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# Competition Policy in Regulated Sectors:
# Focusing on the Institutional Design of the Relationship between Competition Authority and Sectoral Regulators

# 규제산업의 경쟁정책:
# 각 산업의 감독당국과 경쟁당국 간 관계에 대한 제도 설계를 중심으로

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# Division of Power and Interaction between Competition Law Authorities and Sector-Specific Regulators in the Telecommunications Sector

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## 1. INTRODUCTION

This paper explores the relationship between competition law authorities and sector-specific regulators in the telecommunications sector.

Telecommunications markets around the world are in transition from a historical monopoly structure towards a more competitive one. This transition is driven by a belief that a competitive market structure will result in greater benefits for consumers and business users than will a monopoly structure.

Prior to the development of a competitive market, a number of developed countries had a history of independent regulation of the telecommunications market by sector-specific regulators. Others, often characterized by government-owned telecommunications carriers, regulated telecommunications through government departments or non-arms-length regulators. The World Trade Organization's Agreement on Basic Telecommunications Services and the accompanying "WTO Reference Paper" spurred many of these countries to privatize government-owned telecommunications carriers, open markets to competition and establish a system of independent, transparent regulation.

While all countries that have pursued this path are at different stages of development of competitive telecommunications markets, they now face a common dilemma with respect to the appropriate institutional frameworks to govern this new industry structure.

Should the telecommunication sector be relegated to the general laws of competition enforced by anti-trust authorities with economy-wide mandates – or are there attributes of this sector which continue to justify shared jurisdiction between traditional sector-specific regulators and anti-trust authorities? Where are the appropriate boundary lines to be drawn and how should these institutions interact?

Not unexpectedly, different countries are addressing this issue in different ways depending on their own experience with sector-specific regulators, the degree of competition in their domestic marketplace and their socio-political outlook.

The first part of this paper identifies a number of contexts in which competition law issues arise in the telecommunications sector. This discussion is intended to provide an appreciation of the extent of these issues and the degree to which they intersect with other regulatory issues conventionally addressed by sector-specific regulators. The paper also considers the degree to which other social policy objectives conflict with the goals of competition law and how these non-economic policy objectives can be accommodated in a competitively neutral manner.

The paper then examines recent proposals in Canada to reform the relationship between the competition law authority (The Commissioner of Competition) and the sector-specific regulator (the CRTC). It discusses the principles underlying these proposals for reform, as well as the proposed re-division of responsibilities between the two authorities. This discussion takes place against the background of a number of different approaches to this issue being taken in several other developed countries, including Australia, the United Kingdom, Germany and the United States.

In the conclusion, a number of principles are developed that may help to guide policy makers in deciding which model best suits the circumstances present in their own country.

## 2. INTERSECTION OF COMPETITION LAW AND SECTOR-SPECIFIC REGULATION

There are a number of issues where competition law and sector-specific regulation intersect. These include, but are not limited to:

- network interconnection;
- access to essential facilities;
- price regulation;
- abuse of dominance;
- spectrum management; and
- mergers

These are all issues that frequently arise in the context of sector-specific regulation which potentially give rise to the application of competition law principles. This section of the paper discusses the appropriate division of labour between the sector-specific regulator and the competition law authority.

**Network Interconnection**

Interconnection refers to the physical joining of one or more facilities-based networks for the purpose of permitting the exchange of telecommunications traffic between them. In a modern telecommunications environment, interconnection is required for a number of purposes:

- enabling communication between customers of two or more carriers;

- transiting traffic between network termination points; and

- enabling customers of one network to gain access to the services of another carrier.

There are social and economic reasons for facilitating interconnection between carriers. Interconnection increases the social and economic value of the interconnecting networks to users by increasing the number of parties with whom

they can communicate. This capability is so important to some types of telecommunications services that interconnection is often a prerequisite to competitive entry into telecommunications markets and therefore to the development of competitive markets.

Examples of the importance of interconnection arrangements to competitive entry abound. They include local interconnection arrangements between competing wireline carriers and between wireless and wireline carriers, and interconnection with local exchange networks for purposes of originating and terminating competitive long distance or private line services.

A carrier's propensity to enter into interconnection arrangements without regulatory intervention will depend on its own self-interest. In markets where there is no competition, or where competition is in its infancy, an incumbent carrier may be able to block new entry either by denying interconnection outright – or by imposing unreasonable economic or technical terms. On the other hand, where carriers are well established, they may have a mutual interest in concluding interconnection arrangements on ordinary commercial terms.

There are important economic and technical aspects to interconnection arrangements. The pricing of the arrangements, as well as the sophistication of the technical arrangements can have a dramatic impact on the utility and economic viability of the arrangement to a new entrant. Interconnection arrangements can be highly complex requiring the inter-working of not only the physical network – but also the associated signaling, traffic monitoring and "back office" functions.

The details and complexity of these arrangements vary significantly depending on the technical nature of the networks being connected and the type of traffic being exchanged. For this reason, it is common to have different types of arrangements in place for different types of services.

It is also important to observe for the purposes of this discussion that interconnection arrangements change with changes in technology and network costs. An efficient interconnection regime has to be adaptable to both of these variables if it is to serve the objectives of producing significant benefits to users, improving network efficiency and facilitating the development of a competitive telecommunications market.

The degree to which interconnection arrangements can be left to competitive market forces therefore depends to a large extent on the relative bargaining power of the carriers involved. In a perfect world, there would be no need for regulation. However, most countries are at different stages along the continuum from a monopoly to a competitive market structure and, even in those countries that have moved to a more competitive structure, there will always be new services and technologies being developed that either do not fit into the existing interconnection framework – or are a threat to the incumbents' economic well-being. For these reasons, it is unlikely that interconnection arrangements can ever be left entirely to market forces to regulate.

There is no doubt that a refusal to provide interconnection may represent a serious barrier to entry into a telecommunications market. In such circumstances, the determination of whether interconnection should be mandated might well rest on competition law principles. However, the terms and conditions of such arrangements, including the technical parameters, the development of appropriate pricing and the appropriate terms and conditions, require a level of expertise that more often resides within the knowledge base and skill set of the sector-specific regulator.

Even if it is determined to be appropriate to let the parties attempt to negotiate interconnection arrangements in the first instance, unless there is equal bargaining power between the parties, there will likely have to be recourse to some form of regulatory adjudication.

In these circumstances there would appear to be a role for both the application of competition law principles and technical and economic regulation in the realm of interconnection arrangements – even in markets that might be largely deregulated for other purposes such as retail price regulation.

**Access to Essential Facilities**

Some types of network elements and facilities cannot readily be duplicated either technically, or because of lack of comparable economies of scale, or because of scarcity of a required input, or because of other externalities. Examples include:

- telephone numbers
- support structures (poles and ducts)
- local network infrastructure in lower density, higher cost areas

In addition, during the start-up phase of a new entrant, it may not be economically feasible to replicate the incumbent's network footprint to a sufficient degree to enter the market. These types of issues create barriers to new entry and may seriously undermine the development of competitive markets.

Sector-specific regulators have often recognized the need to intervene in telecommunications markets to mandate access to essential facilities at regulated prices in order to facilitate new entry. Recognizing that in many instances, new entrants require access to only a limited number of network components and not the incumbent's whole network, regulators have often ordered the "unbundling" of specific network components and have mandated their provision – often at cost-based rates. The regulator's goal has been to make available to competitors the precise network functionalities they require at an economical price. The degree to which regulators have made such facilities available to new entrants varies widely. Some examples are:

- unbundled local loops
- co-location at central offices
- local transport services
- support structures (poles and ducts)
- various ancillary databases

The scope of mandated essential services made available to competitors, and the price at which they are offered, can have a dramatic impact on lowering the barriers to new entry into telecommunications markets. At the same time, it can have the unintended effect of discouraging investment in new facilities and encouraging uneconomic entry (if the price is too low).

New entrants wishing to make maximum use of their own network resources will prefer to lease from other carriers only the specific network elements they require. Failure to unbundle these elements forces new entrants to purchase more than they need thereby either forcing them to pay more than they can afford – or deterring them from entering the market.

On the other hand, access to too broad a range of wholesale services, at too attractive a price, may disincent new entrants from investing their own capital in competing networks and may breed reliance on a single network for competing services. Since the wholesale price set by the regulator also acts as a price ceiling for what other emerging wholesale carriers can charge for their facilities, the pricing of wholesale services can further dampen new investment by other wholesale carriers.

