REGULATORY DIRECTIONS

Countries are concentrating regulatory and competition law functions in a smaller number of agencies, including combining telecoms with other utility sectors. **PETER ALEXIADIS** examines the approaches in the first of a two part analysis

According to Giandomenico Majone, the Italian political science scholar, the phenomena of greater economic integration and increased international competition have resulted in a reduced role for the positive, interventionist state, and a corresponding increase in the role of the "regulatory state". As part of this thesis, international competition is said to take place not only among producers of goods and services but also, increasingly, among regulatory regimes.[1]

Within the context of the European Union (EU), it is argued that the EU and the European member states are regulatory states that have evolved in response to the demands of economic modernisation. A distinctive feature of the regulatory state in the EU, however, is that the general trend of deregulation over time – assuming that "markets" work effectively – coincides with the political will of greater European integration. This lends itself to the creation of regulatory agencies, irrespective of their apparent lack of "democratic" credentials. By contrast, an author such as Nicolas Jabko considers the achievement of the EU regulatory state to be more the result of politics than economic modernisation.[2]

The liberalisation of utility sectors around the world began in earnest in the late 1980s. Irrespective of whether the principal driver for an era of regulation was economics or politics, it became clear early on in the liberalisation process that there were many common analytical steps that nation states had to take not only to ensure that their regulatory agencies were fit for purpose, but also that national and regional traditions might dictate that different paths be taken in the design of those agencies.

In 1989, at a critical point in the liberalisation process in the EU, Leigh Hancher and Michael Moran considered how different political contexts shape regulation, with many advanced capitalist countries being characterised by a high level of state intervention and the fact that large firms participate actively in the regulatory process. Economic regulation is thus largely seen to be a process of intermediation and bargaining between large undertakings which span the private and public domains of decision-making.[3] This intermediation function has further complicated the role of agencies in the regulatory state, as it has added layers of consultation, fact-finding and balancing of stakeholder interests to the decision-making process. While this trend opened up the decision-making process to new levels of transparency, the parallel concern developed that agencies should not be "captured" by any of the key stakeholders in most regulatory policy debates.

Ian Ayres and John Braithwaite contended that solutions to the problems of capture and corruption lie in the introduction of characteristics such as limits on discretion in decision-making, multiple-agency jurisdiction, and the rotation of personnel; they argued that features of regulatory encounters often foster the evolution of cooperation but also encourage the evolution of capture and corruption.[4] Each of these characteristics inhibit the evolution of a spirit of cooperation between a regulator and the regulated market actors. To address the problem of regulatory capture, the authors advanced the concept of "tripartism", a regulatory policy that fosters the participation of public interest groups in the regulatory process through the same access to information as public agencies, participation in the bargaining process between public agencies and regulated firms, and with the same locus standi as public agencies.

Relying on the EU's policy in the electronic communications sector as a focal point for the analysis, but discussing more widely with examples from other jurisdictions where appropriate, my aim is to explore the following:

- Analytical bases upon which regulatory agencies are allocated sector-specific tasks in utility sectors
- Momentum that exists around the world for the increasingly hybrid performance of competition law (ex post) and regulatory (ex ante) functions
- Tendency in some jurisdictions to collapse all regulatory functions into a single agency, including the performance of competition law functions
- Importance of ensuring that agencies operate in an independent manner
- Increasing use of regional regulatory bodies in the EU in the reinforcement of harmonisation and internal market policies.

SECTOR-SPECIFIC REGULATION

It is universally acknowledged that a critical aspect of public policy is for the regulatory state to be able to address market abuses or market failures

through either competition rules (in the case of abuses) or through economic regulation (in the case of market failures). The regulatory architecture relied on to achieve these twin objectives can vary between different jurisdictions, based on a range of factors such as:

- Budgets (and recurring sources of financing – the classic forms of agency financing are derived from: up-front licensing fees; annual renewal licensing fees; recurring charges for access to scarce resources; and charges, based on a percentage of turnover, that are dedicated to the performance by the regulatory agency of its key functions)
- Size of the overall economy and the particular sector at issue
- Different cultural and legal traditions regarding the exercise of executive power
- Extent to which effective judicial review is available to curb state decision-making
- Extent to which stakeholders' views can be accommodated without compromising an agency's effectiveness[5]
- The pool of skilled technocrats and external advisors capable of administering public policy.

