

International Competition Network

Antitrust Enforcement in Regulated Sectors Working Group

**Subgroup 3: interrelations between antitrust and regulatory
authorities**

REPORT TO THE THIRD ICN ANNUAL CONFERENCE

SEOUL, APRIL 2004

PREFACE

The mandate of the subgroup on interrelations between antitrust and regulatory authorities, as established by the ICN at its second Annual Conference in Merida last year, was to undertake studies about the division of labour between regulators and antitrust authorities with a focus on their degree of cooperation. It was also decided at Merida that a report would be discussed in Seoul, which would summarise preliminary findings. The purpose of this interim report is to present the results of the subgroup's work.

In September 2003, the agency that chaired the subgroup (French DGCCRF) drafted an outline to guide members' reflections. Responses were received from competition authorities from Australia, Brazil, Canada, Finland, France, Germany, Japan and the United States.

We wish to acknowledge the members who submitted contributions to the subgroup and express the hope that this interim report will serve as a sound basis for future work to be undertaken between the Seoul Annual conference (April 2004) and the next Conference in Germany (June 2005).

Introduction

The Subgroup on *interrelations between antitrust and regulatory authorities* of the ICN Antitrust Enforcement in Regulated Sectors Working Group (AERS WG) received contributions from 8 ICN competition authorities : Australian Competition and Consumer Commission, Brazilian Ministry of Justice, Canadian Competition Bureau, Finnish Competition Authority, French DGCCRF, German Bundeskartellamt, Japan Fair Trade Commission and US Department of Justice. All describe the regulation of sectors changing from a monopolistic or heavily regulated market structure to a competitive sector and the methods of co-operation/co-ordination between industry regulators and competition authorities.

Concerned sectors are telecommunications, electricity, gas, postal services, banking, radio & television, air, maritime and rail transport.

<i>Sectors</i>	Australia	Brazil	Canada	Finland	France	Germany	Japan	U.S.A
Telecoms	X	x	x	x	x	x	x	x
Electricity	X	x	x	x	x	x	x	x
Gas	X	x			x	x	x	
Postal serv.	X				x	x		
Banking			x		x			x
Radio & TV					x			
Air transport	X	x		x				
Maritime	X							
Rail	X							

Overview and issues at stake

In many currently regulated markets, the option of relying exclusively on competition law has not been chosen because continuous monitoring is required to steer a market from a monopoly to a competitive market and continuous access regulation and/or price regulation is also needed. Competition policy is chiefly *ex post* (merger review excepted) whereas industry regulation is primarily *ex ante* and on-going.

There are single-sector regulatory agencies (e.g. local electricity regulators) and multi-sector regulatory agencies (e.g. in Finland : electronic communications, information society and post, and electricity and gas ; in France : radio and television or gas and electricity ; in Germany : post and telecommunications ; in Japan : gas and electricity, etc.) The multi-sector agency approach has also been the common institutional form adopted at the state level for well over 100 years in the USA. Multi-sector regulators serve to reduce costs and provide for more consistent approaches across industries.

Conversely, several regulators can be active in a same sector (e.g. French and US banking sector or local energy regulators in federal states).

The fact that continuous access, price regulation and monitoring are required and necessitate large staffs of experts does not rule out assigning functions to a competition authority. In Australia, the competition agency has been mandated and staffed to carry out economic regulation in certain specific sectors. This approach has the virtue of avoiding problematic overlap between competition authorities and regulators and simultaneous complaints to both kinds of agencies.

Avoidance of overlap and the advantages of providing a full range of tools can also be attained by setting up single or multi-sector regulators and granting them a monopoly in enforcing all or part of the competition law in their sector(s) (USA).

As opposed to avoiding overlap, some countries have instead basically opted to assign competition law enforcement to a competition authority and regulation to industry regulators (France, Germany, Japan, USA). Some, such as Brazil and the United Kingdom¹, have even opted to increase the degree of overlap by giving regulators concurrent powers to enforce competition law in their sectors. Where overlap is accepted or observed, it is obviously important that steps be taken to encourage co-operation among competition authorities and regulators. This will not only save on resources, it will also help ensure overall policy coherence.

There is a wide diversity of models. Whatever the current division of labour between competition agencies and regulators, there are certainly no countries where that division can be regarded as finally settled, especially since the transition to greater competition is often far from complete.

¹ Outside the scope of this introduction, the United Kingdom is here cited as an example of concurrent competition powers.

As mentioned in the executive summary of the discussion which took place five years ago in the OECD roundtable on *relationship between regulators and competition authorities* :

"Introducing competition in sectors previously dominated by state owned or heavily regulated firms and protecting consumers from supracompetitive pricing are difficult tasks (...). Technical regulation requires on-going monitoring and application of sector-specific expertise having little direct relevance to competition issues. It can be safely assumed that this function will almost always be conferred on a set of specific regulators".

Each national standard of interrelations between industry regulators and competition authorities is heavily influenced by the country's legal framework.

The main areas where competition rules interact with industry-specific rules are interconnection, access, monopoly/incumbent-pricing, anti-competitive agreements and merger control. Since the sector-specific regulatory bodies are often responsible for defining "entry conditions", their actions directly affect the nature of competition, after entry has taken place. Therefore, conflicts between industry regulators and competition authorities may arise.

According to a recent study by CUTS Centre for Competition, Investment and Economic Regulation :

"International experience shows that interaction between sector and competition regulators can be managed through the institutional approaches: giving primacy to the sectoral regulatory law or the competition law or requiring consultation between both the regulators. Where the economy-wide competition law takes precedence, the sectoral regulator may still have a role in assisting the competition authority to conduct analysis of the competitive effects of agreements in the regulated industry, especially with their natural advantage over technical issues. The use of a single agency for both sectoral regulation and enforcement of competition law is another approach that has been adopted in Australia.

Australia adopted the position that specific rules were preferable to reliance on general competition rules. Administration of industry-specific rules has been entrusted to the Australian Competition and Consumer Commission (ACCC). This was to avoid proliferation of regulatory bodies and to facilitate the transition to more competitive markets. Market access issues related to telecommunications, gas and electricity, airports, postal services, as well as the administration of price control oversight over federally operated utilities, was brought within the purview of the ACCC."

The "optimal" solution (always a compromise) varies from country to country and across industries within the same country. If competition protection is separated from access and economic regulation, which is often the case outside Australia, co-operation and co-ordination are needed to avoid inconsistent, investment discouraging application of the two sets of policies. Co-operative links are also needed to avoid resource duplication and competition law application inconsistencies.

Typology : the various forms of co-operation and means to avoid inconsistencies

The eight country submissions reveal a variety of means, ranging from informal co-operation (everywhere, with varying intensity) to legally required referrals. The ten forms of interaction can be arranged in three groups: informal and soft techniques of cooperation, delimitation of jurisdiction and organized cooperation.

Informal and soft techniques of cooperation

Contacts, meetings and exchange of information

- Informal contacts and exchange of views. One can find them in all systems under review.
- Appointment of contact persons. This option is widespread as well.
- Appointment of industry experts when necessary (Australia).
- Regular or ad-hoc meetings to consider pending matters (Australia, Canada, Finland, Germany...).
- Setting of joint working groups (e.g. Finland) or inter-agency task forces (USA).
- Exchange of information exists in each country as far as public information is concerned. Legislation generally has to enable exchange of confidential information.

Staff training and exchange of officials

- Previous employment of industry regulators' staff by competition authorities, and vice versa (e.g. Finland, Germany).
- Educational co-operation and vocational training by the other authority(ies). This solution is widespread and often *de facto*, to a varying extent.
- Institutional cross-exchange of officials (Australia).

Delimitation of jurisdiction

Abstention

- De facto assignment of lead jurisdiction as way to mitigate overlap (Canada, Ontario electricity sector ; Competition Bureau's policy is not to enforce competition law in regard to anti-competitive actions that are the subject of an enforcement action by an industry regulator).
- Industry regulator required to refrain from exercising regulatory authority where sufficient competition exists (Canadian telecommunications and electricity markets).
- Opting not to apply competition law whenever there is a legal basis of an industry-regulation nature for a specific behaviour (abusive practices concerning telecommunications in Germany).

Written delimitation of jurisdiction, co-operation and co-ordination

- Clear delimitation *by statute* of the tasks which are to be performed exclusively by the industry regulators on the one hand and by competition agencies on the other (France, Germany and Japan in all considered sectors ; Australian Trade Practices Act provisions on consistency of antitrust regulation in international liner cargo shipping).
- Government decision on relationships between the competition authority and industry regulators (Japan).
- Competition authority's continuum of principles for assigning and co-ordinating the respective agencies' roles and responsibilities (Canadian Competition Bureau).
- Joint guidelines on co-operation (Japan), joint statements² or agreements (Brazil, Canada³, USA), joint memoranda (Finland). These documents aim at clarifying the operational principles of co-operation, in particular in case of concurrent (application of the same law), parallel (on the basis of different Acts) or shared competencies.

Federal logic

Federal law prevails over states' laws to the extent of any inconsistency (Germany).

² The British Office of Fair Trading and the Office of Communications have recently published such a joint statement (<http://www.offt.gov.uk/Business/Legal+Powers/default.htm>).

³ E.g. Canadian Competition Bureau and CRTC interface, November 1999;
<http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct01647e.html>

Organized cooperation

Right to make submissions, participate in hearings and ask for optional referrals

- Competition authorities' right to make submissions or provide industry regulators with comments or expert reports (Brazil, Canada, United States, Germany).
- Intervention in regulatory hearings as a possible alternative to investigations (telecommunications in Canada).
- Optional opinions and referrals (Brazil, France, USA).

Joint proceedings

Possibility to conduct joint proceedings in order to make use of complementary expertise (through administrative assistance or request for an expert report in Germany).

Mandatory agreements, consultations and referrals

- Mandatory competitive factors advisory reports provided by a competition authority to a regulator (Brazil, US banking sector).
- Mandatory notification of investigation that are within the jurisdiction of the other body (Canada, France, Germany).
- Obligation to obtain the competition authority's agreement for market definition decisions and conclusions about market dominance (Germany).
- Mandatory consultation or referrals (Australia, Brazil, France, USA).

Consultation time-frame

The regulator or the competition authority may have limited allowed time for providing a report or an opinion to the other body (France, Germany, USA).

Appeal proceedings

- Appeal proceedings of both kinds of authorities assigned to a special Court (France).
- In case of conflicting views, leaving the resolution of a matter to the Appeal body (Finland).

* * *

Sector regulations must be able to develop and change periodically in accordance with the economic and sector evolution (new entrants, new legislative framework, new technologies...).

It would be paradoxical to create specific antitrust enforcement systems in regulated sectors whereas these sectors are aimed at catching up with common competition law.

Informal and formal co-operation between the two kinds of agencies seem particularly helpful in defining markets, market dominance, access and price regulation. Conflicts often arise when both antitrust authorities and regulatory agencies are entitled to apply competition law.

While concurrent or shared jurisdiction and parallel proceedings may result in increased costs and time as well as in conflicting outcomes, conflicts can be mitigated by early and regular interrelations between authorities. Codification of interrelations is also a way. Overlaps may, however, often be avoided by giving as much as possible exclusive jurisdiction to competition authorities on the one hand and to industry regulators on the other. Wherever this is not feasible, a combination of steps and means described above (part 2) is likely to meet national requirements.

Finally, the reader is referred to the following subgroup members' contributions and to the above-mentioned briefing paper produced by Consumers Unity & Trust Society (CUTS) : "Competition and Sectoral Regulation Interface" (<http://www.cuts.org/ccier-5-2003.pdf>). The above-named OECD document entitled "relationship between regulators and competition authorities" can be found at : <http://www.oecd.org/dataoecd/35/37/1920556.pdf>

ANNEX

ANTITRUST ENFORCEMENT IN REGULATED SECTORS

INTERRELATIONS BETWEEN ANTITRUST AND REGULATORY AUTHORITIES

AUSTRALIA

1. Introduction

In general, the Australian regime is characterised by two features:

- (a) economic regulation and technical regulation have been separated (ie there is an economy-wide economic regulator whilst industry-specific regulators are responsible for technical regulation); and
- (b) the agency that administers economic regulation (the Australian Competition and Consumer Commission ('ACCC')) is also responsible for anti-trust regulation (in addition to consumer protection).

This report responds to the list of questions prepared by the AERS WG Subgroup 3. Section 2 of the report sets out the development of the Australian approach (questions 1 and 5). Section 3 sets out how anti-trust, economic and technical regulation are coordinated in Australia (questions 2, 3 and 4).

2. Development of regulatory framework

Question 1 The legislative and regulatory framework (background, rationales for both types of institutions; is there one? Were the different regulators (competition/sectoral) introduced at the same time or at different times and why? Does the time frame change the organization? Does it evolve in time?

Question 5 Is there a relationship between the regulatory framework and the structure of the regulated sectors?

2.1 Overview of the current Australian regulatory framework

Anti-trust regulation

The ACCC is a statutory authority established by a Commonwealth Act (the *Trade Practices Act 1974* (Cth) ('TP Act')). Part IV of the TP Act sets out the rules prohibiting certain anti-competitive conduct including:

- (a) anti-competitive agreements and exclusionary provisions;
- (b) misuse of market power;
- (c) exclusive dealing;
- (d) resale price maintenance; and
- (e) mergers and acquisitions that substantially lessen competition.

The ACCC is responsible for ensuring compliance with Part IV including, where necessary, by commencing proceedings in court for a contravention of Part IV. The ACCC also considers applications ('authorisations and notifications') under Part VII of the TP Act for exemption from Part IV (which are assessed against a public interest test).

Economic regulation

Part IIIA of the TP Act (which was inserted in 1995) establishes an access regime (ie a regime that facilitates third parties obtaining access to the wholesale services provided by means of certain infrastructure). The regime applies across the economy subject to limited exceptions. Under Part IIIA:

- (a) the decision as to whether or not a service should come within the operation of Part IIIA ('declaration') is made by a Commonwealth Minister (upon recommendation of another Commonwealth statutory authority, the National Competition Council ('NCC'));
- (b) the access provider and access seeker are expected to negotiate the terms and conditions (eg price) of access to a declared service. However, if agreement cannot be reached, the ACCC may, upon notification by either party, arbitrate the dispute;
- (c) an access provider may avoid declaration by submitting an access undertaking to the ACCC setting out the terms and conditions upon which the access provider will supply the service. The ACCC is responsible for assessing the proposed undertaking. (An industry body may also propose an industry access code to the ACCC. An undertaking may then adopt the code); and
- (d) a State may avoid declaration of infrastructure within that State's jurisdiction by applying to the NCC / Commonwealth Minister for a decision that the State's access regime is an effective access regime.

The ACCC is also responsible for examining the prices of goods and services nominated by the Commonwealth Government under the *Prices Surveillance Act 1983* (Cth) ('PS Act').

Telecommunications

The following table summarises the key developments in the regulation of telecommunications services in Australia:

Date	Development
From Federation (1901) until 1975	Commonwealth Postmaster-General's Department had a statutory monopoly over the supply of Australian domestic telecommunications services.
1975	Provision of telecommunications services was transferred to a Commonwealth statutory authority (Telecom).
1989	Telecom was corporatised (later renamed Telstra). An independent industry-specific regulator (AUSTEL) was established. Limited competition was introduced for the provision of certain value-added services (ie not including basic telephony services).
1991	Creation of a general carrier duopoly (which ended on 30 June 1997) and the granting of three public mobile operator licences. AUSTEL continued to administer industry-specific competition regulation and certain activities were exempt from Part IV of the TP Act. (Only two carrier licensees had the right to interconnect with the incumbent's (Telstra) network).
1997	The restrictions on the number of licenses that could be issued and the exemption from Part IV of the TP Act were removed. Telstra was partially privatised. A new technical regulator (Australian Communications Authority ('ACA')) was established. AUSTEL's economic regulation functions were transferred to the ACCC. Two new industry-specific parts were inserted into the TP Act: (a) Part XIB deals with anti-competitive conduct in the telecommunications industry. (b) Part XIC sets out a telecommunications access regime. Parts XIB and XIC are based on Parts IIIA and IV but contain additional provisions that are intended to address the incumbent's market power and the 'any-to-any connectivity' feature of telecommunications.

Airports and Air Traffic Control

The following table summarises the key developments in the regulation of airports and air traffic control in Australia:

Date	Development
1920	Civil Aviation Branch was established within the Commonwealth Department of Defence (subsequently transferred to other Commonwealth departments).
1986	Ownership of airports was transferred to a Commonwealth statutory authority (Federal Airports Corporation ('FAC')) (which commenced operation in 1988). FAC was largely self-regulating.
1988	Civil Aviation Authority ('CAA') established to regulate safety and provide air traffic services (air traffic control, air navigation support and aviation rescue).
1990	FAC was corporatised.
1991	The Prices Surveillance Authority (which was merged with the Trade Practices Commission in 1995 to form the ACCC) was given responsibility under the PS Act for reviewing price increases by FAC and CAA (with respect to air traffic services).
1995	Civil Aviation Authority split into two entities. A new Commonwealth statutory body (Airservices Australia) was established with responsibility (statutory monopoly) for air traffic services. The Civil Aviation Safety Authority took on the technical regulatory role. The prices charged by Airservices Australia are reviewed by the ACCC under the PS Act.
1997	Commonwealth Government commenced the privatisation of airports through the sale of long-term leases. The Government created a 'CPI-X' price cap regime administered by the ACCC under the PS Act. Certain airport services were deemed to be declared services for the purpose of Part IIIA of the TP Act. The ACCC is responsible under the <i>Airports Act 1996</i> (Cth) for monitoring service quality, and collecting and publishing information on the financial performance of the airports.
2001-2002	The Government replaced CPI-X regulation with monitoring under the PS Act. Airports services are no longer deemed to be declared under Part IIIA.

Postal services

The following table summarises the key developments in the regulation of postal services in Australia:

Date	Development
1901	The Commonwealth Government established the Postmaster-General's Department.

1975	The Australian Postal Commission ('Australia Post') (a statutory authority) was established to replace the Postmaster-General's Department. (Renamed Australian Postal Corporation in 1988).
1989	The <i>Australian Postal Corporation Act 1989</i> (Cth) ('APC Act') gave Australia Post a statutory monopoly over certain services ('reserved services') on the basis that Australia Post has a legal obligation to collect and deliver letters to anywhere in Australia at a uniform rate. The ACCC is responsible for reviewing Australia Post's prices for these services under the PS Act.
1994/ 1995	The ACCC is responsible under the APC Act for resolving disputes over the level of discounts for bulk interconnection services. Australia Post is exempt from Part IIIA of the TP Act.
2003/ 2004	The Commonwealth Government has introduced a bill into Parliament to amend the APC Act to, amongst other things, require the ACCC to make record keeping rules (ie to introduce accounting separation between Australia Post's reserved and non-reserved services).

Maritime transport

Part X of the TP Act exempts international liner cargo shipping from certain anti-competitive provisions in Part IV provided that the carrier agreements are registered with the Commonwealth Department of Transport and Regional Services (DoTRS). However, the ACCC has a role in investigating conduct of liners who are party to a registered agreement, which may lead to the Commonwealth Minister for Transport de-registering an agreement (which removes the exemption from Part IV).

International liner cargo shipping is not subject to economic regulation in Australia.

Electricity networks

The following table summarises the key developments in the regulation of electricity networks in Australia:

Date	Development
1940s – 1990s	The electricity industry was dominated in each State by a single vertically integrated State owned authority or a combination of State owned authorities responsible for generation, transmission and distribution of electricity. (In contrast to telecommunications, airports and post, the electricity industry was primarily regulated by the States rather than the Commonwealth.) Apart from the Snowy Mountains Hydro-electric scheme, the electricity industry did not operate on an inter-State basis.

1996	New South Wales, Victoria, Queensland, South Australia and the Australian Capital Territory agreed to enact legislation to apply the <i>National Electricity Code</i>. The Code: (a) establishes and governs the operation of a national electricity market. (All the electricity output from generators is centrally pooled and scheduled by the market administrator (NEMMCO) to meet electricity demand. The price paid by the retailers and wholesale end use customers to the generators is calculated by NEMMCO using the price offers and bids); (b) provides for ring-fencing of transmission / distribution businesses; (c) sets out technical standards; and (d) governs access to transmission and distribution electricity networks. The relevant regulator (the ACCC in relation to transmission lines, and the State regulators in relation to distribution lines) is required to set the maximum revenue (revenue cap) that the network owner/operator can earn. The ACCC has an additional role in authorising the Code under Part VII of the TP Act and accepting the Code as an industry access code under Part IIIA.
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The following table lists the agencies involved in the regulation of the national electricity market:

Agency	Primary Function
Anti-trust	
ACCC	Administers Part IV of the TP Act.
Economic	
ACCC	Role under Part IIIA of the TP Act (access undertakings and industry access code). Sets the revenue cap for transmission networks. Sets services standards for transmission network performance. Develops the test for new network assets and determines disputes over the application of that test.
State Regulators: NSW: Independent Pricing and Regulatory Tribunal VIC: Essential Services Commission	Sets price controls for distribution networks / approves distribution tariffs. Under State-specific legislation, may: • set 'safety net' retail tariffs for smaller customers;

Qld: Queensland Competition Authority SA: Essential Services Commission of South Australia ACT: Independent Competition and Regulatory Commission TAS: Office of the Tasmanian Energy Regulator	• develop a scheme of retailer of last resort; • license networks, generators and other market participants; and • advise on retail price controls in some cases.
Technical	
See the regulators listed above subject to the following exceptions: QLD: Electrical Safety Office/ Industrial Relations SA: The Office of the Technical Regulator	Under State-specific legislation may: • regulate technical & safety matters including health & safety and environmental standards and procedures; • specify distribution and customer standards of service; and • regulate network planning and development.
Other	
National Electricity Code Administrator ('NECA')	Supervises and enforces the National Electricity Code and administer the Code's development.
National Electricity Market Management Company ('NEMMCO')	Operates the national electricity market.
National Electricity Tribunal	Reviews certain decisions by NECA and NEMMCO. Hears and determines applications by NECA that Code participants have breached the Code.
NEM Ministers	Ministers from each participating State are responsible for policy issues.

In December 2002, the Council of Australian Governments ('COAG') commissioned an independent review into energy market reform. The Energy Market Review's final report recommends significant reform of Australia's electricity and gas markets including redesigning the institutional arrangements to address the current fragmentation.

Natural gas pipelines

The following table summarises the key developments in the regulation of natural gas pipelines in Australia:

Date	Development
1960s	Commercial use of natural gas commenced in Australia. Like electricity, natural gas was primarily regulated by the States rather than the Commonwealth. However, in contrast to electricity infrastructure, gas infrastructure was predominately owned by private enterprise and there was less vertical integration.
1997	Australian governments agreed to implement uniform legislation to apply the <i>National Third Party Access Code for Natural Gas Pipeline Systems</i> . The Code: (a) requires the owners or operators of certain pipelines to lodge an access arrangement with the relevant regulator (the ACCC in relation to transmission pipelines (except in WA) and the State regulators in relation to distribution pipelines (except in the NT)) setting out the terms and conditions of access (including tariffs); and (b) provides for ring-fencing of transmission / distribution pipelines. States have applied to the NCC under Part IIIA for certification of the regime as an effective access regime.

The following table lists the agencies involved in the regulation of the gas industry:

AGENCY	Primary Function
Anti-trust	
ACCC	Administers Part IV of the TP Act.
Economic	
National Competition Council	Assesses whether pipelines should be regulated under the National Gas Code.
ACCC	Assesses access arrangements provided by transmission pipelines (and the competitive tendering process in relation to new pipelines). Arbitrates access disputes between pipeline service providers and access seekers. Administers the ring-fencing obligations in relation to transmission pipelines.

State Regulators: See the regulators listed for electricity subject to the following exceptions: WA: Office for the Gas Access Regulator	Performs the functions listed above in relation to the relevant distribution pipelines. Under State-specific legislation, may also be responsible for developing retail market rules (including the introduction of retail competition).
Technical	
NSW: Independent Pricing and Regulatory Tribunal Vic: Essential Services Commission and Office of Gas Safety. Qld: Office of Energy SA: Essential Services Commission of South Australia and Office of the Technical Regulator WA: Office of Energy Tas: Office of the Tasmanian Energy Regulator NT: Department of Business, Industry and Resource Development	Under State-specific legislation, may: • license persons to provide services by means of a distribution pipeline subject to technical requirements including safety; and • publish codes that set out the health / safety and environmental standards and procedures that gas licensees are required to follow.
Other	
National Gas Pipelines Advisory Committee ('NGPAC')	Responsible for making recommendations to the State Ministers on amendments to the Code.

