



**INTER-AMERICAN DEVELOPMENT BANK**  
SUSTAINABLE DEVELOPMENT DEPARTMENT  
OFFICE IN EUROPE



**ORGANISATION FOR ECONOMIC  
CO-OPERATION AND DEVELOPMENT**  
COMPETITION DIVISION

**FOURTH MEETING OF THE LATIN AMERICAN COMPETITION FORUM  
(SAN SALVADOR, 11<sup>TH</sup> AND 12<sup>TH</sup> JULY 2006)**

**-- SESSION I --**

**IMPROVING RELATIONSHIPS  
BETWEEN COMPETITION POLICY AND SECTORAL REGULATION**

by  
John C. Hilke, Ph.D.

## TABLE OF CONTENTS

ABSTRACT .....	3
I. INTRODUCTION .....	5
II. ORGANISATION OF THE PAPER .....	10
III. VARIETY IN THE STARTING POINTS FOR INTERACTION .....	10
A. Timing of Interactions .....	10
B. Competition Orientation of the Sector and Its Regulator .....	15
IV. TECHNIQUES FOR IMPROVING INTERACTIONS.....	21
A. Coordinating Policy Decisions .....	21
B. Increasing the Effectiveness of Competition Advocacy.....	35
C. More Effectively Exchanging Institutional and Policy Perspectives at Both the Decision-Making and Staff Levels .....	40
V. CONCLUSION .....	47

## **IMPROVING RELATIONSHIPS BETWEEN COMPETITION POLICY AND SECTORAL REGULATION**

### **ABSTRACT**

Competition agencies and sector regulators should share a common objective in regulated industries to improve economic performance by preventing market power and avoiding inefficient regulations. Differing tasks and specialised areas of knowledge and experiences can cause friction between the two types of agencies, despite this shared objective. And in some circumstances, other official or unofficial objectives may dominate the attention of the sector regulatory agency. The tone and content of interactions between competition agencies and sector regulators depend on a variety of factors. Chief among them are the stages of policy and institutional development in the agencies, the degree of jurisdictional overlap between the agencies, and the competition advocacy initiatives of the competition agency.

There are a variety of starting points for interaction related to the respective stages of policy and institutional development. Timing is likely to affect the nature and content of interactions. The most favourable scenario for incorporating competition concerns into sector regulation is one in which competition policy and institutions are well-developed before the initiation of sector regulation. That is because the opportunities for establishing formal and informal ties between agencies are easiest in these circumstances. Another scenario for timing is when the competition agency decides to initiate competition advocacy directed toward a well-established sector regulatory agency. In this scenario, establishing expertise in the regulated sector, carefully selecting critical issues, and providing fresh information and perspectives in an objective manner are likely to be important. The tone of interaction will depend on whether the sector regulatory agency is giving priority to competition and efficiency concerns on its own. The competition agency has a very different task if the sector regulatory agency is leading a drive to increase competition than if it is leading the opposition to increased competition. Another important context for interaction occurs when the government is reviewing its competition and sector regulation policies.

When competition agencies and sector regulators have overlapping jurisdictions, interaction between the agencies is inevitable. Concerns will arise if the agencies do not coordinate their decisions and processes because failure to do so will create regulatory risk for investors and increase compliance costs. Both can harm consumers by raising costs and prices. Techniques for coordinating the actions of competition agencies and sector regulators range from consolidation of the two types of agencies, to formal agreements dividing responsibilities, to informal arrangements with respect to consultation and notification.

Whether or not jurisdictions overlap, the mission of competition agencies to promote competition and economic efficiency often involves encouraging sector regulatory agencies to take competition and efficiency into consideration in designing new regulations. Competition advocacy experiences from many nations provide guidance on approaches that can improve the effectiveness of competition advocacy. These include establishing expertise in the regulated sector, nurturing reputations for accuracy and objectivity, committing to long-term competition advocacy if the process of regulatory reform is lengthy, emphasising fresh information and analysis, capitalising on litigation experience to bolster competition advocacy (and the reverse), and fostering collegial relationships between staffs of the agencies. Another critical element in successful competition advocacy is exchanging institutional and policy perspectives

between agencies at both the decision making and staff levels. Techniques for so doing include understanding critical differences in tasks and processes, appointing overlapping decision makers, cross-hiring of staff and consultants, cross-training of staff, jointly participating in publicly held policy discussions, organising interagency staff meetings and contributing to joint projects.

## I. INTRODUCTION

1. Competition may be lessened significantly by various public policies and institutional arrangements. Indeed private restrictive business practices are often facilitated by various government interventions in the marketplace. Thus, the mandate of the competition office extends beyond merely enforcing the competition law. It must also participate broadly in the formulation of its country's economic policies [because they] may adversely affect competitive market structure, business conduct, and economic performance. It must assume the role of competition advocate, acting proactively to bring about government policies that lower barriers to entry, promote deregulation and trade liberalisation, and otherwise minimise unnecessary government intervention in the marketplace.<sup>1</sup>

2. An important aspect of the advocacy function is spelling out the implication of public policies for competition and efficiency so that government decision making takes them into account. Through competition advocacy, situations that tend to impede the competitive process can be prevented or at least be subjected to greater accountability, transparency and public discussion. Effective advocacy by the competition agency can help increase awareness of the costs and benefits of alternative policies and ensure that government policy objectives do not work at cross-purposes.<sup>2</sup>

3. The elements of economic performance – production and allocative efficiency, growth, technological progress, full employment, and equity – are concerns common to all nations. Although a variety of potential economic systems has been tried, a growing consensus has developed that a market-based economic system (one focused on competition among private, for-profit suppliers) coupled with consumer sovereignty, offers the greatest opportunity for strong economic performance. Competition creates incentives for suppliers to minimise costs in order to gain customers (and associated higher profits) through lower prices as well as through improved quality and innovations. The growth of the consensus in favour of competition in a market-based economic system is reflected in the growth in the number of nations with competition agencies that are charged with enhancing and protecting competition and consumer welfare. In the 1950s, fewer than ten countries had comprehensive antitrust laws. That number has now swelled to over 100.<sup>3</sup>

4. Not every sector or every market within a sector is well suited to effective competition. Every nation appears to have markets with elements of natural monopoly, for example. A market is a natural monopoly if the social optimum quantity (where marginal cost equals the price) can be produced at a lower average cost by a single firm than by two or more firms. A natural monopoly may stem from scale economies in production technology or from network effects if there are severe obstacles to

---

<sup>1</sup> The World Bank & OECD, *A Framework for the Design and Implementation of Competition Law and Policy* (1998), Ch. 6, quoted in OECD, "Competition Advocacy: Challenges for Developing Countries, available at <http://www.oecd.org/dataoecd/52/42/32033710.pdf>.

<sup>2</sup> Background material accompanying the International Competition Network Questionnaire on Competition Advocacy, attributed to the World Bank, (2002), pp. 13-14, available at <http://www.internationalcompetitionnetwork.org/advocacyquestionnairem.pdf>.

<sup>3</sup> R. Hewitt Pate, U.S. Department of Justice, "Securing the Benefits of Global Competition," (10 September 2004), available at <http://www.usdoj.gov/atr/public/speeches/205389.htm>.

interoperability between separate networks operating in the same market.<sup>4</sup> Network effects exist when the value of a service to each customer increases as the number of customers increases.

5. Both in market economies and in government-dominated economies, natural monopoly markets are usually subject to some type of government intervention because a for-profit firm with a natural monopoly can have incentives and the ability to exercise market power by increasing prices above the competitive level. It also can dissipate some of its monopoly profits by failing to minimise costs. Lack of effective competition can help to make price increases profitable and shelter the firm from the effects of failing to minimise its costs.

6. Until recently, government ownership of natural monopolies was the most common form of intervention. Increasingly, however, governments are corporatising and privatising natural monopolies or coming to realise that natural monopoly conditions do not exist in some state monopoly or regulated monopoly sectors.<sup>5</sup> Further, regulation and state ownership themselves can harm economic performance to the extent that they erode incentives to minimise costs and impede incentives to innovate and invest.<sup>6</sup> Simply privatising a natural monopoly (or a former natural monopoly) does not remove the risk that it will exercise market power, although it may increase incentives to minimise costs. Governments that do not take potential market power concerns into account in corporatising and privatising are likely to harm consumers and economic efficiency. Governments may be tempted to neglect this issue, however, because the price obtained for a state-owned enterprise is likely to be higher if protections against competition come along with the sale of the enterprise.<sup>7</sup> One common approach to address the risk that a natural monopoly (or a statutory monopoly, more generally) will exercise market power and not minimise costs is to create a sector regulator with the assignment of curbing both after privatisation takes place.<sup>8</sup>

---

<sup>4</sup> For example, in the telecommunications sector, although there are network economies, multiple technologies and suppliers can serve the same customer demand because interoperability allows a subscriber of one supplier to reach subscribers of other suppliers. If interoperability were not the norm, network effects could lead to a natural monopoly because interconnecting all subscribers would require each customer to subscribe to multiple networks and result in more duplication of network investments, whereas under a monopoly market structure, only one subscription would be necessary and only one set of network investments would be involved. Thus, the monopoly market structure would, under these circumstances, likely entail the lowest average cost for society, assuming the monopolist minimises its costs and operates at the socially optimum level of output. Network industries can also have multiple suppliers if the network effects are exhausted at a low level of subscribers relative to the whole market. In this situation, there can be efficient size networks that compete with each other in the same market.

<sup>5</sup> United Nations Conference on Trade and Development, Secretariat, *Best Practices for Defining Respective Competences and Settling Cases which Involve Joint Action of Competition Authorities and Regulatory Bodies* (September 2005), p. 3, available at [http://www.unctad.org/en/docs/c2clpd44\\_en.pdf](http://www.unctad.org/en/docs/c2clpd44_en.pdf).

<sup>6</sup> The substantial literature on the social costs of excessive regulation is discussed, for example in the background paper for the OECD Roundtable on *Resale Below Cost Laws and Regulations* (February 2006), Section 3.2, available at <http://www.oecd.org/dataoecd/13/30/36162664.pdf>; the issues paper of the OECD *Global Forum on Competition* Session on “The Relationship between Competition Authorities and Sectoral Regulations” (February 2005), available at <http://www.oecd.org/dataoecd/58/7/34375749.pdf>; and Giuliano Amato and Laraine L. Laudati, Ed, *The Anticompetitive Impact of Regulation* (2001).

<sup>7</sup> OECD, “Competition Advocacy: Challenges for Developing Countries,” Section II, available at <http://www.oecd.org/dataoecd/52/42/32033710.pdf>.

<sup>8</sup> Optimal design of sector regulatory agencies is beyond the scope of this paper, but it is a topic of intense interest in sectors transitioning to competition as well as in sectors that continue to be marked by substantial elements of natural monopoly. See, for example, OECD, Working Party on Regulatory Management and Reform, *Designing Independent and Accountable Regulatory Authorities for High Quality Regulation* (January 2005), available at <http://www.oecd.org/dataoecd/15/28/35028836.pdf>. This

7. The competition agency in a nation has good reason to interact with the privatisation agency and with a subsequent sector regulator in order to discourage selling monopoly protections along with the state-owned assets or unleashing anticompetitive behaviour by the former state monopoly. As an International Competition Network (ICN) report found, “recent regulatory problems are, to a great extent, connected to the actions of the state-owned companies recently privatised.”<sup>9</sup> In economies adopting a market-orientation for the first time, this may well be one of the primary reasons for interactions between the competition agency and sector regulators. In some countries, such as Mexico, this role in privatisation and subsequent regulation has been formalised.<sup>10</sup> However, there are often ample opportunities and justifications for interactions between the two types of agencies even in established market-oriented economies. Over the past two decades, a prominent reason for interaction in market-oriented economies has been technical or organisational developments that make competition feasible in markets that were formerly natural monopolies.<sup>11</sup> Sometimes this occurs because new technologies involve reduced scale economies in production. Sometimes this occurs because markets that were formerly separate are converging. In other instances, the advance toward increased competition may simply be the realisation that a market is not a natural monopoly any longer because demand is now sufficient to sustain several suppliers.<sup>12</sup> Finally, the competition agency may wish to intervene for the sake of improved economic efficiency and consumer welfare, even if the matter is not directly related to competition.

8. Effectively, the competition authority and sector regulators share a common objective --- to improve economic performance by preventing market power and economic inefficiencies associated with market power. The competition authority pursues this objective by promoting and protecting the mechanisms of the market, particularly entry, expansion of incumbent suppliers through investment and innovation, and informed consumer choice. It also pursues this objective by curtailing anticompetitive means of amassing market power. Often, however, competition agencies do not have authority to remedy existing market power that has not been obtained through anticompetitive means.<sup>13</sup> This does not mean, however, that staffs of competition agencies lack expertise in assessing issues of existing market power

---

issue is of most interest to competition agencies when they are asked to help in this design process or to comment on deficiencies in the design of the existing sector regulatory agencies.

<sup>9</sup> International Competition Network, *Competition Advocacy Review: Case Studies on Regulated Sectors* (2005), p. 6, available at

[http://www.internationalcompetitionnetwork.org/bonn/CPI\\_WG/SG3\\_Advocacy\\_in\\_Regulated\\_Sectors/Competition\\_Advocacy\\_Review.pdf](http://www.internationalcompetitionnetwork.org/bonn/CPI_WG/SG3_Advocacy_in_Regulated_Sectors/Competition_Advocacy_Review.pdf).

<sup>10</sup> The statute creating the Mexican Privatisation Commission indicates that the competition agency will be a permanent “guest” of the Privatisation Commission and the competition agency has actively participated in Mexico’s privatisation planning activities since mid-1993. OECD, “Competition Law and Policy in Mexico, an OECD Peer Review (1999), available at <http://www.oecd.org/dataoecd/57/9/31430869.pdf>. The several sector-specific statutes on regulation and privatisation require that firms obtain authorisation from the Competition Commission to participate in privatisations or in public auctions for concessions. Contribution of Mexico, *OECD Roundtable on Relationships between Regulators and Competition Authorities* (1999), p. 182, available at <http://www.oecd.org/dataoecd/35/37/1920556.pdf>.

<sup>11</sup> For a text discussion of this development in the U.S., see W. Kip Viscusi, Joseph Harrington, Jr., and John Vernon, *Economics of Regulation and Antitrust* 4<sup>th</sup> Ed. (2005).

<sup>12</sup> OECD, “Restructuring Public Utilities for Competition,” Report of the Secretary General, available at <http://www.oecd.org/dataoecd/6/60/19635977.pdf>; and *OECD Policy Brief* (February 2002), available at <http://www.oecd.org/dataoecd/0/0/2066164.pdf>. Natural monopoly rationales are particularly apt to be antiquated when a state monopoly or regulatory regime was adopted to promote an infant industry. Aviation sector regulation of rates and routes may be an example.

<sup>13</sup> OECD, Roundtable on *Relationships between Regulators and Competition Authorities*, “Background Note” (1999), Section 4, available at <http://www.oecd.org/dataoecd/58/7/3475749.pdf>.

because, in addressing issues of abuse of dominance and monopolisation, competition agencies often must evaluate existing market power. Competition agencies specialise in understanding how competition impacts economic performance in a wide variety of settings and how impediments to competition can harm consumers and create inefficiencies. This generally gives competition agencies a comparative advantage over sector regulators in assessing behaviour or structural conditions within regulated or unregulated markets.<sup>14</sup>

9. Sector regulators, on the other hand, may not be able to rely on market forces to create strong economic performance and they may be faced by incumbent suppliers with existing market power stemming from a natural monopoly position or general lack of merger control in regulated industries. Rather, the sector regulators design and implement policies to supplement market forces or to substitute for them. In addition, sector regulators often are assigned to address other aspects of economic performance, such as equity, that are not usually assigned to competition agencies. Further, sector regulators are specialists in history, technology, and operations of suppliers in their specific sectors. This generally gives sector regulators a comparative advantage over competition agency staff in designing and enforcing technical regulations.

10. Given the shared objective, yet differing tasks and specialised areas of knowledge and experience that can cause friction between agencies,<sup>15</sup> how should competition agencies interact with sector regulatory agencies?

11. One theme of this paper is that the appropriate interaction of competition agencies with sector regulatory agencies depends on the stages of development of the respective policy areas, as well as on conditions within the markets currently subject to regulation. A second theme is that whatever the respective stages of development, there are identifiable means that are likely to help a competition agency improve its interactions with sector regulators, either through coordination in the case of overlapping jurisdictions or through competition advocacy in the case of only distantly related jurisdictions.<sup>16</sup> The

---

<sup>14</sup> The specialisations of sector regulators and competition agencies are discussed more fully in: OECD, *Global Forum on Competition*, “The Relationship between Competition Authorities and Sectoral Regulations” (February 2005), Section 4, available at <http://www.oecd.org/dataoecd/58/7/34375749.pdf>; and OECD, Roundtable on *Relationships Between Regulators and Competition Authorities*, “Executive Summary” and “Background Note” (1999), available at <http://www.oecd.org/dataoecd/58/7/3475749.pdf>.

<sup>15</sup> United Nations Conference on Trade and Development, Secretariat, *Best Practices for Defining Respective Competences and Settling Cases which Involve Joint Action of Competition Authorities and Regulatory Bodies* (September 2005), p. 3, available at [http://www.unctad.org/en/docs/c2clpd44\\_en.pdf](http://www.unctad.org/en/docs/c2clpd44_en.pdf). “Despite a common goal, friction may arise as a result of differences in the prioritization of objectives and the methods used by sector regulators and the competition authority. In addition, jurisdiction over certain areas may not always be clear-cut and may pose certain dilemmas, the resolution of which will depend on which is judged to be the more effective of the two authorities on the basis of the specific problem under consideration.” Also see, Elizabeth Davidson, ACCC, “The Interface between Competition Authorities and Sectoral Regulators,” paper for the Regional Seminar on Competition Policy and Multilateral Negotiations (April 2002), Section 2.3, available at <http://r0.unctad.org/en/subsites/cpolicy/gvaJuly/docs/en8.doc>; and ICN, Antitrust Enforcement in Regulated Sectors Working Group, Subgroup on Limits and Constraints Facing Antitrust Authorities Intervening in Regulated Sectors, “Possible Conflicts between Antitrust and Regulation: What Are the Solutions?” (April 2004), available at

[http://www.internationalcompetitionnetwork.org/seoul/acrs\\_sg1\\_seoul.pdf](http://www.internationalcompetitionnetwork.org/seoul/acrs_sg1_seoul.pdf).

