions for exemption. Orders under section 62 may include as such a condition individual approval of an agreement by the SoS, the DGFT or the DGGS. There are two Orders to consider here. (1) the RTP (Gas Supply and Connected Activities Order 1986 allows the SoS to approve an agreement falling under s.62(2) if it is not significantly anti-competitive. (2) The RTP (Gas Conveyance and Storage) Order 1996 exempts agreements relating to the network code where the DGGS is satisfied that various criteria relating to competition and the benefits of the agreement are satisfied.	DGGS/DGGSNI involved in similar régime to telecommunications (specifically, she has powers to refer matters relating to (i) the carrying on of activities authorised or required by a particular licence (or certain matters relating to the storage of gas); or (ii) matters relating to the carrying on of activities under licences in general issued under ss.7 or 7A of the 1986 Act) (s.24 of the 1986 Act, as amended by para. 22, Sch 3, 1995 Act)

SPECIAL REGULATORY RÉGIMES (cont'd)

	FAIR TRADING ACT 1973 MONOPOLY PROVISIONS (Part IV)	FAIR TRADING ACT 1973 MERGERS PROVISIONS (Part V)	COMPETITION ACT 1980	RESTRICTIVE TRADE PRACTICES ACT 1976	LICENCE MODIFICATION
AIRPORTS AIRPORTS ACT 1986 AIRPORTS (NI) ORDER 1994	DGFT may make monopoly reference under general powers. Schedule 7, paragraph 6, prevents reference of "air navigation services" (see s.105 of the Civil Aviation Act 1982)	Normal mergers provisions apply, involving DGFT, SoS and (possibly) MMC.	DGFT has full CA powers.	No specific exemption.	CAA must refer charges of "designated airports" (none in NI) to MMC at 5-year intervals (ss.43(1) and (2)). CAA may also make references of the conduct of airport operators (s.43(3)).
AVIATION	No reference of international scheduled services may be made by DGFT (FTA Sch 7 para 7) otherwise full powers.	Normal mergers provisions apply, involving DGFT, SoS and (possibly) MMC.	Exclusions Order 1980 prevents investigation of course of conduct in respect of international scheduled services. Otherwise full powers.	RTPA does not apply to restrictions accepted between air transport undertakings relating to air transport (Schedule to Services Order 1976, para 3).	No such régime.

SPECIAL REGULATORY RÉGIMES (cont'd)

	FAIR TRADING ACT 1973 MONOPOLY PROVISIONS (Part IV)	FAIR TRADING ACT 1973 MERGERS PROVISIONS (Part V)	COMPETITION ACT 1980	RESTRICTIVE TRADE PRACTICES ACT 1976	LICENCE MODIFICATION
RAILWAYS RAILWAYS ACT 1993 (applies only in part to NI)	RR has concurrent powers (s.67(2)); similar to telecommunications; but no reference may be made of rail services supplied by public bodies save by SoS (FTA s.50(2A)).	Normal mergers provisions apply, involving DGFT, SoS and (possibly) MMC; special provision to ensure that the acquisition of a franchise gives rise to a merger situation (s.66(3)).	RR has concurrent powers to DGFT (s.67(3)).	RTPA does not apply to agreements required by or approved by the SoS or RR, by or under an agreement so approved, or by or under a railway licence (s.131(1)). SoS can direct DGFT not to take certain other agreements to the RPC (s.131(3)). RR has no other powers in relation to registrable agreements.	RR involved in similar régime to telecommunications.

Note: SoS Secretary of State (for Trade and Industry)
DGFT Director General of Fair Trading
DGT Director General of Telecommunications
DGWS Director General of Water Services
DGGS Director General of Gas Supply
DGGSNI Director General of Gas Supply for Northern Ireland*
DGES Director General of Electricity Supply
DGESNI Director General of Electricity Supply for Northern Ireland*
RR Rail Regulator
MMC Monopolies and Mergers Commission
CAA Civil Aviation Authority
RPC Restrictive Practices Court
CS(U)A Competition and Service (Utilities) Act 1992

*these posts are held by the same person

Statutory provisions cited refer to the Act in the appropriate part of left-hand column, unless otherwise stated.
This table is only a summary of a complex legal position, and should not be relied on as a definitive statement of the law!

Annex B

JOINT STATEMENT BY THE DIRECTOR GENERAL OF FAIR TRADING AND THE DIRECTOR GENERAL OF GAS SUPPLY

1. Introduction

Following the Gas Act 1995 ('the 1995 Act') and the Government's reorganisation of the gas supply industry, the Director General of Fair Trading (DGFT) and the Director General of Gas Supply (DGGS) each has functions to protect and promote competition in the gas supply markets and related markets. This statement sets out how the Directors propose to exercise their respective powers.

2. Monopoly Situations and Anti-Competitive Practices

a) The 1995 Act repeals paragraph 3 of Part I of Schedule 5 of the Fair Trading Act 1973 ('the 1973 Act') and accordingly brings gas within the scope of the functions of the DGFT with regard to monopoly situations. The 1995 Act also inserts a new section 36A in Part 1 of the Gas Act 1986 ('the 1986 Act') which in subsection (2) transfers to the DGGS, so as to be exercisable concurrently with the DGFT, the functions of the DGFT under the 1973 Act with regard to monopoly situations in relation to (broadly) commercial activities connected with the transportation, shipping or supply of gas and ancillary activities. Subsection (3) of the inserted section transfers to the DGGS, so as to be exercisable concurrently with the DGFT, the functions of the DGFT under the Competition ACT 1980 ('the 1980 Act') with regard to courses of conduct which may restrict, prevent or distort competition in connection with the transportation, shipping or supply of gas and ancillary activities. Subsection (5) of the inserted section requires each Director to consult the other before exercising these powers and provides that they may not both Act on the same matter.

b) In the exercise of these concurrent powers the DGGS and the Office of Gas Supply (OFGAS) will take the lead in making enquiries and in acting where the principal effect is on competition in the markets for gas. The DGFT and the Office of Fair Trading (OFT) will take the lead in cases where the principal effect is on competition in other markets. The two Offices will liaise on all such cases, but in particular on those where it is not clear which one should take the lead or where one Office has a particular interest in an issue which the other would normally handle.

c) As and when OFT receive letters of complaint which clearly fall to OFGAS, it will, subject to the agreement of the complainant, forward them to OFGAS. Similarly OFGAS will pass to OFT for consideration any letters which concern other markets. Where possible, details of telephone complaints will similarly be transferred.

d) Each Director will consult the other before taking formal action under the 1973 or 1980 Acts, as required by section 36 A (5) of the 1986 Act. Such consultations will include considerations of whether it is more appropriate to Act by means of the relevant licence or other powers of the DGGS under the 1986 Act rather than means of the relevant provisions of the 1973 Act or the 1980 Act. The nominated liaison officers within OFGAS and OFT

will be expected to have discussed the question before any recommendation to Act is put to either Director.

e) Concern on competition grounds may arise in relation to commercial activities *of* persons who are engaged in the transportation, shipping or supply of gas and ancillary activities where the activities in question are not themselves connected with the transportation, shipping or supply of gas or ancillary activities. There may also be cases where there is uncertainty as to whether the activities in question are so connected. In such situations liaison is particularly important. Where it becomes evident that the activities in question are not so connected, and therefore within the Fair Trading ACT or Competition Act functions of the DGFT alone, the DGFT will nevertheless consult the DGGS where appropriate.

3. Restrictive Trade Practices Act

Subject to section 62 of the 1986 Act, agreements and arrangements which relate to the transportation, shipping or supply of gas and ancillary activities may be subject to the provisions of the Restrictive Trade Practices Act 1976. Agreements and arrangements which fall to be considered under this Act remain the DGFT's responsibility alone. However, OFT will consult OFGAS informally on these matters should the need arise. If any orders are made under section 62(2) or 2A of the 1986 Act specifying a condition, which, pursuant to section 62(3) of the 1986 Act, provides for the referral of any matter to the DGGS or DGFT, then OFT and OFGAS will consult informally about the determination of any such matter.

4. Mergers

The DGFT exercises the same functions under the 1973 Act in relation to merger situations involving gas enterprises as he does in other cases. Under sections 76 and 86 to 88 the DGFT is obliged to advise the Secretary of State when there may be qualifying mergers and, at his request, to follow up reports by the Monopolies and Mergers Commission (MMC). The DGFT will, on all relevant occasions, consult the DGGS and take into account her views about whether or not a reference to the MMC should be made in any specific case and on any follow up resulting from an MMC report. Such consultations will consider, as a matter of course, whether or not it is more appropriate to Act by means of the relevant licence than by means of the merger provisions of the 1973 Act.

5. The Unfair Terms in Consumer Contracts Regulations 1994

a) OFGAS will consult the OFT in making regulatory requirements that are likely to be reflected in standard terms in consumer contracts for gas supply or related matters. The OFT will consult OFGAS in relation to action under the Regulations in response to complaints that standard terms in consumer contracts for gas supply or related matters are unfair.

b) It is recognised that the DGGS may receive representations from consumers in respect of gas related issues which fall outside her powers under the Gas Act 1986, the Fair Trading Act 1973 or the Competition Act 1980, but may be covered by legislation under which the DGFT alone has powers. Should this occur, the DGGS will refer these complaints or enquires to the DGFT for action. Records will be kept of all such referrals by the DGGS. As

far as possible, the DGFT will notify the DGGS of all representations made directly to him in respect of gas related issues under legislation where the DGFT alone has powers. The above will apply only for gas related issues which fall under the following legislation:

- the Consumer Credit Act 1974;
- the Control of Misleading Advertisements Regulations 1988; and
- the Unfair Terms in Consumers Contracts Regulations 1994.

Appendix

THE IMPACT OF THE COMPETITION BILL

Margaret Bloom[101]

1. Introduction

The Government has made reform of the UK's outdated competition law a top priority. In August 1997, the President of the Board of Trade published proposals for a new legal framework and the Competition Bill was introduced into Parliament in October 1997.[102] The Government's intention is that the new law should come into effect in 1999.

The long awaited Bill will create a modern and effective framework for competition policy. It is based on a tougher and more rigorous approach to abuses than the current regime. One aspect of the Bill which has generated considerable interest is the Government decision to provide concurrent powers for the sectoral regulators with the Director General of Fair Trading (DGFT).

The most significant question raised in the discussions over concurrency is likely to be whether the arrangements put into place for concurrency will lead to consistent application of the new law by all the authorities involved.

This paper considers the arguments which were deployed for and against concurrency and explains how consistency can be delivered. Lastly, it speculates on how economic regulation may develop in the longer term.

2. The Competition Bill

The key elements of the Competition Bill are two prohibitions. The Chapter I prohibition addresses anti-competitive agreements; the Chapter II prohibition deals with abuse of dominant market position. The prohibitions are modelled on Articles 85 and 86 of the EC Treaty. The Bill is drafted so that the prohibitions will be interpreted consistently with Community law, thus keeping the burden on business to a minimum.

The Chapter I prohibition covers all agreements "which have the object or effect of preventing, restricting or distorting competition in the UK and which may affect trade in the UK". Anti-competitive agreements which are prohibited include those such as price fixing and market sharing. The prohibition will replace the Restrictive Trade Practices Act 1976 which is seen as unwieldy and largely ineffective. It also replaces the Resale Prices Act 1976. Under the Chapter II prohibition, abuse of a dominant market position is prohibited including practices such as predatory pricing and refusal to supply. At present, an abuse of a dominant market position can normally only be halted following prolonged investigation by the Monopolies and Mergers Commission (MMC).

In contrast to the current legislation, the Bill provides strong powers of investigation, powers for fines of up to 10 percent of UK turnover for breach of the prohibitions and interim measures which will

allow abuses to be halted pending investigation. The Bill also provides third party rights so that consumers and competitors who suffer will have a right to damages through the courts.

3. Concurrent powers for the regulators

The Bill provides concurrent powers for the sectoral regulators for electricity, gas, telecommunications, water and railways with those for the DGFT. Hence, seven regulators have powers under the Bill in their areas of operation: the Directors General of Telecommunications, Electricity Supply, Electricity Supply for Northern Ireland, Water Services, Gas Supply and Gas for Northern Ireland, and the Rail Regulator. Currently, these regulators have concurrent powers with the DGFT in respect of monopoly references (under the Fair Trading Act 1973) to the MMC and references of anti-competitive practices (under the Competition Act 1980). They have no powers under the Restrictive Trade Practices Act 1976 which covers restrictive agreements. (The Restrictive Trade Practices Act was, though, disapplied at privatisation to gas supply agreements and certain electricity and rail agreements.) Only the Director General of Gas Supply (DGGS) has used his concurrent powers to make a reference as such. In July 1992 he made two references; one into the conveyance and storage of gas and another into the fixing of tariffs for the supply of gas. The Director General of Electricity Supply (DGES) has, on at least one occasion, formally and publicly threatened to make a monopoly reference. The threat of reference to the MMC enabled him, for example, to gain undertakings from the major generators relating to the disposal of plant and restraints on bidding behaviour in the Electricity Pool. The Director General of Telecommunications (DGT) has stated "Action under the Competition Act or Fair Trading Act has been contemplated a number of times and in each case the DGT has concluded that enforcement action was either possible only under the Telecommunications Act or that the Telecommunications Act provided the better remedy."[103]

At the time of the utility privatisations it was recognised that the existing competition law on its own would not be sufficient to look after the interests of customers, hence the privatisation legislation introduced licensing regimes with their additional controls. These licensing regimes provided the regulators with more effective tools for handling anti-competitive conduct and practices than the concurrent powers in the competition legislation. Although, the licensing regimes are of limited use in tackling structural problems. Not every privatisation has, of course, led to specialist regulation. Over the past 15 years, the Unite Kingdom has privatised the docks, long distance haulage, British Airways, the bus and coach industry and many more.

The enforcement powers in the Bill are generally stronger than those currently possessed by the sectoral regulators in their privatisation statute. However, it remains to be demonstrated that the broad prohibitions in the Bill will be as effective as licence powers in dealing with the complex problems of industries characterised by high degrees of "natural monopoly" or market power. Some at least of the regulators may, though, find the new competition legislation a more effective tool than their current licensing regime. To quote again from the DGT "the changes in Competition law will have the most profound impact on the work of the DGT... When the DGT is acting under the new Competition Act to deal with competition matters for dominant operators he will have the full range of powers and sanctions available under that Act and the flexibility of working outside the licensing regime. Restraints on anti-competitive agreements will apply to all firms. However, when dealing with abuse of market power by operators which does not fall under Articles 85 and 86 (in EU jurisprudence terms) [and hence falls outside the new prohibitions], or when dealing with issues such as universal service or numbering, (which are not issues for the new Competition Act), he will work within the more limited enforcement procedures regime of the Telecommunications Act."[104]

Privatisation left the law on mergers largely untouched. The one exception to this is water, where mergers over a certain size are automatically referred to the MMC. But otherwise, the responsibility for a preliminary investigation of utility and other mergers (under the Fair Trading Act) rests solely with the DGFT. Detailed investigations are the responsibility of the MMC and decisions are for the Secretary of State for Trade & Industry. The sectoral regulator is always consulted by the OFT on utility mergers and the practice has developed of that sectoral regulator undertaking the majority of the public consultations on mergers. None of this is changed by the Competition Bill. Utility mergers have tended to be of particular concern to the OFT. Over recent years we have examined eighteen prospective mergers involving the electricity industry, nine acquisitions in the water industry, two cross utility mergers and well over a hundred prospective acquisitions of rail franchises or other parts of British Rail.

4. Concurrency - The issues raised

The concurrent powers for the sectoral regulators in the Bill raised considerable debate in Parliament and elsewhere. Strong views were expressed both in favour of and against concurrency. The following paragraphs describe some of the arguments which were deployed.

4.1 Arguments in Favour of Concurrency

One of the arguments used in favour of concurrency concerns the fact that the Bill is not the place to make a significant policy change in the role of regulators, especially as the Government is reviewing utility regulation. Other arguments concern the desirability of using the expertise and resources of the regulators, and the implications of the overlap between the current regulatory regimes and competition law. This overlap between competition law and various licence conditions is the most important argument for concurrency. Yet another argument in favour of concurrency is that it should encourage the use of competition powers rather than more prescriptive regulatory powers.

4.1.1 Maintains Current Position

The sectoral regulators already have some concurrent competition powers with the DGFT under the Fair Trading and Competition Acts. If a decision had been taken not to confer concurrent functions in relation to the prohibitions this would have been a policy change which would have weakened the regulators' roles relative to that of the DGFT, particularly in view of the strength of the powers in the Bill. In practice, the concurrent powers will extend the regulators' roles in that they do not have powers under the Restrictive Trade Practices Act which is the current equivalent of the Chapter I prohibition on anti-competitive agreements. During the passage of the Bill through the House of Lords some of the peers stated that the argument that the regulators' roles should be maintained relative to the DGFT had particular force given that the Government was undertaking a review of utility regulation. Until the outcome of that review was known they considered it would be premature to make changes which would significantly affect the roles of the regulators.

4.1.2 Specialist Expertise, Knowledge and Resources

The sectoral regulators have developed considerable specialist expertise and knowledge of their sectors which they will be able to use in applying the prohibitions. This is most apparent in the overlap

between assessing agreements under the Chapter I prohibition and mainstream regulatory activities. For example, OFGAS have carefully considered the Article 85 aspects of the gas network code, particularly the exemption requirement that agreements should not impose restrictions which are not indispensable to the attainment of the objectives of contributing to improving production or distribution, or promoting economic or technical progress, while allowing consumers a fair share of the resulting benefit. Sufficient resources for the authorities to apply the prohibitions effectively will be of critical importance to the success of the new legislation. The Government has announced that they will "ensure that the Office of Fair Trading has the necessary resources and uses them effectively, focusing on those areas where its activity will generate the greatest economic return."[105] Concurrent powers will enable some of the resources of the sectoral regulators to be used to apply the prohibitions in addition to those of the OFT. Currently around 140 staff at the OFT work on competition cases and policy. The Explanatory and Financial Memorandum at the front of the introduction print of the Competition Bill stated that "it is estimated that the new functions provided for the Bill will involve a net increase in the staff of the Director General [of Fair Trading] of about 50."[106] For the regulators, the assumption was that their existing staff would operate the new prohibitions where they used these in place of their licence regimes.

4.1.3 Overlap Between Licence Regimes and Competition Law

The Minister of State, Department of Trade and Industry (Lord Simon of Highbury) stated in the Lords Committee Session on the Bill "There is no clear distinction between sectoral regulation and the promotion of competition in those sectors. The one merges seamlessly into the other and the sectoral regulators are drawn inevitably into competition issues. That is reflected in the regulator's responsibilities to enforce certain licence conditions which are aimed at market power issues. For example, there are licence conditions concerning price caps and prohibiting undue discrimination."[107] All the regulators have a duty either to promote or to facilitate competition in the industry which they regulate. Though the conditions in the licences vary considerably, nearly all licences contain some provision in respect of competition matters. For example, the Train Operators' Licence contains a provision enabling the Rail Regulator to investigate exclusionary behaviour and Network Licences include a condition prohibiting undue discrimination unless the Rail Regulator otherwise consents. If there is no clear distinction, the argument runs that the overlap is better handled by one organisation in order to reduce the risk of conflicting positions and decisions which might arise if a regulator was applying licence conditions alongside the competition authority applying competition law.

This overlap between regulation and competition law will be increased by new European legislation as telecommunications, energy and transport markets are liberalised across Europe. Sector specific rules are being developed and implemented at EU rather than Member State level. This will shape the development of Community competition policy - and the application of the new UK competition legislation - as it applies to the regulated industries. For example in telecommunications, the Full Competition Directive (based on Article 90(3) of the EC Treaty) seeks to flesh out the principles of Articles 85 and 86 in the field of telecommunications. Another telecommunications example is the importance to OFTEL's approach to predatory pricing of the accounting separation approach in the EU Interconnection Directive. While such European legislation is most advanced in the telecommunications field, it is developing in energy and transport. For example, there are three directives relating to railway services which will have significant implications for the Rail Regulator; and a recent directive concerning common rules for the internal market in electricity.

4.1.4 Encouraging Move from Regulation to Competition

It is generally accepted that, wherever possible, competition should be developed and regulation diminished. However, if the regulators have no competition powers some argue that they would be reluctant to see their roles diminished and hence the move from a regulatory culture to competition would be delayed unnecessarily. The DGT has said that he sees himself as becoming increasingly concerned with resolving competition issues rather than exercising controls over a monopoly. "The Competition Bill is a further step in the progression from DGT being a prescriptive regulator, relying on detailed rules which prohibit activities in all circumstance, to that of an industry competition authority, with specialist knowledge of the sector, intervening where there is a competition problem, often (but by no means exclusively) after a complaint."[108] The role of the DGES could be described rather differently. It is likely that he will be a prescriptive regulator in respect of the monopoly businesses of transmission and distribution and an industry competition authority in respect of generation and supply.

During the passage of the Bill through the House of Lords, Lord Simon referred to correspondence from the DGT and the DGGS explaining how the new legislation should enable them to consider the removal of licence conditions. Lord Simon quoted, for example, from the DGGS's letter to him: "I would like to take this opportunity to confirm that once the competition legislation is in place, and as competition becomes more effective in gas supply and in activities ancillary to transportation, such as storage, I will be considering the extent to which licence conditions, such as those which control prices, can fall away on the basis that I rely instead on the new, more effective powers under general competition legislation".[109]

4.2 Arguments Against Concurrency

The main arguments which were deployed against concurrency concerned the need for relevant expertise in applying the new competition law, questions over inefficient use of resources through duplication, risks of inconsistent decisions and concerns over how to handle cross sector companies and agreements.

4.2.1 Need Experience of Community Competition Analysis and of Investigations

The OFT has been a competent authority under the competition provisions of the EC Treaty for over 20 years. In this role, the OFT receives from the European Commission a copy of all the applications and notifications together with copies of the most important documents lodged with the Commission for the purpose of establishing existing infringements of Articles 85 or 86 of the Treaty or of obtaining negative clearance or a decision in application of Article 85(3). The OFT advises the Commission on the most significant cases and OFT officials attend all the hearings and meetings of the Advisory Committee on Restrictive Practices and Monopolies. These take place for the most important cases. The OFT also assists Commission officials on the occasional, so called, dawn raids to obtain information from companies in the UK. Hence, the OFT has developed a considerable expertise in Community competition analysis and application of the appropriate procedures. The argument was put that, given the close link in the Bill with Community competition law, this expertise will be more important in ensuring that the new legislation is applied soundly than in-house specialist knowledge of sectors. The necessary sectoral knowledge could be obtained through the OFT consulting the relevant sectoral regulator as is done under the merger regime.

4.2.2 Less Efficient Use of Resources

If all the sectoral regulators with concurrent powers use these, there will be seven organisations in addition to the OFT applying the prohibitions. Hence the argument was put that there is a risk of less efficient use of resources because of duplication between these organisations. In addition to the basic concern over duplication, there was the argument that it might be difficult for individual regulators to ensure that they have the necessary "critical mass" of staff who are expert in law and/or economics if they only apply the new prohibitions occasionally. The sectoral regulators might, though, wish to draw on OFT's expertise in the application of Community competition rules.

4.2.3 Risk of Inconsistency

The most important area of concern was that connected with the risk of inconsistent and hence, less predictable application of the prohibitions. Two reasons were put forward as to why a sectoral regulator might apply the prohibitions somewhat differently to the DGFT. The first of these concerned the statutory, general duties of the regulators. All the regulators have a duty either to promote or facilitate competition in the industry which they regulate. In addition, they have specific duties relevant to their particular sectors - for example, in the case of the Rail Regulator these include promoting the use of the railway network, and in the case of the DGT, they include the universal service provision for telecommunications services. The DGFT has no equivalent duties. The Bill originally stated that the regulators may take their general duties into account when applying the prohibitions. Concerns were raised that this would mean that the regulators would apply the prohibitions differently either in relation to determining whether the prohibitions have been breached or in the choice of remedies to resolve such breaches. This was despite the fact that, the Bill also stated that in taking their general duties into account the regulators must regard the functions in the Bill as paramount. The Bill was subsequently amended so that the regulators' general duties are not to apply when they are operating the prohibitions. However, the regulators may have regard to those aspects of their general duties if these are matters to which the DGFT could also have regard in applying the prohibitions. This first reason for concerns over possible inconsistent application of the new legislation, therefore, no longer applies.

The second reason put forward was that the regulators are likely to have a "regulatory approach" rather than a competition policy approach when they apply the prohibitions. This concern stemmed from the fact that the regulated markets have required active intervention on an *ex ante* basis by the regulators because of their generally uncompetitive structures. In contrast, competition authorities consider that intervention in a market is normally only justified where activity is shown to prevent, restrict or distort competition. Indeed, apart from the merger regime, competition law normally only provides powers for *ex post* intervention. This issue of "regulatory mentality" versus "competition mentality" was one of the factors considered by the Australians in the Hilmer Report which took the view that economic and competition regulation should be located in the national competition authority rather than in industry specific regulators.[110]

4.2.4 Cross-Sector Companies and Agreements

Some companies which operate in a number of sectors, including one or more subject to regulation, expressed concern that different parts of the company would be subject to different regulatory and/or competition authorities. Although this is already the situation with the current arrangements for economic regulation and competition law, these companies were concerned that the new powers would increase the risk of double jeopardy or conflicts between authorities.

Another issue concerned uncertainty over who would be responsible for handling agreements which involve more than one sector, for example, an agreement between a gas and electricity company or between a telecommunications and non-regulated company? The Bill provides for agreements to be notified to the DGFT or sectoral regulators for guidance or a decision under the Chapter I prohibition. Three types of decision are possible, that is: the agreement is prohibited (for example, a cartel), the agreement is not caught by the Chapter I prohibition and it therefore qualifies for "negative clearance" or the agreement is caught but ought to be given an exemption subject to certain conditions or obligations. The DGFT will have jurisdiction to handle any agreement but the sectoral regulators are limited to commercial activities connected with their sector, for example, "The generation, transmission or supply of electricity" for the DGES.

4.3 How to Deliver Consistency with the Concurrent Powers?

Of these concerns, those about potential inconsistency of application of the new prohibitions are likely to be the most significant. Hence, there are a number of provisions within the Bill and other arrangements aimed at ensuring consistency. The OFT and the regulators are well aware of the importance of ensuring that the new regime works well with the concurrent powers and delivers clear, consistent and predictable decisions and advice.

4.3.1 Case Law Will be Driven by OFT

. It is anticipated that the vast majority of decisions taken under the new legislation will be those made by the DGFT rather than the sectoral regulators because of the much greater jurisdictional coverage of the former then the latter. It is the decisions which will drive the case law. In addition, the regulators and the OFT will consult on cases where there is an overlap of interest. The privatisation legislation requires the regulators and the DGFT to consult prior to first exercising their concurrent functions. This requirement will continue under the new legislation. For example, consultation will be required when considering whether to give an exemption to an otherwise prohibited agreement. Even where consultation is not required by the legislation - as, for example, in merger cases or in advising the European Commission on the handling of Article 85 and 86 cases - the OFT consults relevant regulators because of their particular expertise or knowledge.

4.3.2 Consistency with Community Principles and Case Law

The Bill is drafted to ensure that decisions taken will be consistent with those which would have been taken in handling a similar Community case. The 'governing principles' clause (clause 60) makes provision for the interpretation of the prohibitions in a manner not inconsistent with the principles and case law which would apply to a like matter under Community law. This provision will govern decisions

whether they are taken by the sectoral regulators or the DGFT. The Bill also provides for full appeals to be heard by Appeals Tribunals of the Competition Commission and beyond that for appeals on a point of law or the amount of a penalty to be made to the Court of Appeal. The system of appeals is common for cases whether they are handled by the sectoral regulators or the DGFT.

4.3.3 One Set of Procedural Rules

Statutory, procedural rules are to be prepared and approved by the Secretary of State for Trade & Industry. The DGFT is responsible for drafting the procedural rules, consulting the sectoral regulators as necessary. There will also be external consultation on the draft of the rules. The OFT and the sectoral regulators will be bound by one set of these rules which will include arrangements for handling concurrency. These rules will cover such matters as the procedure for handling applications for guidance or a decision under the prohibitions, for granting exemptions under the prohibition on anti-competitive agreements, for disclosure of information and for the transitional arrangements for introducing the prohibitions.

4.3.4 One Set of Guidelines

The DGFT is required under the Bill to produce guidelines giving general advice and information on how the prohibitions will be applied and enforced. There will be one set of OFT guidelines with complementary, supplementary guidelines from those regulators who consider them necessary to explain how general principles will be applied in their sectors or to cover sector-specific issues. The core guidelines will cover the principle provisions of the new legislation including notifications, prohibitions, penalties, market definitions, the transitional arrangements, and concurrency itself. Other guidelines will cover subjects such as vertical agreements and restraints, the application of the mergers interface with the prohibitions and the treatment of intellectual property. The OFT has established a Concurrency Working Party with the sectoral regulators to ensure that the guidelines will be developed as a single set. There will also be, as with the procedural rules, external consultation on drafts of the guidelines. The working party is addressing other issues involved in concurrency, including the drafting of the procedural rules.