Excessive reliance on wholesale access also tends to inhibit network-based innovation and price competition. To the degree to which carriers gravitate to the incumbent carrier's network for wholesale services, network innovation tends to be lessened both by a number of competing carriers using the same network

platform and by the incumbent being disincented to invest in innovation network platforms which must be made available to its competitors.

These tensions tend to produce complex regulatory regimes with a high degree of on-going regulatory supervision by sector-specific regulators. They have also resulted in a disparate range of regulatory practices around the world with some countries developing regulatory regimes that rely to a large extent on wholesale access to promote “service-based” competition, and others taking a more minimalist approach designed to encourage facilities-based competition.

Ultimately, the extent of wholesale access that is required depends on the market structure, the demographics of the relevant geographic market and the extent of other barriers to entry. Countries with a combination of high and low density population in different regions may well end up with different regimes in different regions since in lower density, higher cost, areas, the only type of competition that may be feasible may depend on the resale of wholesale services.

It may also be necessary for countries to phase out access to essential services over time as competing network providers begin to attain economies of scale from their own networks and the number of components they cannot economically produce begins to shrink.

In this environment, there may be a need for competition law guidance on what constitutes an “essential service” and there may be an on-going need for regulatory supervision of the prices charged for such services.

However, as indicated above, it may not be appropriate to rely on strict competition law principles to determine the extent of wholesale services that should be made available to new entrants at cost-based rates. In countries where competition is in its infancy, it may be in the public interest to make more services available at wholesale rates to offset the disadvantage that a new

entrant faces in taking a number of years to achieve economies of scale sufficient to compete with the incumbent carriers. In such cases, care should be taken to phase out these arrangements once certain predetermined benchmarks have been achieved.

**Price Regulation**

Regulators in most developed countries have historically engaged in detailed price regulation of incumbent telephone companies that either enjoyed a monopoly in the provision of telecommunications service – or were considered to be dominant in their market. This regulation often involved a requirement to file tariffs for prior regulatory approval, containing the rate charged and the terms of service for telecommunications services. In some cases, it also involved a review of the carrier's investment decisions, approval of an allowed rate of return and a review of all expense and revenue projections.

With the introduction of competition, this type of detailed regulation has given way over time to other less onerous forms of price regulation, such as price cap regimes, or has been replaced by regulation of wholesale services, or by deregulation of particular services in sectors where the incumbent carrier is no longer considered to possess significant market power (SMP).

It is generally recognized that the test for determining whether a carrier's prices should be deregulated is the competition law test of whether the carrier possesses SMP in the relevant geographic and product market. This requires a comprehensive review of the market to define the appropriate geographic and product markets (including substitute services) and to assess whether the carrier in question possess SMP in that market.

This is a very important determination since premature price deregulation may result in the ability of the incumbent carrier to charge excessive prices to

consumers, or selectively target low prices to consumers in areas where competition is emerging on a limited scale. While competition laws may address this problem, in a market where competition is in an early stage of development, a competition law remedy may not be readily available in an appropriate timeframe.

Conversely, if the decision to deregulate prices is made too late, consumers will not benefit fully from the benefits that competition brings in the form of innovative services, more efficient networks, and lower pricing.

While competition law has an obvious role to play in defining the relevant product market and determining whether SMP exists, it also has a role to play in assessing whether there are less onerous forms of regulation that can be used to prevent abuse of an incumbent carrier's market power in advance of deregulation. Such measures could run the gammit from price cap regimes, to review of prices on a complaint driven basis (*ex post*), to regulation of wholesale services and deregulation of retail services, to the splitting of the carrier's vertical operations into wholesale and retail components.

In making all of these types of decisions, competition law analysis could be utilized to the advantage of the regulator.

Other areas of price regulation that would benefit from the application of competition law principles include price discrimination and price de-averaging. Historically, in many developed countries, prohibitions on price discrimination have been included in telecommunications legislation. These provisions have led some regulators to establish detailed regulatory frameworks that require carriers to charge the same rates to customers in comparable markets. In Canada, for example, this type of regime was blamed for limiting the ability of incumbent carriers to respond in a legitimate way to price reductions by their competitors. This created a price umbrella which competitors could use to their

advantage. While these restrictions on retail pricing have now been reduced, they illustrate the point that price regulation can inhibit price competition. On the other hand, if one relies on *ex post* analysis of alleged anti-competitive pricing practices, it is important to put in place dispute resolution processes with sufficient sanctions to address abusive practices on a timely basis.

**Abuse of Dominance**

In many countries there is an overlap in jurisdiction between sector-specific regulators and competition law authorities in addressing abuse of dominance or other anti-competitive conduct. In some countries, such as Canada, the doctrine of inter-jurisdictional immunity or "the regulated conduct defence" removes regulated conduct from the application of the competition law legislation. This can result in such conduct being treated differently depending on which body has jurisdiction.

For example, a complaint about anti-competitive pricing might be dealt with under a non-discrimination provision of sector-specific legislation if the carrier in question was subject to a regime of price regulation – but under the abuse of dominance or other provisions of the competition law legislation, if the service in question were no longer price-regulated.

This can result in the same type of conduct being analyzed in a different manner and can also result in a different suite of remedies being applied to the same type of conduct.

As discussed above, allegations of anti-competitive conduct should involve competition law analysis. As regards appropriate remedies, there may be a need for a wider range of sanctions and remedial powers in the telecommunications sector – given the high degree of interdependence involved in this sector between competing carriers and given the need for timely resolution of disputes.

**Spectrum Management**

Spectrum management is another area where sector-specific regulation and competition law intersect.

Radio spectrum is a scarce resource which has assumed an increasingly important role in the provision of telecommunications services world-wide. It is used for satellite and microwave services, cellular and PCS services, and increasingly for new broadband transmission services used to extend service to rural and remote areas or to provide an alternative form of access to networks as a “last mile” solution.

The increased value of spectrum to telecommunications carriers has been demonstrated time and again in the prices that carriers are willing to pay to acquire it. Due to this increased value, and due to the difficulties inherent in deciding how to allocate spectrum, many countries have turned to auctions as the best means of efficiently allocating radio spectrum and realizing its true economic value.

Nonetheless, not all countries have taken a hands-off approach to auctions. Some jurisdictions have used regulatory measures such as spectrum aggregation limits, auction caps, set-asides and the mandatory provision of roaming services to new entrants as a means of influencing the outcome of spectrum auctions and increasing competition in the wireless market.

Canada, for example, is currently in the process of designing its auction of spectrum in the 1.7 GHz range for advanced mobile wireless (broadband) services. In its public consultation Industry Canada has asked interested parties to comment on the appropriateness of using these kinds of regulatory mechanisms to facilitate new entry.

As in the case of mandated access to other essential facilities, the answer should rest on an analysis of the competitive state of the market and on barriers to entry. Spectrum caps, set-asides and mandated roaming all influence the outcome of spectrum auctions, reduce government revenues and distort competitive markets. They can incent uneconomic entry and can, in some cases, deny carriers access to sufficient spectrum to carry out their business plans. Requiring incumbent carriers to offer automatic roaming to new entrants on national networks can also result in a reliance on those services in the longer term and less incentive for new entrants to construct competing networks. It can also result in protracted regulation if the terms and conditions of mandated roaming services are regulated.

There is therefore an obvious role for competition law analysis in helping to structure spectrum auctions and other regulatory processes that are designed to allocate scarce spectrum to competing carriers.

**Mergers**

Mergers between telecommunications carriers can have a dramatic impact on both the competitiveness of telecommunications markets and on the appropriate regulatory framework.

By way of example, Canada's second largest integrated telephone company, Telus, announced in mid-June of 2007, its intention to bid on the acquisition of Bell Canada, the largest integrated telephone company in Canada. These two companies also operate mobile wireless carriers that rank second and third in size and would, if combined, form by far the largest wireless carrier in the country and shrink the number of national carriers from three to two.

This merger proposal obviously raises significant competition law issues that will turn on whether it will result in a substantial lessening of competition in the

telecommunications markets. However, since competition between these two companies has also formed part of the justification for deregulating the Canadian wireless market and for discontinuing price regulation of a number of wireline services, it also raises the prospect of re-regulation if it is allowed to proceed.