At the heart of the regulatory state is the understanding that significant consumer and societal benefits can be driven by the liberalisation of markets, which subjects them to the forces of competition. It is only at this point in time that we can speak of "competition" and the importance of developing operational standards for the application of economic regulation.[6] The functions of ex post (competition) and ex ante (regulation) intervention are inevitably performed in a free market environment by agencies that enjoy some form of independence from the state and clear independence from market operators in that market environment. Each and every one of these agencies is subject to its own set of checks and balances in light of the regulatory state's political and economic goals.

Traditional separation of regulatory powers

The overwhelming number of OECD countries (including those of the EU) have institutional architectures which establish more than one specialist ex ante regulatory agency and an ex post competition enforcement agency that is distinct from those regulatory agencies. Among the specialist, sector-specific regulatory agencies, the institutional pattern that is most often relied on is:

- A sectoral regulator or national regulatory authority (NRA) covering electronic communications (or telecoms), whose mandate often extends to postal services and, on occasion, to issues relating to broadcasting or content from various media sources (although this latter type of authority is much more controversial, given the cultural dimension to any such form of regulatory intervention – see box overleaf)
- A sectoral regulator covering energy issues (electricity and gas) which, on occasion, includes jurisdiction over other basic commodities or classic utilities such as water and sewage.

As Martin Cave and Jon Stern have pointed out,[7] the principal rationale for drawing the distinction between these two main groups of sector-specific regulators is that the telecoms and postal sectors are characterised by a monopoly or bottleneck network element at the local customer service point (e.g. the so-called local loop), while there are real possibilities for competition at core network level (especially in the case of telecoms). By contrast, it is widely acknowledged that the electricity, gas and water sectors are all characterised by the existence of physically unavoidable central networks (often along with local distribution networks).

In addition, there is a range of institutional options to achieve the formal allocation of powers between sector-specific regulators and competition authorities. A clear differentiating factor between sector-specific regulation and competition law – at least in theory – is the widespread belief that the

BROADCASTING QUESTIONS

The treatment of broadcasting services raises interesting jurisdictional questions, given that it has so many public interest policy issues, including plurality of media concerns. Cultural sensitivities have meant that broadcasting is therefore treated as a "cultural exception" to World Trade Organisation rules, for example, while the 1997 Amsterdam Protocol to the European Treaties means that there is no role for EU policymaking which might affect the public service remit of national broadcasters within the EU.

Within the EU, a member state such as France draws clear boundaries between the competence of a telecoms regulator and a media regulator, whereas Italy combines both telecoms and media regulation, extending to content. Germany, indeed, also draws a bright line between the regulation of media issues, which are governed at the regional level of the Länder, and telecoms sector issues, which are addressed at federal level.

By contrast, the UK's regulator, Ofcom, is responsible for the economic regulation of both the telecoms and broadcasting sectors. Belgium's unique pattern of cable TV infrastructure rollout has resulted in creeping regulatory powers being introduced into the media sector as a result of the regulation of cable networks under the scope of telecoms regulation.

Not surprisingly, therefore, it is exceedingly difficult to have broadcasting regulation fall within the same agency as other powers, despite the relative success of the UK model. However, convergence of regulatory functions does occur in a country such as China across telecoms, media and IT.

former can pursue a range of public policy goals that are able to shape an industry, whereas competition rules are there to apply rational economic theory across all commercial sectors with a view to maximising consumer welfare. The debates within the competition law family turn largely on whether the optimisation of consumer welfare is to be appraised in the short or longer term, whether overwhelming emphasis is to be placed on price considerations, and whether the maintenance of competitive structures is more important than the protection of individual competitors. Only in the one instance of New Zealand has the liberalisation of a network sector occurred while at the same time presuming that competition policy alone would be capable of addressing all market failures and abusive practices; this experiment from the late 1980s has, over time, given way to a more nuanced approach which has introduced a minimum level of access regulation.