<sup>16</sup> Distinct jurisdictions can originate in legislation that specifies different tasks for the competition and sector regulatory agencies. Distinct jurisdictions can also originate in general exemptions or immunities from competition and consumer protection laws. One of the most important forms of the latter is the immunity

objective of such interactions is for the competition agency to convey the importance of competition concerns in sector regulation and to point to opportunities to improve economic performance by increasing competition in sectors currently subject to regulation. Examples of topics for interactions that emphasise the importance of competition include market delineation,<sup>17</sup> assessment of natural monopoly conditions, identification of existing market power, and design of behavioural and structural market power remedies to complement or replace regulation. Examples of topics for interactions to increase competition include assessment of changes in natural monopoly conditions, evaluation of potential applications of the essential facilities doctrine, assessment of convergence between markets, and development of adjustments in regulations to accommodate and support increased competition.<sup>18</sup> In the process of conducting competition advocacy in one sector, the competition agency may be able to gain insights that will improve its own law enforcement activities and its competition advocacy efforts in other sectors.

12. In general, the social benefits of interaction between competition and sector regulatory agencies may be minor, aside from potential administrative efficiencies, if (1) economic performance is strong in the regulated markets, (2) the respective policy areas are well-developed and flexibly administered, (3) technologies and institutions in the regulated markets are static (both domestically and abroad), and (4) the regulated markets are distant from unregulated markets in product space.

13. Conversely, society can have much to gain from competition agencies helping sector regulatory agencies to better understand and address opportunities to improve economic performance by protecting and enhancing competition if: (5) economic performance in the regulated markets is lagging, (6) opportunities for policy improvements in the regulated sector abound (7) technologies are changing in the regulated markets, (8) products in unregulated markets are close substitutes, or increasingly close substitutes, for products in the regulated markets, or (9) two regulated monopoly markets are converging.

14. For the past three decades, actual situations have been more aligned with the conditions 5-9 rather than conditions 1-4 in an increasing number of markets that commonly have been subject to regulation or state ownership.

---

from competition laws of sovereign entities. In a federated nation such as the United States (or an organisation of nations such as the European Union), both the individual component jurisdictions and the federal authority are regarded as sovereign. These governmental units are all potentially immune from antitrust law enforcement under the “state action doctrine.” Competition advocacy may be particular appropriate when anticompetitive regulation is imposed under this doctrine. See OECD, Roundtable on *Relationships between Regulators and Competition Authorities*, “Aide-Memoire of Discussion” (1999), p. 307-308, available at <http://www.oecd.org/dataoecd/58/7/3475749.pdf>, which summarises discussion of the state action doctrine in the context of the EU; and ICN, Antitrust Enforcement in Regulated Sectors Working Group, Subgroup on Limits and Constraints Facing Antitrust Authorities Intervening in Regulated Sectors, “Possible Conflicts between Antitrust and Regulation: What Are the Solutions?” (April 2004), pp. 9-23, available at [http://www.internationalcompetitionnetwork.org/seoul/acrs\\_sg1\\_seoul.pdf](http://www.internationalcompetitionnetwork.org/seoul/acrs_sg1_seoul.pdf).

<sup>17</sup> In ICN, *Competition Advocacy in Regulated Sectors: Examples of Success* (2004), p. 2-3, available at [http://www.internationalcompetitionnetwork.org/capacitybuild\\_sg4\\_seoul.pdf](http://www.internationalcompetitionnetwork.org/capacitybuild_sg4_seoul.pdf), assistance in defining markets was highlighted by survey respondents as an important form of advice provided by competition agencies to sector regulators.

<sup>18</sup> For additional discussion, see, for example, the background paper for the OECD roundtable on *Ensuring Access to Key Capacity for New Entrants* (2006), forthcoming.

## II. ORGANISATION OF THE PAPER

15. Section III begins by identifying a range of starting points for the interaction between competition agencies and sector regulatory agencies. A situation in which sectoral regulation is introduced subsequent to competition policy offers significant opportunities for cooperative, beneficial interaction. When the numbered conditions above pertain, potential beneficial interactions are less evident. Other situations offer potential benefits from interaction, but the interactions are likely to involve conflicts between the views of established competition agencies and sector regulators. The conflicts are likely to focus on the scope of regulation and the degree to which competition can displace regulation as the society's principal approach for promoting strong economic performance.

16. Section IV of the paper is directed at interactions under circumstances of potential conflict. This section identifies approaches that can improve the interactions between existing competition agencies and sector regulators. Improving the interactions can entail coordinating policy decisions, increasing the effectiveness of competition advocacy, and more effectively exchanging institutional and policy perspectives at both the decision making and staff levels. The techniques include institutional arrangements, formal and informal agreements between agencies, and formal or informal channels for advocacy and technical communications. Examples used in the paper are drawn from around the world, including examples from Latin America, Spain and Portugal.<sup>19</sup> Section V is the conclusion of the paper.

## III. VARIETY IN THE STARTING POINTS FOR INTERACTION

17. From the point of view of a competition agency, the tone and substance of its potential interactions with sector regulators depends in large part on the timing of its efforts relative to formation of a sector regulatory authority; the degree to which the sector regulatory authority is oriented toward competition; the degree to which the regulated sector, or at least part of it, is oriented toward competition; and the political environment. As observed in the previous section, opportunities for beneficial interaction are likely to be less compelling if the regulated sector is performing well, technology is static, and the closest substitutes (regulated or unregulated) are distant. Several noteworthy conditions for interaction are identified and discussed below. Another critical set of decisions about interactions occurs if the legislature reopens decisions on sector structure and on the degree to which the sector will be regulated.

### A. Timing of Interactions

18. This section discusses how the timing of interactions is likely to affect the nature and content of interactions between a competition agency interested in promoting competition and a sector regulatory

---

<sup>19</sup> For a chart describing the approaches for coordination between competition and sector regulatory agencies, see United Nations Conference on Trade and Development, Secretariat, *Best Practices for Defining Respective Competences and Settling Cases which Involve Joint Action of Competition Authorities and Regulatory Bodies* (September 2005), pp. 5-7, available at

[http://www.unctad.org/en/docs/c2clpd44\\_en.pdf](http://www.unctad.org/en/docs/c2clpd44_en.pdf). This paper also presents the OECD Guidelines for Apportioning Competition-Enhancing Tasks between Competition Agencies and Regulators at p. 12.

body. These timing effects can be independent of the official relationships between the agencies as described in the legislation founding the agencies.

19. Sector Regulatory Agency Start-up: If a sector regulatory authority is formed subsequent to the competition authority, the competition agency may have a great opportunity to shape the subsequent relationship by offering assistance and advice to the new agency. In this teaching and mentoring mode, the competition authority can encourage routine consideration of effects of regulation on competition within a sector regulatory authority. Helping to establish institutional avenues for advocacy for competition within a sector regulatory agency is likely to be one of the most effective means of promoting competition, over time, in regulatory decisions. Offering help and advice is also a way to initiate a habit of interagency communications, a practice that is often easy to maintain, but that can be difficult to initiate at a later time.<sup>20</sup>

20. For example, in Mexico, the Competition Commission was established prior to most sector regulation, so it was possible to shape sector regulation around an important role for the competition agency in the design and implementation of sector-specific regulatory mechanisms. The active role of the Competition Commission in helping to design regulations has made it possible to avoid conflicts between regulations and competition policy. Contradictions that could give rise to legal uncertainty have largely been avoided and duplications have been reduced in order to create a clear separation of functions and tasks between the agencies.

21. This role follows from two factors. First, the Competition Law itself empowers the Competition Commission to give its opinion on changes in other laws and regulations that concern competition. Often the communication and coordination between the Competition Commission and other authorities on these matters takes place through one of the Intersecretarial Committees. In practice the opinions and recommendations of the Competition Commission have mostly been taken into account by the relevant authorities.

22. Second, a number of sector-specific laws and regulations explicitly provide for a role for the Competition Commission. These are, principally, the Seaport Law, the Law on Roads, Bridges and Road Transport (both of 1993), the Navigation Law of 1994, the Railroad Services Law, the Federal Telecommunications Law, the Civil Aviation Law and the Airport Law (all of 1995), and the regulations on natural gas and on pension funds (of 1995 and 1996, respectively). The role for the Competition Commission under these provisions basically refers to:

- i. The determination of the competitive situation of a market. For certain activities the Competition Commission may determine whether effective competition exists or whether one of the agents has substantial market power. Thereupon, the relevant regulator may impose or abolish extra regulations<sup>21</sup>. Until now this has only happened in the market for telephony, as discussed in the next section,<sup>22</sup>

---

<sup>20</sup> For related discussion, see ICN, *Competition Advocacy in Regulated Sectors: Examples of Success* (2004), p. 2-3, available at [http://www.internationalcompetitionnetwork.org/capacitybuild\\_sg4\\_seoul.pdf](http://www.internationalcompetitionnetwork.org/capacitybuild_sg4_seoul.pdf).

<sup>21</sup> OECD, *Competition Law and Policy in Brazil: A Peer Review* (2005), pp. 70 and 86, available at <http://www.oecd.org/dataoecd/12/45/35445196.pdf>, recommends further expansion of this procedure by letting the Commission participate in the modification of the regulation: "It would be desirable in any event, however, to implement the 1998 Report's separate suggestion that the CFC be vested with explicit authority to participate in sector proceedings that apply and enforce regulations subsequent to a Commission finding of ineffective competition. Indeed, the CFC's intervention authority should be extended even further to include all proceedings conducted by sector regulators. This is because there are

- ii. The authorisation of economic agents to participate in privatisations or in public auctions for concessions, licences and permits. Here the Competition Commission normally applies standards similar to those of merger reviews. So far, the Commission has reviewed requests for participation in the privatisation of communications packages, rural storage facilities and railroads, and in public auctions for the licensing of seaport services, of natural gas transportation, storage and distribution, and of the use of radio spectrum, among others.”<sup>23</sup>

23. With respect to coordination, the competition law, Ley Federal de Competencia Economica (LFCE), stipulates that entities of the public administration, such as Cofetel, the telephony sector regulator, can consult the competition authority on any matter related to competition or free markets.

24. The general picture of coordination between the competition agency and sector regulators contrasts with the one situation in which sector reorganisation took place before the formation of the competition agency in 1993.<sup>24</sup> “Telecommunications was the first infrastructure sector to be liberalised in Mexico. Privatisation of the telephony state monopoly, Telmex preceded the current sector regulation law and so missed important competition considerations in its design. For example, Telmex was granted a concession title over the pre-existing nation-wide telephony network and a six-year period of exclusivity over long distance telephony.

25. Between 1990 and 1995, the Telmex concession led the sector’s liberalisation. There was no independent sector regulator and the regulatory framework ruling telecommunications continued to be the 1934 Law of Means of Communication. Because key structural and regulatory decisions in this sector were designed prior to the creation of the Competition Agency, the sector has faced a number of regulatory challenges, especially regarding competition. The main allegations concern a lack of effective mechanisms to control the exercise of the incumbent’s market power in the regulatory framework. Regulatory delays have favoured the permanence of Telmex’s market position in telephony markets.”<sup>25</sup>

26. A second example of improved coordination because the competition agency was already in place is from Brazil. “The National Agency for Surface Transportation (ANTT) was created in 2002 and vested with responsibility for regulating freight railway services and interstate and international bus transportation. A 2002 agreement between SEAE (the Secretariat for Economic Monitoring in the

---

regulatory circumstances (other than those following a CFC finding of ineffective competition) in which CFC involvement is important, but in which the Commission now has no formal role.”

<sup>22</sup> Currently it has also happened in other industries. For example: “In the energy sector, the FCC found a lack of competition in the LP Gas market. The FCC detected thirty-five markets for this energy source in Mexico of which twenty did not have effective competition conditions. According to this FCC resolution the authorities of the Ministry of Energy have to establish price regulations. Besides the FCC recommended reviewing local requirements that facilitate the entrance of new enterprises.” International Competition Network, Questionnaire on Competition Advocacy (2002), Response of Mexico, p. 10, available at [http://www.internationalcompetitionnetwork.org/questionnaire\\_mexico.pdf](http://www.internationalcompetitionnetwork.org/questionnaire_mexico.pdf).

<sup>23</sup> Contribution of Mexico, *OECD Roundtable on Relationships between Regulators and Competition Authorities* (1999), p. 182, available at <http://www.oecd.org/dataoecd/35/37/1920556.pdf>.

<sup>24</sup> OECD, Global Forum on Competition, Contribution of Mexico, “The Objective of Competition Law and Policy and the Optimal Design of a Competition Agency” (January 2003), section 3, available at <http://www.oecd.org/dataoecd/58/20/2486119.pdf>.

<sup>25</sup> International Competition Network, *Competition Advocacy Review: Case Studies on Regulated Sectors* (2005), p. 6, available at [http://www.internationalcompetitionnetwork.org/bonn/CPI\\_WG/SG3\\_Advocacy\\_in\\_Regulated\\_Sectors/Competition\\_Advocacy\\_Review.pdf](http://www.internationalcompetitionnetwork.org/bonn/CPI_WG/SG3_Advocacy_in_Regulated_Sectors/Competition_Advocacy_Review.pdf). Central America countries, with the exception of Panama, may face a similar challenge because privatisation is preceding formation of a competition agency.

Ministry of Finance) and ANTT calls for the exchange of information, joint analysis of techniques for applying competition principles to sector regulatory issues, and discussion of methodologies for tariff regulation. There are also provisions dealing with cooperation in competition law enforcement proceedings (including joint investigations). CADE (the Administrative Council for Economic Defence) and ANTT adopted an agreement in 2003 with similar terms but with a particular focus on cooperation to avoid conflicts between competition law enforcement and sector regulatory decisions.”<sup>26</sup>

27. A third example of coordination stemming from the prior formation of the competition agency is the Italian treatment of the electricity sector. The Italian competition law was adopted in 1990, but legislation regarding sector regulation for electricity did not take place until 1995. During the legislative process, the competition agency urged that it retain exclusive authority to enforce competition rules in the sector. The final legislation adopted this approach so a potential coordination problem was generally avoided.<sup>27</sup> The same issues arose in 1997 when telecommunications sector regulation was being initiated. Again the competition agency was able to retain authority for competition law enforcement in the sector.<sup>28</sup>

28. Initiating Competition Advocacy: If the competition agency decides to start up an active competition advocacy program, but has limited resources, it will have to decide how to allocate its advocacy resources. It may be possible to create significant benefits by sue of “quick hit” advocacies aimed at egregious regulatory decisions, but it is also possible that other agencies or private groups will effectively discourage the most obviously anticompetitive and inefficient regulatory proposals. Perhaps the most attractive targets for competition advocacy are regulators in sectors that are at the beginning of, or in the midst of, significant reforms. One way to identify such targets is to monitor regulatory reform efforts in other countries. In most cases, technologies are similar across countries; therefore a sector that becomes a focus for regulatory reform in a few countries is a good candidate for review in other countries as well. Another useful targeting technique is to identify sectors that operate competitively in many countries, but are monopolised in other countries.

29. Once a sector has been chosen by the competition agency for competition advocacy efforts, there are numerous specific approaches that can be useful. They include: formal comments, academic research, conferences, testimony, speeches and editorialising in the press. Success with any of these approaches is not assured, but it is more likely if the competition agency has developed its own expertise about the targeted sector and has built up its reputation as an informed and reasonable commenter. Developing and maintaining expertise is not a short-term proposition. It requires initially learning about the sector, contacting existing experts to obtain their views about critical issues, monitoring developments in the sector, both domestically and in foreign countries, and participating in ongoing policy forums regarding the sector. Where available, a good starting place is to focus on the competition agency’s core mission areas such as market power and incentives innovate and to minimise costs.

30. An example of initiating competition advocacy is the United States Federal Trade Commissions’ (U.S. FTC) competition advocacy program focused on the electric power industry.<sup>29</sup> Because of the large

---

<sup>26</sup> OECD, *Competition Law and Policy in Brazil: A Peer Review* (2005), p. 88, available at <http://www.oecd.org/dataoecd/12/45/35445196.pdf>. “Little or no activity has, however, occurred pursuant to either agreement.”

<sup>27</sup> OECD, Roundtable on *Relationships Between Regulators and Competition Authorities*, “Aide-Memoire of Discussion” (1999), p. 304, available at <http://www.oecd.org/dataoecd/58/7/3475749.pdf>.

<sup>28</sup> OECD, Roundtable on *Relationships Between Regulators and Competition Authorities*, “Aide-Memoire of Discussion” (1999), p. 305, available at <http://www.oecd.org/dataoecd/58/7/3475749.pdf>.

<sup>29</sup> The discussion in this section is derived from John C. Hilke, “Joining the Electric Industry Policy Debate at the State Level;” and Michael O. Wise, “Country Experiences with Targeted Advocacy and Enforcement Programmes;” Also see Kirti Mehta, “Competition Advocacy with the European Commission: The Role of

size of the sector, technical changes that supported development of competition at the generation stage of production, and the completion of regulatory reforms in several other sectors, the electricity sector was a natural candidate for competition advocacy work when the U.S. FTC was re-evaluating its competition advocacy program in the mid-1990s. Focusing the advocacy program on electricity involved several steps. These steps have positioned the U.S. FTC to encourage electricity sector regulators at the federal and state levels to focus on competition issues in the restructuring process. The U. S. FTC's efforts have been recognised by sector regulators in several decisions<sup>30</sup> and by Congress, for example when it formally included the U.S. FTC in the list of agencies advising Congress on electricity competition issues.<sup>31</sup>

31. The first step in the process was the development of a sound understanding of the sector and the existing competition issues affecting it. This was accomplished by conventional information-gathering, discussions with a variety of industry participants (including former U.S. FTC staff), and the input of academics involved in economic research regarding the sector. The end product of the first stage was identification of major issues being considered by policy makers, observers and interested parties.

32. The second step was to identify a subset of issues on which to develop positions for potential competition advocacy. In making the selection, a key consideration was the presence of competition or consumer protection aspects of the issue that match the U.S. FTC's mission areas. On this basis, the selected issues were unbundling, open access to transmission services, efficient transmission pricing, recovery of stranded costs, and market power at the generation stage of production. This selection proved to be apt because these issues have been at the centre of electricity restructuring in the U.S. As a result, development of positions on these relatively few issues allowed comments on many occasions to both national and state sector regulators.

33. The third step in the U.S. FTC competition advocacy development effort involved creating a visible presence in the ongoing policy debate. Elements included joining the national association of sector regulators, attending and presenting at workshops and hearings, participating in the policy formation process within the administration, and leading efforts to bring together the staffs of interested competition and sector regulatory agencies periodically in order to discuss industry issues. Having developed an active presence in the policy debate, the FTC staff's next step was to establish means to monitor changes in the public agenda of controversial topics in the industry. This allowed the advocacy presentations and comments to remain both relevant and engaged with industry experts and interested groups.

---

DG Competition.” These three papers are in Giuliano Amato and Laraine L. Laudati, Ed, *The Anticompetitive Impact of Regulation* (2001), pp. 378-393, 394-411 and 412-441, respectively.

