

Discussion Points

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Independent Sector Regulators and their Relationship with Competition Authorities

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I. Introduction

1. *Business at OECD* appreciates the opportunity to submit comments to the OECD roundtable on Independent Sector Regulators and their relationship with Competition Authorities.
2. *Business at OECD* notes that while Independent Sector Regulators often perform functions that are similar to that of Competition Authorities, such as the definition of markets and the assessment of market power, there are complex technical aspects of regulating certain industries (e.g., the telecommunications industry, energy or banking), which are arguably more appropriately dealt with by an Independent Sector Regulator with highly specialized expertise. Independent Sector Regulators are experts in their respective sector-specific fields while Competition Authorities are not expected to be sector-specific experts and focus on enforcing competition law in every sector of the economy.
3. In recent years, we have seen an increasing number of Sector Regulators being created across the world. There appear to be two principal reasons for this trend. Traditionally, specialised regulatory agencies were created to foster a transition to competitive markets in sectors which were previously nationalised (such as communications, electricity, gas, etc). In some cases there have been concerns with firm size and perceived dominance in particular industries, which have led to legislation to regulate conduct in an attempt to protect competitive dynamics. This approach was seen in railroads in the United States and more recently in the United Kingdom with the publishing of Professor Furman's report "*Unlocking Digital Competition*," which called for further regulation of large digital platforms and for the creation of a new Digital Markets Unit (DMU).¹
4. Sector Regulators cover large and important sections of the economy and their actions have a significant impact on competition. As such, the way they interact with Competition Authorities is of crucial importance to avoid enforcement duplication as well as inconsistent approaches and unnecessary burdens for business. Despite the importance of regulation and competition law, a

¹ UNLOCKING DIGITAL COMPETITION: REPORT OF THE DIGITAL COMPETITION EXPERT PANEL (Mar. 2019), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf. The aim of the DMU would be to promote effective competition in the digital platforms sector. The Report leaves open whether the DMU should operate as a unit of the Competition and Markets Authority (CMA) or Ofcom or should be set up as a new independent regulatory authority.

leading model for effective cooperation between Sector Regulators and Competition Authorities has not yet emerged. As noted by former General Counsel of the U.S. Federal Trade Commission William Blumenthal, “Different jurisdictions have different approaches, and even within a single jurisdiction the approach to the relationship can vary. In one jurisdiction a competition agency has statutory powers for some aspects of sector regulation. In another, sector regulators and the competition authority exercise concurrent jurisdiction. In yet another, a formal agreement establishes a framework for cooperation between the sectoral regulators and the competition authority.”²

5. Given this variety of approaches both across and within jurisdictions, it is hard to provide a comprehensive commentary of the relationship between Sector Regulators and Competition Authorities across the world. Nevertheless, this paper will attempt to extract certain broad principles aimed at discussing the different types of Independent Sector Regulators as well as their relationships with Competition Authorities. We will conclude with a call for consistency between the approaches of Regulators and Competition Authorities to promote business certainty and reduce regulatory burdens.

II. Types of Independent Sector Regulators

6. Across the world, countries have set up different types of Sector Regulators with a variety of powers in different areas of the economy. Network industries, utilities and sectors such as media, banking or other financial services often have their own Independent Regulators. In some cases, these regulators only have regulatory powers, but in others they also have competition law powers covering their sector of expertise (known as “concurrency” in the UK). Finally, certain industries have self-governing bodies that are empowered to regulate their area of competence. Examples of industries with self-regulation are taxis or professional services such as lawyers or notaries. The payments space has seen all these different models and frameworks applied (e.g. in the European Union, the European Payment Council (whose members are payment service providers) has been tasked with industry self-regulation for certain payment schemes; in the UK, the Payment Systems Regulator has been responsible for both regulatory and competition law oversight).
7. While this paper will focus on the first two categories, it is worth noting that there have been regulations by self-governing bodies that have restricted competition unnecessarily. There are examples where regulation has even condoned or expressly allowed anticompetitive behaviour. In the legal profession, competition authorities have been key in eliminating restrictive regulations such as fixed fees and other practices. More recently, Competition Authorities have been active in their advocacy efforts in the taxi sector following the entry of Uber in many cities.

III. Different Roles of Sector Regulators and Competition Authorities

8. There is often a perceived tension between the different approaches of competition (which emphasises the power of marketplace forces) and regulation (which imposes governmental control on market outcomes) in maximising consumer welfare (e.g. lower prices, enhanced quality, increased efficiency and innovation). However different in practice, the objectives of regulation or competition (whether imposed by Regulators or Competition Authorities) should be

² See William Blumenthal, Presentation to the International Symposium on the Draft Anti-Monopoly Law of the People’s Republic of China, Address Before the Legislative Affairs Office of the State Council 15 (May 23-24, 2005), available at https://www.ftc.gov/sites/default/files/documents/public_statements/presentation-international-symposium-draft-anti-monopoly-law-peoples-republic-china/20050523sclaofinal.pdf.

the same: to prevent the creation and abuse of market power to the detriment of consumers. The promotion of free and unrestricted competition should be the main method of achieving this objective, but regulation can be a permissible substitute if competition is stifled by the existence of certain market failures.