5. Whiter economic regulation in the longer term?

The Government decided that the best way to handle the overlap between economic regulation and competition law is the concurrent powers in the Bill. At the same time, a review of utility regulation was initiated by Ministers. Some of the markets currently covered by sectoral regulators are becoming increasingly competitive, reducing or even removing the need for specific regulation. Some are subject to rapid rates of technological and other changes. In rapidly changing markets it is particularly important to get the balance right between regulation and competition law. As specific regulators may well not be able to respond as rapidly as markets change, there is a temptation to cast regulations in a wider form to catch future possible market developments. However, this risks unduly constraining and distorting markets, preventing desirable changes. Some of the regulated markets have experienced cross-utility mergers and, in addition, there are a good number of cross-sector companies. Globalisation is a factor in some markets. Taking all this together, what are the implications for the development of economic regulation in the longer term?

If the aim is to withdraw special economic regulation in favour of general competition law once an industry has developed a healthy market structure, how should this best be achieved? It is unlikely that general competition law could entirely replace specialist economic regulation where there are natural monopolies, as in the distribution systems for gas, electricity and water. It does not follow, though, that specialist economic regulators are required. For example, the Australians have taken a different approach transferring responsibility for economic regulation for telecommunications to the competition authority, the Australian Competition and Consumer Commission. The remaining technical regulation of the former telecommunications regulator, Austel, was merged with the spectrum management regulatory work in the new Australian Communications Authority. This may, of course, reflect the particular circumstances of Australian markets.

The issue of whether economic regulation should be handled by the competition authority or by separate regulators is becoming an area of lively debate in a number of countries, particularly in Europe, as privatisation and deregulation gathers pace. Competition law in most Member States is currently or will soon be similar, modelled on Community competition law. In contrast, there are marked differences in regulatory regimes between Member States. It is likely that we shall see a variety of approaches develop to the relative roles of regulators and competition authorities in Europe. Apart from a very few exceptions in banking and telecommunications regulation, the UK is so far the only state which has decided to give powerful competition law powers to its regulators in addition to the competition authority. Will the concurrent powers in the Bill be used significantly by the sectoral regulators? Indeed, will economic regulation remain in the hands of separate regulators in the longer term?

NOTES

101. The views expressed in this paper are personal and are not necessarily those of the DGFT.

102. HL Bill 33. Competition Bill. The Stationery Office Limited. 15 October 1997.

103. OFTEL. Review of Utility Regulation. Submission by the Director General of Telecommunications. September 1997.

104. OFTEL. Op Cit.

105. HM Treasury. Pre-Budget Report. Cm3804. November 1997.

106. HL Bill 33. Op Cit.

107. Hansard. House of Lords. Column 914. 25 November 1997.

108 .OFTEL. Op Cit.

109. Hansard. House of Lords. Column 496. 23 February 1998.

110. Hilmer Report. (Independent Committee of Inquiry). National Competition Policy. Australian Government Publishing Service. Canberra. August 1993.

UNITED STATES

1. Introduction

This document is submitted in answer to the questions raised in the 1 April questionnaire to all delegates (CLP/98.38). The questionnaire sets out five logical paradigms for the interface between regulators and competition authorities: A) regulators are the primary enforcers of competition laws, B) competition agencies also function as the principal economic regulators, C) unlike in most other countries, certain sectors are not regulated, D) competition authorities enforce competition laws while regulators enforce regulations, and, E) regulators and competition agencies concurrently enforce competition laws. Not all five apply to the United States, nor do any of them apply perfectly.

In brief, the United States has some experience under paradigms A and E, no experience under B, and the broadest experience under D. Item C requires a degree of speculation, but the US delegation believes it also can provide one or two examples in that context. In fact, were we to propose paradigms based on United States experience, we might suggest:

1) regulatory agencies consider competition as one of several factors, and their decisions immunize certain industry actions from antitrust agency review;

2) regulatory agencies consider competition as one of several factors, and their decisions do not immunize industry action;

3) regulatory agencies (*i.e.*, those with licensing, pre-approval and technical responsibilities) do not address competition and antitrust agencies do antitrust enforcement.

Our answers are limited to the interface between federal regulators and federal antitrust authorities, and do not address regulatory and law enforcement interactions with or by state and local government authorities.

There are no sectors in which regulators are the principal enforcers of US antitrust law. There are a very few sectors (*e.g.*, railroads) in which the regulator has principal authority to evaluate the effect of mergers on competition, but there are no sectors in which regulators have the lead in investigating and preventing anticompetitive activities such as price-fixing. In some instances, regulators must assess competitive impacts or take into account antitrust standards or policies in making regulatory decisions under their own statutes, but no regulator has primary responsibility for antitrust enforcement. The United States thus believes that paradigm D best describes the broad reality of its situation for most sectors that are subject to regulation. A very limited number of sectors have exemptions from antitrust law for business activities other than mergers, in which case normal application of the antitrust laws by the Department of Justice ("DOJ"), the Federal Trade Commission ("FTC") or private litigants is ruled out. However, in those cases, the regulators apply statutes and regulations that in whole or in part are designed to fulfill objectives in addition to or other than competition (*e.g.*, financial soundness, universal service). A full discussion of antitrust immunities is beyond the scope of this paper.

A. Regulators as the principal enforcers of competition laws

The limited circumstances in which paradigm A applies are likely to be of interest, and will be described here.

In order to avoid conflicting merger decisions and to permit certain industry-specific regulators to maintain exclusive decision-making power over the markets under their jurisdiction, Section 7 of the Clayton Act, the federal statute governing mergers and acquisitions, exempts from antitrust agency enforcement certain types of regulated transactions, including those that are now reviewed and authorized by the Surface Transportation Board, the Secretary of Agriculture (for marketing orders), or the Securities and Exchange Commission (for certain securities transactions involving public utility holding companies). The scope of this exemption has diminished over the years due to changes in various regulatory statutes and currently applies to very few regulated sectors[111]. Antitrust enforcement agencies may exercise an advisory role before the regulatory agencies in dealing with transactions under the regulator's jurisdiction where the regulator must take into account competitive concerns or antitrust policies.

Railroad Regulation

A substantial responsibility for competition law and policy relating to the railroad industry lies with the Surface Transportation Board ("STB"), the successor agency to the Interstate Commerce Commission[112]. The STB has authority over mergers and acquisitions, and transactions approved by the Board receive antitrust immunity. In addition, if the STB determines that railroads possess "market dominance" over transportation of a particular type of shipment, it has the authority to regulate rates. The DOJ may prosecute railroads for antitrust violations that are not within the STB's jurisdiction, *e.g.*, price-fixing.

The stated reasons for giving jurisdiction over mergers and dominant firm rate regulation to the STB are technical expertise and the need to review mergers using a "public interest" standard that takes into account such factors as public benefits, labor conditions, environmental issues and effects on competition. The STB's authorization expires in 1999, and Congress is currently considering reauthorization.

The differences between STB and DOJ approaches to competition issues can be seen most clearly in the case of the 1996 Union Pacific/Southern Pacific merger, which involved the combination of two of only three major railroads in the Western United States. The DOJ concluded that the transaction would significantly reduce competition in numerous markets where the number of carriers dropped from two to one or from three to two, and that the remedy proposed by the carriers (granting trackage rights to the third western railroad) was unworkable and, in any case, insufficient to remedy the harm. The DOJ also found that the efficiencies claimed did not outweigh the competitive harms. DOJ therefore recommended that the STB deny the merger application. The STB did not accept DOJ's recommendation, instead giving great weight to the benefits claimed by the carriers. The Board also found that trackage rights were sufficient to replace direct competition where the number of carriers fell from two to one, and that a reduction from three competitors to two was not of concern. Following implementation of the merger, there has been a massive service breakdown in the West, resulting in billions of dollars in losses to shippers. In addition, there have been numerous complaints that the trackage rights have been ineffective in replacing competition lost because of the merger.

Ocean Shipping

It is perhaps debatable whether this sector belongs in section A. The original mandate of the regulator may have included curbing certain anticompetitive practices, but the current regulatory scheme emphasizes a variety of factors besides or even instead of competition. Thus, the current Shipping Act operates to a considerable extent as a regulatory immunity scheme, not a competition enforcement one. Its presence here is for illustrative purposes.

In the years immediately proceeding the adoption of the Shipping Act of 1916, the US Congress became aware that ocean carriers serving the foreign trade of the United States had organized shipping conferences. After extensive hearings and investigation by the Alexander Committee (headed by Representative Alexander), Congress concluded that: (a) ocean carrier conferences were common in international ocean trades, and preceded the enactment of US antitrust laws; (b) the activities of foreign carriers might not be subject to the US antitrust laws;[113] (c) US carriers would be put at a competitive disadvantage if they were subject to US antitrust laws, while foreign carriers might be beyond the reach of those laws; and (d) conferences brought some stability to ocean transportation trades. Under these circumstances, Congress concluded that it would be preferable to prohibit the most anticompetitive conference practices (such as closed conferences, discrimination among shippers, ports and localities, deferred rebates and fighting ships), and to regulate the remaining conference activities, than to attempt to subject conferences to US antitrust laws.

The Shipping Act of 1916 created an independent regulatory agency (which eventually became known as the Federal Maritime Commission, or "FMC") to administer the Act. Congress apparently believed that an independent regulatory agency would be in the best position to balance normal antitrust policies against perceived special needs of the ocean transportation industry. The Supreme Court ruled that exemptions to the antitrust laws must be narrowly construed, and that the FMC had authority to grant conferences antitrust immunity only to the extent necessary to serve specific transportation needs.[114]

Congress enacted major revisions to the Shipping Act in 1984, which greatly limited antitrust challenges to conference agreements and reduced the role of competition. Congress is currently considering a major revision to the Shipping Act that would continue to provide antitrust immunity to conferences, while strengthening the right of individual conference members to take independent action on individual service contracts. Although the bill falls short of applying competition policy to the ocean transportation industry, its adoption could reduce the economic cost of insulating conferences form normal competitive forces. Empirical research indicates that collective price-fixing and other anti-competitive practices of ocean carrier conferences raise freight rates by $2 to $3 billion per year.[115]

In many respects, FMC regulation differs significantly from US competition policy as reflected in the antitrust laws. The agency, for example, may and does immunize practices that would otherwise constitute *per se* violations of the antitrust laws -- including giving ocean carrier conferences authority to fix prices. In other situations, the FMC has provided the carriers with antitrust immunity to engage in activities that do not violate the antitrust laws, and would not be challenged by the DOJ (for example, most carriers' slot chartering agreements). The FMC has no power over maritime mergers, however; rather, the normal antitrust jurisdiction applies.

B. Competition agencies are also the principal economic regulators

There are no sectors corresponding to this paradigm in the United States. The DOJ the FTC enforce the antitrust laws against persons whose activities violate those laws, but they do not engage in economic regulation in any normal sense of the word.

C. Unlike in most countries, certain sectors are not regulated

Which unregulated sectors in the United States are regulated in most other countries is, to some extent, a matter of speculation. Arguably, commercial aviation is a sector that, for the United States, belongs under this heading, given the large way that our government has gone in deregulating this sector. However, give the continued existence of some regular regulatory oversight over aviation matters, this sector will be discussed *infra*, under Paradigm E. We will discuss bus and truck transport here (in Section C) as two sectors in which the US federal government has deliberately ended most economic regulation, while we believe that most other governments have not. Since the regulation of bus and truck transport shares some characteristics with railroad regulation, these sectors could perhaps have been described under paradigm A instead.

It should be kept in mind that most business sectors are not subject to economic regulation in the United States, and have not been. For them, the free market and the application of general antitrust laws is the norm.

Bus and Trucking industries

For years the federal and state governments heavily regulated the motor carrier (trucking) industry. In 1935, Congress passed the Motor Carrier Act, which gave the Interstate Commerce Commission (ICC) broad powers to regulate interstate trucking entry, mergers and rates. Rates were effectively set by cartels, referred to as "rate bureaus," which were specifically exempted from the antitrust laws. However, this regulation led to monopoly profits, excessive costs and inflexibility. It forced carriers to operate in an environment of high costs, wasted fuel and low quality of service. Deregulation has effectively occurred in stages, beginning with the Motor Carrier Act of 1980. With the 1980 MCA, entry was eased, common carriers were permitted to raise and lower rates 10 percent annually without regulatory interference, and some antitrust exemptions were repealed. However, it was not complete deregulation. Carriers were still required to file rates with the ICC and rate bureaus retained their general antitrust immunity. In addition, the 1980 MCA did not preempt state-level regulation of the intrastate trucking industry. This state-level regulation continued until 1995, when Congress succeeded in preempting intrastate trucking regulation.

The 1980 MCA had the effect of greatly increasing entry, increasing independent rate filing (while decreasing the role of rate bureaus) and increasing productivity. Tariff filing by trucking firms was finally eliminated in 1994. All this has led to lower rates, cost savings and better service for shippers. However, the DOJ advocates going further, to fully deregulate the industry. Collective ratemaking still exists. Pursuant to the Interstate Commerce Commission Termination Act (ICCTA), the Surface Transportation Board (STB), the ICC's successor, can refuse to renew a rate bureau agreement if it finds that the agreement is not in the public interest. Collective ratemaking conflicts directly with some public interest goals of the national transportation policy described in the ICCTA. However, if a rate bureau agreement is approved or renewed, the antitrust laws do not apply to the parties to the agreement with respect to making or carrying out the agreement.

Like the trucking industry, intercity motor carriers of passengers (bus industry) were also heavily economically regulated for many years by the ICC. However, with the passage of the Bus Regulatory Reform Act of 1982 (1982 Bus Act), the ICC's jurisdiction was significantly reduced. Bus companies operating entirely intrastate, school buses, and airport taxis and limousine services were exempted from ICC regulation. Although the 1982 Bus Act greatly reduced economic regulation, the ICC (and now its successor, the STB) retained some oversight over the industry.

Although entry into the bus industry can now be characterized as open, the STB retains jurisdiction to grant authority to operate to an applicant upon a showing of fitness. These applications are seldom challenged, and since 1982 the bus industry has experienced substantial growth in the number of carriers. These new carriers operate mainly in the areas of charter and tour or special operations -- whereas regular route bus service has experienced a decline in service due to competition from other modes of transportation.

Bus carriers (regular route and charter operators) are also required to file tariffs with the STB containing rates and classifications, and the rules related to them. The 1982 Bus Act prohibits the STB from suspending or investigating a rate before it takes effect, unless the rate has been collectively established and shown to be predatory or discriminatory. Once a rate is filed, anyone can file complaints challenging its reasonableness, and the STB must make a decision within 90 days of the filing of the complaint.

The STB also retains authority to approve or disapprove mergers of motor passenger carriers. The statutory standard for approval requires a showing that the merger is consistent with the public interest. If necessary, the STB may approve the merger with conditions to ensure that the public interest is protected. In the case where the Antitrust Division believes a merger may be anticompetitive, it may file comments or recommendations with the STB. Nonetheless, the ultimate authority remains with STB to decide whether to approve the transaction.

There has been a significant decline in regular route bus service over the last 20 years - - leaving one dominant nationwide carrier and many much smaller regional carriers. It appears that this decline has been mainly due to deregulation in the bus industry and increased competition from private automobiles, a deregulated airline industry and other external factors. Because of competitive factors such as price, service, speed and convenience, there has been growing substitution of other forms of transportation. However intercity bus transportation remains significantly less expensive than other modes of transportation, and in many instances more convenient, and therefore is used by portions of the population that cannot afford those other modes, such as students, the elderly and other low-income passengers.

D. General division of labor -- Competition authorities enforce competition laws, regulators enforce regulations

This paradigm best describes the normal situation in the United States where sector- specific economic regulation exists. This paradigm covers many aspects of federal regulatory oversight of communications, energy, and transport industries, with some exceptions noted elsewhere (paradigms A. and E.). Regulatory programs in the United States traditionally have had objectives beyond, or other than, increasing competition, though current regulatory initiatives place far more emphasis on promoting competition and the free play of market forces than in the past. Industry-specific regulation is the responsibility of separate specialized agencies. Companies are generally subject to antitrust law and may in addition be subject to industry-specific regulatory requirements; companies are not exempt from the

antitrust laws merely because they are regulated, and compliance with both the antitrust laws and applicable regulation should not lead to incompatible requirements being placed on companies.

Situations where incompatibility theoretically could arise are likely to involve antitrust immunities, either express or implied. Express immunities, of course, involve explicit Congressional statements that antitrust law is displaced by regulation. Where there is no such explicit statement, there may still be an implied exemption where necessary to preserve the integrity of the regulatory scheme that Congress mandated. US courts will draw implied immunities narrowly, and will only find them where required to avoid disruption of a comprehensive regulatory program called for by Congress. See, e.g., *Gordon v. New York Stock Exchange*, 422 US 659 (1975).[116] In certain cases, antitrust courts may determine that a regulatory agency has "primary jurisdiction" over a particular issue and stay judicial decision pending initial agency resolution. Application of the doctrine of primary jurisdiction depends on the relevance of the agency's decision to the issue before the court and the value of the agency's expertise and fact-finding. The doctrine only postpones but does not supplant federal court review of the antitrust concern.

The relationship between competition agencies and regulators, in industries affected by both antitrust law and regulation, is typically defined not by any formal, published agreements between the agencies, but by the difference between the limited types of conduct that are reached by the antitrust laws and the broader range of activities and statutory objectives that are usually subject to the regulatory jurisdiction of an industry-specific regulator. Also, regulatory agencies usually consider interests beyond competition ones. For example, regulatory agencies would have no power to prosecute anticompetitive price-fixing or market allocation agreements; such conduct would be dealt with exclusively by the federal and state antitrust agencies. At the same time, the antitrust agencies have no power to license participants in a market, to set prices charged by firms or to guarantee universal service; all such things would be handled exclusively by the industry-specific regulator. To the extent that overlapping oversight may occur, this is most likely in the areas of merger review in a regulated industry, and civil enforcement directed at particular types of anticompetitive conduct by a dominant firm (e.g., discrimination, cross-subsidization).

In addition, competition agencies may play an advisory role in proceedings concerning the need for regulation, the treatment of particular firms as dominant, and the determination of whether particular firms should be permitted to enter a market. As part of the Executive Branch, DOJ engages in competition advocacy as a member of task forces or interagency committees which formulate the Administration's policy on number of economic issues. Both DOJ and FTC have participated in an interagency working group on electricity issues. The FTC is also empowered to gather information and issues reports (§ 6 FTCA). Studies about regulatory issues by FTC staff have applied staff expertise about the operation of competitive markets to examine the economic consequences of regulation. One example is a staff study showing that the allocation of airport landing slots by market methods was not leading to anti-competitive behavior that furnished the basis for FTC comments in the Federal Aviation Administration's proceeding on the effectiveness and viability of the FAA's High-Density Rule adopted to alleviate delays caused by congestion at certain airports.

Various statutes provide avenues for competition advocacy by either authorizing DOJ or the FTC to participate in industry-specific regulatory proceedings (e.g. in the energy area - section 7(a) of the Deep Water Port Act of 1974, section 205(b) of the Outer Continental Shelf Lands Amendment Act of 1978 or requiring regulatory agencies to seek advice from DOJ or the FTC on competition matters (e.g. - in the telecommunications sector -- Section 271 of the Telecommunications Act of 1996 requires the FCC to consult with the Attorney General regarding the proposed Bell company entry into long distance and to

accord "substantial weight" to the Attorney General's evaluation.) Even where there is no explicit authorization, regulatory agencies regularly request DOJ and FTC views on competition issues.

Competition agencies, like other agencies of the Executive Branch, may file comments in regulatory proceedings before independent agencies such as the FCC offering their expert advice and opinions, just as private companies may do. The DOJ and the FTC have filed comments with the FCC on such issues as the deregulation of AT&T and the extent of "effective" competition in cable television markets.

In their advocacy efforts, DOJ and FTC have opposed, for example, governmental approval of joint ratemaking where such activities unnecessarily harmed consumers (transportation) and limitations on entry where competition was feasible (transportation, telecommunications, energy and professional services). Competition agencies also have urged that potential rivals be provided access to monopoly or essential facilities where such access was needed to promote new entry against firms that had maintained monopoly positions under prior regulatory regimes (*e.g.* telecommunication, energy.)

E. Regulators and competition authorities concurrently enforce competition laws

There are several sectors in which federal regulators have some overlapping authority with the competition agencies to enforce certain parts of the antitrust laws, or, more commonly, competition-oriented provisions of regulatory laws, primarily in the merger area. Those sectors include telecommunications, electrical and gas utilities and banking. For example, the Federal Communications Commission has concurrent authority with DOJ to enforce Section 7 of the Clayton Act with respect to telecommunications carriers that it regulates. The various federal bank regulators[117] exercise a similar responsibility with respect to assessing the competitive impact of mergers in the banking industry. The mandates of these agencies all extend beyond enhancing competition, however, and thus their actions may differ in subtle or not so subtle ways from actions by the antitrust enforcement agencies in similar circumstances.

Section 11 of the Clayton Act entrusted enforcement of certain parts of the Act -- such as Section 7 regarding acquisitions -- to particular regulatory bodies with respect to specific industries or activities instead of the FTC. The DOJ's enforcement authority is not affected by Section 11. The pertinent agencies were the Federal Reserve Board, the predecessors to the Surface Transportation Board and Department of Transportation, and the Federal Communications Commission. It should also be noted that the FTC Act itself imposes certain limitations on the FTC's antitrust jurisdiction. For example, Section 5(a)(2) of the Act prohibits the Commission from exercising jurisdiction with respect to banks, savings and loan associations, federal credit unions, transport and telecommunications common carriers, air carriers and activities subject to the Packers and Stockyards Act of 1921 (See discussion *infra* regarding that Act).

The decision whether to give an expert industry-specific regulator exclusive jurisdiction over mergers in its industry, and relegate the antitrust agencies to an advisory role, or to authorize concurrent jurisdiction over mergers for both the regulator and the antitrust agencies, has been made by Congress on a case-specific basis over time, and so it is not possible to identify any obvious general principle underlying how particular industries have been treated. In some instances of exclusive regulatory jurisdiction, Congress may have sought to insulate an industry from the likelihood of more vigorous merger enforcement by antitrust agencies. In other industries where concurrent jurisdiction exists, Congress may have been concerned that the regulator would be insufficiently attentive to competitive problems on its own and sought to promote competition through dual oversight. Although concurrent

oversight clearly involves some duplication of resources, and exclusive jurisdiction in the hands of a regulatory agency has on occasion led to transactions being approved that the antitrust agencies probably would have challenged, situations where concurrent jurisdiction has led to conflicting analyses or decisions have not been frequent, and there are no specific legislative proposals pending in the US to change the respective authority of the antitrust agencies or the regulatory agencies over competition-related matters (other than the ocean shipping proposals discussed *supra*).

Telecommunications

The Telecommunications Act of 1996 expanded the DOJ's powers in telecommunications by removing the ability the FCC previously had to exempt mergers of local telephone companies from antitrust review, thereby furthering the new US policy of promoting local telecommunications competition. Although Congress wanted to allow the expert regulatory agency in telecommunications to review mergers in its industry, it did not want to give it exclusive responsibility for such mergers, in light of the considerable experience that antitrust enforcers also had in dealing with that industry and the value of having an independent examination of the antitrust consequences of mergers by an agency not linked to the industry in question.

The telecommunications industry affords a good example of how US government agencies can minimize the potential conflicts inherent in overlapping enforcement jurisdiction over competition matters. As a practical matter, the FCC and the antitrust agencies are usually able to avoid inconsistent decisions on telecommunications mergers because the agencies can informally share views in advance of a decision by either (though the antitrust agencies are limited in their ability to share confidential information they receive in an investigation). These discussions have been facilitated by special exemptions from FCC rules requiring public disclosure of ex parte communications, thus permitting discussions between the FCC and the antitrust agencies on mergers being reviewed by both. The agencies have had such discussions more commonly in recent years, in response to some past instances of inconsistent competition analyses. In addition, the FCC does not need to rely on its concurrent Clayton Act Section 7 jurisdiction to review mergers, but can also rely on its more general "public interest" authority to review transfers of licenses. Using this "public interest" jurisdiction, the FCC has identified broader concerns about some types of telecommunications mergers that have allowed it to impose conditions for approval of those mergers even where the antitrust agencies did not challenge the same mergers under Section 7 of the Clayton Act. This occurred, for example, in the Bell Atlantic-NYNEX merger of two of the largest local telephone companies serving different but adjoining geographic areas. The FCC, under its "public interest" standard, required additional measures to open local markets, while the DOJ, reviewing the transaction under the Clayton Act, did not challenge or seek modifications to the merger.

Cable Television

The FCC and local authorities[118] regulate the cable television industry pursuant to the Cable Communications Act of 1984 ("1984 Act"), the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act"), as amended and supplemented by provisions of the Telecommunications Act of 1996. The 1984 Act was enacted to establish a national policy concerning cable communications, in lieu of ad hoc regulations that inhibited the growth and development of cable, and to promote competition, minimize unnecessary regulation, and allocate regulatory responsibility among federal and local authorities.

Finding that the 1984 Act allowed cable operators to increase cable rates substantially, Congress enacted the 1992 Act to curb the market power of cable operators, to protect the economic viability of broadcast television threatened by the growth of cable, and to promote competition to cable television by new technologies for the distribution of video programming. A key element of the 1992 Act was to entitle multichannel video programming distributors to obtain access at reasonable, non-discriminatory rates to programming owned by vertically integrated cable operators. The 1992 Act also prohibited price discrimination in the subscriber rates charged by the many cable operators not subject to "effective competition" in their franchise areas. The relevant federal antitrust law, the Robinson-Patman Act, was determined not to apply to this situation because it applies only to price discrimination in the sale of goods, whereas the delivery of cable programming is a service.

The 1996 Act effected a number of changes to the regulatory scheme by eliminating or reducing ownership restrictions and regulations, among other things. These changes were aimed at opening up the opportunity for new programmers and new distributors to get into the business of producing cable television programming and delivering it to consumers. The Act's most important change was to permit telephone companies to provide services similar to those provided by cable operators. In addition, the Act eliminates as of 1999 rate regulation of programming carried by cable with the exception of broadcast TV programming. Further, the 1996 Act limited the price discrimination provision of the 1992 Act by expanding the parameters of "effective competition" noted above in the 1992 Act.

Besides its responsibilities under the three aforementioned statutes, the FCC also has authority to approve or deny transfers of cable television relay service licenses, and thus has indirect power over mergers and acquisitions. Its decision on a proposed transfer is based on a determination of whether it will serve the public interest, convenience and necessity. In making this determination, the FCC must make findings related to the pertinent antitrust policies and weigh them along with other important public interest considerations.[119] An aspect of the interface between the FCC and federal antitrust authorities is illustrated by its decision in Telecommunications, Inc. & Liberty Media Corp.[120] There the applicants argued to the FCC that the license transfers should be approved since the DOJ had reviewed the acquisition and approved it subject to certain conditions of a negotiated consent decree. But the FCC decided not to abbreviate its review in deference to the DOJ review on the ground that the FCC must make an independent review that requires consideration of factors other than antitrust in its public interest analysis. To facilitate its review, the FCC subsequently amended its regulations to allow for consultations with FTC and DOJ staff on antitrust policies.

The FCC's regulation of the cable industry does not provide immunity from antitrust scrutiny.[121] Participants in the cable industry remain subject generally to federal antitrust laws. The 1992 Cable Act specifically provides that nothing in the statute shall be construed to alter in any manner the applicability of federal or state antitrust laws. (The 1996 Act has a similar provision.) Both the DOJ and the FTC have successfully challenged proposed acquisitions that raised antitrust concerns of increased horizontal concentration or vertical foreclosure. The FTC also entered into consent agreements with cable TV companies settling charges of illegal agreements not to compete and to allocate markets.

Antitrust Agencies and the FCC Generally

While the US antitrust agencies generally prefer structural to behavioral remedies in resolving horizontal competitive overlaps, both antitrust agencies and regulators have made use of behavioral restrictions as well, particularly in dealing with competitive problems arising from vertical relationships. Both the DOJ and the FCC largely employed "behavioral" conditions in dealing with joint ventures between foreign dominant telecommunications carriers and US carriers, but based their conditions for

approval in some cases on the basis of market-opening reforms ordered by European antitrust and telecommunications authorities. It is not possible to generalize about the breadth of market definitions used by antitrust agencies and regulators, as those decisions are case specific, but in many instances regulatory agencies have tended to adopt market definitions that differ from what a purely antitrust perspective would dictate, but afford greater regulatory convenience for purposes of broad rulemaking. However, the FCC's market definitions are increasingly reflecting application of antitrust concepts, as in its local competition safeguards decisions.