Rail

The following table summarises the key developments in the regulation of rail transport in Australia:

Date	Development
	Post-federation, the State governments maintained ownership of, and regulatory responsibilities for, rail operations within their borders.
1990s	A number of State governments corporatised and/or privatised their railways, and separated the ownership / management of railways from above-track operations (ie freight and passenger services).

	All railways (whether state or privately-owned) are subject to Part IV of the TP Act and may be regulated under Part IIIA. Most Australian States have also developed their own access regimes that provide for train operators to negotiate access to tracks. However, most of the regimes are not certified as effective under Part IIIA. Typically, the regimes also provide for the vetting of price increases for passenger services. The ACCC has also accepted an access undertaking from Australian Rail Track Corporation under Part IIIA with respect to the interstate track through Victoria and South Australia.
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Summary

The Australian approach may be summarised as follows:

- (a) all businesses are subject to the anti-trust provisions in Part IV of the TP Act (subject to some exceptions such as international liner cargo shipping) which is administered by the ACCC. Where the Commonwealth has created industry-specific anti-trust regulation (such as in telecommunications), the ACCC is the regulator;
- (b) all industries are subject to the general access regime set out in Part IIIA of the TP Act (subject to some exceptions such as telecommunications and post) which, in relation to the terms and conditions of access, is administered by the ACCC. Where the Commonwealth has created industry-specific economic regulation (either in place of Part IIIA (such as in telecommunications and post) or in addition to Part IIIA (such as in airports)), the ACCC is the regulator;
- (c) however, within Part IIIA of the TP Act, the States have developed industry-specific regimes that confer economic regulatory functions on agencies in addition to the ACCC. This reflects the nature of Australia's federal system and the historical division of responsibilities between the Commonwealth and the States; and
- (d) the Commonwealth has created separate industry-specific regulators who are responsible for technical regulation. The States have generally taken the same approach although there are some exceptions.

2.2 Rationale for the Australian approach

The Australian model of combining anti-trust and economic regulation in the one agency was developed in the mid 1990s and was a reflection of the particular nature of the Australian economy and stage of development of network industries at that time.

In the early 1990s, there was a policy objective of improving the efficiency of Australia's public utilities and industry more generally. In 1991, the Commonwealth and States reached agreement on the establishment of an independent committee (chaired by Prof. Hilmer) to undertake an inquiry into national competition policy.

As part of the inquiry, the Committee considered how to structure the regulatory institutions so as to minimise the costs of regulation (being both compliance costs and the risk of regulatory error). The Committee proposed that a single economy-wide body should be responsible for both anti-trust regulation and prices oversight (including the access regime). The rationale for this was as follows:

(a) An economy-wide economic regulator

The Committee considered the synergies between technical and economic regulation but concluded that an economy-wide economic regulator would be preferable for the following reasons:

- (i) *Consistency.* An economy-wide regulator is more likely to deliver consistency across sectors. While all infrastructure industries have unique features, many of the economic regulation issues raised are similar. As all industries compete for investment capital, inconsistent approaches to issues such as the valuation of capital and tariff setting may lead to inefficient investment patterns. An industry-specific regulator would increase the risk of economic distortions.
- (ii) *Cost of Regulation.* Given the size of the Australian economy and the Committee's proposed access model (which envisaged limited intervention), an economy-wide regulator would provide administrative savings through:
 - learning economies (as a decision would create a precedent for other industries). This would create a more certain environment for investors and consumers; and
 - pooling of skills and analysis.
- (iii) *Accountability.* The performance of a single regulator would be easier to monitor.
- (iv) *Regulatory Capture.* The Committee concluded that the regulatory capture model was overly-simplistic but noted that an economy-wide regulator would have sufficient

distance from industries to form objective views on difficult issues.

(b) Integrating economic and anti-trust regulation

The Committee further concluded that economic and anti-trust regulation should be located in the same agency as:

- (i) *Competition focus.* The Committee regarded the access regime as a core element of a national competition policy. Introducing competition in some markets requires that competitors be assured of access to certain facilities. Integration of anti-trust and economic regulation functions would foster a 'pro-competition' culture. An anti-trust agency would be more attuned to the benefits of competition, what constitutes a competitive market and what threatens it. This competitive focus could be lost, distorted or relegated to a secondary position by separate anti-trust and economic regulatory agencies.
- (ii) *Administrative Savings.* There would be savings in combining the anti-trust and economic regulation functions in the one body.

(See Independent Committee of Inquiry, *National Competition Policy* (August 1993) Chapter 14.)

Section 2 of the TP Act provides that the object of the Act is to:

enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

The ACCC regards the competition focus as the unifying theme of the TP Act. The consumer protection provisions are a form of competition policy because if consumers are given deceptive or misleading information about goods and services then they will be unable to make properly informed choices between competitors and the competitive process will be damaged. Whilst the access regime could be regarded as a purely regulatory activity (in which, for example, the ACCC must determine the price and other terms and conditions of access), a key policy factor underlying the ACCC's decisions is the impact of the terms and conditions that it sets on competition in markets that depend on the regulated service.

The list of questions prepared for the AERS WG Subgroup 3 refers to the different objectives of sectoral regulation and competition law, and notes that, traditionally, the economic regulator is there to promote competition while the anti-trust regulator merely protects competition. This distinction is not always evident. For example, competition agencies are required to look at structural aspects in their merger

deliberations and to examine the impact such market structures would have on the achievement of pro-competitive outcomes. More importantly, however, in both cases, the overall objectives are directed towards economic welfare and efficient outcomes. That is, a regulator should not promote competitors if this would lead to less efficient outcomes, and similarly a competition agency should not protect a competitor if this is not efficiency enhancing. Anti-trust and economic regulation may thus be seen as tools for achieving the same objective. To give a specific example, in relation to internet peering, the ACCC decided that the Part XIB anti-trust provisions would be a more effective and efficient way of responding to the issue than using the access regime in Part XIC.

3. Co-ordinating anti-trust, economic and technical regulation

Question 2 Their respective role in antitrust enforcement (who does what and how), their degree and methods of co-operation / co-ordination (non regulatory and regulatory co-operation).

Question 3 Shared vs exclusive competencies, jurisdiction conflicts, solutions and various relevant cases.

Question 4 How to ensure competition law consistency in this context?

In Australia, the above issues are primarily addressed by combining, within one agency, responsibility for anti-trust and economic regulation across the economy. However, there remains a need for co-ordination as:

- (a) co-ordination is required within the ACCC;
- (b) in some limited cases, other Commonwealth agencies are responsible for anti-trust regulation;
- (c) in relation to economic regulation, co-ordination is required between the ACCC and the State economic regulators; and
- (d) co-ordination is required between the ACCC and technical regulators.

Each of these issues is addressed below.

3.1 Co-ordination within the ACCC

The ACCC currently consists of a Chairperson, Deputy Chairperson and three full time Commissioners. The organisation (staff) consists of the following divisions:

- (a) Compliance (responsible for Parts IV and V of the TP Act) (located in each capital city);

- (b) Regulatory Affairs (divided into four branches: Telecommunications, Electricity, Gas and Transport & Prices Oversight) (located in Canberra, Melbourne and Sydney);
- (c) Mergers (responsible for assessing proposed mergers and acquisitions); and
- (d) Adjudication (responsible for assessing applications for authorisation / notifications).

In addition, Commissioners sit on different Committees (being Enforcement, Telecommunications, Energy, Transport, Mergers and Adjudication).

The ACCC has sought to develop the expertise necessary to perform its functions by creating the different staff divisions listed above and ensuring that matters are considered by the relevant committee of commissioners. However, the following arrangements are intended to achieve the benefits of having anti-trust and economic regulation within the one agency:

- (a) although matters are considered by the relevant committees, the final decision is made by all Commissioners at a weekly meeting. Membership of the committees also overlaps;
- (b) staff from different divisions are assigned to work on particular matters. For example:
 - transport (regulatory) staff provided detailed economic and industry advice to adjudication staff working on the application for authorisation lodged by Qantas and Air New Zealand during 2003;
 - in 2003, electricity staff worked closely with mergers staff on the proposed acquisition of a Victorian electricity generator by an electricity distributor / retailer;
 - the operator of Adelaide airport simultaneously lodged a price notification with the ACCC under the PS Act and sought authorisation for its conduct;
 - when Australia Post sought to introduce barcoding and phase out bulk discounts for unbarcoded mail, it simultaneously lodged a price notification with the ACCC under the PS Act and submitted a third line forcing notification under Part VII of the TPA; and
 - when investigating conduct by certain international liner cargo carriers, regulatory staff drew upon the expertise of the adjudication and compliance divisions;
- (c) complaints regarding the conduct of network industries can originate from a wide range of locations throughout Australia,

and may be received in any of the ACCC's offices. The complaints are logged in a centralised database, accessible by all staff.

3.2 Ensuring consistency in anti-trust regulation

In relation to international liner cargo shipping, the issue of consistency is addressed in Part X which sets out the respective roles of DoTRS and the ACCC.

Although not related to anti-trust, another example is consumer protection in relation to the financial services sector. Responsibility for this function was transferred from the ACCC to the Australian Securities and Investments Commission ('ASIC') in 1998 although ASIC is able to delegate functions to the ACCC. Co-ordination between the agencies is addressed in a memorandum of understanding which covers referral of complaints, exchanging information and undertaking joint responses.

3.3 Ensuring consistency between Commonwealth and State economic regulators

As set out in section 2 of this report, responsibility for the economic regulation of gas pipelines, electricity networks and rail networks is divided between the ACCC and State regulators.

The following arrangements have been put in place to address the risk of inconsistency:

- (a) the heads of the State regulators are also appointed, under the TP Act, as ex-officio commissioners of the ACCC. The ex-officio commissioners attend the ACCC's Energy Committee meetings;
- (b) in 1997, the regulators established a forum to promote the exchange of information. The ACCC is responsible for co-ordinating a regular publication ('Network') setting out developments in each jurisdiction; and
- (c) the regulatory framework requires consultation between regulators on certain matters (for example, the development of transmission and distribution ring-fencing arrangements under the National Electricity Code).

In relation to rail, there is a potential for a conflict to arise between Part IIIA of the TP Act and a State regime. In such a case, the conflict would be resolved through the operation of the Commonwealth Constitution (section 109) which provides that the Commonwealth law prevails over the State law to the extent of any inconsistency.

3.4 Ensuring consistency between technical and anti-trust / economic regulators

There is some overlap between the competition functions of the ACCC and the technical functions of other regulators. For example, in relation to telecommunications, the provision of access must take into account the operation and technical requirements for the safe and reliable operation of the system. The ACA's assessment of levies and levy credits for the provision of universal service and determination of technical standards may affect the relative competitiveness of players in the telecommunications industry.

The Hilmer Committee noted that technical issues associated with the terms and conditions of access can be addressed through the appointment of industry experts. In addition, the telecommunications regime seeks to address this issue by:

- (a) setting out, in the legislation, when consultation is required and the respective powers of the agencies concerned. For example, the ACA must not make a numbering plan that sets out the rules for portability of allocated numbers unless it is directed to do so by the ACCC; and
- (b) the Chairman of the ACA is an associate member of the ACCC. Similarly, a commissioner of the ACCC is an associate member of the ACA.

ANTITRUST ENFORCEMENT IN REGULATED SECTORS

INTERRELATIONS BETWEEN ANTITRUST AND REGULATORY AUTHORITIES

BRAZIL

Introduction

Brazil has an antitrust law since 1962. However, like other developing countries, this law remained unused for many years due to some well-known reasons (e.g. from the early thirties to the late eighties, Brazilian economic growth was based on import substitution industrialization). This implied a protectionist environment in which there was almost no room for competition policy issues on the public agenda. In 1994, a new competition law replaced the previous one, within a context of broad economic reforms, such as trade liberalization, regulatory reform and macroeconomic stabilization. Privatization of state monopolies was considered an important point of the reform agenda and that, by itself, would justify competition policies.

Until the mid-nineties, telecommunication services, electric energy and LPG were provided by state monopolies, which meant that the Brazilian government was responsible for providing and supporting such sectors. Through the privatization of these services, the government thus delegated to the private sector the costs and risks of the appropriate level of investments, sufficiently enough to guaranty the supply of the demand, which it was unable to maintain. With the purpose to set the legal framework and monitor those sectors, Brazil followed a worldwide tendency and created independent regulatory agencies.

The regulatory framework had the purpose to introduce competition into those markets, where services were previously provided by state monopolies, thus the new agencies were required to take into consideration whether their proposed regulations were pro-competitive. The enforcement of antitrust law in regulated markets became very important as well. For that purpose, the legal statutes for each of these sectors established in various ways how the interface between the antitrust authorities and the regulatory agencies would work.

Antitrust law

The Brazilian Competition Policy System is composed by the Secretariat for Economic Monitoring (SEAE) of the Ministry of Finance; the Secretariat of Economic Law (SDE) of the Ministry of Justice; and the Administrative Council for Economic Defense (CADE), an independent body administratively linked to the Ministry of Justice. SEAE and SDE have analytical and investigative functions while CADE is an administrative tribunal. CADE's decisions can only be reviewed by the courts. The three bodies are, thus, responsible for the enforcement of the Brazilian antitrust law.

The Brazilian antitrust law is based on preventive and repressive principles. Article 54 establishes the merger control, which states the notification and analysis criteria for these transactions. Actually, such provision encompasses all transactions which may result in any kind of economic concentration (i.e., merger, consolidation or incorporation of companies carried out to exercise the control of a company or any other form of a corporate group).

According to the Brazilian Competition Law, there are two criteria for notification of transactions: whenever one of the parties involved in the transaction controls 20% or more of the relevant market; and/or where any of the participants of the transaction have registered a turnover, in the last balance sheet, equivalent to four hundred million reais (R\$ 400,000,000.00). Even though the law does not specify the criteria, since 1997 CADE has been considering the company's or the corporate group's turnover worldwide, even though there is some recent trend in the decisions, considering the turnover to be the one in Brazil.

Enforcement of anticompetitive behavior is covered by articles 20 and 21 of the Antitrust Law, that seek out to repress the abuse of dominant position. According to the law, when the dominant position is a result of a natural process based on the company's higher efficiency compared to its competitors, there is no illegal conduct.

Regulation in the telecommunications sector

The telecom sector is regulated by Law No. 9472/97 (General Telecommunication Law), which created the National Agency for Telecommunication (Agência Nacional de Telecomunicações, ANATEL).

As mentioned above, after privatization, the General Telecommunication Law had the clear purpose to introduce competition in the telecommunication sector, and authorized the federal government to proceed with the privatization of the state companies.

Thus, in order to avoid the formation of private monopolies by the recently privatized companies in the fixed line market, which were awarded the possibility to exploit different regions in the Country, the Law established legal conditions for mirror companies to exploit the telecommunication services in each of those regions. Thus, those mirror are allowed to use the network of the privatized companies, through the payment of an access (interconexão) fee, or establish another technology that should release them from such use. The economic model as mentioned has been facing some troubles, since the cost of the mirror companies are revealing to be too high: such companies have not been able to compete with the privatized companies, which were the owners of the transmission nets.

In addition, the model has established that after the incumbent companies had concluded the task of extending access throughout the country, they would be free to provide long-distance service, as well as the long distance providers would be authorized to operate locally. This is already happening and the regulatory agency

(ANATEL) is currently monitoring the market to identify possible anticompetitive behavior. Recently, the companies that provide long distance service have accused the local incumbents of cross-subsidizing their long distance service rates through the access tariff that they charge from the national providers. Access pricing is a very important regulatory issue and has motivated a significant number of complaints of anticompetitive behavior including, for example, of interconnection to internet access).

The competition model established by the General Law of Telecommunication was quite ambitious, since it introduced competition between the local incumbent, *mirror companies* and long-distance providers. However, this model has shown not to be totally successful, as the local companies still have a market share of about 95% in its areas of local operations.

With respect to the mobile telecomm sector, the companies that first received the exclusive right to explore the services in specific regions face the competition of entrant companies, as the latter recently received authorizations from ANATEL to explore the mobile service in a new frequency (*Range B*). As the existence of 3 providers in each was considered adequate, new companies were allowed to enter in the market to exploit another frequency (*range C*). As established by the General Telecommunication Law, the Agency tried to introduce two additional ranges (D and E), but there were no investors.

The General Telecommunication Law has determined that ANATEL is responsible for the enforcement of antitrust laws, determining, in Article 97, that every split-up, merger, acquisition, consolidation, decrease of the capital stock of the company and transfer of the company's controlling interest needs to be examined by it. ANATEL's analysis, however, do not replace Article 54 of Law No. 8884/94, as CADE remains, even in the telecom sector, as the Tribunal that decides whether the transaction is to be approved or not. Even though the General Telecommunication Law is not enough clear on this subject (as regards to Article 7, §§ 1º and 2º), SEAE and SDE have not been analyzing transactions in the telecom sector to send it to CADE, remaining ANATEL as the agency that is developing such work.

With respect to anticompetitive behavior, Article 19, XIX of the General Telecommunication Law has been interpreted to mean that both the antitrust authorities (SEAE and SDE), as well as the regulatory agency (ANATEL) have jurisdiction over the matter. Thus, ANATEL has been sharing with the antitrust authorities the same attributions regarding the investigation of anticompetitive behavior in the telecom sector. Besides, note that Article 70 of the General Telecommunication Law adds to the exemplificative list of conducts of Article 21 of Antitrust Law, possible unlawful conducts applicable to the telecommunication sector.

Regulation in the electric energy sector

Law No. 9427/96 created the National Agency for Electric Energy (ANEEL) and established the regulatory rules for the sector. The concern related to the

introduction of competition issues in this legislation is also clear, even though it does not have as many provisions as the General Telecommunication Law.

Due to the technical characteristics of the sector, the privatization of state monopolies should be followed by the deverticalization, which should force the companies that act in the natural monopolies segment (transmission and distribution) not to operate also in the potentially competitive segments (production and commercialization).

Since Brazilian energy comes essentially from hydroelectric power plants, the huge lack of rain in year 2001 created a risk of a blackout. As a result, the government introduced an energy rationing program, as well as took some measures to the construction of thermoelectric power plants, so as to avoid any the risks of a blackout.

The blackout risk was avoided by the normalization of rainfall. In order to prevent the same problem in the future the government sent to Congress a number of amendments to the regulatory framework, which essentially establish: 1) the restructuring of medium and long-term planning; 2) the supervising, in the short term, of the conditions of service provision; 3) contracting energy in the long term should be compatible with the investments payments; 4) competition in the generation of electric energy by means of competitive bidding procedures in compliance with the lower rate criterion; 5) the coexistence of two contracting environment of energy, one regulated and another one free, encouraging free consumer initiative; 6) the establishment of a regulated contracting pool of energy to be bought by the distribution concessionaires; 7) separation of the distribution service from any other activity; 8) the foresight of a conjectural reserve for the reestablishment of the equilibrium conditions between offer and demand and; 9) the reestablishment of the Ministry of Mining and Energy as the Granting Power, as after the privatization, the Agency has been in charge of granting concessions.

Specifically with respect to the competition rules in such sector, Article 3, VII of Law No. 9.427/96 (added by Law no. 9648/98) states that the Agency, in order to enable effective competition and avoid economic concentration in the sector, should determine restrictions to the companies, conglomerates and shareholders, concerning the obtainment and transference of concessions, permissions and authorizations, to corporate concentration and to the celebration of relation businesses. Such measures were introduced by Resolution No. 278/2000, which established the limit of 20% of the installed capacity in the national market; 25% of the installed capacity in the South, South East and West Central region and 35% of the installed capacity in the North and North-East regions.

The Law for regulation of the Electric Sector is not clear about the boundaries of the jurisdiction between the Agency and the Brazilian System of Antitrust (SBDC) with respect to the applicability of the Antitrust Law. Therefore, it is necessary to observe Decree No. 2.335/97 provisions, which regulated the creation of ANEEL. For merger control, this Decree established, in Article 4, XI e XII, Annex I that the Agency shall analyze every deal that results in economic concentration and to transfer of concessions.

It is possible, therefore, that such analysis differs from the analysis made by the SBDC, which follows the criteria stated on Article 54 of the Antitrust Law and is applicable to all other economic sectors. It is important to notice that the control exercised by ANEEL only refers to companies of the electric sector, mean while the control made in the SBDC scope shall analyze the eventual impact of the transaction upon others sectors that might have the market conditions altered by the anticompetitive practices. The interaction between SBDC and ANEEL is set forth by Article 3, sole paragraph, of the Law for regulation of the Electric Sector as well as Article 13, sole paragraph, Annex I, of the Decree, which established that referred authorities should enter into agreements with the purpose of harmonizing their institutional action. The SBDC authorities have entered into technical cooperation agreements with ANEEL. According to these agreements, the jurisdiction of the Agency should be issuance of technical reports in order to assist the analysis of mergers.

In terms of control of conducts, the interaction of the said authorities operates likewise. However, the issuance of technical report is not mandatory (as well as the issuance of a technical report by SEAE with respect to the conducts control is not mandatory). Besides that, ANEEL is responsible for monitoring the Electric Energy market, informing SDE about any possible anticompetitive practice

Regulation in the air transportation sector

The Civil Aviation Department –(*Departamento de Aviação Civil, DAC*) is the administrative body in charge of regulating the Airlines Sector, which is subordinated to the Command of the Aeronautics of the Ministry of Defense. The establishment of an independent regulatory agency is being discussed, the Civil Aviation National Agency (*Agência Nacional de Aviação Civil, ANAC*). However, the date of its creation is uncertain.

As from 1992, the sector has been undergoing a deregulation process, with a gradual flexibilization of the restrictions previously imposed (as authorization to operate in certain routes), accompanied by liberalization of rates. The consequence was the increase of offers of flights, in an environment of competition for prices and differentiation of services. Studies on the sector have disclosed that the competition was healthy, having generated a great market expansion (more than 9% per year, this rate is a lot higher than the average of growth of the economy), including the access of low-income consumers.

Consequently, the liberalization of the rates did not render it more expensive, being possible to observe its stability between 1996 and 2002 (decrease of 0,5% in Reais, the Brazilian currency). The dollar value of the rates fell by 51%.

The serious crisis faced by the traditional companies of the sector is well-known, many people ascribe this crises to excess of supply. Nonetheless, statistics have proved that the rate of occupation of the flights has grown since the beginning of the liberalization process. Concerning the decrease of the dollar value of rates, the

administration of debts assumed in this currency, is a problem to be faced by companies of any sector, not being particularity of airline companies. Therefore, the deregulation cannot be pointed as the reason to the financial difficulties faced by this sector.

On March 13, 2003, the Command of the Aeronautics has published Joint Directive n. 243/GC5 restricting the importation of commercial aircraft. On July 31 of the same year, by means of Joint Directive n. 731/GC5, it was determined that the DAC: should adequate the offer of air transportation to the evolution of the demand; should prevent any harmful and irrational competition and its undesirable predatory practices; upon analyzing the creation of new companies, the DAC should consider the economic situation of preexisting ones; it should prevent that the price competition adversely affect the financial health of companies, as well as the abusive rates. It should follow the evolution of the operational costs structure of the sector to restrain abuses, cartelization and dumping.

Regulation in the LPG (Liquid Petroleum Gas) market

The Oil Law (n° 9478/97) has established the promotion of free competition as one of the objectives of the energy sector (article 1o, IX), and has created the Regulatory Agency of the sector, the National Oil Agency - ANP. Decree 2455/98 has regulated the creation of the Agency, and has established that the ANP should regulate the markets on the basis of the principle of free competition (Annex I, article 3o, IV).

The regulation in the LPG sector has been undergoing some alterations. A Joint Directive has already been issued about resale (Joint Directive n. 297, November 18, 2003) and it is about to be published another Joint Directive about distribution. Aiming at intensifying the competition, the Agency should adopt some measures to bring down the entrance barriers in the sector. In this way, the requirement of minimum capital stock for newcomers companies, would not be required anymore. Instead of this requirement, the ANP would establish a procedure to evaluate if the company is able or not to operate in the market. Such evaluation would include an analysis of the tax regularity of the company and a study of the economic viability of this enterprise, indicating the volume of bulk gas and/or the number of cylinders that it intends to distribute, as well as the facilities necessary for such enterprise. Another barrier, which also would be removed, is a certification of financial qualification required of newcomers, since the LPG supplying company is much more qualified to make this judgment. Nonetheless, the effectiveness of such measures is questionable, since the initial investment required to apply for the Agency authorization would be comparable to that demanded by the current regulation.