Over time, many national competition authorities (NCAs) have also embraced the application of unfair trade practices rules, or even consumer protection rules, within their competence. For example, within the EU, Italy, Denmark, Malta, Finland, the UK, Ireland and the Netherlands provide clear examples of the fusion of competition law and consumer protection powers. In the US, Article 5(1) of the Federal Trade Commission Act, which prohibits "unfair methods of competition in or affecting commerce", is often identified by commentators as a broad power of market regulation that "spans the boundary between competition law and regulators".[8]

The particular market defect that might need to be remedied, the specific legal standard adopted for intervention, the legitimate objectives that can be pursued by the agency in question, and the remedies that might be available, are all highly relevant considerations in determining whether any particular agency structure is best placed to take action. In turn, decisions taken under ex ante and ex post regimes are not taken in isolation, but are often taken in consultation between the various agencies responsible for the administration of these disciplines. The consultation process can vary:

- Brazil has a system of cooperation between the NCA and the NRA, with a view to enforcing competition rules in the telecoms sector.
- In Germany, the telecoms regulator, Bundesnetzagentur (BNetzA, the Federal Network Agency), is obliged to consult with the competition agency, Bundeskartellamt, when formulating regulatory remedies and when considering the implications for competition of spectrum allocations.
- Italy has also worked hard since 2013 to forge greater cooperation between its NRA and NCA.
- In Poland, the NCA is either consulted or obliged to provide an opinion on various questions arising under telecoms regulation.
- Significant cooperation between the NRA and the NCA also takes place in Turkey, with the NRA being obliged to seek the NCA's opinion with respect to certain key issues.
- There is significant cooperation too in the US between the telecoms regulator, the FCC, and one of the two NCAs (the Federal Trade Commission, FTC).
- The complexities of cooperation take a slightly different twist in jurisdictions such as New Zealand and South Korea, where regulatory traditions are modified by the actual or potential use of structural or functional separation remedies.

Exceptions to the general rule The majority of EU member states endorse the form of institutional sector-specific regulatory architecture centred on the fundamental telecoms/energy split, with notable exceptions being the UK, which has a separate regulator for water; Greece, which has an electronic communications regulator that also has sector-specific competition powers; and Spain, Germany, the Netherlands and Estonia, which have consolidated most of their relevant regulatory functions under one roof (as have countries such as Australia and Jamaica outside the EU). Small EU member states such as Luxembourg and Malta also combine their telecoms and energy functions within the same regulatory body. By contrast, in a small sovereign state such as Botswana, the regulator expressly assumes the responsibility for broadcasting regulation, but declines responsibility for electricity and water regulation, based on their different network characteristics.

In Germany, the regulatory agency that had responsibility for the regulation of the telecoms and postal sectors (RegTP) was founded in 1998. In 2005, it was conferred additional competences in relation to the energy and rail sectors, and re-named as

BNetzA. Its internal organisation was modelled on the country's competition authority. Nonetheless, there has been criticism about its performance, largely because BNetzA is subordinate to the Federal Ministry for Economic Affairs and Energy. Concerns that have been expressed about the independence of the authority do not relate to its daily decision-making powers, but rather to its more general independence in developing a policy strategy, as the minister has the power to instruct BNetzA.

Despite the proposal of the Monopolkommission (the advisory body to the Federal Ministry for Economic Affairs and Energy) that BNetzA should be conferred with additional effective powers for controlling the rail sector (in particular the fees charged to users of the tracks), and BNetzA's own arguments in 2011 that its powers be extended to cover the water sector, its accumulated powers from 2005 remain unaffected. In parallel, no debate has taken place as to the possible addition of competition law powers, as Germany's Bundeskartellamt (Federal Cartel Office) has a long history of independence from all other forms of government involvement.

And despite calls for the greater accumulation of regulatory powers to include rail and water, there seems to be residual concern in many circles that the influence and direction of the German government in the policies pursued by BNetzA has been carried over into its new structure. In other words, the accumulation of regulatory powers does not appear to have quashed the idea that BNetzA is any more independent today than it was when its functions were more fragmented.

More limited departures from the traditional competition law/sector-specific regulatory architecture split are not uncommon. Accordingly, the UK's Competition and Markets Authority (CMA) has the authority to conduct appeals on regulatory decisions, while the US FTC has particular powers in relation to telecoms sector transactions. The reasons for such partial extensions of competence are many and varied, including the need for greater objectivity in decision-making, greater efficiency and technical knowledge, and more effective review.