The relationship between the FCC and the antitrust agencies has operated without any formal designation of "lead agencies" or development of common guidelines on competition issues, although the FCC in its decisions often refers to the merger guidelines jointly developed by the DOJ and the FTC for accepted principles on such issues as market definition and measurement of concentration. In addition, a decision on a merger reached by the FCC is appealable to the federal courts, and enforcement actions by the antitrust agencies likewise are reviewable by the federal courts of appeal and ultimately the US Supreme Court, providing a safeguard against development of inconsistent antitrust precedent.

In various FCC rulemaking proceedings, DOJ and FTC staff have filed comments advising the agency to adopt antitrust analysis or to rely on antitrust enforcement against monopolization rather than continuing bans or limitations on acquisitions or multiple ownership, particularly in broadcasting. For example, the FTC staff urged case by case analysis of acquisitions of radio stations using antitrust principles rather than a blanket ban of multiple ownership. Both agencies also recommended use of the 1992 merger guidelines principles to FCC decisions on TV station ownership. Yet another example is the FCC's Financial Interest and Syndication Rule. FTC staff argued that instances of alleged monopolization could be addressed through conventional application of the antitrust laws rather than the rule's existing prohibitions or limitations on network ownership of syndication rights.

Electricity

The antitrust agencies and the Federal Energy Regulatory Commission ("FERC") have overlapping jurisdiction with respect to mergers among electric utilities. Under §203 of the Federal Power Act, 16 U.S.C. §824b the FERC reviews mergers under a public interest standard. This differs from the standard under §7 of the Clayton Act which prohibits mergers, the effect of which "may be substantially to lessen competition" in any relevant market. Although the FERC must take into account antitrust considerations among other factors when considering a merger, it "is not bound to use antitrust principles when they may be inconsistent with the Commission's regulatory goals ...." Northeast Utilities Service Co. v. FERC, 993 F.3d 937, 943 (1st Cir. 1993). The antitrust agencies can sue to block a merger approved by FERC, and FERC can refuse to approve a merger that Justice and the FTC have taken no action on. Federal electricity legislation does not contain antitrust immunity provisions.

On December 18, 1996 FERC issued *Order No. 592*, announcing its public utility merger *Policy Statement*. Pursuant to the Order, competitive effects are the primary focus of FERC's public interest inquiry under Section 203 of the Federal Power Act, so as to assure that mergers do not impede the development of vibrant, fully competitive wholesale generation markets. Mergers will be screened and analyzed under the DOJ/FTC *Horizontal Merger Guidelines*, with transactions passing the screen typically resolved without hearings on competition issues. Merger applicants are expected to provide *Guidelines* analysis (including HHI calculations for all relevant markets) and supporting data in their application, while opponents of the merger are likewise expected to raise competitive issues with specificity, focusing on errors or other factual challenges to the data or assumptions underlying the analysis presented by the applicants or demonstrating adverse effects ignored by the applicants. Applicants are also expected to

propose, as part of their application, appropriate remedies to mitigate any competitive problems identified. Among the remedies explicitly mentioned are generation capacity divestiture, transmission system upgrades, restrictions against trades by the merged firm over constrained paths, open seasons for early customer termination of power supply contracts, and commitment to independent system operators ("ISOs").

The antitrust agencies' role in electric power to date has been mostly that of advocate and advisor, both because of the relatively early stage of deregulation and the statutory role of FERC in reviewing mergers of utilities engaged in the interstate sale and transmission of electricity. The Energy Policy Act of 1992 created the opportunity for competition in wholesaling of electricity. In its subsequent FERC proceeding to implement this Act, FERC requested comments on proposals to promote competition, principally uncoupling power generation capability from transmission services. Both the FTC and the DOJ filed extensive comments analyzing the means by which transmission of power over the lines of the former monopolist could be implemented so as to generate real competition among generators of electricity. The proceeding resulted in Order No. 888 - the promotion of wholesale competition through open access non-discriminatory transmission services. While the agencies' suggestions for separating power generation from transmission were not adopted at that point[122], FERC recognized their potential usefulness, if the measures it adopted did not have the desired results, and the need to monitor results closely.

Natural gas

The natural gas industry is regulated by the Federal Energy Regulatory Commission (FERC), formerly the Federal Power Commission. FERC has the power to establish rates (for the interstate transmission of gas and its sale) and to regulate asset (but not voting securities) acquisitions and changes in facilities and service pursuant to the "public interest" standard in the Natural Gas Act. Beginning with the Natural Gas Policy Act of 1978, price controls on wellhead sales of natural gas were decontrolled and finally eliminated when Congress passed the Natural Gas Wellhead Decontrol Act of 1989. The Wellhead Decontrol Act ended 35 years of regulation of the pricing of natural gas supplies, establishing competition over regulatory control as the best mechanism for pricing natural gas. After issuing a series of orders in the 1980s that attempted to open up the transportation of gas to varying degrees, FERC in 1992 issued Order No. 636 requiring that all pipelines provide open access transportation[123] and that all contracts for sales of gas and transportation be unbundled. Antitrust enforcement agencies have full, normal powers over this industry.

Section 7(c) of the Natural Gas Act prohibits the operation of acquired assets without a certificate of public convenience and necessity. The courts have held that FERC must consider antitrust policies when deciding whether proposals satisfy the Act's public interest requirements. Under the Supreme Court's interpretation of the law, FERC does not have the power to immunize approved activities from antitrust scrutiny nor to enforce Section 7 of the Clayton Act. Thus, Justice, the FTC and private parties are free to challenge FERC-approved acquisitions under the antitrust laws. The FTC and DOJ have successfully challenged several mergers involving gas pipelines, obtaining either divestitures to remedy the anticompetitive aspects of the transaction or a bar to the acquisition.[124]

Aviation

US regulation of the airline industry resembles some combination of scenarios C and E. The Department of Transportation ("DOT") is the economic regulator, applying varying degrees of economic

regulation, depending on whether the air transport is domestic or international. The domestic airline industry is largely deregulated, although DOT continues to engage in economic regulation of some aspects of domestic airline operations (fitness, ownership[125], advertising). DOT's economic regulation of international aviation is more extensive.

Authority to enforce competition laws is concurrent. DOT has explicit authority to prohibit unfair and deceptive practices and unfair methods of competition. 49 U.S.C. §41712. DOT also has authority to review agreements among airlines that affect international air transportation, and to confer upon such agreements immunity from the antitrust laws. The DOJ has authority to enforce general US competition laws with respect to airlines. Because of DOT's power to grant immunity, the DOJ often brings its expertise to bear in comments to the DOT. The DOJ has, for example, commented on various "code sharing" arrangements between US and foreign carriers, and many of our recommended limits on such arrangements have been accepted and implemented by DOT.

To the extent the US system reflects Scenario C, regulation of airlines was abolished because it was perceived that the market could more effectively and efficiently regulate rates and services than could the regulators. As a general matter, subsequent experience has proven that decision to be a good one. Competition has forced US airlines to become much more efficient, prices have decreased in real terms, and most consumers have more service available to them. Increasingly, as "open skies" agreements are negotiated between the United States and other countries, airline deregulation has become international in scope. US competition laws were not adjusted in connection with the move toward airline deregulation, although the movement from regulation took place over a ten-year transition period. The US competition authority with jurisdiction over airlines (the DOJ) has not published any guidelines concerning the application of competition laws to airlines.

However, DOT has on a few occasions exercised its competition authority to enact regulations and policy statements concerning airline competition. Examples of such actions include regulations governing the operation of travel agent computer reservations systems and DOT's proposed policy statement on unfair exclusionary conduct (Statement of Department of Transportation Policy Regarding Unfair Exclusionary Conduct in the Air Transportation Industry, DOT Notice No. 98-16, April 6, 1998). The DOJ provided comments to DOT on both matters and generally agrees with DOT's approaches to them. DOJ has a strong, on-going relationship with DOT and cooperates with that agency on an informal as well as formal basis.

In general, deregulation has been a success. Some critics have argued that some small cities have suffered from price increases and service decreases under deregulation. Others have asserted that the development of large hub/spoke networks by major airlines has given those airlines the power to charge excessive prices in some city pairs.

As noted, the US system reflects Scenario E in that both DOT and DOJ enforce competition laws relating to airlines[126]. This dual responsibility for airline competition is similar to the arrangement with respect to other industries, where DOJ and the Federal Trade Commission have overlapping jurisdictions. Consistent application of the law is ensured by the fact that the actions of each agency are subject to action or review by our judicial system. During the transition from regulation to an unregulated environment, DOT had authority to approve mergers among airlines, but that authority ended at the beginning of 1989. Consequently, airline merger review is now a normal antitrust matter.

Bank Mergers

This paradigm also applies to the treatment of mergers between banks or between bank holding companies, a treatment with some unusual features. The banking agencies have authority to approve or deny bank merger/bank holding company applications. Under the Bank Merger Act, the DOJ provides a competitive factors advisory report to the relevant banking agency which the agency must take into consideration in its decision. However, under the Bank Holding Company Act, the Federal Reserve is only required to advise the DOJ of an approval. In both bank mergers and bank holding company mergers, DOJ has 30 days after regulatory approval to challenge the merger. The FTC does not have jurisdiction over banking.[127]

Concurrent regulatory and DOJ review was adopted after the DOJ challenged, post- merger, a bank merger and the Supreme Court in 1963 upheld DOJ's authority to challenge a merger under the antitrust laws.[128] To resolve industry and Congressional concern over DOJ's post-merger challenge to mergers,[129] the Bank Merger Act and the Bank Holding company were amended in 1966. The Bank Merger Act of 1966 provided DOJ, via the advisory report, input to the competitive review process at the regulatory agency and required the agency to consider the DOJ report and to apply the same antitrust standards which DOJ used. Both Acts provide the regulatory agency a convenient defense to antitrust challenges in that the agency is tasked also with considering convenience and needs in its decision process. In return for post-merger anti-trust immunity, both Acts give DOJ a 30-day post-regulatory-approval window in which to institute a suit (and DOJ was given an automatic stay provision).

The statutes require that the bank regulatory agency and DOJ apply the same antitrust standards. In 1994, DOJ, the Federal Reserve Board and the Office of the Comptroller of the Currency published a document, "Bank Merger Competitive Review," which outlines the bank merger antitrust review process.

Nevertheless, the bank regulatory agencies and the DOJ in practice do not necessarily use the same product market and may disagree on the geographic market definition as a result of the differing product markets. For example, in the merger of BayBanks into Bank of Boston Corp., the Federal Reserve, using their "cluster of banking services" product market, cleared the transaction without any divestiture in the Boston market. However, DOJ required a divestiture in the Boston market after an investigation determined possible anticompetitive effects within the product market of small and lower middle market business banking services.

Having competition policy instruments has not altered the regulator's carrying out of its regulatory policy, as the law requires competition analysis by the regulator as but one of several criteria which the regulator must consider in its approval process. The regulator is also given the choice of overriding competitive concerns with the "convenience and needs" defense.

The major issues with the current concurrent approach are two fold:

a) Having four separate bank regulatory agencies involved in competitive analysis may allow companies to "forum shop"[130] the transaction as a means of improving their chances of regulatory approval. In recent merger cases, when DOJ ultimately sued following agency approval, the relevant agency intervened in the case on behalf of the bank in order to defend the agency's approval in court.

b) Current legislation requires that DOJ review all bank merger transactions and provide a report to the regulator. In addition all bank merger transactions have a 30-day post-approval waiting period, which can only be shortened to 15 days by DOJ. Approximately

one third of the 1,800 applications reviewed each year are inherently competitively neutral but the current statutes provide neither exceptions nor an ability for DOJ and the regulators to exempt certain classes of transactions from review. Attempts to remedy this have been unsuccessful despite repeated attempts over the last 10 years.

Meatpacking

An area in which US antitrust authorities and a federal regulatory body have relatively broad concurrent powers to prevent anticompetitive practices is the meatpacking sector. The Packers and Stockyards Act, 7 U.S.C. 181, 192, empowers the Secretary of Agriculture to investigate and take administrative action (cease and desist orders and cash penalties) against restrictive and monopolistic practices by meatpacking enterprises. This power encompasses some conduct beyond that which would be in violation of the antitrust laws -- such as deceptive practices and "incipient" trade restraints -- but does not govern mergers and acquisitions. The DOJ retains full statutory powers to investigate and prosecute antitrust violations in the livestock and meat industries. DOJ and the Department of Agriculture have had a cooperative relationship in this area, and regularly share information and views.

NOTES

111. This paragraph was added to Section 7 in 1950. It currently lists the following: the Secretary of Transportation, the Federal Power Commission (now renamed the Federal Energy Regulatory Commission), the Interstate Commerce Commission (now defunct), the Securities and Exchange Commission re §10 of the Public Utility Holding Company Act of 1935, the US Maritime Commission (now the Federal Maritime Commission) and the Secretary of Agriculture. The Federal Communication Commission was deleted from the list by a provision of the Telecommunications Act of 1996. As noted, this list does not correspond well to the actual situation regarding the authority to review mergers and acquisitions. See, e.g., FMC v. Seatrain Lines, Inc., 411 US 726, 743-44, n. 11.

112. The STB has similar responsibilities for the other surface transport sectors (trucking and bus transport), but those sectors arguably are better described under paradigm C. (deregulated sectors).

113. The US Supreme Court subsequently found the activities of foreign firms undertaken outside the United States are subject to our antitrust laws if they affect US interstate or foreign commerce.

114. Congress also established the Interstate Commerce Commission and Civil Aeronautics Board to exercise similar regulatory powers respectively (including the grant of antitrust immunity) over surface transportation carriers and airlines. Subsequently, it abolished both of them and subjected the trucking, bus and airline industries to substantial application of the antitrust laws.

115. Clyde, P. and J. Reitzes, 1995, The Effectiveness of Collusion under Antitrust Immunity (Bureau of Economics Staff Report, FTC).

116. Antitrust and regulatory conflicts are also addressed by the state action defense, which recognizes an exemption from antitrust enforcement for situations where a state government clearly articulates an affirmative policy to displace competition in a particular sector, and actively supervises the implementation of its policy by the persons and businesses subject to it. See, e.g., Parker v. Brown, 317 US 341 (1943). This does not, however, afford an antitrust exemption where a sub-federal regulatory agency merely tolerates, but does not actually authorize and oversee, conduct inconsistent with the antitrust laws in an industry under its supervision.

117. The four bodies are the Federal Reserve Board, Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation and Office of Thrift Supervision. See 12 U.S.C. 1828(c).

118. There also is a limited number of express private rights of action to enforce certain provisions of the 1984 and 1992 Acts.

119. 47 U.S.C. §§ 308, 310(d) (1994). The FCC also publishes an annual report on the state of competition in the cable industry.

120. 9 F.C.C.R.4783 (1994).

121. Cableamerica v. FTC, 795 F. Supp. 1082 (N.D. Ala 1992); US v. RCA, 358 US 334, 336 (1959).

122. FTC and DOJ staff recommended an operational unbundling approach to the separation of power generation from transmission, to separate control over those two parts of the business. FERC instead adopted a functional unbundling approach that seeks to achieve functional separation through rules.

123. "Open access transportation" refers to providing local distributors access to transportation on the pipeline so they can buy gas in the field.

124. *See*, *e.g.*, United States v. El Paso Natural Gas Co., 376 US 651(1964); MidCon Corp., 107 F.T.C. 48 (1986); Questar Corp., FTC File No. 961-0001, 5 Trade Reg. Rep. (CCH) Para. 23,949 (1995); Phillips Petroleum Co., FTC Docket C-3728, 5 Trade Reg. Rep. (CCH) para. 24,104 (1995).

125. DOT review of ownership changes no longer includes competition issues.

126. The FTC has no jurisdiction over air carriers.

127. In addition to authorizing the banking agencies to review mergers, the banking statutes contain their own strict prohibition against "tying arrangements." 12 U.S.C. 1464(q) and 1972.

128. United States v. Philadelphia National Bank, 374 US 321 (1963). Prior to passage of the Bank Merger Act of 1960, it was believed that, for technical drafting reasons, the antitrust laws largely did not cover bank mergers. See H.R. 1416 (March 23, 1960).

129. Banks felt that if a post-merger challenge were successful, the undoing of the merger could result in harm to the safety and soundness of the banking system.

130. "Forum shop" means to structure the transaction such that the application is filed with the regulator who is viewed as having the least restrictive competition analysis.

COMMISSION EUROPÉENNE

PRATIQUES ANTICONCURRENTIELLES AUTORISÉES, TOLÉRÉES OU IMPOSÉES PAR LES POUVOIRS PUBLICS

Les règles communautaires de concurrence comportent deux volets : les règles directement applicables aux entreprises (essentiellement articles 85 et 86 du Traité de Rome, applicables aux ententes et abus de position dominante, et règlement de contrôle des concentrations) et les règles applicables aux autorités publiques (pour l'essentiel, articles 92 à 94, applicables aux aides d'Etat et articles 5 et 90, qui interdisent aux Etats membres de prendre des mesures ayant pour effet de permettre aux entreprises de se soustraire aux contraintes imposées par le droit de la concurrence).

Les commentaires relatifs aux aides d'Etat feront l'objet d'une note séparée. La présente note s'en tiendra donc aux dispositions des articles 5 et 90. Elle examinera ensuite dans quelle mesure les articles 85 et 86 sont applicables aux pratiques anticoncurrentielles autorisées, tolérées ou imposées aux opérateurs économiques en dépit de l'interdiction prévue aux articles 5 et 90.

1. Règles de concurrence applicables aux autorités publiques

Notons d'abord que si les interdictions prévues aux articles 85 et 86 concernent le comportement des entreprises, les principes de libre concurrence s'imposent également à l'action des institutions communautaires[131].

~~L~~L'article 5 impose par ailleurs aux Etats membres de s'abstenir de prendre des mesures permettant aux entreprises de s'affranchir des règles de concurrence : "les Etats membres (...) s'abstiennent de toutes mesures susceptibles de mettre en péril la réalisation des buts du présent Traité". Cette disposition a été interprétée par la Cour de Justice comme interdisant aux Etats membres de faire obstacle à l'effet utile des articles 85 et 86[132]. Dans son arrêt GB-Inno-BM, la Cour a été encore plus explicite : "les Etats membres ne sauraient édicter des mesures permettant aux entreprises (...) de se soustraire aux contraintes imposées par les articles 85 à 94 du traité"[133].

L'interdiction prévue à l'article 5 est complétée par les dispositions plus spécifiques de l'article 90.1 : "les Etats membres, en ce qui concerne les entreprises publiques et les entreprises auxquelles ils accordent des droits spéciaux ou exclusifs, n'édictent ni ne maintiennent aucune mesure contraire aux règles du présent Traité, notamment à celles prévues aux articles (...) 85 à 94 inclus").

Les dispositions des articles 5 et 90 s'appliquent toujours en combinaison avec d'autres dispositions du Traité.

1.1 Article 5

La Cour de Justice a, à plusieurs reprises appliqué l'article 85 à des mesures étatiques. A titre d'exemple sont contraires aux articles 5, 3 g et 85 :

- une législation nationale qui rendrait inutiles des comportements d'entreprises visés à l'article 85, en donnant aux éditeurs ou importateurs de livres la responsabilité de fixer librement les prix obligatoires au stade du commerce de détail[134];

- le fait d'homologuer des tarifs aériens et d'en renforcer les effets lorsque ces tarifs sont le résultat d'une entente contraire à l'article 85[135] ;

- un arrêté qui étend l'effet (entre les parties) d'accords contraires à l'article 85, en ce que la règle posée par ces accords acquiert un caractère permanent et que toute contravention constitue un acte contraire aux usages honnêtes en matière de commerce, est contraire aux mêmes dispositions[136].

La Commission estime par ailleurs que la jurisprudence de la Cour de Justice implique que les Etats membres n'ont pas seulement une obligation de s'abstenir d'adopter certains comportements. Ils ont également un rôle actif à jouer : ils ont le devoir, au moins dans certaines circonstances, de prendre des mesures pour s'assurer que les règles communautaires de concurrence sont, en pratique, appliquées de façon satisfaisante. Ce principe implique par exemple l'obligation d'imposer aux entreprises des règles de présentation comptable, lorsqu'elles sont nécessaires pour empêcher les subventions croisées contraires aux règles de concurrence. Il ne s'agit pas d'aller au-delà du domaine de compétence des autorités normatives, mais plutôt d'appliquer tous les pouvoirs qui leur sont conférés pour assurer la bonne application du droit de la concurrence.

1.2 Article 90.1

L'article 90.1, en combinaison avec les articles 85 ou 86 interdit les mesures étatiques susceptibles d'éliminer, en ce qui concerne les entreprises publiques et les entreprises auxquelles elles accordent des droits spéciaux ou exclusifs, l'effet utile des règles de concurrence applicables aux entreprises. Ces mesures peuvent être classées en quatre catégories :

- les mesures contribuant à un comportement d'entreprise interdit par les articles 85 ou 86. Il s'agit de mesures qui favorisent ou renforcent les effets de comportements spécifiques d'entreprises. Ainsi, l'approbation par les autorités nationales d'accords tarifaires tombant sous le coup de l'article 85 conclus entre compagnies aériennes est interdit par l'article 90.1[137] ;

- les Etats membres ne peuvent non plus accorder un droit qui renforcerait la position dominante d'une entreprise. A titre d'exemple, dans l'affaire BskyB-BDB, l'autorité normative britannique compétente dans le domaine des télécommunications, suivant en cela l'avis de la Commission Européenne, a informé les parties que leur entreprise commune BDB ne pouvait obtenir une autorisation d'exploiter un réseau de télévision câblé qu'à la condition que BskyB renonce à sa participation au capital. En effet, si l'autorisation avait été accordée dans le cadre du projet initial, la position dominante de BskyB sur le marché britannique de télévision payante aurait été renforcée ;

- les mesures par lesquelles un Etat membre renonce partiellement à son pouvoir normatif, qu'il délègue à des opérateurs privés. Ceux-ci pourraient être amenés à prendre des décisions d'intervention dans le domaine économique et fausser ainsi le jeu de la concurrence ;

- les mesures imposant un comportement incompatible avec les articles 85 ou 86. Par exemple, des pouvoirs municipaux qui imposeraient à des entreprises détenant une position dominante d'appliquer des prix particulièrement élevés pour leurs services tombent sous le coup de l'article 90.1[138] ;.

- les mesures qui influencent la structure de la concurrence d'une manière telle qu'elle rend inévitable un comportement visé aux articles 85 ou 86. Par exemple, est visé aux articles 90.1 et 86 une mesure nationale conférant à un organisme un droit exclusif dans la mise en contact des demandeurs d'emploi et des employeurs. Une telle position se justifie notamment lorsque l'organisme n'est manifestement pas en mesure de satisfaire la demande du marché du travail et que la législation en cause empêche des entreprises privées de satisfaire cette demande. La Cour de Justice a précisé que l'Etat membre enfreint les dispositions des article 90 et 86 lorsque la mesure crée une situation dans laquelle l'entreprise est amenée à enfreindre l'article 86. Cette théorie de l'"abus automatique" a été appliquée à plusieurs reprises par la Cour de Justice[139].

La Commission n'a pas une compétence exclusive pour appliquer l'article 90 §1 : cette disposition peut être appliquée par les tribunaux nationaux. La Commission n'est donc pas obligée à traiter toutes les plaintes fondées sur cette disposition, et dispose d'un large pouvoir d'appréciation à cet égard.

Pour la mise en oeuvre de l'article 90.1, l'article 90.3 confère à la commission le pouvoir d'adopter des décisions et des directives obligatoires pour les Etats membres.

1.2.1 Les décisions

Lorsqu'un Etat membre enfreint une des obligations qui lui incombe en vertu de l'article 90 §1, la Commission, dans sa mission de surveillance peut :

- soit introduire devant la Cour de Justice une action visant à faire constater par celle-ci l'existence d'un manquement commis par l'Etat (article 169) ;

- soit adopter une décision sur la base de l'article 90 §3 constatant le manquement et exigeant de l'Etat d'y mettre fin.

Cette dernière possibilité, qui n'existe que pour les infractions à l'article 90 §1 (alors que l'art 169 a un champ d'application beaucoup plus vaste), renforce sensiblement la position de la Commission. La décision est obligatoire pour l'Etat et c'est à l'Etat membre de demander l'annulation à la Cour s'il ne la trouve pas bien fondée. La Commission peut ainsi appliquer les règles de concurrence destinées aux Etats avec une efficacité semblable à celle déployée à l'égard des entreprises.

En pratique, la Commission n'arrive que très rarement au stade de la décision. La plupart des problèmes sont réglés informellement lors des contacts préalables entre la Commission et l'Etat membre.

1.2.2 Les directives

L'article 90.3 permet aussi à la Commission de faire respecter les règles du Traité dans un secteur déterminé, non pas par plusieurs décisions individuelles, mais par une directive à caractère général.

La Commission a notamment recouru à ce pouvoir dans le secteur des télécommunications. Cette politique a contribué au mouvement général vers la libéralisation des télécommunications dans le monde et à l'adoption de l'accord OMC du 15 février 1997 sur les télécommunications.

2. Règles de concurrence applicables aux entreprises

La question que l'on se pose ici est de savoir si une entreprise peut se prévaloir d'une réglementation d'un Etat membre pour justifier une pratique anticoncurrentielle (state action immunity). Il convient de distinguer selon l'intensité de la contrainte exercée par les pouvoirs publics.

Le fait qu'un comportement soit autorisé, approuvé ou toléré par une réglementation nationale qui viole l'article 5 ou 90 ne dispense pas les entreprises du respect du droit communautaire de la concurrence.

Par contre, la situation est différente si le comportement anticoncurrentiel est imposé aux entreprises par une législation nationale sans qu'il y ait violation des articles 5 ou 90 :

- si un comportement anticoncurrentiel est imposé aux entreprises par une législation nationale ou si celle-ci crée un cadre juridique qui lui-même élimine toute possibilité de comportement concurrentiel de leur part, les articles 85 et 86 ne sont pas applicables. Dans une telle situation, la restriction de concurrence ne trouve pas sa cause, ainsi que l'exigent ces dispositions, dans des comportements autonomes des entreprises. A titre d'illustration, la Cour de Justice a estimé que les pratiques concertées visant à contrôler les livraisons de sucre sur le marché italien ne tombaient pas sous le coup du droit des ententes dans la mesure où la réglementation italienne, en combinaison avec l'influence que les autorités italiennes ont exercée sur l'action des producteurs concernés, était de nature à provoquer le comportement incriminé[140] ; .

- en revanche, les articles 85 et 86 du traité peuvent s'appliquer s'il s'avère que la législation nationale laisse subsister la possibilité d'une concurrence susceptible d'être empêchée, restreinte ou faussée par des comportements autonomes des entreprises.

Ainsi, dans l'affaire du treillis soudé, la Cour de Justice a rejeté l'argument visant à justifier une concertation dans ce secteur en se prévalant d'une réglementation[141] concernant le marché du fil machine, situé en amont : "la nature réglementaire et économique du fil machine n'autorisait nullement la requérante à participer à des accords anticoncurrentiels sur un produit dérivé sous prétexte de protéger le produit en amont et de se substituer ainsi aux autorités compétentes, seules habilitées à cet effet"[142].

NOTES

131. CJCE 13 févr. 1969, aff. 14/68, Walt Wilhelm, Rec. p. 1

132. CJCE Walt Wilhelm, préc.

133. CJCE 16 nov. 1977, aff. 13/77, GB-Inno-BM, Rec. p. 2115

134. CJCE 10 janv. 1985, aff. 229/83, Leclerc - livres, Rec. p. 1

135. CJCE 30 avr. 1986, aff. 209 à 213/84, Nouvelles Frontières, Rec. p. 1425 ; CJCE 11 avr. 1989, aff. 66/86, Ahmed Saeed, Rec. 803

136. CJCE 1er oct. 1987, aff. 311/85, Vereniging van Vlaamse Reisbureaus, Rec. 3801

137. CJCE 11 avr. 1989, aff. 66/86, Ahmed Saeed, , Rec. p. 803. On a vu qu'il a également été jugé qu'une telle mesure est aussi interdite par l'article 5.

138. CJCE 4 mai 1988, aff. C-30/87, Bodson, Rec. 2507

139. CJCE 23 avr. 1991, Höfner, aff. C-41/90 : Rec. 1979 ; CJCE 18 juin 1991, ERT, C-260/89 : Rec. 2925 ; CJCE 11 déc. 1997, Job Center coop, aff. C-55/96

140. CJCE 16 décembre 1975, Suiker Unie e.a. / Commission, 40/73 à 48/73, 50/73, 54/73, 55/73, 56/73, 111/73, 113/73 et 114/73, Rec.p.1663, points 36 à 72, plus particulièrement, points 65 et 66 ainsi que 71 et 72

141. Il s'agissait d'une réglementation communautaire, mais la solution est transposable aux réglementations nationales

142. CJCE 17 juillet 1997, Ferriere Nord/Commission, C-219/95P

MAKING THE TRANSITION FROM REGULATION TO COMPETITION

THINKING ABOUT MERGER POLICY DURING THE PROCESS OF ELECTRIC POWER RESTRUCTURING

Address by:
Joel I. Klein[*]

Federal Energy Regulatory Commission
Distinguished Speaker Series

Washington, D.C.
January 21, 1998

Let me begin by thanking Chairman Hoecker for inviting me to participate in the Commission's Distinguished Speakers Program. I welcome the opportunity because, first of all, it has given me a chance to think through some important issues of mutual concern to the Antitrust Division and Commission during what is an exciting and challenging time in restructuring the electricity industry. As importantly, I hope that the Chairman's kind invitation and my presence here today will signal a commitment by both agencies to work closely as we deal with issues concerning electricity restructuring-issues whose difficulty will be outpaced only by their importance.

