

APPENDIX II

Different Models of Allocating Oversight Responsibilities

The advantages and disadvantages associated with these different approaches are discussed in light of the objective of controlling market power and anti-competitive activity (*i.e.* through both the promotion and maintenance of competition) in the telecommunications sector.

1. Vesting Full Sectoral Oversight in the Competition Authority

A useful example of allowing the competition authority full power to oversee the telecommunications sector is that of New Zealand before its adoption of sector-specific rules in 2001. Interestingly, this arrangement has also been used in some Eastern European nations as an interim measure, until a viable sector-specific regulator could be developed. Under this model the competition authority is responsible for overseeing all aspects of the telecommunications industry. This approach entails the competition authority applying competition rules to all competition and regulatory issues that arise in the telecommunications sector.

The following advantages may be associated with the competition authority's full oversight over the telecommunications sector:²¹⁵ certain anti-competitive practices may be addressed relatively easily and efficiently; jurisdictional overlap between the competition authority and the telecommunications regulator is eliminated since there is only one institutional authority; regulatory coherence is more readily achieved; there is more flexibility in the sense that the competition authority may use a wide range of discretion; as a consequence of this approach, and given the relatively large degree of power vested in judges, a strong degree of regulatory autonomy is maintained (*i.e.* regulatory capture is less of a concern); regulatory autonomy is further maintained in the sense that competition authorities, due to their relative autonomy from any one particular industry, are less prone to political lobbying; competition authorities generally have broader powers in which to gather information; all sectoral oversight is implemented through a "pro-competitive lens;"²¹⁶ and, depending on the situation at hand, the long-term enforcement costs of applying competition rules, instead of sector-specific rules, may be relatively less expensive.

The following disadvantages may be associated with this approach:²¹⁷ complexity, in the sense that certain technical issues such as interconnection and number portability may be difficult to resolve with competition rules alone; competition rules cannot address many social policy issues; delay, in the sense that the *ex post* nature of competition rules, when applied to certain issues, may take longer to effectuate a result; competition may not be as vigorous as a result of these disadvantages; a lack of institutional specialization implying that sub-optimal outcomes may often result; and, given the potentially limited expertise of competition authorities with respect to the sector in question, the degree of deference given by the courts may be limited.

²¹⁵ For a more in depth discussion, see generally: Controlling Market Power

²¹⁶ OECD DAF/COMP/GF(2005)2 at 2.

²¹⁷ For a more in depth discussion, see generally: Controlling Market Power

2. Vesting the Enforcement of Competition Rules within the Sector-Specific Regulator

The second approach entails the sector-specific regulator being afforded primary authority to apply competition laws, principles, and remedies to the telecommunications sector, in addition to its regulatory mandate. It is generally the case with this approach, that the competition authority will still enforce competition law with respect to mergers and cartels in the telecommunications industry. Considering that many countries, particularly developing ones, do not have competition authorities, this approach may provide valuable insight. While the European Union (EU) has generally been moving in the direction of this approach,²¹⁸ the most prominent and established example is that of the United Kingdom (UK).

Before discussing the benefits of this approach, it is important to realize at the outset that such benefits are likely to materialize only if the sector-specific regulator applies competition laws and principles to the same effect that a competition authority would under the same circumstances. Advantages of this model may include:²¹⁹ allowing the sector-specific regulator to import competition principles and approaches for market definition and assessing market power, thus allowing for more cohesive regulation; as highly detailed sector-specific rules are often poorly adapted to the evolution of the telecommunications market, allowing the sector-specific regulator to utilize more flexible competition laws may be more effective at dealing with market change; there may be efficiencies and a reduction in time delays when combining sectoral expertise with the ability to apply this expertise with competition rules; and, this arrangement may effectively facilitate the transition from sector-specific regulation to competition law.