The responsibility for the administration of scarce resources is also an area where distinctly different approaches are taken. For example, whereas a number of EU and non-EU jurisdictions confer responsibility for the allocation and evaluation of spectrum to their NRAs, a large number still continue to regulate the availability of spectrum through their responsible ministries. There is, though, a growing number of regulatory agencies around the world that are responsible for spectrum management, including nations as diverse as the US, Australia, Brazil, Hong Kong, India, Japan, Mexico, Turkey, South Africa and South Korea. Within the EU, many member states designate the regulation of spectrum issues to their respective NRAs, including Germany, Belgium, Italy and Poland. Even where spectrum management issues rest in general in the hands of an NRA, special derogations often exist for spectrum used for broadcasting and for socially critical or security critical services (such as those used by the armed forces or public broadcasters); the control of spectrum allocation and its release and economic valuation for such specialist uses continues to be held tightly by most governments.

The split reflects a fundamental difference in approach. On the one hand, nations which confer exclusive powers in relation to spectrum management on their NRAs tend to view spectrum as a relevant input in the competitive process, and hence something that should be regulated by the NRA responsible for the overall economic regulation of the sector. Moreover, the large amounts of revenue generated by the sale of radio frequencies also provides the basis upon which an NRA often funds its operations, and hence sustains its decision-making independence. By contrast, many states believe reasonably that spectrum is a valuable national asset. As such, the financial benefits derived from that asset should accrue to the state more generally, which also creates a dynamic that the state should monitor all aspects of its allocation, use and valuation. Both positions have merit.

> **There is a growing number of regulatory agencies responsible for spectrum management.**

Where the resources in question are localised (e.g. access to pipes, ducts, sewers, permits necessary to dig up roads and lay cabling), regulatory powers often reside at the local level. Although EU rules establish a common legal framework for how resources are to be managed and valued, it is difficult in practice for NRAs or even national governments to enforce EU liberalisation and harmonisation goals consistently at such a local level, especially where there would otherwise be an adverse impact on local revenue-raising possibilities.

Next-generation regulation A recent report in the UK has promoted the rather novel idea of creating a new regulatory agency architecture that cuts across traditional utility sector regulation. This new multisectoral agency would create an "essential services consumer regulator", while a second multisector agency would be responsible for the more traditional source of regulatory intervention – an infrastructure services regulator.[9]

The driver for this bifurcated regulatory model is said to stem from the need to put consumers at the heart of markets which, rather than being silos, are being increasingly brought together by the twin phenomena of digitisation and connectivity. As a result, certain traditional individual products become "invisible" as they are embedded in a broader range of products or services that are more desirable to consumers. In such an environment, the focus of regulation will need to move from product regulation to one that regulates integrated services. Moreover, identifying consumer harm in such circumstances will become an increasingly complex task, as consumers' meaningful choices will need to be assessed in a multi-product world, which will also mean that they will increasingly focus on service value rather than merely on

product cost. It is said that if these functions are not merged, consumers will either not be able to benefit from bundled services or will have to unpick these complexities themselves, thereby increasing consumer harm.

Under the proposed bifurcated regime, the essential services consumer regulator would merge the consumer elements of its existing regulatory regime and in doing so, it would need to:

- Triage consumer vulnerability appropriately and merge consumer vulnerability responsibilities across all essential services
- Merge the consumer advocacy role to reflect the new regulator's remit
- Adopt new consumer protection principles and identify next-generation consumer risks
- Develop a common essential services ombudsman regime
- Develop a "complexity" labelling system
- Develop new standards by which to weigh and measure the new values developed in the regulation of essential services.

To complement this major shift in emphasis towards consumer-focused regulation, a rationalisation would occur of the economically regulated monopolies, with the development of a new infrastructure agency that regulates the fixed assets of all infrastructure utility monopolies. According to the authors of the report, there are emerging business models that indicate that cross-utility asset management and upgrades offer cost reductions and synergies.

Subsuming all consumer-facing regulation under one roof makes a lot of sense, especially given the encroachment of consumer protection policy across all liberalised sectors. As proposed, however, the new bifurcated regulatory responsibilities do not seem to envisage how the existing concurrency of powers with competition law would operate. The new regulatory model might provide a blueprint for action in smaller nations keen to cut costs, promote efficiency and to develop scale, although one should presume that a prerequisite for its application will be a relatively high degree of broadband penetration.