In the past, I fear, communication between our two agencies has been too infrequent and generally limited to formal public hearing and comment procedures. I understand that there was a useful, informal meeting between our staffs last month and I hope that is also of harbinger of things to come. For my part, I will tell you that I have learned a great deal during the process of implementing the Telecommunications Act of 1996 about the importance-no, the necessity-of working closely with our colleagues at the Federal Communications Commission and the various state public utility commissions. The affected industry participants and the public deserve consistency across the governmental spectrum. And, to that end, I hope to bring to bear what I've learned from our telecom experience as we engage with this Commission and the state commissions in addressing electricity restructuring.

Now, turning to the substance of the issues, let me start by pointing out that, regardless of what happens with respect to possible federal restructuring legislation, we know two things for sure-or, at least at the level of confidence that passes for certainty in this town: First, we know that many states already are engaged in the restructuring process; and second, we know that the Department of Justice and the Commission will continue to have shared jurisdiction over merger reviews during this time of restructuring. So let me first make some preliminary comments about competition in the electricity industry in general, and then turn to our mutual interest and involvement in merger review.

---

* Assistant Attorney General, Antitrust Division, US Department of Justice.

As you probably know, promoting competition in wholesale electric power markets has long been one of the Antitrust Division's goals. In 1969, five years before the AT&T case was filed, the Division filed the landmark *Otter Tail* case.[143] The Supreme Court's decision in that case eliminated significant doubts about whether the antitrust laws applied to regulated industries, and began what has turned out to be a quarter-century-long process to facilitate competition in wholesale electric power markets by assuring competitive access to electric power transmission networks. To that end, at about the same time that *Otter Tail* was filed, the Department began a long and successful campaign to condition nuclear power plant licenses on the provision of transmission services.[144]

Important as these early efforts were, there is no doubt that considerably more progress has been made in recent years. Today, truly competitive wholesale markets are now beginning to emerge as a result of the Energy Policy Act of 1992, coupled with some more recent initiatives, primarily at the state level. The Energy Policy Act made possible the Commission's Order 888 mandating open access, and several states already have begun dramatic restructuring. In terms of the states' efforts, I would note, in particular, that an increasingly popular component of restructuring is the use of an independent system operator, which offers the prospect of a simple yet effective solution to the transmission-access problem. In our view, this is a promising development.

These developments are important, but we believe that other efforts are also likely to be needed as we move down the path from regulation to competition. The antitrust laws provide ample authority for the Justice Department to challenge anticompetitive conduct of various sorts, but we cannot challenge market structure itself. In other words, to whatever extent restructured electric power markets are too highly concentrated to yield pricing at or near competitive levels, the antitrust laws provide no remedy. To address these kinds of structural competitive problems, some states have encouraged or required divestiture as part of their restructuring efforts, and these divestiture efforts have progressed substantially. In support and furtherance of such efforts, the Antitrust Division suggested in testimony before the House Judiciary Committee last June that Congress might want to look into providing authority to order divestiture in any federal restructuring legislation. Such authority, if conferred, would presumably go to the Commission. In the same testimony, we also suggested that the Commission undertake a comprehensive study of market power in a restructured electric power industry. This is a difficult and challenging assignment, but we think it is very important and that it would be worth the significant effort that would be required. We are prepared to work with the Commission in devising and carrying out such a study.

One other preliminary point worth mentioning is that, as competition becomes increasingly important in the electricity industry, so, too, will antitrust enforcement. That is true in the merger area, as I will soon discuss, but it is true in civil enforcement under the Sherman Act as well. Indeed, two of the four contested civil non-merger cases that we currently have in court involve anticompetitive behavior by incumbent or would-be monopolists in electricity markets. The first case, which we filed in April of 1996, sought to enjoin the City of Stilwell, Oklahoma from refusing to extend or connect water and sewer lines to consumers unless they also bought their electric power from the City. We believe that this conduct amounts to a per se unlawful tying arrangement and that it impaired competition on the merits between the City and an electricity co-operative. Next, in June of 1997, we brought suit against Rochester Gas & Electric, challenging its agreement with the University of Rochester. In that case, we charged that RG&E made threats and offered financial rewards to induce the University to abandon its plan to build a new, efficient power plant, that would have competed directly with RG&E.

This whole deregulatory process really is exciting stuff and I know it is receiving a great deal of attention at the Commission as well as in our offices. But, for today, there is a specific issue that I would like to address in some detail. As we move forward with our mutual efforts in electricity restructuring, I

think it may be useful to ask whether the resulting flux should require any special treatment for mergers. Before commenting specifically on that area, let me first note that I started thinking about this issue during the Division's investigation of the Bell Atlantic-NYNEX merger. Based on a year-long analysis of millions of documents-including, significantly, the non-public business plans of many of the affected players-as well as lots of deposition testimony, interviews, expert commentary, and advice, I believed then, and continue to believe, that the merger was not anticompetitive. In fact, the evidence indicated that real efficiencies were likely to result from the merger-some of which have already been realised -- and that, over time, those efficiencies would lead to better service in the affected areas.

Still, in the process of analysing the Bell Atlantic-NYNEX merger, *one* thought (well, *at least* one thought) continued to nag at me: "Wouldn't it be nice", I kept thinking, "if we had been able to observe some actual, real-world experience with head-to-head competition between Regional Bell Operating Companies, so we could have actual market data to add to our other evidentiary considerations" Under the AT&T consent decree, of course, such head-to-head competition had never taken place and, while it is now allowed under the 1996 Telecom Act, none of the regional companies had invaded another's territory at the time we were reviewing the Bell Atlantic-NYNEX deal. We frankly regretted not having that kind of information available to us.[145]

Thinking about this lack of market-based experience while working on the Bell Atlantic merger started me thinking more broadly about merger policy during a period of industry restructuring and deregulation. And, as my subsequent comments will demonstrate, I'm still thinking about the issue. But I've progressed far-enough to at least articulate some potential concerns and some possible solutions. I do so in the time-honoured tradition of putting ideas out for consideration so that we can generate discussion and analysis which, in turn, one hopes, will lead to better policy. But lest there be any confusion let me make one thing, as they say, absolutely clear at the outset: I'm not here suggesting that any of this is necessarily better than the status quo, much less that it should be part of any federal legislation; all I'm saying is that I believe these matters merit thoughtful discussion and debate.

Merger Review under the Clayton Act

Let me turn then to the issue of merger review, and start by noting that, while the Justice Department and the Commission have shared jurisdiction in this area, our statutory responsibilities and missions are somewhat different. The principal antitrust statute affecting mergers is the Clayton Act, passed in 1914, which prohibits mergers whose effect "may be substantially to lessen competition" in any relevant market.[146] For the most part, merger enforcement under the Clayton Act is prospective: that is to say, we generally challenge mergers *before* they are consummated.

This kind of prospective enforcement is greatly facilitated by the Hart-Scott- Rodino Antitrust Improvement Act of 1976,[147] which requires parties proposing mergers exceeding certain financial thresholds to inform the Department and the Federal Trade Commission in advance and to wait certain specified periods before going forward and consummating their deal. During the statutory waiting period, or such longer period as the parties may voluntarily elect to wait, we do our investigative work, sometimes reach a remedial agreement with the parties or, if we think it appropriate, file suit seeking to block the merger.

As with any other civil plaintiff, the Department is entitled to relief only if it establishes by a preponderance of the evidence that a merger "may . . . substantially . . . lessen competition." Thirty years ago, during what we at the Antitrust Division fondly call the "halcyon days" of antitrust enforcement, the

Supreme Court sustained practically every merger challenge that we filed. Recently, however, the lower federal courts have been less willing to uphold merger challenges. While we are not happy about that, I should hasten to add that very few cases are contested; some challenged transactions are abandoned, and most others that concern us are remedied through consent decrees. So only the really hard ones end up in litigation.

Most of our concerns, as I said, result in a consent agreement with the parties. The purpose of such a consent decree is to restore the market to roughly the competitive posture it would have had but for the merger. For us, merger decrees are almost always structural; they normally require divestiture of one or more lines of business or a package of competitively significant assets. For completeness, I should add that, unlike in many other areas of the law, an antitrust consent decree is not routinely entered by the court. The Department first publishes a Competitive Impact Statement explaining the alleged anticompetitive effects of the merger and how the decree would prevent those effects. There is then a comment period, and possibly even hearings before the court. The decree is ultimately entered only after the court concludes that it is in the public interest.[148]

Finally, in providing some relevant background, I should also note that there is little history of Justice Department merger enforcement in the electric power industry. The reason is partly that there have not been many major mergers in this area, but mostly because, given the historically regulatory nature of the industry, there has been little competition that could have been lost through merger. Competition has been growing in importance in the electric power industry, and mergers are now potentially far more problematic from a competitive standpoint. This may also mean that there will be far more impetus for mergers, although restructuring may provide efficiency rationales for mergers as well. Given all of this, in the past couple of years, we have devoted more resources to merger review in the electricity industry and we are beginning to focus on potential competitive concerns in some of our analyses.

Merger Policy During Electric Power Restructuring

Now, with that primer on the Clayton Act in mind, let me turn specifically to the question of merger policy during electric power restructuring. At a recent hearing before the House Judiciary Committee, I suggested the possibility of restricting mergers during electricity restructuring. Without endorsing the idea, I mentioned it in response to one of the questions I had been asked about lessons we had learned from implementing the Telecom Act. I explained that, in the typical merger investigation, we deal with a reasonably mature industry about which we can learn a great deal from observing and analysing the recent history of market transactions. The Antitrust Division is very experienced in conducting such investigations, and we are confident that they provide a sound basis for predicting and proving the competitive effects of mergers-both pro- and anticompetitive. But what about the uncertainties stemming from major industry restructuring resulting from deregulation? How does this affect merger review?

To be sure, we deal with uncertainties every day because the Clayton Act requires a prediction about an inherently uncertain future. We must make predictive judgements about what would happen in the event of a post-merger attempt to exercise market power. But while often difficult, these judgements are grounded in experience and hard data. On the other hand-and this is the key point-the grounding in experience and hard data from a competitive market may be lacking, at least to some degree, during the early stages of a transition to competition, especially in an industry that has experienced little, if any, prior competition.

To be specific about electricity, there is nowhere in the United States today that can we observe a fully restructured market in actual operation, and, in large parts of the country, we have little idea, for example, of what the basic nature of transmission pricing will be. This lack of experience presents practical analytic challenges for us. For example, the paradigm of the Merger Guidelines requires us to examine the effects of a five or ten percent increase by a hypothetical monopolist above levels likely to prevail in the near future. In almost all cases, currently prevailing prices provide the best indication of prices in the near future, and they are used as the benchmark for analysing price increases. But there is ample reason to doubt that current electric power prices will prevail in the near future. Similar complications arise is addressing key issues such as whether generation at point *A* is likely to be competitive at point *B.* We can make some reasonably educated assumptions about these kinds of issues but, as time passes, experience obviously will help confirm or refine our thinking.

In short, in assessing mergers and other transactions in the electric power industry today, I find unsettling the possibility that a competitive analysis may at times-and perhaps in non-trivial ways-depend on assumptions, rather than empirical, experience- based analysis and modelling. The source of my discomfort is not that I think an analysis without empirical, experience-based input would necessarily provide an insufficiently sound basis for making policy decisions. Rather, I am concerned that a competitive analysis based significantly on assumptions about basic issues may make it more difficult to carry our burden of proof in court, where empirically based fact-finding is the norm and as is clearly favoured.

This concern, I hope, will not endure for long. I anticipate that in the next few years the electric power industry will have taken significant steps in its transition to competition; many of the new market institutions will become well established, and there will be important market experience to look to, certainly at least those states that restructured first. I also expect that our modelling capabilities for sophisticated electric power networks will have improved as well. But during the transitional period, we will continue to face the potential uncertainties that I've been discussing.

Given that fact, utilities may see this as a time when they have a window of opportunity in which to consummate mergers. Mergers with little immediate anticompetitive effect can nonetheless frustrate the emergence of competition. For example, incumbent dominant firms could pick off competitors in their infancy, or even before they become competitors. In this climate, even utilities that otherwise might prefer to devote their present energies to other pressing matters, may feel that they must act now or possibly lose a golden opportunity.

Public Policies Toward Mergers During The Transition to Competition

That's the problem, as I see it. And the question is, what, if anything, should we do? First, let me stress that the antitrust laws in general, and the Clayton Act in particular, have served the nation very well, and I certainly would not propose amending them to deal with potential short-term problems associated with electric power restructuring. Having said that, I still believe that it is worth discussing whether, if there ultimately is federal restructuring legislation, it should address merger policy specifically. Although I mentioned the possibility of a temporary moratorium to the House Judiciary Committee, I did not mean to suggest that it is the only possibility or even the best one. A variety of alternatives merit consideration.

The idea behind a moratorium would be to postpone making difficult competitive evaluations for a brief period until we have developed a market-based history of evidence for making them. We can hope that the transition process will take only a few years, and postponing certain mergers for a brief period might not inflict significant hardships. In some cases, a moratorium could even do positive good because some firms would decide during the cooling-off period that the potentially anticompetitive mergers they might be contemplating are not such good ideas after all. The moratorium idea reflects the general proposition that mergers are very difficult to undo after they prove to be anticompetitive and that, during a transition to competition, there is unlikely to be any prospect for meaningful relief after the damage is done. Missed opportunities for the emergence of competition at the outset of the transition are forever lost, with potentially substantial social costs.

Of course, a literal moratorium on all electricity mergers clearly would go much too far. Most mergers are undoubtedly competitively benign or even procompetitive. To be precise about it, the most that I think merits discussion in terms of a moratorium would be the prohibition for a limited period of time of one or more narrowly defined classes of potentially problematic mergers. An example of such a category would be mergers of adjacent-that is, directly interconnected-generators, each with very substantial generating capacity.

Given the absolute nature of a moratorium, we at the Antitrust Division have also been considering some other, more flexible, alternatives to the status quo. One approach would be a targeted moratorium with a waiver provision. This is what was done in the Telecommunications Act of 1996 for mergers between local telephone companies and cable operators in the same service area. These mergers are prohibited by the Act unless the FCC makes any of several findings, including that ?the anticompetitive effects of the proposed transaction are *clearly* outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.[149] As Senator Leahy explained during the legislative debates, the premise of this restriction was that allowing ?telephone companies to buy out cable companies-their most likely competitor-in the telephone companies' local service areas . . . would destroy the best hope of developing competition in both local telephone service and cable television markets.[150]

A potentially softer approach, and the one that I currently find most intriguing, would be a modification of the burden of proof in merger cases during transitions to competition. The basic notion behind this approach is that any uncertainties associated with the transition period should not provide a legal license to merge but rather may be a good reason for increased skepticism about certain combinations. One way to think about such a proposal is to consider the way the antitrust laws treat restraints that are deemed to be facially anticompetitive but that do not fall within the narrow categories of per se illegal conduct. Such restraints are often analysed under what antitrust lawyers and courts generally refer to as an "abbreviated rule of reason"[151]-or as I have called it, a "stepwise approach to antitrust review"[152] Under this approach, when the ostensible nature of an practice is shown to suggest a likelihood of competitive harm, the plaintiff's initial burden is satisfied. Defendants are then required to offer an efficiency justification in order to subject the practice to a fuller competitive inquiry. If the defendant cannot come forward with a convincing explanation of how the practice will create real efficiencies, it is summarily condemned.

That in a very general way is the basic idea. I recognise, of course, that there are possible variations on the definitions of the parties' respective burdens as well as variations as to which mergers such burden-shifting should apply to. I will not detail these variations, much less discuss their virtues or vices, but I do want to make it clear that modifying the burden of proof during a period of industry deregulation is not meant to amount to a merger ban. Defendants should not be required to prove things

they never can, and reallocation of burdens should not materially affect the analysis of mergers that are very likely to be competitively benign.

The Commission And Merger Policy

Until now, I've focused on the Justice Department's role in merger review. Now let me make a few concluding comments about the Commission's role. First, I should note in this regard that the idea of placing some sort of burden of proof on the merging parties is hardly revolutionary. That is typically what occurs in the regulatory merger approval process and, as I understand it, that is how the merger process works when the Commission itself acts under section 203 of the Federal Power Act.[153] More importantly, the Commission reviews mergers under a broad public interest standard, and that standard, I would suggest, might provide the flexibility to allow the Commission to craft special policies or procedures for dealing with mergers during a transitional period.[154] Thus, I'd like to take this opportunity to encourage the Commission to consider the matters that I have been discussing. Although I wholeheartedly concur with the Commission's decision in its Merger Policy Statement to adopt the Horizontal Merger Guidelines, and I expect the Commission to look to Clayton Act case law for guidance in implementing those guidelines, I still think the Commission might want to go further and consider possible alternatives for coping with the special temporary problems associated with restructuring.

While on the issue of the Commission's merger authority, let me focus on one other point. The Commission is authorised under section 203(b) of the Federal Power Act to condition its merger approvals and to exercise continuing jurisdiction over merged entities.[155] Although this authority certainly is very useful, I would caution against allowing it to result in an overly regulatory approach to merger review during the transition to competition. While I recognise, of course, that the Commission is a regulatory agency, and that the electric power industry has long been highly regulated, restructuring obviously is intended to move away from that paradigm. We at the Department hope and expect that market forces will become the primary determinants of wholesale electric power rates. And, in that context, mergers that substantially lessen competition should be allowed to proceed only if a court-imposed consent decree, or set of Commission-imposed merger conditions, offers a permanent, preferably structural remedy for the anticompetitive effects of the merger. More specifically, I would urge the Commission to reject rate freezes or rate roll-backs as conditions for approval of mergers creating structural competitive problems in generation.[156] Such remedies typically are short-term, and do not in any way address the real competitive effects of the merger. Even in the short term, there will often be reason to doubt that the frozen rates would be as low as competitive rates.

Finally, based on a century of experience, I would further emphasise that the Department is also highly sceptical of any relief that requires judges or regulators to take on the role of constantly policing the industry. Relief generally should eliminate the incentive or the opportunity to act anticompetitively rather than attempt to control conduct directly. We are institutionally sceptical about code-of-conduct remedies. The costs of enforcement are high and, in our experience, the regulatory agency often ends up playing catch-up, while the market forces move forward and the underlying competitive problems escape real detection and remediation.

Conclusion

Let me end by reiterating that the Clayton Act has served the nation well, and I do not propose to tinker with it to better handle the narrow time frame in which competition takes hold in a previously

regulated monopoly industry. But, for the reasons that I've laid out today, I hope I have persuaded you that it is worth considering whether any supplemental restrictions are appropriate-be they in tailored federal restructuring legislation or by dint of Commission action. If the subject interests you, I am sure that members of the Division's staff would be happy to discuss these issues with members of Commission's staff and I expect that a productive dialogue would ensue. Thank you.

NOTES

143. Otter Tail Power Co. v. United States, 410 US 366 (1973).

144. 1970 amendments to § 105(c) of the Atomic Energy Act provided that the Attorney General review each nuclear power plant construction and operating license to determine whether ?the activities under the license would create or maintain a situation inconsistent with the antitrust laws.? Pub. L. No. 91-560, 84 Stat. 1473, codified at 42 U.S.C. § 2135(c)(5).

145. Subsequently, Ameritech announced that it will compete out-of-region. I hope that we will learn something significant from that experience as we go forth with our efforts in deregulating local telephone markets.

146. Clayton Act § 7, current version codified at 15 U.S.C. § 18.

147. Pub. L. 94-435, title II, § 201, 90 Stat. 1390 (1976), codified at 15 U.S.C. § 18a. The Hart-Scott-Rodino filings for electric power mergers now typically are made long after the FERC filings. Consequently, we investigate these mergers prior to the Hart-Scott-Rodino filings.

148. *See* 15 U.S.C. § 5.

149. 47 U.S.C. § 572(a) (emphasis added).

150. 141 Cong. Rec. S8,464 (June 15, 1995).

151. *See, e.g.*, California Dental Association v. Federal Trade Commission, 128 F.3d 720, 727-28 (9th Cir. 1997).

152. *See* Joel I. Klein, A Stepwise Approach to Antitrust Review of Horizontal Agreements, Address Before the ABA Antitrust Section Semi-Annual Fall Policy Program (Nov. 7, 1996) (available at http//:www.usdoj.gov/atr).

153. 16 U.S.C. § 824b. Placing the burden on the applicants to show that a merger is in the public interest was upheld in Pacific Power & Light Co. v. Federal Power Commission, 111 F.2d 1014, 1015 (9th Cir. 1940).

154. Although the Commission must include antitrust considerations in its public interest calculus under the FPA, it is not bound to use antitrust principles when they may be inconsistent with the Commission's regulatory goals. . . . [I]ndiscriminate incorporation of antitrust policy into utility regulation could undercut the very objectives the antitrust laws are designed to serve.? [The Commission's] ?analysis must sensitively recognise and reflect the distinctive economic and legal setting of the regulated industry to which it applies.? Northeast Utilities Service Co. v. FERC, 993 F.2d 937, 947 (1st Cir. 1993) (internal quotations and citations omitted).

155. 16 U.S.C. § 824b (b).

156 . Long-term contracts of various sorts may adequately guard against anticompetitive effects when those effects would be of very limited duration. A contractual solution may be satisfactory when a large transaction produces only a small and short-term competitive problem.

AIDE-MEMOIRE OF THE DISCUSSION

by the Secretariat

Introduction

The Chairman of the Competition Law and Policy Committee introduced the topic by making four observations.

First, there are specific regulatory regimes in many sectors in OECD countries. They are particularly common in sectors such as telecommunications, electricity, railways and natural gas, but are found as well in radio and TV broadcasting, civil aviation, cable television, ocean shipping, pharmaceuticals, petrochemicals, radioactive minerals, alcoholic beverages, insurance, banking, inter-city bus transportation and trucking, water distribution etc..

Second, a quick look at the country submissions indicates that there is no unique model describing the relationship between sector specific regulators and competition authorities either across countries or sometimes even within a country. One particular model, the mandate driven division of labour approach, appears, however, to be somewhat more common than the others.

Third, in countries which have deregulated somewhat earlier than others, a rather pragmatic approach seems to have been used, one that differs from sector to sector. Countries liberalising somewhat later appear to have followed a more systematic approach.

Finally, there is a good deal of variation across countries in vocabulary used. Some countries make a distinction between technical regulation, economic regulation and competition law enforcement. But sometimes “competition policy” seems to be grouped within “economic regulation”. In some countries, there also appears to be a tendency to use "economic regulation" and "technical regulation" interchangeably. A more precise definition is therefore needed for economic regulation to distinguish it both from competition policy and technical regulation.

The Chairman organised the roundtable into several major sections: the first dealing with principles; the second with the diversity of ways of dealing with the interaction between regulation and competition policy plus a comparative analysis of those models; and the third centring on a problem that seems to arise frequently in the mandate driven division of labour approach, i.e. how to handle the overlap between the competition office and the regulatory bodies. A brief closing section would be devoted to a question unique to the European Union.

1. Principles

The Chairman drew attention to three country submissions exploring in the most general way the relationship between competition law and sector specific regulation. He noted that the Norwegian Competition Authority (NCA) had commissioned in 1997 an expert report to discuss the extent to which

responsibility for competition policy should be delegated to subordinated authorities and how competition and regulatory enforcement tasks should be allocated between the competition authority. The Norwegian context is one in which both the regulatory agencies and the competition authorities retain close links with the technical ministries and the Ministry of Economic Affairs. Also in 1997, these same issues were reviewed in Denmark where it was concluded that, in the main, competition policy functions should be concentrated in the competition authority but there was also a need for sector specific regulators. Finally in the Netherlands, a country where clear primacy is now given to competition law, a broad project begun in 1996 reviewed the supervision of the privatised utilities. This involved extensive discussions of the differences between sector specific regulation and the application of general competition law, the need to exercise restraint in introducing sector specific regimes, and the appropriate relationship between sector specific regulators and the Competition Authority.

The Norwegian delegate was called upon to make the first presentation, and he dwelt primarily on the pros and cons of various alternative ways of organising the competition authority and the sector regulators. He emphasised two important issues or questions. The first had to do with vertical division of tasks, i.e. the appropriate degree of delegation of competition policy functions to subordinated authorities. The second concerned the horizontal division of tasks, i.e. how to allocate enforcement tasks between the competition authority and the sector regulators.

As regards vertical division, the Norwegian expert report laid out three alternatives. First, the competition authority could enjoy full independence with its decisions not being subject to appeal to a ministry or the Government. Second, there could be a limited independence as is now the case of the Norwegian Competition Authority which is a separate administrative body but appeals from its decisions can be taken to the Ministry. The third option is one where competition law is executed by one or more separate ministries.

Concerning horizontal division, there are again three possible alternatives. First, competition law enforcement could be centralised in one authority. Second, there could be a decentralised competition policy where the sector regulators are responsible for competition policy in their sectors. Third, the competition agency and the sector regulators could share responsibility for enforcing general competition law, as is currently the case in many Norwegian markets, e.g. in electricity, telecommunications, and financial services.

A decentralised competition authority, i.e. sector regulators enforcing competition law, may potentially facilitate making trade-offs between different political objectives. However, since political preferences are hard to communicate, the regulator may be saddled with ambiguous objectives leaving it more exposed to capture by the entities it regulates. Moreover, faced with conflicts between objectives, the regulator will have a tendency to choose the least controversial solution. Competition objectives will suffer because the negative consequences of reduced competition are less visible.

Overlapping or concurrent competition authorities introduces competition between competition agencies and lessens the chances of making mistakes. However, there will be inefficiencies due to duplication of competition expertise and enterprises will have a higher reporting burden.

The expert report noted that centralising competition policy functions has many advantages: efficiencies in employing specialised expertise; a one-stop-shop for affected enterprises; and a higher probability of having unambiguous objectives. It therefore favoured this solution. That left two issues to be addressed. The first was how to make the best use of the sector expertise found in the sector regulators. Some kind of co-operation between them and the competition authority needed to be established. Second, procedures would have to be instituted to ensure that proper trade-offs are made between competition

concerns and political objectives. This could be resolved, in cases involving special policy objectives, by subjecting decisions of the competition authority and the sector regulators to appeal to the appropriate ministry, with both the competition authority and the regulators having standing to bring such appeals. Where special objectives are not present, appeals should go to a special independent appellate body.

Following the Norwegian presentation, the Chairman turned the floor over to Denmark which was encouraged to: discuss their expert committee's findings on the respective roles of regulatory bodies and competition authorities; describe the prevailing division of labour; and comment on the extent to which the committee's findings were implemented particularly with respect to the telecommunications sector.

The Danish delegate began by noting that heavy sector specific regulation in the telecommunication sector was the main reason the expert committee was created. The principles of the committee's proposals were very general in nature. As a starting point it was agreed that competition rules should normally be monitored by the competition agency. The committee also addressed the problem of technical and economic regulation. It recommended that technical regulation should monitored by a sector specific agency. As for economic regulation, the committee found that when it follows closely the principles of the general competition law, such regulation should be monitored by the competition agency. On the other hand, when the general competition rules cannot be used, for instance where that is ruled out for political reasons, a sector agency should monitor economic regulation. That should also be the solution where it is manifestly more efficient to give the task to a sector specific agency.

The expert committee's proposals appeared to have had a significant impact on the telecommunications and railway laws. Technical regulation, governing things like quality, safety and environment etc., is the domain of the sector regulators in telecommunications and railways. Public service and fair price issues are again the domain of sector regulators. Determining correct prices is both very technical and political, hence not for competition authorities to decide. If one examines infrastructure access, in telecommunications, the sector authorities monitor prices but the competition authority monitors the competition and service issues involved in the agreements. In the railways sector, the competition authority monitors prices and all terms related to railway stations and the leasing of rolling stock.

At this point, the Chairman called on the Netherlands to address the specific issue of giving some regulatory functions to the competition authority and informing the roundtable as to whether that was actually happening.

One of the Dutch delegates began by mentioning two circumstances which were particularly important in the Netherlands: a new Competition Act came into force in 1998; and a liberalisation process is underway in a number of public utilities sectors. The delegate elucidated a number of general principles which guided decisions affecting the competition policy/regulation interface.

First of all, great importance was attached to consistency and this meant that general competition policy and general competition regimes should be relied on as much as possible. The new competition law applies to all sectors, and the Dutch competition authority has exclusive power to enforce it. Several steps, or organising questions, were mentioned in terms of determining how this principle should be applied.