<sup>30</sup> For example, the comment from the U.S. FTC staff was the leading citation used by the Federal Energy Regulatory Commission in its decision to encourage operational unbundling of transmission services. See Federal Energy Regulatory Commission, Notice of Proposed Rulemaking, FERC Docket Number RM99-2-000 (May 13, 1999), p. 57, available at

<http://faculty-gsb.stanford.edu/wilson/archive/E542/classfiles/rm99-2.00c.pdf>. Similarly, the U.S. FTC staff comment was cited several times in the sector regulator's decision to extend rules against cross-subsidisation regarding power purchase agreements with affiliates to affiliate asset transfer agreements as well. See Federal Energy Regulatory Commission, Opinion No. 473, in the Matters of Ameren Energy Generating Company and Union Electric Company, d/b/a/ AmerenUE, FERC Docket Nos. EC03-53-000 and EC03-53-001 (July 18, 2004), available at <http://ferc.gov/industries/electric/gen-info/mergers/opinion-473.pdf>.

<sup>31</sup> The Energy Policy Act of 2005 requires that a federal agency task force report to Congress on competition issues in U.S. electricity markets within a year of enactment of the legislation. The U.S. FTC is included as one of five agencies represented on the task force. The other member agencies are the Federal Energy Regulatory Commission (sector regulator), the Department of Justice, the Department of Energy, and the Rural Electric Service.

34. A final step was to leverage the information and perspectives from competition advocacy into related law enforcement activity-merger analysis in particular. The litigation activity was enhanced by the prior competition advocacy effort. And, just as importantly, the litigation effort gave increased credibility to the competition advocacy presentations because litigation gave competition advocacy staff access to documents and analyses of firms in the industry that confirmed advocacy positions and that were often not accessible to the sector regulator.<sup>32</sup>

## **B. Competition Orientation of the Sector and Its Regulator**

35. The orientation of regulated firms and sector regulators toward increased competition is a key ingredient in designing effective competition advocacy. These orientations vary from country-to-country and over time. Indeed, some of the leading examples of regulatory reforms have been led by sector regulators and, in some instances a regulator has successfully urged the elimination of his own sector regulatory agency. A well-know example in the U.S. is the elimination of the Civil Aeronautics Board under the leadership of its Chairman, economist Alfred Kahn.<sup>33</sup> Similarly, regulated firms often have a variety of views about the existing regulatory regime. If regulation is a binding constraint on pricing, regulated firms will generally favour relaxation of the pricing constraint, but if the cost of that relaxation is easier entry, incumbent firms may have diverse views. Some will be vulnerable to entry and will be reluctant to accept any change that eases entry. Others will be less vulnerable and may foresee that eased entry will allow them to expand at the expense of other firms in the market. The latter firms may favour both entry and relaxed regulatory constraints on prices because both are in their self-interest. There are several potential alignments of perspectives between the regulator and the regulated sector that are of particular interest.

36. First Scenario: The firms in the industry and the sector regulator are all generally opposed to increasing competition or are opening markets to competition at a very slow rate. This is often the case at the early stages of regulatory reform, before incumbent firms fully realise the potential profit opportunities that some of them may have as competition increases. This general opposition to entry and competition may be accentuated if strong potential entrants are seeking permission to enter. The challenge for competition advocacy in this context is (1) to persuade the sector regulator, or the government and public more generally, that competition will improve economic performance and help consumers without causing major disruptions in the sector, or (2) to bring enough political pressure to bear that the sector regulator allows, and eventually promotes, increased competition where it is likely to be more efficient and to benefit consumers. Opposition to increased competition on the part of the sector regulator could stem from honest disagreement with the competition agency, but it could also stem from capture of the regulatory process by the incumbent supplier(s) in the sector.<sup>34</sup> Assuming that promoting competition is not a major element of the policy agenda of the government, the primary tools for competition advocacy in this situation include application of economic theory to the sector, experience with increased competition in other sectors, or historical experiences with increased competition in portions of the same sector. These

---

<sup>32</sup> The positive effect of law enforcement activity on the credibility of competition advocacy is emphasised in Michael O. Wise, "Country Experiences with Targeted Advocacy and Enforcement Programs," in Giuliano Amato and Laraine L. Laudati, Eds., *The Anticompetitive Impact of Regulation* (2001), pp. 394-411.

<sup>33</sup> Public Broadcasting System, *Legacy of Deregulation*, Interview of Alfred Kahn (January 9, 2003), available at [http://www.pbs.org/newshour/bb/transportation/jan-june03/airlines\\_1-9.html](http://www.pbs.org/newshour/bb/transportation/jan-june03/airlines_1-9.html).

<sup>34</sup> There is a broad economic literature on capture theory that is termed "public choice economics." Leading scholars in the field include George Stigler, James Buchanan, and Sam Peltzman. For a text discussion, see W. Kip Viscusi, Joseph Harrington, Jr., and John Vernon, *Economics of Regulation and Antitrust* 4<sup>th</sup> Ed. (2005), Chapter 2. Also, see OECD, Roundtable on *Relationships between Regulators and Competition Authorities*, "Background Note" (1999), Section 5.6, available at <http://www.oecd.org/dataoecd/58/7/3475749.pdf>.

experiences can be anecdotal, or can be systematically demonstrated through statistical testing. New information and unique analyses can be particularly helpful. Additionally, coverage by the media can be critical to success.

37. A good example of the first scenario is trucking deregulation in the United States. Trucking regulation began in the U.S. in 1935, primarily to suppress the competitive pressure that truck firms were putting on the railroads. The regulatory agency was the Interstate Commerce Commission (ICC). It already regulated railroads. The primary supporters of the enabling legislation were these same railroads. Later, the unionized truckers, who obtained wage premiums from trucking firms that faced little competition, were also vocal supporters of the ICC's extension of regulation to trucking. Trucking regulation took the form of entry restrictions and legalised opportunities for trucking firms to co-ordinate their pricing.<sup>35</sup> In the period leading up to the initial national reform legislation in 1980, economists began to challenge the justification for trucking regulation.<sup>36</sup> They brought evidence to bear that regulation was driving up prices, increasing costs, and leading to inefficient trucking operations including poor service in areas with rapid economic growth. A key event in the eventual reform of the sector was a decision by the ICC, under pressure from agricultural interests, to exempt some agricultural products from trucking regulations. This natural experiment resulted in a 19% rate drop in trucking rates for fruits and vegetables and a 33% rate drop in rates for poultry. Further economic research focused on the beneficial effects of the initial restructuring effort in 1980 and this analysis contributed to the final decisions both to abolish the Interstate Commerce Commission in 1995 and to eliminate state regulation of intrastate rates for freight movements by interstate trucking firms.<sup>37</sup>

38. Second Scenario: The sector regulator is leading the regulatory reform process, but industry incumbents generally oppose increasing competition. In this situation, the task of competition advocacy is to support the proposals of the sector regulator and marshal materials that the sector regulator has not itself presented. The roll of competition advocacy in this situation is much like that of an ally – the competition agency generally supports the sector regulator, but will, in some instances, suggest extensions or different emphases. The competition agency may have some comparative advantage in articulating competition perspectives and experiences that can help garner public support for increased competition in the regulated sector.

39. A good example of the second scenario also comes from the U.S. FTC's electricity competition advocacy program, discussed above. Specifically, the sector regulator's initial approach for unbundling transmission from generation was functional unbundling which consisted of behavioural rules against transmission discrimination. The U.S. FTC staff comment to the sector regulator emphasised the disappointing results that the U.S. FTC had experienced with behavioural rules in antitrust cases. The comment indicated that while rules against transmission discrimination would probably be helpful, they were unlikely to prevent it because (1) vertically integrated utilities would continue to have incentives to

---

<sup>35</sup> W. Kip Viscusi, Joseph Harrington, Jr., and John Vernon, *Economics of Regulation and Antitrust* 4<sup>th</sup> Ed. (2005), Chapter 17, describes the effects of regulation and efforts to reform regulation of U.S. surface transportation industries.

<sup>36</sup> See, for example, Richard Levin, "Surface Freight Transportation: Does Rate Regulation Matter?" *Bell Journal of Economics* 9 (Spring 1978), pp. 18-45. Trucking and rail regulation were often treated together and concerns about rail efficiency were also substantial. A strong critique of the effects of regulation on the U.S. railroad industry was prepared by the Task Force on Railroad Productivity, *Improving Railroad Productivity* (1973). Its members were economists, most of whom had served on the staff of the Council of Economic Advisors or other economic research organisations. Impetus for railroad restructuring included several bankruptcies of major railroads in the mid-Atlantic states during the 1970s.

<sup>37</sup> W. Kip Viscusi, Joseph Harrington, Jr., and John Vernon, *Economics of Regulation and Antitrust* 4<sup>th</sup> Ed. (2005), p. 607-609 and Chapter 17, more generally.

use transmission discrimination to protect their generation investments and (2) detecting and documenting discrimination in the electric power sector is likely to be difficult. Even subtle forms of behaviour, for example, can disrupt negotiations for transmission service.

40. The sector regulator adopted the behavioural rules approach initially (1996), but soon found that complaints about transmission discrimination continued and in a few instances were documented. In 1999, the sector regulator (using the U.S. FTC staff comment and the continued complaints from market participants as justification) adopted new regulations to promote operational unbundling. Operational unbundling is a form of structural separation in which control of the transmission system within a region is turned over to an independent system operator.<sup>38</sup> The system operator has no incentives to discriminate against generators seeking to supply power to distant customers that also could be served by generators owned by the distribution utility.

41. Third Scenario: The sector regulator has been a champion of increased competition in the past, but is now retreating from that position and taking fewer initiatives that increase competition. The regulated firms may also be less enthusiastic about increasing competition because of setbacks they have suffered in increasingly competitive markets. Sometimes the sector regulatory agency may de-emphasise prior reform efforts, perhaps because they raised so much opposition, but it may undertake other initiatives that have the same general objectives. The role of competition advocacy in this situation is to urge the sector regulator to move ahead and complete the process of increasing competition, even if the means being pursued seem less likely to succeed. Reminders of past benefits and evidence of expected benefits from additional competition will be the focus of advocacy. At this point in the regulatory reform process, at least some incumbent firms will likely continue to be enthusiastic about additional reforms because of the opportunities they present for growth; so these firms are natural allies for competition advocacy.

42. Brazil's aviation sector has experienced a setback in regulatory reform efforts of this type. The deregulation of air services in Brazil was accomplished after a successful advocacy effort by the competition authorities, according to pro-competition principles. However, after some time and for reasons beyond the effects of deregulation,<sup>39</sup> there has been a crisis in the sector. This has resulted in backtracking in the liberalisation process by the sector regulatory agency. Unfortunately, the erroneous understanding of the causes and consequences of the crisis led the sector regulator to issue new regulations for the sector. These regulations restrict the discretionary power of the companies to select their own routings and city pairs to serve. Even though the national aviation market remains to some extent deregulated, the regulator is once more trying to artificially equate supply and demand. These recent events illustrate that a competition authority's competition advocacy program must be stable and long-term, in order to create "a culture of competition" that can survive macroeconomic disruptions.<sup>40</sup>

---

<sup>38</sup> See Federal Energy Regulatory Commission, Notice of Proposed Rulemaking, FERC Docket Number RM99-2-000 (May 13, 1999), p. 57, available at

<http://faculty-gsb.stanford.edu/wilson/archive/E542/classfiles/rm99-2.00c.pdf>. This Notice led to FERC Order No. 2000, establishing Regional Transmission Organizations.

<sup>39</sup> Among the reasons they mention as causes for the crisis are: "great devaluation of the exchange rate" which "stressed the costs of the air companies" and "reduced the flow of Brazilian tourists to other countries", "the macroeconomic slowdown of the Brazilian economy" and "the terrorist attacks in New York."

<sup>40</sup> International Competition Network, *Competition Advocacy Review: Case Studies on Regulated Sectors* (2005), pp. 23-24, available at [http://www.internationalcompetitionnetwork.org/bonn/CPI\\_WG/SG3\\_Advocacy\\_in\\_Regulated\\_Sectors/Competition\\_Advocacy\\_Review.pdf](http://www.internationalcompetitionnetwork.org/bonn/CPI_WG/SG3_Advocacy_in_Regulated_Sectors/Competition_Advocacy_Review.pdf).

43. Spain's electricity sector also experienced a pulling back from the regulatory reforms designed to increase competition.<sup>41</sup> The sector regulatory body, after legislation was passed to open Spain to electricity competition in 1997, was the National Electricity Commission. Its Chairman at the time was a former president of the competition agency. The electricity commission was very active in developing and implementing the opening of the electricity markets in Spain, however, substantial opposition developed. As a result, the Chair of the NEC resigned in 1998. After the resignation, legislation was passed that weakened the Commission further and eventually led to a reorganisation of the sector regulatory function under the National Energy Commission. This body does not have independent investigative authority; rather it can only refer matters to the competition agency that is part of the government. This is not the independent competition agency whose former president had vigorously pursued electricity restructuring.

44. U.S. electricity sector reforms also provide an example of a deteriorating environment for competition advocacy. In 2005, the term of the chairman of the national sector regulatory agency expired. Opposition to his re-nomination was significant and centred in regions that generally opposed sector restructuring. Rather than confront this opposition, the President nominated another member of the agency as its chairman. The new chairman de-emphasised structural approaches to preventing transmission discrimination, but initiated efforts to improve the efficiency and effectiveness of behavioural rules and information requirements that govern open access to the transmission system. The U.S. FTC competition advocacy staff generally favour structural approaches, but decided that rather than opposing the initiative of the sector regulator, the U.S. FTC's comment would support the new initiatives of the sector regulator. This decision was made because the proposals do foster open access, even if they are less likely to be as effective as structure approaches.<sup>42</sup>

45. Fourth Scenario: The sector regulator independently is pursuing a policy of imperialism that would fold new technology into the sphere of regulation or the sector regulator is being persuaded by regulated firms or state agencies to do so. The rationale is that the new technology is a substitute for products or services that are regulated, and therefore the emerging technology makes it more difficult for regulation to be effective in promoting expansion of the sector or stabilising financial conditions in the sector.

46. An example of attempted regulatory imperialism that was blocked (after competition advocacy efforts against it) was the proposal of the United States Postal Service to offer an early form of e-mail service, E-COM.<sup>43</sup> This could have served as a gateway for incorporating e-mail within the postal monopoly as a form of letter mail.<sup>44</sup> In this instance, the USPS actually implemented such a service, but had to apply to the Postal Rate Commission (PRC) to set the price for the service. The competition advocacy comment from the U.S. FTC challenged the USPS decision on the basis that it underestimated

---

<sup>41</sup> See Manuel Ballbe and Carlos Padros, "Spanish Independent Authority and Its Role in the New Competitive Environment," in Giuliano Amato and Laraine L. Laudati, Eds., *The Anticompetitive Impact of Regulation* (2001), pp. 364-376.

<sup>42</sup> A phrase sometimes used to capture this type of compromise in a competition advocacy position is that "the perfect should not be the enemy of the good." The U.S. FTC competition advocacy comment supporting improved transmission access behavior rules and information is the "Comment of the Federal Trade Commission before the Federal Energy Regulatory Commission in the Matter of Information Requirements for Available Transfer Capability," FERC Docket No. RM05-17-000, filed August 22, 2005, available at <http://www.ftc.gov/os/2005/08/050823availtranscapab.pdf>.

<sup>43</sup> Regulatory imperialism was successful in the case of trucking regulation in the U.S., as described previously.

<sup>44</sup> James Bovard, "The Last Dinosaur: The U.S. Postal Service" (1985), pp. 6-7, available at <http://www.cato.org/pubs/pas/pa047.html>.

the costs of offering E-COM service and that the rates proposed by the USPS were below the market rate and would, therefore, harm consumers by preventing entry of equally or more efficient private suppliers.<sup>45</sup> The PRC's decision required that the USPS show within a short period that the E-COM service was self-sustaining. The PRC's position was that revenues from the statutory monopoly should not be used to cross-subsidise services that private suppliers could supply.<sup>46</sup> The USPS subsequently dropped the E-COM service and ended the risk that it would fold e-mail under the postal monopoly.

#### 47. C. Reopening Basic Sector Policies and Arrangements

48. In *The Strategy of Conflict*,<sup>47</sup> Thomas Schelling<sup>48</sup> notes that conflict, which is one form of interaction between agencies as well as between governments, routinely takes place at one level, but occasionally escalates to a different level of decision making. Interactions between competition agencies and sector regulators follow the same pattern - most of the time, the agencies' interactions are attended to by a narrow audience of the most closely affected organisations and individuals. Within this context, issues such as breadth of jurisdiction, decision processes, and basic objectives are fixed and beyond the scope of the decision makers involved. Sometimes, however, interactions rise to a higher level of public attention in the form of legislative review. When consideration of agency interactions rises to this level, even the fundamental relationships between agencies are subject to change. In this high stakes environment, agencies have to decide whether to urge changes in the fundamental relationships that will alter conventional interactions in the future. And one of the factors in the decision about whether to advocate fundamental changes is the character of current interactions, including the potential loss of cooperation if fundamental changes are advocated, but not enacted.

49. An example of changing the fundamental relationships between competition authorities and sector regulators comes from Spain. There, the existing overlapping jurisdiction between competition agencies and sector regulators has been the subject of legislative consideration that would bring Spanish institutions more in line with practices in other European countries. Proposals included increasing the independence of the competition agency, increasing its participation in merger policy, and formalising relationships with the sector regulatory agencies. A proposal published by the government would withdraw merger authority from sector regulatory agencies.<sup>49</sup> These types of measures would substantially alter the relationships between competition and sector regulatory agencies in ways that strengthen the role of the competition agency.

50. A second case in point is the treatment of mergers between electricity generators under 2005 Energy Policy Act in the U.S. Under the long-standing Federal Power Act, mergers between utilities that are under the jurisdiction of the sector regulator require approval from the sector regulator, and effects of these mergers on competition are one element of the review criteria. Utility mergers are also subject to review by the antitrust agencies, generally the Department of Justice's antitrust division. In 1996, the sector regulator formally adopted the Horizontal Merger Guidelines issued by the Department of Justice

---

<sup>45</sup> U.S. Federal Trade Commission, Before the U.S. Postal Rate Commission, "Objections and Responses to the United States Postal Service's Interrogatories to the Federal Trade Commission," in the Matter of E-COM Rate and Classification Changes, PRC Docket No. R81-1, filed 18 September 1983.

<sup>46</sup> U.S. Postal Rate Commission, "Proposed Rulemaking Concerning Amendment to the Rules of Practice and Procedure," PRC Docket Number RM2004-1 (16 January 2004) available at <http://www.prc.gov/docs/39/39780/ORDER1389.pdf>.