The process of splitting consumer-facing regulation from platform/network regulation may, however, not be straightforward, and will undoubtedly require changes in primary legislation. Decisions by policymakers to regulate by reference to a clearly defined economic sector or across a particular value chain which might combine various sectors might depend on the approach taken (individually and collectively) in relation to a number of factors, including:

- Greater complexity of the relationships across sectors, which means that there are likely to be less obvious "economies of scope" in an agency expanding its powers across value chains
- The benefits of achieving universally "correct" decisions by adopting consistent policies across sectors are possibly offset by the risk of arriving at a uniformly "wrong" decisions on key issues (e.g. costs) where there is no possibility of recalibrating a particular approach for a particular sector
- The benefits of protecting vulnerable customers across all retail levels, as opposed to an excessive intrusion of regulation into the retail level, where competition should in theory be at its most effective at that functional level
- Whether any split along vertical or horizontal lines between regulatory functions results in material cost savings for governments (and for operators).

MERGING EX ANTE AND EX POST FUNCTIONS

Given the horizontal nature of competition rules (i.e. operating across all economic sectors) and the generally held view that sectoral expertise is required to address sector-specific regulatory issues, conventional wisdom has been that it is preferable for ex post and ex ante disciplines to be strictly separated and administered by separate agencies. However, there has been an increase in appetite among policymakers to bring together the worlds of antitrust and regulation, or at least to create hybrid agencies which can administer both disciplines, along with consumer protection powers. This has been inspired by:

- The onset of "regulatory creep" into competition policy
- The increasing need of NRAs to adopt more flexible approaches towards the remedying of market failures
- The perceived need for specialist sectoral expertise when applying competition rules
- The increasing realisation that theories of harm in the world of antitrust are difficult to adapt to address structural market failures in many network industries.

Accordingly, it is increasingly seen as a viable option to have the architecture of sector-specific authorities enjoy ex ante powers as part of the broader remit usually associated with an NCA.

> **"Subsuming all consumer-facing regulation under one roof makes a lot of sense."**

The empowerment of a particular agency with both competition law and regulatory powers would in theory be able to avoid poor policy choices as a result of regulatory and competition agencies' power struggles, essentially through the reduction of "external pressures to deploy its powers to strategic effect".[8]

In the words of Christopher Decker and Linda Gray, the enhancement of the "functional substitutability" of the various agencies as "market supervisory tools" is increased where the respective competition and regulatory functions are merged.[10] This cross-fertilisation of expertise is seen in some quarters as being more cost efficient and capable of leading to higher quality decision-making. Moreover, a mixed set of competences in principle facilitates the transition (at least in theory) to a system of competition law alone, with sector-specific regulation having been rendered redundant over time (the somewhat naïve view that regulation could be rendered redundant over time was initially pioneered by the Littlechild report in the UK).[11]

However, as noted by Niamh Dunne: "The blurring

of the lines between antitrust and regulation at an institutional level may increase opportunities for capture, and thus diminish the independence and objectivity of decision-making, particularly in the competition law context."[8] Martin Cave and Jon Stern also write: "Our preference is for separation between competition and regulatory agencies, based largely on concern about regulatory opportunism and about the resulting suppression of multiple viewpoints."[7]

Jurisdictions exhibiting a combination of competition powers with the powers of at least one sector-specific NRA include nations such as Australia, Estonia, New Zealand, the Netherlands and Spain. By contrast, jurisdictions with a clear separation of powers include the US, Canada, Japan and the large majority of EU member states. A third hybrid category is reflected in the powers of regulators such as those in Greece, Mexico, Peru, Ireland, the UK, Singapore and Hong Kong which exercise various concurrent or selective ex ante and ex post powers.

The federal structure within the EU is reflected in the fact that most decision-making is taken at the national level by NRAs under most sector-specific initiatives. The policy objectives for various sector-specific issues are set at local level for particular characteristics of the industry (e.g. water and certain aspects of energy), while competition policy is set centrally. However, the bulk of activity in competition matters occurs at national level, but only with regard to the more effective enforcement of competition rules, given that the European Commission is not in a position to investigate all potential infringements due to its lack of resources.

Australia's institutional framework takes into account its federal political structure, by including federal electricity generation within the remit of the Australian Competition and Consumer Commission (ACCC), while leaving the regulation of distribution or retail supply to the Australian states. By contrast, in telecoms regulation, the ACCC shares responsibilities with the Australian Communications and Media Authority (ACMA), with the latter also being responsible for the regulation of radio spectrum and broadcasting.

Pros and cons Commentators have identified a number of positive factors which support the view that ex ante and ex post powers should be combined, including:

- Limits on the ability of a firm to engage in regulatory "forum shopping" by having its issues adjudicated by the forum most likely to judge its case favourably
- Lower costs for the government and taxpayer
- Use of sector-specific expertise can be harnessed by the ex post regulator to arrive at better informed results
- It avoids unnecessary rivalry between agencies as to which is best placed to deal with any particular issue, and prevents unnecessary competition for the public purse, especially when prompted by populist sentiments.