Taking into account the application of the Antitrust Law to this sector, the article 10 of the Oil Law, has established that the ANP should communicate to the SBDC any violation to the economic order. The technical cooperation agreements between the SBDC bodies and the ANP have stipulated the same system adopted by the agreements

with ANEEL. That is, taking into account the control of structures, the Agency is required to issue a legal opinion that should be analyzed by CADE, together with the legal opinions issued by the Secretariats. As regards conducts, the ANP should communicate to the SDE any possible anticompetitive practice, and if it wishes, it could issue a legal opinion.

Perspectives regarding the distribution of attributions between the independent Regulatory Agencies and the Ministries

Two bills are pending, which aim at transferring from the Regulatory Agencies to the Ministries, the power to enter into contracts of concession and permission, as well as issuing authorizations. The motivation for such initiative is the finding that jurisdiction of independent Regulatory Agencies concerns to economic regulation and monitoring. The concession of the right to explore services should be made by the Ministries

Another important point of the bill is the greater attention given to the improvement of mechanisms of accountability, such as the obligation to answer considerations presented in public consultations. Moreover, it provides that the General Director of the Agency should account to Congress regularly and provide for the regulation of relationship between regulators and regulated parties.

As regards the interaction between the sectorial Regulatory Agencies and the antitrust authorities, the SBDC proposed that the law should provide that only its administrative bodies (SEAE, Sde and CADE) should have power to apply the antitrust legislation. It could also request to the sectorial Agencies to issue one expert opinion on the sector (and they should make it), with the purpose of assisting the SBDC in the appreciation of the merger or the anticompetitive behavior, as the case might be. It also considered that the Agencies are required to request a legal opinion from Agencies of the System on drafts of norms and regulations (before its disclosure for public consultation), so these could reveal on possible impacts on the competitive conditions of the sector. Moreover, the Agency would have the obligation of answering the issues presented in a legal opinion, especially in case the Regulatory Administrative Agency opposed to the recommendations of the antitrust authority.

ANTITRUST ENFORCEMENT IN REGULATED SECTORS
INTERRELATIONS BETWEEN ANTITRUST AND REGULATORY AUTHORITIES

CANADA

The following is the report of the Canadian Competition Bureau (the “Bureau”) for Sub-Group 3 of the ICN Working Group on Antitrust Enforcement in Regulated Sectors. The Report outlines mechanisms that the Bureau uses to manage overlap between its role in applying competition and the roles of sector regulators with examples drawn from the Canadian electricity, telecommunications and banking sectors.

Competition law was first enacted by the Canadian federal government in 1889. Subject to certain exceptions, the law applies generally to business activity in markets across the country. However, the law does not apply to governments in the country with the exception of activities engaged in by government owned corporations in competition with other businesses.

The law’s interface with regulation has been an important issue throughout much of its history. Case law dating back to the early 1900s has established that business conduct is generally within the jurisdiction of the law subject to the so-called “regulated conduct defence” (RCD). The RCD provides that conduct that is specifically authorized by a regulatory body exercising its authority under validly enacted legislation cannot be found in contravention of the *Competition Act*. Simply stated, the RCD protects conduct which would otherwise be subject to the *Competition Act*, if the conduct is specifically authorized by valid provincial or federal legislation.

The Bureau’s approach to applying the RCD is to determine where the Act and a statutory regulatory regime are in conflict. The RCD applies, and the Act becomes inoperative where there is clear operational conflict between the regulatory regime and the Act, such that obedience to the regime means contravention of the Act. When determining the application of the RCD, it is the specific conduct rather than the industry as a whole that is examined.

The relatively limited scope of the RCD means that there is the potential for broad overlap between competition law and regulatory oversight of markets in Canada. This is particularly the case in markets that are in transition from regulation to competition. In these markets, regulatory agencies, while they may not be directly regulating price, entry and other terms of supply, often take on new competition and market oversight responsibilities. At the same time, the movement away from direct regulation creates a corresponding increase in the scope for application of competition law.

This report discusses the various mechanisms the Bureau may use to manage

overlap between its roles and those of regulators with references to examples from the Canadian telecommunications, electricity and banking sectors. Part 1 provides an overview of the market and regulatory structure of the Canadian electricity and telecommunications sectors. Part 2 discusses the mechanisms for achieving inter-agency cooperation and coordination within the context of seven principles for assigning and coordinating the respective agencies' roles that the Bureau has developed from its historic involvement in markets in transition from regulation to competition. Part 3 outlines specific examples of interface arrangements that have been put in place between sector regulators and the Bureau to effectively coordinate and manage their respective roles and responsibilities.

1. The Canadian Electricity, Telecommunications and Banking Sectors

A. The Electricity Sector Market and Regulatory Structure

Electricity markets in Canada, for jurisdictional and other reasons, have traditionally been segmented along provincial lines. Outside of certain aspects of trans-border and interprovincial trade, responsibility for the regulation of electricity systems in Canada resides with the provincial governments. The degree of electricity sector restructuring that has taken place, or is projected in near future, varies greatly from one province to the next. However, two provinces, Ontario and Alberta, have undertaken extensive pro-competitive restructuring. Other provinces, while they may have made some reforms, have not undertaken basic pro-competitive restructuring.⁴

i. Ontario

Prior to restructuring, Ontario's electricity sector was dominated by the government-owned, vertically-integrated Ontario Hydro (OH). The company controlled over 90% of in province generation as well as the provincial transmission grid. OH also controlled distribution to some areas of the province. Import potential into the province is about 20% of peak demand. The vast majority of distribution assets were controlled by municipal utilities that numbered in excess of 300.

Legislation to open the Ontario electricity system to competition was adopted in October 1998. The Ontario electricity market opened to both wholesale and retail competition on May 1, 2002. However, a period of high prices in the Fall of 2002 led the government to reintroduce price controls for household electricity consumers. Citing concerns regarding the adequacy of generation capacity, a lack of private investment

⁴ For example, a number of provinces have posted transmission tariffs, revised their regulatory regimes and required vertical functional separation to comply with US Federal Energy Regulatory Commission requirements for access by Canadian utilities to US wholesale power markets. However, these provinces, which include B.C., Quebec and Manitoba, have not established market structures and mechanisms for either wholesale or retail competition.

and other matters, the provincial government, in January 2004, has retreated from various aspects of the initial restructuring plan. However, the wholesale energy trading markets that were created remain in operation.

Under the initial restructuring plan, generation owned by OH was transferred to a separate entity, Ontario Power Generation (OPG). OPG had started to divest some of its generation to reduce its share of generation capacity for Ontario below 35%. In two transactions the company divested control of hydro-electric facilities representing about 3% of capacity and nuclear facilities representing more than 10% of capacity. Nevertheless, OPG remains the dominant generator in the province.

Oversight of competition issues in the Ontario electricity markets is a shared responsibility of the Independent Electricity Operator (the “IMO”), the Ontario Energy Board (the “OEB”) and the Bureau. The IMO operates the electricity transmission system, and runs as well as monitors Ontario’s wholesale electricity markets. The Market Surveillance Panel (MSP) attached to the IMO monitors, investigates and reports on market behaviour, including suspected abuse of market power, in the IMO operated markets. The MSP consists of independent members.

The OEB is required to monitor all Ontario electricity markets and may report to the Minister of Energy, Science and Technology on the efficiency, fairness, transparency and competitiveness of those markets. The OEB directly regulates the monopoly sectors of the electricity industry (transmission and distribution) and has broad authority over the entire sector. The OEB is required to refrain from exercising its regulatory authority where, on an application or in the course of a proceeding, it determines that a matter is subject to sufficient competition to protect the public interest. Ontario energy legislation specifically provides that where the OEB refrains from regulating a matter, the legislation will not limit the application of the *Competition Act* (“CA”) to the matter.

ii. *Alberta*

Alberta has 11,750 MW of installed generating capacity, including 10,800 MW in the province's integrated electrical system and access to 950 MW from neighbouring jurisdictions through B.C. and Saskatchewan. Thermal sources account for the majority of Alberta's installed generating capacity: coal-fired plants make up approximately 50 per cent of the province's total generating capacity, and natural gas accounts for over one-third, including efficient cogeneration. The remainder is hydro, wind and biomass.

Power generated in Alberta is exchanged through the power pool, operated by the Alberta Electricity System Operator (AESO), an open-access competitive wholesale market for electric energy. The AESO co-ordinates all electricity sales and purchases in the province, as well as all energy imports and exports and provides real-time control of the provincial electricity grid. The Alberta wholesale market has numerous participants none having more than a 15% market share of dispatch (Canadian Energy Research Institute, October 28, 2003).

More than 20 retail companies are competing to sell power to the province's larger commercial and industrial users, who account for 64 per cent of all electricity usage in Alberta. The retail market for residential and farm customers is less well developed with most customers, over 90%, remaining on supply arranged through their distribution utility. By 2006, all such customers will receive electricity based on the real time wholesale market price (if they have not already been transferred to a wholesale market pass through price).

Oversight of competition is a shared responsibility of the Alberta electricity Market Surveillance Administrator (MSA), the Alberta Energy and Utilities Board (AEUB) and the Competition Bureau. The MSA is an independent investigative agency with a mandate to oversee the operation of a fair, efficient and openly competitive market for the exchange of electric energy in Alberta. The MSA's authority potentially extends to any aspect of the exchange of electricity in the province, and potentially includes anti-competitive practices of a type that may also fall under the federal *Competition Act*. The AEUB is responsible for appointing tribunals to adjudicate competition issues examined by the MSA and regulates pricing and access to the Alberta electricity system.

Alberta energy legislation requires that the MSA notify the Competition Bureau or any other body of any matters which it is investigating that are within the jurisdiction of the other body. The legislation further provides that the MSA may: (a) discontinue the investigation if the matter appears to be within the jurisdiction of another body and in that event must notify the person who made a complaint or referral of the discontinuance, giving reasons for the decision, or (b) continue the investigation (i) for the purpose of carrying out its mandate, or (ii) for the purpose of collaborating with any body notified. In addition, the MSA may decide to refrain, in whole or in part and conditionally or unconditionally, from the exercise of any power or the performance of any part of its mandate in regard to an activity if it is found on a factual basis that it is or will be subject to competition sufficient to protect the public interest.

B. TELECOMMUNICATIONS SECTOR MARKET AND REGULATORY STRUCTURE

Canadian telecommunications markets were initially segmented along provincial lines, coming under the jurisdiction of either federal, provincial or municipal regulation. In 1993, with the passage of the federal *Telecommunications Act*, all telecommunications carriers came under the jurisdiction of the federal regulator, the Canadian Radio-television and Telecommunications Commission (i.e. CRTC). The CRTC is responsible for administering this legislation, which sets out the policy framework for the sector. It is an independent public authority with quasi-judicial powers which are set out in the legislation.

Since 1992 the CRTC has initiated a number of significant proceedings to introduce competition into telecommunications services. Reform has been incremental and methodical. While relatively slow, reform has been smooth and effective. Nearly

all the original monopolies have been eliminated. This includes adopting new mechanisms for meeting social policy goals as well as allowing new entrants to have access to the networks of incumbents. Today virtually all voice and data communications markets in Canada are open to competition including equipment, local, long distance, pay phones, mobile wireless, and international. In addition, the CRTC has chosen not to regulate the Internet or Internet service providers.

During this same period, the federal government has made portions of the electro-magnetic spectrum available for use by wireless firms and has initiated several spectrum auctions. This has enabled wireless firms to compete for customers with wireline telecommunications providers for some services.

Canada has had open market entry in all telecommunications services since the end of the 1998 when international services were opened to competition. A licence is required of wireless operators and international service providers. Other providers need only register. All telecommunications providers must meet Canadian ownership requirements.

Prior to the 1992 the Canadian telecommunications industry was dominated by a few provincial wireline telephone companies. Each firm enjoyed a monopoly over all telecommunications services within its own territory and did not compete outside of its territory. The largest of these firms is BCE which is the majority owner of the largest telecommunications firms in the provinces of Ontario and Quebec (Bell Canada) as well as New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland (Aliant Telecom). The second largest is Telus Communications, which operates primarily in British Columbia and Alberta. MTS Communications operates in Manitoba, SaskTel in Saskatchewan, and Northwest Tel in the Yukon, the Northwest Territories, Nunavut, and northern British Columbia. TELUS Communications (Québec) and Société en commandite Télébec operate with regions of Quebec. In addition, there are some 40 small firms servicing rural areas and small towns which have a monopoly. Most telecommunications firms in Canada are privately owned. Exceptions include SaskTel, which is owned by the Saskatchewan government, and several small municipally owned companies.

The following provides information on market shares held by incumbents and competitors in specific telecommunications services as of December 31, 2002.⁵

i. Long Distance Telecommunications

The long distance market was open to competition in 1992. By the end of 2002 incumbents accounted for 73% of total retail long distance revenues. Competitors accounted for the remaining 27%. With regard to retail long distance minutes, incumbents accounted for 66% and the competitors 34%. In the domestic business market, incumbents enjoyed 71% of total revenues and 64% of minutes while

⁵ Source: Canadian Radio-television and Telecommunications Commission, Report to the Governor in Council, *Status of Competition in Canadian Telecommunications Markets*, November 2003

competitors held 29% of revenues and 36% of minutes. In the domestic residential market, incumbents held 75% of total revenues and 80% of minutes while the competitors accounted for 25% of revenues and 20% of minutes. With regard to international telecommunications services, incumbents held 65% of the residential market revenues and 58% of the business market revenues. Competitors held 35% and 42% respectively. With respect to minutes, incumbents had fallen to a 46% market share in both segments while competitors were at 54%.

ii. *Local Telecommunications*

The CRTC opened local telephone markets to competition in 1997 and continues to actively regulate this market. The primary focus is preventing anti-competitive practices by dominant incumbent local telephone companies through the adoption of a price cap structure and ensuring competitors have access to essential facilities on reasonable terms and conditions. Competitors have primarily targeted the major urban centres in Canada in their entry strategies for the local markets. Incumbents continue to hold a virtual monopoly on local telecommunications services in Canada accounting for 98.9% of residential local revenues and 91.9% of business local revenues. Competitors captured 1.1% of residential local revenues and 8.1% of business local revenues. With respect to local lines, the CRTC reports that on a national basis incumbents have 95% of lines versus 5% for competitors. The incumbents market share ranges from 93% in Ontario to 100% in Saskatchewan. There is no break down for residential lines versus business lines.

iii. *Mobile and Paging Services*

Since 1998 the CRTC has forborne from regulation of mobile and paging services. Industry Canada manages the spectrum required by the wireless industry and from time to time conducts spectrum auctions. There are four major suppliers of mobile and paging services. As of December 2002, the BCE group of companies⁶ accounted for 37% of industry revenues, Rogers accounted for 28%, Telus for 25% and Microcell for 10%. With respect to subscribers, the BCE group has 34%, Telus 29%, Rogers 28% and Microcell 8%.

iv. *Internet Service*

There is no regulation of retail Internet prices in Canada. The regulatory framework has been concerned primarily with the wholesale Internet access market so that third parties may access the networks owned or controlled by dominant telephone companies and cable companies. In the retail market there are three main groups of competitors - incumbent telephone companies (ILECs), cable television companies, and

⁶ Bell Mobility, Aliant Telecom, MTS, SaskTel, Northwestel Mobility, Télébec Mobilité and NorTel Mobility

other internet service providers. As of the end of 2002, ILECs accounted for 41% of total revenues in this segment, cable accounted for 36%, and others for the remaining 23%. Approximately half of all retail Internet revenues were accounted for by four companies - Bell Canada (ILEC), Telus (ILEC), Rogers (cable) and Shaw (cable). Cable and incumbent telephone companies have been the primary suppliers of high speed Internet service to residential customers. "Others" high speed service is largely marketed to the business community. In the business market, "Others" have 46% of revenues as compared with 44% for the ILECs and only 9% for cable companies.

The Competition Bureau and the CRTC act in a complementary fashion to deal with competition policy issues within this sector. The *Telecommunications Act* grants to the CRTC the authority to regulate the activities of all telecommunications firms. The objectives of this legislation include fostering increased reliance on market forces for the provision of telecommunications services and the encouragement of innovation in the provision of telecommunications services. The CRTC is responsible for meeting social policy goals and regulating the behaviour of telecommunications firms who possess the ability to exercise monopoly power. The CRTC has the authority to forbear conditionally or unconditionally from the regulation of specific services where it is satisfied that sufficient competition exists to protect the interests of end users.

The Bureau is responsible for ensuring that unregulated activities do not contravene the provisions of the *Competition Act*. In addition, the Competition Bureau has frequently intervened in CRTC hearings, as well as provided advice to Parliament and the other parts of the federal government in respect of competition in the telecommunications sector. While the Bureau's intervention work is continuing, it expects its role in the telecommunications sector will necessarily evolve towards a greater emphasis on enforcement as the Commission exercises its forbearance powers.

C. The Banking Sector Market and Regulatory Structure

The banking sector in Canada is dominated by 5 banks, the Royal Bank of Canada, the Canadian Imperial Bank of Commerce, the TD Bank Financial Group, the BMO Financial Group and the Bank of Nova Scotia. Regulation is divided between the federal and provincial governments. The federal government has the power to incorporate banks and to regulate banking. The power to regulate the securities industry rests with the provincial governments. The regulation of trust, loan and insurance companies is shared by two levels of government. The major areas of economic regulation are: 1) control of entry and exit, such as incorporation and licensing at various federal and provincial levels, capitalization requirements, restrictions preventing specific institutions from operating in specific markets, regulation of composition of assets and liabilities, across lending institutions, and approval to wind down, 2) ownership requirements for various categories of financial institutions, 3) mergers and acquisitions, and 4) special regulations for foreign financial institutions.

A merger among any of the banks also requires the ultimate approval of the

Minister of Finance under the *Bank Act*. In addition, the Minister of Finance also has the unique authority under section 94 of the *Competition Act* to prevent the Competition Tribunal from issuing any order in those circumstances where he has certified that a transaction among banks is desirable in the interest of the financial system. In short, exercising this authority would over-ride the Commissioner's and the Tribunal's roles.

2. Principles and Mechanisms For Managing Overlapping Roles and Responsibilities

Managing the overlap between the industry regulator and the Bureau requires the identification and clarification of the appropriate roles and responsibilities for the agencies during the various stages of restructuring. The Bureau, through its long-time involvement in both industry restructuring and applying competition law in deregulating markets, has developed a core set of principles for assigning and coordinating the respective agencies' roles and responsibilities. These principles form a continuum: starting from the initial decision to deregulate and continuing through to the development of measures for managing ongoing relations between the Bureau and the industry regulator.

Mechanisms that the Bureau uses for managing its relations with industry regulators are embedded in these principles. They start with interventions during the initial stages of restructuring to put in place the market, regulatory and legislative conditions for the right roles and relationships to be developed. After markets have been opened, they include mechanisms for inter-agency cooperation and coordination ranging from informal interactions and information exchange through to the creation of formal interface documents where warranted.

This section discusses mechanisms that the Bureau uses for managing overlapping roles and responsibilities with regulators in the context of the seven principles it has developed for assigning and coordinating the respective agencies' roles.⁷ It may be noted that the principles and mechanisms have been developed in the specific context

Principle 1: Introduce Effective Competition and Efficient Market Structures as soon as Feasible

The first principle and mechanism for determining roles and responsibilities and managing overlap is simply to put competitive market structures in place as soon as feasible. Effective and efficient competition, where it can be implemented, is the best mechanism for achieving the low-cost and innovative supply of products. Where such

⁷ These principles are taken from *The Complementary Role of Regulations and Competition Law in Deregulating Industries*, remarks by André Lafond, Deputy Commissioner of Competition, Competition Bureau to the Canadian Bar Association, Annual Fall Conference on Competition Law, October 3-4, 2002.

competition exists, market forces are the best regulators of business behaviour. In other words, the smaller the role that regulators and the Competition Bureau play in the market, the better.

Ultimately governments and regulators are responsible for the establishment of competitive market structures in making the initial move out of regulation. This is not to say, however, that the Bureau does not have a role at this stage. Rather, we consider the provision of policy advice and analysis to governments and regulators on how best to implement pro-competitive reforms in a regulated industry to be one of the key ways of achieving our objectives under the Act.

This policy role is entrenched in sections 125 and 126 of the *Competition Act*. These sections give the Commissioner the statutory authority to intervene before federal and provincial regulatory bodies. As an agency actively involved in analyzing competition issues, and not having a commercial interest in markets being deregulated, we are uniquely placed to provide competition policy advice.

Under section 125, the Commissioner has a statutory authority to make representations and call evidence before any federal board, commission or tribunal in respect of competition, whenever such representations are relevant to the board and to the factors the board is entitled to take into consideration in determining the matter. Generally, this means board decisions or recommendations related directly or indirectly to the production, supply, acquisition or distribution of goods or services subject to federal legislation. In addition to acting on his own initiative, the Commissioner may also be directed to intervene before federal bodies by the Minister.

Section 126 provides the Commissioner with the authority to make representations and call evidence before any provincial board, commission or tribunal in respect of competition. This power is limited in that the Commissioner must be invited to appear by the provincial body or must have the consent of the provincial body to intervene. These interventions address board decisions or recommendations related directly or indirectly to the production, supply, acquisition or distribution of goods or services subject to provincial legislation.

In addition to the intervention powers granted under the Act, the Bureau's advocacy efforts for competition encompass a public policy dimension. The Bureau regularly participates in policy and legislative development at the federal and provincial levels and also appears before Standing Committees of Parliament. In these fora the Bureau comments on issues related to the *Competition Act*, and any other matter relevant to competition policy and deregulation.

The Bureau has made numerous competition interventions before committees as well as federal and provincial regulatory bodies. Key sectors dealt in these interventions include transportation, telecommunications, broadcasting, electricity, natural gas, agriculture, resources and financial markets.⁸ In making these

⁸ Joseph Monteiro and Gerald Robertson, *Competition Advocacy by the Competition Bureau*, Competition Bureau, January 2001; Competition Bureau *Annual Report, 2000-2001*. In the 2000-2001

interventions, the Bureau does not argue for competition to be established merely for its own sake. Rather, we view effective competition as the best means to ensure the supply of innovative and lowcost products for the benefit of consumers. Where competition might conflict with social policy objectives, the Bureau has recommended that, where possible, these social objectives be implemented in a way that are least restrictive to competition. This could include phasing in competitive markets over time.

For example, in our May 31, 2001 submission to the Nova Scotia Energy Department Nova Scotia Energy Strategy Review, *Realizing the Benefits of Competition in the Nova Scotia Electricity System: An Evolutionary Approach*, the Bureau recommended the adoption of a phased-in approach to restructuring of the Nova Scotia electricity system. A key consideration underlying this recommendation was that the relatively small size of the Nova Scotia electricity system combined with the province's limited interconnections with other jurisdictions could make the establishment of fully open and competitive electricity markets difficult or excessively costly to implement.

To cite another example, the most important barrier to competition in local telecommunications was the existence of highly subsidized local residential telephone rates. For almost a century, in order to provide universal affordable local service, Canada and other countries have supported a monopoly market structure which made local telephone prices affordable by setting high prices for long distance and business service and using the revenue to subsidize local rates below their full incremental costs.

This policy was very successful and Canada achieved a penetration rate of approximately 98%. Yet, effective local competition cannot take place unless these subsidies are removed. Regulated below-cost prices impede the possibility of new entry. In our presentations to the CRTC in the proceedings leading up to the opening of local markets, we supported a policy of cost-based pricing by rebalancing and restructuring telephone rates. The elimination of price distortion would provide incentives for new entry and would ensure all market participants are making economically efficient decisions.⁹ To its credit, the CRTC increased local rates over the 1995-2001 period and today it has determined that local residential rates now cover their costs, except for rural and remote areas of the country.

PRINCIPLE 2: REGULATORY ROLE TO PROMOTE COMPETITION

As a second principle, the Competition Bureau supports regulators having an explicit role to promote competition. This objective should not be to promote competition for its own sake. Rather, as is the case under the purpose clause of our

period the Bureau made 9 interventions - 4 electricity, two telecommunications, two transportation, and one natural gas.