Step one is "what should be the rules". The guiding principle here is restraint in establishing sector specific rules. If there are to be sector specific rules, step two is "who should supervise". Once again, restraint is to be shown. There should be no extra regulators unless they are really needed. There

are two alternatives to creating new regulators. The first is assigning supervision to the Dutch competition authority itself. The second is to create a chamber within the Dutch competition authority. Where a sector specific regulator outside the competition authority is set up, step three concerns defining the relationship between it and the competition authority.

In order to reduce the risk of different interpretations of competition terms, some of the decisions of a sector specific regulator are subject to the approval of the competition authority.

Turning to the implementation of these principles, at the time of the roundtable, in the electricity sector a bill was being discussed which could affect the degree to which agreement between the regulator and competition authority could be required. There was also some discussion of converting the sector regulator into a chamber within the competition authority. Things were quite different in the telecommunications sector, where the Parliament at the time of the roundtable was declining to require the telecommunications regulator, OPTA, to agree on certain matters with the competition authority. So the only agreement actually required at the time of the roundtable was one on general policy guidelines established by both OPTA and the Dutch competition authority.

The Chairman found it interesting that even in countries which have addressed the issues in a systematic way, sector specific solutions are still adopted for somewhat mysterious reasons. He expressed the hope that subsequent discussion would clarify why a universal approach is rejected even when it is explicitly considered. He then moved the discussion from theory to practice.

2. Diversity of models

The Chairman noted that there is a wide diversity of models across countries. He gave the floor to the New Zealand delegation to explain its unique solution.

The New Zealand delegate noted that its submission focused primarily on how telecommunications and electricity have performed under “light-handed regulation”, which the delegate said had three parts. First, a reliance on the emergence of competition and the prohibitions contained in the general competition law, i.e. the Commerce Act, to control anticompetitive behaviour. Second, industry specific information disclosure designed to render transparent the operation of firms having monopoly power. Third, the threat of heavier handed regulation such as price control if monopoly power is abused. Access to essential facilities in New Zealand is determined by negotiations between the parties which have recourse to the courts to stem any anticompetitive behaviour. Under this approach, New Zealand has not found any need to establish industry specific regulators.

So how has light-handed regulation worked in practice? First, looking at telecommunications, since the introduction of such regulation, competition has emerged in most segments of the industry and has led to substantial improvement in productivity, service quality, and prices. In particular, long-distance prices have fallen sharply. However, competition in the area of local services has taken longer to emerge than anticipated. This delay was caused in part by the inter-connection dispute between Telecom, the incumbent, and a new entrant, Clear. The negotiations remained deadlocked until the Government threatened intervention. Telecom and Clear finally entered into an agreement in March 1996. The Telecom/Clear agreement has been a watershed. Since then a number of new inter-connection agreements have been made. In summary, the Government is satisfied that competition is increasing satisfactorily in telecommunications.

Turning to electricity, this sector has been subject to a series of reforms beginning in 1987 but not yet completed. However, in the wholesale electricity market the reforms have already delivered a range of benefits that include low wholesale prices and reductions in generation costs. However, there are problems in the generation sector where prices are not competitive and there is overcapacity. These problems arise because E.C.N.Z., controlling about 70 per cent of total electrical generation capacity is still dominant. In future, E.C.N.Z. will be split into three state owned companies. In the distribution sector, there is insufficient pressure on costs and profits. In the retail sector, little competition has developed and important entry barriers remain. For example, integrated line and retail companies frustrate competition by making line access difficult. To address these problems the Government will strengthen the information disclosure requirement and separate line businesses from retail and generation businesses. The Government is also examining ways to enhance the threat of price control.

The general conclusion was that light-handed regulation has been successful in New Zealand's telecommunications sector, while in electricity the reforms are still incomplete so the regime is not yet fully tested. New Zealand has learned some important lessons in making light-handed regulation work. First, competition law must be effective - the laws, penalties, and remedies provisions must promote compliance and court processes must be efficient. Currently there are important weaknesses in these regards in New Zealand. Second, the threat of heavy-handed regulation must be real, and this is not the case in New Zealand. Despite these problems, light-handed regulation has generally been successful in New Zealand.

The Chairman noted a contrast between the New Zealand and Australian experiences, since the latter country has a regulatory domain but some of the sector specific rules are enforced by the Australian Competition and Consumer Commission (ACCC). He called on Australia to explain why the ACCC does not rely entirely on abuse of market power prohibitions, and to describe whether it behaves differently in its regulatory and competition law enforcement roles.

The Australian delegate began by noting that the ACCC is responsible for administering a generic law governing access to public utility infrastructures and performs as well some economic regulatory functions in areas like telecommunications, energy, transport (airports and rail), etc.. Australia felt that the courts were an unsuitable fora for dealing with access and similar complex issues. The delegate referred to the whole "atmospherics" of a court trial where one must prove that someone has committed an offence under the law when one is actually dealing with an economic question about whether or not to give access to a monopoly facility. There is also some difficult jurisprudence to contend with. In Australian law one must prove that the purpose of exclusion was to lessen competition or to exclude competitors. Moreover, in addition to delays and legalism, the courts are generally very poor when it comes to devising an appropriate remedy, e.g. defining exact terms of access.

Once the decision was made to rely on a regulator rather than the courts, the question arose - which regulator? It seemed that ongoing convergence in several sectors mitigated against having industry specific regulators. Such regulators may also be vulnerable to capture and fail to reap certain economies of scale. This led to favouring some form of general regulation.

The next question was whether the regulation should be done at the state or federal level. Since markets are increasingly national, it made sense to shift the issues to the federal level unless they were purely state matters.

The next issue was whether to set up a general regulator or assign such functions to the competition agency. The argument which carried the day in favour of the competition agency was the

belief that these regulatory questions involve large questions about competition and it is best to approach them from a competition policy perspective.

In response to the Chairman's question about what difference it makes to consolidate regulatory functions within the competition agency, the delegate noted that when the ACCC makes regulatory decisions, a competition outlook is being applied. Such consolidation also makes it possible to co-ordinate all the policy instruments, whether consideration is being given to mergers, exclusive dealing, anticompetitive agreements, access questions or price control issues. Consolidation also facilitates realising certain economies of scope and fosters greater consistency across areas - for example, looking at prices, one can apply the same approach to setting the cost of capital and determining what sorts of assets should be taken into account for valuation purposes.

The delegate conceded that there are some problems with the Australian approach - it puts "a lot of eggs in one basket", and there are dangers in monopoly in any realm.

On the relationship between technical and economic regulation, the Australian approach has been to separate the two giving the economic regulatory questions to the competition agency and the technical issues to an agency that does not have any economic or competition questions to address. The telecommunications technical regulator has a close relationship with the competition agency, e.g. cross membership, and when technical issues involve competition questions, decisions basically have to be approved by the competition regulator.

On the federal/state question, national regulation is exercised by the ACCC, e.g. telecommunications, airports, gas pipelines, electricity transmission, national rail lines etc.. There are also state regulators handling purely state market matters, as in the distribution and retailing of gas or electricity.

In transferring discussion to Germany, the Chairman noted that it had adopted a system quite different from the Australian one. Under the German Telecommunications Act, certain competition policy functions were transferred from the Federal Cartel Office (FCO) to the telecommunications regulator. Yet the competition authority remains competent regarding the enforcement of some abuse of dominance prohibitions. The Chairman wished to know more about the theory behind this policy and how it was working.

One of the German delegates began by noting that the Chairman's questions were political as well as legal in nature. All political solutions, of course, are part of a compromise. The delegate added that in the field of telecommunications and posts, the German legislator had decided that general competition law was insufficient, therefore it created a sector specific regulatory regime administered by an independent regulatory authority.

Since sector specific authorities can lead to the loss of uniform legal enforcement, a co-ordination of tasks is laid down in the Telecommunications Act. In its own area of competence, e.g. fee regulation, the regulator has to give the FCO an opportunity to be heard. The FCO's legal position is strongest as regards the geographic product market definition and market dominance. In both fields, the regulator can only decide in concurrence with the FCO. This was laid down to ensure legal consistency regarding the definition of geographic product markets and market dominance which feature critically in the regulation of, for example, telecommunication tariffs. In practice, there were some initial difficulties of co-ordination between the regulatory authority and the FCO, and the Ministry of Economics, which supervises both the FCO and telecoms regulator, has tried to improve the situation.

The role of a regulatory authority in Germany is not an easy one since it must co-ordinate with well established and experienced competition authorities at both the national and European level. No doubt the regulatory authority benefits from pressures exerted upon it to develop real competition in the field of telecommunications and posts.

Another German delegate, this time from the FCO, added her remarks, beginning by reminding delegates that the competition authority must live within the framework set out by the legislature. Naturally, it does not particularly like having a "competitor" in applying antitrust laws. There are some problems with uncertainties about jurisdiction and also fears, so far unfounded, concerning possible inconsistent application of competition laws.

The practical areas of conflicts between the FCO and the telecommunications regulator do not include determining whether Deutsche Telecom has a market dominating position - that much is clear to everyone - nor is there any conflict as regards geographical or product market definitions. The problems instead arise when one turns to addressing abuses of a market dominating position. The telecoms regulator must decide on an appropriate level for tariffs. When the incumbent enjoys a monopolistic position, it is very difficult to find comparable competitive markets in order to judge whether prices are indeed too high. This is clearly a difficult issue which is made even harder because the telecoms regulator is required to consider not just actual current costs, but also what an efficient level of costs would be. The FCO has offered its opinion on these matters, and as previously noted, it has a formal right to be heard. Nevertheless, the telecommunications regulator is free to decide as it sees fit. The worst scenario would be where the FCO disagrees so strongly with the regulator's decision that it resorts to applying European competition law - where it continues to retain exclusive competence.

The Chairman called upon the United Kingdom to shed light on its unique and challenging treatment of the interface between regulators and competition agencies, noting that in the United Kingdom there is full "competition" between regulators and competition authorities, i.e. there is concurrent power to enforce competition law, and there were no plans to change that in the Competition Bill then before Parliament.

A United Kingdom delegate (from the Office of Fair Trading - "OFT") opened by developing the arguments for and against concurrency in competition powers between the OFT and the main sector regulators, with particular reference to the pending Competition Bill (which she noted did not contain merger provisions). She cited four reasons in favour of giving concurrent enforcement powers to both regulators and the OFT:

1. there is a very clear overlap between competition law and licence (i.e. economic regulatory) regimes, particularly those aimed at addressing market power - e.g. price caps prohibit undue discrimination;

2. concurrency maintains the current position - sector regulators already had competition powers, although these were weaker than their regulatory powers;

3. the sector regulators have considerable specialist expertise, knowledge, and resources which should be tapped; and

4. it is a good idea to encourage evolution from regulation to competition and this is fostered, as is currently seen in regards to the UK's telecoms regulator (OFTEL), by giving both powers to the same body.

The arguments put forward against concurrent powers are:

1. there will be a risk of inconsistent decisions (greater detail on this issue follows later);

2. the OFT alone has experience in dealing with EC cases and certain enforcement techniques such as dawn raids;

3. if there are a number of authorities employing the same powers there is less efficient use of resources; and

4. there could well be difficulties in handling cross-sectoral companies, e.g. agreements between a water company and another company outside the purview of the water regulator.

The delegate said that only the first argument was significant. She then moved on to identify what she saw as the seven main reasons why the United Kingdom can have a system which delivers consistent decisions despite the number of bodies enforcing competition law:

1. there are procedural rules in the new legislation applying in common to the competition agency and regulators, e.g. a common point of notification (the OFT);

2. common guidelines adopted by the OFT and the regulators - in future, the sector regulators will probably want to amplify them, but they will be doing so in the context of the whole set, i.e. explaining how particular aspects will apply in their special markets;

3. the competition agency and the concerned regulators will consult with each other on cases;

4. the Bill generally requires the competition office, sector regulators, courts and final tribunal to follow EC jurisprudence;

5. in practice the majority of decisions will be made by the OFT, so it will have the greatest impact on the case law and precedents;

6. the OFT is providing extensive training in law and economics to both its own case officers and regulatory staffs; and

7. there will be a common tribunal hearing appeals against decisions by the OFT and the concerned sector regulators.

In calling at this point on the United States, the Chairman noted that it illustrates a considerable variety of models being applied in various sectors.

One of the United States delegates began her remarks by noting that until Germany and the United Kingdom had presented their views she was beginning to marvel at the degree of Cartesian logic evidenced - a neat division of the competition, technical and economic regulation. The United States in contrast has proceeded in a very practical, pragmatic manner inspired perhaps by its common law tradition. The US accordingly developed a number of different systems; perhaps every possible system, and there are some pros and cons to each.

One option is to have regulators be the principal enforcers of competition law in their domains. US experience with this has not been particularly good. The delegate referred to the Surface

Transportation Board (STB) handling of the 1996 Union Pacific/Southern Pacific railroad merger. The STB applies both a competition law and public interest standard to such mergers. At the time of the particular railroad merger mentioned, US competition agencies were just developing their joint efficiency guidelines, and were quite concerned about how efficiencies would be evaluated in that Union Pacific/Southern Pacific merger. At the end of the day, the competition agencies' views were ignored. Post merger, significant bottlenecks developed in the western railroad system, tending to validate the competition agencies' concerns.

The US has never really tried the Australian option, i.e. giving economic regulation to the competition agencies. Maybe this is because the US competition agencies (DOJ/FTC) do not like to think of themselves as regulators. They see antitrust imposing negative not affirmative duties on market players, i.e. telling companies not to fix prices or not to merge in certain situations. Moreover, in devising remedies, US competition agencies have a clear preference for structural as opposed to behavioural remedies. The DOJ/FTC would feel very uncomfortable undertaking some of the functions the Australian competition agency seems to be at ease with.

The model most frequently applied in the US is division of competencies, i.e. the competition agencies as primary enforcers of the competition law and regulatory authorities as principal enforcers of what can be loosely described as economic and technical regulations (a distinction that the delegate was somewhat uncomfortable making).

An optimal division of labour between competition authorities and regulators is difficult to make, and could in practice be quite informal. This works surprisingly well in the US. Even concurrent authority over competition issues tends to produce relatively good results. For example, though the DOJ now has jurisdiction to enforce competition law in the airline domain, the Department of Transportation (DOT) retains some vestiges of its former authority (which was not applied very well in the merger domain at least) particularly as regards airline agreements in the international area. The DOJ advises the DOT and there are really very few instances where the two agencies disagree. There is therefore a good sense of cross-fertilisation as the agencies work together and the regulators take on more and more the competition agencies' viewpoint. As another example, the federal energy regulator essentially adopted the DOJ/FTC Guidelines as their model for reviewing mergers. The dialogue between the agencies includes the DOJ/FTC promoting the use of structural instead of behavioural remedies. In the airline field, the DOT's competition authority is actually worded exactly like the FTC's authority (prohibiting unfair and deceptive practices and unfair competition). The DOT has recently completed an interesting paper concerning unfair and exclusionary practices in the airline industry (see the Federal Register, April 1998) particularly as regards dominant carrier behaviour in relation to their hub cities.

After the Chairman opened the floor to general discussion, the Korean delegate expressed concern that in specific areas like telecommunications and electricity, sector specific regulators tend to be oriented towards producers' interests. This creates a potential for conflict between competition agencies which naturally have a consumer orientation. He asked other delegates for their views on how to deal with such conflict. Unfortunately, his question was left largely unanswered.

The Mexican delegate stated that he was very impressed with the remarks made by the New Zealand delegate, i.e. that it is possible to live without industry specific regulators. He suggested that this point of view had considerable merit especially since the domain covered by natural monopolies seemed to be shrinking.

A German delegate pointed out that her country's Telecommunications Act contained a sunset provision requiring the Monopolies Commission to revisit the continuing need for regulation.

A representative of the United Kingdom's OFTEL believed that the answer to the question, "Why have regulators at all?", was actually contained in the New Zealand delegate's reference to the lengthy NZ Telecom/Clear inter-connection dispute. If there had been a prescriptive rule in place regarding inter-connection, that dispute would not have gone on so long. Indeed the European telecommunications regulators have a specific role, enshrined in the EU telecommunications directive, to sort out inter-connection disputes within a fairly compressed time frame (i.e. in a matter of months, rather than years).

A delegate from the new Dutch telecommunications regulator, began by noting the "slight" bias in the roundtable against sector specific regulators, which he of course understood and to some extent agreed with. He stated, however, that there are public interests in regulation which extend beyond, or possibly conflict with, competition interests. His daily practice principally revolves around trying to make competition work. Specific rules covering open network provisions specified by the European Union are derived from competition law and sometimes even strengthen competition law.

The delegate moved on to consider the potential for inconsistent application of competition policy arising from the Netherlands granting a sector exemption to competition law for telecommunications. The Dutch Parliament was interested in assuring both consistent application of competition law, and discharging responsibilities arising from European Union and WTO rules regarding telecommunications. The latter appear to require setting up an independent telecommunications regulator. The compromise reached in the Netherlands, as earlier pointed out, was that the telecommunications regulator is not bound to seek the competition authority's approval for individual regulatory decisions, but is obligated to reach agreement at a general policy level. This does not mean that co-operation between these authorities is limited to making general agreements. For example, the general competition agency and the telecommunications regulator jointly investigate cross-subsidisation within the telecommunications and post company in the Netherlands. They also voluntarily jointly discuss making one-stop shopping available and measures to discourage forum shopping.

A representative from the United Kingdom's OFTEL very much agreed first of all with the delegate representing the Netherlands telecommunications regulator, and with a number of comments made by his competition agency colleague. In particular, about the absolute need to be clear about what rules are necessary in a particular sector and to continually prune them back to the required bare minimum. Once the appropriate rules for a particular market at a particular time are identified, it is much easier to determine what the appropriate regulatory structure is then to try to deal with this matter in the abstract.

The delegate disagreed with a point made in the Netherlands written submission, i.e. the supposed dichotomy between the competition agency and sector specific regulator approaches. In particular he objected to the notion that in contrast with competition policy, sector specific rules amount to continuous regulation, are temporary, and pro-active. This absolutely does not, in his opinion, have to be the case. Initially in the UK, there was resort to continuous interference in BT's pricing, but the telecom regulator has pretty well withdrawn from that approach and aims to do so completely within the next few years. The rules which OFTEL tries to put into place are of the nature of permanent rules; generic rules applying to particular kinds of situations, not to one narrow circumstance. In that sense they are very similar to general competition law being based on the same general philosophy and economic analysis.

The delegate then turned to the Australian presentation and in particular to the view that regulatory questions major on competition and the best kind of authority to deal with competition questions is a competition agency. This actually cuts both ways. There will be situations even in a fairly

competitive market (he referred delegates to paragraph 24 of the Secretariat's paper which he said captured the UK view) where ongoing specific prescriptive rules are necessary because market failures are endemic and competition will not solve them. A competition authority is less inclined because, he suggested, of its general approach to be sympathetic to those kinds of rules and will tend not to apply them even when they are appropriate. Nevertheless, he accepted the general proposition that, as far as possible, these economic questions should be dealt with by general competition law.

The Australian delegate basically agreed with the UK telecom regulator's point about things cutting both ways. In areas undergoing deregulation where there are network externalities and incumbents with a very high degree of market power, more rule making is needed than would be typically forthcoming from a competition agency. If only a bit more is required, jurisdiction should be given to the competition agency, but if a lot more is needed a sector regulator approach should be adopted.

The Australian delegate agreed as well with the earlier expressed view that competition regulators basically enforce negative prohibitions rather than make positive regulatory decisions, but added that antitrust is getting a lot more complicated now especially in network areas. It is increasingly looking at complex solutions going beyond negative prohibitions. In the US Microsoft case for example, some positive requirements are being sought in terms of the products that Microsoft supplies etc.. In other jurisdictions, when questions of access to essential facilities have arisen it has been necessary to take the extra step of asking on what terms and conditions, and this leads into some difficult pricing questions.

A United States delegate suggested that it would help to think of the various reasons for regulation. Most of the people in the room would probably agree that the free-market is the best way to do things except where the market does not work. The delegate favoured free exit and entry into markets, but would not want free entry into brain surgery services. Of course if there were free entry, brain surgeons making enough mistakes would probably find few customers and exit the market, but that is a pretty inadequate way to assure quality in this market. As regards prices, these should usually be set in the markets but the delegate thought of a monopoly cable company that supplies his cable services and did not believe it should be free of price supervision. Again on quality control, food and drug products should probably be examined by an independent third party before they appear on the market. He also alluded to complicated situations where there are other policy considerations to be satisfied like universal service in the telephone business. In sum, the delegate emphasised the need to identify the different reasons for regulation when designing institutional arrangements.

3. Overlaps and co-operation between regulatory agencies and competition authorities in countries which have adopted the model of mandate driven division of labour between both types of institutions.

The Chairman remarked that most countries have adopted some variation of a mandate driven division of labour with its inherent overlap in competencies, i.e. companies are subject to both competition authorities and sector regulators. In reading the various country contributions there seems to be quite a number of different ways to try to ensure consistent decision-making by both sets of agencies.

The Chairman highlighted two points made in the Canadian contribution: advocacy is very important when the regulatory regime is being established; and regulatory forbearance should be urged in sectors undergoing the transition to greater competition. The Chairman was especially interested in the forbearance policy and asked Canada for further comment.

The Canadian delegate agreed that advocacy is indeed essential. As to the regulatory forbearance policy, this is rooted in the Canadian Telecommunications Act, but is making its way slowly into other sectors such as electricity and natural gas. There are two distinctions that need to be made about this concept. Pursuant to the Telecommunications Act, forbearance can be either mandatory or discretionary. Under the mandatory regime, the regulator must withdraw or "forbear" regulating when convinced that market forces are achieving the objectives of regulation. It has been recognised that the market power test is the appropriate one to apply to determine whether this point has been reached. Under discretionary forbearance, the regulator may choose not to regulate when that would be consistent with the objectives of Canadian telecommunications policy.

Where a regulator chooses to forbear, the Competition Bureau takes the position that the Competition Act applies fully to a sector, i.e. the “regulated conduct defence” does not apply.

Though the regulatory authority alone decides whether or not to forbear, the competition authority is called upon to make representations relating to it. This is what happened in 1996 when the regulation of long-distance telephone services was forborne subject to specific conditions (see the Canadian submission).

The Chairman noted that the Mexican system, in several sectors, gives the competition authority a specific role in the regulatory process. Nevertheless, he noted that there are apparently still problems of overlap and called upon Mexico for comment.

The Mexican delegate noted that regulatory reforms have taken place in several sectors since the mid 1980s. Those sectors are now simultaneously regulated by the 1993 competition law and sector specific laws containing both technical and economic regulation. The Mexican approach clearly falls within the mandate driven division of labour category. Matters pertaining to competition law are exclusively enforced by the Competition Commission and sector specific regulations are the exclusive responsibility of sector regulators.

The competition law applies to all sectors of the economy even if they are regulated by specific regulation. Those activities considered to be strategic under the Constitution can only be conducted through State monopolies, but the agents performing such activities cannot engage in anticompetitive practices. Thus the Competition Commission is fully empowered to investigate and prohibit anticompetitive practices and mergers in all sectors, even those having their own specific economic regulation. On the other hand, technical and economic regulation applying to specific sectors are enforced by regulators. Some sectors such as natural gas and insurance, are regulated by a specific commission. Others, such as telecommunications and banking are regulated both by commissions and certain Federal ministries. Transport and pharmaceuticals, among others, are directly regulated by the pertinent ministry.

While the Competition Commission is not empowered to apply economic regulation such as price controls or quality standards, it still has an important role to play in the design and implementation of sector specific regulatory mechanisms. This role derives from two factors. First, the competition law empowers the Competition Commission to give its opinion on changes in other laws and regulations that concern competition. Most of the opinions and recommendations of the Competition Commission have been taken into account by the relevant authorities. Notwithstanding this fact, the Competition Commission has had problems especially in the area of telecommunications where the regulator has heard but rejected the Commission's views. Second, a number of sector specific laws and regulations explicitly provide a role for the Competition Commission. In particular, it may be asked to determine whether effective competition exists in a market, or whether one of the participants has potential market power. If market power is found, the appropriate regulator can impose specific regulations. The Competition

Commission has so far played this role in two instances relating to the telecommunications and airlines sectors.

In 1997, the Competition Commission carried out an *ex officio* investigation and declared that the incumbent telephone operator Telmex had substantial market power in several markets. Telmex is currently challenging that conclusion and it is not yet known whether the regulatory agency will eventually impose the additional regulations provided for in the telecommunications law.

In addition to the above, the Competition Commission is empowered to pre-authorise the participation of economic agents in privatisations or in public options for concessions, licences and permits. Here, the Competition Commission normally applies an analysis similar to that used in merger reviews. The Competition Commission has exercised this function in a number of instances including railroads privatisations, and public auctions for licensing of seaport services and use of radio spectrum.

Despite the clear division of labour, there are still some important overlaps. For example, both the telecommunications law and the competition law have provisions about some monopolistic practices such as cross-subsidisation and discriminatory treatment. However, the telecommunications law prohibits these practices *per se*, whereas under the competition law, a rule of reason approach is applied.

The experience of the Competition Commission as regards the coexistence of both competition law and sector specific regulations is still quite limited and mostly concerns the initial stages of regulatory reform. So far, the Competition Commission has been most active in the design of regulations and the authorisation of new market participants. Direct consultation channels between the Commission and the regulators have not yet been fully and formally developed and more work is needed in this regard.

In conclusion, the Mexican Competition Commission has been very active in advocating deregulation and in identifying and screening potential new entrants in certain industries.

The Chairman commented that the Mexican contribution provides a good backdrop for considering the Spanish submission which he thought reflected some very important difficulties of co-operation and co-ordination between the competition authority and regulatory authorities. Perhaps this is because the concept of forbearance does not exist, or perhaps because there was not a very strong desire on the part of other regulators to co-ordinate themselves with the competition authority. The situation differs, however, from sector to sector. He invited the Spanish delegation to comment on the co-operation difficulties.

The Spanish delegate offered a summary review of inter-relationships between regulators and the competition authority in her country, beginning by outlining the main reasons for setting up regulatory bodies, i.e. a perceived need to apply in a neutral fashion, specialised expertise to the regulation of network infrastructure industries.

In sectors undergoing liberalisation, there used to be, and in most cases there still are, large publicly owned companies having close links to corresponding public ministries. There is therefore a serious risk of positive discrimination in their favour unless they are subject to regulation by independent bodies. The main characteristics of the two Spanish regulatory bodies, i.e. electricity and telecommunications commissions (both set up in the last four years), are that they are specialised by sector, and enjoy a certain degree of independence from the government.

Both the electricity and telecommunications commission are charged with a duty to promote the development of competition in their respective sectors and play an advocacy role in the drafting of laws

affecting their sectors. They can issue mandatory competition enhancing instructions to companies such as requiring non-discriminatory access to necessary inputs. The regulators can also act as arbitrators in the case of conflicts among sector participants, and have the capacity to impose solutions.

The creation of regulators in Spain has given rise, as in many other countries, to discussions about the appropriate relationship between them and the competition agency. During the course of adopting legislation setting up the regulatory bodies, there were several proposals to allow them to apply the competition law regarding restrictive practises and merger control. In fact, transitional arrangements were adopted allowing regulators, in concert with the competition authority, to impose merger control and investigate and decide concerning restrictive practises. The government soon saw that these arrangements presented some serious jurisdictional and other problems, and moved to change them. Framework laws have recently been adopted in both the electricity and telecommunications sectors clarifying the jurisdictions of the regulatory competition agencies.

Under the new laws, the main principles governing the relationship between regulatory and competition authorities are: competition agencies have exclusive competence in applying antitrust rules; and regulatory bodies have a duty to foster competition. They also retain the earlier mentioned advocacy and conflict resolution tasks. The competition authority must request the written views of the regulators in cases affecting their sectors but are not obligated to heed those opinions. In addition, the regulators can request intervention by the competition authority whenever they judge this necessary.

In theory, this division of functions is supposed to be complemented by co-operation between regulators and competition authorities. In actual practice, there is still a long way to go in terms of achieving real co-operation especially in the telecommunications domain.

At this point the Chairman turned to Italy where there is a system of reciprocal nonbinding opinions given by the competition and regulatory authorities to each other. He mused that given the recent transfer of competition law powers from the telecommunications agency to the competition authority, perhaps Italian regulators have a real incentive to co-operate with that authority.

The Italian delegate began by stating that in Italy there were no regulators when the competition law was adopted in 1990, and only two agencies other than the general competition agency had competition enforcement powers - the central bank and the audio-visual agency. When regulators were being set up there was first a need to determine exactly the regulators' mandates as enforcers of the competition law. The general approach was that jurisdiction should be decided on the basis of the relevant market rather than companies. Frequently, there is double competence by regulators and the competition authority, because a certain behaviour affects several markets, some under the jurisdiction of the regulators, and others under the competition authority. Inconsistent decisions have so far been avoided but there have been some co-ordination difficulties. A second important issue arose out of the need to apply a common instead of a sector by sector approach to antitrust issues. This is important in agreements and abuse of dominance cases, and particularly so in the merger domain where regulators may believe they can tackle competition problems in a regulatory manner, i.e. allowing mergers subject to conditions which competition agencies would not find helpful.