9. Despite commonality of aims, there are differences in the role played by Sector Regulators and Competition Authorities in advancing these goals.
 - a. Competition Authorities have a broader mandate of promoting competition in all sectors of the economy while Sector Regulators often have other additional statutory objectives in specific sectors. Examples include universal service obligations in network industries, environmental protection in energy industries and financial stability in banking. Sometimes these additional objectives might create tension with competition law.
 - b. The intervention of Competition Authorities (with the exception of merger control and certain country-specific tools such as Market Studies and Investigations in the UK) is usually *ex post*. Competition Authorities have traditionally intervened after the event,³ opening cases when they believed competition law had been infringed, for example following the receipt of a complaint. Sector Regulators on the other hand constantly monitor the sector they regulate and seek to make changes *ex ante* by drafting guidance, regulation or imposing price caps and directing the behaviour of companies to achieve a desired outcome.
 - c. The type of information requested is also different. While Competition Authorities rely on internal documents and substantive requests for information to establish infringements, Sectoral Regulators require a lot of accounting information (so much so that in certain sectors, such as telecoms, there is a different set of regulatory accounts altogether).
 - d. Competition Authorities prefer structural remedies as they do not require constant monitoring. Sector Regulators constantly monitor the industry and therefore do not shy away from behavioural remedies such as price caps, and open access to facilities.
 - e. Regulators tend to focus on market structure and giving effect to industrial policy that might drive to a particular desired outcome that might be broader than the pursuit of open competition and consumer welfare. Competition Authorities, on the other hand, tend to pursue open competition based on rules that are not focused on a particular structure or outcome, as long as consumer welfare is served. These two approaches might require a different legal framework, different analytical approaches and different methods. Tensions might arise when the approach of one authority strays into the objectives sought by the other.

IV. Advantages and Disadvantages of Having Separate Independent Sector Regulators and Competition Authorities

10. There are certain advantages to having Independent Sector Regulators exist and operate separately from Competition Authorities. Clearly, the ability of Sector Regulators to focus exclusively on a particular sector enables them to develop a deeper sector expertise than Competition Authorities would be able to achieve, as well as ensuring that their enforcement activities are consistent with the specific regulatory environment. Furthermore, companies in

³ There are currently ongoing discussions in several countries whether there should be *ex ante* monitoring of certain sectors of the economy and in particular the digital economy by competition authorities.

regulated sectors have no option but to engage with their regulator to work collaboratively and constructively to find solutions to perceived problems. This aspect also renders Sector Regulators particularly well-suited to industries characterised by rapid innovation, since frequent dialogue with the industry makes them better placed to envisage developments and assess their compatibility with the regulatory landscape. On the other hand, investigations by Competition Authorities are naturally more adversarial, with certain entities being singled-out for specific conduct. Companies faced with competition investigations will tend to defend themselves vigorously as a result.

11. But there are also disadvantages to this separation. The first is the potential for regulatory capture: the ability of industry to exercise too much influence over the Sector Regulator's direction, thereby preventing it from pursuing its original regulatory objectives. This is less of an issue for Competition Authorities that are dealing with different sectors and entities every day. There is also a tendency for Sector Regulators to feel the need to justify their existence through an increase in their continuing supervision and monitoring role, placing an undue regulatory burden on regulated entities. In many instances, sector regulation was supposed to be temporary—a tool to be superseded by competition law once the market had become competitive. This transition has not materialised in practice. They may also be less inclined to look at learnings from other sectoral regulators or regulatory approaches, which a multisector Competition Authority is perhaps better suited to undertake, leveraging experience across all its areas of focus. Finally, and as discussed further below, lack of effective coordination between Competition Authorities and Sector Regulators can lead to an increase the regulatory burden imposed on businesses.