⁹ Submission by the Director of Investigation and Research to the CRTC, January 17, 1994 re: Telecom Public Notice CRTC 92-78 (*Review of Regulatory Framework*), paragraphs 93 to 114; Submission by the Director of Investigation and Research to the CRTC, January 26, 1996 re: Telecom Public Notice CRTC 95-36 (*Local Interconnection and Network Component Unbundling*), paragraphs 42-58.

legislation, it should be to promote competition as a way to achieve the efficient and innovative production and supply of products, meeting consumers' demands at the lowest possible cost.

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

The value of providing regulators with a role to promote competition is evident in the telecommunications sector. The *Telecommunications Act* has the express objective of fostering increased reliance on market forces and ensuring that regulation, where required, is efficient and effective. This objective has enabled the CRTC to open new areas of the telecommunications sector to competition, such as long-distance and local telephone services and pay telephones.¹⁰

While newer, a further example is provided by the revised *Ontario Energy Board Act* (the "OEBA") adopted in 1998. Section 1 of the Act lists a number of objectives that the Board is to consider in carrying out its responsibilities. The first objective on the list is to "facilitate competition in the generation and sale of electricity and to facilitate a smooth transition to competition." This objective will ensure that the Board takes account of competition concerns in carrying out its broad electricity regulatory and market oversight authority under the OEBA.

PRINCIPLE 3: REGULATORY CONTROL OVER EXCESSIVE PRICING DUE TO INCUMBENT MARKET POWER

As a third principle, the Bureau supports regulatory control over excessive pricing due to market power held by market incumbents in industries during the transition to competition. If a previously regulated company has excessive market power, competition law in Canada cannot prevent its use simply to obtain high prices. If this is to be prevented, regulatory oversight is necessary.

As an example, during the initial phases of deregulation, the Competition Bureau supported a price ceiling on the retail and wholesale rates set by incumbent local telephone companies until such time that effective competition is present to discipline incumbent pricing. In the Bureau's comments to the Alberta Electricity Market Structure Review, we supported interim regulation of certain Alberta electricity generation assets in the event that efforts to divide control over them do not succeed in establishing effective competition.¹¹

¹⁰ Telecom Decisions CRTC 97-8 and 98-8 opened local telephone markets and local pay telephone markets, respectively, to competition.

¹¹ See *Written Comments of the Competition Bureau to the Alberta Electricity Industry Review*, February 15, 2004.

PRINCIPLE 4: REGULATORY CONTROL OVER ACCESS TO ESSENTIAL FACILITIES

The Bureau's fourth principle is to support regulatory control over access to essential facilities in deregulating industries. Essential facilities include any facilities that businesses need access to in order to compete in a market, are not subject to effective competition and for which the costs of replication would raise an excessive barrier to entry. Examples include electricity and natural gas transmission, distribution systems and the local public switched telephone network. Canadian competition law, in certain circumstances, may be used to prevent companies owning or controlling essential facilities from using them to restrict competition in related markets. However, the law is generally not as well suited as industry specific regulation to deal with market access issues in such cases. These issues frequently involve complex technical and pricing matters that an industry regulator may be particularly well-placed to resolve on an ongoing and timely basis.

Moreover, the Canadian Competition Tribunal is not a price regulator. Therefore, an industry regulator is required to prevent the excessive pricing of essential facilities due to any market power residing in them. For this reason, the Bureau supports the recent price cap regime adopted by the CRTC for local telecommunications services. It enables the Commission to regulate access to essential facilities required by new entrants while at the same time allowing market forces to influence the price of services offered on these facilities.

Principle 5: Rely on Competition Law to Prevent Anti-Competitive Business Practices Unless Regulation is Demonstrably Better

Fifth, even from the first opening of a market, competition law should be relied on to prevent anti-competitive or unfair business practices, such as abuses of dominance, bid-rigging, price-fixing, misleading advertising and the attainment of market power through mergers or acquisitions, unless regulation or industry specific oversight is demonstrably better in this role. Competition law provides an established set of disciplines for dealing with such practices where they create a significant threat to competitive markets. These should be relied on unless regulation or industry specific oversight is clearly more effective.

However, the Bureau recognizes that the protections against anti-competitive practices under the *Competition Act*, which are, for most part, designed for application in all markets, may not be considered sufficient in specific circumstances. Additional competitive safeguards administered on a timely basis by an industry specific regulator may be essential in markets that are in the early stage of deregulation when competitive market structures tend to be the most fragile. A year or more delay in stopping an anticompetitive practice by a dominant incumbent, due to the requirements for investigating and taking a case to the Competition Tribunal, may have particularly

serious implications for the establishment of effective competition in a newly opened market as compared to in an established market.

Where such circumstances exist and industry regulators or oversight authorities are in a position to effectively deal with them in a shorter time frame, the Bureau supports these agencies having the lead role. For example, under Part VII of the *Telecommunications Rules of Procedure*, the CRTC has the authority to investigate anti-competitive complaints and has prescribed specific deadlines for completing these investigations. This contrasts with a more open-ended process under our legislation. In the Alberta electricity market, provision has been made for the establishment of tribunals specifically to examine competition and other matters investigated by the Market Surveillance Administrator.

Principle 6: Mechanisms for Removing Regulation When its Costs Outweigh its Benefits.

As a sixth principle, the Bureau supports effective mechanisms being put in place to ensure that regulation is removed when its costs outweigh its benefits. These mechanisms may include either the sunseting of regulation, or the use of regulatory forbearance provisions, such as those in the *Telecommunications Act*. Sunset provisions have the benefit of providing a certain time frame for the removal of regulation. However, an appropriate time frame may not always be possible to determine beforehand. In such cases, the Bureau supports the regulator itself having a role in removing regulation. More specifically, to promote the timely removal of regulation, the Bureau supports regulatory forbearance provisions being put in place having the following two basic elements:

- First, regulatory forbearance should be mandatory in regard to any activity that is shown to be subject to sufficient competition to protect the public interest.

To meet this test, it should not be necessary to establish that a market is approaching the perfect competition ideal. Rather, recognizing that regulation itself is costly and by nature restricts competitive behaviour, the Bureau believes that an activity should be viewed as sufficiently competitive if the level of competition is enough to prevent any market participant from establishing or sustaining a significant and non-transitory price increase.

- Second, forbearance provisions or decisions should provide a clear indication that competition law applies in areas in which the regulator is forbearing.

The purpose of this requirement is to ensure that competition law will be applicable in areas that are no longer subject to direct regulation, and to provide a clear signal that the primary role and responsibility for competition in the relevant market

have devolved to the Competition Bureau. This is best achieved by the adoption, as was done in the *Ontario Energy Board Act* passed in 1998, of a separate regulatory forbearance provision clearly indicating that the *Competition Act* will apply where the regulator forbears. Alternatively, where such provisions do not exist, regulators should clearly indicate the areas in which they are forbearing from regulation and their intention that competition law applies in these areas.

PRINCIPLE 7: INTER-AGENCY COOPERATION AND COORDINATION

As a final guiding principle for defining and managing overlapping roles and responsibilities, the Bureau supports effective inter-agency cooperation and coordination. Where overlap exists, the Bureau's objectives are: to work cooperatively and effectively with other agencies to ensure that unfair or anti-competitive business activity is detected and prevented; to minimize unnecessary overlap and duplication in examining and taking action in regard to specific matters; to minimize costs of businesses complying with the requirements of competition law as well industry specific regulators; and to create a more certain competition oversight framework for businesses. The Bureau uses both informal and formal mechanisms to achieve these objectives.

Particularly in sectors that are making the transition from regulation to competition, regulators tend to be unfamiliar with the potential application of competition law in the markets that are being created. Accordingly, an important first step in managing overlapping roles and responsibilities can be informing regulators of the potential application of competition law in their sectors.

Often this is done through meetings between senior management and staff of the agencies. These provide the opportunity for both agencies to benefit from a two way flow of information, and for dialogue to commence, as warranted on ongoing relations. In addition, in number of cases, the Bureau has used more formal hearing appearances as a means to create awareness of the potential application of competition law in newly created markets. An additional benefit of these appearances is to inform participants in the newly formed markets, which may be unfamiliar with competition law due to previous regulation, of how competition law may apply to them as regulation is removed.

Over the past several years, discussion of the potential application of competition law in deregulating markets has been a particularly important part of the Bureau's regulatory interventions in the energy sector. As noted above, the regulation of electricity markets in Canada is generally done at the provincial government level. While interprovincial trade in natural gas is subject to federal regulation, responsibility for retail trade within provinces rests primarily with provincial governments. As provincial governments have opened their energy markets over the past several years, the Bureau has made a number of interventions that have included as a key component,

discussion of the potential application of competition law in newly created energy markets.

Ongoing informal relationships may be maintained with regulatory agencies where warranted by the circumstances. These may occur where, for example, the issues involving overlap that do arise are ones that can be resolved on an *ad hoc* basis. However, in industries where there is broad overlap, the Bureau supports more formal arrangements being developed. In particular, where there is a high level of overlap the Bureau supports the development of written interface documents which describe the respective roles and responsibilities of the Bureau and the regulator. The Bureau currently has in place two such documents, one with the OEB and the IMO and the other with the CRTC. In addition, a Merger Review Process has been put in place to clarify how the how the Bureau and the Minister should interact in regard to bank mergers. These arrangements are outlined in the following section.

3. Interface Arrangements Between the Bureau and Regulators

The interface document between the Competition Bureau, the OEB and the IMO, the *Joint Statement on Competition Oversight of the Ontario Electricity Marketplace* (the Joint Statement), was created in respect of the high degree of overlap that potentially existed between the agencies in dealing with competition issues in the relevant markets. It was developed prior to the opening of the Ontario electricity market both to clarify the competition related roles of the respective agencies and provide a basis for coordinating actions on matters subject to overlapping jurisdiction.

Under the Ontario electricity market oversight framework, broad overlap exists between the OEB, the IMO and the Competition Bureau in dealing with potential anticompetitive practices. For example, the IMO Market Surveillance Panel may investigate and report to the OEB on competition abuses, including any anti-competitive practices affecting markets operated by the IMO. Following up on these reports, the OEB may amend the relevant market participants' licences to prevent the competition abuses. Subsequent violations of the related licence provisions may result in fines being imposed by the OEB. Other major areas for overlap between the IMO, the OEB and the Competition Bureau include the review of false or misleading advertising, and mergers, particularly those involving transmission and distribution companies.

The Joint Statement addressed this overlap by clarifying the respective agencies' jurisdictions with respect to Ontario electricity sector competition and providing a framework for cooperation and coordination in dealing with matters for which there is shared jurisdiction.¹² Under the Joint Statement, the agencies mutually recognize their jurisdictions in the relevant markets and indicate their intent to form working relationships, where appropriate, as well as work together to avoid the duplication of efforts in competition oversight wherever possible. The agencies further commit to: designating persons responsible for coordinating implementation of the Joint Statement;

¹² A copy of the full Joint Statement is attached.

consulting on a regular basis on competition oversight matters; and notifying the others of matters likely to fall within their jurisdictions at the earliest opportunity. Schedule 1 of the Joint Statement outlines each agency's responsibilities on competition matters in eight key areas including: anti-competitive practices; ongoing monitoring of electricity markets; implementation of the Market Power Mitigation Agreement under which Ontario Power Generation was required to divest control of much of its generation assets; excessive pricing due to market power; mergers and acquisitions; deceptive marketing practices; transmission and distribution access; and matters for which the OEB is refraining from regulation. These areas are grouped according to which agencies share responsibility. In certain cases, the schedule provides guidance on how the agencies may manage overlap. For example, the sections on anti-competitive practices and deceptive marketing practices indicate that the Competition Bureau's policy is not to enforce the *Competition Act* in regard to anti-competitive practices that are the subject of an enforcement action by either the IMO or the Board. While the Joint Statement has only been in effect for a short period of time, it has provided an effective basis for maintaining open lines of communication and ensuring the agencies are informed of each others' competition related actions in the Ontario electricity markets. This is being achieved through regular communications involving representatives from each of the agencies.

The telecommunications Interface Agreement had its genesis in the mid-1990s when companies having difficulty competing in the telecom market began to complain to the CRTC and the Bureau simultaneously, often leading to two investigations into the same activity. In an attempt to provide greater certainty to market participants and to limit these dual investigations, the Bureau and the CRTC entered into discussions to create a formal agreement setting out the agencies respective areas of responsibility and authority in the communications industry. These discussions culminated in the November 1999 Interface Agreement between the two agencies.¹³

The Agreement sets out the responsibilities of the two agencies with regard to the telecommunications sector and sets out the criteria under which the *Competition Act* would apply to allegations of anti-competitive behaviour by telecommunications carriers. Specifically, the Interface Agreement states:

- The *Competition Act* will apply where the CRTC has unconditionally exempted from regulation or has forborne unconditionally;
- The *Competition Act* will apply to conditionally or unconditionally forborne or exempted behaviour;
- The *Competition Act* would not be applied where the CRTC is managing a transition to competition and prior to formal forbearance or exemption order;

¹³ Competition Bureau and CRTC Interface, November, 1999; <http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct01647e.html>

- The CRTC has exclusive jurisdiction over interconnection and access issues given its special expertise and capacity for flexible and timely resolution;
- The Competition Bureau has exclusive authority with respect to criminal activity, such as price fixing, bid-rigging and price maintenance; and
- Both the CRTC and the Competition Bureau have parallel and concurrent jurisdiction with respect to certain areas such as mergers and marketing practices.

As indicated in section 1(C) above, the Minister of Finance must approve bank mergers in Canada and has the unique authority under section 94 of the *Competition Act* to prevent the Competition Tribunal from issuing any order in those circumstances where he has certified that a transaction among banks is desirable in the interest of the financial system. However, while the authority of both the Commissioner and the Minister of Finance are spelled out in the *Competition Act* and the *Bank Act*, both acts were silent on how the Commissioner and the Minister should interact and how this process should unfold. A bank merger review process was announced by the Minister of Finance on February 7, 2001. The process applies to mergers among banks and bank holding companies with equity in excess of \$5 billion.

There are three distinct phases to the Merger Review Process: an examination stage, a decision stage and, if required, a remedies stage. Subject to the prerogatives of Parliament, the Government will seek to complete the decision stage of its review of major transactions within a maximum of five months after receiving a complete application and adequate supporting documentation from the parties.

Stage 1: Examination of the Proposal

- The banks will apply to the Competition Bureau, the Office of the Superintendent of Financial Institutions (OSFI) and the Minister of Finance in writing for permission to merge and will provide information necessary to assess the merger request.
- The applicants will be required to prepare a Public Interest Impact Assessment (PIIA).
- The Competition Bureau and OSFI will conduct reviews of the proposal from the competition and prudential perspectives.
- Concurrently with the Bureau and OSFI reviews, the House of Commons Standing Committee on Finance (Finance Committee) and the Standing Senate Committee on Banking, Trade and Commerce (Senate Committee) will be asked to conduct public hearings into the broad public interest issues that are raised by the merger proposal, using the PIIA as a key input.

- Once they have completed their analyses of the proposed merger, the Commissioner of Competition and the Superintendent of Financial Institutions will provide to the applicants and to the Minister of Finance a letter with views on the competitive and prudential aspects of the proposed merger.
- Upon receiving the inputs of the Competition Bureau and OSFI, the Minister of Finance will publicly release the documents, with due regard to the need to maintain the confidentiality of commercially sensitive information and information that may affect the stability of the Canadian financial system. These public documents will be available for scrutiny by the Finance Committee and Senate Committee.
- Upon completion of its hearings and deliberations, the Finance Committee and Senate Committee will each report to the Minister of Finance on the broad public interest issues that are raised by the proposed merger.

Contents of the PIIA

- In the PIIA, the applicants explain the rationale for the merger and the steps that they could take to mitigate any potential costs or concerns. It should be made widely available to provide a solid basis for public hearings on the transaction. Applicants will be expected to articulate the following in the PIIA:
 - their business case and objectives, that is, why they wish to merge;
 - the possible costs and benefits to customers and small and medium-sized businesses, including the impact on branches, availability of financing, price, quality and availability of services;
 - the timing and socio-economic impact of any branch closures or alternative service delivery measures at the regional level, and any alternative service delivery measures that might mitigate the impact;
 - how the proposal would contribute to the international competitiveness of the financial services sector;
 - how the proposal would affect direct and indirect employment and the quality of the jobs in the sector, distinguishing between transitional and permanent effects;
 - how the proposal would increase the banks' ability to develop and adopt new technologies;
 - what remedial or mitigating steps in respect of public interest concerns the banks are prepared to take, such as divestitures, service guarantees and other commitments, and what measures to ensure fair treatment of those whose jobs are affected; and
 - the impact the transaction may have on the overall structure of the

industry.

- The PIIA will also cover any additional issues that the Minister of Finance or the parties deem relevant in the context of a particular proposed transaction.

Stage 2: Minister of Finance Decision

- Using the reports of the Competition Bureau, OSFI, the Finance Committee and the Senate Committee as inputs, the Minister of Finance will render a decision on whether the public interest, prudential and competition concerns that are raised by the transaction are capable of being addressed. If not, the transaction will be denied and the process will stop at this stage. If these concerns are capable of being addressed, the Merger Review Process will enter the negotiation of remedies stage.

Stage 3: Negotiation of Remedies

- The Competition Bureau will negotiate the competition remedies and OSFI the prudential remedies with the merger applicants, and will work with the Department of Finance in co-ordinating an overall set of public interest remedies (including possible divestitures). These remedies would address concerns that have been raised during the review process.

Following the successful negotiation of remedies, the Minister of Finance will approve the transaction with terms and conditions that reflect those remedies

**JOINT STATEMENT
MARCH 2002**

**COMPETITION BUREAU
INDEPENDENT ELECTRICITY MARKET OPERATOR
ONTARIO ENERGY BOARD**

COMPETITION OVERSIGHT OF THE ONTARIO ELECTRICITY MARKETPLACE

The purpose of this Joint Statement by the Competition Bureau (the «Bureau»), the Independent Electricity Market Operator (the «IMO») and the Ontario Energy Board (the «Board») (collectively, the «Agencies») is to clarify the overall regulatory and legal framework for competition oversight in Ontario electricity markets.

The Agencies acknowledge that they each have competition oversight responsibilities in the Ontario electricity markets, as more particularly summarized in Schedule 1 to this Joint Statement. A list of authorities governing the Agencies and key interpretative documents is attached as Schedule 2.

The Agencies intend to form effective working relationships, where appropriate, and to work together to avoid the duplication of efforts in competition oversight wherever possible. Each Agency shall designate one or more persons responsible for coordinating the implementation of this Joint Statement.

The Agencies will consult with one another on a regular basis with respect to issues relating to competition oversight. Each Agency shall notify the other(s) on matters likely to fall within the other's jurisdiction at the earliest opportunity.

Nothing in this Joint Statement limits the responsibility or authority of any of the Agencies in carrying out their respective mandates.

This Joint Statement will be reviewed after 12 months or sooner at the request of any Agency, but will continue until replaced or amended by the Agencies.

Floyd Laughren
Chair
Ontario Energy Board

Konrad von Finckenstein
Commissioner
Competition Bureau

Dave Goulding
President
Independent Electricity
Market Operator

Fred Gorbet
Chair
Market
Surveillance
Panel

March, 2002

SCHEDULE 1: SPECIFIC COMPETITION MATTERS

INTRODUCTION

Competition oversight of Ontario's electricity markets is the responsibility of the Board, the IMO, and the Competition Bureau.

Ontario Energy Board

The Board is the regulator of the electricity industry in Ontario. It functions as a quasi-judicial tribunal and is supported by a professional staff. The Board directly regulates the monopoly sectors of the electricity industry and has broad authority over the entire sector. All participants in the electricity industry are licenced by the Board. The Ontario Energy Board Act («OEBA») states that the Board, in carrying out its responsibilities, shall be guided by six objectives, including: to facilitate competition in the generation and sale of electricity in Ontario and to facilitate a smooth transition to competition in the Ontario electricity marketplace; and to provide generators, retailers and consumers with non-discriminatory access to transmission and distribution systems in Ontario.

Independent Electricity Market Operator

The IMO is a corporation without share capital, established by the Electricity Act, 1998 (the «EA») to direct the operations of the electricity transmission system, maintain the reliability of the IMO-controlled grid, and to establish and operate the IMO-administered markets, Ontario's wholesale electricity markets. When the authority is transferred by the Minister of Energy, Science, and Technology (the «Minister») the IMO will have responsibility for the Market Rules governing the IMO-administered markets. Like the OEB, the IMO is charged with facilitating competition in the generation and sale of electricity and facilitating a smooth transition to competition. A Market Surveillance Panel (the «MSP») has been appointed by, and reports to, the independent directors of the IMO Board.

Competition Bureau

The federal Competition Bureau, headed by the Commissioner of Competition, is responsible for the administration and enforcement of the Competition Act ("CA"). The CA is a federal law governing business conduct in markets across Canada. Its purpose is to maintain and encourage competition in the marketplace in order to promote the efficiency and adaptability of the Canadian economy, to ensure all businesses have an equitable opportunity to participate in the Canadian economy and to provide consumers the benefits of competitive prices and product choices. The CA achieves this purpose by stopping anti-competitive practices. The Competition Bureau conducts investigations under the CA which includes both criminal and civil provisions.

SPECIFIC COMPETITION MATTERS

The roles and responsibilities of the Agencies with regard to key competition matters may be grouped into the following four areas:

- A. Where each agency has jurisdiction.
- B. Where the Board and the IMO have jurisdiction.
- C. Where the Board and the Bureau have jurisdiction.
- D. Where the Board is refraining.

A. WHERE EACH AGENCY HAS JURISDICTION

(i) Anti-Competitive Practices

Overview

Anti-competitive practices are activities that have the effect of preventing or lessening competition among businesses in a market, or are intended to have that effect. This section applies to all anti-competitive practices not dealt with elsewhere in the Joint Statement.

The detection and prevention of harmful anti-competitive practices in Ontario electricity markets is the responsibility of the Bureau, the Board and the IMO.

The Bureau's responsibility derives from its role in ensuring that companies comply with the relevant criminal and civil provisions of the CA. The key criminal matters provisions of the CA deal with price-fixing, bid-rigging, price maintenance, price discrimination and predatory pricing. The key civil matters provisions include those dealing with abuse of a dominant market position, exclusive dealing, tied selling and market restriction, and, in certain circumstances, the refusal to supply products. Criminal violations of the CA are subject to penalties including fines and possible imprisonment. Civil contraventions may be remedied by orders to cease the relevant activity and undertake other actions that the Competition Tribunal considers necessary to restore competition.

Where there is overlap between the jurisdictions of the Board and the IMO, and the Bureau in dealing with an anti-competitive practice in Ontario electricity markets, the Bureau's policy is not to enforce the CA in regard to the practice if it is subject to an enforcement action by either the Board or the IMO under their respective jurisdictions. In cases involving overlapping jurisdiction, the Bureau, subject to its enforcement policies and priorities, will enforce the CA in regard to anti-competitive practices that are referred to the Bureau by the Board and the IMO or where the Board is refraining from regulation. The Bureau, where warranted, will also enforce the CA in regard to

anti-competitive practices that may affect competition in Ontario electricity markets but are outside the jurisdiction of either the IMO and the Board.

The IMO's responsibilities derive from its governance framework, notably the EA and the Market Rules. The MSP focuses on the monitoring and investigation of the IMO-administered markets, Ontario's wholesale electricity markets. The MSP's authority encompasses investigations and the issuance of reports and recommendations. Apart from the MSP, the IMO may address issues by changing the Market Rules. It also has authority to levy financial penalties in certain defined circumstances that may involve competition matters.

The Board, or the director of licencing, licenses market participants including electricity generators, transmitters, distributors, wholesalers and retailers. Licences may contain conditions addressing anti-competitive behaviour including those:

- that are appropriate, having regard to the objectives of the Board and the purposes of the EA, including promoting efficient and effective competition in the generation and sale of electricity in Ontario and facilitating a smooth transition to competition in the Ontario electricity marketplace;
- requiring the licensee to observe codes, including codes governing the conduct of:
 - a transmitter or distributor as that conduct relates to its affiliates;
 - a distributor as that conduct relates to a retailer; or
 - a generator, retailer or wholesaler or affiliate of that person, as that conduct relates to the abuse or possible abuse of market power;
- establishing minimum and maximum prices or a range of prices at which electricity may be offered for sale or sold through the IMO-administered markets or directly to another person or class of persons;
- restricting the duration of contracts between licensees and any other persons; and
- restricting significant investment in or acquisition of generation facilities located in Ontario.

