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**BEST PRACTICES FOR DEFINING RESPECTIVE COMPETENCES AND
SETTLING OF CASES, WHICH INVOLVE JOINT ACTION BY COMPETITION
AUTHORITIES AND REGULATORY BODIES**

Study by the UNCTAD secretariat

Executive summary

Despite potentially playing complementary roles in fostering competitive markets and safeguarding consumer welfare, the different approaches employed and different perspectives held by competition policy and sector regulation can be a source of friction. Moreover, the distinction between economic and technical regulation and competition enforcement can often be blurred. This paper examines the various frameworks under which competition authorities and sector regulators are coexisting in order to glean best practices from various countries' experiences. It concludes that although there is no ideal type of division of labour between competition authorities and other regulatory bodies, it is possible to specify guidelines and principles that can be generally applied to most industries and countries.

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FOREWORD

1. The Intergovernmental Group of Experts on Competition Law and Policy, at its fifth session held from 2 to 4 July 2003, requested the UNCTAD secretariat to prepare a study on best practices for defining respective competences and settling of cases which involve joint action of competition authorities and regulatory bodies, for consideration at its sixth session. The original version of this paper was considered by the IGE at its Sixth session in November 2004. It has been revised to take into account comments received from member States.

2. The present study examines the approaches that are currently being applied by different countries to manage the relationship between, and joint actions of, competition authorities and regulatory bodies. The principal focus of the study is the domestic regulatory framework, however, since domestic regulatory frameworks; including competition, are increasingly the subject of regional agreements, the study also provides a snapshot of regional experience and considers what could be learned from it.

I. INTRODUCTION

3. Allowing private sector participation in a country's important sectors is creating increasing opportunities for and promotion of competition. As a result of technological advances, traditional sectors are converging with other sectors and the notion of what constitutes a natural monopoly is being revised. Despite these developments, however, a fair amount of government intervention has proved desirable, notwithstanding competition law. Some areas of the economy remain susceptible to market failures and the role of the sector regulator remains relevant. Indeed, in many countries privatization has often been accompanied by the creation of new sector regulators in order to ensure the success of market reforms.

4. In this context, although a sector regulator and a competition authority have different legislative mandates, employ different approaches and have different perspectives (see table 1), they can share common goals and play complementary roles in fostering competitive markets and safeguarding consumer welfare.

Table 1. Institutional characteristics of sector regulators and competition authorities

	Sector Regulator	Competition Authority
A. Mandate	Substitute for lack of competition; broad range of socio-economic goals	Protect and enhance process of competition; emphasis on efficiency goals and consumer welfare
B. Approach	<ul style="list-style-type: none"> - attenuate effects of market power wielded by natural or network monopoly - impose and monitor behavioural conditions - <i>ex-ante</i> prescriptive approach - frequent interventions requiring continual flow of information 	<ul style="list-style-type: none"> - forestall and penalize anticompetitive conduct - impose structural (and behavioural) remedies - <i>ex-post</i> enforcement (except with merger review) - information gathered in case of investigation; more reliant on complaints

Source: Adapted from OECD, Relationship between regulators and competition authorities.1999. DAF/CLP(99)8.

5. Despite a common goal, friction may arise as a result of differences in the prioritization of objectives and the methods used by sector regulators and the competition authority. In addition, jurisdiction over certain areas may not always be clear-cut and may pose certain dilemmas, the resolution of which should generally depend on which is judged to be the more effective of the two authorities on the basis of the specific problem under consideration. *A priori*, on the basis of the classification of the typical tasks assigned to sector regulators and competition authorities (see box 1), it might appear logical to confine sector regulators to economic and technical regulation and assign competition protection [] to the competition authority. However, the distinction between economic and technical regulation and competition regulation can often be blurred. For example, in telecommunications, technical decisions regarding spectrum use and accompanying decisions about licences profoundly affect the intensity of competition in the sector. The determination of reasonable access conditions and their enforcement are an issue in which both the competition authority and the industry regulator have some degree of competence.

6. Jurisdictional conflicts also occur as a result of ambiguities in the law as to whether sector regulation or competition law has precedence with regard to competition issues. In many instances sector regulators' existence preceded that of the competition authority and they were given responsibility for competition issues in their respective sectors. Even in cases where new sector regulators have been created in recent times, for example after deregulation and privatization have taken place, countries have chosen to assign competition

responsibilities to sector regulators as a means of infusing and diffusing competition principles in the sector-regulatory regime and thus supporting a consistent application of competition policy across the economy.