V. Concurrence

12. In some countries, sector regulators also have competition powers. An example is the UK, where the sectoral regulators have competition law powers in addition to their regulatory powers. The sectoral regulators in the UK cover the payment systems, financial services, communications, energy, water, aviation and railway sectors.
13. The UK concurrence regime involves competition law in regulated sectors being applied by both (i) the Competition and Markets Authority (CMA) (the primary competition authority); and (ii) the sector regulators in the areas for which they are responsible. Like the CMA, the sectoral regulators can apply the prohibitions on anticompetitive agreements and abuse of dominant market positions. They can also conduct market studies or make market investigation references to the CMA.⁴
14. Concurrence allows competition law enforcement to benefit from the complimentary skill sets of the sectoral regulators and the CMA. The CMA has more experience on the application of competition laws, both from a substantive and procedural point of view. It also has experience of applying competition principles across sectors and can take a more economy-wide perspective or apply learnings from different industries which may exhibit similar features. The sectoral regulators, on the other hand, may have more detailed and technical knowledge of the sector and its specific characteristics, as well as the sector's development over time. Sectoral regulators will often have longstanding and ongoing relationships with market participants, understand their business models and engage with them in the spirit of cooperation. The CMA's *Annual Report on*

⁴ COMPETITION & MKTS. AUTH., ANNUAL REPORT ON CONCURRENCE 2019 1 (Apr. 10, 2019), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/811431/ACR_PV2406.pdf [hereinafter CMA CONCURRENCE 2019].

Concurrency for 2018 and 2019 shows a trend towards broader and more in-depth cooperation between the CMA and the sectoral regulators, as well as improved numbers of case delivery.⁵

15. The close relationship between the CMA and the sectoral regulators is further exemplified by the appeals process: the CMA is the appeal body for all price control decisions and certain other regulatory decisions made by the sectoral regulators. In a speech about the CMA's work in the regulated sectors, CMA Chief Executive Andrea Coscelli explained that the CMA was better placed than the courts or the Competition Appeals Tribunal to deal with such appeals because "these cases can call for a review of substantive matters as well as procedural issues, and that they consider financial and regulatory issues, [which] means that in practice, they are well suited to being decided by a body with the economic and financial, business and legal expertise that we have in the staff and CMA panel members."⁶ Pursuant to a "strategic steer" by the UK government, the CMA also set up the UK Competition Network with the sectoral regulators, the government suggesting that competition regulation would benefit from "a strong dialogue with sector regulators using the UK Competition Network to ensure that the overall competition regime is coordinated, and regulatory practices complement each other."⁷

VI. Conclusion — The Need for Coordination

16. Competitive markets require efficient and effective allocation of enforcement responsibility between Competition Authorities and Independent Sector Regulators.
17. Decisions made by Independent Sector Regulators are sometimes at odds with recommendations and decisions of the Competition Authorities and this can create a climate of business uncertainty. An example of this can be seen in the UK energy sector where, as part of the CMA's review, the CMA removed "some of Ofgem's retail market remedies which were designed to simplify the market and promote competition, [because the CMA's] analysis suggested have had the opposite effect, by stifling market dynamics."⁸ We have seen this happen in other jurisdictions as well. Instances where such corrective intervention is required could be reduced at the outset by ensuring close and effective coordination between the Regulators and Competition Authorities.
18. Coordination between Independent Sector Regulators and Competition Authorities can be achieved in several ways, both formally and more informally. On one end of the spectrum, Regulators and Competition Authorities can agree on memoranda of understanding, which clearly delineate their jurisdictional division of labour or how and when they will cooperate on specific cases or issues. Independent Sector Regulators and Competition Authorities can also be required to draft joint reports, ensuring that that regulatory positions on a particular industry are agreed before they are published, and that their enforcement activities in that specific sector are better coordinated. On the other end of the spectrum, Competition Authorities and Sector Regulators should organise staff secondments, ensuring cross-pollination of valuable institutional knowledge

⁵ *Id.*; see also COMPETITION & MKTS. AUTH., ANNUAL REPORT ON CONCURRENCY 2018 (Apr. 2018), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/703566/annual_concurrency_report_2018_cma79.pdf.

⁶ Andrea Coscelli, Our Work in the Regulated Sectors, Address Before the Utility Week Congress in Birmingham (Oct. 18, 2016), available at <https://www.gov.uk/government/speeches/andrea-coscelli-our-work-in-the-regulated-sectors>.

⁷ DEP'T FOR BUS. INNOVATION & SKILLS, COMPETITION REGIME: GOVERNMENT'S RESPONSE TO THE CONSULTATION ON THE STRATEGIC STEER TO THE COMPETITION AND MARKETS AUTHORITY (Dec. 2015), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/481040/BIS-15-659-government-response-governments-strategic-steer-to-the-competition-and-markets-authority.pdf.

⁸ Coscelli, *supra* note 6.

and strategy. In its most recent annual report on concurrency, the CMA noted, “Secondments continue to be an important means of sharing and transferring skills, expertise and resource between the CMA and the regulators.”⁹

19. This coordination ensures that in those instances where additional industry expertise is required, Competition Authorities can cooperate with Independent Sector Regulators to improve the quality of their enforcement (and vice versa). Cooperation will also ensure that regulated entities are not subjected to undue burdens as a result of divergent approaches between Competition Authorities and Independent Sector Regulators.

⁹ CMA CONCURRENCY 2019, *supra* note 4, at 76.