If the Board receives a report from the MSP and information from the IMO that contain recommendations relating to the abuse or possible abuse of market power, the Board may conduct a review of the Market Rules or the licence of any market participant. If directed to do so by the Minister, the Board must conduct a review to determine whether the Market Rules or the licence of any market participant should be amended.

Upon completion of the review the Board may amend the licence of any market participant or make an order directing the IMO to amend the Market Rules for the purposes of reducing the risk of or mitigating the effects of an abuse of market power.

Also, on the application of any person, the Board may amend the licence of any market participant if it considers the amendment in the public interest, having regard to the objectives of the Board and the purposes of the EA. In addition, on application of any person, if the Board finds that a Market Rule or amendment to a Market Rule is inconsistent with the purposes of the EA, or unjustly discriminates against or in favour of a market participant or class of market participants, the Board must make an order directing the IMO to amend the Market Rule or revoke the amendment and refer the amendment back to the IMO for further consideration.

The Board may not commence a proceeding of its own motion to amend a licence to address an abuse or possible abuse of market power unless it considers the proceeding necessary to implement a Directive from the Minister.

Key Points

The detection and prevention of anti-competitive practices is a shared responsibility among the Agencies.

The Bureau's policy is not to enforce the CA in regard to anti-competitive practices that are the subject of an enforcement action by either the IMO or the Board.

B. WHERE THE BOARD AND THE IMO HAVE JURISDICTION

(i) Monitoring

Overview

As part of its role as the independent manager of Ontario's bulk electric system the IMO is charged with closely monitoring the wholesale electricity markets. This responsibility is carried out by the MSP whose monitoring is to identify: 1) inappropriate or anomalous market conduct, 2) flaws in the Market Rules, and 3) flaws in the overall structure of the markets. The MSP has access to all the operating information available to the IMO, supplemented by confidential information obtained directly from market participants.

The Board is required to monitor all segments of the electricity market and may report to the Minister on the efficiency, fairness, transparency and competitiveness of those markets. If requested, the Board must advise the Minister on any abuse or potential abuse of market power in the electricity sector, and circumstances giving rise to or capable of giving rise to unintended outcomes or effects that operate contrary to the interests of competition.

The CA does not specifically require the Bureau to monitor the Ontario electricity sector but the Bureau maintains an interest in activities in the sector that may contravene the CA.

Key Points

Monitoring of the Ontario electricity sector is the responsibility of the IMO and the Board. Whereas the IMO is responsible for monitoring of activity within the IMO-administered markets, the Board's responsibilities cover the entire electricity sector.

(ii) Market Power Mitigation Agreement

Overview

The Market Power Mitigation Agreement (the «MPMA») was negotiated as a means to mitigate Ontario Power Generation Inc.'s («OPG») market power in Ontario's wholesale electricity market, and is a condition of licence for OPG. The MPMA sets out market share reduction targets for OPG and provides incentives to meet these targets. In addition, the MPMA revenue cap mechanism provides a measure of protection for Ontario consumers of electricity against high prices. The revenue cap mechanism expires four years after market opening, or after the Board determines that OPG has met its decontrol obligations in full, whichever date comes sooner.

The Board has jurisdiction to ensure that OPG complies with the conditions of its licence, including the MPMA. The MPMA provides that OPG must pay a rebate to the IMO if the average hourly price exceeds a price cap over the period of a settlement year. The Board determines if OPG has completed the transfer of «effective control» over the output of a generation unit. If such a determination is made, the quantity of energy upon which the rebate is determined is reduced by 110% of the energy associated with the decontrolled plant. OPG is required to report to the Board periodically following the opening of the competitive electricity market with respect to OPG's progress toward its decontrol targets.

The IMO is responsible for calculating and distributing rebates to consumers annually, according to the formulae contained in the OPG Transitional Licence.

The Bureau supports the creation of competition in the Ontario electricity generation market but has no responsibilities for implementing the MPMA.

Key Points

The Board supervises the implementation of the MPMA.

(iii) Price Effects

Overview

The unilateral exercise of market power to raise prices may be considered an abuse or possible abuse of market power under the OEBA, that can be addressed by the Board through imposing licence conditions or changes to the Market Rules in accordance with the procedures stated above. However, the MPMA provides that OPG may engage in unilateral actions to maintain prices at the revenue cap level, and that if OPG has taken unilateral action to cause prices to exceed the revenue cap level, payment of the rebate is the only remedy.

The MSP's review of price movements involving OPG in the IMO-administered markets is also subject to the MPMA provision that the rebate is the only remedy to unilateral actions by OPG to sustain prices at or above the MPMA revenue cap level. Additionally, the Market Rules give the IMO the authority to sanction the exercise of local market power via replacement prices and the levying of financial penalties in certain defined circumstances.

The use of market power merely to increase or sustain prices without evidence of an anti-competitive practice does not contravene the CA.

Key Points

The Board and the IMO's overview of prices in the marketplace is conditioned by the MPMA and the framework established in the OEBA and the Market Rules.

C. WHERE THE BUREAU AND THE BOARD HAVE JURISDICTION

(i) Mergers and Acquisitions

Overview

If an electricity distributor proposes to amalgamate with another corporation, a new licence is required for the amalgamated corporation. An electricity transmitter or distributor may not sell, lease or otherwise dispose of any part of a transmission or distribution system that is necessary in serving the public without an order from the Board. In addition, leave of the Board is required for a person to acquire voting securities of an electricity transmitter or distributor if, after the acquisition, it would directly or indirectly hold more than twenty percent of the voting securities of the transmitter or distributor.

The Board has a right to review proposed vertical mergers between generators and distributors or transmitters. Vertical mergers between competitive sector generators and regulated monopoly sector distributors and transmitters risk impairing non-discriminatory access to distribution and transmission systems, and can also lead to

incentives to leverage market power from the regulated sectors to the competitive sectors. The Board must make the order approving the proposal if it determines that «the impact of the proposal would not adversely affect the development and maintenance of a competitive market». The Board may also approve a transmitter or distributor acquiring or constructing a generator, if the proposal is required to maintain the reliability of the transmission or distribution system.

If the merger of any market participant requires a new licence or an amendment to an existing licence, the Board, or the director of licensing, may choose to review the competitive effects of such merger as part of any licensing review.

Under the CA, all mergers and asset acquisitions are potentially subject to review and transactions which exceed prescribed asset/sales thresholds must be formally prenotified to the Bureau. The Bureau's examination of mergers and acquisitions relates exclusively to competition and efficiency effects.

The IMO does not have a specific role in mergers and acquisitions, other than providing information to the Board as required.

Key Points

Both the Board and the Bureau have independent jurisdiction with respect to Ontario electricity mergers, amalgamations, acquisitions and divestitures.

Mergers must comply with the legislation and regulations administered by both the Board and the Bureau including requirements for prenotification.

The Board, in reviewing mergers, considers all of the objectives covered in section 1 of the OEBA, including their competitive impacts.

The Bureau is concerned with the impact of a particular merger on the competitiveness and efficiency of electricity markets in Ontario and potentially other areas in Canada.

(ii) Deceptive Marketing Practices

Overview

Under the OEBA, electricity retailers in Ontario must have a valid licence. As a condition of the licence, marketers must comply with the Board's Retailer Code of Conduct and failure could result in a marketer's licence being suspended or revoked, or the imposition of financial penalties by the director of licensing. The intent of the Code is to ensure an adequate level of consumer protection in the emerging electricity markets.

The Ministry of Consumer and Commercial Relations also has responsibilities for regulating consumer protection and unfair business practices in Ontario.

The CA contains both civil and criminal law provisions prohibiting false or misleading representations and deceptive marketing practices in promoting the supply or use of a product or any business interest. Whereas the marketer Code of Conduct requires that information be provided to consumers, the only specific disclosure requirements contained in the CA relate to pyramid selling, promotional contests, and deceptive telemarketing. Apart from these matters, the CA only provides that a representation must not be false or misleading in a material respect.

Key Points

Both the Board and the Bureau have broad responsibilities with respect to reviewing deceptive marketing practices.

The Bureau's policy is not to enforce the CA in regard to false or misleading representations or deceptive marketing practices that are the subject of an enforcement action by the Board.

(iii) Transmission and Distribution Access

Overview

Providing «generators, retailers and consumers with non-discriminatory access to transmission and distribution systems in Ontario» is one of the core objectives of the Board. The Board has extensive powers to regulate the pricing of and access to transmission and distribution in Ontario.

It may be possible to address discrimination with respect to transmission and distribution access, in certain circumstances, under the CA. However, the establishment of non-discriminatory access to transmission and distribution systems is not a specific objective of the CA.

Key Points

The Board has responsibility for ensuring open and non-discriminatory access to the electricity transmission and distribution systems in Ontario.

The Bureau may deal with access issues if such conduct contravenes the CA but will not take related actions in regard to access matters being dealt with by the Board.

D. WHERE THE BOARD IS REFRAINING

Overview

If, on an application or in the course of a proceeding, the Board finds as a question of fact that a licensee, person, product, class of products, service or class of services is or will be subject to competition sufficient to protect the public interest, the Board is required to refrain, in whole or part, from exercising any power or performing any duty under the OEBA. A Board decision to refrain can be made in relation to any matter, any licensee, any person subject to the OEBA or any classes of products or services provided in Ontario by a person subject to the OEBA. The Board must notify the Minister if it makes a determination to refrain. A Board decision to refrain can be rescinded by a later Board decision.

Where the Board refrains, in whole or in part, nothing in the OEBA limits the application of the CA to those matters with respect to which the Board refrains.

Key Points

Where the Board is refraining, the CA will apply.

SCHEDULE 2: GOVERNING AUTHORITIES AND INTERPRETIVE DOCUMENTS

IMO

1. STATUTORY & OTHER GOVERNING AUTHORITIES

The Electricity Act, 1998

Sections 13-14, 32-38

IMO Governance and Structure By-Law

Articles 8.1, 8.3, 8.9, 8.10

Transitional Licence for the Independent Electricity Market Operator

EI-1999-0450 Paragraphs 10.1, 10.2, 12, 19.1, 19.2, 22, 24

Transitional Generation Licence Issued to:

Ontario Power Generation Inc. EG-1999-0333

Market Rules

Chapter 3, Sections 3, 5, 6,

Appendix 7.6

2. KEY INTERPRETATIVE DOCUMENTS

Market Manual 2: Market Administration

Part 2.0 Market Administration Overview

Part 2.1 Dispute Resolution
Part 2.5 Maintaining Surveillance Data and Amending the Data Catalogue
Part 2.6 Treatment of Compliance Issues
Part 2.7 Treatment of Market Surveillance Issues

Market Surveillance Confidentiality Policy

Market Surveillance Data Catalogue

OEB

1. STATUTORY & OTHER GOVERNING AUTHORITIES

The Electricity Act, 1998

The Ontario Energy Board Act, 1998

2. KEY INTERPRETATIVE DOCUMENTS

The Affiliate Relationships Code for Electricity Distributors and Transmitters

Code of Conduct for Electricity Retailers

Distribution System Code

Retail Settlement Code

Standard Supply Service Code

Transmission System Code

Rules of Practice and Procedure

Guidelines for the Treatment of Filings made in Confidence: Phase I

Preliminary Filing Requirements for Mergers, Acquisitions, Amalgamations, and Divestitures in the Ontario Electricity Transmission and Distribution Sector

Preliminary Filing Requirements for Notice of Proposal Under Sections 80 and 81 of the Ontario Energy Board Act, 1998.

Transitional Generation Licence Issued to: Ontario Power Generation Inc. EG-1999-0333

Transitional Licence for the Independent Electricity Market Operator EI-1999-0450

Market Rules

COMPETITION BUREAU

1. STATUTORY & OTHER GOVERNING AUTHORITIES

The Competition Act

2. KEY INTERPRETATIVE DOCUMENTS

Enforcement Guidelines on the Abuse of Dominance Provisions.

Merger Enforcement Guidelines.

Misleading Advertising Guidelines.

Notifiable Transactions under the Competition Act: Prenotification Guide.

Predatory Pricing Enforcement Guidelines.

Price Discrimination Enforcement Guidelines.

ANTITRUST ENFORCEMENT IN REGULATED SECTORS
INTERRELATIONS BETWEEN ANTITRUST AND REGULATORY AUTHORITIES

FINLAND

Points of focus

In this report, the emphasis will be on telecommunications. The sector will be complemented with recent experiences within the field of electricity where the Ministry of Trade and Industry (MTI) and the consumer authority are also involved. Finally, we will shortly cover the interrelation between the FCA and the air transport authority with reference to a specific example of an interest of conflict (Annex 1).

The advocacy role of the FCA was significant in making initiatives to deregulate the closed Finnish markets during 1988-1995. Before membership in the EU, the FCA primarily took structural initiatives to open up markets such as liberalising imports, abolishing licences and reforming technical standards. Several initiatives focused on abolishing monopolies and restructuring state-owned enterprises. Considerable progress was also actually made before Finland joined the EU in 1995. In fact, Finland has an impressive record of market-opening reforms, in which competition policy and advocacy have been key drivers. Major regulatory reforms promoting market openness are listed in Annex 2.

For the past few years, the FCA's activities have focused on the examination of the marketisation of public service production and the competitive problems involved with public utilities. The communications and telecommunications markets and the financial sector have also been under scrutiny. To state an example, on the FCA's initiative, the state-owned banks' exclusive right to conduct the state's payment traffic ended in 2000.

Other points of focus in competition monitoring have included certain areas of trade and industry as well as transport, particularly air traffic. In addition, potential competition restraints related to environmental issues have gained importance recently.

1. *The legislative and regulatory framework*

Competition Authority

The FCA is an independent administrative body established in 1988 with the objective to protect sound and effective economic competition and to increase economic efficiency by promoting competition and removing harmful restrictive practices. The FCA protects economic competition by intervening with competition restraints violating the Act on Competition Restrictions (480/92) (hereafter the Competition Act) and by general advocacy. In the spring of 2004, a draft Bill to reform the Competition Act is likely to be brought before the Parliament.

From 1 May 2004, the FCA shall apply EU competition rules to competition restraints felt within the EU region, provided they have a significant effect on the trade between the Member States. If such an effect is lacking, the national Competition Act shall be applied.

The FCA's organisation was reformed in 2002 and competition control and the promotion of competition became the responsibilities of the Monopolies Unit, the Cartels Unit and the Advocacy Unit. The FCA's role is both reactive and proactive: it boosts market activities by intervening with breaches of the competition rules and engages in various forms of advocacy.

The FCA works in close liaison with the Competition Directorate of the European Commission. From 1 May 2004 the FCA will cooperate with other competition authorities of the EU Member States and the Commission in the European Competition Network (ECN). The FCA is also a member of the International Competition Network (ICN) and contributes to the work of the OECD Committee on Competition Law and Policy. Cooperation with the Nordic competition authorities and near regions has traditionally been tight.

The FCA is located in Helsinki and has a staff of 70. Director General Matti Purasjoki has headed the office from its start in 1988. The FCA is an agency in the administrative sector of the MTI.

Telecommunications

Telecom services, liberalised in the 1990s, are fully subject to the Competition Act. The FCA has put considerable resources into the sector, picking up issues such as broadband connections (ADSL), interconnection and the pricing of services to Internet service providers. It has also resisted efforts by major network operators to acquire dominant positions in cable infrastructure.

Telecommunications regulator

Like the FCA, the Telecommunications Administration Centre was also established in 1988. It changed its name into the Finnish Communications Regulatory Authority (FICORA) in 2001. The FICORA is a general administrative authority for issues concerning electronic communication and information society services, and it operates in the administrative sector of the Ministry of Transport and Communications, which is responsible for drafting regulations for the sector. FICORA's supervision of the communications markets aims at healthy competition and compliance by the operators with the statutory obligations relating to pricing and operations.

Good cooperation has existed between the FCA and FICORA for many years. In this connection, it is worth mentioning that the key directors and experts of FICORA have previously been employed by the FCA and are thus thoroughly familiar with the FCA's decisions within the field of telecommunications.

In 2003, the FCA and FICORA signed a memorandum to clarify the operational principles of cooperation between the FCA and FICORA. The operational principles listed in the memorandum will be assessed and developed on the basis of experience gained from the cooperation.

According to the principles suggested in the memorandum, the two authorities aim to do the following:

- * Creating prerequisites to enable both to function effectively in fostering competition in the communications sector.
- * Reaching an agreement on intensified cooperation, particularly so as to avoid inconsistent decisions.
- * Defining the principles that will eliminate overlaps in settling cases that fall within the jurisdiction of both authorities.

2. *Their respective role in antitrust enforcement (who does what and how)*

Both the FCA and FICORA have responsibilities with respect to creating and maintaining viable competition on the communications market. The implementing powers of these authorities are parallel to some degree. Whereas the decisions of the FCA are based on the Competition Act, FICORA promotes the effectiveness of markets on the basis of the Communications Market Act (396/1997), and, partially, under the Postal Services Act (313/2001). Both the Competition Act and the Communications Market Act may be applied to the same case.

Cooperation between the two authorities is critical, due to their parallel implementing powers. The need for cooperation was necessary when the new Communications Market Act entered into force in 2003. According to the Act, FICORA will formulate market definitions and perform analyses related to decisions on significant market power (SMP). These will be conducted according to principles

conventionally used in Competition Act. In 2003, the FCA has given its opinions related to SMP draft decisions.

The FCA and FICORA aim to promote the functionality of communications markets so as to use the resources of the authorities as effectively and expediently as possible. On the one hand, they will try to avoid overlapping authoritative actions concerning the same case, and on the other will ensure that either of them intervenes, when necessary, in problems that require the use of such authoritative action.

3. *Shared vs. exclusive competencies*

Handling requests for action

The FCA and FICORA will strive to handle requests for action as quickly as possible. The relatively short period of time legislated by the Communications Market Act increases the need for smooth and swift cooperation between the two authorities for hearing such requests.

The FCA and FICORA will regularly exchange information on pending requests for action and other related matters. The aim is to promptly direct requests to whichever authority is best placed to deal with the matter, including implementation of necessary changes.

However, in some cases it is not immediately evident which authority can most effectively handle a request for action. The range of means and sanctions offered by the Competition Act and the Communications Market Act are partially dissimilar, and certain cases may therefore require the relevant expertise of both authorities. In matters related to pricing, for example, FICORA can better assess how reasonable a price level is, with the help of methods generally used by regulatory authorities, whereas the FCA often has the more effective ways of intervening in discriminatory pricing practices.

The handling of a request for action is naturally a matter for the FCA if it is clear that a competition infringement fine for a competition restriction must be imposed, or that the injured party is taking the case to court and demanding compensation as referred to in Article 18a of the Competition Act. Resolving the matter and implementing further measures are primarily matters for FICORA if the request concerns infringement of an obligation FICORA has imposed on an operator with SMP. If both authorities are investigating the matter, conflicting views can be avoided by agreeing, for example, to leave the resolution of the matter to one authority, or to the appeal body, the Market Court.

The FCA and FICORA have agreed that when the same request for action is pending at both Offices, the authority which makes its decision first will contact the other before making the final decision. Under the Administrative Procedure Act, the receiving public authority must be notified of matters submitted for transfer prior to said transfer.

The FCA and FICORA are prepared to arrange negotiations, when necessary, in which the companies involved have the opportunity to discuss the same matter simultaneously with the representatives of both authorities. Such mutual negotiations are particularly called for when the companies are providing general information on their products or operating methods. Companies normally negotiate separately, and in detail, with the relevant authority regarding the application of the Competition Act or the Communications Market Act.

4. *How to ensure competition law consistency in this context?*

Working groups

According to the new Communications Market Act, decisions on SMP are based on market definition and analysis of the competitive situation on the relevant market. FICORA can declare a telecommunications operator to have SMP, and impose the necessary obligations on the operator if the analysis shows that the competition on the market is not effective. The methods used for defining the market and assessing SMP are the same as those used in competition law.

The FCA and FICORA have established a working group consisting of experts from both authorities. Set up in 2002, the group handles issues regarding market definition such as SMP and analyses the competitive situation.

The FCA and FICORA have also agreed on regular meetings to consider pending matters and other topical issues. Contact persons have been appointed to ensure efficient cooperation.

Market follow-up and educational co-operation

Experts at the FCA and FICORA regularly discuss the state of the communications market. When necessary, the authorities can work together and make settlements on their own initiative.

Every effort will be made to ensure that the experts can participate in relevant training given by the other authority. The authorities may also arrange mutual training.

Information exchange

The FCA and FICORA may exchange public information only. Information and documents containing trade secrets can be supplied to the other authority only if the company concerned allows it.

The new communications legislation enables the exchange of confidential information as well. The FCA and FICORA will agree in detail on the principles involved in the exchange of information. The exchange of confidential documents may

become inevitable, particularly in the case of market definitions and analyses concerning SMP decisions and settlements concerning pricing.

Prior competition authorities' consultation is desirable and often provided for in the field of regulation as well as in non-regulatory matters. Vice versa, competition authorities' cases may have technical aspects that only the specialized authority can sort out. This kind of consultation is also desirable.

ELECTRICITY

Interrelations between the FCA and the electricity regulator

The power sector was also liberalised in the 1990s. This included disaggregating of the vertical supply chain to separate the grid (transmission and distribution) from generation and supply so as to promote competition in the latter, the abolition of permits, and rules to ensure fair grid access. The electricity regulator, the Energy Market Authority (EMA), has the main responsibility for grid access and pricing, though the FCA is also involved. Wholesale and retail prices are not regulated, but subject to the general Competition Act principles about predation, discrimination and so on.

Interrelations between the FCA and EMA largely correspond that of the telecommunications sector. The EMA is an expert body subordinate to the MTI. Its operation started as the Electricity Market Authority in 1995, at the same time new Electricity Market Act (368/1995) took effect, opening stepwise the electricity market to competition.

The goal of the EMA is to promote healthy and efficient competition in the electricity market and also in the natural gas market, and to secure reasonable and equitable services principles. The principle task of the EMA is to supervise the pricing of transmission, distribution and other network services. Supervision takes place case by case afterwards.

At the FCA's initiation, an unofficial Working Party was set up in 2003. The tasks of the Working Party include exchange of views on competition problems and especially consideration of new ways on how to transmit electricity price information to consumers. The members of the Working Party include the FCA, the EMA, the Energy Department of the MTI and the Finnish Consumer Agency.

COMPETITIVE EFFECTS OF BILATERAL AIRLINE AGREEMENTS

In April 2002, the FCA received information that the Finnish Civil Aviation Administration had approved the suggested fares of the Latvian Air Baltic for the route Riga-Helsinki for just one month. The extremely short deadline was exceptional. The FCA inquired from the Civil Aviation Administration the reasoning for the decision.

According to the Finnish Civil Aviation Administration, the fares proposed by Air Baltic for the Finnish air traffic were considerably below the prices for Denmark and Sweden. The Civil Aviation Administration held that the rates appeared to be Air Baltic's "invasion" of the Finnish market. SAS is one of the owners of Air Baltic.

On the basis of the airline agreement between Finland and Latvia, both countries shall approve the schedules and fares used by the carriers in the bilateral traffic. The same or similar principles are applied in other airline agreements between Finland and the non-EU countries. In this context the aviation authorities represent the contracting countries. That is why the Competition Authority had no say in the matter even though aviation authorities' decision clearly had a competition dimension as well.

The airline agreements between Finland and the non-EU countries have major competitive effects. Finnair has an exclusive position as the sole carrier, which is considered national in the bilateral airline agreements concluded by Finland with the non-EU, third countries. The basis of the agreements dates back from the 1944 IATA¹⁴ convention in Chicago: explicit restrictions may be imposed on the routes, schedules and fares. The beneficiary of these contracts in Finland is Finnair. These trafficking rights do not affect other carriers registered in Finland.