Notable disadvantages may include:²²⁰ consistency in competition decisions may be a problem in the sense that both the competition authority and the sector-specific regulator may have the competence and authority to enforce competition laws in some circumstances;²²¹ there is a greater risk of duplication; there is a greater risk of regulatory capture; the sector-specific regulator might not have the critical expertise needed to apply both sector-specific regulation and competition laws; and, there is a greater risk that either sector-specific rules should be applied instead of competition rules or vice versa. In light of many of these disadvantages, the need for effective co-ordination mechanisms between the sector-specific regulator and the competition authority is paramount. One additional concern is that, not only are sector-specific rules generally more expensive to administer, but also sector-specific regulators sometimes need to extract compliance costs (*i.e.* fees associated with supporting the respective regulatory framework) from the firms they regulate. Finally, this model presumes that the sector-specific regulator is capable of making decisions on competition policy principles alone and is not influenced by other policy objectives, which may be within its mandate.

²¹⁸ After the European Commission's review of the regulatory framework in the telecommunications industry, the 1999 "Communications Review" placed a significant emphasis on shifting from *ex ante* controls to a hands-off *ex post* competition law regime. See: Walden & Angel at 19.

Nonetheless, the Communication's Review did not specify which agency is to apply such rules. Furthermore, in some jurisdictions, while the sector-specific regulator may apply competition principles, they do not necessarily enforce competition law.

²¹⁹ For a more in depth discussion, see generally: Controlling Market Power. Also see: OECD DAF/CLP(99)8 at 22-23.

²²⁰ For a more in depth discussion, see generally: Controlling Market Power. Also see: OECD DAF/CLP(99)8 at 22-23.

²²¹ ICN AERS 2005 at 4., citing OECD DAF/COMP/GF(2005)2

3. Maintaining a Functionally Separate Sector-Specific Regulator and Competition Authority

This approach essentially entails having a telecommunications-specific regulator alongside a competition authority, with each functionally separate and competent within their respective spheres of expertise. To this end, there are essentially two variations that this approach can take. The first is having the sector-specific regulator entrusted with both technical and economic regulatory functions, and the competition authority with the application of competition rules. The second variation is to have the competition authority entrusted with applying both competition rules and economic regulation, and the sector-specific regulator with applying only technical regulation. The United States is a prominent example of the first variation, while Australia is a prominent example of the second.

The advantages and disadvantages of reliance on both a sector-specific regulator and competition authority, which are functionally separate, are ultimately unique and depend on the actual implications of the regulatory and enforcement provisions in question. Nonetheless, some general observations can be made.²²² The following advantages may be realizable with this approach: each agency works within its area of expertise and competency;²²³ each agency has certain powers, which may provide certain benefits depending on the case at hand (*e.g.* competition authorities tend to have broader powers to gather information than do sector-specific regulators); checks and balances between the two agencies may mitigate both the risks and costs of regulatory mistakes; a good balance of specificity, coherence, competency, and consistency may be attained; and likewise, a healthy degree of flexibility and certainty may also be attained.

The following disadvantages of the functionally separate model may be evident: there are relatively greater regulatory costs; the greater the number and specialization of regulatory agencies there are, the greater the potential for regulatory complexity;²²⁴ detailed sector-specific regulations may be more prone to lobbying and regulatory capture; regulatory delays may result due to the inherent complexity; arbitration processes may be costly and time consuming; there may be a multiplicity of rules that are potentially applicable to the same set of facts; separating competition law from certain aspects of economic and technical regulation sacrifices some efficiencies;²²⁵ and, there might be regulatory gaps, as well as problems associated with overlapping jurisdiction. In light of these disadvantages, the need for effective co-ordination mechanisms between the sector-specific regulator and the competition authority is paramount.

²²² For a more in depth discussion, see generally: Controlling Market Power

²²³ Competition authorities typically have a comparative advantage with respect to delineating relevant markets, assessing significant market power, assessing the likelihood of harm to competition, and assessing entry conditions. See: OECD DAF/CLP(99)8 at 33-34. Also see: OECD DAF/COMP/GF(2005)2 at 5.

²²⁴ Regulatory complexity is potentially problematic, as it may: lead to market rigidity in some cases (See: Controlling Market Power at 111); hamper competition if such rigidity persists (See generally: ICN Case Studies on Regulated Sectors); and, lead to an increased likelihood of regulatory mistakes.

²²⁵ OECD DAF/CLP(99)8 at 33.