By contrast, some commentators have also identified positive factors that can be associated with the maintenance of separate sources of supervision that would otherwise be lost if regulatory and competition powers converged into the same institutional hands. These include:

- By combining all powers in a single authority, it has the power to choose its easiest instrument through which to pursue intervention, rather than that which is most appropriate, and has an inherent tendency to promote more onerous ex ante interventions and remedies.
- It is harder in principle for a market operator to "capture" multiple institutions, as opposed to one very large institution (although the counter-argument is that it may be harder to capture one very large, integrated, financially secure entity that has multisectoral agendas running in parallel).
- There is a risk of certain "Cinderella" sectors being created because intervention is limited across all sectors, which means that overstretched regulators (particularly in smaller jurisdictions) have to identify particular sectoral targets that need to be pursued at the expense of others.
- Competition between regulators allows for greater transparency and a more free flow of ideas, so that errors in public policymaking can be identified more easily and are more likely to be corrected (either in real time or in the future).
- In an integrated or converged regulator, the default setting for intervention will usually shift to more ex post regulation, rather than to the greater targeting of ex ante regulation and to the susceptibility of ex ante rules eventually being wound down, which is what should in theory occur if markets are operating effectively. (As Niamh Dunne observes, such a model establishes distorted incentives for regulators, given that an agency that successfully introduces sustainable competition into a formerly regulated market, thereby removing the need for economic regulation beyond competition law, "has effectively regulated itself out of business".)[8] Thus, a converged regulator would not only have an enhanced armoury with which to intervene, but might also be tempted to opt for the "weapon of choice" that is simply the most damaging and simplest to use (rather than the most appropriate).
- Specialist sector-specific policies can get "lost" in a more broad-based agency. For example, certain types of "buy or build" regulatory strategies work most effectively in certain sectors at particular stages of industry development, whereas an agency with accumulated powers would find it difficult to do anything other than adopt a relatively uniform policy position across sectors, for fear of being accused of acting inconsistently or arbitrarily. In this regard, we should note the potential shift in emphasis between the recently adopted European Electronic Communications Code at EU level and the current EU regulatory framework for electronic communications networks and services when it comes to the treatment of investors in upgraded infrastructures.[12] Martin Cave has also addressed the regulatory incentives provided to new entrants in order that they deploy networks (rather than merely providing competing services).[13]
- The scope of powers of search and seizure, confidentiality of submitted information and legitimate use of company data can create enforcement problems, as each jurisdiction does not necessarily adopt the same approach to such matters across both NCAs and NRAs.

Conflicting policy goals The fusion of ex ante and ex post powers is an emerging trend which is gaining support in a number of jurisdictions, whether for sound analytical reasons or simply as a cost-saving measure. In bringing together ex ante and ex post disciplines, however, thought has to be given as to whether the regulatory mindset of a particular jurisdiction sits comfortably with a competition law regime that prizes short-term consumer welfare above other public policy priorities.

Some smaller jurisdictions do not emphasise their pursuit of competition policy at the expense of other policy goals. For example, a number of smaller Eastern European EU countries such as the Czech Republic and Latvia (and also Ireland) have tended to support, either directly or indirectly, the growth of local infrastructure players

through a variety of means, as opposed to service providers that do not invest in infrastructure. Thus, while the importance of achieving competitive markets tends to be the focal point for most governments, it is not uncommon that policy remits designed to deliver consumer welfare often give way in network (infrastructure) industries to the need for "balance" between the interests of the consumer and industry, or at least to condition the pursuit of consumer welfare by reference to the financial constraints imposed on the infrastructure owner or to the investment priorities that they must satisfy.

In this way, an uneasy balance often exists between the need to prop up a "national champion" and measures designed to foster an open market. Many regulatory regimes therefore become more concerned about preserving industry structures to deliver consumer welfare and are not necessarily likely to opt for a "pure" competition model.