These agreements effectively cover the national carriers appointed therein from competition on routes flown to third countries. Although there are differences in the agreements concluded with the different countries, they all contain a provision, under which the aviation authorities of both countries shall approve the schedules and tariffs of the carriers. The following rationale for approving the tariffs is presented in the agreements:

"The tariffs to be charged by a designated airline of one Contracting Party for carriage to or from the territory of the other Contracting Party shall be established at reasonable levels, due regard being paid to all relevant factors, including cost of operation, reasonable profit, characteristics of service (such as standards of speed and accommodation), the interests of users, market considerations and the tariffs of other airlines for any part of the specified route."

The following is provided on capacity: "In operating the agreed services the designated airline(s) of each Contracting Party shall take into account the interests of the designated airline(s) of the other Contracting Party so as not to affect unduly the services which the latter provide on the whole or any part of the same routes."

The situation of Finland and Finnair does not differ from the international usages. However, the bilateral airline agreements are the reason why Finnair's direct flights to non-EU countries are not exposed to regular competitive pressure. Only flights with stopovers offer competing alternatives, and their substitutability depends e.g. on the amount of alternative supply and the impact of stopovers on flight time and costs.

¹⁴ International Air Transport Association.

The role of the bilateral agreements is about to change, however, as a result of the decisions of the Court of First Instance regarding the Open Skies agreements between the EU countries and the USA.

Open skies agreements

The USA offers so-called Open Skies agreements to countries wanting bilateral treaties on cross-Atlantic flights to the USA. A bilateral Open Skies agreement between the USA and a third country gives complete freedom for airlines registered in the two countries to travel between the two, both on new and existing routes.

The European Commission has been trying for some years to negotiate such a deal with the USA on behalf of all 15 EU Member States, but has still not succeeded. Thus, several Member States have individually negotiated Open Skies agreements with the USA.¹⁵

The Commission considers bilateral agreements to infringe Community Regulations, as the agreements only ensure the Member State's own air carriers the right to fly from their territory to the USA. According to the Commission, the involved Member State in this way creates serious discrimination and distortions of competition towards other Member States. The Commission has therefore submitted applications to the Court against the Member States, who have made bilateral agreements with the USA.¹⁶ In an opinion delivered by the Advocate General to the European Court of Justice on 31 January 2002, it is proposed that individual member states no longer be allowed to entertain such individual aviation treaties with non-EU countries.

Decision by the Court of First Instance of 5 November 2002

In November 2002, the EC Court of First Instance gave its ruling on cases concerning eight EU member states, where the object of assessment were the Open Skies agreements between those eight countries and the USA (so-called third country).

The Court found that the provision contained in the agreements, which required that the airlines appointed in the agreement, of which a substantial part of the ownership and effective control is vested in the signatory or its nationals, discriminates against carriers from other member states by excluding them from the traffic subject to the agreement. The Court found such a provision to violate the EU Treaty and that the member states that had signed the Open Skies agreement had not complied with the obligations set by the community legislation.

¹⁵ Austria, Belgium, Denmark, Finland, Germany, Italy, Luxembourg, Netherlands, Portugal, and Sweden.

¹⁶ C-466-469/98, C-471-472/98 and C-475-476/98. The cases are still pending before the Court.

An extract from the decision of the Court of First Instance C-469/98:

“122 Articles 52 and 58 of the Treaty thus guarantee nationals of Member States of the Community who have exercised their freedom of establishment and companies or firms which are assimilated to them the same treatment in the host Member State as that accorded to nationals of that Member State (see Case C-307/97 *Saint-Gobain v Finanzamt Aachen-Innenstadt* [1999] ECR I-6161, paragraph 35), both as regards access to an occupational activity on first establishment and as regards the exercise of that activity by the person established in the host Member State.

123 The Court has thus held that the principle of national treatment requires a Member State which is a party to a bilateral international treaty with a non-member country for the avoidance of double taxation to grant to permanent establishments of companies resident in another Member State the advantages provided for by that treaty on the same conditions as those which apply to companies resident in the Member State that is party to the treaty (see *Saint-Gobain*, paragraph 59; Case C-55/00 *Gottardo v INPS* [2002] ECR I-413, paragraph 32).

124 In this case, the clause on the ownership and control of airlines does, amongst other things, permit the United States of America to prohibit or revoke the exercise of traffic rights granted to an airline designated by the Republic of Finland but of which a substantial part of the ownership and effective control is not vested in that Member State or Finnish nationals.

125 There can be no doubt that airlines established in the Republic of Finland of which a substantial part of the ownership and effective control is vested either in a Member State other than the Republic of Finland or in nationals of such a Member State ('Community airlines') are capable of being affected by that clause.

126 By contrast, the formulation of that clause shows that the United States of America is in principle under an obligation to grant traffic rights to airlines of which a substantial part of the ownership and effective control is vested in the Republic of Finland or Finnish nationals ('Finnish airlines').

127 It follows that Community airlines may always be excluded from the benefit of the commitments on air transport between the Republic of Finland and the United States of America, while that benefit is assured to Finnish airlines. Consequently, Community airline companies suffer discrimination, which prevents them from benefiting from the treatment, which the host Member State, namely the Republic of Finland, accords to its own nationals.

128 It should be added that the direct source of that discrimination is not the possible conduct of the United States of America but the clause on the ownership and control of airline companies, which specifically acknowledges the right of the United States of America to act in that way.

129 It follows that the clause on the ownership and control of airlines is contrary to Article 52 of the Treaty.”

The most important reforms aimed at opening the markets in Finland

Opening data transfer for competition (1988)
Abandoning general price control (1988)
Liberalisation of the import of crude oil products (1991)
Abolishment of the needs-testing in road freight transport (1991) ¹⁷
Liberalisation of kiosk retailing (1991)
Liberalisation of entry into the restaurant and hotel business (1991)
Abolishment of the sugar import monopoly (1992)
Abolishment of the restrictions on foreign ownership (1993)
Abolishment of the needs-testing in the domestic passenger airline services (1993)
Opening telecommunications services for competition (1987, fully in 1994)
Abolishment of the needs-testing for driving schools (1994)
Liberalisation of entry into the motor-vehicle inspection business (1995)
New Electricity Market Act (1995)
Abolishment of the almanac and calendar monopoly (1995) ¹⁸
Incorporation of the State Grain Storage (1995)
Liberalisation of the import and wholesale of alcohol products (1995)
Abolishment of Postipankki's exclusive right to take care of the State's payment traffic (2000)
Increase in the transparency and control of monopolies in water supply (2001)

¹⁷ The needs-testing refers to an arrangement whereby the permit-issuing authority has the exclusive right to assess whether new players are needed on the market. The authority can grant new permits at its own discretion.

¹⁸ According to the law, the University of Helsinki had, since 1923, the exclusive right to publish and sell Finnish- and Swedish-language almanacs and calendars in Finland.

ANTITRUST ENFORCEMENT IN REGULATED SECTORS
INTERRELATIONS BETWEEN ANTITRUST AND REGULATORY AUTHORITIES
FRANCE

Introduction

This paper discusses the relations between French competition authorities, namely the Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes (DGCCRF) (*General Directorate for Competition Policy, Consumer Affairs and Fraud Control*) and the Conseil de la concurrence (*Competition Council - the Conseil* below), on the one hand, and three independent sectoral regulatory authorities, namely the Conseil Supérieur de l'Audiovisuel (*French audiovisual board*) (CSA), the Autorité de Régulation des Télécommunications (*French telecommunications regulatory authority*) (ART) and the Commission de Régulation de l'Énergie (*Energy Regulation Commission*) (CRE), on the other. The relations between the Conseil and two banking regulators are also described.

Historically, competition rules have been laid down before sectoral rules in France. The latter *organise* a specific market, whereas competition rules control the *functioning* of given markets or the evolution of market structures within the framework of merger control.

Given that Europe's regulated sectors are gradually being opened to competition, competition rules are being applied with increasing frequency.

Although national sectoral regulators may reason in terms of competition principles, they have no power to regulate competition in the sense of competition law (control of anti-competitive practices and mergers). In contrast, the DGCCRF (as regards anti-trust enforcement and merger control) and the Conseil only act under competition rules.

The coherence of economic law is largely ensured by the fact that appeals against the economic decisions of the ART or the CRE are brought before the Paris Court of Appeal (special economic section) ; this Court of Appeal also has jurisdiction to review the decisions of the Conseil.

1 The media (television and radio) sector

The liberalisation of the audiovisual sector, the emergence of new private players and the concern, specific to this sector, related to the content, led to the creation of the *Conseil Supérieur de l'Audiovisuel* (CSA) in 1989. This sectoral regulator superseded the *Haute Autorité de la Communication Audiovisuelle* set up in 1982, and the *Commission Nationale de la Communication et des Libertés*, created in 1986.

Given the mission of ensuring the freedom of audiovisual communications, the CSA¹⁹ is not exactly an economic regulator along the same lines as the ART or the CRE. However, its mission is not confined to verifying the content of information and enforcing a balance between the various media; it must also ensure the plurality of capital ownership of the various TV broadcasters, and refer any suspected anti-competitive conduct to the Conseil.

The CSA issues broadcasting licences to privately-owned hertzian radio and television stations, and operating licences to cable and satellite channels. It manages and allocates radio and television frequencies. To ensure freedom of communication, the CSA monitors the audiovisual content provided by all broadcasters, be they public or private. Through systematic recordings of all programming broadcast by public hertzian channels (and by random samplings of private-channel programming), the CSA checks whether operators are complying with their obligations as defined by law or in specific agreements. In the event of any failure to meet these obligations, the CSA is empowered to impose sanctions ranging from fines to suspension of the broadcasting licence, or even revocation of the licence in the case of private operators.

The role of the CSA has been considerably enlarged with the emergence of new cable and satellite networks, the birth of new thematic channels and the forthcoming advent of digital terrestrial television, for which CSA has been granted oversight by the law of 1 August 2000.

Mergers fall within the scope of general rules. If a merger is referred to the Conseil, the latter must consult the CSA.

The CSA has to co-operate with the Conseil (article 41-4 of the law of 30 September 1986). The law of 1 August 2000 and the “New Economic Regulations” law of 15 May 2001 have enhanced the effectiveness of this co-operation.

Under the terms of this co-operation, the Conseil must consult with the sectoral regulator regarding any matter of concentration or anti-competitive practice involving a producer or distributor of a media service. The CSA provides the Conseil with technical expertise, since it does not determine the legal characterisation of the matter in dispute in regard to competition law.

Conversely, the CSA may refer any acts that may constitute an anti-competitive practice to the Conseil.

¹⁹ <http://www.csa.fr>

For example, disputes frequently arise between a satellite TV distributor who has selected channels as part of his “programme package” and the channels which he declined to include. The rejected channels sometimes complain about their exclusion, arguing that preference is unfairly given to channels with which the operator of “programming packages” allegedly has a special business relationship. In such cases, the CSA is in a position to explain the general functioning of satellite television distribution and the relations prevailing among the various producers of TV channels.

This system works well because it allows the sectoral regulator in charge of audiovisual communication to remain within its own scope of competence.

2 Telecommunications and postal services

Under the law of 26 July 1996, the ART – which like the CSA and the CRE, is an “Autorité administrative indépendante” (independent administrative authority) – is charged with the task of organising competition in the telecommunications sector, which has been completely liberalised since 1 January 1998. The ART has certain of its own areas of competence and shares other areas of competence with the minister responsible for telecommunications.

In particular, the ART approves the standard interconnection offer of the so-called “powerful” operators (a designation that applies only to *France Telecom* at present), issues licences or, on behalf of the minister, examines applications for licences filed by industry professionals, and allocates frequency and numbering resources. Regarding universal service, which it is also the ART’s role to safeguard, the ART proposes an evaluation of the net cost of universal service and of operator contributions to the universal service fund²⁰.

The ART has the power to sanction any operator who does not comply with legislative and regulatory requirements. It can thus impose fines or suspend licences either temporarily or permanently.

Finally, when the scope of regulation is broadened to include postal services as will soon be the case, the ART will become the ARTP, or the *Autorité de Régulation des Telecommunications et des Postes*. This is in connection with a bill now being examined “on the transposition of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service²¹, and establishing a regulatory authority for the postal sector.”

In its opinion of 16 May 2003²² concerning this bill, the Conseil focusses on the provisions defining the relations between the sectoral regulator and the Conseil. The

²⁰ Article L. 36-7 4° of the French Posts and Telecommunications Code.

²¹ O J L15, 21.1.1998, p. 14.

²² Opinion of the Conseil de la Concurrence, n° 03-A-06 dated 16 May 2003; BOCCRF (official bulletin) N° 9 dated 11 August 2003 (http://www.finances.gouv.fr/DGCCRF/boccrf/03_09/a0090014.htm).

Conseil approves the provisions of the bill which establish the same relations between the sectoral regulator and the competition authorities for the postal sector as those defined for the telecommunications sector by the law of 26 July 1996 (article L. 36-10 of the French Posts and Telecommunications Code). However, the Conseil points out that “it does not seem opportune to provide a special procedure for referring an urgent matter by the ARTP, which, moreover, has proved difficult to implement in the past, in the case of telecommunications. It would suffice to stipulate that the ARTP may bring an urgent case before the Conseil on the basis of the existing provisions (article L. 464-1 of the Commercial Code).”

The law of 26 July 1996 was intended to preserve the unity of French competition law. Its preparatory work stipulates that the ART shall not be a competition authority for the telecommunications sector and that it is not incumbent upon the ART to judge conduct falling within the scope of the Commercial Code provisions on competition, the ART’s powers being strictly limited to those defined in the Posts and Telecommunications Code. The competition authorities thus retain their full jurisdiction under ordinary law over all aspects of the telecommunications sector.

Within the framework of the arbitration mission entrusted to it by law, the ART can nevertheless settle disputes related to network access or interconnection; the bringing into conformance of agreements with clauses excluding or making restrictions of a legal or technical nature on the supply of telecommunications services over cable networks ; or the sharing use of existing facilities located in the public domain or on a private property²³ (article L. 36-8 of the Posts and Telecommunications Code). Matters related to interconnection or to joint use of infrastructure account for the majority of disputes among operators. However, the ART does not have exclusive jurisdiction over this type of case ; civil and commercial jurisdictions or the Conseil retain their prerogatives.

The ART has also the power of conciliation in other types of disputes among operators (article L. 36-9 of the Posts and Telecommunications Code). Here again, this competence does not prevent the exercise of specific competence of the Conseil or of civil and commercial jurisdictions.

These quasi-judicial powers of arbitration and mediation of disputes which lie at the edge of competition law are justified by the *de facto* monopoly control of infrastructure exercised by France Telecom and by the dominant market position of the incumbent operator.

Various mechanisms aim at preventing potential conflicts between the sectoral regulator and the competition authority through arrangements for reciprocal consultations or referrals. The ART may consult the Conseil on any matter falling within its jurisdiction, and has the obligation to bring before the Conseil any cases of abuse of a dominant position or any anti-competitive conduct of which it is aware in the telecommunications sector.

²³ <http://www.art-telecom.fr/presentation/artanglais/art-glais.htm>.

Likewise, the ART must consult the Conseil if it intends to rule that an operator exerts significant power on a relevant market of the telecommunications sector (article L. 36-5 of the Posts and Telecommunications Code), or if it wishes to modify an interconnection agreement to ensure fair competitive conditions and interoperability of services (article L. 34-8 I and II of the Posts and Telecommunications Code). The ART must refer a dispute to the Conseil in the event it fails in its conciliation mission, if the dispute falls within its scope of competence (article L. 36-9 of the Posts and Telecommunications Code).

In exchange, the Conseil informs the ART of any referrals which lie within the latter's jurisdiction and hears its opinion on any practice in the telecommunications sector which is brought before it (article L. 36-10 of the Posts and Telecommunications Code). The ART has issued many opinions in this context.

The bill on electronic communications now being reviewed reinforces the relations between the Conseil and the ART. The ART will publish an exhaustive list of relevant markets in the telecommunications sector, after hearing the opinion of the Conseil ; examine the competitive situation of each of these markets ; establish, after hearing the opinion of the Conseil, the list of operators deemed to exert significant power in each of these markets and impose upon them specific, gradual obligations where necessary. The *ex ante* definition of the relevant markets by the ART should facilitate investigations of competition actions brought before the Conseil, without prejudice to the Conseil's own evaluation of such actions.

3 The energy sector (electricity and gas)

The 1996 European Directive organising the gradual opening-up of the electricity market was transposed into French law by the law of 10 February 2000, which calls for the unbundling of power transportation network (entrusted to an autonomous unit of *Electricité de France*-EDF: RTE) and power generation activities. This law created the *Commission de Régulation de l'Energie* (CRE)²⁴.

In the field of electricity, in order to guarantee that power producers and eligible consumers will have access to public transmission and distribution networks, the CRE verifies that RTE is effectively managed as an independent enterprise from EDF, and gives its opinion on the appointment of its director. The CRE proposes the tariff level for the use of public networks to the minister. It is also in charge of settling disputes between users and the transmission system operator, such as in the event of differences over network access agreements. In the area of electricity market regulation, the CRE organises calls for tenders which create opportunities for new power producers to enter the market. It publishes its opinion on the selling prices of electricity to "non eligible" consumers and on the social tariffs for low-income consumers.

²⁴ <http://www.cre.fr>

Furthermore, the CRE determines and proposes to the minister the amount of charges related to public service obligations. There are two types of expenses: those arising out of EDF's obligations to purchase power from other producers, and those resulting from the application of a single price for electricity throughout France. The excess cost which EDF incurs as a result of these factors is compensated by the public service fund for electricity generation, to which all power producers and importers contribute in accordance with terms proposed by the CRE.

The law of 3 January 2003 extended the scope of competence of the CRE to include the regulation of the gas market.

To prevent any conflicts which might arise between the CRE and the Conseil, the law provides a mechanism for co-operation between these two authorities. This co-operation, which is modelled in part on the one defined for the ART, is sometimes optional and sometimes compulsory.

Co-operation is optional when the law authorises the chairman of the CRE to request the Conseil's opinion on any matter within its competence²⁵. In this respect, the law gives the CRE the possibility of seeking the advice of the Conseil on any competition-related matter.

In contrast, co-operation is compulsory when the CRE must refer to the Conseil before taking a decision. The approval of rules concerning the separate accounting is the only matter to which compulsory co-operation applies.

The overlap can be envisaged only in connection with the application by the Conseil of rules prohibiting anti-competitive practices. It is not impossible, therefore, that the two authorities may be led to rule on the same practice, one as part of the settlement of a dispute and the other on the grounds of provisions against abuse of a dominant position. To resolve any difficulties that might arise from this situation, the law provides a mechanism of reciprocal referrals, in addition to unifying the appeal proceedings, as mentioned in the introduction.

On the one hand, it is provided that the chairman of the CRE shall refer matters of anti-competitive behaviour of which he is aware in the energy sector to the Conseil. The law stipulates that such matters cannot be referred in an instance of interim measures in accordance with article L. 464-1 of the Commercial Code, which gives the Conseil the power to take interim measures under certain conditions. The Conseil may then make its decision without any imposed deadline, contrary to the provisions applicable to telecommunications (30 working days after the referral).

In contrast, the Conseil "shall inform the CRE of all referrals which fall within the CRE's scope of competence." This information is compulsory only in cases where the referral relates to a dispute between the network operators and users over the access or use of these networks, or over the interpretation or performance of the access agreements.

²⁵ article 39 of the law of 10 February 2000

4 The banking sector

In the banking sector, the law provides that the Conseil must consult with sectoral regulators regarding mergers and anti-competitive practices.

According to Article L511-4 of the Monetary and Financial Code, when the Conseil reviews a merger directly or indirectly related to a credit institution or an investment company, it shall refer the case to the *Comité des établissements de crédit et des entreprises d'investissement (CECEI)*. The Conseil informs the CECEI of any referral relating to such operations. The CECEI shall provide the Conseil with its published opinion within one month.

Articles L420-1 to L420-4 of the Commercial Code (anti-competitive practices) shall apply to credit institutions for their banking and related activities. The statement of objections provided for at Article L463-2 of this Code shall be transmitted to the *Commission Bancaire* which shall deliver its opinion within two months. Should the Conseil impose a penalty on conclusion of the procedure, it shall where relevant state its reasons for diverging from the opinion of the *Commission Bancaire*.

The Conseil applied these provisions in its decision of 19 September 2000, relating to the competition situation in the home loan market sector.

* * *

In addition to the formal opinions exchanged between the sectoral regulators and the Conseil, there are many informal exchanges between the DGCCRF and these regulators, in their respective fields of intervention. Likewise, entrusted with the detection of infractions and the conduct of inquiries into cartels and abuses of a dominant position, the DGCCRF is the government's representative ("commissaire du gouvernement") before the Conseil and, as such, takes part in the global regulation of these sectors. Moreover, the Ministry of the Economy may, in this sector as in any other, refer anti-competitive practices of which it is aware to the Conseil, and follows up on compliance with orders.

The co-operation procedures between sectoral regulators and competition authorities just described may have the drawback of lengthening the time needed to complete proceedings, whereas speed is a prerequisite for economic efficiency. However, this system has until now proved satisfactory and demonstrated its ability to absorb substantial and gradual evolution.

For the sake of clarity and legal coherence, French policymakers strive to harmonise the procedures governing co-operation between the competition authorities and the sectoral regulators.

In the final analysis, co-operation between the two types of authority appears to be the most appropriate system for the French context, provided that there is no subordination among the different independent regulatory authorities and that the principle of indivisibility is guaranteed in the application of competition law.

ANTITRUST ENFORCEMENT IN REGULATED SECTORS
INTERRELATIONS BETWEEN ANTITRUST AND REGULATORY AUTHORITIES

GERMANY

LEGISLATIVE BACKGROUND

The German Act against Restraints of Competition (ARC) came into force in 1958. There have been six revisions of the ARC since then. The second revision in 1973 is of particular significance due to the introduction of merger control. Several ‘utility’ or ‘public service’ sectors were initially exempted from the general competition rules of the ARC. In line with the liberalisation efforts in other member states of the European Union, Germany has liberalised formerly ‘public service’ markets such as postal services, telecommunications, transport, gas and electricity during the past years. These markets are today liberalised to varying degrees. Sectoral exemptions to the ARC were reduced step-by-step, most significantly under the fifth and sixth revisions in 1989 and 1998, and will be further reduced under the current revision. In 1998, the Regulatory Authority for Telecommunications and Posts (RegTP) was founded. The RegTP is expected to be granted additional regulative supervision powers for the energy sector in 2004. Besides the RegTP, there are some other German authorities with competencies that can be classified as regulative in rather a non-economic sense (e.g. the Federal Railway Authority, the media regulation authorities of the federal states, etc.). However, the RegTP is the most important regulative authority the FCO deals with.

Founded in 1958, the FCO in Germany enforces the ban on cartels and abusive practises, and exercises merger control according to its competencies under the ARC and the European Community Treaty (EC), Articles 81, 82. Besides the FCO, the competition authority of each federal state (“Bundesland”) and the European Commission also act against infringements of competition which have an effect in Germany. While the competition authorities of the federal states exclusively deal with those cases where the alleged infringement does not reach beyond the borders of the state concerned, the FCO is responsible for the remaining cases. Those restraints which have an appreciable effect on trade between member states of the European Union, can also be prosecuted by the European Commission. German merger control is exclusively enforced by the FCO. The RegTP assigns frequencies and licenses, regulates prices, and enforces the sector-specific bans on abusive practices in postal and telecommunication services in accordance with the Telecommunications Act (TA) and the Postal Act (PA). The ARC and the TA are currently being amended due to the new European regulation on the implementation of the competition rules laid down in Articles 81 and 82 (Council Regulation 01/2003/EC) and the new European telecommunication regulatory framework directive (Directive 2002/21/EC) and associated directives. The German

government has already decided on the draft for a new TA (TA draft), the amendments are expected to come into force in summer 2004. The ARC revision is also scheduled for summer 2004, but might be delayed.

PARALLEL COMPETENCIES, CONCURRENT COMPETENCIES AND CASE DISTRIBUTION

In order to avoid diverging interpretation of competition and regulatory law, parallel competencies of the RegTP and the FCO were minimized, and the cooperation between the two was specified in Section 82 TA and Section 48 PA. For the time being the RegTP plays no role in FCO proceedings in merger control or cartel ban enforcement. Similarly, the FCO is generally not involved in activities of the RegTP which are more of a technical nature such as frequency and licence assignment, universal service, numbering etc. Thus, parallel competencies and shared responsibilities only exist in the area of abusive practices in telecommunications and postal services.