<sup>47</sup> Harvard University Press (1960).

<sup>48</sup> Professor Schelling shared the 2005 Nobel Prize in Economics for his work on game theory. *The Strategy of Conflict* was his first application of rationalist game theory to international relations.

<sup>49</sup> Available at <http://www.globalcompetitionforum.org/regions/europe/Spain/Aritucllo%20E1%20Pais.pdf>.

and U.S. FTC as the framework for its merger analysis of competition issues.<sup>50</sup> But the actual approach used by the sector regulator does not closely follow the Horizontal Merger Guidelines. Both the Department of Justice and the Federal Trade Commission comments to FERC pointed to differences between the Horizontal Merger Guidelines and FERC's actual approach. Hence, there was a long-standing concern in the antitrust agencies about FERC merger analysis.

51. Prior to passage of the 2005 Energy Policy Act, similar legislative initiatives had been discussed for several years. Included in these discussions was the appropriate role of the antitrust agencies and the sector regulator in merger analysis involving utilities. The chairman of the sector regulatory agency for electricity did not take a strong position that his agency should retain its review of the competitive effects of mergers. But at the same time, the antitrust agencies did not take a strong position that this authority should be removed, despite their misgivings about the validity of the sector regulator's approach. The policy review within the administration likewise did not result in a definitive position about changing the existing responsibilities. Some proposals during the final negotiations for the legislation called for removing competition analysis from the sector regulator's list of responsibilities. Just as momentum for passage of the act gathered steam, the chairman of the sector regulator announced his pending resignation. Unlike his predecessor, the new chairman of the sector regulatory agency had a distinct preference for continuation of competition analysis in merger reviews by the sector regulator. One justification he gave is that merger reviews by the antitrust agencies would result in more structural remedies such as divestiture! Further, he sought to fill gaps in the range of the sector regulator's authority to review mergers in the sector.<sup>51</sup> Apparently this change in the viewpoint expressed by the chairman of the sector regulatory agency was enough to tip the balance in the final legislative language. Absent lack of strong push from the administration or the antitrust agencies, the final legislation retained the existing overlapping enforcement approach and extended the types of mergers and acquisitions that can be reviewed by the sector regulator. At the margin, this may reduce reviews of such mergers by antitrust agencies because the sector regulator will now review mergers that it would not have reviewed under the prior legislation.

52. An important potential means of reopening fundamental relationships between the sector regulators and the competition agencies is for legislation authorising sector regulation to contain "sunset" provisions that abolish sector regulation unless it is renewed by a specified date. Sunset provisions give the government an opportunity to regularly review whether sector regulation is warranted. Sunset provisions can provide a periodic opportunity for competition agencies to aid the government in making the most fundamental determination about sector regulation. In Germany, for example, the Telecommunications Act's sunset provision required the Monopolies Commission to assess the continued need for regulation.<sup>52</sup>

---

<sup>50</sup> Issued 2 April 1992 and revised 8 April 1997, available at [http://www.usdoj.gov/atr/public/guidelines/horiz\\_book/hmg1.html](http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html).

<sup>51</sup> "FERC Could Abandon Merger Authority, Wood Suggests; Kelliher Sharply Disagrees," *Inside FERC* (13 June 2005), p. 1, available at [http://construction/ecnext.com/free-scripts/document\\_view\\_v3.pl?item\\_id=024940&format\\_id=XML](http://construction/ecnext.com/free-scripts/document_view_v3.pl?item_id=024940&format_id=XML).

<sup>52</sup> OECD, Roundtable on *Relationships Between Regulators and Competition Authorities*, "Aide-Memoire of Discussion" (1999), p. 299, available at <http://www.oecd.org/dataoecd/58/7/3475749.pdf>.

## IV. TECHNIQUES FOR IMPROVING INTERACTIONS

53. This section starts with the assumption either that the competition agency has decided to interact with a sector regulator, or that the competition agency has been asked by legislators to propose how the competition agency should interact with a sector regulator. In some circumstances, the competition agency and a sector regulator both make decisions that affect a market because they have overlapping jurisdiction. In these situations, the immediate interaction challenges are potential contradictions in the decisions of the agencies or disagreements about which agency will deal with a particular matter that is within the jurisdiction of both agencies. Section A addresses techniques for coordinating policy decisions.<sup>53</sup> In other markets or aspects of markets, the competition agency lacks jurisdiction, but believes that it can improve economic performance by influencing a sector regulator to give weight to competition or more general efficiency concerns within its purview. Section IV.B. describes ways to improve the effectiveness of competition advocacy techniques. Both coordinating policy decisions and competition advocacy can depend in part of mutual understanding between agencies. Coordination and advocacy are likely to be more effective if agencies understand each other's perspectives, constraints, and concerns. Personal acquaintances can foster communications and encourage agencies to alert each other when major challenges to competition or opportunities for increased competition first arise. Section IV.C. discusses approaches to improve the flow of information and understanding back and forth between the competition agency and a sector regulator.

### A. Coordinating Policy Decisions

54. Regulatory risk arises from unanticipated changes and inconsistencies in government decision making. Faced with regulatory risk, firms have higher costs of capital and charge higher prices to compensate. The higher costs and higher prices translate into harm for consumers and inefficiencies relative to a situation with less regulatory risk. Lack of coordination between agencies with overlapping jurisdictions (or with authority over different aspects of a market) can increase regulatory risk and compliance costs. Both can harm consumers by unnecessarily increasing costs of suppliers, subsequently leading to higher prices.

55. Coordination can take a variety of forms ranging all the way from a merger of agencies to informal communications. Several different arrangements are discussed below along with examples.

56. Consolidation of Sector Regulatory Functions under the Competition Agency: The most complete form of coordination of organisations is to combine the organizations. One well-known example of this approach occurs in Australia where the ACCC (Australian Competition and Consumer Commission) combines many of the functions of competition agencies and sector regulatory agencies in other countries.<sup>54</sup> The decision to combine functions followed a 20 year history of gradual corporatisation

---

<sup>53</sup> For a description of the variety of arrangements for interaction between competition agencies and sector regulatory agencies and some statistics from survey results on the subject, see OECD, Global Forum on Competition, "Note by the Secretariat on Optimal Design of a Competition Agency" (February 2003), pp. 4-5, available at <http://www.oecd.org/dataoecd/58/29/2485827.pdf>.

<sup>54</sup> Contribution of Australia, *OECD Roundtable on Relationships between Regulators and Competition Authorities* (1999), available at <http://www.oecd.org/dataoecd/35/37/1920556.pdf>; International Competition Network, Questionnaire on Competition Advocacy (2002), Response of Australia, available at [http://www.internationalcompetitionnetwork.org/questionnaire\\_australia.pdf](http://www.internationalcompetitionnetwork.org/questionnaire_australia.pdf); and Michel Kerf and Damien Geradin, "Controlling Market Power in Telecommunications: Antitrust vs. Sector-Specific Regulation, An Assessment of the United States, New Zealand, and Australian Experiences," *Berkeley Technology Law Journal* (1999), available at <http://www.law.berkeley.edu/journals/btlj/articles/vol14/Kerf/html/text.html>

and privatisation of services such as telecommunications and electric power. The most critical step in the reorganisation of the competition and sector regulatory functions was the Hilmer Report in 1993 - the result of an independent inquiry initiated by the Prime Minister. The Hilmer Report recommended that competition related functions of sectoral agencies be combined and placed within the competition agency and that a cross-sectoral approach to infrastructure access be initiated. The competition agency came to have a major role in the infrastructure access regime and stepped in to develop a system for pricing such access as well. The ACCC has seven commissioners who are appointed by the Governor-General from a list of qualified individuals identified by the minister responsible for trade practices. Some members of the staff specialise in each sector and commissioners specialise in managing a sector group. The ACCC commissioners can only be dismissed for cause, but the agency is responsible for carrying out directives from the government outside of its rule making and adjudicative responsibilities. ACCC decisions are subject to review by the Australian Competition Tribunal which is a non-judicial body presided over by a Federal Court judge. The other two members are an economist and a business person.

57. It is interesting to note that part of Australia's willingness to retain regulatory authority in markets that are now potentially competitive was in reaction to the restructuring experience for telecommunications in New Zealand. Australia concluded that at least some technically complex disputes would remain in newly deregulated sectors and that courts using general antitrust approaches, as in New Zealand, were not well-positioned to deal with these conflicts efficiently or quickly. The case in point was a dispute over the pricing of interconnection between Telecom and an entrant, Clear Communications. The dispute was litigated for four years before a government statement of its views favouring lower interconnection charges persuaded the parties to come to agreement.<sup>55</sup>

58. The Netherlands has taken a similar approach by creating sections within the competition authority that are responsible for sector regulations, under the supervision of the competition authority.<sup>56</sup>

59. Veto Rights: One step short of merging sector regulation into the competition agency is to give the competition agency authority to veto actions of the sector regulator. This approach creates considerable leverage for the competition agency in its competition advocacy efforts. However, the competition agency may have to exercise this veto right with discretion in order to avoid being viewed as obstructionist. There is a risk that the veto right will be removed if it is overused.

60. As a first example, in some government systems, cabinet ranking for a competition agency gives the agency potential veto power over anticompetitive proposals from sector regulatory agencies and affords the competition agency a direct avenue of appeal to the highest levels of decision-making within the government. For example, The Korean Fair Trade Commission has cabinet level standing that has allowed

---

[and /note.html](#). The issue of access to natural monopoly infrastructure is also handled by a competition agency, but it is the National Competition Council, rather than the ACCC, that has this task. Elizabeth Davidson, ACCC, "The Interface between Competition Authorities and Sectoral Regulators," paper for the Regional Seminar on Competition Policy and Multilateral Negotiations (April 2002), Section 3, available at <http://r0.unctad.org/en/subsites/cpolicy/gvaJuly/docs/en8.doc>.

<sup>55</sup> Contribution of New Zealand, *OECD Roundtable on Relationships between Regulators and Competition Authorities* (1999), available at <http://www.oecd.org/dataoecd/35/37/1920556.pdf>.

<sup>56</sup> OECD, *Global Forum on Competition*, Session on "The Relationship between Competition Authorities and Sectoral Regulations" (February 2005), Section 5.9, available at <http://www.oecd.org/dataoecd/58/7/34375749.pdf>.

it to have a leading position in regulatory reforms and privatisation as well as to block anticompetitive proposals from other ministries.<sup>57</sup>

61. In Japan, the Japan Fair Trade Commission is not a member of the cabinet, but the fact that the government generally acts only after the cabinet ministries have coordinated their positions creates an environment of inter-ministry consultation that potentially helps the JFTC prevent anticompetitive proposals from supplier interests within ministries. More formally, exemptions from the competition laws proposed by government ministries cannot take place without consent of the JFTC.<sup>58</sup>

62. Another example involves the Mexican Competition Commission's relationship with sector regulators. In several sectors, it has the authority to both terminate regulation of a sector and initiate such regulation. A number of sector-specific laws and regulations explicitly provide for a role for the Competition Commission. These are, principally, the Seaport Law, the Law on Roads, Bridges and Road Transport (both of 1993), the Navigation Law of 1994, the Railroad Services Law, the Federal Telecommunications Law, the Civil Aviation Law and the Airport Law (all of 1995), and the regulations on natural gas and on pension funds (of 1995 and 1996, respectively). The role for the Competition Commission under these provisions basically refers to its authority to determine if regulation is warranted and its authority to prevent a firm from participating in privatization bidding or bidding for government procurement contracts in these sectors.<sup>59</sup>

63. An alternative to a veto is the right to make binding recommendations. A veto is potentially equivalent to a binding recommendation because the competition agency with a veto could veto any proposal other than the one that it recommends.<sup>60</sup> A very important example of binding recommendations is the competition agency for the European Union which can issue competition-driven directives and harmonisation directives that are binding on the sector regulators in member states. It should be noted, however, that the focus of these orders is distinct from those that a national competition agency might issue. The distinction is that the EU competition directives focus on opening up trade between member states and do not necessarily foster competitive conditions other than through trade across member states. They are directed at dismantling barriers to such trade rather than restructuring domestic production. In some situations, trade between EU member states may be sufficient to constitute effective competition in

---

<sup>57</sup> OECD, *Global Forum on Competition*, Session on "The Relationship between Competition Authorities and Sectoral Regulations" (February 2005), Section 5.8, available at <http://www.oecd.org/dataoecd/58/7/34375749.pdf>; and Michael O. Wise, "Country Experiences with Targeted Advocacy and Enforcement Programs," in Giuliano Amato and Laraine L. Laudati, Eds., *The Anticompetitive Impact of Regulation* (2001), pp. 394-411 at p. 410.

<sup>58</sup> Contribution of Japan, *OECD Roundtable on Relationships between Regulators and Competition Authorities* (1999), available at <http://www.oecd.org/dataoecd/35/37/1920556.pdf>; and OECD, Roundtable on *Relationships Between Regulators and Competition Authorities*, "Aide-Memoire of Discussion" (1999), p. 306, available at <http://www.oecd.org/dataoecd/58/7/3475749.pdf>.

<sup>59</sup> For a more detailed discussion of the substantial and substantive effects of the Mexican competition agency on the development and practice of sector regulatory agencies, see Michael O. Wise, *Background Report on the Role of Competition Policy in Regulatory Reform [in Mexico]* (1998), available at <http://www.ftc.gov/bc/international/docs/US%201999%20Peer%20Review.pdf>. Section 5 highlights competition advocacy.

<sup>60</sup> For a discussion of authority to make binding recommendations to sector regulators, see ICN, *Competition Advocacy in Regulated Sectors: Examples of Success* (2004), p. 5-7, available at [http://www.internationalcompetitionnetwork.org/capacitybuild\\_sg4\\_seoul.pdf](http://www.internationalcompetitionnetwork.org/capacitybuild_sg4_seoul.pdf).

each state, but this may not be sufficient in other situations such as localised markets and markets with strong product differentiation.<sup>61</sup>

64. Interlocking or Joint Decision Making Bodies: In competition analysis, anticompetitive concerns arise if directors of one firm are also directors of competing firms. The concern is that such interlocking directorates foster coordination between ostensibly competing firms. The common directors can serve as conduits for flows of competitively sensitive information, can monitor compliance with agreements between the organisations, and can help advocate coordination at the highest decision-making levels. While all of these are bad things in the context of lessening competition between private firms, they are likely to be good things in the context of coordinating the work of government agencies. Hence, having overlapping decision-making bodies with participants from competition agencies and sector regulators could be an effective source of coordination.<sup>62</sup>

65. Mexico has developed the institution of Intersecretarial Committees with representation from sector regulatory agencies and the competition agency. “[T]he communication and coordination between the Competition Commission and other authorities on these matters [laws and regulations that concern competition] takes place through one of the Intersecretarial Committees”. For instance, “since 1993, the Competition Commission has actively participated in the design of the Telecommunications Law and several related regulations, mainly through the relevant Intersecretarial Committee.”<sup>63</sup> Similarly, in 1999, the Competition Commission started participating in the design of an airport privatisation plan through another Intersecretarial Committee.<sup>64</sup>

66. Australia also has overlaps in the memberships of the competition agency and sector regulators. “Chairpersons of various Commonwealth and State economic [sector regulatory agencies] are associated members of the ACCC; and certain members of the ACCC are appointed as associate members of the Australian Communications Authority and the Australian Broadcasting Authority. This helps to bridge the ‘knowledge gap’ that can arise when competition, economic and technical regulators are separate bodies.”<sup>65</sup>

67. Mandatory Competition Impact Statement: A competition impact statement is a separate analysis of the effects of regulation on competition prepared by the regulatory agency. This can prompt the regulator more explicitly to consider how competition effects are likely to balance against other effects. A blatantly defective competition impact statement could be subject to judicial review in some jurisdictions. Ideally, the competition impact statement requirement encourages the sector regulator to incorporate competition concerns into its policy-making process. The hope is that substance will follow form, if the sector regulator has been dismissing competition concerns in the past.

---

<sup>61</sup> See Alberto Heimler, “Competition and Regulation in Public Utilities” (September 1998), paper for the Twelfth Plenary Session of the OECD Advisory Group on Privatisation, Helsinki, Finland, p. 3, available at <http://www.oecd.org/dataoecd/49/9/1929846.pdf>.

<sup>62</sup> Use of interlocking decision making bodies is not limited to coordination issues between a competition agency and a sector regulator. In the U.S. for example, a joint decision making body is used to settle which of the two national competition agencies will handle proposed mergers that both agencies are interested in analysing.

<sup>63</sup> Contribution of Mexico, *OECD Roundtable on Relationships between Regulators and Competition Authorities* (1999), p. 183, available at <http://www.oecd.org/dataoecd/35/37/1920556.pdf>.

<sup>64</sup> Contribution of Mexico, *OECD Roundtable on Relationships between Regulators and Competition Authorities* (1999), p. 184, available at <http://www.oecd.org/dataoecd/35/37/1920556.pdf>.

<sup>65</sup> Contribution of Australia *OECD Roundtable on Relationships between Regulators and Competition Authorities* (1999), p. 107, available at <http://www.oecd.org/dataoecd/35/37/1920556.pdf>.

68. The United Kingdom has introduced this type of compulsory competition assessment in each regulatory impact assessment.<sup>66</sup> The Cabinet Office treatment involves first determining if there are potentially significant effects from a regulation, and, secondly, in-depth analysis if there are such effects. The Office of Fair Trade has published its own “Guidelines for Competition Assessment.”<sup>67</sup>

69. Required Consultation: One approach to try to assure consideration of the competition perspective is to require that the sector regulator specifically consult with the competition agency. At the very least, this type of requirement gives the competition agency an identified and specific opportunity to marshal its best arguments and information regarding the impact of proposed regulations on competition.

70. Portugal has institutionalised the ability of the competition authority to urge a program for increasing competition on the government as a whole (which can affect the sector regulator through new laws or government initiatives). The “Recommendation put forward to Government” is a legal faculty, entrusted by law to the Competition Authority. However, this instrument is not mandatory, hence the competition authority needs to articulate its viewpoint and accompany it with an appropriate dissemination effort. Essentially, the Recommendation instrument allows the Authority to present to the government (and to other public institutions) measures – mainly legislative ones – to boost competition. The Telecom Recommendation was informally presented, first-hand, to the Minister of Finance and Public Administration, in order to make her aware of the potential savings for the public budget. It has been estimated that these savings would amount to up to 25% of the public telecom budget. The Minister is also responsible for public procurement legislation at large, and specifically for the public procurements of telecom services. The success of the instrument used depends, largely, on its acceptance by the government. In this case, the role of the central government was critical because it was, simultaneously, responsible for adjustments in sector regulation as well as for major procurements for consumers of telecom services and products. In addition, contacts were made with local governments who are also major consumers of telecom services and are subjected to public tendering regulation. Direct contacts between the Authority and the Minister of Finance and Public Administration, as well as the municipalities, were instrumental in the success of the advocacy process.