When a new law was passed in 1995 establishing the electricity regulator, the competition agency focused, successfully, on securing exclusive competence for the competition agency to enforce competition rules in the electricity sector.

In 1997, a new authority was formed to regulate telecommunications and absorb the functions of the previously existing pluralism of information authority. The competition authority again was able to

obtain exclusive jurisdiction to apply competition law, meaning that such powers were recovered from the pluralism of information authority. The delegate believed that one reason for this development was that the new authority had not yet been set up hence unable to lobby on its own behalf.

The recently instituted Italian regulatory regimes include a great deal in the way of encouraging exchange of information and general co-operation between regulators and the competition authority. The energy regulatory regime is functioning quite well. It is too early to tell how things will go in the telecommunications sector.

The Chairman noted a striking contrast between how things are going in Finland and, for example, Spain. He called on Finland to shed more light on the happy state of co-operation between the regulators and competition authority in his country.

The Finnish delegate began by pointing out that Finland had adopted the mandate driven division of labour approach. The competition authority has exclusive competence to apply competition law and sector specific regulators apply economic and technical regulation to particular sectors. She focused in particular on the various overlaps between competition and regulatory authorities, concentrating especially on the telecommunications and electricity sectors.

Overlap can be seen for example as regards pricing issues. Neither in the telecoms nor electricity sectors are there any formal agreements between the competition and regulatory authorities governing how the overlapping areas will be addressed. Rather, these problems are handled in practice in an informal fashion. For example, in the electricity sector, the competition authority (i.e. the Office of Free Competition, OFC) and regulatory body have recently agreed that the numerous complaints regarding electricity transmission prices are best handled by the electricity regulator since it has better access to the required accounting information plus a thorough knowledge of the sector.

Generally speaking, relations between the OFC and regulators are conducted on a case by case basis. In addition to constant informal co-operation, the authorities request the other's written opinion on pending cases and/or draft decisions. It is also worth mentioning that both the Telecommunications and Electricity Acts contain provisions allowing the regulator to decline to investigate issues falling under the competition statute and to instead turn the case or part of it over to the OFC.

The informal interplay between the competition and regulatory agencies have so far worked rather well. There are at least three reasons for this. First, the Finnish competition authorities were very much involved in the drafting of the sector specific regulations. Second, liberalisation of the telecommunications and electricity sectors has resulted in the competition and regulatory authorities having the same goals, i.e. to increase efficiency by increasing competition. Third, the small size of the Finnish economy and the limited number of companies on the market facilitates solving issues in an informal, case by case fashion. This flexible approach to co-operation is desirable even preferable in the current situation of ongoing liberalisation and rapid change in the two industries concerned. In the future, a more advanced and formal means of co-operation might be needed.

The Chairman noted that the Japanese submission illustrates yet another way in which regulators and competition authorities may co-operate, i.e. administrative co-ordination. He sought further detail as to how this actually functions - how does its start, what are the results, and who takes the initiative.

The Japanese delegate commenced by noting that he was expressing the viewpoint solely of the Japanese competition authority. As concerns the initiative issue, he stated that as early as 1982 the competition authority, i.e. Japanese Fair Trade Commission (FTC) sought an overall review of Japanese

regulation. It has continued since then to urge ministries and concerned agencies to abolish or modify unnecessary or redundant regulations. By the early 1990s, deregulation had become one of the government's top policy priorities. Deregulation includes review of exemptions to the application of competition law. Here too, the JFTC is playing the central role.

There are three categories of exemptions: those set out in the Antimonopoly Act itself; others contained in an exemption act; and those contained in various industry specific acts.

Concerning the degree to which administrative reviews of regulation are systematic, the answer is that this differs according to issue and sector. The review of exemptions is an example of a very systematic approach - all ministries and concerned agencies have been requested to consult with the competition agency. In other instances, a flexible case by case approach is being applied.

Regarding the question of whether administrative review applies to individual regulatory decisions, in some cases it does. For example, it applies to administrative guidance. In accordance with the three-year deregulation action plan adopted by the Japanese government in April 1998, all ministries and agencies are requested to consult with the Japanese competition agency before they issue administrative guidance.

Do regulators have to take into account the views of the JFTC? They certainly do when it comes to new measures presented to the Diet. In that case, a regulator, Ministry, or administrative agency must first seek approval by the Cabinet which decides by unanimous vote. Before the Cabinet decision, the agencies or ministries concerned are required to co-ordinate with all the relevant government agencies including the competition agency. One could say that, in an extreme case, this system gives the competition agency a veto against any legislation which it opposes. In most cases, however, the matter would be settled rather informally.

In many instances, the advice of the competition agency has been disregarded, but this should become more infrequent as the role of the competition agency continues to be upgraded.

In introducing the Swedish presentation, the Chairman remarked that the post and telecommunications agency (PTS) apparently has extensive powers and has been given a co-ordinating role in relation to competition and consumer protection law. He sought greater detail about that co-ordinating function.

The Swedish delegate began by explaining that the competition and regulatory agencies have different, not concurrent obligations or functions. Only the Competition Authority is competent to apply the Competition Act. PTS received its co-ordinating function at the same time it obtained, in 1997, enhanced powers regarding the determination of interconnection charges. It obtained those extra powers in order to streamline a process that had potentially involved (i.e. if the parties could not agree) both the Competition Authority and PTS. The competition agency welcomed this development and did not see it as a limitation of its own powers or jurisdiction.

The Telecommunications Act did not spell out what was meant by PTS' co-ordinating role, but what has evolved is a series of regular meetings between the competition agency and PTS where the agencies inform one another and exchange information about recent cases. So far the experience has been very positive.

The Chairman commented that though Hungary does not have a long experience in terms of relationships between regulators and the competition agency, it illustrates yet another means of managing

the interface between them - one requiring unanimous decisions between regulators and the competition agency particularly in the merger area.

The Hungarian delegate provided further detail as to her country's approach beginning by reviewing the different methods applied by sector regulation and competition regulation. Sector regulation obliges market participants to do certain things or proscribes various actions, for example, set prices for certain products or services. It seeks to eliminate certain negative effects by to a certain degree replacing the market. In contrast, competition law centres on *ex post* prohibitions leaving market participants a considerably greater degree of freedom than is permitted within a sector regulation framework.

When the competition authorities are presented with a complaint against a regulated entity, the first issue which must be decided is whether the entity's behaviour was freely chosen as opposed to being required under regulation. If it was freely chosen, then competition law fully applies even though the sector is regulated. On the other hand, if the impugned behaviour was required by regulation, then the complaint is transferred to the regulatory authorities.

Regarding the division of labour in merger cases, the competition law requires parties to obtain the prior permission of the Competition Council if the transaction exceeds certain threshold levels. At the same time, the energy law as amended in March 1998 requires merging parties to obtain authorisation by the regulator which analyses the merger from a different perspective than applied by the Competition Council. For example, security of supply etc. would be considered by the energy regulator. In principle it is possible that the energy regulator and the Competition Council would come to a different decision as regards a merger. As of June 1998, there had not yet been a merger reviewed by the two agencies. It is clear that the sector regulators and competition authority will have to make contact with one another in order to better appreciate the other's point of view even if they continue to act independently.

4. The Specific Case of the European Union

The next issue the Chairman wished to consider was a very specific, European matter. The European Commission's submission basically centred on the state action doctrine and the extent to which actions by regulators can or cannot be subject to European law. Other submissions indicate that competition authorities in some European countries feel that the EU through its directives is promoting the establishment and development of regulators in ways creating problems of overlap and co-ordination with competition authorities.

The European Union delegate began his presentation by noting that matters of harmonising national laws are determined by the Council rather than the European Commission. It is ultimately for the legislator to choose the most appropriate form of regulation. This does not mean that the European Commission shirks its responsibility. It is the Commission which initiates proposed legislation and clearly needs to take very careful account of the desires and requirements of each member state's own particular regulatory tradition. Of course the Commission has its own views which, simply put, are that usually competition policy should be universal in scope and application and that any exceptions to that, and there have been some, should be very carefully thought out.

Whether or not the Member States choose to regulate certain industries by sector specific regulation or by enhancing or extending the powers of the competition authority is essentially a matter for them. The principle of subsidiarity applies here. It is for individual governments to organise their

administrative affairs as they wish, and the European Commission should not, by the way in which proposed legislation is couched, indirectly influence those administrative decisions.

The delegate recalled one general point made in the Commission's submission, namely that the Treaty of Rome sets a framework for competition policy applicable to both companies and public authorities and imposes a whole series of specific and general requirements on the latter. There is a general requirement that Member States and their subordinate authorities should do nothing which impedes the achievement of the Treaty objectives. This means for example, as has been held by the European Court of Justice, that no national authority, at whatever level, can approve behaviour which would be contrary to the competition rules of the Treaty of Rome, for example they cannot approve a cartel between airlines.

The Chairman opened the floor to general discussion.

A Brazilian observer noted that the roundtable discussion was particularly relevant to Brazil. As part of a movement away from state monopolies in certain infrastructure areas, regulators have been set up during the past year in the telecommunications, electricity and oil sectors. The privatisation process has obvious implications for the structural aspects of the markets in question. Moreover, competition law enforcement is being invigorated. Brazil's arrangements regarding relationships between regulators and the competition authority are complex. The lead in part belongs to the independent competition agency, but two ministries, Justice and Finance, also play a role (particularly with respect to investigation and competition advocacy, and sector ministries not regulators have retained a general policy oversight, especially in sectors undergoing privatisation.

Brazil did not adopt a systematic approach to the regulation/competition interface, i.e. the legislator adopted a piecemeal case by case strategy in setting up the sector regulators. In general, however, it is fair to say that Brazil has adopted a system of concurrent competencies, hence co-operation between the regulators and competition authority is more than advisable.

A BIAC representative stated that effective deregulation is usually a process requiring a considerable period of time to set up new institutional arrangements and allow industries to change various established practices. Sorting out the role to be played by competition and by regulatory authority's during the deregulation transition period requires striking a delicate balance in sending appropriate investment signals to potential new entrants and mitigating actual or potential interim market power of incumbent businesses.

BIAC recognises that competition policy has an important role in the deregulation process. It can prevent significant restraints that would otherwise impede market access and undermine the benefits of reductions in state imposed barriers. But BIAC also wanted to note that competition policy must be applied sensitively recognising that industries undergoing transition, especially those facing significant innovation and technological improvement, can actually be harmed if competition authorities are over zealous in their missions.

Competition authorities, by and large lack the long accumulated industry expertise possessed by sector specific regulators. Competition authorities are rightfully concerned, however, that competition laws are applied in a careful and effective manner. BIAC believes that enhancing and protecting competition during deregulation may require that there be appropriate interim regulatory safeguards to ensure that the attainment of competition in the long-term actually occurs. In other words, in order to attract the kind of investment and growth required to ensure long-term competition there has to be a high degree of certainty. Business must know in advance of investing what the rules of the game will be in an

industry undergoing transition. Policy makers should proceed cautiously and carefully, recognising that transition cannot occur overnight and avoiding transforming the competition authority into a new price and market regulator.

Another BIAC representative added that different parts of the business community naturally have different views on the subject of regulation and regulatory exemptions. It depends on whether one is regulated or is a customer of a regulated industry. He commended the Mexican delegate's comments adding that Mexico has been more advanced than the US in railway deregulation. He opined that one of the United States delegates already raised the question which should be asked by both businesses and enforcement agencies, viz. what is the reason for regulation? Though there are divisions on the point, most people in the business community believe that regulation is warranted if and only if there is a natural monopoly.

The Mexican delegate noted that regulation is often claimed to be necessitated by a need to ensure universal service. He then pointed to the paradox that regulation itself often imperils universal service, e.g. by mandating flat rate structures despite markedly different costs of service.

Summary

The Chairman wound up the roundtable by noting that though the theory of regulation seems reasonably clear in terms of indicating where regulation could be usefully applied, the corresponding theory of appropriate regulatory institutional arrangements was much less clear. The three models presented in the course of the roundtable were all very interesting but do not lead to exactly the same result party because they begin from different political and legal environments. Several times the discussion revealed that in countries where the administrative branch of government was particularly involved in regulation, relationships between the competition authority and regulators are different from countries where the regulators are more independent of the executive branch. It was also clear that lobbying power has played a role in how institutional arrangements have been decided. It is very difficult at this point to have a unique theory of how institutional relationships should work. In the second part of the discussion delegates learned of several different attempts, some imposed by statute and others rather informal, to solve particular problems of overlapping competencies. There is no unique solution to the problems addressed in this roundtable.

AIDE-MÉMOIRE DE LA DISCUSSION

par le Secrétariat

Introduction

Le Président du Comité du droit et de la politique de la concurrence introduit le sujet en formulant quatre observations.

Premièrement, les régimes réglementaires spécifiques couvrent de nombreux secteurs dans les pays de l'OCDE. Ils sont particulièrement répandus dans des secteurs tels que les télécommunications, l'électricité, les chemins de fer et le gaz naturel, mais se retrouvent aussi dans la radio et la télévision, l'aviation civile, la télévision par câble, les transports maritimes, les produits pharmaceutiques, la pétrochimie, les produits minéraux radioactifs, les boissons alcooliques, l'assurance, la banque, les transports interurbains par autocar et le camionnage, la distribution de l'eau, etc.

Deuxièmement, un coup d'œil rapide aux notes soumises par les pays montre qu'il n'existe pas de modèle unique décrivant la relation entre les autorités chargées de réglementations sectorielles et les autorités de la concurrence, que ce soit d'un pays à l'autre ou parfois même à l'intérieur d'un même pays. Un modèle particulier, à savoir la division des tâches dans le cadre d'un mandat, semble toutefois un peu plus répandu que les autres.

Troisièmement, les pays qui ont déréglementé un peu plus tôt que les autres ont apparemment adopté une approche relativement pragmatique, qui diffère d'un secteur à l'autre. Les pays qui ont libéralisé un peu plus tard ont, semble-t-il, suivi une démarche plus systématique.

Enfin, la terminologie utilisée varie considérablement suivant les pays. Certains établissent une distinction entre la réglementation technique, la réglementation économique et l'application du droit de la concurrence. Mais parfois, la politique de la concurrence semble être intégrée dans la "réglementation économique". Dans plusieurs pays, on observe également une tendance à utiliser indifféremment les termes "réglementation économique" et "réglementation technique". Il convient donc d'élaborer une définition plus précise de la réglementation économique pour la distinguer à la fois de la politique de la concurrence et de la réglementation technique.

Le Président organise la table ronde en plusieurs parties : la première traitera des principes, la seconde de la diversité des moyens de gérer l'interaction entre la politique de la réglementation et la politique de la concurrence, avec une analyse comparative des modèles en question, tandis que la troisième section est centrée sur un problème qui semble se poser fréquemment dans l'approche de la division du travail dans le cadre d'un mandat, à savoir comment remédier au chevauchement entre l'office de la concurrence et les organismes chargés de la réglementation. Une brève section finale sera consacrée à une question spécifique de l'Union européenne.

1. Principes

Le Président appelle l'attention sur trois contributions nationales explorant de la façon la plus générale la relation entre le droit de la concurrence et la réglementation sectorielle. Il note que l'Autorité norvégienne de la concurrence a commandé en 1997 un rapport d'experts afin d'évaluer dans quelle mesure la responsabilité de la politique de la concurrence devrait être déléguée à des organismes subordonnés et comment les tâches de mise en œuvre du droit de la concurrence et des réglementations devraient être réparties. Dans le contexte norvégien, les organismes de réglementation et les autorités chargées de la concurrence conservent des liens étroits avec les ministères techniques et le ministère des Affaires économiques. En 1997 également, ces mêmes questions ont été étudiées au Danemark, où l'on a conclu que, pour l'essentiel, les fonctions de la politique de la concurrence devraient être concentrées dans l'autorité chargée de la concurrence, mais qu'il fallait aussi des organismes de réglementation sectorielle. Enfin, aux Pays-Bas, où la primauté est clairement accordée désormais au droit de la concurrence, un projet de grande envergure amorcé en 1996 a consisté à évaluer la surveillance des sociétés de services publics privatisées. L'étude a porté sur des analyses approfondies des différences entre la réglementation sectorielle et l'application du droit général de la concurrence, sur la nécessité de faire preuve de prudence en instaurant des régimes sectoriels et sur la relation appropriée entre les organismes de réglementation sectorielle et l'Autorité de la concurrence.

Le délégué norvégien est invité à faire le premier exposé. Il décrit principalement les avantages et les inconvénients de diverses façons d'organiser l'autorité de la concurrence et les organismes sectoriels de réglementation. Il souligne deux questions importantes. La première concerne la division verticale des tâches, c'est-à-dire le degré approprié de délégation des fonctions de politique de la concurrence à des autorités subordonnées. La seconde concerne la division horizontale du travail, c'est-à-dire la répartition des fonctions d'exécution entre l'autorité de la concurrence et les responsables de la réglementation sectorielle.

En ce qui concerne la division verticale, le rapport d'experts de la Norvège définit trois solutions possibles. Premièrement, l'autorité de la concurrence pourrait bénéficier d'une indépendance totale, ses décisions n'étant pas soumises à l'agrément d'un ministère ou du gouvernement. Deuxièmement, l'indépendance pourrait être limitée, comme c'est aujourd'hui le cas de l'Autorité norvégienne de la concurrence qui est un organe administratif séparé mais dont les décisions peuvent être contestées auprès du ministère. La troisième option est celle dans laquelle le droit de la concurrence est appliqué par un ou plusieurs ministères distincts.

S'agissant de la division horizontale, il existe encore trois solutions possibles. Premièrement, l'application du droit de la concurrence peut être centralisée entre les mains d'une autorité unique. Deuxièmement, il peut exister une politique de la concurrence décentralisée, des organes sectoriels de réglementation étant chargés de l'appliquer dans leurs secteurs respectifs. Troisièmement, l'agence de la concurrence et les organes sectoriels pourraient partager la responsabilité de la mise en œuvre du droit général de la concurrence, comme c'est aujourd'hui le cas sur de nombreux marchés norvégiens, par exemple dans l'électricité, les télécommunications et les services financiers.

Une autorité de la concurrence décentralisée, dans laquelle les organes sectoriels appliquent le droit de la concurrence, est susceptible de faciliter les arbitrages entre différents objectifs politiques. Toutefois, étant donné que les préférences politiques sont difficiles à transmettre, l'organisme de réglementation pourrait être encombré par des objectifs ambigus, avec un risque accru de récupération de la réglementation par les entités qu'ils sont censés contrôler. De surcroît, confronté aux conflits entre objectifs, le responsable de la réglementation aura tendance à choisir la solution qui prête le moins à

controverse. Les objectifs dans le domaine de la concurrence en souffriront car les conséquences négatives d'une réduction de la concurrence seront moins visibles.

Le chevauchement ou la coexistence entre plusieurs autorités chargées de la concurrence instaure une compétition entre ces organismes et réduit les risques de commettre des fautes. Toutefois, les doubles emplois dans le domaine des compétences sont une source d'inefficience, et les entreprises sont soumises à des obligations de déclaration plus lourdes.

Le rapport d'experts note que la centralisation des fonctions de la politique de la concurrence présente de nombreux avantages : des gains d'efficience liés à l'emploi de compétences spécialisées, un guichet unique pour les entreprises concernées, et une probabilité accrue d'avoir des objectifs dépourvus d'ambiguïté. C'est donc cette solution qui est préconisée. Il reste deux questions à résoudre. La première est celle de savoir comment utiliser au mieux l'expertise des organismes sectoriels de réglementation. Une certaine forme de coopération entre ces derniers et l'autorité de la concurrence doit être mise en place. Deuxièmement, il convient d'instaurer des procédures permettant des arbitrages appropriés entre les considérations dans le domaine de la concurrence et les objectifs politiques. Dans les cas où interviennent des objectifs d'action spéciaux, on peut y parvenir en veillant à ce que les décisions de l'autorité de la concurrence et des organismes de réglementation sectorielle puissent être contestées devant le ministère compétent, l'autorité de la concurrence comme les organismes de réglementation sectorielle étant habilités à faire appel. En l'absence d'objectifs spéciaux, les recours devraient être soumis à un organe d'appel indépendant spécial.

A la suite de l'exposé norvégien, le Président donne la parole au Danemark qui est invité à : analyser les conclusions de son comité d'experts sur les rôles respectifs des organes de réglementation et des autorités de la concurrence, décrire la division du travail en vigueur et indiquer dans quelle mesure les conclusions du comité ont été mises en œuvre, plus particulièrement en ce qui concerne le secteur des télécommunications.

Le délégué danois note tout d'abord que la création du comité d'experts a été principalement motivée par le poids de la réglementation dans le secteur des télécommunications. Les propositions du comité reposent sur des principes très généraux. Au départ, il a été admis que les règles de la concurrence devraient normalement faire l'objet d'un suivi par l'agence de la concurrence. Le comité a également abordé le problème de la réglementation technique et de la réglementation économique. Il préconise que la réglementation technique soit suivie par une agence sectorielle spécifique. En ce qui concerne la réglementation économique, le comité estime que lorsqu'elle suit étroitement les principes du droit général de la concurrence, elle devrait être suivie par l'agence de la concurrence. En revanche, quand les règles générales de la concurrence ne peuvent pas être appliquées, par exemple lorsqu'elles sont exclues pour des raisons politiques, un organisme sectoriel devrait surveiller la réglementation économique. Cette solution doit être également retenue lorsqu'il est manifestement plus efficient de confier la tâche à un organisme sectoriel.

Les propositions du comité d'experts ont eu apparemment un impact notable sur les lois relatives aux télécommunications et aux chemins de fer. La réglementation technique, qui vise des aspects tels que la qualité, la sécurité, la protection de l'environnement, etc., est du ressort des organismes de réglementation chargés des télécommunications et des chemins de fer. Ces organismes sont également compétents en ce qui concerne le service public et l'équité des prix. La détermination des prix corrects est à la fois très technique et politique, et ne relève donc pas des autorités chargées de la concurrence. Si l'on considère l'accès à l'infrastructure, dans le secteur des télécommunications les organismes sectoriels surveillent les prix mais c'est l'autorité chargée de la concurrence qui suit les questions de concurrence et

de service intervenant dans les accords. Dans le secteur ferroviaire, l'autorité de la concurrence surveille les prix et toutes les conditions relatives aux gares et à la location de matériel roulant.

Le Président invite ensuite les Pays-Bas à traiter la question de l'attribution de quelques fonctions réglementaires à l'autorité de la concurrence et à indiquer à la table ronde si ce transfert a lieu effectivement.

L'un des délégués néerlandais mentionne d'abord deux circonstances particulièrement importantes aux Pays-Bas : une nouvelle loi sur la concurrence est entrée en vigueur en 1998 et un processus de libéralisation est en cours dans plusieurs secteurs de services d'utilité publique. Le délégué décrit un certain nombre de principes généraux qui ont guidé les décisions affectant l'interface politique de la concurrence/réglementation.

Tout d'abord, une grande importance a été accordée à la cohérence, ce qui implique que l'on s'appuie autant que possible sur la politique globale de la concurrence et les régimes généraux de la concurrence. Le nouveau droit de la concurrence couvre tous les secteurs, et l'Autorité néerlandaise de la concurrence dispose de pouvoirs exclusifs pour le faire appliquer. Plusieurs étapes ou questions d'organisation ont été mentionnées en ce qui concerne les modalités d'application de ce principe.

La première étape consiste à déterminer quelles devraient être les règles. Le principe directeur consiste ici à faire preuve de circonspection avant de mettre en place des règles sectorielles spécifiques. S'il doit exister des règles spécifiques, la deuxième étape consiste à savoir qui devrait surveiller. Une fois encore, la retenue s'impose. Il ne devrait pas y avoir d'organisme de tutelle supplémentaires, à moins qu'ils ne soient réellement nécessaires. Il existe deux solutions pour créer de nouveaux services de réglementation. La première consiste à assigner la surveillance à l'Autorité néerlandaise de la concurrence. La seconde consiste à créer une chambre spéciale au sein de l'Autorité. Si un organisme sectoriel spécifique extérieur à l'Autorité de la concurrence est mis en place, la troisième étape concerne la définition de la relation entre cet organisme et l'Autorité.

Afin de réduire le risque d'interprétations divergentes des conditions de la concurrence, certaines des décisions d'un organisme sectoriel sont soumises à l'agrément de l'Autorité de la concurrence.

S'agissant de la mise en œuvre de ces principes, au moment où se déroule la table ronde un projet de loi sur le secteur de l'électricité est en cours d'examen et pourrait rendre plus ou moins nécessaire un accord entre l'organisme chargé de la réglementation et l'Autorité de la concurrence. Il est également question de convertir l'organisme de réglementation sectorielle en une chambre relevant de l'Autorité. La situation est bien différente dans le secteur des télécommunications, où le Parlement se refuse pour le moment à exiger que l'organe de réglementation des télécommunications, l'OPTA, s'entende sur certaines questions avec l'Autorité de la concurrence. Par conséquent, le seul accord effectivement requis au moment de la table ronde concerne des lignes directrices de politique générale élaborées à la fois par l'OPTA et par l'Autorité néerlandaise de la concurrence.

Le Président note avec intérêt que même dans les pays qui ont traité les questions d'une manière systématique, des solutions sectorielles sont encore adoptées, pour des raisons quelque peu mystérieuses. Il exprime l'espoir que les débats ultérieurs permettront d'expliquer pourquoi une approche universelle est rejetée même lorsqu'elle est explicitement envisagée. Il quitte ensuite la théorie pour lancer le débat sur les aspects pratiques.

2. Diversité des modèles

Le Président fait observer que les modèles varient considérablement d'un pays à un autre. Il invite la délégation de la Nouvelle-Zélande à exposer sa solution originale.

Le délégué de la Nouvelle-Zélande fait observer que la note de son pays traite principalement des performances des télécommunications et du secteur de l'électricité dans le cadre d'une "réglementation allégée", qui comprend trois éléments. Premièrement, le recours à l'apparition de la concurrence et aux interdictions contenues dans le droit général de la concurrence, à savoir la loi sur le commerce, pour réprimer le comportement anticoncurrentiel. Deuxièmement, la publication d'informations sectorielles spécifiques destinées à rendre transparent le fonctionnement des entreprises qui détiennent un pouvoir de monopole. Troisièmement, la menace d'un alourdissement de la réglementation, notamment par un contrôle des prix, si le pouvoir de monopole est utilisé de façon abusive. L'accès aux installations essentielles en Nouvelle-Zélande est déterminé par des négociations entre les parties qui s'adressent aux tribunaux pour contrer tout agissement anticoncurrentiel. Eu égard à cette approche, la Nouvelle-Zélande n'a jugé aucunement nécessaire de mettre en place des organismes de tutelle sectoriels.

Comment la réglementation allégée a-t-elle fonctionné dans la pratique ? Premièrement, si l'on examine les télécommunications, depuis la mise en place de cette réglementation la concurrence a émergé dans la plupart des segments du marché et elle a entraîné une amélioration substantielle de la productivité, de la qualité du service et des prix. En particulier, les prix des appels longue distance ont fortement baissé. Toutefois, la concurrence sur les services locaux a mis plus de temps que prévu à apparaître. Ce retard a été dû en partie au conflit sur l'interconnexion entre Telecom, l'exploitant en place, et Clear, un nouveau concurrent. Les négociations sont restées dans l'impasse jusqu'à ce que le gouvernement menace d'intervenir. Les deux sociétés ont fini par conclure un accord en mars 1996. L'accord Telecom/Clear a marqué un tournant. Depuis lors, plusieurs nouveaux accords d'interconnexion ont été signés. En définitive, le gouvernement constate que la concurrence se développe de façon satisfaisante dans les télécommunications.

Pour sa part, le secteur de l'électricité a été soumis à une série de réformes qui ont été lancées en 1987 mais qui ne sont pas encore achevées. Sur le marché de gros, elles ont déjà eu plusieurs retombées bénéfiques, notamment une baisse des prix de gros et une réduction des coûts de production. En revanche, dans le secteur de la production, les prix ne sont pas compétitifs et il existe un excédent de capacité. Ces problèmes sont dus au fait que ECNZ, qui contrôle environ 70 pour cent des capacités totales de production d'électricité, domine encore le marché. A terme, ECNZ sera démantelé pour donner naissance à trois compagnies publiques. Dans le secteur de la distribution la pression sur les coûts et les bénéfices est insuffisante. Dans le secteur du détail, la concurrence ne s'est guère développée et il subsiste d'importantes barrières à l'entrée. Par exemple, l'intégration entre les compagnies propriétaires du réseau de transport et les compagnies de vente au détail entrave la concurrence en rendant difficile l'accès au réseau. Pour résoudre ces problèmes, le gouvernement renforcera les obligations de publicité et séparera les entreprises de transport des entreprises de distribution au détail et de production. Le gouvernement étudie aussi les moyens de rendre plus opérante la menace d'un contrôle des prix.