Box 1. Regulatory tasks

- **Competition protection:** controlling anti-competitive conduct and mergers;
- **Access regulation:** ensuring non-discriminatory access to necessary inputs, particularly network infrastructure;
- **Economic regulation:** adopting measures to control monopoly pricing; and
- **Technical regulation:** setting and monitoring standards to ensure compatibility and to address privacy, safety and environmental concerns.

Source: OECD, Relationship between regulators and competition authorities, 1999. DAFFE/CLP(99)8.

II. OVERVIEW OF COUNTRY EXPERIENCE

7. Competition authorities and sector regulators can coexist under various conditions. Different countries have chosen different approaches to ensure coordination and policy coherence between sector regulators and the competition authority (see table 2). These approaches can generally be classified into five types:

- I. To combine technical and economic regulation in a sector regulator and leave competition enforcement exclusively in the hands of the competition authority;
- II. To combine technical and economic regulation in a sector regulator and give it some or all competition law enforcement functions;
- III. To combine technical and economic regulation in a sector regulator and give it competition law enforcement functions which are to be performed in coordination with the competition authority;
- IV. To organize technical regulation as a stand-alone function for the sector regulator and include economic regulation within the competition authority; and
- V. Rely solely on competition law enforced by the competition authority.

8. According to OECD analysis¹ of the various frameworks in place in OECD member States, there is no cut and dried formula for the division of labour between sector regulators and competition authorities. A wide range of factors such as the social and economic context and the legal system may influence the division. The characteristics of the regulated industry are also an important factor that has a bearing on the choice of regulatory framework; such that more than one approach might be employed within a country depending on the industry

¹ OECD, Relationship between regulators and competition authorities, (1999). DAFFE/CLP(99)8. The OECD recently addressed the issue in its Fifth Global Forum, the papers of which are available at: http://www.oecd.org/document/55/0,2340,en_2649_37463_34255159_1_1_1_37463,00.html.

or sector. According to the OECD secretariat, the ideal relationship between competition authorities and sector regulators is driven by a central government that promotes broad review of existing regulations with a pro-competitive lens, ensuring that a "competition culture" encompasses both sector regulators and competition authorities.²

Table 2. Country approach to sector regulation and competition

COUNTRY	TYPE	COMMENTS
Australia	IV, V	The Australian Competition and Consumer Commission's regulatory role covers access regulation, regulation of prices of public utilities and a variety of other regulatory tasks. Australia has tended to favour general rather than industry-specific regulation, but where State Regulators exist, these bodies have technical and economic regulatory responsibilities across a range of industries and have a close association with the ACCC.
Brazil	I	The competition law is fully applicable to regulated sectors and the competition authorities are in charge of its enforcement in cooperation with sector regulators.
Canada	II, III	There is no formal separation of jurisdiction. Apparent or possible areas of statutory conflict are resolved through recourse to the doctrine of "regulated conduct". A second approach has been for the competition authority and the sector regulator to sign a Memorandum of Understanding, which effectively sets out the respective roles of the agencies. However, this approach has not proved a lasting solution in the case of the MOU with the Canadian Radio and Television Commission, where changes in top management have resulted in the MOU being abandoned.
France	II, III	Sector regulator mandates in some sectors extend beyond enhancing competition and lead to an overlap with no formal separation of jurisdiction. In most cases, particularly where the question of <i>service public</i> ³ arises, the Conseil d'Etat or the Minister of Economic Affairs, Finance and Industry makes decisions on a case-by-case basis and the Conseil de la Concurrence has an advocacy function. Decisions on mergers and acquisitions are made by the Minister and are outside the jurisdiction of the Conseil de la Concurrence. Competition law generally defers to other laws and regulations if they are inconsistent.

² OECD, The relationship between competition authorities and sectoral regulators, 2005. DAF/COMP/GF(2005)2.

³ General (public) interest.