71. In support of the importance of a new regulatory framework, the competition authority has studied beforehand the market structure, the demand, and the number and types of telecom contracts generated by the Finance and Public Administration Ministry. It has also studied some foreign experiences, both for purposes of benchmarking and searching for best practices in regulatory reform.

72. Finally, a major dissemination effort of the contents of the Recommendation was carried out through the media, including press and television. Simultaneously, the Competition Authority formally published the Recommendation on its website. This website was frequently visited, with a monthly average of 8,000 hits in 2004. The Competition Authority publicised extensively the goals of the Recommendation before and after its enactment. This effort was instrumental in sensitising consumers, including the Public Administration, to benefits of the market opening. In general, the news and opinion columns in the media were very supportive of the Authority’s position. The government and the Authority had “good press”, when the decree-law, based on the Recommendation, was approved.

73. The advocacy work was received with enthusiasm by the rivals to the incumbent. The incumbent did not formally react to the Recommendation, but market watchers have highlighted the risk of its loss of

---

<sup>66</sup> United Kingdom Cabinet Office, Regulatory Impact Assessment Checklist, available at [http://www.cabinetoffice.gov.uk/regulation/ria/ria\\_guidance/index.asp](http://www.cabinetoffice.gov.uk/regulation/ria/ria_guidance/index.asp).

<sup>67</sup> The Guidelines (2002) are available at <http://www.offt.gov.uk/NR/rdonlyres/A7138977-6FE2-45DE-BE32-3AB6E767664A/0/oft355.pdf>.

formerly captive customers. The Sector Regulator (ANACOM) was not formally involved since this was primarily an issue of competition policy.”<sup>68</sup>

74. In Spain, some of the most effective competition advocacy work also has been broad in scope.<sup>69</sup> In 1992, the government requested recommendations from the Competition Tribunal about structural reforms in general. The ensuing report was remarkable, both for its important suggested changes in legislation, and for its description of a strategy to surmount the opposition to restructuring from special interests. The 1992 report also established credibility that aided the effectiveness of subsequent competition advocacy efforts.

75. In the United Kingdom, The Office of Fair Trading has a similar right to study existing or proposed regulations and issue a public report stating its views about the proposed regulations. Once the report has been issued, the government has undertaken to respond publicly within 90 days.<sup>70</sup>

76. In Italy, competition analysis in the banking sector was, until recently, outside the jurisdiction of the Antitrust Authority. The competition authority, however, did have the right to submit its views on competition issues to the sector regulator, the Bank of Italy. Further, the banking sector regulator was required to respond and could not permit anticompetitive activity unless such activity was necessary to maintain stability of the banking system. The competition authority agreed with this assessment.<sup>71</sup>

77. In the U.S., the Federal Trade Commission is authorised to investigate and publish public reports on competition issues in any sector of the economy including regulated sectors. Section 6(b) of the Federal Trade Commission Act, which allows the use of subpoenas for such studies, has been used in several investigations requested by Congress or the President. The U.S. FTC is authorised to undertake such studies under its own initiative as well,<sup>72</sup> although this approach has been used sparingly. There is no legal requirement that the related sector regulator or executive agency or agencies respond, but if either Congress or the President are interested in the results of a study, agencies (and private groups) involved in the sector will feel compelled to respond.

78. In the European Union, the European Competition Commission has the institutional power to publish official Communications and White Papers, and to make suggestions for legislation to the European Union Council.<sup>73</sup>

---

<sup>68</sup> International Competition Network, *Competition Advocacy Review: Case Studies on Regulated Sectors* (2005), pp. 12-13, available at [http://www.internationalcompetitionnetwork.org/bonn/CPI\\_WG/SG3\\_Advocacy\\_in\\_Regulated\\_Sectors/Competition\\_Advocacy\\_Review.pdf](http://www.internationalcompetitionnetwork.org/bonn/CPI_WG/SG3_Advocacy_in_Regulated_Sectors/Competition_Advocacy_Review.pdf).

<sup>69</sup> Michael O. Wise, “Country Experiences with Targeted Advocacy and Enforcement Programs,” in Giuliano Amato and Laraine L. Laudati, Eds., *The Anticompetitive Impact of Regulation* (2001), pp. 394-411 at p. 409.

<sup>70</sup> OECD, *Global Forum on Competition*, Session on “The Relationship between Competition Authorities and Sectoral Regulations” (February 2005), Section 6.3, available at <http://www.oecd.org/dataoecd/58/7/34375749.pdf>.

<sup>71</sup> Contribution of Italy, *OECD Roundtable on Relationships between Regulators and Competition Authorities* (1999), p. 165, available at <http://www.oecd.org/dataoecd/35/37/1920556.pdf>.

<sup>72</sup> U.S. Federal Trade Commission, “A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority” (September 2002), available at <http://www.ftc.gov/ogc/brfovrwv.htm>.

<sup>73</sup> International Competition Network, *Competition Advocacy Review: Case Studies on Regulated Sectors* (2005), p. 14, available at

79. In the U.S., legislation sometimes formally requires that a sector regulatory agency consider the views of a competition agency. For example, the pending postal sector reform legislation requires that the Postal Regulatory Commission specifically take into account the comments of the U.S. FTC on rate cross-subsidisation issues.<sup>74</sup> More generally, federal sector regulators and most state sector regulators in the U.S. are required to publish proposed regulations and invite comments on these proposals from anyone, including federal and state competition and consumer protection agencies. The sector regulatory agencies generally respond to these comments before finalising proposed regulations. Agencies do so because doing so is a general procedural requirement<sup>75</sup> as well as a means to reduce the probability that a court will find the regulator's decisions to be invalid because they are arbitrary or capricious.

80. In Germany, there is some overlap in the jurisdictions of the competition authority and the telecommunications sector regulator. The telecommunications laws sets out requirements for mutual consultation. "Where both the regulator and the Federal Cartel Office conduct control, the co-ordination of tasks is laid down in the Telecommunications Act. With respect to co-operation, the Telecommunications Act provides for the following: In its own proceedings, the regulator has to give the Federal Cartel Office an opportunity to be heard. Conversely, the Federal Cartel Office has to hear the regulator before issuing decisions in its own abuse proceedings. The Federal Cartel Office's legal position is strongest as regards the geographic and product market definition and market dominance. In both fields the regulator may only decide in agreement with the Federal Cartel Office."<sup>76</sup>

81. Argentina has a legal requirement for consultation between the competition agency and sector regulators, but the requirement applies to the competition agency rather than the sector regulators. In investigations led by the competition agency, the sector regulators must be consulted if the investigation involves a firm in a regulated sector. Competition agency officials have analysed numerous activities of economic concentration in sectors such as telecommunications, transport and distribution of electricity, transport of gas, shipping services and infrastructure, airport services, etc. In these and other cases, the CNDC, according to Law 25.156, must solicit the opinion of the corresponding regulatory organisation.<sup>77</sup>

82. Formal and Informal Coordination Agreements: If the competition agency and a sector regulator interact regularly, one method to bolster coordination and information sharing is to formalise the interaction. A memorandum of understanding is one type of formal agreement that states explicitly how two agencies agree to interact. Such agreements could involve the order in which the agencies decide matters in which they have overlapping jurisdiction or conditions under which agencies agree to share information in matters in which both are involved.

83. Brazil provides several examples of agreements for coordination between the competition agency and sector regulators. Brazil also illustrates that the degree of agreement is subject to deterioration if the affected agencies do not foster these relationships. "CADE, the Administrative Council for Economic Defence) and ANATEL (the telephony sector regulator) had established a working group to address the potential problems presented by the overlapping jurisdictional provisions. CADE has indicated that, since

---

[http://www.internationalcompetitionnetwork.org/bonn/CPI\\_WG/SG3\\_Advocacy\\_in\\_Regulated\\_Sectors/Competition\\_Advocacy\\_Review.pdf](http://www.internationalcompetitionnetwork.org/bonn/CPI_WG/SG3_Advocacy_in_Regulated_Sectors/Competition_Advocacy_Review.pdf).

<sup>74</sup> Section 703(d), available at <http://mchugh.house.gov/pr2004/images/HR4341.pdf>.

<sup>75</sup> The Administrative Procedures Act is the legislation that governs federal regulatory agencies in the U.S. For a description of the Act, see <http://usgovinfo.about.com/library/bills/blapa.htm>.

<sup>76</sup> Contribution of Germany, *OECD Roundtable on Relationships between Regulators and Competition Authorities* (1999), available at <http://www.oecd.org/dataoecd/35/37/1920556.pdf>.

<sup>77</sup> Latin American Competition Forum 2004, contribution of Argentina, available at <http://www.oecd.org/dataoecd/52/49/32033426.pdf>.

2000, the two agencies have successfully developed a cooperative working arrangement under which ANATEL assumes the role of SDE (the Economic Law Office in the Ministry of Justice) and SEAE (the Secretariat for Economic Monitoring in the Ministry of Finance) in merger cases involving telecommunications services. Under the arrangement, ANATEL conducts the investigation and provides a technical opinion, while CADE renders the final judgment. With respect to conduct cases, in contrast, ANATEL shares concurrent jurisdiction with SDE and SEAE, so that any one or all three, of those agencies may perform investigative functions and present recommendations to CADE. Over the years, CADE and ANATEL have signed several written cooperation agreements, each of which has subsequently expired. CADE reports that, until recently, the two agencies had been negotiating a new agreement. That project was suspended, however, when the term of ANATEL's president ended. The procedures for interaction between ANATEL and both SDE and SEAE are not well developed, consisting primarily of informal contacts between agency staff members.<sup>78</sup>

84. Ireland has several formal agreements between competition and sector regulatory agencies that have been established under legislation specifically authorising and encouraging such coordination, the Competition Act of 2002, section 34(1). The purpose of fostering such agreements is to facilitate co-operation, avoid duplication of effort and ensure consistency among decisions related to competition issues. The agreements encompass information sharing, authorisation of forbearance when another agency is already dealing with a matter involving competition issues, and mandatory consultation when an agency is taking up a matter already being considered by another agency.<sup>79</sup>

85. Another form of coordination through forbearance applies in Canada. In general, markets subject to regulation are not subject to antitrust scrutiny because defendants can use a "regulated conduct defence." The sector regulators in Canada can, or in some cases must, "forbear" from regulating if the market is likely to accomplish the same objectives as the regulatory regime. The Competition Bureau holds that once a sector regulatory agency has declared that it will forbear from regulating, the "regulated conduct defence" no longer applies.<sup>80</sup> Hence, coordination occurs because the competition agency asserts jurisdiction only after the sector regulator effectively stops regulating.

86. A similar form of coordination is used in Hungary. In evaluating complaints against a regulated firm, the competition agency assesses whether the action in question is one that is required of the firm by the sector regulator or one over which the firm has discretion. If it is the former situation, the competition agency will not take action against the firm. In the latter situation, the competition agency has jurisdiction.<sup>81</sup>

87. An example of an informal agreement between a sector regulator and an antitrust agency occurs in the area of telecommunications mergers in the U.S. Both the Department of Justice and the Federal Communications Commission (FCC) have merger review authority in the telecommunications sector. The Department of Justice reviews telecommunications mergers using the same standards that it applies to other mergers. It challenges a merger if it believes that it will substantially lessen competition. The FCC

---

<sup>78</sup> OECD, *Competition Law and Policy in Brazil: A Peer Review* (2005), p. 86, available at <http://www.oecd.org/dataoecd/12/45/35445196.pdf>.

<sup>79</sup> OECD, *Global Forum on Competition*, Session on "The Relationship between Competition Authorities and Sectoral Regulations" (February 2005), Section 5.5, available at <http://www.oecd.org/dataoecd/58/7/34375749.pdf>.

<sup>80</sup> OECD, Roundtable on *Relationships Between Regulators and Competition Authorities*, "Aide-Memoire of Discussion" (1999), p. 302, available at <http://www.oecd.org/dataoecd/58/7/3475749.pdf>.

<sup>81</sup> OECD, Roundtable on *Relationships Between Regulators and Competition Authorities*, "Aide-Memoire of Discussion" (1999), p. 307, available at <http://www.oecd.org/dataoecd/58/7/3475749.pdf>.

also reviews mergers on the basis of competitive effects, but the FCC's general standard is that it will not approve a merger unless the merger enhances competition. The FCC also applies other public interest standards in its merger reviews. Over the course of time, the FCC has, in general, waited to conclude its competition analysis until after the Department of Justice has completed its assessment. When the Department of Justice has challenged a merger and the challenge is settled, the FCC sometimes incorporates the terms of the settlement into its own requirements for approving the merger. This arrangement helps to minimise the risk that the decisions of the agencies will be inconsistent with respect to the same aspects of a proposed telecommunications merger. The convenience of this informal arrangement has been strengthened by institutional factors. First, merging parties must notify the antitrust agencies about a proposed merger 30 days before the proposed merger date. There is no requirement for pre-merging filing before the FCC. Hence, the antitrust review process is sometimes well underway before it starts at the FCC. Further, the antitrust review is generally completed before the merger because the antitrust agencies strongly prefer to stop an anticompetitive merger before it is consummated. This preference flows from the common failure of divestitures after a merger to restore competition to its pre-merger state. Finally, there are no time constraints on the FCC decision process and the merging parties must receive FCC approval in order to merge.<sup>82</sup> To date, this informal arrangement has avoided sharp analytical inconsistencies between the competition analysis of the antitrust agency and the sector regulator.

88. Not all efforts to foster coordination and cooperation through formal agreements prove to be successful. For example, the Spanish delegation to the 1999 OECD roundtable on relationships between competition agencies and sector regulators reported that tensions continue in these interactions in Spain, despite the formal arrangements for consultation that have been implemented.<sup>83</sup>

89. Formal or Informal Channels for Consultation, Advocacy and Technical Communications: Informal networks of friendship, common experience, professional training, and political affiliation are common means by which government agencies coordinate their work.<sup>84</sup> Some of these arise spontaneously and without purposeful direction from agency decision makers and managers, however, an agency can foster or suppress these informal channels of communication and coordination. For the purpose of advancing coordination between the competition agency and a sector regulator, the competition agency should recognise and support the development of informal channels, as long as this is done in a way that is consistent with protection of proprietary information. Sections B and C below describe some of these channels.

---

<sup>82</sup> Joel Klein, Assistant Attorney General for Antitrust, "Consolidation in the Telecommunications Industry," statement before the House Committee on the Judiciary (24 June 1998), available at <http://www.usdoj.gov/atr/public/testimony/1806.htm>. Also see William Kovacic, "The Impact of Domestic Institutional Complexity in the Development of International Competition Policy Standards," Annex 3-B (15 March 1999), available at <http://www.justice.gov/atr/icpac/3b.htm>; and John Alden, "Competition Policy in Telecommunications: The Case of the United States of America," for the International Telecommunications Union, Workshop on Competition Policy in Telecommunications, CPT/05 (18 November 2002), available at <http://www.itu.int/osg/spu/casestudies/>.

<sup>83</sup> OECD, Roundtable on *Relationships Between Regulators and Competition Authorities*, "Aide-Memoire of Discussion" (1999), p. 303-304, available at <http://www.oecd.org/dataoecd/35/37/1920556.pdf>.

<sup>84</sup> Relationships between organisations, including government agencies, are an element of the fields of industrial organisation economics and interorganisational theory. Both involve large academic literatures. For a text treatment of industrial organisation economics see, for example, Dennis W. Carlton and Jeffrey M. Perloff, *Modern Industrial Organization* 4<sup>th</sup> Ed. (2005). For a text treatment of organisational and interorganisational theory, see, for example, Richard L. Daft, *Organizational Theory and Design* 9<sup>th</sup> Ed. (2006).

90. Mexico provides an example of consultation and advocacy that is permitted, but not required under law. The Mexican Competition Law stipulates that entities of the public administration, such as Cofotel (Comisión Federal de Telecomunicaciones), can consult the competition authority on any matter related to competition or free markets. “One example... involved Telcel’s<sup>85</sup> 2001 application to expand the uses permitted for its existing spectrum concession. The CFC was able to express an opinion in that proceeding only because COFETEL decided to seek the Commission’s views as a matter of discretion. And although COFETEL imposed some conditions on the expansion of Telcel’s concession, ostensibly to address the competitive concerns articulated by the CFC, no explanation was provided for COFETEL’s treatment of the CFC’s opinion. No such explanation was required because the CFC was not a party.”<sup>86</sup>

91. Similar non-mandated consultations have taken place between competition authorities and sector regulators in Brazil. “CADE has sometimes requested that SDE or SEAE (or both) provide supplementary technical opinions in merger cases falling within ANATEL’s jurisdiction and in conduct cases that SDE and SEAE had not investigated. Thus, CADE sought opinions from SEAE with respect to the temporary injunction in the News Corporation – Hughes merger. Likewise, opinions from both SDE and SEAE were sought in an abuse of dominance case against Telecomunicações de São Paulo (Telesp). The complaining firm in that case, Empresa Brasileira de Telecomunicações S.A. (Embratel), asserted that Telesp was charging discriminatory tariffs for accessing Telesp’s network. SDE and SEAE agreed that the conduct was likely to be discriminatory and CADE issued a precautionary order following their recommendations.”<sup>87</sup>

92. Like Brazil, France has legislation that permits, but does not require consultation and coordination between the competition authority and sector regulators. In France, the telecommunications law and energy law enable cooperation between the regulators and competition authority. The telecommunications laws enable consultation between the Autorité de Regulation de Telecommunications and the Conseil de la Concurrence. Similarly, the energy law suggests that conduct related to abuse of dominance or restrictive agreements will be referred by the energy regulator, the Commission de Regulation de l’Energie (CRE) to the Conseil de la Concurrence. The law also promotes consultation between the CRE and the Conseil de la Concurrence.<sup>88</sup>

93. Information-Sharing: A potential source of conflicting decisions or views of a competition agency and a sector regulator is differences in the information available to the two agencies. Agencies have different sources of information and the information available to one agency may, therefore, be more complete or more readily understood than that available to the other agency. Conflicts that arise because one agency is less well informed are particularly unfortunate from a social perspective because they may be avoidable if agencies share information. It is difficult to condemn a decision if you would have made the same decision had you had the same information as the decision maker. The competition agency can take the initiative in seeking ways to convey relevant information to the sector regulator, although there

---

<sup>85</sup> Telcel is called Radio Móvil Dipsa, the wireless telephony affiliate of Telmex, the dominant telephone services provider.

<sup>86</sup> OECD, *Competition Law and Policy in Brazil: A Peer Review* (2005), p. 86, available at <http://www.oecd.org/dataoecd/12/45/35445196.pdf>.