For example, policy decisions to promote infrastructure deployment or services-based competition or the use of particular cost modelling methodologies or cost accounting standards can have a critical impact on the decisions of new entrants to invest, and hence on the ultimate structure of an industry. By the same token, many network sectors present themselves as irresistible targets to certain NRAs, which see themselves as having an indirect role as a "tax collector". For example, an NRA has the potential to exert significant levies from energy sector market actors to support renewable energy initiatives, while telecoms NRAs have on many occasions not been able to overcome the urge to allow pricing for spectrum auctions to be driven up (e.g. Italy).

Within the EU, an additional policy tension stems from the fact that, whereas member states are obliged to implement EU competition law standards found in Articles 101 and 102 of the Treaty of the Functioning of the EU (TFEU), they also have some leeway in adopting their parallel domestic competition law standards, which often contain unique substantive and procedural elements. Thus, broad consumer protection powers are available in a number of EU member state jurisdictions, while procedural elements such as the UK's "market investigation" mechanism mean that the UK's competition authority has much more sweeping investigatory powers than those available under the European Commission's analogous "sectoral inquiry" mandate (sector inquiries under EU law and market investigations under UK law both reflect a hybridised form of ex ante/ex post intervention).

Another debate that has gained traction is whether sector-specific regulators should exercise ex post competition-style intervention powers rather than the more prescriptive style of ex ante regulatory intervention. Conversely, it is just as clear that regulatory paradigms about certain commercial practices have slipped unnoticed into competition law practice (so-called measures of "regulatory antitrust") over the years, and vice versa.

The driving force behind the fusion of ex ante and ex post powers in both its institutional and substantive dimensions is the commonly held view that sector-specific regulators will, through their intimate knowledge of the workings of a given sector, be able to provide "added value" to the decision-making of competition regulators. It is arguable, however, that this apparent "gain" is offset by the knowledge deficit created by the loss of antitrust expertise that usually resides in a specialist competition agency.

There is also a somewhat misplaced understanding that concurrent competition powers are necessary to foster competition and that their effective application will render regulatory powers redundant. However, the reality underlying liberalised markets is that they are inevitably characterised by elements of natural monopoly or complex oligopoly, so some regulatory powers will probably need to be sustained indefinitely, irrespective of whether there is broad consensus that effective competition powers offer a "better" system of intervention in markets (and irrespective of whether ex ante rules need to be better refined or targeted). Thus, market failures may occur that have little likelihood of being redressed by traditional competition rules (which focus on market abuse and agreements to restrict competition).

Competing competences The question remains as to how competing competition and regulatory agencies are to determine which of them should assert their jurisdiction over the same subject matter, either in the alternative or cumulatively (and see the World Competition Database for the growing tendency to integrate ex ante and ex post functions).[14] In the context of the UK's "concurrency of powers" model, formal rules determine how ex ante and ex post powers are to be exercised by multiple agencies, although this model presumes the existence of a mature and integrated political system to avoid friction in reporting competing competences (see also hybrid options, p25).

Within the EU, the primacy of competition law above and beyond sector-specific regulation is clear, as is reflected in a series of Commission decisions involving margin-squeezing practices in the telecoms sector and endorsed by the European courts.[15] By contrast, the US approach has consistently been to endorse the primacy of sector-specific regulation above antitrust rules, with the issue having been clarified in a series of judgments delivered across the US court hierarchy.[16]

The resolution of this ex post vs ex ante dilemma exemplifies the importance of different legislative traditions, given that the respective US and EU approaches are based on sound policy principles consistent with their institutional backgrounds. Thus, in the US, the doctrine of "primary jurisdiction" established in the Ricci case in 1973[17] had the US Supreme Court holding that antitrust proceedings should be stayed pending the outcome of a parallel investigation by the relevant sector-specific regulator, based on the working assumption that the latter had the appropriate powers to sanction the alleged violation. The principle in Ricci has been adopted in the financial services sector by the Credit Suisse case[18] and in the telecoms sector by the cases of Trinko and Linkline.[16]

The rationale for the US antitrust regime deferring to the regulatory framework stems from the understanding that sector-specific regulation is likely to "cover the field" in terms of subject matter, thereby leaving little or no scope for the application of antitrust rules. By contrast, the EU's approach has been that competition rules override regulation unless it can be demonstrated that the alleged infringer had no opportunity to exercise any discretionary behaviour in light of the broad sweep of regulation. The rationale for this difference in approach is the primacy accorded to competition rules in the EU legal order and the clear legislative indicators that competition law and regulation are to play a complementary role, rather than the application of one discipline to the exclusion of the other.