Mergers between telecommunications carriers or other telecommunications service providers can therefore raise both competition law and regulatory concerns.

## 3. INTERSECTION OF COMPETITION LAW AND SOCIAL POLICY

In most developed and developing countries, telecommunications policy and legislation does not simply address issues of economic regulation. Most countries also include social policy objectives in their telecommunications legislation. One such policy objective that appears in the legislation of many countries is the goal of achieving universal access to telecommunications systems across diverse regions and different socio-economic groups. Other social objectives might include access to telecommunications services by persons with disabilities, protection of privacy and access to emergency services.

The pursuit of these types of social policies can potentially conflict with the objective of economic efficiency. It is therefore important that social policies are clearly delineated and are implemented in a manner that distorts competitive markets to the least extent possible. In attempting to achieve this goal, there is a role for competition law in helping to ensure that regulatory measures designed to advance social objectives are implemented in a competitively neutral manner, that they do not dictate competitive outcomes in the market and that they apply in as uniform manner as possible to competing carriers and service providers. The universal service policy provides an excellent example both of the problem and the possibility of devising a competitively neutral outcome.

Universal service policies usually have as their objective the extension of telecommunications services to persons in remote and rural areas or the subsidization of telecommunications services in higher cost service areas in order to make them more affordable. Often, the two go hand-in-hand.

In a system of monopoly provision of telecommunications services, universal service was often dealt with through a system of inexplicit cross-subsidies between urban and rural areas and between services such as overseas rates, that were charged at excessive rates in order to offset the higher costs of providing basic local telephone service in high cost areas.

With the introduction of competition, many countries have tried to address the economic inefficiencies built into this system of inexplicit subsidies, while still maintaining the social policy objective of achieving universal service in a more competitive environment. This has often been a long and painful process for both the regulator and the industry. It has involved a number of steps including:

- clearly identifying the social policy objective;
- identifying high cost areas where a subsidy is warranted to fulfill this objective;
- quantifying the subsidy required by determining the cost of providing service in this area;
- implementing a competitively neutral subsidy program; and
- rationalizing prices of other services that are artificially high due to the prior inclusion of the internal inexplicit subsidy.

As is normally the case, there are a number of different approaches that can be taken to implementing this type of program in a competitively neutral manner. These range from establishing a system of “portable subsidies” that go to the subscriber’s carrier of choice in high cost areas – to allowing carriers to bid on subsidies to serve such areas, with the subsidy going to the bidder proposing the lowest price. Funding for such subsidies can be provided by the Government or by the telecommunications industry – again in a competitively neutral manner.

Given the clear need to ensure that the implementation of social policy objectives distorts competitive markets to the least extent possible, there is a role for competition law authorities in helping to design the appropriate regime.

## 4. CAPTURING RELATIVE EXPERTISE

As can be discerned from the foregoing discussion, as telecommunications markets evolve from a framework that seeks to protect users from monopoly pricing, to one that relies to an increasing degree on competitive market forces to carry out that function, competition law principles assume a greater role both in determining when regulatory mechanisms are required, and how they are implemented.

In this environment, the obvious question is what body is best suited and best equipped to address these issues and how will the institutional framework ensure that the appropriate body is involved in the decision-making process?

The answer to these questions might be easier if all segments of the telecommunications market were at a similar stage of competitive development – but this is rarely the case. In many countries, competitive market forces are more robust in urban than in rural areas and in certain sectors of the market, such as mobile wireless services, than in others such as basic wireline services. In these circumstances there is unlikely to be a wholesale abandonment of

sector-specific regulation in favour of competition laws of general application. A hybrid model involving a combination of the two is still a likely outcome.

It is even more difficult to apply one model to all countries as each country is at a different stage in the development of competitive telecommunications markets and will therefore require on-going sector-specific regulation for differing periods of time.

Furthermore, even when markets become sufficiently competitive to deregulate retail prices, there will be a continuing role for sector-specific regulation or oversight in such matters as interconnection arrangements, access to and pricing of essential services, social policies and spectrum management.

In considering how to structure the jurisdictional and institutional framework that best satisfies these requirements it is useful to catalog the relative expertise of the sector-specific regulator and the competition law authority before making any decision on how they should interact.

Again, this assessment may vary from country to country depending on the perceived competency of the sector-specific regulator in addressing competition law issues and analyzing market structures and the degree to which the regulator is seen to be the victim of "regulatory capture" or institutional attitudes that will not readily be adapted to the need for deregulation or lighter forms of regulation of the telecommunications market.

In its March 2006 Final Report, the Canadian Telecommunications Policy Review Panel (TPRP)[1] identified the following attributes that it believed should reside within the government authority that deals with competition issues in the telecommunications sector:

[1] The TPRP was an independent panel of experts commissioned by the Canadian Government to review Canada's telecommunications laws and policies and to recommend reforms that would meet Canada's needs in the telecommunications and IT sectors in the coming years.

- strong sector-specific knowledge, including technical knowledge of the telecommunications industry
- strong background in economic analysis and competition law principles
- quasi-judicial structure
- expertise in conducting public hearings, including expedited proceedings
- ability to impose a wide range of behavioural remedies
- ability to monitor or supervise behavioural remedies
- ability to impose fines or order divestiture.[2]

While there may be some countries where it is easy to point to the agency that satisfies all of these requirements, this is not the case in most countries. In most countries, there is a split in relative expertise between the competition law authority and the sector specific regulator.

In the Canadian context, for example, the TPRP concluded that there was an institutional bias within the sector-specific regulator, the CRTC, which prevented it from applying competition law principles in a rigorous manner and which would not be cured by simply amending the telecommunications legislation:

> The CRTC clearly has a high degree of sector-specific knowledge and is well-equipped as a quasi-judicial tribunal to conduct proceedings as well as impose and monitor behavioural remedies. However, there is a fairly strongly held view in the industry that the CRTC does not rigorously apply competition law principles in adjudicating complaints of anti-competitive conduct. The CRTC's long history of economic regulation based on the jurisprudence of public utility and common carrier regulation makes it hard for the CRTC to make the shift away from a presumption of regulation to an approach more oriented toward competition law.

[2] TPRP Final Report, at page 4-12.

> This regulatory tradition in many ways defines the CRTC's current approach to issues of competitive safeguards and abuse of dominance. It has led to an environment in which the CRTC has adopted competition law tests for defining markets and assessing market power in forbearance proceedings, but has pursued a public policy approach to competition issues in other contexts. Its approach has been to engage in a "balancing of interests," rather than an economic analysis of market power. This results in a tendency to micro-manage competitive market behaviour in order to influence competitive outcomes, rather than to seek less intrusive remedies. This has led to uncertainty in results and a lack of rigour in economic analysis. In the Panel's view, this approach to regulation is unlikely to change by simply amending the governing legislation. This problem is exacerbated by the fact that the CRTC lacks the depth of expertise resident in the Competition Bureau to apply competition law principles in a rigorous manner to issues of market definition and assessment of SMP.[3]

At the same time, the TPRP was not convinced that the Competition Bureau satisfied all of its criteria either:

> …while the Competition Bureau has a higher level of expertise in defining markets and assessing market power than does the CRTC, the Panel is not satisfied that the *Competition Act* provides an appropriate framework for the resolution of competitive disputes in the telecommunications sector where SMP still exists or where markets are in transition from SMP. Nor does it provide an appropriate framework in situations where the development, ongoing monitoring and supervision of sector-specific competitive safeguards may be required. As a body with responsibility for administering Canada's competition laws in all sectors of the Canadian economy, the Competition Bureau clearly lacks the degree of sector-specific knowledge possessed by the CRTC.
>
> In addition, the Competition Bureau is constituted as an enforcement agency rather than as a quasi-judicial body. Its process does not allow for the timely resolution of disputes that routinely arise in the dynamic and rapidly changing telecommunications sector. The *Competition Act* has constituted the Competition Bureau as an investigative body that investigates and reviews complaints of anti-competitive conduct. It then decides whether there is sufficient evidence to pursue either civil or criminal proceedings before the Competition Tribunal or the courts. This two-stage process involves significant time lags, sometimes measured in years, between the lodging of complaints and the resolution of issues. This lengthy process is not well suited to an environment in which competitive disputes arise on a fairly frequent basis and require prompt resolution. In

[3] TPRP Final Report, page 4-13.