Indonesia	I, III	The telecommunications regulatory body, the Badan Regulasi Telekomunikasi (BRTI), is charged with regulating service quality standards, licensing, interconnection costs and competition in the sector. In addition, the Competition Authority has an advocacy mandate, which extends to making recommendations or giving opinions on sector regulations (including for other sectors such as air and land transportation, the pharmaceutical industry etc.) of relevance to competition.
Kenya	II	The Competition Authority has neither jurisdiction over regulated sectors nor advocacy powers. However, sector regulators increasingly coordinate with the competition authority, although they are not obliged to do so.
Malawi	II	The competition law does not exempt regulated sectors. Sector regulators have the mandate to promote efficiency and competition. The separation of jurisdiction and clarification of the respective roles of the agencies may become an issue when the competition law is enforced (although in existence since 1998, the law has yet to be enforced).
Mauritius	II	Some sector regulators have competition competencies.
New Zealand	V	New Zealand has a policy of "light-handed" regulation and relies on a generic competition law. However, in recent years this approach has been questioned.
Portugal	III	Sector regulators have been given competition competencies, and the competition authority and sector regulators are obliged to coordinate on competition matters. There is no specific provision in the event of conflict.
Republic of Korea	I, III, IV	As a result of regulatory reform, the Republic of Korea is moving towards type III; however, in some instances types II and I apply.
South Africa	III	Sector regulators have concurrent jurisdiction. However, the Competition Act neither explicitly defers to other regulation nor explicitly claims precedence over it. The competition authority is required to negotiate agreements with sector regulators to coordinate the exercise of jurisdiction over competition matters in regulated sectors (in those sectors where the regulator has an explicit mandate over competition matters in their sector – i.e. this does not imply agreements with every sector regulator). At present, the competition authority has agreements with regulators in the broadcasting and electricity sectors, and under these agreements the

		Competition Authority is the lead investigator in concurrent jurisdiction matters. The competition authority also has an advocacy function.
Namibia	III	The Competition Act 2003 replicates the South African model.
United Kingdom	III	Sector regulators have concurrent jurisdiction. The Concurrency Regulations 2000 spell out the procedure by which it is decided which authority is better/best placed to deal with a case, and settlement procedures in the event of a dispute.
United Republic of Tanzania	I	Article 96 of the Fair Competition Act, 2003 excludes conduct that is provided for in sector legislation (which legislation is specified in the Act).
United States of America	I, II	The division of labour for competition matters within an industry differs by sector; in limited instances, conduct is exempt from antitrust laws. Certain types of conduct are evaluated only under antitrust and for other categories of conduct antitrust agencies and regulators share concurrent jurisdiction. Sector regulators were created with objectives beyond protecting competition, although industry regulators and competition agencies are increasingly working together to protect and promote competition. Antitrust agencies also play a strong competition advocacy role with respect to sector regulation.
Zambia	II	Sector regulators have concurrent jurisdiction (equivalent powers). The competition authority also exercises an advocacy role. There is no formal system for resolving disputes.
Zimbabwe	I, II	The Competition Act gives primacy to the Competition Authority on competition issues in regulated sectors. Section 3 of the Act requires all sector regulators to apply for clearance from the Competition Authority for all mergers in regulated sectors.

9. In most countries, it is not unusual that conduct resulting from the application of other laws or regulations is excluded from the application of competition law.⁴ This is often understood to be the case even in instances in which the national competition legislation does not include a specific exclusion to this effect or purports to apply without exclusion throughout the economy. The majority of jurisdictions are generally able to effectively enforce their competition legislation within these confines, which often imply a blurring of the competition authority and sector regulator jurisdictions or a policy vacuum. Whether or not regulated sectors have undergone reforms, how far advanced such reforms are, and whether the potential conflicts in the enforcement of competition law in regulated sectors have actually materialized and have been serious enough to warrant action – these would

⁴ For examples of exclusion in OECD member States, see OECD, Coverage of competition laws: illustrative examples of exclusions, 2003. COM/DAFFE/TD(2003)6/FINAL.

seem to be factors that can prompt countries to consider a formal separation of jurisdiction or otherwise resolve the apparent overlap in jurisdictions, including developing sector-specific rules within the competition legislation. For example, in the case of South Africa, it was when firms in the banking and agriculture sectors challenged the jurisdiction of the competition authority in a bid to escape competition oversight and the courts began to interpret the phrase in the Competition Act 1998 which excluded "acts subject to or authorised by other legislation" to mean that firms in regulated industries were beyond the scope of the Act that the competition legislation was duly amended in 2000 to confer concurrent jurisdiction in instances where another regulatory scheme applies to competition matters (see table 2). In Canada, the statutory restrictions on foreign ownership severely limited available remedies when the effects of liberalization and increased competition crippled one of the country's two major airlines and resulted in the approval of a near-monopoly. Sector-specific rules to deal with the resulting market power had to be developed. It may not always be possible to anticipate such problems; however, for many countries the banking, airline and agriculture sectors appear to present the thorniest issues in this context and, particularly for developing countries that are yet to implement competition laws or are at the earlier stages of their enforcement history, more attention might have to be devoted to these areas.