For example, competition rules occupy a higher place in the EU legal hierarchy (i.e. primary law in the form of constitutional level normative standards contained at treaty level) than secondary level normative rules found in directives, which provide the principal legal basis for the regulation of industrial sectors. By contrast, in India, a similar approach to that put forward in Ricci has been taken

recently by the Indian High Court when awarding a stay of an antitrust action until the impact of an action brought under the regulatory regime on the same subject matter has been resolved.

Hybrid options Beyond the collapse of an antitrust regime with a sector-specific regulatory regime into an integrated system of intervention, there remains a range of options available to policymakers as to how to deploy some form of hybrid ex ante/ex post institutional structure.

For example, the UK has the relatively unique concurrency regime with respect to regulated network (ex-monopoly) sectors, whereby competition law can be enforced by sector-specific regulators within their sectoral remits; this occurs in parallel with the competition powers exercised by the specialist competition authority, the CMA. Under this regime, a highly consensual procedure is in place that is designed to ensure that the appropriate agency is seized of competition law jurisdiction. This consensual model is most likely to succeed in a country with a highly mature and integrated system of power sharing. It also reflects the belief that regulation would one day become obsolete as regulated markets develop their own sustainable market dynamics and requires that sector-specific regulators actively promote competitive outcomes in their sectors.

Given the way in which the scope of competition interventions has expanded over the years, the strategic decision of the UK to retain the concurrency model has been criticised in some quarters as lacking a strong analytical foundation, especially given that sector-specific regulators in the UK have consistently aired their views that they would prefer having exclusive regulatory powers rather than nominal competition powers afforded to them under the concurrency model.

The UK concurrency model has found support in some Commonwealth countries. In Hong Kong (which still has some Commonwealth participation) and Singapore, the NCA and the NRA exercise concurrent powers to enforce competition rules in the telecoms and broadcast sectors, although the NCA takes the role of the lead agency. Concurrent powers in the telecoms sector are also exercised by South Africa's regulator, ICASA. Similarly, concurrent enforcement powers in the telecoms sector exist in India, although a recent Indian High Court judgement suggests that competition rules should defer to sector-specific regulation.[19] Japan and South Korea provide interesting non-Commonwealth examples of concurrency, with certain sector-specific competition powers capable of being exercised by the NRA. Most interestingly, Mexico and Peru administer competition rules in the telecoms sector through a specialist sectoral agency.

What has changed over the years in the UK, however, is that the usual deference practised by the previous competition regulator, the Office of Fair Trading (OFT), towards sector-specific regulators, has given way to the current CMA approach, according to which the agency is more comfortable exercising general competition powers across a number of

"The concurrency model pioneered in the UK has found some support in a number of Commonwealth countries."

regulated sectors. Perhaps this trend signals a response to the fact that, for over a decade, sector-specific regulators in the UK had engaged in practices more consistent with the under-enforcement of competition rules within their spheres of competence. This was reflected in the perception that NRAs had been reluctant to prosecute competition claims outright (preferring to arrive at negotiated settlements) and conducting in-house reviews of problematic market outcomes rather than referring them to the CMA under the "market investigation" reference procedure afforded under the local legislation.

The official response of the UK government since 2013 has been, somewhat surprisingly, to maintain the concurrency regime while at the same time pushing NRAs into more active antitrust enforcement.

By contrast, the current Australian enforcement model is one that reflects the findings of the landmark Hilmer Report of 1993,[20] which advocated bringing together competition and regulatory powers for network sectors in one agency, the ACCC. These regulatory functions now extend to the telecoms, energy, transport and postal sectors. The rationale for this fusion of functions at the federal level was supposedly prompted by an approach that placed the pursuit of efficiency at the heart of the Australian economy. The ACCC's powers not only apply traditional competition rules to these sectors but also extend to telecoms-specific regulatory provisions (including an access regime), while excluding technical issues of regulation. The ACCC's powers in relation to the energy sector are more complex, as it shares powers with a variety of agencies, including the Australian Energy Regulator (AER), which is an independent statutory body that is located within the ACCC. In this way, the ACCC's powers in relation to the energy sector include competition law, consumer protection and regulated access in specified network sectors, while other types of regulatory issues fall outside the ACCC's remit. Australia has since conducted another major review of its competition rules.[21]

Part two of this article will cover the creation of "super-regulators"; ensuring the independence of regulators; and centralised vs localised enforcement.

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