> addition, the Competition Tribunal does not view itself as a regulator that monitors behavioural remedies on an ongoing basis.[4]

This analysis of the situation in Canada led the TPRP to recommend the creation of a new hybrid tribunal to address competition issues in the telecommunications industry until the transition to a more competitive market structure is completed.

The new Telecommunications Competition Tribunal (TCT) envisaged in the TPRP's Final Report would be comprised of the Commissioner of Competition, the Vice Chair, Telecommunications, of the CRTC and a third member appointed by the Government.

It would be constituted as an independent *quasi-judicial* regulatory authority with all of the powers made available to the CRTC under the *Telecommunications Act* and to the Competition Tribunal under the civil provisions of the *Competition Act*. It would have access to staff of both the sector-specific regulator and the competition law authority and these two agencies would be required to share information with the TCT.

Under this proposal, the new TCT would have exclusive jurisdiction to determine the following matters:

- define telecommunications markets and assess whether significant market power exists in accordance with competition law principles;

- decide applications for deregulation of services in telecommunications markets on the basis that significant market power does not exist;

[4] Ibid., page 4-14.

- adjudicate complaints of anti-competitive conduct in all telecommunications markets, other than the terminal equipment market;

- determine which services should be subject to mandated wholesale access and establish the regulatory regime applicable to such services;

- decide applications for re-regulation of services in telecommunications markets where significant market power is alleged to exist; and

- review mergers involving telecommunications service providers and carriers.

The division of responsibility proposed by the TPRP as between the TCT, the Competition Bureau and the CRTC is depicted below:

**Table 4-2. Division of Jurisdictions[5]**

| **Issue** | **TCT** | **Competition Bureau** | **CRTC** |
|---|---|---|---|
| Deregulation of services where no SMP | X | | |
| Re-regulation of services where SMP exists | X | | |
| Definition of wholesale access services and delineation of applicable regime | X | | |
| Review of allegations of anti-competitive conduct (civil) where SMP is alleged to exist | X | | |
| Mergers | X | | |
| Anti-competitive conduct (criminal) | | X | |
| Misleading advertising | | X | |
| Competition in terminal equipment markets | | X | |
| Technical regulation | | | X |
| Spectrum management and licensing | | | X |
| Social regulation | | | X |
| Regulation of service providers with SMP | | | X |

[5] Ibid, page 4-28.

Despite the apparent clean lines of this chart, the TPRP acknowledged that its proposal would require other mechanisms to be put in place, similar to the UK's "Concurrency Regulations", to resolve borderline jurisdictional issues between the agencies – while giving the TCT exclusive jurisdiction over civil allegations of anti-competitive conduct in the telecommunications sector. The TPRP proposed a system of referrals whereby the CRTC and the Competition Bureau would have to refer these issues to the TCT, and whereby the TCT would have to refer issues of technical, social or rate regulation to the CRTC. As is the case under the current Australia model, this could, for example, result in the TCT ordering measures such as local number portability to be implemented by the CRTC and the CRTC in turn addressing the technical implementation of the local number portability system and monitoring its performance.

While certain aspects of the TPRP's Final Report have already been implemented by the Canadian Government through subordinate legislation, there has yet to be any new legislation proposed to establish the TCT, and there has not been any indication on the part of the Government that it agrees with the proposal. Politically, it may be difficult to justify the creation of a third agency in an era of deregulation and cost-cutting. Nonetheless, this proposal provides an interesting example of how competition issues could be addressed in the telecommunications sector.

## 5. EXPERIENCE IN OTHER DEVELOPED COUNTRIES

It is beyond the scope of this paper to canvass all of the ways that other countries address the appropriate division of labour between competition law authorities and sector-specific telecommunications regulators and the institutional arrangements required to give effect to these divisions of responsibility. Suffice it to say that this is a topical issue in a number of countries and that law-makers are addressing it in a number of different ways. The experience of Australia, the United Kingdom, Germany, the United States and Canada was canvassed in a

2005 report prepared for the Canadian Competition Bureau.[6] That study revealed that even among those developed countries, all of which have well-developed telecommunications infrastructure and a significant experience with the introduction of competition, very diverse approaches have been taken to address competition issues in the telecommunications sector. A summary of some of the salient features of those approaches is provided below.

**Australia**

In 1997, the Commonwealth Government of Australia undertook an extensive restructuring of its anti-trust and telecommunications legislation. This restructuring resulted in the redistribution of economic regulatory functions, previously exercised by an industry-specific regulator (AUSTEL), to the Australian Competition and Consumer Commission (ACCC), which also has responsibility for anti-trust regulation and consumer protection. At the same time, AUSTEL's responsibility for "technical regulation" was transferred to a new agency which has since been renamed the Australian Communications and Media Authority (ACMA). This restructuring of jurisdiction over telecommunications regulation was mirrored in several other sectors, including the transportation and energy sectors.

The restructuring of Australia's telecommunications regulatory institutions was driven by a number of factors, including a desire to deliver consistency in regulation across different sectors of the economy; to produce administrative savings by pooling skills and providing predictability in regulation across sectors; to lessen the risk of "regulatory capture" of a sector-specific regulator that maintains close contact with the entities it regulates; and to inject a more "pro-competitive culture" into the regulatory process.[7]

[6] Laurence J.E. Dunbar and Leslie J. Milton - *Comparative Study On Interaction Between Competition Law Authorities and Telecommunications Regulations*, August 12, 2005.
[7] Independent Committee of Inquiry, National Competition Policy, August 1999, chapter 14.

While the restructuring process resulted in the economic regulation of the telecommunications sector and general anti-trust regulation being brought together under the unified jurisdiction of the ACCC, it did not result in the elimination of economic regulation or a holistic approach to economic regulation. Rather, the approach taken was to add to the primary statute governing anti-trust regulation (the *Trade Practices Act*), two new telecommunications-specific regimes dealing with anti-competitive conduct (Part XIB) and regulated access to carriage services (Part XIC).[8]

While the other anti-trust provisions of the *Trade Practices Act* continue to apply to the telecommunications sector, in practice, the industry-specific provisions in Parts XIB and XIC of the Act are applied in respect of issues affecting anti-competitive conduct or access to facilities or services in the telecommunications sector and price regulation, to the extent to which it is required, is performed under Part XIB, rather than under Part IIIA, which contains more generic powers to subject other designated industry sectors to price regulation.

The ACMA's jurisdiction over "technical" matters is fairly broad. It includes the licensing of carriers, the licensing of radio spectrum, the creation of standards, the creation of numbering plans, and some areas of consumer protection. Despite this split in functions, there are still some areas of overlapping jurisdiction between the ACCC and the ACMA. These arise in respect of terms and conditions of interconnection and inter-operability, numbering plans, number portability, standards and consumer protection issues. For example, in the consumer protection area, the ACCC focuses on misleading advertising and fraudulent conduct, while the ACMA concentrates on more detailed telecom-specific consumer issues such as notice of rate changes, billing issues and proper disclosure of contractual terms. Technical regulation by the ACMA is

[8] Part X of the *Trade Practices Act* contains an industry-specific regime for international liner cargo, while other sectors of the economy can be subjected to economic regulation by the ACCC under Part IIIA of the Act, or pursuant to other industry-specific legislation.

carried out primarily pursuant to the *Telecommunications Act* and the *Radiocommunication Act*.[9]

Having split jurisdiction over telecommunications regulation between the ACCC and the ACMA, the Australian legislation has established a number of mechanisms to address possible overlaps in jurisdiction. These include:

- mandatory consultations;
- powers of direction;
- overlapping commissioners; and
- provisions for sharing information.

Generally speaking, these mechanisms are designed to ensure that the ACCC provides input or direction on all issues that could affect competition in the telecommunications market, and conversely, that the ACMA has the opportunity to provide input on issues before the ACCC that have a technical element. However, in practice, the cooperation and interaction between the ACCC and ACMA goes beyond the statutory provisions, to include the appointment of the chairperson of the ACMA as an associate member of the ACCC and the appointment of a member of the ACCC as an associate member of the ACMA. This mechanism provides the opportunity for on-going consultation between the agencies and participation in the decision-making process. It also provides an informal mechanism for the sharing of information.