D'une manière générale, la réglementation allégée en Nouvelle-Zélande a été efficace dans le secteur des télécommunications, tandis que dans celui de l'électricité les réformes sont encore incomplètes de sorte que le régime n'a pas encore été bien mis à l'épreuve. La Nouvelle-Zélande a tiré quelques enseignements importants dans ce domaine. D'une part, le droit de la concurrence doit être efficace – les lois, pénalités et recours doivent favoriser le respect des dispositions et les procédures judiciaires doivent être efficientes. A l'heure actuelle, des carences majeures existent dans ces domaines en

Nouvelle-Zélande. D'autre part, la menace d'une réglementation lourde doit être réelle, ce qui n'est pas le cas dans ce pays. En dépit de ces problèmes, la réglementation allégée s'est montrée généralement efficace en Nouvelle-Zélande.

Le Président relève un contraste entre l'expérience de la Nouvelle-Zélande et celle de l'Australie : ce dernier pays a un domaine réglementaire mais certaines des règles sectorielles sont mises en application par l'Australian Competition and Consumer Commission (ACCC). Il invite l'Australie à expliquer pourquoi l'ACCC ne s'appuie pas entièrement sur les interdictions de l'abus de pouvoir de marché et à indiquer si cet organisme se comporte différemment selon qu'il joue son rôle réglementaire ou qu'il assure la mise en œuvre du droit de la concurrence.

Le délégué australien indique tout d'abord que l'ACCC est chargée d'administrer une loi générique régissant l'accès aux infrastructures d'utilité publique et qu'elle exerce aussi quelques fonctions réglementaires économiques dans les télécommunications, l'énergie, les transports (aéroports et chemins de fer), etc. L'Australie estime que les tribunaux ne sont pas une instance appropriée pour traiter de l'accès et de questions complexes du même ordre. Le délégué évoque l'"atmosphère" d'un procès, au cours duquel il faut prouver que quelqu'un a commis une infraction à la loi, alors qu'il s'agit en fait d'une question économique, à savoir s'il faut ou non donner accès à un service de monopole. En outre, il faut tenir compte d'une jurisprudence difficile. En droit australien, on doit démontrer que l'exclusion avait pour but d'amoindrir la concurrence ou d'évincer des concurrents. Par ailleurs, indépendamment des retards et des arguties juridiques, les tribunaux sont généralement très inefficaces quand il s'agit d'élaborer un remède approprié, par exemple de définir les conditions exactes de l'accès.

Une fois la décision prise de recourir à un organisme de réglementation et non aux tribunaux, la question suivante a porté sur le type d'organisme. La convergence en cours dans plusieurs secteurs militait apparemment contre la mise en place d'organismes réglementaires par branche. Ces organismes sont également vulnérables au "captage" de la réglementation et peuvent se montrer incapables de produire certaines économies d'échelle. On a donc privilégié une forme de réglementation générale.

La question suivante était celle de savoir si la réglementation devait être mise en place au niveau des Etats ou au niveau fédéral. Etant donné que les marchés sont de plus en plus nationaux, il a paru logique de transférer les questions à l'échelon fédéral à moins qu'elles n'aient un caractère purement étatique.

Ensuite, il a fallu décider de mettre sur pied un organisme général de réglementation ou d'attribuer ces fonctions à l'agence de la concurrence. La balance a penché en faveur de celle-ci car on a estimé que ces aspects réglementaires impliquent d'importantes questions de concurrence et qu'il vaut mieux les aborder du point de vue de la politique de la concurrence.

En réponse à la question du Président sur l'intérêt d'un regroupement des fonctions réglementaires au sein de l'agence de la concurrence, le délégué note que lorsque l'ACCC prend des décisions réglementaires, c'est l'optique de la concurrence qui prévaut. Ce regroupement permet aussi de coordonner tous les instruments d'action, que l'on examine les fusions, les contrats d'exclusivité, les accords anticoncurrentiels, les questions d'accès ou les questions de contrôle des prix. L'intégration des fonctions facilite aussi la réalisation de certaines économies de gamme et favorise une plus grande cohérence d'une domaine à l'autre – s'agissant des prix, par exemple, on peut appliquer la même démarche pour fixer le coût du capital et pour déterminer quels types d'actifs devraient être pris en compte à des fins d'évaluation.

Le délégué admet que l'approche australienne pose quelques problèmes – il y a "trop d'œufs dans le même panier", et dans tout domaine le monopole est source de dangers.

En ce qui concerne la relation entre réglementation technique et réglementation économique, la démarche australienne a consisté à séparer les deux, en confiant les questions de réglementation économique à l'agence de la concurrence et les questions techniques à un organisme qui n'a pas de questions d'économie ou de concurrence à traiter. L'organisme de réglementation technique des télécommunications est en relation étroite avec l'agence de la concurrence, du fait par exemple que certains membres sont présents simultanément dans les deux organismes, et lorsque les points techniques font intervenir des questions de concurrence, les décisions doivent pour l'essentiel être approuvées par l'organisme de réglementation de la concurrence.

S'agissant du partage de la question Etat fédéral/Etats fédérés, la réglementation nationale est exercée par l'ACCC, notamment pour les télécommunications, les aéroports, les gazoducs, le transport de l'électricité, le réseau ferré national, etc. Il existe également des organismes réglementaires au niveau des Etats, chargés de questions de marché intéressant exclusivement l'Etat, par exemple pour la distribution et la vente au détail de gaz ou d'électricité.

S'adressant à l'Allemagne, le Président note que celle-ci a adopté un système très différent du régime australien. En vertu de la loi sur les télécommunications, certaines fonctions de la politique de la concurrence ont été transférées de l'Office fédéral des ententes (OFE) à l'autorité de régulation des télécommunications. Pourtant, l'autorité de la concurrence demeure compétente pour l'application de certaines interdictions d'abus de position dominante. Le Président désire en savoir plus sur le fondement théorique à l'origine de cette politique et sur la façon dont elle fonctionne.

L'un des délégués allemands fait observer tout d'abord que les questions du Président ont un caractère à la fois politique et juridique. Toutes les solutions politiques reflètent bien entendu un compromis. Le délégué ajoute que dans le domaine des télécommunications et de la Poste, le législateur allemand a estimé que le droit général de la concurrence était insuffisant, aussi a-t-il créé un régime réglementaire sectoriel administré par une autorité indépendante.

Etant donné que les organismes sectoriels peuvent conduire à une perte d'uniformité dans l'application de la loi, une coordination des tâches est prévue dans la loi sur les télécommunications. Dans son propre domaine de compétence, en particulier la réglementation tarifaire, l'organe de réglementation doit donner à l'OFE la possibilité de se faire entendre. La position juridique de l'Office est particulièrement solide en ce qui concerne la définition géographique des marchés de produits et la position dominante sur le marché. Dans ces deux domaines, l'organisme de réglementation ne peut décider qu'en concertation avec l'OFE. Cette disposition a été prise pour veiller à la cohérence juridique de la définition des marchés de produits géographiques et de la position dominante sur le marché, qui sont des aspects critiques de la réglementation des tarifs des télécommunications, par exemple. Dans la pratique, il y a eu quelques difficultés initiales de coordination entre l'autorité réglementaire et l'OFE ; le Ministère de l'Economie, qui exerce sa tutelle à la fois sur l'OFE et sur le régulateur des télécommunications, s'est efforcé d'améliorer la situation.

Le rôle d'un organisme de réglementation en Allemagne n'est pas aisé, car il lui faut agir en coordination avec des autorités de la concurrence bien établies et expérimentées au niveau national comme au niveau européen. Il ne fait pas de doute que l'organisme de réglementation tire profit des pressions dont il fait l'objet pour développer une véritable concurrence dans le domaine des télécommunications et de la Poste.

Une déléguée allemande représentant l'OFE rappelle aux délégués que l'autorité de la concurrence doit s'accommoder du cadre fixé par la législature. Naturellement, elle n'apprécie pas particulièrement d'avoir un "concurrent" pour l'application des lois antitrust. Il existe certains problèmes liés aux incertitudes concernant la juridiction ainsi que des craintes, jusqu'ici non fondées, d'une possible application incohérente des lois relatives à la concurrence.

Dans la pratique, les différends entre l'Office fédéral des ententes et le régulateur des télécommunications ne portent pas sur la question de savoir si Deutsche Telekom exerce une position dominante sur le marché – c'est clair pour tout le monde – ni sur les définitions géographiques ou les définitions de marché de produits. Les problèmes surgissent lorsqu'il s'agit de traiter l'abus de position dominante. L'organisme de réglementation des télécommunications doit décider du niveau approprié des tarifs. Quand l'opérateur en place bénéficie d'une position monopolistique, il est très difficile de trouver des marchés concurrentiels comparables pour déterminer si les prix sont effectivement trop élevés. C'est là manifestement une question difficile, d'autant plus que le régulateur des télécommunications doit prendre en compte non seulement les coûts courants effectifs, mais aussi un niveau de coûts présumé efficient. L'OFE a donné son avis sur ces questions et, ainsi qu'on l'a déjà noté, il a officiellement le droit de se faire entendre. Néanmoins, l'organisme de réglementation des télécommunications est libre de décider comme il le juge bon. Dans le pire des cas, l'OFE s'opposerait fortement à la décision du régulateur qu'il déciderait d'appliquer le droit européen de la concurrence – domaine dans lequel il conserve des compétences exclusives.

Le Président invite le Royaume-Uni à donner des précisions sur son traitement unique et fort intéressant de l'interface entre les organismes de réglementation et les agences chargées de la concurrence : en effet, au Royaume-Uni il existe une situation de pleine "concurrence" entre les uns et les autres, qui disposent de pouvoirs concurrents pour l'application du droit de la concurrence, et le projet de loi sur la concurrence soumis au Parlement ne prévoit pas de modifier ces dispositions.

Une déléguée du Royaume-Uni (représentant l'Office of Fair Trading, OFT) expose d'abord les arguments pour et contre l'exercice de pouvoirs concurrents par l'OFT et les principaux organismes de réglementation sectorielle dans le domaine de la concurrence, en s'appuyant en particulier sur la prochaine loi sur la concurrence (qui ne contient pas de dispositions relatives aux fusions). La déléguée cite quatre raisons en faveur de l'octroi de pouvoirs exécutifs concurrents aux organismes de réglementation et à l'OFT :

1. il y a un très net chevauchement entre le régime du droit de la concurrence et les régimes de licences (réglementation économique), en particulier ceux qui visent le pouvoir de marché – ainsi, les plafonds de prix interdisent une discrimination injustifiée ;

2. la mise en concurrence maintient la situation actuelle – les organismes sectoriels de réglementation avaient déjà des pouvoirs en matière de concurrence, même s'ils étaient plus réduits que leurs pouvoirs réglementaires ;

3. les organismes sectoriels de réglementation possèdent des compétences spécialisées, des connaissances et des ressources considérables qui devraient être exploitées ; enfin,

4. il est judicieux d'encourager l'évolution de la réglementation vers la concurrence et, comme le montre à l'heure actuelle le cas du régulateur britannique des télécommunications (OFTEL), on peut favoriser ce processus en conférant les deux formes de pouvoir au même organisme.

Les arguments à l'encontre de pouvoirs concurrents sont les suivants :

1. il y a un risque d'incohérence des décisions (ce point sera développé ci-après) ;

2. seul l'OFT possède une expérience des affaires à l'échelle de la CE et de certaines techniques de mise en application, notamment en cas d'OPA surprise ;

3. si plusieurs organismes recourent aux mêmes pouvoirs, l'utilisation des ressources est moins efficiente ; enfin,

4. des difficultés pourraient apparaître en ce qui concerne les entreprises multisectorielles, par exemple en cas d'accord entre une compagnie de l'eau et une autre société qui n'entre pas dans le champ de compétence de l'organisme de réglementation de l'eau.

La déléguée déclare que seul le premier argument est significatif. Elles expose ensuite les sept grandes raisons pour lesquelles le système du Royaume-Uni produit des décisions cohérentes en dépit du nombre d'organismes chargés de faire appliquer le droit de la concurrence :

1. la nouvelle législation comprend des règles de procédure qui s'appliquent à la fois à l'agence de la concurrence et aux organismes de réglementation, par exemple un point commun de notification (l'OFT) ;

2. les lignes directrices communes adoptées par l'OFT et les organes de réglementation – à l'avenir les autorités de tutelle sectorielles voudront probablement les amplifier, mais elles le feront dans le contexte du dispositif global, c'est-à-dire en expliquant comment certains aspects s'appliqueront sur leurs marchés spécifiques ;

3. l'agence de la concurrence et les organes de réglementation concernés se consulteront au sujet des affaires en cours ;

4. le projet de loi exige d'une manière générale que l'office de la concurrence, les organismes de réglementation sectoriels, les tribunaux et le tribunal de dernier ressort suivent la jurisprudence de la CE ;

5. dans la pratique, la majorité des décisions seront prises par l'OFT, qui exercera ainsi une influence majeure sur la jurisprudence et les précédents ;

6. l'OFT assure une formation approfondie en droit et en économie à ses propres agents et au personnel des organes de réglementation ; enfin,

7. un tribunal commun examinera les recours contre les décisions de l'OFT et des organismes sectoriels de réglementation concernés.

Avant de donner la parole aux Etats-Unis, le Président note l'extrême diversité des modèles appliqués dans les différents secteurs.

Une déléguée des Etats-Unis fait d'abord observer que, jusqu'à ce que l'Allemagne et le Royaume-Uni aient exposé leurs vues, elle a été frappée par la forte logique cartésienne des interventions précédentes – à savoir, la distinction bien tranchée entre la réglementation de la concurrence, la réglementation technique et la réglementation économique. A l'inverse, les États-Unis ont procédé d'une manière très pragmatique, inspirée peut-être par leur tradition du "common law". En conséquence, les

Etats-Unis ont élaboré plusieurs systèmes différents, peut-être même tous les systèmes possibles, chacun d'eux ayant ses avantages et ses inconvénients.

L'une des options consiste à faire des organismes de réglementation les principaux exécutants du droit de la concurrence dans leurs domaines respectifs. L'expérience des Etats-Unis à cet égard n'est pas particulièrement satisfaisante. La déléguée évoque le traitement par le *Surface Transportation Board* (STB) de la fusion des compagnies de chemins de fer Union Pacific et Southern Pacific en 1996. Pour ce type de fusion, le STB applique à la fois le droit de la concurrence et un critère d'intérêt public. A l'époque de la fusion en question, les agences de la concurrence des Etats-Unis venaient à peine d'entreprendre l'élaboration de leurs lignes directrices communes en matière d'efficience et s'inquiétaient de savoir comment les effets sur l'efficience seraient évalués dans cette fusion Union Pacific/Southern Pacific. En définitive, il n'a pas été tenu compte de leur point de vue. A la suite de la fusion, d'importants goulets d'étranglement se sont formés dans le réseau ferroviaire de l'Ouest, confirmant ainsi les craintes des autorités chargées de la concurrence.

Les États-Unis n'ont jamais réellement essayé l'option australienne, qui revient à confier la réglementation économique aux agences de la concurrence. C'est peut-être parce que les organismes américains chargés de la concurrence (Ministère de la Justice/FTC) ne tiennent pas à se considérer comme des organismes de réglementation. Ils estiment que la réglementation antitrust impose des droits négatifs et non affirmatifs aux acteurs du marché ; autrement dit, il est demandé aux entreprises de ne pas fixer de prix concertés ou de ne pas fusionner dans certaines situations. De surcroît, dans la mise au point de remèdes, les agences américaines de la concurrence marquent une nette préférence pour les mesures structurelles par opposition aux actions comportementales. Le Ministère de la Justice et la FTC seraient très réticents à assumer quelques-unes des fonctions que l'agence australienne de la concurrence exerce apparemment sans état d'âme.

Le modèle le plus souvent appliqué aux Etats-Unis est la division des compétences : les agences de la concurrence sont responsables au premier chef de l'application du droit de la concurrence tandis que les autorités réglementaires sont chargées principalement de mettre en œuvre ce qui peut être décrit globalement comme les réglementations économique et technique (cette distinction est assez floue aux yeux de la déléguée).

Une division optimale du travail entre les autorités de la concurrence et les organismes de réglementation est difficile à réaliser et pourrait dans la pratique être très informelle. Le processus est d'une efficacité surprenante aux Etats-Unis. Même le chevauchement des pouvoirs en matière de concurrence tend à produire des résultats relativement satisfaisants. Ainsi, bien que le Ministère de la Justice soit désormais compétent pour l'application du droit de la concurrence dans le secteur des transports aériens, le Ministère des Transports conserve quelques vestiges de ses pouvoirs antérieurs (qui ne s'exerçaient pas très efficacement, du moins dans le domaine des fusions), plus particulièrement en ce qui concerne les accords entre compagnies aériennes dans le secteur international. Le Ministère de la Justice informe le Ministère des Transports et il est très rare que les deux organismes soient en désaccord. Par conséquent, on observe une interaction féconde, du fait que les agences travaillent ensemble et que les organismes de réglementation adoptent de plus en plus le point de vue des autorités chargées de la concurrence. Pour citer un autre exemple, l'organisme fédéral chargé de la réglementation dans le secteur de l'énergie a adopté pour l'essentiel les lignes directrices Ministère de la Justice/FTC pour l'examen des fusions. Dans le cadre du dialogue entre les organismes, le Ministère de la Justice et la FTC veillent à promouvoir l'utilisation de remèdes structurels de préférence aux mesures comportementales. Dans le domaine du transport aérien, le mandat du Ministère des Transports en matière de concurrence est exprimé exactement dans les mêmes termes que celui de la FTC (interdire les pratiques déloyales et trompeuses ainsi que la concurrence déloyale). Le Ministère des Transports a mis récemment la dernière

main à un intéressant rapport sur les pratiques déloyales et les manœuvres d'éviction dans le secteur des transports aériens (voir le Federal Register, avril 1998) particulièrement en ce qui concerne les pratiques des transporteurs dominants dans leurs aéroports-pivots.

Le Président ayant ouvert le débat général, le délégué coréen se déclare préoccupé par le fait que, dans des domaines spécifiques comme les télécommunications et l'électricité, les organismes sectoriels de réglementation tendent à privilégier les intérêts des producteurs. Cela crée un risque de conflit avec les agences de la concurrence qui défendent naturellement le point de vue des consommateurs. Il sollicite les avis des autres délégués sur la façon de résoudre ce conflit. Malheureusement sa question reste pour l'essentiel sans réponse.

Le délégué mexicain se déclare très frappé par les observations du délégué de la Nouvelle-Zélande, à savoir qu'il est possible de se passer des organismes réglementaires sectoriels. Il estime que ce point de vue est d'autant plus justifié que le domaine couvert par les monopoles naturels semble se rétrécir.

Une déléguée allemande souligne que la loi sur les télécommunications de son pays contient une clause de validité temporaire, selon laquelle la Commission des monopoles est tenue de réévaluer la nécessité d'une réglementation durable.

Un représentant de l'OFTEL (Royaume-Uni) estime que la réponse à la question "faut-il vraiment des organismes de réglementation ?" est contenue dans la mention par le délégué néo-zélandais du conflit prolongé sur l'interconnexion entre NZ Telecom et Clear. Si une règle prescriptive sur l'interconnexion avait été en vigueur, ce conflit n'aurait pas duré si longtemps. Du reste, les autorités européennes de réglementation des télécommunications, en vertu d'un mandat spécifique défini dans la directive de l'UE sur les télécommunications, sont tenues de régler les différends sur l'interconnexion dans un délai relativement court (en quelques mois, et non en quelques années).

Un délégué de la nouvelle autorité néerlandaise de régulation des télécommunications constate d'abord que la table ronde a un "léger" parti pris à l'encontre des organismes sectoriels de réglementation, parti pris qu'il comprend tout à fait et approuve dans une certaine mesure. Il déclare toutefois que la réglementation traite de questions d'intérêt public qui dépassent les intérêts de la concurrence ou qui peuvent entrer en conflit avec ces derniers. Sa pratique quotidienne vise principalement à faire jouer la concurrence. Les règles spécifiques sur les réseaux ouverts édictées par l'Union européenne dérivent du droit de la concurrence et parfois même le renforcent.

Le délégué néerlandais évoque ensuite le risque d'un manque de cohérence dans l'application de la politique de la concurrence, du fait que les Pays-Bas accordent une dérogation sectorielle au droit de la concurrence dans le cas des télécommunications. Le Parlement néerlandais est en faveur d'une application cohérente du droit de la concurrence, mais dans le respect des règles de l'Union européenne et de l'OMC relatives aux télécommunications. Ces dernières exigent apparemment la mise en place d'une autorité indépendante de régulation des télécommunications. Comme indiqué précédemment, en vertu du compromis réalisé aux Pays-Bas, l'organisme de réglementation des télécommunications n'est pas tenu de solliciter l'agrément de l'autorité de la concurrence pour des décisions réglementaires individuelles, mais il doit parvenir à un accord avec celle-ci au niveau de la politique générale. Cela ne signifie pas que la coopération entre ces autorités se limite à des accords généraux. A titre d'exemple, l'agence générale de la concurrence et l'autorité de régulation des télécommunications enquêtent conjointement sur les péréquations tarifaires au sein de la société des télécommunications et de la Poste aux Pays-Bas. En outre, elles ont engagé de leur propre initiative des discussions en vue de mettre en place un guichet unique et de prendre des mesures pour décourager le "chalandage".

Un représentant de l'OFTEL (Royaume-Uni) se déclare tout à fait d'accord avec le délégué représentant l'organe de régulation des télécommunications des Pays-Bas et avec un certain nombre de commentaires faits par sa collègue de l'agence de la concurrence. Il confirme en particulier qu'il est absolument indispensable de préciser quelles règles sont nécessaires dans un secteur déterminé et de les alléger continuellement pour les maintenir au strict minimum requis. Une fois identifiées les règles pertinentes pour un marché donné, il est beaucoup plus facile de déterminer quelle est la structure réglementaire appropriée que d'essayer de résoudre le problème dans l'abstrait.

Le délégué est en désaccord sur un point de la contribution écrite des Pays-Bas, à savoir la dichotomie supposée entre l'approche de l'agence de la concurrence et celle de l'organisme sectoriel de réglementation. En particulier, il conteste l'idée que, contrairement à la politique de la concurrence, les règles sectorielles représentent une réglementation continue, sont temporaires et anticipatives. A son avis, cela n'a absolument pas lieu d'être. Au Royaume-Uni, on a eu recours initialement à une intervention continue dans la tarification de British Telecom, mais l'agence de régulation des télécommunications a largement abandonné cette approche et prévoit de le faire complètement d'ici quelques années. L'OFTEL s'efforce de mettre en place des règles permanentes, des dispositions génériques applicables à certains types de situations, et non à une circonstance très spéciale. En ce sens, elles sont très analogues au droit général de la concurrence, puisqu'elles reposent sur la même théorie globale et sur la même analyse économique que celui-ci.

Le délégué évoque ensuite l'exposé de l'Australie et en particulier l'idée que les questions de réglementation renvoient à la concurrence et qu'une agence de la concurrence est l'organisme le plus approprié pour traiter des questions de concurrence. De fait, cet argument est à double tranchant. Il existe des situations, même sur un marché assez concurrentiel (à cet égard, le paragraphe 24 du document du Secrétariat exprime à son avis le point de vue britannique) dans lesquelles des règles normatives spécifiques permanentes sont nécessaires parce que les carences du marché sont endémiques et que la concurrence ne les corrigera pas. Le délégué estime que, du fait de sa démarche globale, un organisme chargé de la concurrence est moins enclin à favoriser ce type de règles et aura tendance à ne pas les appliquer même si elles sont appropriées. Néanmoins, il reconnaît que, dans la mesure du possible, ces questions économiques devraient être prises en charge par le droit général de la concurrence.

Le délégué australien est d'accord dans l'ensemble avec le régulateur britannique des télécommunications sur le fait qu'il s'agit d'un argument à double tranchant. Dans les secteurs en voie de déréglementation où existent des externalités de réseau et des entreprises en place détenant un pouvoir de marché considérable, il est indispensable d'établir davantage de règles que n'en produirait normalement une agence de la concurrence. S'il faut seulement quelques règles supplémentaires, la tâche devrait être confiée à l'agence de la concurrence, mais s'il en faut bien davantage on devrait recourir à un organisme sectoriel de réglementation.

Le délégué australien approuve également une opinion déjà exprimée, à savoir que les régulateurs appartenant aux services de la concurrence appliquent pour l'essentiel des interdictions négatives au lieu de prendre des décisions réglementaires positives, mais il ajoute que l'action antitrust devient beaucoup plus compliquée aujourd'hui, surtout dans les secteurs de réseau. Elle envisage de plus en plus des solutions complexes allant au-delà des interdictions négatives. Dans l'affaire Microsoft, aux Etats-Unis, certaines exigences positives sont formulées en ce qui concerne les produits que Microsoft livre sur le marché, etc. Dans d'autres juridictions, lorsque des problèmes d'accès aux installations essentielles se sont posés, il a fallu aborder aussi les modalités et conditions, ce qui soulève des questions difficiles de tarification.

Un délégué des Etats-Unis estime qu'il serait utile de réfléchir aux diverses raisons justifiant la réglementation. La plupart des délégués présents conviendront probablement que le marché libre représente la meilleure solution, sauf quand il ne fonctionne pas. Le délégué se prononce pour la liberté de sortie et d'entrée dans les marchés, mais ne souhaite pas la libre entrée dans le segment des services de neurochirurgie. Bien entendu, si cette liberté existait, les neurochirurgiens qui commettraient suffisamment de fautes professionnelles n'auraient probablement que peu de clients et sortiraient du marché, mais ce serait là un moyen assez peu indiqué de maintenir la qualité sur ce marché. Quant aux prix, ils devraient normalement être fixés sur les marchés. Mais prenant l'exemple d'une compagnie de câble en situation de monopole, il ne pense pas que celle-ci devrait échapper à une surveillance tarifaire. S'agissant du contrôle de la qualité, les produits alimentaires et les médicaments devraient probablement être examinés par un organisme tiers indépendant avant leur mise sur le marché. Le délégué évoque également des situations complexes dans lesquelles il existe d'autres objectifs d'action à atteindre, notamment le service universel dans le secteur du téléphone. En résumé, le délégué souligne la nécessité de définir les différentes raisons justifiant la réglementation au moment d'élaborer des dispositifs institutionnels.

3. Chevauchements et coopération entre les organismes de réglementation et les autorités de la concurrence dans les pays qui ont adopté le modèle de la répartition des tâches par voie de mandat entre les deux types d'institutions

Le Président fait observer que la plupart des pays ont adopté une variante de la division du travail par voie de mandat, avec un chevauchement inévitable des compétences, c'est-à-dire que les entreprises sont assujetties à la fois aux autorités chargées de la concurrence et aux organismes sectoriels de réglementation. La lecture des diverses notes par pays fait apparaître nombre de moyens différents de veiller à la cohérence de la prise de décision dans les deux catégories d'organismes.

Le Président souligne deux points mis en avant dans la note du Canada : l'action de sensibilisation est très importante quand le régime réglementaire est en voie d'établissement, et il faut s'abstenir d'appliquer la réglementation dans les secteurs en transition vers une concurrence accrue. Le Président est particulièrement intéressé par la politique d'abstention et invite le Canada à fournir des précisions.

Le délégué canadien reconnaît que la sensibilisation est réellement indispensable. En ce qui concerne la politique d'abstention réglementaire, celle-ci a sa source dans la loi canadienne sur les télécommunications, mais elle se propage lentement dans d'autres secteurs tels que l'électricité et le gaz naturel. Deux distinctions s'imposent à propos de ce concept. En vertu de la loi sur les télécommunications, l'abstention peut être soit obligatoire, soit discrétionnaire. Dans le régime obligatoire, l'organisme de réglementation doit s'abstenir de réglementer lorsqu'il est convaincu que les mécanismes de marché réalisent les objectifs de la réglementation. Il a été reconnu que le critère du pouvoir de marché est le critère approprié à appliquer pour déterminer si ce stade a été atteint. En vertu de l'abstention discrétionnaire, l'organisme de tutelle peut décider de ne pas réglementer lorsque cette décision est compatible avec les objectifs de la politique canadienne en matière de télécommunications.

Quand un organisme décide de s'abstenir d'appliquer la réglementation, le Bureau de la concurrence considère que la loi sur la concurrence s'applique pleinement au secteur concerné ; autrement dit, on ne peut plus invoquer l'argument de "conduite réglementée".

Bien que l'autorité réglementaire décide seule de cesser ou non d'intervenir, l'autorité chargée de la concurrence est appelée à formuler des observations sur ce point. C'est ce qui s'est produit en 1996

quand la réglementation des services téléphoniques à longue distance a été suspendue sous réserve de conditions spécifiques (voir la note du Canada).

Le Président observe que le système mexicain, dans plusieurs secteurs, donne à l'autorité chargée de la concurrence un rôle spécifique dans le processus réglementaire. Néanmoins, constatant qu'il subsiste apparemment des problèmes de chevauchement, il invite le Mexique à formuler des commentaires.