<sup>87</sup> OECD, *Competition Law and Policy in Brazil: A Peer Review* (2005), p. 87, available at <http://www.oecd.org/dataoecd/12/45/35445196.pdf>.

<sup>88</sup> OECD, *Global Forum on Competition*, Session on “The Relationship between Competition Authorities and Sectoral Regulations” (February 2005), Section 5.5, available at <http://www.oecd.org/dataoecd/58/7/34375749.pdf>.

may be legal restrictions on doing so.<sup>89</sup> Conversely, the competition agency should try to avoid making decisions on limited information that it could request from the sector regulator. Conflicts based on insufficient information-sharing between agencies are unlikely to be viewed with sympathy by affected parties or the public.

94. Brazil provides a good example of this type of information-sharing between competition agencies and sector regulators. The National Electrical Energy Agency (ANEEL), like ANP and ANATEL, was created in 1997, and its law also requires that competition principles be incorporated into regulatory policy where possible. ANEEL has cooperation agreements with all three competition agencies, under which the parties agree to share information and technical expertise and jointly analyse the interaction between the competition law and the sector regulatory system. ANEEL provides SDE with reports of suspected competition law violations and with technical opinions in both conduct and merger cases.<sup>90</sup>

95. Ongoing Communication Directed at Coordination: The section above on information-sharing focused on information used in making sector regulation decisions, but other forms of information can foster coordination between competition agencies and sector regulators as well. In particular, information on how sector regulators are taking competition concerns into account in other sectors can help a sector regulator put competition issues into perspective in a specific sector. Australia provides an example of this approach. “The ACCC publishes a quarterly newsletter, the ‘Public Utility Regulators Forum.’ The ‘Forum’ was established in recognition of the need for co-operation among the various state-based regulators. It aims to focus understanding of similar issues and concepts faced by different regulators; minimise regulatory overlap for large users operating across jurisdictions; provide a means of exchanging information; and enhance the prospects for consistency in the application of regulatory functions.”<sup>91</sup>

96. In the U.S., communication directed at coordinating the actions of state sector regulators with each other and with federal sector regulators and competition agencies is one of the main functions of the National Association of Regulatory Utility Commissioners (NARUC),<sup>92</sup> a 100 year old organisation that also sponsors the National Regulatory Research Institute (NRRI).<sup>93</sup> Both NARUC and NRRI publish newsletters and reports designed to encourage coordination between NARUC members. Conferences and workshops provide opportunities for state sector regulators to discuss common issues and identify promising problem-solving approaches. Sessions often include presentations from the federal sector regulators and sometimes from competition and consumer protection agencies at the state or federal level.

97. Consumer Advocate Inside the Sector Regulator: One technique to encourage consideration of consumer welfare in a sector regulator’s operations is to create an advocacy unit within the agency that has independent ability to bring issues to the attention of the sector regulatory agency’s decision makers. The internal consumer advocate’s office is one potential point of contact with the competition agency. And

---

<sup>89</sup> The principal difficulty is that the pre-merger filing legislation in the U.S., the Hart-Scott-Rodino Act, effective since 1977, forbids antitrust agencies from sharing the filings with other agencies. Regulatory agencies sometimes avoid this restriction by ordering firms to submit the same documents that they submitted to the antitrust agencies. See William Kovacic, “The Impact of Domestic Institutional Complexity in the Development of International Competition Policy Standards,” Appex 3-B (15 March 1999), available at <http://www.justice.gov/atr/icpac/3b.htm>.

<sup>90</sup> OECD, *Competition Law and Policy in Brazil: A Peer Review* (2005), p. 88, available at <http://www.oecd.org/dataoecd/12/45/35445196.pdf>.

<sup>91</sup> Contribution of Australia, *OECD Roundtable on Relationships between Regulators and Competition Authorities* (1999), p. 107, available at <http://www.oecd.org/dataoecd/35/37/1920556.pdf>.

<sup>92</sup> The NARUC website is <http://www.naruc.org/>.

<sup>93</sup> The NRRI website is <http://www.nrri.ohio-state.edu/>.

contacts through the consumer advocate's office can be easier for the competition agency because there are less likely to be ex-parte rules that limit discussions between the consumer advocates and the competition agency.

98. At the same time, the competition agency should not place too much reliance on a consumer advocate office (within a sector regulatory agency) for two reasons. First, the consumer advocate's office could have little influence on the sector regulatory agency. Second, the consumer advocate's office could have a different interpretation of consumer welfare than does the competition agency.

99. The institutional arrangement of consumer advocates inside regulatory bodies is common among state sector regulatory agencies in the U.S. Indeed, there exists a National Association of State Utility Consumer Advocates (NASUCA)<sup>94</sup> that meets regularly within the conventions of the National Association of Regulatory Utility Commissioners (NARUC). This institutional advocacy arrangement is less common within national government sector regulators, but it does exist within the Postal Rate Commission. These offices are intended to represent consumer interests before the sector regulator. This can be done either directly or by channelling the input of consumer groups to the sector regulator. The rationale for these offices is that consumer interests are more difficult to organise because they are diffuse, especially compared to producer interests. One intention in the formation of these organisations is to help improve the balance of input that the regulator receives so that the regulator will not drift toward suppliers' interests due to lack of input from consumer interests. Ideally, the positions taken by internal consumer advocates should echo the consumer welfare approach taken by antitrust agencies. This does not always prove to be the case, however. For example, in the U.S., state consumer advocates appear to focus primarily on short-term lower prices for consumers, even if this is likely to create inefficiencies and potential market power problems in later time periods. A case in point is the debate over the prices for provider-of-last-resort (POLR) service. This is a regulated service that remains in place when retail customers are free to select an alternative supplier. Often state consumer advocates have supported fixed prices for POLR service that do not adjust for changes in underlying costs – fuel costs in particular. State consumer advocates have generally opposed changes in POLR pricing agreements that would allow adjustments for fuel costs on the basis that consumers benefit from these lower prices. In contrast, the antitrust agencies have generally concluded that below-market POLR prices ultimately harm consumers by creating inefficient pricing signals and preventing entry of alternative suppliers.<sup>95</sup>

100. Coordination through External Intervention: Not all coordination between agencies stems from interactions between them. Some of the most important sources of coordination come from outside the agencies involved. One of these external sources is review of agency decisions by the judiciary system. Courts review agency decisions under a wide variety of standards. One of these standards is noting major departures from statutory authorisation language or from judicial precedents. If an agency veers too far a field on either basis, courts are likely to invalidate agency decisions and part of the basis for such rulings is the set of decisions made by other agencies that have already been reviewed by the judiciary.<sup>96</sup>

101. Even with appeal to the courts, consistency is not assured because different courts within a country can have different viewpoints that may not be reconciled, or that can only be reconciled after many

---

<sup>94</sup> The NASUCA website is <http://www.nasuca.org/>.

<sup>95</sup> U.S. Federal Trade Commission Staff, *Competition and Consumer Protection Perspectives on Electric Power Regulatory Reform: Focus on Retail Competition* (September 2001), available at <http://www.ftc.gov/reports/elec/electricityreport.pdf>.

<sup>96</sup> Judicial review may not be an effective or suitable source of coordination if the judiciary is overburdened, ill-trained, or subject to capture by special interests. See OECD, Global Forum on Competition, Contribution of Mexico, "The Objective of Competition Law and Policy and the Optimal Design of a Competition Agency" (January 2003), available at <http://www.oecd.org/dataoecd/58/20/2486119.pdf>.

years by an opinion from the highest court (as in the U.S.). One method for fostering consistency is setting up a common appeals path, so that there is one court that has oversight of competition laws cases, whatever their origin. Common appeals paths have been developed, for example, in the United Kingdom (Competition Appeals Tribunal), Poland (Antimonopoly Court) and France (cour d'appel de Paris).<sup>97</sup> To the extent that competition cases become a substantial part of a court's case load, the court can develop expertise on competition issues that may also facilitate coordination and cooperation between competition and sector regulatory agencies that come before the court.

102. An important variant on the coordinating function of judicial review occurs in the case of Hungary.<sup>98</sup> In Hungary, the threat of court review appears to give weight to competition concerns in a very direct way because the independent Hungarian Competition Office has the authority to go to court to challenge the decisions of other agencies' actions that conflict with the competition laws. Although this power has not been widely used, the threat of using it appears to have been effective. This power also likely helps to encourage compliance with another aspect of the agencies competition advocacy powers – the competition agency is supposed to be consulted on any government proposals that could restrict competition.<sup>99</sup> This gives the agency an opportunity to try to prevent anticompetitive proposals from moving forward.

103. Another important form of coordination is the power of appointment exercised by the legislature or the executive branch of government. See the discussion of overlapping decision-makers in Section IV.C.

104. Purposeful Overlapping Jurisdictions: The opposite of formal coordination and clear distinctions in jurisdiction is fostering situations in which competition and sector regulatory agencies can conflict. Ironically, by making potential points of conflict more numerous, the need for coordination can become more obvious. If the agencies rise to the challenge of coordination, the lack of formal distinctions in responsibilities can result in cooperation and informal divisions of work.

105. The United Kingdom is a nation in which substantial opportunities for conflict between the competition agencies and sector regulators exist. There have been seven sector regulators that share concurrent power in the area of competition with the Office of Fair Trading (OFT). By and large, however, conflicts have been avoided.<sup>100</sup> One major contributor to this favourable result is that the OFT handles all of the mergers (except for large water mergers, which are referred to the Monopolies and Mergers Commission). At the same time, there are understandings on how the sector regulators' views will be taken into account by the OFT. On non-merger competition matters, the jurisdictions are concurrent, but there are formal or informal consultation arrangements between the OFT and the sector

---

<sup>97</sup> OECD, *Global Forum on Competition*, Session on “The Relationship between Competition Authorities and Sectoral Regulations” (February 2005), Section 6.1, available at <http://www.oecd.org/dataoecd/58/7/34375749.pdf>.

<sup>98</sup> Michael O. Wise, “Country Experiences with Targeted Advocacy and Enforcement Programs,” in Giuliano Amato and Laraine L. Laudati, Eds., *The Anticompetitive Impact of Regulation* (2001), pp. 394-411 at pp. 409-410.

<sup>99</sup> Korea has a similar comprehensive requirement that the competition agency be consulted in any matters that could harm competition.

<sup>100</sup> A summary of the explanations for effective coordination in the U.K. between competition and sector regulatory agencies is provided by the Office of Fair Trading is available in OECD, Roundtable on *Relationships between Regulators and Competition Authorities*, “Aide-Memoire of Discussion” (1999), pp. 297-298, available at <http://www.oecd.org/dataoecd/58/7/3475749.pdf>.

regulators.<sup>101</sup> Another contributor toward coordination between competition agencies and sector regulators is that the sector regulators are more likely to address competitive concerns through their authority to grant or revoke licences of suppliers than through litigation.<sup>102</sup> Hence, conflicts are avoided to some extent by the use of different forms of intervention in the market.

106. Argentina's experience highlights the point that coordination can be a significant issue even if the competition agency and the sector regulators have authorities that appear to be distinct. "In Argentina, there is no jurisdictional overlap, but practical experience shows that it is sometimes unclear whether a problem, such as a complaint on a possible anti-competitive practice, falls under the jurisdiction of the competition law or the regulatory framework of a specific sector. In merger cases, the competition authority is obliged to ask for the opinion of the relevant regulatory body, and some ex officio investigations into specific economic sectors have been requested by the regulatory agency."<sup>103</sup>

107. In particular: "The powers granted the TNDC by the Law on the Defence of Competition, and currently exercised by the CNDC, cannot be undertaken in any way by other regulatory organizations. These organisations can only act within the regulatory framework of the sector over which they have jurisdiction. There exist some instances in which it is not entirely clear whether a problem, such as a complaint of a possible anti-competitive practice, falls under the jurisdiction of the Law on the Defence of Competition or the regulatory framework of a specific sector. Once clarified, the intervention of the CNDC is immediate. One possibility specifically addressed in Law 25.156 is those anti-competitive practices originating in the violation of other regulations (such as laws tax and prevision laws, and standards for regulated sectors of the economy). In these cases, the Law on the Defence of Competition is applicable once the violation of other regulations has been declared by administrative act or decisive verdict.

108. ...the central question facing the CNDC when it must intervene in a sector of economic activity where another public regulatory agency has authority is establishing whether a problem exists from a competition perspective, as it may relate to possible anti-competitive processes, the analysis of an operation of economic concentration, or a market investigation. There are no limits for applying the Law on the Defence of Competition to regulated sectors of economic activity. In the case of accusations of possible anti-competitive practices, the CNDC undertakes the corresponding investigations. In recent years, officials have investigated accusations in sectors with specific normative frameworks and regulatory agencies such as telecommunications, medicines (with respect to their approval for entry into the market), shipping services, etc.

109. In regard to market investigations, which are initiated without the occurrence of a previous complaint, with the effect of establishing whether there exist competition problems, there are no

---

<sup>101</sup> The United Kingdom has backstop requirements in place to avoid double jeopardy and to settle disputes between agencies that cannot be settled by other means. Agencies must notify each other of enforcement actions and unresolved disputes result in notification of the Secretary of State by the Chairman of the Office of Fair Trading. See, OECD, *Global Forum on Competition*, Session on "The Relationship between Competition Authorities and Sectoral Regulations" (February 2005), Section 5.2, available at <http://www.oecd.org/dataoecd/58/7/34375749.pdf>.

<sup>102</sup> Contribution of the United Kingdom, *OECD Roundtable on Relationships between Regulators and Competition Authorities* (1999), available at <http://www.oecd.org/dataoecd/35/37/1920556.pdf>.

<sup>103</sup> Latin American Competition Forum 2004, p. 4, available at <http://www.oecd.org/dataoecd/52/41/32033728.pdf>.

restrictions in bringing them forward. By way of example, some of these investigations have been initiated at the request of regulatory agencies, as in the case of contracts for wellhead sales of gas.<sup>104</sup>

## **B. Increasing the Effectiveness of Competition Advocacy**

110. The premise of this section is that the competition agency is interested in competition advocacy directed at a particular sector regulator, whether or not the competition agency has specific authority to affect the decisions of the sector regulatory agency. The competition agency may have decided on this particular sector as a focus for competition advocacy because, for example, technical conditions are changing in the sector, thereby making it more suitable for competition; opportunities are appearing for competitive contracting out; competition for the market appears feasible;<sup>105</sup> the decisions of the regulatory agency are reducing existing competition in the sector; or law enforcement activities of the competition agency have brought regulatory inefficiencies to the attention of the competition agency.

111. Whatever the reason for undertaking competition advocacy in the sector, the competition agency faces a choice between a quick hit approach (perhaps because it has a single particular point it wants to bring to the attention of the sector regulator), or a longer-term approach, recognising that bringing competition to a sector accustomed to state ownership or regulation is a challenging proposition that often extends over several years. Despite the potential costs and frustrations of a longer-term approach, it also has the potential of producing substantial gains in economic performance for society if the competition advocacy helps to steer the sector regulator toward effective competition in the sector and away from potentially costly mistakes. Brazil's experience in the aviation sector demonstrates the potential importance of a long term commitment to competition advocacy in a sector. Also see the discussion of the long-term competition advocacy program of the U.S. Federal Trade Commission in the electric power sector in Section III.A.

112. Regulatory experience in [Brazil's]... civil aviation market was initiated in the early 60's, when the government sponsored a number of conferences to discuss models of intervention in the aviation sector. The result of these meetings was a rigid regulatory model based on stimulation mergers between the main air companies, strict control over the establishment of new businesses, as well as over tariffs, new routes and itineraries.

113. The government and the regulatory agency itself tried to artificially equate the supply to the existing demand, endorsing a strong disincentive to competition in the civil aviation market. Competition was seen as harmful to the stability of service in the sector.

114. The aim of competition advocacy work, carried out during the 90's, was to gradually dismantle the existing regulatory scheme, withdrawing the participation of the State in some carriers, allowing airlines to operate freely, administering their own capacity, seats offered, airports served and selecting their own management strategies. The main objective of the Competition Authority was to deliver better services to the citizens at more competitive prices. The goal was to switch the focus from the airlines to the consumer. The deregulation of air services in the country took a decade to be implemented due to the conservative position of the Air Force, the sector regulator.<sup>106</sup> In collaboration with the Competition

---

<sup>104</sup> Latin American Competition Forum 2004, contribution of Argentina, available at <http://www.oecd.org/dataoecd/52/49/32033426.pdf>.

<sup>105</sup> Competition for a natural monopoly franchise is sometimes termed a Demsetz auction after the article by economist Harold Demsetz, "Why Regulate Utilities?" *Journal of Law and Economics* 11 (April 1968), pp. 55-66.

<sup>106</sup> International Competition Network, *Competition Advocacy Review: Case Studies on Regulated Sectors* (2004), pp. 7-8 and 13-14, available at

Authorities, the Air Force started a measured reduction of the existing regulation. A system of gradual and monitored liberalisation of the domestic airfares was implemented. In 1991 the carriers were allowed to operate with fares different from the tariff established by the regulatory agency (DAC), by means of a price interval of 32% higher and 50% lower than the tariff. In 1998, the companies were allowed to give discounts of 65% on the fare established by the regulatory agency.

115. In 2001, the cooperation between the Competition Authority and the Ministry of Defence became even stronger. By this time the Competition Authority issued a proposal of an amplified deregulation. The proposal was based on a number of studies carried out by the Competition Authority and by non-government agencies. Those studies advocated that the market was strong enough to operate without restraints and that the companies could be allowed to determine freely their fares, operating routes and seats supplied. The plan included phased deregulation, initially setting free all the operations between the main airports of the country.

116. The close monitoring of the results allowed the government to proceed to the next phase, deregulating businesses in all the airports. The process also included removing restrictions on entry of new firms for both scheduled and chartered air transportation; ending the distinctions between regional and national carriers, ending restrictions on operating on the main routes between major airports (between Rio de Janeiro, São Paulo, Belo Horizonte and Brasília); lessening restrictions on new routes and itineraries; and designating additional domestic air carriers to explore the international services markets (a monopoly at that point in time). Only the formal operation of the airports, allocation of slots and gates, and safety inspections were to be kept under strict control of the sector regulatory authorities.