The treatment of carrier pre-selection rules provides a good example of how the mandatory consultation process is intended to work. While the ACCC can establish telecommunications access codes which might entail carrier pre-selection requirements, the ACMA has primary jurisdiction over the technical implementation of carrier pre-selection. The ACCC must consult with the ACMA

[9] Other statutes also apply.

before establishing an access code, and the ACMA must consult with the ACCC before deciding on the technical parameters of the pre-selection process.

While the legislation identifies a number of specific areas for consultation, the scope of consultation between the ACCC and the ACMA is significantly broader in practice, in part due to the overlap in commissioners.

**European Union**

Articles 81 and 82 form the basis of EU anti-trust law and, in accordance with the *EC Treaty*, apply to each Member State.

The goals of the EU in the telecommunications sector have been to stimulate a dynamic, competitive market for communications services, to consolidate the internal market in a converged environment, to restrict regulation to the necessary minimum and to aim at technological neutrality and accommodation of converging markets.[10]

In the past few years, the EU has extensively reformed both its administration of anti-trust law and its framework for regulation of telecommunications services.

In 1997, the European Parliament adopted *Directive 97/13/EC* which was intended to create a framework for general authorizations and individual licences in the field of telecommunications services. Key elements of this *Directive* included the prohibition of any limitation on the number of new entrants (except to the extent required to ensure an efficient use of radio spectrum), priority to be given to general authorizations as opposed to individual licences, and the adoption of harmonized licensing principles, including an exhaustive list of permitted licensing conditions.

[10] 1999 Review of the regulatory framework for telecommunications services.

In its 1999 review of the way in which the *Directive* had been implemented by Member States, the EU Commission found that there still was no harmonized approach to authorizing market entry for communications service providers – but rather a patchwork of fifteen national regimes which were widely divergent in their basic approach and licensing requirements.[11] It found that markets were still fragmented along traditional national borders which also impeded the development of pan-European services.[12]

These findings led the European Parliament and Council to introduce a new directive governing the telecommunications regulatory regime on July 25, 2003. This directive, which is known as the *Framework Directive*, is aimed at harmonizing regulation across Europe, reducing entry barriers in national markets and fostering the development of effective competition both within domestic markets and across borders within the European Community. A major thrust of the *Framework Directive* is to reduce sector-specific regulation to instances where it is warranted due to the presence of "significant market power" (SMP) in relevant markets. Where sector-specific regulation is not justified on this basis, generally applicable national and EU competition (anti-trust) laws are to be applied.[13]

National Regulatory Authorities (NRAs) are required to define markets and determine whether SMP exists in each of the defined markets, based on competition law principles. Even where a NRA finds SMP to exist in a market segment defined by the European Commission, that fact alone does not necessarily justify sector-specific regulation. The NRA must go a step further

[11] European Commission, Fifth Report on the Implementation of the Telecommunications Regulatory Package, COM (1999) 537, 10.11. 1999.
[12] Ibid, para. 2.
[13] European Commission, Directorate-General Information Society, DG Information Society Working Document: access to, and interconnection of, electronic communications networks and associated facilities (27April 2000) page 2.

and determine that competition law alone would not adequately address the market failure in question.[14]

As required by the *Framework Directive*, the EC issued a recommendation identifying some eighteen retail and wholesale relevant product and service markets that it considered to be susceptible to *ex ante* regulation.[15] The EC also issued guidelines setting out the principles to be employed by NRAs in defining relevant markets and assessing market power in these markets.[16]

While the *Framework Directive* does not preclude NRAs from defining additional market segments that may be subject to sector-specific regulation, NRAs must employ competition principles developed by the EC to define the market and their methodology must be consistent with EC Guidelines on market analysis and the assessment of SMP. Notification of such determinations to the EC is also required.[17] If the EC determines that a proposed decision by an NRA on market definition or SMP would create a barrier to a single EU market or has serious concerns about the compatibility of the decision with EC law, it may issue a decision requiring the NRA to withdraw the proposed decision.

It is important to note that there are other EU directives that also apply to the telecommunications sector. As in other jurisdictions, there are social policy obligations established by Special Directives that apply independently of any assessment of market power. For example, the Universal Service Directive establishes general obligations of Member States in respect of universal service, access by the disabled, access to directories, and access to pay telephone

[14] Ibid, para. 9.
[15] Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and Council on a common regulatory framework for electronic communications networks and service, 2003/311/EC, OJ L 114/45.
[16] Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic networks and services, 2002/C 165/03, OJ C 165/6 (11.7.2002).
[17] Ibid, para. 19.

service. Undertakings that have been designated by Member States to satisfy these obligations may be regulated to ensure fulfillment of the obligations, notwithstanding the absence of SMP. All public network operators are also subject to an obligation to negotiate interconnection arrangements in accordance with requirements imposed by an NRA.

The *Framework Directive* and the *Modernisation Regulation* have had extensive implications on NCAs and NRAs in each of the Member States. Amendments to domestic legislation have been required in order to give effect to these reforms and Member States have had to rethink the traditional split in jurisdiction between their sector-specific telecommunications regulator and their general competition law regulator. Among the issues raised by the *Framework Directive* is which of these regulators is going to make determinations respecting market definition and the presence or absence of SMP, and which is going to decide on the adequacy of generally applicable competition law to address the presence of SMP in a specific market. The *Modernisation Regulation* also raised new issues for domestic regulators including the question of how to apply EU competition law in the context of proceedings before a sector-specific regulator. The individual Member States have been directed to resolve these issues and, as discussed further below, have chosen a number of different approaches. Member States have had to modify the relationship between their sector-specific telecommunications regulator and their competition law regulator, and in some cases, put in place new measures for interaction and cooperation between those authorities.

**United Kingdom**

The UK's approach to implementation of the EU Directives is believed to be unique in Europe. Rather than maintain the traditional split in jurisdiction between the national competition authority, the Office of Fair Trading (OFT), and the national communications regulator, the Office of Communications (Ofcom),

and coordinate the relationship between the two regulators with respect to the enforcement of EU anti-trust law and communications policy, the UK's approach has been to confer on Ofcom concurrent powers to administer anti-trust laws with respect to the communications sector. This extends not only to the enforcement of Articles 81 and 82 of the *EC Treaty* and implementation of the Communications Directives – but also to the enforcement of domestic anti-trust law embodied in the *Competition Act 1998*. It does not however extend to mergers or criminal behaviour under the *Enterprise Act, 2002*.

The UK's approach to the jurisdictional issues raised by the EU's reforms is intended to foster consistency in regulation, to provide regulated entities with access to a single regulator ("one-step shopping") and to avoid double jeopardy under UK and EU law.[18] This approach has not only been applied to the communications sector (telecommunications and broadcasting), but also to five other sector-specific regulators.[19]

The division of responsibilities between OFT and Ofcom is governed by the *Competition Act 1998 (Concurrency) Regulations 2004*.[20]

The *Concurrency Regulations* govern the relationship between OFT and the six sectoral regulators, including Ofcom. These regulations are supplemented by Guidelines published by OFT (the *Concurrency Guidelines*). The relationship between OFT and Ofcom specifically is further refined in a letter dated December 18, 2003 from OFT setting out the *OFT/Ofcom Concurrency Arrangements* (the *Concurrency Letter*).

[18] White Paper, Our Competition Future: Building the Knowledge Driven Economy, Department of Trade and Industry, 1998.
[19] The Office of Communications (OFCOM), the Gas and Electricity Markets Authority (OFGEM), the Northern Ireland Authority for Energy Regulation (OFREG NI), the Director General of Water Services (OFWAT), the Office of Rail Regulation (ORR), and the Civil Aviation Authority (CAA).
[20] SI 2000/260.

The terms of the *Concurrency Regulations* were intentionally drafted in broad terms in order to avoid legal disputes over which authority has jurisdiction in a particular case. Ofcom has been conferred with the power under section 371 of the *Competition Act 2003* to enforce the provisions of the *Competition Act 1998* against parties to anti-competitive agreements (including decisions or concerted practices) or that are engaged in abuse of a dominant position, in relation to "activities connected with communications matters." The *Concurrency Regulations* anticipate that agreements or conduct relating to communications matters will be dealt with by Ofcom. These matters include:

a) the provision of electronic communications networks;

b) the provision of electronic communications services;

c) the provision of associated services and facilities;

d) associated apparatus; and

e) broadcasting and related matters.[21]

The *Concurrency Letter* generally equates categories (a) to (d) to the general category of "telecommunications" matters including competition issues relating to the allocation, use or trading of spectrum.