Le délégué mexicain indique que des réformes de la réglementation ont eu lieu dans plusieurs secteurs depuis le milieu des années 80. Ces secteurs sont désormais régis simultanément par la loi sur la concurrence de 1993 et par des lois sectorielles spécifiques renfermant à la fois une réglementation technique et une réglementation économique. La démarche mexicaine relève clairement de la division du travail définie par voie de mandat. Les questions touchant le droit de la concurrence dépendent exclusivement de la Commission de la concurrence tandis que les réglementations sectorielles sont du ressort exclusif des organismes sectoriels respectifs.

Le droit de la concurrence s'applique à tous les secteurs de l'économie, même s'ils sont soumis à une réglementation spécifique. Les activités jugées stratégiques en vertu de la Constitution ne peuvent être exercées que par des monopoles d'Etat, mais les agents qui effectuent ces activités n'ont pas le droit de se livrer à des pratiques anticoncurrentielles. Par conséquent, la Commission de la concurrence est pleinement habilitée à ouvrir des enquêtes et à prononcer des interdictions visant des pratiques et fusions anticoncurrentielles dans tous les secteurs, même ceux qui ont leur propre réglementation économique. Par contre, la réglementation technique et économique applicable à des secteurs spécifiques est mise en œuvre par des organismes de réglementation. Certains secteurs tels que le gaz naturel et l'assurance sont régis par une commission spécifique. D'autres, notamment les télécommunications et la banque, sont réglementés à la fois par des commissions et par certains ministères fédéraux. Les transports et les produits pharmaceutiques, entre autres secteurs, sont sous la tutelle directe du ministère compétent.

Si la Commission de la concurrence n'est pas habilitée à appliquer des réglementations économiques telles que le contrôle des prix ou les normes de qualité, elle a encore un important rôle à jouer dans la conception et la mise en œuvre des mécanismes réglementaires sectoriels. Ce rôle résulte de deux facteurs. Premièrement, la législation de la concurrence autorise la Commission à donner son avis sur les modifications d'autres lois et réglementations qui intéressent la concurrence. La plupart des avis et recommandations de la Commission ont été pris en compte par les autorités compétentes. Néanmoins, la Commission a connu des problèmes, surtout dans le secteur des télécommunications où l'organisme de régulation a entendu puis récusé les vues de la Commission. Deuxièmement, un certain nombre de lois et réglementations spécifiques d'un secteur assignent explicitement un rôle à la Commission de la concurrence. En particulier, celle-ci peut être appelée à déterminer s'il existe une concurrence effective sur le marché, ou si l'un des acteurs détient une position de force potentielle. Si cette position dominante est mise en évidence, l'autorité de tutelle compétente peut imposer des réglementations spécifiques. La Commission a jusqu'ici joué ce rôle à deux reprises, dans les secteurs des télécommunications et du transport aérien.

En 1997, la Commission de la concurrence a effectué une enquête *ex officio* et annoncé que Telmex, l'opérateur téléphonique en place, détenait une importante position dominante sur plusieurs marchés. Telmex conteste actuellement cette conclusion et l'on ne sait pas encore si l'agence de réglementation imposera en définitive les mesures réglementaires additionnelles prévues par la loi sur les télécommunications.

Indépendamment des dispositions ci-dessus, la Commission de la concurrence a le pouvoir de délivrer des pré-autorisations aux agents économiques pour la participation à des privatisations ou à des enchères publiques concernant des concessions, licences et permis. Dans ces cas, la Commission applique normalement une analyse similaire à celle qui est utilisée dans l'examen des fusions. La Commission a exercé cette fonction à plusieurs reprises, notamment pour les privatisations de compagnies ferroviaires et pour les enchères publiques concernant les services portuaires et l'utilisation du spectre de fréquences hertziennes.

En dépit d'une répartition claire des tâches, il subsiste quelques chevauchements importants. Ainsi, la loi sur les télécommunications et la loi sur la concurrence renferment l'une et l'autre des dispositions sur certaines pratiques monopolistiques comme la péréquation tarifaire et le traitement discriminatoire. Toutefois, la loi sur les télécommunications interdit ces pratiques en tant que telles, tandis que le droit de la concurrence conduit à appliquer une règle de bon sens.

L'expérience de la Commission de la concurrence concernant la coexistence du droit de la concurrence et des réglementations sectorielles est encore très limitée et porte principalement sur les phases initiales de la réforme de la réglementation. Jusqu'ici, la Commission s'est montrée particulièrement active dans l'élaboration de réglementations et la délivrance d'autorisations à de nouveaux acteurs du marché. Les circuits de consultation directe entre la Commission et les organismes de réglementation n'ont pas encore été pleinement et formellement établis, et d'autres travaux sont nécessaires à cet effet.

En conclusion, la Commission mexicaine de la concurrence s'est employée très activement à promouvoir la déréglementation et à recenser et sélectionner les entrants potentiels dans certaines branches d'activité.

Le Président estime que la communication du Mexique fournit un contexte approprié pour examiner la note de l'Espagne qui, selon lui, révèle de très sérieuses difficultés de coopération et de coordination entre l'autorité de la concurrence et les autorités chargées de la réglementation. La raison en est peut-être que la notion de suspension de la réglementation n'existe pas, ou que les autres organismes réglementaires n'étaient pas très désireux de coordonner leur action avec celle de l'autorité chargée de la concurrence. La situation varie toutefois d'un secteur à l'autre. Le Président invite la délégation espagnole à commenter les difficultés en matière de coopération.

La déléguée espagnole résume les interrelations entre les organismes de réglementation et l'autorité chargée de la concurrence dans son pays, en indiquant d'abord les principales raisons de la mise en place d'organismes réglementaires, à savoir le besoin perçu d'appliquer d'une manière neutre des compétences spécialisées dans la réglementation des industries d'infrastructure de réseaux.

Dans les secteurs en cours de libéralisation, il existait et, dans la plupart des cas, il existe encore, de grandes entreprises publiques conservant des liens étroits avec les ministères compétents. Par conséquent, le risque est grand de voir une discrimination positive s'exercer en leur faveur si elles ne sont pas réglementées par des organismes indépendants. Les deux organismes espagnols de réglementation, à savoir les commissions de l'électricité et des télécommunications (créées toutes deux depuis moins de quatre ans) ont pour principale caractéristique d'être spécialisées par secteur et de bénéficier d'une certaine autonomie vis-à-vis de l'Etat.

Les commissions de l'électricité et des télécommunications sont chargées de promouvoir le développement de la concurrence dans leurs secteurs respectifs et de jouer un rôle catalyseur dans l'élaboration des lois affectant ces secteurs. Elles peuvent adresser des instructions contraignantes aux

entreprises, en exigeant par exemple un accès non discriminatoire aux intrants nécessaires. Les organismes de réglementation peuvent aussi arbitrer les différends entre les opérateurs d'un même secteur et ils ont le pouvoir d'imposer des solutions.

La création d'organes de réglementation en Espagne a donné lieu, comme dans beaucoup d'autres pays, à un débat sur la relation appropriée entre ces organismes et l'agence de la concurrence. Lors du processus d'adoption de la législation portant création de ces organismes, plusieurs propositions ont été soumises en vue de les autoriser à appliquer le droit de la concurrence dans le domaine des pratiques restrictives et du contrôle des fusions. De fait, les dispositions transitoires adoptées autorisent les organismes de réglementation, de concert avec l'autorité chargée de la concurrence, à imposer un contrôle des fusions et à enquêter et statuer sur les pratiques restrictives. Le gouvernement s'est rapidement aperçu que ces dispositions soulevaient de sérieuses difficultés d'ordre juridictionnel et d'autres problèmes, et il a entrepris de les modifier. Les lois-cadres adoptées récemment dans les secteurs de l'électricité et des télécommunications précisent les domaines de compétence des organismes chargés de la réglementation et de la concurrence.

Conformément aux nouvelles lois, les grands principes régissant la relation entre les autorités chargées de la réglementation et les autorités chargées de la concurrence sont les suivants : les agences de concurrence détiennent des compétences exclusives dans l'application des règles antitrust ; les organismes de réglementation ont le devoir de favoriser la concurrence. Ils conservent aussi les missions de sensibilisation et de règlement des différends mentionnés précédemment. L'autorité de la concurrence est tenue de solliciter l'avis par écrit des organismes de réglementation dans les affaires qui touchent leurs secteurs, mais elle n'est pas obligée d'en tenir compte. Par ailleurs, les organismes de réglementation peuvent demander l'intervention de l'autorité de la concurrence chaque fois qu'ils le jugent nécessaire.

En théorie, cette répartition des fonctions doit être complétée par une coopération entre les organismes de réglementation et les autorités chargées de la concurrence. Mais dans la pratique, beaucoup reste à faire pour instaurer une véritable collaboration, surtout dans le secteur des télécommunications.

Le Président se tourne alors vers l'Italie, où il existe un système d'échanges de vues non contraignants entre les autorités chargées de la concurrence et de la réglementation. Etant donné que les pouvoirs de l'agence des télécommunications en matière de droit de la concurrence ont été transférés récemment à l'autorité de la concurrence, les organismes italiens de réglementation sont peut-être réellement incités à coopérer avec cette dernière.

Le délégué italien précise d'abord qu'en Italie il n'existait pas d'organismes de réglementation lorsque la loi sur la concurrence a été adoptée en 1990, et que, exception faite de l'agence générale de la concurrence, deux organismes seulement disposaient de pouvoirs exécutifs en matière de concurrence : la Banque centrale et l'Agence de l'audiovisuel. Quand des organismes de réglementation sont mis en place il faut d'abord définir avec précision leur mandat en ce qui concerne l'application du droit de la concurrence. D'une manière générale, la juridiction devrait être délimitée sur la base du marché pertinent et non des entreprises. Fréquemment, il existe une double compétence des autorités de réglementation et de l'autorité de la concurrence, étant donné qu'un comportement déterminé affecte plusieurs marchés, dont certains relèvent des organismes de réglementation et d'autres de l'autorité de la concurrence. Les décisions incohérentes ont été jusqu'ici évitées, mais il y a eu quelques difficultés de coordination. Autre aspect essentiel, les questions antitrust exigent une approche commune, et non une démarche secteur par secteur. Ce point revêt de l'importance pour les accords et les abus de position dominante, surtout dans le domaine des fusions où les organismes de réglementation peuvent s'estimer en mesure de résoudre les problèmes de concurrence dans une optique réglementaire, c'est-à-dire en autorisant les fusions sous certaines conditions, solution que les agences de la concurrence ne jugeraient pas opportune.

Après la promulgation en 1995 d'une nouvelle loi portant création de l'organisme de régulation du secteur de l'électricité, l'agence de la concurrence s'est employée effacement à affirmer sa compétence exclusive dans l'application des règles de la concurrence à ce secteur.

En 1997, une nouvelle autorité a été mise en place pour réglementer les télécommunications et reprendre les fonctions de l'ancienne autorité pour le pluralisme de l'information. L'autorité de la concurrence a pu de nouveau obtenir une compétence exclusive en matière d'application du droit de la concurrence, reprenant ainsi les pouvoirs de l'autorité pour le pluralisme de l'information. Selon le délégué, l'une des raisons de cette évolution est que la nouvelle autorité n'avait pas encore été mise en place et ne pouvait donc pas défendre ses propres intérêts.

Les régimes réglementaires récemment institués en Italie favorisent dans une large mesure l'échange de renseignements et la coopération générale entre les organismes de réglementation et l'autorité de la concurrence. Le régime de réglementation du secteur de l'énergie fonctionne de façon très satisfaisante. Il est encore trop tôt pour dire s'il en sera de même dans le secteur des télécommunications.

Le Président relève un contraste frappant entre le fonctionnement du système en Finlande et, par exemple, en Espagne. Il invite la Finlande à donner des précisions sur la coopération satisfaisante entre les organismes de réglementation et l'autorité de la concurrence dans ce pays.

La déléguée finlandaise souligne d'abord que la Finlande a adopté l'approche de la division des tâches en vertu de mandats. L'autorité de la concurrence détient une compétence exclusive pour l'application du droit de la concurrence tandis que les organismes sectoriels appliquent la réglementation économique et technique à des secteurs particuliers. La déléguée met en lumière les diverses zones de chevauchement entre les autorités chargées de la concurrence et de la réglementation, en particulier dans les télécommunications et l'électricité.

Le chevauchement se manifeste par exemple pour les questions de tarification. Dans le secteur des télécommunications pas plus que dans celui de l'électricité il n'existe d'accord formel entre les autorités de la concurrence et de la réglementation sur les modalités de traitement des zones de double compétence. Dans la pratique, ces problèmes sont réglés de manière informelle. Par exemple, dans le secteur de l'électricité, l'autorité de la concurrence (c'est-à-dire l'Office de la libre concurrence, OLC) et l'organe de réglementation sont convenus récemment que les nombreuses plaintes touchant les prix du transport de l'électricité devaient être traitées de préférence par l'organe de régulation de l'électricité, car celui-ci a un plus large accès aux données comptables requises et une connaissance approfondie du secteur.

En règle générale, les relations entre l'OLC et les organismes de réglementation sont déterminées au cas par cas. Indépendamment de la coopération informelle constante, les autorités se consultent par écrit sur les affaires en cours et/ou sur les projets de décision. Il convient aussi de noter que la loi sur les communications et la loi sur l'électricité contiennent des dispositions autorisant l'organe de régulation à s'abstenir d'enquêter sur des questions qui entrent dans le domaine de la concurrence et à transmettre l'affaire, en tout ou partie, à l'OLC.

L'interaction informelle entre les agences de la concurrence et de la réglementation a jusqu'ici fonctionné de manière assez satisfaisante. Il y a au moins trois raisons à cela. Premièrement, les autorités finlandaises chargées de la concurrence ont participé très activement à l'élaboration des réglementations sectorielles. Deuxièmement, la libéralisation des secteurs des télécommunications et de l'électricité a fait que les autorités de la concurrence et de la réglementation ont le même objectif : accroître l'efficience en développant la concurrence. Troisièmement, la taille réduite de l'économie finlandaise et le nombre

restreint de sociétés sur le marché facilitent le règlement informel des problèmes selon une démarche au cas par cas. Cette approche flexible de la coopération est souhaitable, et même préférable dans le contexte actuel de libéralisation et de mutation rapide des deux activités concernées. A l'avenir, une coopération plus élaborée et plus formelle pourrait se révéler nécessaire.

Le Président constate que la note du Japon illustre une autre forme de coopération possible entre les organes de réglementation et les autorités de la concurrence, à savoir la coordination administrative. Il souhaiterait avoir plus de détails sur les modalités de son fonctionnement – comment s'instaure-t-elle, quels en sont les résultats, et qui prend l'initiative.

Le délégué japonais précise d'abord qu'il exprime seulement le point de vue de l'autorité japonaise de la concurrence. En ce qui concerne la question de l'initiative, il indique que dès 1982 l'autorité chargée de la concurrence, à savoir la Japan Fair Trade Commission (JFTC) a souhaité réaliser un examen d'ensemble de la réglementation japonaise. Depuis lors, elle a pressé les ministères et les agences compétentes d'abolir ou de modifier les dispositions inutiles ou redondantes. Au début des années 90, la déréglementation est devenue l'une des principales priorités du gouvernement. Ce processus comprend un réexamen des dérogations à l'application du droit de la concurrence. Dans ce domaine également, la JFTC joue un rôle central.

Il existe trois catégories de dérogations : celles qui sont fixées dans la loi antimonopole elle-même, d'autres qui sont contenues dans une loi sur les dérogations et celles qui figurent dans diverses lois sectorielles.

Le réexamen administratif de la réglementation est plus ou moins systématique, selon les questions et les secteurs d'activité. La révision des exemptions est un exemple d'approche très systématique – tous les ministères et organismes concernés ont reçu pour instruction d'engager des consultations avec l'agence chargée de la concurrence. Dans d'autres domaines, c'est une approche flexible, au cas par cas, qui est appliquée.

Quant à savoir si le réexamen administratif s'applique aux décisions réglementaires individuelles, la réponse varie selon les cas. Par exemple, il touche les directives administratives. Conformément au plan d'action de déréglementation de trois ans adopté par le gouvernement japonais en avril 1998, tous les ministères et organismes publics doivent consulter l'agence japonaise pour la concurrence avant de publier des directives administratives.

Les organismes de réglementation sont-ils tenus de prendre en compte les avis de la JFTC ? Ils le sont certainement lorsqu'il s'agit de nouvelles mesures présentées au Parlement. Dans ce cas, un organisme de réglementation, un ministère ou une agence administrative doivent solliciter l'agrément du Cabinet qui décide par vote unanime. Avant la décision du Cabinet, les agences ou ministères concernés sont tenus de coopérer avec toutes les agences gouvernementales compétentes, y compris l'agence chargée de la concurrence. En poussant les choses à l'extrême on pourrait dire que ce système permet à l'agence de la concurrence d'opposer son veto à tout texte de loi. Mais le plus souvent, le problème est réglé de manière assez informelle.

Dans nombre de cas, il n'a pas été tenu compte de l'avis de l'agence de la concurrence, mais cette attitude devrait se faire plus rare car le rôle de l'agence continue de se renforcer.

Avant l'exposé de la Suède, le Président fait observer que l'agence des Postes et Télécommunications (PTS) dispose apparemment de pouvoirs étendus et s'est vu confier une mission de

coordination à l'égard du droit de la concurrence et de la loi de protection des consommateurs. Le Président souhaiterait avoir plus de détails sur cette fonction de coordination.

Le délégué suédois explique tout d'abord que les agences de la concurrence et de la réglementation ont des obligations ou des fonctions différentes, mais non concurrentes. L'Autorité de la concurrence est seule compétente pour l'application de la loi sur la concurrence. La PTS s'est vu confier une fonction de coordination au moment même où elle a obtenu, en 1997, des pouvoirs élargis concernant la détermination des tarifs d'interconnexion. Ces pouvoirs supplémentaires lui ont été conférés de manière à simplifier un processus qui jusque-là pouvait faire intervenir (si les parties n'étaient pas en mesure de s'entendre) à la fois l'Autorité de la concurrence et la PTS. L'agence chargée de la concurrence se félicite de cette évolution et ne pense pas qu'elle limite ses propres pouvoirs ou sa juridiction.

La loi sur les télécommunications ne précise pas quel est le rôle de coordination de la PTS, mais il s'est traduit par une série de réunions régulières entre l'agence de la concurrence et la PTS, au cours desquelles ces organismes s'informent l'un l'autre et échangent des renseignements sur des affaires récentes. Jusqu'ici l'expérience a été très concluante.

Le Président note que si la Hongrie n'a pas une longue expérience des relations entre les organismes de réglementation et l'agence de la concurrence, elle illustre un autre moyen de gérer l'interface entre les deux autorités, à savoir une approche exigeant des décisions unanimes, surtout dans le domaine des fusions.

La déléguée hongroise donne des précisions sur la démarche de son pays et passe d'abord en revue les différentes méthodes appliquées dans la réglementation sectorielle et la réglementation au niveau du droit de la concurrence. La réglementation sectorielle oblige les acteurs du marché à entreprendre certaines actions ou proscrit divers agissements, par exemple l'imposition de prix pour certains produits ou services. Elle vise à éliminer certains effets négatifs en remplaçant le marché dans une certaine mesure. A l'inverse, le droit de la concurrence est axé sur les interdictions *ex post* et laisse aux acteurs du marché une marge de liberté beaucoup plus grande que ce n'est le cas d'une réglementation sectorielle.

Lorsque les autorités chargées de la concurrence sont saisies d'une plainte contre une entité réglementée, elles doivent d'abord déterminer si le comportement de l'entité résultait d'un libre choix ou était imposé par la réglementation. Dans le premier cas, le droit de la concurrence s'applique pleinement même si le secteur est réglementé. En revanche, si le comportement incriminé était exigé par la réglementation, la plainte est transmise aux autorités chargées de la réglementation.

S'agissant de la division des tâches dans les affaires de fusions, le droit de la concurrence prévoit que les parties doivent obtenir l'autorisation préalable du Conseil de la concurrence si la transaction dépasse certains seuils. Par ailleurs, la loi sur l'énergie modifiée en mars 1998 exige que les parties à une fusion obtiennent l'autorisation de l'organisme de réglementation, qui analyse la fusion dans une optique différente de celle du Conseil de la concurrence. Ainsi, l'autorité de régulation de l'énergie prendra en considération la sécurité des approvisionnements, etc. En principe, il se peut que l'organe de réglementation dans le secteur de l'énergie et le Conseil de la concurrence aboutissent à des décisions différentes au sujet d'une fusion. En juin 1998, aucun projet de fusion n'avait encore été examiné par les deux agences. Il est clair que les organismes réglementaires sectoriels et l'autorité chargée de la concurrence devront se consulter pour mieux jauger leurs points de vue respectifs même s'ils continuent d'agir de manière indépendante.

4. Le cas particulier de l'Union européenne

La question suivante que le Président souhaite aborder est un problème exclusivement européen. La note de la Commission européenne porte essentiellement sur la doctrine de l'acte de gouvernement et sur le point de savoir dans quelle mesure les actions des organismes de réglementation peuvent ou non être soumises au droit européen. Selon d'autres contributions, les autorités de la concurrence de certains pays européens estiment que l'UE, par le biais de ses directives, favorise l'établissement et le développement d'organes de réglementation d'une manière telle qu'il en résulte des problèmes de double emploi et de coordination avec les autorités chargées de la concurrence.

Le délégué de l'Union européenne entame son exposé en signalant que les problèmes d'harmonisation des législations nationales relèvent du Conseil et non de la Commission européenne. Il appartient en définitive au législateur de choisir la forme de réglementation la plus appropriée. Cela ne signifie pas que la Commission européenne se soustrait à ses responsabilités. C'est la Commission qui prend l'initiative des projets de législation et elle doit à l'évidence tenir dûment compte des souhaits et des exigences liés à la tradition réglementaire de chaque Etat membre. Bien entendu, la Commission a ses propres vues : pour simplifier, en règle générale la politique de la concurrence devrait avoir une portée et une application universelles et les exceptions éventuelles (il y en a eu quelques-unes) devraient faire l'objet d'une réflexion très approfondie.

Que les États membres choisissent ou non de réglementer certaines activités au moyen d'un organisme sectoriel ou de renforcer et d'étendre les pouvoirs de l'autorité chargée de la concurrence, c'est là essentiellement une question qui ne dépend que d'eux-mêmes. Le principe de subsidiarité s'applique en la matière. Il appartient aux différents gouvernements d'organiser leurs affaires administratives comme ils l'entendent, et la Commission européenne ne doit pas, par la manière dont sont rédigés les projets de législation, influencer indirectement ces décisions administratives.

Le délégué rappelle une observation d'ordre général dans la note de la Commission, à savoir que le Traité de Rome fixe un cadre pour la politique de la concurrence applicable à la fois aux sociétés et aux autorités publiques et impose à ces dernières toute une série de prescriptions spécifiques et générales. Globalement, les Etats membres et leurs autorités subordonnées ne devraient rien faire qui entrave la réalisation des objectifs du Traité. Cela signifie par exemple, comme l'a confirmé la Cour de justice des Communautés européennes, qu'aucune autorité nationale, à quelque niveau que ce soit, ne peut approuver un comportement qui serait contraire aux règles de la concurrence inscrites dans le Traité de Rome ; à titre d'exemple, les autorités nationales ne peuvent approuver une entente entre des compagnies aériennes.

Le Président ouvre le débat général.

Un observateur brésilien indique que la table ronde présente un intérêt tout particulier pour le Brésil. Le processus de suppression des monopoles d'Etat dans certains secteurs d'infrastructure s'est traduit par la mise en place l'an dernier d'organismes de réglementation dans les télécommunications, l'électricité et le secteur pétrolier. La privatisation a des effets manifestes sur les caractéristiques structurelles des marchés en question. De surcroît, l'application du droit de la concurrence s'en trouve stimulée. Au Brésil, les relations entre les organismes de réglementation et l'autorité de la concurrence sont complexes. Le rôle principal revient à l'agence indépendante chargée de la concurrence, mais deux ministères, celui de la Justice et celui des Finances, interviennent également (notamment en ce qui concerne les enquêtes et la défense de la concurrence), et les ministères techniques qui n'exercent pas de fonction de réglementation ont conservé un droit de regard général, surtout dans les secteurs en cours de privatisation.

Le Brésil n'a pas adopté une approche systématique de l'interface réglementation/concurrence : le législateur a retenu une démarche au cas par cas pour mettre en place les organismes sectoriels de réglementation. D'une manière générale, cependant, on peut dire que le Brésil applique le système des compétences concurrentes, de sorte que la coopération entre les organismes de réglementation et l'autorité chargée de la concurrence est tout à fait indiquée.

Un représentant du BIAC déclare qu'une déréglementation efficace nécessite un laps de temps considérable pour installer de nouveaux dispositifs institutionnels et permettre aux industries de modifier différentes pratiques établies. Pour définir les rôles respectifs de l'autorité de la concurrence et des organismes de réglementation durant la période transitoire de déréglementation, il faut trouver un équilibre délicat entre la nécessité d'adresser des signaux d'investissement appropriés aux entrants potentiels et le besoin d'atténuer le pouvoir de marché provisoire effectif ou potentiel des entreprises en place.

Le BIAC reconnaît que la politique de la concurrence joue un rôle important dans le processus de déréglementation. Elle peut prévenir la formation de contraintes importantes qui entraveraient l'accès au marché et remettraient en cause les avantages d'une réduction des obstacles imposés par l'Etat. Mais le BIAC tient aussi à faire remarquer que la politique de la concurrence doit être appliquée en douceur, étant admis que les industries en voie de transition, notamment celles qui sont confrontées à d'importantes innovations et percées technologiques, peuvent souffrir d'un zèle excessif des autorités chargées de la concurrence.

Les autorités responsables de la concurrence sont en général dépourvues des compétences sectorielles accumulées de longue date par les organes de réglementation chargés de secteurs spécifiques. Cependant, elles souhaitent à juste titre que le droit de la concurrence soit appliqué d'une manière systématique et efficace. Le BIAC estime que pour renforcer et protéger la concurrence durant la déréglementation, il faudrait mettre en place des sauvegardes réglementaires provisoires appropriées afin d'assurer le développement de la concurrence dans le long terme. Autrement dit, un degré élevé de certitude est nécessaire si l'on veut attirer les investissements et la croissance requis pour instaurer la concurrence à long terme. Avant d'investir, les entreprises doivent savoir quelles seront les règles du jeu dans une branche en transition. Les décideurs publics devraient procéder prudemment et avec soin, en admettant que la transition ne peut se produire du jour au lendemain et en évitant de transformer l'autorité de la concurrence en un nouvel instrument de réglementation des prix et des marchés.

Un autre représentant du BIAC ajoute que dans le monde des affaires il existe naturellement des divergences de vues au sujet de la réglementation et des dérogations réglementaires. L'opinion d'une entreprise varie selon qu'elle est ou non réglementée ou cliente d'un secteur réglementé. Le représentant salue les commentaires du délégué mexicain et ajoute que le Mexique est allé plus loin que les Etats-Unis dans la déréglementation des chemins de fer. Il confirme que l'un des délégués des Etats-Unis a déjà soulevé la question que devraient se poser à la fois les entreprises et les organismes chargés de l'application des textes : quelle est la raison d'être de la réglementation ? Bien qu'il existe des divergences sur ce point, la plupart des acteurs du monde des affaires estiment que la réglementation n'est justifiée que s'il existe un monopole naturel.

2. Le délégué mexicain fait observer que la réglementation est souvent justifiée par la nécessité d'assurer un service universel. Il souligne alors ce paradoxe : la réglementation elle-même met souvent en danger le service universel, par exemple en ordonnant des structures tarifaires uniformes en dépit d'une variation marquée des coûts du service.

Conclusions

Le Président clôt la table ronde en constatant que si la théorie de la réglementation semble raisonnablement claire quand il s'agit d'indiquer dans quels domaines la réglementation pourrait être utilement appliquée, la théorie correspondante des dispositifs institutionnels réglementaires appropriés est beaucoup moins nette. Les trois modèles présentés au cours de la table ronde sont tous très intéressants mais n'aboutissent pas exactement au même résultat, notamment parce qu'ils partent de contextes politiques et juridiques différents. A plusieurs reprises, les débats ont révélé que dans les pays où la branche administrative du gouvernement est particulièrement impliquée dans la réglementation, les relations entre l'autorité de la concurrence et les organismes de réglementation ne sont pas les mêmes que dans les pays où les organismes de réglementation sont plus indépendants de la branche exécutive. Il est clair aussi que l'action des groupes de pression a influé sur les décisions concernant le dispositif institutionnel. A ce stade, il est très difficile d'avancer une théorie unique sur les modalités souhaitables des relations institutionnelles. Dans la seconde partie du débat, les délégués ont été informés de plusieurs tentatives différentes, certaines imposées par voie statutaire et d'autres assez informelles, en vue de résoudre les problèmes particuliers posés par le chevauchement des compétences. Il n'existe pas de solution unique des problèmes abordés au cours de cette table ronde.