117. The Competition Authority's proposal was initially received with scepticism by the Air Force. Nevertheless, the advocacy work carried out in other branches, particularly in the National Council for Civil Aviation (CONAC), composed of a number of Ministries and responsible for issuing the policy guidelines of the sector, helped to make Air Force's position more flexible. The constant links with the media and the divulgement of the agency studies on the web site and in policy seminars helped build awareness about the inefficiencies in the sector.<sup>107</sup>

118. After several discussions between the Ministries in the CONAC, the proposal was largely approved and, with the success of deregulation between the main airports, the liberalisation was soon extended to the rest of the country. Competition Authorities were then responsible for conceiving the steps of this liberalisation, as well as focusing competition law enforcement against any attempt of the airlines to act cooperatively in terms of conducts against competition (cartels, dumping). Observe that none of the instruments used to convince regulators were institutional tools. That means that the Competition Authority was neither required nor specifically authorised by law to offer remarks on the sector. What must be highlighted is the adjustment in the approach of the regulatory agency, and that of some sections inside the armed forces that were associated with the competition advocacy effort. For the first time these institutions were recognising that competition allows the economy, including the aviation sector, to better

---

[http://www.internationalcompetitionnetwork.org/bonn/CPI\\_WG/SG3\\_Advocacy\\_in\\_Regulated\\_Sectors/Competition\\_Advocacy\\_Review.pdf](http://www.internationalcompetitionnetwork.org/bonn/CPI_WG/SG3_Advocacy_in_Regulated_Sectors/Competition_Advocacy_Review.pdf).

<sup>107</sup> The importance of sympathetic media coverage in establishing support for increased competition was highlighted by competition agencies responding to the ICN survey on competition advocacy. ICN, *Competition Advocacy in Regulated Sectors: Examples of Success* (2004), p. 10, available at [http://www.internationalcompetitionnetwork.org/capacitybuild\\_sg4\\_seoul.pdf](http://www.internationalcompetitionnetwork.org/capacitybuild_sg4_seoul.pdf).

allocate its resources, offering the consumers better products, at lower prices and ensuring more efficiency for the whole system.<sup>108</sup>

119. In seeking to influence a sector regulator, the competition authority should keep in mind the workload and perspective of the sector regulator. For example, it is likely to be subject to ongoing, well-articulated petitioning from many private interests, particularly those of the firms that it regulates. An important question is: “Why should the sector regulator pay attention to advocacy from the competition agency if it is not legally compelled to do so?” Several potential answers to this question are discussed below.

120. Expertise: While it may be difficult for the staff of the competition agency to match the sector-specific knowledge of the staff of the sector regulator, the sector regulator is more likely to pay attention to competition advocacy from the competition agency if the competition agency appears to be generally well-informed. Sector expertise consists of several components including understanding the technical and institutional/regulatory background of the sector, understanding the key economic aspects that make the sector different from other sectors and keeping pace with technical and regulatory developments in the sector. Section C below discusses some of the specific means to establish expertise and to make this expertise known to the sector regulator.

121. Reputation for Accuracy: A sector regulator is more apt to pay attention to competition advocacy from a competition agency if the competition agency can demonstrate that some of its previous advocacy positions have proven to be correct. The most compelling situation could be one in which the sector regulator initially rejected the view of the competition agency, but was subsequently convinced to change its position to align with the advice of the competition agency. See, for example, the discussion of unbundling policy in the U.S. electric power sector in Section III.A. Barring this, the competition agency may be able to refer to similar situations in other sectors or to similar situation in the same sector, but in a different region or country.

122. Reputation for Objectivity: An important component in the reputation of the competition agency should be its objectivity. Protecting this part of the competition agency’s reputation can give its competition advocacy efforts greater weight because most other advocacy is expected to foster the interests of regulated firms or specific groups of customers. Indeed, the sector regulator may come to depend on objective advocacy to help it fend off special interest advocacy. If objective advocacy is not present, the sector regulator could be more tempted to pick a compromise position that partially placates conflicting interests, but is objectively deleterious. The competition agency should realise that its reputation for objectivity can make its advocacy a likely resource for future pro-competitive comments of interested private parties. As a catalyst for pro-competition comments, the competition agency indirectly can help to rebalance the advocacy received by the sector regulator. This can make it easier for the sector regulator to take pro-competitive steps opposed by the existing firms in the sector. See, for example, the discussion, in Section IV.A., regarding competition advocacy support from the press and private firms in the Portuguese telecommunications sector.

123. Continuity of Voice: A sector regulator is more apt to seriously consider advice from a competition agency if the competition agency evidences an interest in long-term engagement in helping the sector regulator to deal with competition issues that arise in the sector. The sector regulator may also have greater confidence in using the competition agency as a source in its decisions if the competition agency

---

<sup>108</sup> International Competition Network, *Competition Advocacy Review: Case Studies on Regulated Sectors* (2005), pp. 7-8 and 13-14, available at [http://www.internationalcompetitionnetwork.org/bonn/CPI\\_WG/SG3\\_Advocacy\\_in\\_Regulated\\_Sectors/Competition\\_Advocacy\\_Review.pdf](http://www.internationalcompetitionnetwork.org/bonn/CPI_WG/SG3_Advocacy_in_Regulated_Sectors/Competition_Advocacy_Review.pdf).

has a record of reasonable and informative competition advocacy in the past. See the discussion, in Section III.B., of the long-term competition advocacy program of the U.S. Federal Trade Commission in the electric power sector, or the importance of long-term competition advocacy in Brazil's aviation sector discussed at the beginning of this section. As the business representatives reportedly observed at the OECD roundtable on relationships between competition and sector regulatory agencies: effective deregulation is usually a process requiring a considerable period of time to set up new institutional arrangements and allow industries to change various established practices. Sorting out the role to be played by competition and regulatory authorities during the deregulation transition period requires striking a delicate balance in sending appropriate investment signals to potential new entrants and mitigating actual or potential interim market power of incumbent businesses.<sup>109</sup>

124. Fresh Information and Analysis: A well-intentioned sector regulator makes decisions based on the best available information and analysis, but sometimes this set of information is incomplete because interested parties only present information that supports their interests. Ideally, the sector regulatory agency should conduct its own information-gathering and empirical research, but there may be opportunities for the competition agency to provide useful materials as well. In general, competition advocacy that brings new information, analysis, or insights to bear on sector regulation issues can be compelling, newsworthy and difficult to ignore. Further, new information and analysis can be critical to attracting media attention to competition issues and in developing broad public support for regulatory reforms that can make specific reforms feasible.<sup>110</sup>

125. One example is the empirical analysis of state regulations restricting interstate wine sales via the Internet conducted by the U.S. FTC.<sup>111</sup> A U.S. FTC staff reported the results of a study of wine prices and availability that compared prices and the variety of products available via the Internet to those at conventional retail outlets in a suburban area of the State of Virginia that is near to Washington, D.C. The study concluded that state restrictions on Internet sales of wine reduced the variety of products available to consumers and increased the prices paid. The sector regulator in this case, a state liquor control board, refused to alter its rules to permit interstate sales via the Internet. Litigation ensued and resulted in a final decision by the U.S. Supreme Court striking down the state laws and associated regulations. The U.S. Supreme Court decision referenced the results of the U.S. FTC study in explaining its decision.

126. The evidence on inefficiencies that prompted high costs in Brazil's consumer aviation markets, discussed above, is a second example.

127. A third example is the authority of the Japanese Fair Trade Commission to organise study groups that examine potential sector reforms in order to increase competition. For example, study groups have reported on passenger air transport, electricity, and natural gas restructuring issues. The JFTC received the responsibility for such study groups in the Second Revised Deregulation Action Plan adopted by the

---

<sup>109</sup> OECD, Roundtable on *Relationships Between Regulators and Competition Authorities*, "Aide-Memoire of Discussion" (1999), p. 308, available at <http://www.oecd.org/dataoecd/58/7/3475749.pdf>.

<sup>110</sup> The importance of helping to create a general political environment favorable to increased competition is emphasised in Michael O. Wise, "Country Experiences with Targeted Advocacy and Enforcement Programs," in Giuliano Amato and Laraine L. Laudati, Eds., *The Anticompetitive Impact of Regulation* (2001), pp. 394-411.

<sup>111</sup> The U.S. FTC staff study and related competition advocacy and litigation is described in John T. Delacourt, "Competition, Commerce, and Constitutionality: The Supreme Court's Internet Wine Sales Case," *theantitrustsource* (July 2005), available at <http://www.abanet.org/antitrust/source/07-05/Jul05-Delacourt7=28f.pdf>.

Cabinet in March of 1997.<sup>112</sup> Study group recommendations also have helped to limit or reverse exemptions from the Antimonopoly Act.<sup>113</sup>

128. Similar reliance on outside expertise organised by the competition agency has occurred in Portugal. Strategic support for the competition agency's advocacy of telecommunications competition was provided by "the Portuguese Innovation and Knowledge Society Unit" (UMIC), a high profile initiative promoting wider use of information technology. The UMIC reports directly to the Presidency of the Council of Ministers. The UMIC has a keen interest in greater competition and lower prices for telecommunication services, because these lower prices would promote innovation and a greater usage of telecommunication services. To this extent, the objectives of the UMIC and of the Competition Authority are similar.<sup>114</sup>

129. Interaction with Litigation: Competition advocacy from the competition agency can have greater credibility if the competition agency has conducted investigations and litigated cases in the sector or in markets related to the sector. Such activities mean that the competition agency is likely to have detailed knowledge of the sector and that it has access to data from the sector that could uniquely qualify it to provide insights about the effects of existing regulations and prospective changes in regulations.

130. Sometimes litigation involving the competition agency can directly impact the regulated sector. A strong example comes from Chile. In Chile, the Antitrust Commission has promoted competition principles through its decisions, especially in regulated sectors.

#### *Telecommunication Sector:*

131. Resolution N° 389: In 1993, the Antitrust Commission concluded that local and long distance telephone services could be operated by the same holding company, but through separate corporate subsidiaries. It also laid out various other principles to be incorporated into new provisions of the telecom law, especially the so-called multi-carrier system, allowing consumer choice among long distance service providers.

132. Resolutions N°s. 394, 515, 611 and 686: The telecom law provides that in the local exchange telephone market, prices can be fixed by the telecom regulator if the Antitrust Commission finds that competitive conditions do not exist. Periodically, the dominant firm has consulted the Antitrust Commission in order to obtain a statement which allows it to set freely the price of these services. The Antitrust Commission has done far more than making these periodic determinations on the existence of competitive conditions. It has set rules to promote more competition in this sector. For example, it established principles to ensure open access to telecommunications networks.

133. Resolution N° 584 of September 27th 2000: In this decision, the Antitrust Commission determined how the telecom regulator allocates spectrum serving the mobile telephone industry. The Commission ordered that the regulator has to use a bidding process to decide which firms should obtain

---

<sup>112</sup> Contribution of Japan, *OECD Roundtable on Relationships between Regulators and Competition Authorities* (1999), available at <http://www.oecd.org/dataoecd/35/37/1920556.pdf>.

<sup>113</sup> Michael O. Wise, "Country Experiences with Targeted Advocacy and Enforcement Programs," in Giuliano Amato and Laraine L. Laudati, Eds., *The Anticompetitive Impact of Regulation* (2001), pp. 394-411 at p. 407. The use of study groups by the JFTC is in part a necessity for competition advocacy because government bodies do not generally propose legislation outside their own jurisdiction.

<sup>114</sup> Contribution of Portugal, *OECD Roundtable on Relationships between Regulators and Competition Authorities* (1999), available at <http://www.oecd.org/dataoecd/35/37/1920556.pdf>.

rights to spectrum. Initially, the telecom regulator was going to give preference to firms because they applied first.

### *Electricity Sector*

134. Resolution N° 488 of 1997: The Antitrust Commission, assessing a case of vertical integration in the electricity market, issued general rules and ordered distribution companies to call for bids and buy their supplies on objective and non-discriminatory terms. In Chile, the generation market is potentially competitive, but the distribution one is not competitive. So, through this Resolution, the Antitrust Commission attempted to promote competition in the generation sector, not allowing the distribution companies to procure their supplies without competition between electric generating firms.

135. By Resolution N° 592 of 2001: the Antitrust Commission decided that the prices of some complementary services offered by electricity distribution companies, had to be fixed by the authority because they were not provided in competitive conditions.<sup>115</sup>

136. Collegial Relationships: “A majority of respondents (competition agencies) focused on the important role of dialogue and coordination among the competition authorities and sectoral regulators” when asked to offer examples from experience that could be helpful to other competition authorities regarding competition advocacy.<sup>116</sup>

137. Decision makers in a sector regulatory agency, like decision-makers in most organisations, rely on staff to organise materials and to provide advice on the technical accuracy and reliability of different information sources, including advocacy from various parties. Staff and decision makers are often obligated to take all views into consideration, but a well-intentioned sector regulatory agency will be aware of the bias in much of the advocacy directed towards its decision-making. If the competition agency has developed collegial relationships with the regulatory staff, the sector regulator is less likely to dismiss advocacy from the competition agency, and the sector regulatory agency may encourage competition advocacy from the competition agency. This encouragement can make it easier for the competition agency to effectively participate in advocacy. Without any impropriety, the sector regulator or the elements within the sector regulatory most attuned to competition issues, can make sure that the competition agency knows about impending regulatory decisions in a timely fashion if they have major competition components,<sup>117</sup> and can secure an invitation for the competition agency’s staff to make presentations at technical conferences held by the sector regulator. Collegial contact with staff of the sector regulator can also help the competition agency become aware of situations when the sector regulator would most welcome advice from the competition agency. Staff contacts also can provide an avenue for informal competition advocacy. Sometimes informal forms of competition advocacy may be possible and effective when formal forms are impractical.

### **C. More Effectively Exchanging Institutional and Policy Perspectives at Both the Decision-Making and Staff Levels**

138. An agency, like any organisation, can be highly complex and face an environment that impinges on or prompts its actions, but not the entire potentially vast array of information is needed to support

---

<sup>115</sup> Page 8, available at: <http://www.oecd.org/dataoecd/52/47/32033452.pdf>.

<sup>116</sup> For related discussion, see ICN, *Competition Advocacy in Regulated Sectors: Examples of Success* (2004), p. 10, available at [http://www.internationalcompetitionnetwork.org/capacitybuild\\_sg4\\_seoul.pdf](http://www.internationalcompetitionnetwork.org/capacitybuild_sg4_seoul.pdf).

<sup>117</sup> One of the difficulties a competition agency may have in developing competition advocacy with limited resources is separating pertinent competition advocacy opportunities from the potentially vast number of regulatory decisions that have little relationship to competition.

sharing of perspectives with other agencies. Presumably the decision-makers and staff of an agency understand their own agency fairly well; hence aspects of another agency that are similar are already understood by leaders and other staff in both agencies. The most relevant information, therefore, concerns the differences that impinge on or prompt an agency's actions. Some of these are inherent in the differing powers or organisational structures of agencies. But others are less obvious, such as the tenure of senior employees, the volume of decision-making expected of the agency, and the degree of general political consensus about the mission of an agency. The discussion below identifies a number of techniques by which the competition agency can better understand the sector regulatory agencies and by which the competition agency can convey more about its perspective to the sector regulatory agencies.

139. Understanding Critical Differences: A major obstacle to crafting effective competition advocacy can be differences between the general approaches taken by the competition agency and those taken by the sector regulator. When the competition agency understands these differences, it can be better positioned to design competition advocacy that may be more relevant and practical for the sector regulator to implement. Such understanding can also help the competition agency to identify key institutional issues that may have to be addressed legislatively so that pro-competitive decisions can be implemented by the sector regulator in the future. Some differences that are likely to be important include the following.<sup>118</sup>

140. *Market Rules versus Litigation*: A regulatory agency often operates primarily by establishing market rules and penalising firms that violate the rules. Establishing market rules is often accomplished by building a public record about potential alternatives. In this process, interested firms, organisations, and individuals typically present information that they view as relevant. The submissions generally favour the interests of the submitters. Often the regulatory agency relies almost entirely on interested parties to critique other submissions and to develop useful data and analyses. In contrast, competition agencies often make policy through case decisions. Case decisions resulting from litigation provide a record of precedents that influence future private behaviour and future litigated decisions. In this process, competition agency personnel seek out information on their own initiative, including information collected through the use of subpoenas. The information developed in this process is often at odds with the interests of the parties from which it is obtained. Access to the internal records of firms, for example, often reveals explicit calculations of effects of regulatory actions including adverse effects on efficiency and competition. Comments from a competition agency should recognise that in some situations sector regulators may have less ability to obtain information from internal company documents than does the competition agency. Comments that do not recognise this limitation (or suggest ways to surmount it) may be of limited practical use to the sector regulator.<sup>119</sup>

---

<sup>118</sup> Treatments of relationships between competition agencies and sector regulators could also highlight the difference between ex ante and ex post treatment of market power issues. Traditionally it might be said that competition agencies use ex post approaches with the exception of merger analysis. This contrasts with sector regulators that apply ex ante behavioral rules to prevent market power problems. At least in the U.S., this distinction appears to have little remaining relevance for two reasons. First, merger analysis accounts for the vast majority of antitrust enforcement activity, so it is now the rule and the exception is ex post analysis. Second, while the sector regulators do create ex ante market rules, a substantial portion of their activity is associated with identifying and prosecuting violations. A strong example is the U.S. Federal Energy Regulatory Commission which has undertaken several intensive investigations regarding the California energy crisis of 2000-2001. For discussion of this distinction, see Martin Cave and Peter Crowther, "Co-ordinating Regulation and Competition Law – Ex Ante and Ex Poste, in Swedish Competition Authority, *The Pros and Cons of Antitrust in Deregulated Markets* (2004), available at [http://www.kkv.se/bestall/pdf/rap\\_pros\\_and\\_cons\\_Deregulated\\_markets.pdf](http://www.kkv.se/bestall/pdf/rap_pros_and_cons_Deregulated_markets.pdf).

<sup>119</sup> For example, the U.S. FTC staff commented on the difference between the FTC's use of subpoenas to obtain key decision-making and marketing documents from firms in merger cases (including the merging firms, their competitors, and customers in the market) and the sector regulator's reliance on public

141. *Structural Versus Behavioural Remedies*:<sup>120</sup> Competition agencies generally prefer structural remedies for anticompetitive behavior because structural changes alter the incentives of market sellers and, therefore, are less likely to require ongoing attention from the competition agency. In some sense, competition agencies are forced toward structural remedies if they do not have sufficient staff to engage in intensive, long-term market monitoring. Sector regulatory agencies are more likely to rely on behavioral remedies. In part this view may stem from their ability to engage in long-term monitoring of behavior with existing personnel levels. A competition agency may repeatedly urge a sector regulator to rely on structural remedies more often, but advocacy that is limited to this advice may appear to be impractical to the sector regulator that has little experience with structural remedies and a long tradition of setting behavioral rules. If the advocacy is going to focus on shifting toward structural remedies, the advocacy should demonstrate that application of behavior rules is likely to fail, or has already failed, to correct the problem or to improve economic performance. These differing perspectives were emphasised in a disagreement about vertical separation of transmission service that occurred between the electric power sector regulator and the U.S. FTC (discussed in Section III.B).