In cases where concurrent jurisdiction exists, the "working assumption" is generally that the competent sectoral regulator (Ofcom) is better placed than OFT to investigate anti-competitive agreements or conduct relating to its sector.[22]

However, there may be factors in a particular complaint which point to OFT exercising jurisdiction notwithstanding the fact that the subject matter is telecommunications or broadcasting.

> The Concurrency Guidelines suggest that, when establishing which of the OFT or the relevant regulators is best placed, one needs to consider

[21] *Communications Act 2003*, section 369(1).
[22] Concurrency Letter, s. 1.2.

> factors such as the sectoral knowledge of the regulator, whether the case affects more than one regulated sector, the extent of previous contacts with the parties or complainant and recent experience of dealing with the same undertakings or similar issues.
>
> On this basis, factors which may point towards Ofcom undertaking an investigation include: the desirability to ensure consistency of regulation within the ambit of Ofcom's regulatory responsibilities; the fact that Ofcom may in some circumstances be in a better position to appreciate the relationship between CA98 cases and regulation within its sector; and the specialist experience, and knowledge, of Ofcom staff of the communications sector. Factors indicating that the OFT may be better placed to undertake an investigation may include whether the conduct involves potentially criminal, covert, hard core cartel activity or has effects on competition beyond the sectors covered by Ofcom.[23]

The *Concurrency Regulations* are designed to ensure that only one competent authority launches an investigation under the *Competition Act 1998* involving the same conduct. This is achieved by Regulation 5, which requires any authority proposing to open such an investigation to inform other authorities that may also have concurrent jurisdiction of its intention to do so and to obtain their agreement to this exercise of jurisdiction. By virtue of Regulation 7, formal investigative powers cannot be exercised until such agreement is reached.

Once it is determined pursuant to the *Concurrency Regulations* that either OFT or Ofcom is going to assert jurisdiction over a complaint, that Authority has carriage of the investigation and adjudication of the matter and the other Authority is not involved, except to the very limited extent discussed below. The only exception to this complete jurisdiction is in circumstances that give rise to both civil and criminal sanctions. In those instances, it is possible that the two Authorities could exercise jurisdiction independently applying different provisions of the legislation.

The UK legislation also contains a number of mechanisms for sharing information between OFT and Ofcom.

[23] Concurrency Letter, s. 1.2.

For example, OFT and Ofcom are required to share relevant information relating to a complaint in the context of their consultation to determine which Authority is going to act when there is concurrent jurisdiction.

The *Concurrency Working Party* (*CWP*) provides another forum for sharing information on a broader basis.

The *CWP* was formed in 1997. Membership consists of representatives of the OFT, Ofcom and the other five sectoral regulators. It is chaired by the OFT's representative. The aims of the *CWP* are:

- to facilitate, to the greatest extent possible, a consistent approach by the Regulators and the OFT in the exercise of their functions and powers under the Act (including their functions and powers in relation to the application of Article 81 and Article 82),
- to consider the practical working arrangements between them,
- to provide a vehicle for the discussion of matters of common interest, and the sharing of information where appropriate and where legally permitted, and
- to co-ordinate the provision of advice and information on the application of Article 81, Article 82, and the Chapter I prohibition and the Chapter II prohibition to the public.[24]

Article 12 of the *EU Modernisation Regulation* also gives the European Commission and designated NCAs (which include OFT and Ofcom) the power to provide one another with, and use in evidence, any matter of fact or law, including confidential information, for the purposes of applying Articles 81 and 82 (and for the purposes of applying national competition law where national competition law is applied in the same case and in parallel with EC competition law and does not lead to a different outcome). This general right to share information in these circumstances is subject to a number of safeguards.[25]

**Germany**

[24] Competition law terms of reference for the concurrency working party, section 3.
[25] Council Regulation (EC) No. 1/2003, December 16, 2002, Article 12.3.

Germany, like the UK, has also amended its *Telecommunications Act* to address the EU *Communications Directives.* However, the changes in Germany have been relatively minor, as German law already required the telecommunications regulator – the Regulatory Authority for Telecommunications and Posts (RegTP) – to define markets and assess market power in accordance with German competition law.

The RegTP has authority under the German *Telecommunications Act* over technical telecommunications matters[26] such as frequency assignments, numbering and universal service. The RegTP also has authority to regulate rates for telecommunications services and address abusive practices by telecommunications carriers. In these latter two areas, in accordance with the EC *Framework Directive*, RegTP can only regulate where telecommunications markets have been defined and the carrier has been found to be dominant in the market in a manner that is consistent with EC market definitions and market power assessment.[27]

The RegTP has no authority with respect to mergers.[28]

The competition authority in Germany is the Federal Cartel Office (FCO).[29] The FCO has authority over cartels, abusive practices and mergers under the German *Act Against Restraints of Competition*. In addition, the FCO has authority to enforce Articles 81 and 82 of the *E.C. Treaty*. These provisions can

[26] The RegTP has authority over all signal transport issues, including cable distribution of broadcasting signals. Regulation of broadcasting content falls within state jurisdiction under the German constitution and is regulated by state media authorities. The RegTP assigns radio frequencies to state media authorities who then assign the frequencies to broadcasters and address content issues. The states have no jurisdiction over telecommunications.
[27] Decisions by the RegTP involving market definition and market power must be notified to the EC and are subject to veto by the EC if it does not agree with the RegTP analysis and conclusions.
[28] If a merger involves the transfer of spectrum licences, the RegTP would need to approve the transfer. Our contact at RegTP stated that if the transfer gave rise to competitive issues, she did not expect that RegTP would differ from the FCO and, in fact, this has never occurred.
[29] Seven to eight non-dedicated case officers at the FCO work on telecommunications matters.

also be enforced by the EC where the restraints of trade affect trade between member states.[30]

It follows that the RegTP and FCO have overlapping jurisdiction with respect to abusive practices in the telecommunications sector.

Legislative requirements for cooperation between the RegTP and FCO are set out in section 123(1) of the *Telecommunications Act*.[31] This provision requires the RegTP to obtain the agreement of the FCO on decisions concerning the definition of telecommunications markets, the assessment of market power, and principles of frequency allocation that are intended to address competitive distortions.

There are no formal procedures governing the contact between the RegTP and FCO in these proceedings. In practice, however, contact and discussion between the RegTP and FCO usually begins very early on. Information requests to the parties are normally reviewed by the FCO prior to being sent out and comments by the FCO are generally accepted by the RegTP. There is ongoing contact and discussion throughout the process between the RegTP and the FCO. The FCO will provide an oral opinion setting out its views on the issues and, in some cases, will provide written comments on the issues to the RegTP. Early drafts of the RegTP's decision are frequently sent on an informal basis to the FCO for comment. The final draft of the decision is sent to the FCO for its formal consent. This close cooperation throughout the process minimizes the potential for disagreement between the RegTP and FCO.

[30] Each German state also has a competition authority that has jurisdiction to address abusive practices that occur solely within the state. State competition authorities have no jurisdiction in respect of mergers.

[31] Section 123(2) also provides that the RegTP shall work together with state media authorities and, at their request, inform state media authorities of findings required for the discharge of their functions.

No legislative mechanism has been established to address a deadlock between the RegTP and the FCO should the parties be unable to agree on a matter that requires FCO consent.

Section 123(1) of the *Telecommunications Act* also establishes a right of the FCO and RegTP to comment in certain proceedings conducted by the other agency:

> … Where the Regulatory Authority takes decisions in accordance with Part 2, Chapters 2 to 5 [access issues, rate regulation, control of anti-competitive practices and certain other obligations of telecommunications carriers], it shall give the Federal Cartel Office the opportunity to state its views in good time before closure of the case. Where the Federal Cartel Office opens cases in the telecommunications sector under sections 19 and 20(1) and (2) of the Competition Act, Article 82 of the EC Treaty or section 40(2) of the Competition Act [abuse proceedings and Phase II merger proceedings], it shall give the Regulatory Authority the opportunity to state its views in good time before the closure of the case. …

Both the FCO and RegTP have exercised their right to comment. Often in these proceedings the decision-making body will provide a draft of the decision to the other body for comment. The FCO comments in many more RegTP proceedings than vice versa. As a matter of practice, when the RegTP opens a proceeding, it sends a notice and copy of the file to the FCO. If the FCO has an interest in the proceeding it will contact the RegTP and meetings between the agencies are arranged as required.