10. In setting out to define the respective competences of competition authorities and regulatory bodies, most countries have recognized the need to foster close cooperation and policy coherence between these two groups of regulators in the implementation of their respective mandates. A key element of this cooperation is the timely exchange of information and prior consultation between sector regulators and competition authorities on issues that impact on one another's areas of specialization. A number of jurisdictions have created regulators' forums through which sector regulators and the competition authority keep in regular contact and strengthen and consolidate their cooperation and coordination. In some jurisdictions the competition authority has concluded memoranda of understanding with other regulatory bodies, which typically set out the manner in which the parties will interact with respect to issues that require joint action. South Africa⁵ and Canada have used this approach, for example. However, in other countries, such as Zimbabwe, the competition Act simply reads:

"Where a statutory body established to regulate the activities of any person or class of persons authorises a merger between two or more such persons, such body shall, unless the enactment establishing it expressly provides otherwise, apply to the Commission in terms of this Act for the final authorisation of the merger"
(Amendment of section 3 of Act No. 7 of 1996).

In Croatia, coordination with other regulatory bodies extends to cooperation with the law faculty at the local university. This kind of cooperation is potentially very useful for developing countries that have a dearth of legal and economic skills. The competition advocacy functions of a competition authority are also a powerful and effective way of facilitating policy coordination and coherence between the competition authority and other regulatory bodies. In some jurisdictions where the authority has the status of a department in

⁵ The Memoranda of Agreement between the Competition Authority of South Africa and sector regulators can be viewed at www.compcom.co.za.

a Ministry, it may be necessary to ensure that the competition authority has the necessary powers to advise other public entities on their legislative and regulatory programmes.

III. OVERVIEW OF REGIONAL APPROACH

10. The relationship between competition and other regulations⁶ is also an issue at the level of regional and international economic groupings and incorporates the implications for trade between members as an additional dimension. It is increasingly common for regional trade agreements to incorporate provisions on competition that may have as a feature some reference to regulation and/or public enterprises. In addition to direct regulation, Governments also pursue a variety of overlapping social and industrial policy objectives through the setting of standards and the use of fiscal incentives and taxes. Since direct and indirect regulation may be used to fulfil protectionist objectives, the issue of what might or might not be considered an appropriate incentive or State aid is often also the subject of regional trade agreements. The objectives of free trade and competition are often complementary, but this may not always be the case.⁷ Indeed, in the context of free trade, competition policy is intimately connected with the policy pillars of liberalization, deregulation and privatization. Regional provisions tend to prioritize the goal of promoting economic efficiency and favourable terms for foreign investment, whereby the discussion is focused on market access and other investor rights. They often provide an impetus for regulatory reform, particularly in the area of public services and monopolies. Although such reforms may be overdue and much needed, regional integration can also imply a restriction of the capacity of Governments to engage in public interest regulation and industrial policies – particularly in developing economies where the goals of sector regulation typically encompass broader socio-economic objectives and not just economic efficiency – in the interest of ensuring market access.⁸

11. The scope of the provisions in regional agreements varies from the establishment of supranational rules and the harmonization of domestic legislation and practices to the adoption of common guiding principles and encouraging cooperation amongst national authorities. While still seeking to minimize the scope of domestic regulation, a number of agreements also recognize the sovereign right of their members to pursue regulatory objectives subject to certain provisos. In that context and in recognition of the special case of natural monopolies, some of the agreements also contain specific exclusions.

12. For example, the European Union has exclusions related to rail, roads and inland waterways, maritime transport and air transport. Similarly, undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly are treated differently. However, these exclusions apply only so long as they do not have an effect that is contrary to the interests of the European Community, and the European Commission has actively promoted regulatory reform in member States and

⁶ Including intellectual property and standards.

⁷ For example, it is conceivable that a practice may hinder market access while at the same time causing no discernible injury to overall competition in the market concerned.

⁸ It is interesting to note that in France, where the tradition of *service public* remains a priority and liberalization is being implemented cautiously, introduction of competition in the electricity sector was precipitated by the ambitions of the then integrated State-owned monopoly to expand elsewhere in Europe. Other European countries were inclined to prohibit acquisitions or activities by firms connected with States that denied reciprocal market access or investment opportunities.

enforced the competition provisions in relation to public actions. The EU competition policy is first and foremost a tool to break down national boundaries between member States and complete the unification of the common market, hence the need to control the anticompetitive conduct of both public and private actors. The system accommodates the competition policies of member states so long as they do not interfere with the enforcement of competition law at the Community level.