There is no specific provision on the delineation of the rules on sector-specific price regulation and the ban on abusive practices under the TA and PA on the one hand and on abusive practices under Sections 19, 20 ARC on the other hand. In practice the RegTP has dealt with cases of abusive practices in telecommunications and postal services. The RegTP may not authorize prices which violate the ARC or the EC Treaty (Section 27 (3) TA, Section 21 (3) PA). The FCO may enforce the ban on abusive practices according to Art. 82 EC Treaty, which cannot be prevented by national acts such as the TA and PA, possibly also on the basis of Section 19, 20 ARC. For abusive practices concerning telecommunications, the FCO has taken a cautious approach by opting not to apply the ARC whenever there is a legal basis for a specific behaviour under the TA. The academic world has broadly discussed the relationship between the ARC on the one hand and the TA and PA on the other, and has suggested a variety of possible solutions. Due to lacking precedence, the question has so far not been judicially reviewed.

In order to avoid duplication, RegTP and FCO have never investigated a specific alleged abusive practice in parallel. Both authorities consult each other on an ad-hoc basis in all cases where it is doubtful whether they fall under the competence of the FCO or the RegTP. This has so far led to an efficient division of labour and satisfactory results in the overwhelming majority of cases. However, these distributed responsibilities can occasionally lead to disagreement on who should take up a proceeding, as was the case for example in prices for call termination in mobile telephony networks.

SHARED COMPETENCIES AND COOPERATION

Overall, the cooperation between FCO and RegTP has worked quite well and has not resulted in many disputes. The legal bases for cooperation seem appropriate.

The remaining differences between FCO and RegTP are not at all based on the cooperation framework, but rather on different cultures within the two authorities. The FCO is an independent authority organized in a number of (currently eleven) sector-specific Decision Divisions. Similar to the practice of German courts, each case is investigated by a case handler and decided by a college of three members of the Decision Division. The Decision Divisions operate free from external influences and hierarchical orders. This high degree of independence was achieved through many years of widely acknowledged case work and a continuous strive to maintain this independence. In order to avoid sector-specific influence and lobbying (“regulatory capture”), personnel is frequently exchanged between the different Decision Divisions. External observers have described the independent institutional culture of the FCO as perhaps “the defining feature of German competition policy” (cp. OECD, Germany Regulatory Reform Country Review, 2003). The Decision Chambers of the RegTP were modelled after the FCO’s Decision Divisions, as they also decide by a college of three members. Thus, the legal basis for decisions is very similar.

Section 82 TA and Section 48 PA stipulate, amongst others, that

- RegTP and FCO have to inform each other about relevant observations and conclusions,
- the RegTP needs to obtain agreement by the FCO for all market definition decisions and conclusions about market dominance,
- RegTP and FCO have to give each other the possibility to comment prior to completion of a procedure about price regulation and abusive practices.

Based on general administrative rules, FCO and RegTP can also ask each other for assistance, which can virtually end up in a joint procedure.

Mutual information

General German administrative law is very strict regarding the sharing of business secrets with the public or other authorities. Under the penal code, sharing business secrets is a criminal offence which would normally make it impossible for RegTP and FCO to share business secrets. Therefore, the right and the duty of the FCO and the RegTP to inform each other plays a vital role in permitting this exchange. Both authorities grant each other full access to the files in proceedings where the other authority is entitled to comment. Outside formal proceedings, both inform each other about consumer complaints or general observations. Mutual information also takes place in informal ad-hoc meetings on general or specific topics. The draft amendments to the ARC also provide for a general powers for the competition authority and the regulatory authority to exchange information.

Consensus decisions (market definition and dominance conclusions)

By far the most important cooperation provision is the RegTP's obligation to obtain agreement by the FCO for all market definition decisions and conclusions about market dominance. This provision puts the FCO in a strong position regarding market analysis, as it could potentially block those RegTP decisions which hinge on market analysis. Practice proves that there is no need for an escalation procedure or conflict resolution scheme. Thus the question arises, what would happen if the FCO refused its agreement. As this ultimately never happened, this question was also not judicially reviewed. It has been the view of the RegTP, the FCO and the academic world that if the FCO refuses its agreement, each decision of the RegTP in which it uses the disputed market definition or market dominance conclusion is unlawful.

In practice, cooperation in market assessment has been much closer than the pure act of asking the FCO for agreement. The intensity of cooperation varies by case and is steered mainly by the RegTP based on how much it wants to resort to the experience and opinions of the FCO. Often cooperation in market assessment starts at a very early stage, at the very beginning of investigation, by drafting questionnaires, etc. The RegTP usually writes the initial drafts and the FCO comments on them. Obviously, this cooperation is closer than the law requires. However, in this way, the authorities usually agree on solutions at a very early stage before any serious conflict may arise.

From the FCO's point of view, the consensus requirement has played a vital role in ensuring consistent application of competition and regulatory law, and proved very effective. The RegTP was able to profit from the FCO's broad market assessment experience. In the six years since the foundation of the RegTP, the FCO has given its agreement on the market assessment in a large number of RegTP decisions.

Under the framework directive and the new TA, the European Commission is accorded the role of the third. Market definition and assessment will then require consensus by all three authorities in telecommunication matters (Articles 15, 16 framework directive, Section 121 TA-draft). Practical work in this new set-up has just begun, so that it is too early to comment on experiences. However, it can be expected that decisions will take much longer in a three-partite set-up. The strong role of the European Commission also raises subsidiarity questions.

Entitlement to comment (decisions on price regulation and abusive practices)

RegTP and FCO have to give each other the possibility to comment prior to completion of a procedure about price regulation and abusive practices. In practice, this provision has only played a minor role in proceedings of the FCO, but concerned several hundred RegTP proceedings.

In practice, the legal requirement to give the FCO the possibility to comment means that the RegTP provides the FCO with the full file of the proceeding, invites the FCO to the public hearing and sends the draft of its intended decision on time. Similar to consensus decisions, in many proceedings cooperation went much further than these minimum requirements. However, the FCO as a commentator plays a much less

involved role than in consensus decisions. Also, the RegTP operates under tight timeframes, as price regulation decisions must be made within ten weeks after application. Thus there were also cases where the RegTP sent the decision draft so shortly before the tight deadline that the FCO was not able to exercise its entitlement to comment.

On the whole, the FCO has agreed with most RegTP-decisions but has frequently criticized individual aspects of the decisions. From the FCO's point of view, the entitlement to comment played a vital role in ensuring the information flow in all proceedings, even if, on the whole, it proved less effective and harmonic than the consensus requirement in market assessments.

Joint proceedings

Neither the TA nor PA provides a specific legal basis for joint proceedings by FCO and RegTP (but sometimes even the above mentioned cooperation cases may virtually end up in joint proceedings). However, based on general administrative rules, FCO and RegTP may also ask each other for formal assistance, which can be rendered either in the form of "Amtshilfe" (administrative assistance) or by asking the other authority for an expert report on a specific aspect of the proceeding. Joint proceedings have been infrequent so far but can be appropriate to make use of complementary expertise, e.g. the FCO may profit from the cost auditing and technical expertise of the RegTP. One such case is reported below.

SELECTED RECENT CASES

Provisioning of subscriber data

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

The FCO asked the RegTP for its expert assistance in determining the efficient cost level. This cooperation practically led to a joint proceeding, which proved successful. In August 2003, Deutsche Telekom agreed with retrospective effect from January 2003 to base its calculation of costs for providing subscriber data merely on

annual costs amounting to a total of 49 million Euro, as opposed to the former cost base of 90 million Euro. The new basis of calculation resulted in a considerable reduction of costs for purchasers and therefore eliminated a significant obstacle for competitors. Due to the agreement with DT, the FCO has discontinued its abuse proceedings.

Local loop margin squeeze

The “local loop” is the physical circuit (typically copper wires) between the telephone customer's premises and the telecommunications operator's local switch. New entrants on the telecommunications markets need access on non-discriminatory terms to the local loops to be able to offer retail services to end-customers, as it would be economically impossible to replicate such a network built over decades. Deutsche Telekom offers local loop access in Germany at two different levels. Besides the retail subscriptions to end customers, DT also offers unbundled access to the local loop to competitors, which allows them direct access to end-users. DT holds dominant positions in all these markets.

Since 1998 DT is legally obliged under the TA to provide competitors with access to its local loops. Since then, retail prices as well as wholesale prices have been regulated by the RegTP. The DT price applications as well as RegTP decisions resulted in DT charging competitors higher fees for local loop access than it charged to its end users. It is important to note that RegTP proceedings on access prices are decided by a different decision chamber (fourth decision chamber) on the basis of the efficient costs falling to the individual service than proceedings regarding end customer prices (second decision chamber) on the basis of the benchmarks it prescribes for the average rates of change in the prices for a basket of combined services. This led to inconsistent price authorization decisions.

In these RegTP proceedings the FCO frequently made use of its entitlement to comment and often criticized the decisions. The FCO opined that the price authorizations resulted in a margin squeeze which violated the ban on discrimination according to Section 33 TA as well as the bans on abusive practices under German and European competition law. Many new entrants have tried to compete with the incumbent operator, none of them has been able to achieve significant market shares, not least due to the margin squeeze. However, the FCO was not able to convince the RegTP of this point of view.

In parallel, the European Commission led proceedings on the alleged margin squeeze and found that the pricing scheme constituted an abusive practise under article 82 EC. Notably, the Commission decided in May 2003 that, although DT-prices were authorized by RegTP, DT was not granted immunity from fines (no "regulated conduct defense"), because it did not make use of the legal scope for restructuring its tariffs within the regulatory framework to avoid the margin squeeze. DT was fined 12.6 million Euro. As a reaction to this decision DT raised its retail prices in order to close the price gap.

Optional tariffs for frequent telephone users

Since 1999 Deutsche Telekom has introduced a variety of optional tariffs called “AktivPlus”. These offers include generally lower connection fees and flat rates or free contingents for certain call types. In turn, customers have to pay a monthly fee in order to be entitled to use these offers. Due to this fee structure choosing an AktivPlus tariff only makes sense for frequent telephone users. The optional tariffs are mainly designed as a substitute to the preselection offers for private customers by competitors. AktivPlus tariffs had significant market success, over a third of German fixed line subscribers are now AktivPlus subscribers.

As DT holds dominant positions in the markets concerned, these tariffs are also subject to price regulation by the RegTP. In these proceedings the FCO again made broad use of its entitlement to comment and focused on the aspect that the tariffs may constitute an abusive practice according to Sections 19, 20 ARC. The DT tariff applications consistently included a clause which would prohibit AktivPlus customers from simultaneously subscribing to a preselection offer by a competitor.

The RegTP held that the AktivPlus tariffs as such did not violate the cost-oriented criteria of Section 24 TA. However, Section 27 (3) TA prohibits the authorization of a tariff which violates antitrust laws. By rejecting the preselection preclusion, the RegTP for the first time interdicted the application of a clause on the grounds of Section 19 ARC – in line with the comments expressed by the FCO. In a further investigation it was also examined whether the AktivPlus-tariffs on the whole violated the ARC. FCO provided the RegTP with broad input on investigation design and result interpretation. In the first stage, an infringement could not be proved. Today, discussions on a possible abuse are still continuing. In a recent decision the Administrative Court of Cologne discarded two of the price authorizations by RegTP but was soon overruled by the Higher Administrative Court of Münster.

CONCLUSION

In Germany there is a clear legal delimitation of the tasks which are to be performed exclusively by the regulator on the one hand and by the competition authority on the other. Competency overlap was kept to a minimum and exists only in the area of abusive practices where it gave no cause for any problems in practice. There is a broad and differentiated spectrum of cooperation requirements and possibilities between RegTP and FCO. On the basis of these provisions a close cooperation developed. The general ban on abusive practices enforced by competition authorities constitutes an important complementary and sometimes even corrective measure to regulative decisions. The requirement for consensus in market definition and market dominance assessment proved to be the most important provision to ensure consistency and close cooperation.

ANTITRUST ENFORCEMENT IN REGULATED SECTORS
INTERRELATIONS BETWEEN ANTITRUST AND REGULATORY AUTHORITIES
JAPAN

1. Introduction

Reviewing regulatory reform from the viewpoint of competition policy is an essential ingredient for opening up and liberalizing the Japanese economy on an international scale on the basis of self-responsibility and market principles.

The competition authority in Japan, the Japan Fair Trade Commission (JFTC), pursues (1) reform of the government's regulatory system, (2) co-ordination of administrative practices, (3) co-ordination of laws and ordinances, in government-regulated sectors with a view to promoting free and fair competition.

On this paper, we will focus mainly on the role of the JFTC who administers the AMA in regulated sectors, and the interrelationship between the JFTC and the regulatory authorities.

2. The role of the JFTC in the Government's Regulatory Reform

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 regulatory 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 method the JFTC has used to promote regulatory reform in the regulated sectors is making examinations of issues and future plans, and also setting study groups involving academics, professions etc. and obtaining suggestions from the view point of competition policy.

Such JFTC's policy proposals, a kind of competition advocacy, is regarded as one of the principal government policy prescribed in the "Second Revised Deregulation Action Plan" decided by the Cabinet in March 1997. The Action Plan 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 consumers” The role of the JFTC in the process of deregulation is thus very clear.

The reports published by the Study Group recently are as follows. The JFTC also made researches concerning competition law and policies in other regulated sectors, for example, postal services, broadcasting, private insurance, and aviations etc. recently.

a. electricity sector

“Improvement in the Surroundings for Promotion of Competition in the Electricity Sector” (June, 2002)

The Study Group on Government Regulations and Competition Policy considered about future system reform from the standpoint of securing appropriate administration of the AMA in the partially liberalized electricity business field.

The report of the Study Group pointed out that it is needed to establish measures to promote new entry into the market and make fair competition in the whole business field actively, and also it is needed to make rules for fair competition concerning consignment supply system etc.

b. gas sector

“Competition Policy in the Natural Gas Sector” (December, 1999)

The Study Group on Government Regulations and Competition Policy evaluated the system reform, expansion of partial liberalized field in retail supply businesses, in the natural gas sector with amendment of the Natural Gas Utility Law, and examined about issues in future from the standpoint of promoting competition in the natural gas industry.

c. telecommunications sector

“Regulatory Reform and Competition Policy in the Telecommunications Business Field” (November, 2002)

The Study Group on Government Regulations and Competition Policy had examined measures to promote fair and free competition in the telecommunications business field in which market structure changed rapidly. The report of the Study Group pointed out that basic regulatory policy in the telecommunications business field should be to use ex post methods rather than to depend on ex ante regulatory methodology because of the keenness of technological innovation and it is needed to collaborate the JFTC with the regulator concerning regulations to ensure fair competition in the business field.

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 for government agencies is to carry out the necessary co-ordination in advance. The JFTC is involved in that process as the authority of competition law and policy. The JFTC reports summary of this kind of activity to the Diet as a part of an annual report.

4. The progress of regulatory reform and relationship between the JFTC and regulators

There are no special provisions concerning procedures for addressing issues that arise between the competition authority and regulators. However, there is a Cabinet Decision, the “Three-Year Program for Promoting Regulatory Reform (Second revised March, 2003)” describing relationships between the competition authority and regulators. The Decision states that the JFTC, if needed, shall examine conditions of competition and if there is a room to be improved, make proposals actively in the occasion of introducing competitive system into regulated sectors where new entry has been restricted so far. And in regulated sectors stated above, the JFTC and regulators, including publishing the guidelines, shall consider to create systems to perform necessary collaboration concerning establishment and reform of institutions related to competition from the viewpoint of promoting competition. The Cabinet Decision prescribes the collaboration of the JFTC with regulatory agencies in addition to JFTC’s activity such as examination and making proposals in regulated sectors.

1) Enforcement of competition laws and policy in heavily regulated sectors

The AMA shall be applied to business activities in all sectors including regulated sectors in principle. Until few years ago, in the so-called regulated sectors, main regulatory policy adopted in Japan was prior regulation by regulators on charges, entry, tariffs for general demand from the viewpoint of protecting the interests of its users and ensuring the sound development of the businesses.

The regulatory laws have many aspects of restraining free business activities of individual entrepreneurs, so these authorized business activities normally deemed not violate the AMA. Therefore, it is conceivable that there is a slight possibility to occur violations against the AMA concerning items regulated by regulatory authority in advance of its effectuation.

If anticompetitive conducts occur in regulated sectors, the JFTC is expected to take measures vis-à-vis the AMA against anticompetitive conducts. To date, in the transportation sector, there have been some cases such as unjust restriction of the functions or activities concerning members of trade associations by trade associations.

2) Enforcement of competition laws and policy in deregulated sectors

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 orders rendered by regulators based on their own decisions without consultation with the JFTC can be issued *ex post facto*. Some corrective orders, seemingly drawing inspiration from the AMA, cite “unfair or discriminatory treatment” and “unfair competition”. The timing of rendering the corrective order by regulators is equivalent to that of rendering cease and desist order by the JFTC in the sense of *ex post*. Therefore, it is possible that these “notified” prices violate the AMA prohibiting conducts such as predatory or discriminatory pricing. The JFTC would render cease and desist order against this kind of conducts.

As stated above, the regulators do not have authority to enforce the AMA and do not intervene in procedures when the JFTC implements measures based on the AMA. As the AMA is enforced solely by the JFTC, enforcement of the AMA is always consistent reflecting of principles of the JFTC²⁶.

5. Guidelines for administrative guidance of regulators from the viewpoint of the AMA

In June 1994, the JFTC published “Guidelines for Administrative Guidance under the Antimonopoly Act” in order to clarify interpretations concerning administrative guidance under the AMA, based on cases where the JFTC had already coordinated with administrative agencies concerned and made investigations. The aim was to prevent administrative agencies from distorting free and fair competition or inducing the violation of the AMA.

From the viewpoint of further promoting fair and free competition, deregulation is being actively pursued, but even if any restriction through laws or regulations is relaxed or abolished, should any administrative guidance result in a similar restriction, this would go against the purpose of deregulation.

It has been decided by the Cabinet that “the relevant ministries and government agencies will, bearing in mind the aim of the Guidelines for Administrative Guidance under the Antimonopoly Act, have sufficient prior consultation with the JFTC to ensure that government regulations are not replaced by anti-competitive administrative guidance after deregulation.”

²⁶ Introduction of a new system is under consideration for effectively eliminating conducts of preventing new market entry by entrepreneurs who possess essential facilities (facilities whose use are necessary and indispensable when supplying goods or services and which competitors find difficulty to construct on their own because of economic, technical, legal or other reasons). This system would give the JFTC an authority to regard these anticompetitive conducts as per se illegal and to take measures to eliminate such conduct to restore competition unless they have proper justifications.

6. Guidelines concerning specific regulated sectors

In accordance with the government decision mentioned above, the JFTC, in cooperation with regulators, published the guidelines concerning consistent administration of the AMA and regulation laws to promote fair competition actively in specific sectors where regulatory reform was implemented.

The background of publishing these guidelines is a chain of regulatory reform aiming at the establishment of fair competition in regulated sectors through liberalization. Principal method to promote fair competition in liberalized sectors is eliminating anticompetitive conducts by enforcing the competition law, which is a fundamental rule in markets. However, there is a limit in accomplishing this solely by eliminating anti-competitive activities through the enforcement of the AMA, because such sectors have unique characteristics that incumbents have sometimes large-scale facilities, enjoying a large amount of share in markets. On the other hand, regulatory laws have an important role to play in order to make the markets more competitive. Under such conditions, both administering regulatory laws including its technical and economical aspects and eliminating anticompetitive activities through the enforcement of competition law are needed. Utilization of both laws is quite important to promote competition in these sectors and it was considered that showing views concerning these laws in advance had been needed.

There are three guidelines prepared by the JFTC and regulators. These guidelines are “Guidelines Concerning Appropriate Electric Power Dealings” (JFTC and Ministry of Economy, Trade and Industry (METI), December 1999) ,“Guidelines Concerning Appropriate Natural Gas Dealings” (JFTC and METI, March 2000) “Guidelines for Promotion of Competition Policy in the Telecommunications Business Field” (JFTC and Ministry of Public Management, Home Affairs, Posts and Telecommunications (MPHPT), November 2001)

a. guidelines for the telecommunications sector

Among these guidelines, the guidelines for the telecommunications sector have clear description concerning the collaboration for promoting fair competition between the JFTC and the regulatory authority, the MPHPT. Following is an explanation of the framework of the guidelines and the way to collaborate between the JFTC and the MPHPT.

(a) framework of the guidelines

The framework of the “Guidelines for Promotion of Competition Policy in the Telecommunications Business Field” is as follows:

- I. Guidelines for promotion of competition in the telecommunications sector—necessity and framework

II. Practices constituting problems under the Antimonopoly Act or Telecommunications Business Law (TBL)

III. Desirable practices of telecommunications carriers in view of promoting further competition

IV. System for responding to reporting and consultations, and submission of opinions

The JFTC and the MPHPT show their views regarding the enforcement of the Antimonopoly Act and TBL, respectively under their responsibility in Chapter II. Chapter III describes concrete practices that telecommunications carriers are expected to pursue. Chapter IV includes reports on violation cases of the two laws, legal consultation systems which confirm the JFTC and the MPHPT whether a certain practice violates the Antimonopoly Act or TBL etc., and collaboration between the JFTC and the MPHPT.

(b) collaboration between the JFTC and MPHPT

The guidelines describe collaboration between the JFTC and the MPHPT in IV as follows.

As the Antimonopoly Act and the Telecommunications Business Law (TBL) “can be applied to the same practice in enforcing the two laws., From the viewpoint of coordinating the enforcement of the two laws and preventing unnecessary confusion and excessive burden of operators, the JFTC and the MPHPT will contact each other and exchange information as follows:

1. Acting upon consultations with the JFTC or the MPHPT and submission of compliments or opinion to the MPHPT based on the provisions of Article 96-2 of TBL, the JFTC and the MPHPT will notify each other of the occurrence thereof, giving due consideration of the desires of the party being conferred with or submitting when the JFTC finds the case may violate the TBL or the MPHPT finds it may violate the Antimonopoly Act.
2. In implementing the Antimonopoly Act and TBL, the JFTC and the MPHPT will exchange information on their respective administrative dispositions when necessary.
3. The JFTC and the MPHPT will set up liaison to exchange the information described above.”

b. electricity and gas

The guidelines for electricity and gas sectors do not have specific provisions concerning collaboration between the JFTC and the regulatory authority, the Ministry of

Economy, Trade and Industry (METI). However, these guidelines refer to the necessity for mutual coordination (for example, the JFTC attended the Advisory Committee for Natural Resources and Energy, the METI and made a statement on what should be considered from the viewpoint of promoting fair competition in the electricity sector in November 2002.) as the purpose of preparing these guidelines.

7. Summaries of regulatory framework and reform in electricity, gas and telecommunications sectors

These are the summaries of regulatory framework and evolution of reform in electricity, gas and telecommunications sectors.

1) electricity

The electricity sector is regulated by the Electricity Utility Industry Law and the competent authority is the Ministry of Economy, and Industry (METI).

5 types (categories) of electricity businesses are defined in the Electricity Utility Industry Law. Following are the outlines of current regulations and reform in “general electric utilities,” one of 5 categories, as an example.

(current regulations to general electric utilities)

- a. General electric utilities which supply electricity in response to general demand in their supply areas, shall obtain permission to enter or discontinue the business.
- b. They shall establish supply tariffs for general customers which set forth terms and conditions including charges for their services. Prior approvals of such tariffs by the Minister are required.
- c. They shall also establish cross-area wheeling service tariffs and connection supply tariffs for consignment supply. Tariffs set forth terms and conditions including service charges for each transaction crossing from one service area to another.

Prior notifications for those tariffs must be made to the Minister.

(outline of the reforms)

- a. The Electricity Utility Industry Law was amended in June 2003. It shall set in forth in April 2005.
- b. Under the amended Electricity Utility Industry Law, present consignment supply system shall be revised and the liberalized area for retail supply shall be expanded. The deregulation shall include abolition of cross-area wheeling service charges in order to promote cross-area transactions.

2) gas

The natural gas sector is regulated by the Gas Utility Industry Law. The competent authority is the Ministry of Economy, Trade and Industry (METI).

3 types (categories) of gas businesses are defined in the Gas Utility Industry Law. Followings are the outlines of current regulations and reform in “general gas utilities”, one of 3 categories, as an example.