Our contacts at both agencies considered that the right to comment was useful but much less important than the consensus requirement.[32]

Finally, section 123(1) of the *Telecommunications Act* requires the RegTP and FCO to exchange observations and findings that may be significant to the discharge of their respective functions:

[32] Tight timelines for RegTP decisions in some proceedings have, in the FCO's view, limited the ability of the FCO to comment effectively.

> 123(1) … Both authorities shall seek to achieve a uniform interpretation of this Act and one which is consistent with the Competition Act. They are to inform each other of all observations and findings which may be significant to the discharge of their respective functions.

There are no formal procedures governing the exchange of general information between the RegTP and FCO. These exchanges take place informally and at various levels of management of the organizations.

While both the RegTP and FCO have jurisdiction to address abusive practices in the telecommunications sector, the agencies have not engaged in parallel investigations. As a matter of practice, the FCO does not open an investigation into a matter that falls within RegTP jurisdiction unless the RegTP refuses to investigate the matter.[33] Therefore, if a complaint of abuse in the telecommunications sector is filed with the FCO, the matter is referred to the RegTP for investigation. Similarly, if the RegTP receives information on a competition matter that falls outside its jurisdiction, it refers the matter to the FCO. Where jurisdiction is not clear, the RegTP and FCO meet to determine who should take the lead on a matter.

Both the FCO and the RegTP have full access to all information filed with the other authority. Section 123 of the *Telecommunications Act* has been considered to be the basis for permitting full information sharing between the RegTP and FCO. Amendments to the *Act Against Restraints of Competition* are also being considered that would specifically permit information-sharing between the FCO and RegTP.

**The United States**

The United States has had a long history of conferring anti-trust enforcement powers on both its telecommunications sector regulator (The FCC) and on its

[33] The issue of jurisdiction of the FCO to initiate proceedings in respect of matters that can be addressed by the RegTP under the *Telecommunications Act* is an open legal issue.

anti-trust authorities, the Anti-Trust Division of the Department of Justice (USDOJ) and the Federal trade Commission (FTC). This is a fairly complex system with significant overlap in jurisdiction between the various enforcement agencies.

The FCC has jurisdiction pursuant to the *Communications Act* of 1934 and the *Telecommunications Act* of 1996 to engage in sector specific regulation, but it also has jurisdiction to enforce the *Clayton Act* anti-trust provisions, including the merger provisions of that Act.

Although there appears to be a great deal of overlap between the jurisdiction of the USDOJ and the FTC, in practice, the two agencies do not usually engage in parallel or duplicate investigations. Coordination in overlapping jurisdiction is achieved through a clearance procedure under which matters are allocated to one agency or the other prior to initiation of an investigation. In March of 2002, the USDOJ and the FTC entered into a revised memorandum of understanding which clarified and streamlined the clearance process by allocating primary responsibility for industry sectors to the USDOJ and FTC respectively. Primary responsibility for the media and entertainment (including cable services, satellite services, television and radio broadcasting) and telecommunications services and equipment industries (including set-top boxes, cable plant and related infrastructure, satellite data and programming, communications infrastructure, and telecommunications equipment) has been allocated to the USDOJ.[34] In a press release announcing the Agreement, the FTC and USDOJ indicated that the allocation of primary responsibility for antitrust enforcement in the media and

[34] Memorandum of Agreement between the Federal Trade Commission and the Anti-Trust Division of the United States Department of Justice concerning Clearance Procedures for Investigations, March 5, 2002. Prior to this Agreement, cases were allocated on the basis of relevant expertise. The relevant expertise test is retained in the March 2002 agreement for matters that do not fall within one of the sectoral allocations. Relevant expertise is to be determined by reference to expertise in the product that has been gained through a substantial antitrust investigation of the product within the last seven years.

entertainment industries to the USDOJ reflects the superior expertise of the USDOJ in these sectors.[35]

Under the Agreement, the FTC and USDOJ have agreed to maintain a common database to track clearance matters.

The USDOJ Antitrust Division Manual further provides that neither the USDOJ nor the FTC may begin an investigation (i.e. exercise its information-gathering powers) until clearance is granted. Also, where a merger has been notified pursuant to the requirements of the *Hart-Scott-Rodino Act*, no contact with the parties can be initiated prior to clearance.

The clearance procedures mean that overlapping jurisdiction in the communications sector is largely confined, in practical terms, to overlap between USDOJ and FCC investigations or proceedings.

With the exception of the legislative requirements established by section 271 of the *Communications Act of 1934*, the processes for interaction and cooperation between the FCC and the USDOJ are informal.

Section 271 of the *Communications Act of 1934* established the regulatory conditions for granting RBOCs permission to provide interlata services in their home markets. This is a matter that clearly turns on resolution of competitive concerns. The FCC is required by section 271 of the *Communications Act of 1934* to consult with the USDOJ and accord "substantial weight" to the USDOJ's analysis before finding that an RBOC's local markets are open to competition such that the RBOC should be permitted to enter the long distance market. Section 271 is now essentially of historical significance as all of the RBOCs have now been granted approval to provide long distance services under the section.

[35] The USDOJ has approximately 30 lawyers and 3-6 economists that are dedicated to telecommunications matters. No staff at the USDOJ are dedicated to broadcasting matters.

The USDOJ filed comments in respect of all section 271 applications. The USDOJ described the "substantial weight" threshold as meaning that the USDOJ's position was not conclusive but that the FCC had to consider the USDOJ views and, if it rejected those views, explain the basis for the rejection in its decision.

Apart from its special rights under section 271, the USDOJ has the right to file comments in any FCC proceeding. While the USDOJ has in some cases filed formal comments, it is more common for the USDOJ to provide its views to the FCC through informal discussions.

As noted above, both the FCC and USDOJ investigate mergers of communications entities. There are no formal consultation requirements. Typically, however, the FCC and USDOJ make contact early in the investigations at the staff level and discuss issues of mutual interest.

In practice, the USDOJ generally releases its competitive analysis of a merger prior to the FCC.[36] The FCC has the benefit of the USDOJ's analysis and decision in its deliberations and typically avoids inconsistent assessment of markets and market power.[37] Also, if the USDOJ imposes conditions on a merger (through a consent decree), the application before the FCC will need to be modified to reflect the USDOJ terms. The FCC would act on the modified application and, if necessary, impose additional conditions on its approval.

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[36] An aberration is the Echostar/DirectTV merger where the FCC decision was released prior to a USDOJ decision. FCC officials indicated that this was partly due to a coordinated effort to allow the FCC to issue a decision denying a merger.

[37] Apparently in the 1990s there were some inconsistent rulings by the USDOJ and FCC; the FCC has sought to avoid a recurrence of this. Commentators have also suggested that the USDOJ and the FCC appeared to reach inconsistent conclusions in respect of the 1997 Bell Atlantic/NYNEX merger. The USDOJ allowed the merger to proceed without restrictions. The subsequent settlement with the FCC included competition-related restrictions, suggesting that the FCC had reached a different conclusion from the USDOJ on competitive effects of the transaction. Typically, if differences do arise between the USDOJ and the FCC, they are more likely to relate to the appropriate remedy to address anti-competitive concerns. This is due to the different remedial biases of the USDOJ and FCC. The USDOJ prefers structural remedies such as divestiture. The FCC is comfortable imposing conduct remedies that require ongoing monitoring.