142. *Boutique Decision-Making Versus “Mass Production” Decision-Making*: Competition agencies’ decisions are generally focused on individual investigations and cases. As a result, the decisions made by competition agencies are very fact-intensive and can be few in number during periods where merger activity is subdued. In contrast, the decision-making of a sector regulator is often dominated by price setting and determinations of whether firms have conformed to existing rules. The sheer number of decisions is often far higher than for a competition agency. Recommendations from a competition agency that propose data intensive investigations and detailed decisions can be seen as impractical because of the sector regulator’s heavy calendar of decision making. It can be extremely difficult for a sector regulator to devote as much time and attention to individual decisions as a competition agency does.

143. *Burden of Proof on Agency Versus on Defending Parties*: Part of the reason that the viewpoints of agencies may differ is the difference in what happens if the agency fails to act within a specified time period on a proposed merger, for example. Often in the case of a merger review by a competition authority, the transaction is allowed to go forward unless the competition agency challenges the merger within a specified time period. In contrast, in the case of a merger review by a sector regulator, the transaction often cannot take place without the regulatory agency’s approval. Because the burden of proof is often borne by the competition agency, investigations by competition agencies often probe into decision-making documents of the parties and third parties for the evidence needed to convince a court that the merger will substantially lessen competition. Parties to the transaction have incentives to conceal documents that support a lessening of competition hypothesis, but they do so at the risk that the competition agency will issue additional document demands. In contrast, a sector regulator looking at the same transaction does not have to prove anything in order to block the transaction -- the applicants must prove that the transaction will provide benefits. This means that the sector regulator’s inquiry is not likely to be as probative about potential anticompetitive effects. Difficulties in guaranteeing security for proprietary documents can further erode the information made available to the sector regulator by parties to a merger. Given these differences in access to proprietary information, competition advocacy comments

---

submissions by merging parties and interveners. The comment to the sector regulator expressed concern that merger analysis of the sector regulator is likely to be inadequate as a result of deficiencies in its information-gathering procedures. U.S. Federal Trade Commission, Bureau of Economics, “Comment to the Federal Energy Regulatory Commission in the Matter of 18 CFR Part 33, Revised Filing Requirements,” FERC Docket No. RM98-4-000 (filed 11 September 1998), available at <http://www.ftc.gov/be/v980022.htm>.

<sup>120</sup> See OECD, Roundtable on *Relationships Between Regulators and Competition Authorities*, “Background Note” (1999), Section 5.4., available at <http://www.oecd.org/dataoecd/58/7/3475749.pdf>, for additional discussion.

should be careful not to assume that a sector regulator will obtain detailed proprietary information that often proves essential in case decisions at competition agencies.<sup>121</sup>

144. *Single Objective Versus Multiple Objectives:* Competition agencies generally have fairly narrowly drawn objectives compared to sector regulators. Competition agency statutes tend to focus primarily in competition.<sup>122</sup> Even where the applicable statutes include other concerns, competition agencies often exercise prosecutorial discretion to downplay these statutes. In contrast, sector regulators are often assigned multiple objectives in the founding legislation. Regulators are often expected to promote growth of the industry, support universal service,<sup>123</sup> or preserve the effectiveness of regulations imposed by other regulatory agencies. Where the competition agency has jurisdiction that overlaps with that of the sector regulator, the competition agency's decisions may differ from those of the sector regulator in the same cases because of the competition agency's narrower focus. If such differences arise, the competition agency should emphasise that its decision is based on stand-alone competition analysis. Transparency can be enhanced for market participants if the sector regulator specifies the basis on which its decisions differ from those of the competition agency. The most troubling situation is if the two agencies differ in their conclusions based on the competition analysis component.<sup>124</sup> In this case, the competition agency must decide whether to further explain why its competition analysis conclusions differ from those of the sector regulator. Potentially, a court may be asked to rule in favor of one agency or the other. Coordination of decision making between the competition agency and the sector regulator can avoid such inconsistencies, but the competition agency should not abandon economically appropriate analysis just to be in agreement with a sector regulator. To do so could undermine the competition agency's ability to apply economically appropriate analysis to the non-regulated sectors of the economy.

145. *Differing Institutional Setting for Economists, Lawyers, and Administrators:* Internal organisational differences between agencies can influence the types of arguments that reach decision-makers in different agencies at different stages of decision-making. For example, if the competition agency has internal arrangements that routinely bring economic theory and empirical analysis to the

---

<sup>121</sup> These differences in perspectives are described for the U.S. telecommunications sector in Joel Klein, Department of Justice, Assistant Attorney General for Antitrust, "Consolidations in the Telecommunications Industry," presentation to the House Committee on the Judiciary (24 June 1998), available at <http://www.usdoj.gov/atr/public/testimony/1806.htm>.

<sup>122</sup> However, some statutes that are commonly described as antitrust statutes appear to function primarily to protect incumbent suppliers. Resale below sales laws are an example. See the background paper for the OECD Roundtable on *Resale Below Cost Laws and Regulations* (February 2006), available at <http://www.oecd.org/dataoecd/13/30/36162664.pdf>.

<sup>123</sup> Financial support for universal service often is accomplished with cross-subsidisation and this generally creates conflicts with the economic efficiency and consumer welfare standards embraced by competition agencies. For discussion, see Alberto Heimler, "Competition and Regulation in Public Utilities" (September 1998), paper for the Twelfth Plenary Session of the OECD Advisory Group on Privatisation, p. 3, available at <http://www.oecd.org/dataoecd/49/9/1929846.pdf>.

<sup>124</sup> In the U.S., merger review in some deregulated sectors was granted exclusively to the Department of Transportation (DOT), but the record of merger decisions in these industries is dubious, at best. Alfred Kahn, a principal proponent of reform in the airline sector summarised the experience: "The DOT seems to have no appreciation whatever of the dangers our antitrust laws were set up almost a century ago to forestall." See, W. Kip Viscusi, Joseph Harrington, Jr., and John Vernon, *Economics of Regulation and Antitrust* 4<sup>th</sup> Ed. (2005), p. 627. Also see Alden Abbott, U.S. FTC Bureau of Competition, "Statutory Immunities and Exemptions," presentation to the Antitrust Modernization Commission (1 December 2005), available at <http://ftc.gov/os/2005/12/051202statutory.pdf>; and Maureen Ohlhausen, FTC Office of Policy Planning, "presentation to the Antitrust Modernization Commission (29 September 2005), available at <http://www.ftc.gov/os/2005/09/050929antitrustmod.pdf>.

attention of decision-makers, while the sector regulator does not, then competition advocacy from the competition agency may be difficult for the sector regulatory agency decision-makers to link to regulatory terminology and concepts. In this scenario, the competition agency could be more effective in competition advocacy if it provides more explanation of the concepts, terms and techniques that decision makers in the sector regulatory agency generally receive.

146. Overlapping Decision-Makers: Sharing of perspectives between agencies can be particularly effective if a decision-maker from the competition agency becomes a decision maker in the sector regulatory agency. If the decision-making obligations within one agency do not preclude an individual from being appointed both to the competition agency and a sector regulator, joint appointments can be a way to assure exchanges of perspectives and views at the highest levels of the agencies. If the decision making obligations are too extensive to permit a joint appointment, then appointing a former competition agency decision maker to a decision-making post in the sector regulatory agency could accomplish some of the same sharing and exchange.

147. An example from the U.S. is the appointment of James Miller, former Chairman of the U.S. Federal Trade Commission to the Board of Governors of the United States Postal Service (USPS). Dr. Miller prompted the program of competition advocacy before the U.S. Postal Rate Commission during his term of office at the U.S. FTC, including the comment opposing E-COM service being developed by the Postal Service (described in Section III.B.) After being appointed to the Board of Governors in 2003, Dr. Miller was elected chairman in 2005. During his tenure as Chairman of the Board of Governors, he has encouraged the USPS to prepare for increased competition<sup>125</sup> and he supported pending reform legislation that would expose the USPS to antitrust and consumer protection law enforcement with respect to classes of service that are not part of the postal statutory monopoly. This legislation is expected to revamp the Postal Rate Commission into the Postal Regulatory Commission with more power to prevent both cross-subsidisation and expansions of the postal monopoly into other classes of service.

148. Cross-Hiring of Staff: Another way to transfer information and perspectives regarding the sector regulator is for the competition agency to hire former staff from the sector regulator or to offer a temporary exchange of staff members. Cross-hiring by the sector regulatory agency can also result in a useful exchange of viewpoints. The latter also allows staff from the competition agency to directly participate in decisions within the sector regulator. These employees then can return with a better understanding and a series of personal contacts that may improve future competition advocacy efforts. Another form of professional exchange occurs when the same consultants work with both the competition agency and the sector regulator. In this case, the consultant acts a bridge between the agencies and can help to develop common perspectives or common understandings of the likely effects of policy alternatives. Sometimes simply clarifying the nature of unresolved empirical disputes or separating trivial from fundamental differences in viewpoint can help the competition agency to make its competition advocacy efforts be more effective.

149. For example in the U.S., several staff, both economists and lawyers, from one of the competition agencies were hired by the sector regulator for policy development and case work during the natural gas industry restructuring effort of the 1980s. These staff contributed to the substantial success of the sector regulator in introducing competition into that sector in the U.S.

150. Cross-Training: Even if personnel exchanges are not implemented, some sharing of perspectives can be accomplished by cross-training. This could involve exchanging seminar presenters, exchanging critiques of past decisions, or holding common training sessions for both staffs. In the United Kingdom,

---

<sup>125</sup> United States Postal Service Strategic Transformation Plan 2006-2010 (2005), Executive Summary, available at [http://www.usps.com/strategicplanning/stp2006\\_2010/](http://www.usps.com/strategicplanning/stp2006_2010/).

reform proposals in the area of sector regulation included provisions that called for common training on competition issues for staff of both competition agencies and sector regulators.<sup>126</sup> In the U.S., for example, the electricity and natural gas sector regulator invited staff from the U.S. FTC to give presentations to the sector regulatory agency's staff, including analysis of a previous case before the sector regulator. The case involved an application for market-based rates from a pipeline owner in the mid-West. The presentation gave the competition agency staff an opportunity to show, in a day-to-day work context, how the approach of the competition agencies' staffs differs from that of the sector regulator's staff. Other sessions dealt with differences in merger analysis techniques and perspectives. Another form of cross-training involves seminar series sponsored by competition agencies. While most speakers are academics, the topics they cover sometimes involve sector regulation and, on those occasions, staff from the relevant sector regulator should be invited to attend. Similarly, the seminars hosted by the sector regulatory agencies sometimes include competition topics that are of interest to staff from the competition agencies.

151. Attending the Same Policy Discussions: Attending the same policy discussions can promote common perspectives and interchanges of ideas raised in these discussions. In many sectors, policy discussions occur in academic settings or at industry-sponsored events. When both the sector regulator and the competition agency participate in such forums and discussions, they develop a common understanding of how economic and legal scholars regard the current effects and future prospects for the sector under various scenarios about decisions of the sector regulator. The academic community can contribute expertise in theory and research that should be helpful to both the competition agency and the sector regulator. When personnel from both types of agencies participate in the ongoing public policy debate regarding a sector, it helps the competition agency to make sure that its advocacy is consistent with academic research and provides assurance that at least some of the staff of the sector regulator have been exposed to the reasoning and empirical results behind the academic commentary. Another form of participation in academic and policy discussions is reviewing and critiquing professional papers from the staff of the competition agency and sector regulatory agency. In the process, the competition agency should be able to develop a good understanding of the views of other individuals groups seeking to influence the sector regulator. Some of these parties will favour competition because it is in their best interests. The competition agency may be able to garner support for its competition advocacy from these interested parties, academics, and think tanks. These "allies" may become more effective themselves by referencing the views of the competition agency

152. Another example of this scenario is the long-term process of engaging the sector regulator in a wide variety of policy forums that fostered liberalisation of Brazil's aviation sector, as described at the beginning of this section. The Portuguese competition authority's efforts to increase competition in the telecommunications sector also involved a campaign to promote general awareness of competition issues in the sector. The Competition body used a number of advocacy tools to convince regulators. Outreach efforts were directed at increasing awareness of competition concerns among policy-makers and opinion-leaders, as well as consumers.<sup>127</sup>

153. Interagency Staff Meetings: If the competition agency has designated personnel that are responsible for competition advocacy before a sector regulator, the two agencies can help keep communications open by holding periodic meetings at the staff level between the agencies. At these meetings, staff can report on recent developments at their respective agencies and discuss presentations on

---

<sup>126</sup> Contribution of the United Kingdom, *OECD Roundtable on Relationships between Regulators and Competition Authorities* (1999), available at <http://www.oecd.org/dataoecd/35/37/1920556.pdf>.

<sup>127</sup> International Competition Network, *Competition Advocacy Review: Case Studies on Regulated Sectors* (2005), pp. 12-13, available at [http://www.internationalcompetitionnetwork.org/bonn/CPI\\_WG/SG3\\_Advocacy\\_in\\_Regulated\\_Sectors/Competition\\_Advocacy\\_Review.pdf](http://www.internationalcompetitionnetwork.org/bonn/CPI_WG/SG3_Advocacy_in_Regulated_Sectors/Competition_Advocacy_Review.pdf).

topics of mutual interest and concern. These meetings also provide a good forum to understanding the future regulatory proposals being developed at the sector regulator and the issues within such initiatives that are most likely to have significant competition components.

154. An example is the series of Interagency Electricity Meetings in the U.S., initiated by staff from one of the competition agencies and involving staff from the Federal Energy Regulatory Commission (sector regulator); the Department of Justice, Antitrust Division; Federal Trade Commission (competition agencies); and Department of Energy.<sup>128</sup> Agency staffs started meeting informally every three or four months starting in the late 1990s in order to share perspectives on electricity sector technical, regulatory, and policy developments. Hosting of the meetings circulated among the participating agencies and the host agency developed the agenda. The meetings usually included a period of reporting on recent projects or cases. This was followed by presentations on specific topics by individual agencies. The presentations were followed by open discussion, within the limits of confidentiality. From the perspective of a competition agency staff, the meetings offered opportunities to learn more about pending regulatory proposals that enabled staff to prepare timely comments. The meetings also offered opportunities to bring competition concerns to the attention of the staff of the sector regulator in a setting where questioning and argument could take place readily and without participation of parties with vested interests.

155. Similarly in Brazil, CADE and ANATEL had established a working group to address the potential problems presented by the overlapping jurisdictional provisions, as described in Section IV.A.<sup>129</sup>

156. Joint Projects: Outside of litigation, there can be situations in which the sector regulator and the competition agency are both participating in the development of policy by a third agency such as a privatisation agency, patent agency, or standards organisation. During the course of interaction in an area of interest to both, the competition agency may be able to explore areas of mutual agreement with the sector regulator and, as a result, both agencies can be more effective in expressing these mutual views to the third agency.

157. Working together on a single project provides an opportunity to engage staff from both types on agencies in more depth with each other. Typically such projects require that each agency review the other agency's work and that discussion take place to resolve differences in understanding and interpretation of facts, events, and theory.

158. An example from the U.S. is the U.S. Defense Department's Defense Service Board Task Force on Defense Mergers that also involved the Federal Trade Commission and the Department of Justice, discussed in Section IV.A. Another example from the U.S. is the Electric Energy Market Competition Task Force, mandated under Section 1815 of the Energy Policy Act of 2005.<sup>130</sup> The Task Force includes staff from the sector regulatory body, the antitrust agencies, the executive agency dealing with the sector, and the executive agency that facilitates rural utility infrastructure projects. During the work of the task force, the individual agency representatives jointly developed questions for public comments and the outline of the report. During the course of drafting the report, the agency representatives shared viewpoints and commented to each other on the individual sections. Often, but not always, the viewpoints overlapped. Where viewpoints differed, discussions took place to resolve the differences so that a consistent report could be prepared. Similar interactions between sector regulators and competition

---

<sup>128</sup> John C. Hilke, "Joining the Electric Industry Policy Debate at the State Level in Giuliano Amato and Laraine L. Laudati, Ed, *The Anticompetitive Impact of Regulation* (2001), pp. 378-393.

<sup>129</sup> OECD, *Competition Law and Policy in Brazil: A Peer Review* (2005), p. 86, available at <http://www.oecd.org/dataoecd/12/45/35445196.pdf>.

<sup>130</sup> The draft report of the Task Force is forthcoming.

agencies can occur when the government is seeking to formulate positions that affect the development of a regulated sector. In these circumstances, the interactions are likely to include many agencies in addition to the sector regulator and the competition agency.

## V. CONCLUSION

159. A competition agency should not limit its activities to the confines of its law enforcement responsibilities. To do so is to neglect the potentially important contributions it can make in helping to guide sector regulatory agencies to increase competition in previously regulated or state-owned sectors. This transformation to increased competition can improve economic performance and benefit consumers. Once a competition agency has decided to become active in regulated sectors, it immediately faces the question of how it should interact with existing or emerging sector regulators. There is no single appropriate mode for interacting with sector regulators because institutions and market conditions can differ dramatically between countries. One of the most important considerations is the development of competition policy relative to the development of sector regulatory policy. The paper has indicated, for example, that situations in which sector regulation policy develops after competition policy offer real opportunities to shape future interactions in a way that keeps competition concerns high on the agenda of the sector regulator. These are the circumstances in which it may be feasible to secure formal deference to competition concerns within the regulatory process. Patterns of cooperation established during this period can also facilitate subsequent interactions.

160. When the competition agency and sector regulatory agencies are both mature, the nature of interactions will likely depend on whether there are overlaps in their jurisdictions. If the overlaps are substantial, the degree of interaction will be substantial, but the degree of cooperation and coordination is not predetermined. The paper has shown that there are a range of approaches to increase cooperation and coordination. The method that appears to provide the surest coordination is the approach taken by Australia and the Netherlands in which the sector regulatory functions are brought within the competition agency, although they remain as specialised units. Short of this merging of competition and sector regulatory agencies, the forms of coordination range from highly formal to almost entirely informal. Even systems that have great potential for lack of coordination can develop effective coordination, as the example of the United Kingdom demonstrates.

161. When there is little overlap in the official responsibilities of the competition agency and sector regulatory agencies, the primary means of interaction is more likely to be limited to competition advocacy. Here again, there are a wide range of approaches, but a strong common theme is that the competition agency should have something substantive and objective to contribute and it should be contributed in a way that is sensitive to the conditions faced by the sector regulatory agency. Sometimes, however, the sector regulatory agency is simply not interested in or is actively opposed to the message that the competition agency seeks to convey. In these conditions, the interaction between agencies is really to focus the public's and government's attention on the benefits of increased competition. In other situations, the sector regulatory agency is part of the regulatory reform effort, and the interaction can be directed at informing and helping to steer the sector regulator's approaches, either on specific issues or on more general approaches toward competition and efficiency, through a long-term process of competition advocacy.