(current regulations to general gas utilities)

- a. General gas utilities, which supply gas in response to general demand via pipes in their supply areas, shall obtain permission to enter or discontinue their business.
- b. They shall establish supply tariffs for general customers which set forth terms and conditions including charges for their services. Prior approvals of the Minister are required.
- c. Specific general gas utilities prescribed by the Minister, four major companies, shall establish connection supply tariffs which set forth terms and conditions including service charges. Prior notifications for those tariffs must be made to the Minister.

(outline of the reforms)

- a. The Gas Utility Industry Law was amended in June 2003, and shall set in forth in April 2004.
- b. Under the amended Gas Utility Industry Law, all general gas utilities, except small sized utilities etc. prescribed by the Minister, shall establish consignment supply (note: with amendment of the law, the term “connection supply” was replaced by the term “consignment supply”) tariffs which set forth terms and conditions including service charges (prior notifications to the Minister shall be maintained).
- c. With regard to retail supply, liberalized area shall be expanded.

3) telecommunications

The telecommunications sector is regulated by the Telecommunications Business Law.

The competent authority is the Ministry of Public Management, Home Affairs, Posts and Telecommunications (MPHPT).

The telecommunications Business Law defines two types (categories) of telecommunications business, i.e. Type I telecommunications business and Type II telecommunications business, based on whether the telecommunications business establishes telecommunications circuit facilities or not. Type I telecommunications business shall be the business which provides telecommunications services by establishing telecommunications circuit facilities. Type II telecommunications business shall be any other telecommunications business than Type I.

(outline of current regulations and the reform)

- a. Type I telecommunications businesses shall obtain permission to enter or discontinue the business.
- b. Type I telecommunications business shall establish tariffs which set forth terms and conditions including charges for their services. Prior notifications of those tariffs to the Minister are required.
- c. Among Type I telecommunications businesses, those which establish Category I designated telecommunications facilities (Type I telecommunications facilities with more than 50% share of local fixed circuit) shall obtain prior permission from the Minister on interconnection tariff which sets forth terms and conditions including access charges.

(outline of the reforms)

The Telecommunications Business Law was amended in July 2003. It shall set in forth in April 2004.

Under the amended Telecommunications Business Law, following deregulation shall be made.

- a. Regulatory frameworks based on the difference between Type I and Type II shall be abolished.
- b. Permission from the Minister for new entry shall be unnecessary. Instead, only registration or notification shall be required.
- c. Except for particular services, notification of tariffs shall be abolished. Instead, new obligation to explain important articles of tariffs to consumers shall be introduced. Another new obligation to redress consumers' complaints without delay shall be also introduced.
- d. Prior authorization (permission) system by the Minister on interconnection tariff by businesses which establish Category I designated telecommunications facilities shall be maintained.

Interrelations between antitrust and regulatory authorities

1 The legislative and regulatory framework (background, rationales for both types of institutions) ; is there one? Were the different regulators (competition/sectoral) introduced at the same time or at different times and why? Does the time frame changes the organization? Does it evolve in time?

-See 7. of our contribution.

The telecommunications sector is regulated by the Ministry of Public Management, Home Affairs, Posts and Telecommunications(MPHPT),the electricity sector and Gas sector is regulated by the Ministry of Economic, Trade and Industry. It is common in Japan that a regulated sector is exclusively supervised by single corresponding competent agency. This system has not been changed throughout and after regulatory reform was implemented.

(note) Japanese government reorganized government bodies (e.g. integration of ministries/agencies) on a large scale in 2001. However, basic regulatory structure stated above did not be changed.

2 Their respective role in antitrust enforcement (who does what and how), their degree and methods of co-operation-co-ordination (non regulatory and regulation co-operation).

-See 4. and 5. of our contribution.

3 Shared vs exclusive competencies, jurisdiction interface/conflicts, solutions and various relevant cases.

-See 4. and 6. of our contribution.

4 How to ensure competition law consistency in this context?

-See 4. of our contribution.

5 Is there a relationship between the regulatory framework and the structure of the regulated sectors?

We haven't had specific views on this matter.

ANTITRUST ENFORCEMENT IN REGULATED SECTORS
INTERRELATIONS BETWEEN ANTITRUST AND REGULATORY AUTHORITIES

UNITED STATES

1. Introduction

In the United States, the various industry-specific regulatory agencies, such as the Federal Communications Commission (FCC), and the federal antitrust authorities, the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC), were created at different times with different authorizing statutes. Generally, regulatory programs were established with objectives beyond just protecting competition, objectives such as universal access and diversity of voices. In contrast, in modern times the U.S. antitrust agencies have focused solely on competition, although the authors of some of the antitrust laws certainly had more populist or business-protection goals in mind. However, the push toward deregulation of many industry segments over the past several decades has led the regulatory agencies increasingly to emphasize competition analysis and respect for free market forces. This shift has changed the dynamic between the industry-specific regulators and the antitrust agencies.

In general, U.S. federal law addresses the competitive effects of business conduct in one of three ways. First, in a few limited instances, conduct is statutorily exempt from the antitrust laws. An example is the business of insurance, which is exempt under the McCarran-Ferguson Act.²⁷ In such cases, the regulated company is said to be expressly exempt or immune from the antitrust laws. Antitrust immunity may also be implied when there is a clear repugnancy between the antitrust laws and the regulatory system.²⁸ A discussion of express and/or implied antitrust immunities is outside the scope of this paper.²⁹

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

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

²⁷See 15 U.S.C. '1012(b).

²⁸*United States v. Nat'l Ass'n of Securities Dealers, Inc.*, 422 U.S. 694, 719 (1975).

²⁹For a discussion of express and implied immunities, see *Accommodating Regulatory Approaches in An Antitrust Universe: The U.S. Experience in Harmonizing Antitrust with Laws that Restrain Competition*.

matters within an industry or to establish concurrent jurisdiction between the industry regulator and the antitrust agencies on a case-by-case basis. This paper will focus on interrelations between the antitrust agencies and industry-specific regulators in the banking, electricity and telecommunications industries.

2. Antitrust Framework

There are three major federal³⁰ antitrust laws: the Sherman Antitrust Act,³¹ the Clayton Act,³² and the Federal Trade Commission Act.³³ The Sherman Act, enacted in 1890, prohibits all contracts, combinations and conspiracies that unreasonably restrain interstate and foreign commerce and prohibits monopolization of or attempts to monopolize any part of interstate and foreign commerce. A Sherman Act violation may bring both civil and criminal penalties; however, only the DOJ is empowered to bring criminal prosecutions under the Sherman Act. The Clayton Act is a civil statute, enacted in 1914 and substantially amended in 1950. The Clayton Act, *inter alia*, prohibits all mergers and acquisitions that are likely to substantially lessen competition in any relevant line of commerce. Under the Clayton Act, all transactions above a certain financial threshold must be notified to both the DOJ and the FTC. The Federal Trade Commission Act, which created the FTC, also was enacted in 1914. The FTC Act is a civil statute that prohibits unfair methods of competition in interstate commerce and may be enforced only by the FTC.

Although the Sherman Act has been in existence since 1890, it was not until 1903 that the United States Congress first appropriated funds for antitrust enforcement and authorized the appointment of an assistant within the Department of Justice to advise the Attorney General on antitrust matters.³⁴ The FTC was formed by Congress in 1914. Both the DOJ and the FTC have jurisdiction to investigate and bring cases under the Sherman and Clayton Acts although as pointed out above, only the DOJ is authorized to file criminal complaints (e.g., price fixing, bid rigging, etc.). Moreover, both the Clayton and FTC Acts limit the FTC's jurisdiction over mergers in certain industries (e.g., telecommunications common carriers, banking, aviation). The FTC has exclusive jurisdiction to enforce the FTC Act.

³⁰ In addition to the federal laws, most states have antitrust laws that closely parallel the federal statutes. These laws are enforced through the offices of state attorneys general. A discussion of the interrelations between federal and state antitrust authorities is outside the scope of this paper.

³¹ 15 U.S.C. "1 and 2.

³² 15 U.S.C. '12 *et seq.*

³³ 15 U.S.C. '41 *et seq.*

³⁴ The term Antitrust Division was not used within an official Department of Justice document until 1919. The first Assistant Attorney General for Antitrust was confirmed by the U.S. Senate in 1933.

3. Interrelations Concerning Mergers

a. Banking

There are four industry-specific regulators that have authority to approve or deny bank and bank holding company mergers: the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation and the Office of Thrift Supervision.³⁵ In 1963, the Supreme Court upheld the DOJ's authority to challenge a banking merger under the antitrust laws.³⁶ Prior to that time, it was believed that the antitrust laws largely did not cover bank mergers.³⁷ To resolve industry and Congressional concern over potential harm to the safety and soundness of the banking system from inconsistent outcomes, the Bank Merger Act and the Bank Holding Company Act were amended in 1966 to include a provision for concurrent independent competitive effects review by the DOJ and the bank regulatory agency.

Under the Bank Merger Act of 1966, the regulator must request and the DOJ must provide a competitive factors advisory report to the relevant banking agency which the agency *must* take into consideration in its decision.³⁸ The Act prohibits the relevant banking agency from approving any transaction that would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or attempt to monopolize the business of banking in any part of the United States,³⁹ or whose effect in any section of the country may be substantially to lessen competition, unless the anticompetitive effects of the proposed transaction are clearly outweighed by the public interest.⁴⁰ The relevant regulatory agency must notify DOJ of its approval of a proposed transaction.⁴¹ Unless exigent circumstances (e.g., imminent failure of one of the banks or bank holding companies) exist, the companies may not consummate the merger for thirty (30) days following approval by the relevant regulatory authority, to give DOJ an opportunity to review and if appropriate challenge the merger.⁴² The post-approval waiting period may be reduced to 15 days by the relevant regulatory authority with the concurrence of the DOJ but in no circumstances may the post-approval waiting period be reduced to less than 15 calendar days after the date of regulatory approval.⁴³

³⁵See 12 U.S.C. ' 1828(c) and 12 U.S.C. 1842.

³⁶See *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963).

³⁷See Bank Merger Act of 1960, H.R. 1416 (March 23, 1960).

³⁸See 12 U.S.C. '1828(c)(4). By statute, the FTC does not have jurisdiction over banking. See 15 U.S.C. '45(2).

³⁹12 U.S.C. '1828(c)(5)(A).

⁴⁰*Id.* at '1828(c)(5)(B).

⁴¹*Id.* at '1828(c)(6).

⁴²*Id.*

⁴³*Id.*

To ensure that the regulatory agencies and the DOJ apply similar standards, in 1994 the DOJ, the Federal Reserve Board, and the Office of the Comptroller of the Currency jointly published the Bank Merger Competitive Review, which outlines the bank merger antitrust review process. As highlighted in this joint statement, the bank regulatory agencies and the DOJ in practice do not necessarily use the same product market definition and, as a result, may disagree on the geographic market definition. For example, in the merger of BayBanks and Bank of Boston Corp., the Federal Reserve Board, using their cluster of banking services product market, would have cleared the transaction without any divestiture in the Boston market.⁴⁴ The DOJ, however, required a divestiture in the Boston market after an investigation determined possible anticompetitive effects for small and lower middle market business banking services.⁴⁵

As in other industries, the requirement that the bank regulatory agencies apply some of the same antitrust standards as the DOJ has not altered the banking agencies' efforts to carry out the other facets of their regulatory policy. Competition analysis is only one of several criteria which the banking regulators must consider in their approval process, and the regulator can override competitive concerns if the public's convenience and needs so warrants.⁴⁶ Indeed, in cases where DOJ has ultimately sued following agency approval, the relevant agency has intervened in the case on behalf of the bank in order to defend the agency's approval in court.⁴⁷

b. Electricity

Electric utilities in the United States are regulated by both the states and the Federal Energy Regulatory Commission (FERC), a successor agency to the Federal Power Commission. The FPC was created by the Federal Power Act of 1920.⁴⁸ In its declaration of policy explaining the need to regulate electric utility companies, the Act states that the business of selling electric energy for ultimate distribution to the public is affected with a public interest.⁴⁹ Historically, the FERC has focused on wholesale electricity sales and associated transmission services. Under the Act, the rates that the FERC establishes for wholesale electricity sales and transmission must be just and

⁴⁴Volume 82 Federal Reserve Bulletin Number 9: page 856. The Federal Reserve Board order includes the DOJ required divestiture.

⁴⁵Letter from J. Robert Kramer, II, Chief of Litigation II Section, Antitrust Division, Department of Justice, dated July 2, 1996, to the Honorable Alan Greenspan, Chairman of the Board of Governors of the Federal Reserve System.

⁴⁶ 12 U.S.C. '1828 (c)(5)(B).

⁴⁷ See e.g., *United States v. National Bank and Trust of Norwich*, 1984 WL 21972 (N.D.N.Y. June 12, 1984).

⁴⁸16 U.S.C. '791a.

⁴⁹16 U.S.C. '824(a).

reasonable.⁵⁰ The states, on the other hand, traditionally have focused on retail electricity rates and transmission. States also retain control over the siting of generation and transmission lines within their borders.

Since the early 1990s, federal legislation has introduced competition into wholesale electricity markets. For example, in 1992 Congress enacted the Energy Policy Act which facilitated competition in the wholesaling of electricity by increasing the FERC's authority to order third parties access to transmission lines.⁵¹ Both the DOJ and the FTC filed extensive comments on how this objective could be best achieved, although the FERC did not accept all of the agencies' proposals.

In addition to advising on rule-makings pertaining to competition, the antitrust agencies share concurrent jurisdiction with the FERC over electric utility mergers. In keeping with the objectives of the Federal Power Act, the FERC is charged with ensuring that a merger is in the public interest.⁵² This "public interest" standard differs from that applied by the DOJ and the FTC who review mergers pursuant to Clayton Act § 7, which prohibits mergers that are likely to substantially lessen competition in any relevant market.⁵³ Another key difference between the agencies' reviews is that applicants in a FERC proceeding bear the burden of proving that their transaction is consistent with the public interest whereas in order to block a merger, the DOJ must prove to a federal court that the anticompetitive effects of the merger outweigh any procompetitive benefits. These differing standards and burdens could, but rarely do, lead to situations where the antitrust agencies take no action, but the FERC imposes conditions on a merger.

In 1996, in furtherance of the federal government's deregulatory approach to wholesale electricity markets, the FERC adopted the Open Access Rule. This rule requires each public utility that owns, operates or controls interstate transmission facilities to file an open access transmission tariff. Thereafter, the FERC issued a new merger policy statement.⁵⁴ This policy statement declared competitive effects to be one of three key inquiries under the FERC's public interest analysis. Consequently, the competitive effects of mergers are now analyzed by the FERC under the *DOJ/FTC Horizontal Merger Guidelines*. Merger applicants are required to submit to the FERC a *Guidelines* analysis and supporting data in their application. If the application is consistent with the *Guidelines*, it generally will be resolved by the FERC without a hearing on competition. While this development may help to eliminate some inconsistent results, the policy statement also makes clear that there may be unusual circumstances in which, for example, a merger that raises competitive concerns may nevertheless be in the public interest because customer benefits (such as the need to

⁵⁰16 U.S.C. '824(d).

⁵¹16 U.S.C. '824(k).

⁵²16 U.S.C. '824b.

⁵³15 U.S.C. '18.

⁵⁴FERC Order No. 592, 18 C.F.R. Part 2 (Dec. 19, 1996) (hereinafter *Policy Statement*).

ensure reliable electricity service from a utility in severe financial distress) may clearly compel approval.⁵⁵

c. *Telecommunications*

The industry-specific regulator for telecommunications is the Federal Communications Commission (FCC) which was established by the Communications Act of 1934.⁵⁶ The purpose of the Communications Act is to make available, so far as possible, to all people of the United States, . . . a rapid, efficient, Nationwide, and worldwide wire and radio communication service with adequate facilities at a reasonable price Pursuant to sections 214(a) and 310(d) of the Act,⁵⁷ the FCC must determine whether a proposed transfer of telecommunications licenses and authorizations (such as those involved in a merger of two telecommunications companies) will serve the public interest, convenience and necessity.⁵⁸ In conducting its public interest analysis, the FCC must consider the goal of the Communications Act, which includes among other things, preserving and enhancing competition in relevant markets, ensuring that a diversity of voices is made available to the public, and accelerating the private sector deployment of advanced services.⁵⁹ Consequently, the FCC's merger review analysis is broader than the DOJ's analysis under section 7 of the Clayton Act.⁶⁰ In some cases (e.g., AT&T/Comcast), this has resulted in the FCC imposing conditions on a merger that the DOJ has decided not to challenge.

In addition to the differing standards of review, the FCC and the DOJ also employ different processes and timetables for reviewing mergers. For example, while both agencies may compel additional information from the merging parties, the FCC is required to publish any information that it relies on in reaching its decision (absent a protective order allowing such information to be placed under seal).⁶¹ In contrast, the DOJ has an affirmative obligation not to disclose to the public any party or third party information obtained pursuant to compulsory process.⁶² Similarly, the FCC, by its own

⁵⁵*Policy Statement* at 7.

⁵⁶47 U.S.C. '151.

⁵⁷The FCC also is authorized to analyze telecommunications mergers under Section 7 of the Clayton Act.

⁵⁸47 U.S.C. "214(a), 310(b).

⁵⁹*In re Applications for Consent to the Transfer of Control of Licenses from Comcast Corp. and AT&T Corp., Transferors, to AT&T Comcast Corp., Transferee*, 17 F.C.C.R. 23,246, at 23,255 (citing 47 U.S.C. 157; Telecommunications Act of 1996, Pub. L. No. 104-104, Preamble, 110 Stat. 56).

⁶⁰By statute, the FTC does not have jurisdiction over telecommunications common carriers (e.g., wireline or wireless carriers). See 15 U.S.C. "21(a) and 45(a)(2). The FTC can review telecommunications matters involving non-common carrier issues such as cable distribution and programming.

⁶¹See 47 C.F.R. '0.459.

⁶²15 U.S.C. '18a(h).

internal rules, aims to rule on a merger application within 180 days of filing⁶³ whereas the DOJ is statutorily obligated to make a decision within 30 days of receiving the merging parties' completed application or, if the DOJ has requested additional information or documents (referred to as a Second Request) within 30 days of certification of compliance with such Second Request.⁶⁴ Finally, the applicants in a FCC proceeding bear the burden of proving that a particular license transfer is in the public interest whereas under the Clayton Act, the antitrust authorities must convince a federal court that the anticompetitive effects of a merger outweigh any procompetitive benefits.

Despite differences in standards, burdens of proof and timing, the FCC and the DOJ can and do cooperate on and coordinate their respective merger investigations. There are no rules governing when or which agency may initiate the contact. Typically, such cooperation begins once the parties have filed with one of the agencies, although in large cases contact may occur sooner. As noted above, although FCC rules generally require it to disclose *ex parte* meetings, the rules contain an exception for meetings with the antitrust authorities.⁶⁵ While the FCC and the DOJ are thus free to meet and discuss theories of competitive harm, proposed remedies and timing, the DOJ may not disclose any information it has obtained via compulsory process from the parties or third parties absent a waiver. Such waivers are useful in order to streamline the review process and avoid inconsistent results.

4. Interrelations Concerning Non-Merger Matters

As noted above, the antitrust agencies often advise industry-specific regulators on non-merger matters that impact competition. This advice may take several forms. For example, both the DOJ and the FTC participate in a number of inter-agency task forces or committees which formulate an Administration's policies on various economic issues. Additionally, the antitrust agencies, like any private person, may file comments in regulatory proceedings before independent agencies. For example, both the DOJ and the FTC submitted comments to FERC regarding its 1996 merger policy statement. Finally, some statutes authorize the antitrust agencies to participate in certain regulatory proceedings and/or require the regulator to seek advice from the competition agencies in particular types of proceedings. An example of such a statute is the

⁶³See FCC Press Release, *FCC Implements Predictable, Transparent And Streamlined Merger Review Process* (Jan. 12, 2000).

⁶⁴15 U.S.C. "18a(b) and (e). The Hart-Scott-Rodino reporting requirements (and the time limitations contained therein) apply to all mergers, including telecommunications mergers, above a certain financial threshold. See 15 U.S.C. '18a(a)(2). Because the parties cannot consummate their merger until they receive all necessary regulatory approvals, as a practical matter the DOJ may continue its investigation up until the time the FCC issues its decision, if after the HSR deadline.

⁶⁵47 C.F.R. '1.1204(a)(6).

Telecommunications Act of 1996⁶⁶ which seeks to open all telecommunications markets in the United States, including local services, to competition. Section 271 of the 1996 Act conditions Regional Bell Operating Company (RBOC) entry into the long distance market on a showing that the RBOC's local market is open to competition. In making this determination, the Act requires the FCC to consult with the DOJ and accord substantial weight to the DOJ's analysis. As part of this consultative process, the DOJ generally has provided the FCC with a written evaluation within thirty (30) days of the RBOC's application. By statute, the FCC has ninety (90) days within which to rule on an RBOC application for entry. Both before and after the DOJ's evaluation is filed, DOJ and FCC staff consult with respect to issues which the DOJ believes may impede competition in the local market. These consultations fall within the exception to the FCC's ex parte rules and thus, are not required to be put on the public record. While the FCC is required to accord substantial weight to the DOJ's evaluation, the FCC is not bound to follow the DOJ's advice.

In addition to seeking the antitrust agencies advice on competition matters, a regulatory agency also may notify the antitrust agencies of conduct that falls within the regulatory agency's jurisdiction that may violate the antitrust laws. One example of such a referral involved allegations against three wireless communications firms which agreed not to bid against each other in license auctions conducted by the FCC. In numerous auctions conducted over a six month period, each company refrained from bidding on licenses that another wanted in exchange for the other's agreement not to bid against them in markets that they wanted. As a result, the FCC received less money than it would have for licenses in markets that were the subject of the agreement. After receiving information about the alleged bid rigging from the FCC, the DOJ launched an investigation which ultimately led to the filing of complaints and consent decrees against the three firms.⁶⁷

5. Conclusion

There are advantages and disadvantages associated with concurrent or shared jurisdiction. One of the advantages is that it allows each agency to avail itself of the other agency's expertise. For example, the antitrust agencies are experts in antitrust law whereas the regulatory agencies have broad knowledge of their respective industries. Interaction between the two agencies may be particularly helpful in defining markets, obtaining industry statistics, and articulating theories of competitive harm. Moreover, the antitrust agencies generally have greater investigative powers (e.g., power to subpoena documents and depositions) than the regulatory agencies. In addition,

⁶⁶47 U.S.C. '151 *et seq.*

⁶⁷See *United States v. Mercury PCS II, L.L.C.*, 1999-2 Trade Cas. P72,707 (D.D.C. 1999); *United States v. Omnipoint Corp.*, 1999-1 Trade Cas. P72,472 (D.D.C. 1999); *United States v. 21st Century Bidding Corp.*, 1999-1 Trade Cas. P72, 473 (D.D.C. 1999).

consumers and competitors are more likely to complain to the antitrust agencies because of the strong confidentiality provisions that the antitrust laws provide.

An additional advantage for competition may come from the different standards applied by the antitrust agency and regulatory agency. As noted above, the antitrust laws are designed to protect against anticompetitive harm from certain activities (e.g., price fixing, monopolization), and with that narrow focus, the antitrust agencies are limited to redressing only anticompetitive harm. On the other hand, the regulatory agencies not only can redress anticompetitive harm in certain circumstances, but through their public interest standard they can also alter the competitive situation.

In contrast, concurrent or shared jurisdiction imposes costs on the antitrust and regulatory agencies and the parties, especially in the merger context. In addition to increased transactional costs from duplication of effort within the agencies and by the parties in dealing with multiple agencies, one of the disadvantages is that shared jurisdiction can lead to inconsistent outcomes. For example, the antitrust agency may decide not to challenge a merger, but the sector regulator may impose competition related conditions to its approval. When an antitrust agency and sector regulator enforce the same competition laws, differences in enforcement approaches may emerge and can increase the difficulty of achieving consistent antitrust policies in a jurisdiction. Since regulatory outcomes can vary according to how individual regulators exercise their discretion, firms may expend additional resources to learn and monitor the preferences of both an antitrust agency and sector regulators. As regulatory agencies make competitive effects a more significant part of their analysis, the opportunities for inconsistent outcomes and greater duplication are increased. But these costs can be mitigated by early and regular contact between the agencies, which can reduce duplication of effort and limit the risk of inconsistent outcomes.