Notwithstanding these measures, the overlapping jurisdiction of the USDOJ and the FCC with respect to merger review has been the subject of some external criticism. In a report issued in February, 2000, the International Competition Policy Advisory Committee (ICPAC), Antitrust Division identified the following costs of overlapping jurisdiction of antitrust authorities and sector-specific regulators in the U.S.: uncertainty caused by the possibility of different decisions by different decision makers, increased transactions costs associated with the need to defend the transaction before multiple agencies, and uncertainty caused by different time frames for review by different regulators. The ICPAC also considered that overlapping jurisdiction resulted in inefficient expenditure of regulatory resources. A majority of the ICPAC recommended that US antitrust authorities be given exclusive jurisdiction with respect to competition issues and that sectoral regulators such as the FCC be bound by any findings of US antitrust authorities on competition issues. Sectoral regulators would continue to assess other (non competition) policy issues associated with mergers. In addition to eliminating the costs associated with multiple proceedings, the ICPAC considered that this would ensure a consistent application of competition principles to mergers and enhance transparency, as any non-competition factors relied on by sectoral regulators would need to be clearly identified. A minority of the members of the ICPAC considered that rather than granting exclusive jurisdiction over competition issues to antitrust authorities, there should be a presumption by sectoral regulators in favour of any conclusions by competition authorities on competition issues. The ICPAC also recognized that “soft convergence strategies”, including the creation of joint working groups, conferences and the adoption of common analytical methods facilitate consistency and reduce the costs of overlapping jurisdiction.[38]

[38] International Competition Advisory Committee, Antitrust Division, Final Report to the Attorney General and Assistant Attorney General for Antitrust, February, 2002.

**Canada**

In Canada, jurisdiction over telecommunications issues rests largely with the sector-specific regulator – the CRTC, subject to appeals to the Federal Court of Appeal on issues of law or jurisdiction and to the Federal Cabinet on policy determinations. Jurisdiction over competition laws of general application rests with the Commissioner of Competition and the Competition Tribunal under the *Competition Act*.

As indicated above, the precise split in jurisdiction depends in part on the doctrine of regulatory immunity which removes regulated conduct of a non-criminal nature from the ambit of the *Competition Act*. Therefore, many of the issues discussed above, such as market definition, determinations of SMP, definition of essential services and discriminatory pricing fall squarely within the CRTC's jurisdiction, when they arise in a regulated environment.

The Commissioner of Competition currently only has two of the least intrusive forms of input into this decision-making process – namely the right to make representations to, and call evidence before, the CRTC in respect of competition issues that arise in a CRTC proceeding, and the non-statutory ability to liaise or consult with the CRTC on an informal basis (subject to the CRTC's mutual desire to consult) in respect of issues that are not currently before the CRTC in the context of a public proceeding. The Commissioner's right to make formal representations to the CRTC is set out in section 125(1) of the *Competition Act*, which provides as follows:

> The Commissioner, at the request of any federal board, commission or other tribunal or on his own initiative, may, and on direction from the Minister shall, make representations to and call evidence before the board, commission or other tribunal in respect of competition, whenever such representations are, or evidence is, relevant to a matter before the board, commission or other tribunal, and to the factors that the board, commission or other tribunal is entitled to take into consideration in determining the matter.

This right to make representations before the CRTC and other regulatory agencies does not accord any special status to the submissions made and does not affect the regulatory agency's discretion to accept or reject the submissions made. The current role of the Commissioner of Competition and the Competition Bureau in competitive issues before the CRTC is therefore a minimal role in comparison with the other countries discussed in this paper.

The Commissioner of Competition routinely intervenes in CRTC proceedings that raise competition issues – but as indicated above has no special status in such proceedings. In recent years the Commissioner has been critical of this role and has sought a greater role in these important determinations. In particular, the Commissioner has sought and has been denied access to confidential information filed with the CRTC by market participants that would assist the Competition Bureau in assessing market power and enable it to participate in a more meaningful way in the regulatory process.

In its submission to the TPRP in 2005, the Commissioner of Competition noted these deficiencies in the current framework and made representations in favour of a new model in which the CRTC would either have to accord "substantial weight" to its recommendations on competition law issues – or refer such issues to the Competition Bureau for binding determination. In either case, the Commissioner emphasized the need for the sharing of pertinent information between the two agencies.[39]

As discussed above, this was not the solution recommended by the TPRP in its Final Report. To date the situation remains unchanged with the Competition Bureau currently participating as an intervenor in the CRTC's Essential Services review, without access to much of the information it would like to have to conduct an informed analysis of market conditions.

[39] Comments of the Commissioner of Competition to the Telecommunications Policy Review Panel, August 15, 2005.

## 6. CONCLUSIONS

It is apparent from the foregoing discussion that there are a number of different models that are being used to define the relationship between competition law authorities and sector-specific regulators in developed countries. While the approaches are diverse, they nonetheless provide some direction.

(1) None of the countries discussed have eliminated sector-specific regulation in the telecommunications sector in favour of competition law. Even in Australia, where the competition authority (ACCC) was given increased jurisdiction over the telecommunications sector, the laws applied are largely specific to the telecommunications sector and the ACMA has retained jurisdiction over the technical aspects of telecommunications regulation.

(2) A primary goal for law makers should be to identify an authority that has a strong background and credibility in the application of competition law principles as the appropriate authority to make determinations respecting competition issues in the telecommunications sector. A good understanding of the telecommunications sector, as well as an appreciation of the intersection of competition issues and network functionality and technology, is also important, given the high degree of technical and operational interoperability between competing carriers in this sector.

Where the sector-specific regulator has credibility in applying competition law principles and in assessing the competitiveness of markets, it may be appropriate to confer it with concurrent jurisdiction to apply competition law analysis and competition law remedies to the telecommunications sector, as is done in the U.K. and the United States. This has the advantage of bestowing these powers on the authority with the greatest

sector-specific knowledge. It also enables a single authority to deal with both the technical and economic issues that arise in many telecommunications proceedings.

While concurrent jurisdiction gives rise to the need for administrative mechanisms to be put in place to clarify jurisdiction over particular cases, it would appear from the U.K. and U.S. experience, that such mechanisms can work relatively smoothly.

If, on the other hand, the sector-specific regulator does not have credibility in applying competition principles or in assessing the competitiveness of telecommunications markets, or if that authority is considered to be too wedded to principles of conventional economic regulation, it may be appropriate to transfer jurisdiction over competition issues to the competition law authority – or to share it in some manner between the two authorities.

Where jurisdiction is transferred to the competition law authority, as it was in Australia, other mechanisms must be put in place to ensure that sector-specific information is shared with the competition law authority and to ensure that the expertise of the sector-specific regulator is still brought to bear on technical issues that may arise in the course of the proceedings. As discussed in the second chapter of this paper, technical expertise may be required both in the analysis of certain types of competition issues, such as access to essential facilities, and in formulating and implementing appropriate remedies that may involve interconnection arrangements, access to databases, or new arrangements such as local number portability or a portable contribution system (for universal service). To the extent to which on-going supervision of these remedies is required, a sector-specific regulator may be in a better position to provide the

necessary oversight. Therefore, under this model, significant cooperation between the two regulatory authorities will be required.

The German approach of requiring the agreement of the competition law authority on competition issues that arise in the telecommunications sector is another possible approach – although it may not be possible to use this mechanism in jurisdictions where it conflicts with administrative law requirements for transparent public proceedings and decision-making processes.

The new model proposed by the TPRP in Canada, that combines the expertise of the competition law authority and the sector-specific regulator in a new hybrid agency, addresses this requirement for dual expertise to a significant degree. However, it still requires a hand-off to the sector-specific regulator when it comes to implementation of technical remedies or on-going economic regulation. The fact that this model calls for the creation of a third regulator is also a political negative in an era where most countries are trying to move towards less regulation – not more.

For this reason, the TPRP's proposal is likely to be better suited to countries where the transition to a competitive market is at an advanced stage and where competition law issues arise less frequently. An *ad hoc* arrangement between the sector-specific regulator and the competition law authority to jointly address these kinds of issues makes more sense in this type of environment. Using Commissioners from both agencies, supported by staff from both agencies, this type of *ad hoc* panel could address competition law issues as they arise in the telecommunications sector and could instruct the sector-specific regulator to implement remedies involving complex technical arrangements (such as local number portability) or detailed economic regulation (such as cost-based

rates for essential services identified by the panel).

(3) Regardless of which model is selected, it is important to endow the responsible authority with a broad range of remedial powers embodied in both the anti-trust legislation and the telecommunications legislation. As discussed above, the types of barriers to entry encountered in the telecommunications sector give rise in many instances to the implementation of technical remedies, or on-going economic regulation. These types of remedies are not usually included in conventional anti-trust legislation.

(4) Finally, legislators should ensure that the authority selected is equipped with the necessary procedural powers to adjudicate competitive disputes and conduct public inquiries into the types of issues that arise in the telecommunications sector in an expedited manner. This should include the power to grant injunctive relief in appropriate cases.