13. NAFTA⁹ provisions require that members take measures to proscribe anti-competitive business practices; they do not however, establish any standards to be incorporated into domestic laws but, rather, emphasize the importance of cooperation on competition enforcement. NAFTA provisions also recognize the right of Governments to establish monopolies or State enterprises, but seek to ensure that they do not unduly hamper the free flow of trade by setting out disciplines on the activities of these entities based on the principle of non-discrimination in the purchase and sale of goods where they have a monopoly (Articles 1502-1503). However, there is some controversy over whether the [] provisions of NAFTA's Investment Chapter¹⁰ have a negative effect on the ability of a country to regulate in the public interest. Unlike in the case of the EU competition provisions, NAFTA members have not [] committed themselves to developing any form of supranational competition law and obligations relating to national competition laws are entirely outside of the scope of NAFTA's dispute settlement mechanism.

14. Mercosur's Protocol for the Defence of Competition (also known as the Fortaleza Protocol) calls for convergent domestic laws and views on the interplay between competition policy and other governmental actions, and provides an agenda for the monitoring of private actors in the market as well as government policies that may have anti-competitive and trade-distorting effects.

15. The Australia–New Zealand Closer Economic Relations Trade Agreement (ANZCERTA; popularly known as the CER) has led to the application of common competition policies at the regional level and can be considered to be testimony to the degree of convergence of competition conditions in the domestic markets of the two countries resulting from deep economic integration – but with little political integration in contrast to the EU.¹¹

⁹ The North American Free Trade Agreement. The member countries are Canada, Mexico and the United States of America.

¹⁰ The provisions contained in Article 1110 give investors the right to sue Governments for compensation should their investments incur losses as a result of **confiscatory** regulatory measures. Investors have to date filed a number of NAFTA Investment Chapter cases in a variety of sectors including environment, tobacco controls, pharmaceutical licensing and pesticide ingredients. The Metalclad vs. Mexico case (environment), for instance, generated a great deal of public debate.

¹¹ The Australian and New Zealand competition laws, although harmonized, are not identical, but the CER is the most comprehensive example of harmonization and is unique in that it encompasses the relaxation of territorial limitations to allow one party to take actions in the territory of the other party, such that the handicap factor of crossing jurisdictions for investigation and prosecution is diminished. In July 2004, after 21 years of the CER's existence, the two countries announced that they had commissioned a study, which would, among other things, examine the option of passing common laws and creating a single enforcement agency.

16. The UEMOA¹² agreement creates a supranational authority whose jurisdiction extends to public enterprises and government policies that may have trade distorting or anti-competitive effects.¹³ The draft COMESA¹⁴ Competition Regulations apply to all economic activity whether conducted by private or public entities and have primary jurisdiction over industries or sectors, which are the subject of a separate regulatory entity. They create a supranational authority whose responsibility is to promote competition within the Common Market. Similarly, the CARICOM¹⁵ competition policy envisages the supranational treatment of cases with a regional dimension, and Protocol VII on competition policy, consumer protection, dumping and subsidies seeks to control anti-competitive actions by both public and private actors. All these regional agreements on competition appear to be modelled on the EU approach, which accommodates the discrete competition policies of member States and under which competition law represents a principal tool of economic integration.

17. APEC¹⁶ countries have elaborated guidelines based on the principles of non-discrimination, comprehensiveness, transparency and accountability. The APEC Principles to Enhance Competition and Regulatory Reform are voluntary and non-binding and emphasize cooperation in competition enforcement. They recognize that policy and regulation in member economies may have objectives other than promoting competition and that exemptions from and exceptions to a competition-driven regulatory framework may be necessary.

IV. FINAL OBSERVATIONS

18. At the domestic level, a number of factors – not least history, legal and constitutional frameworks, and inherited institutions – will influence the choices made by Governments in defining the respective competences of competition authorities and regulatory bodies and managing joint actions by these entities where such a necessity arises. Article 7 of the UNCTAD Model Law on the relationship between competition authority and regulatory bodies, including sectoral regulators, is one source of inspiration for Governments grappling with this issue. The Model Law states that competition authorities should assess regulatory barriers to competition incorporated in economic and administrative regulations from an economic perspective, including for general interest reasons. It states further that general

¹² Union Économique et Monétaire Ouest Africaine (West African Economic and Monetary Union). The members are Benin, Burkina Faso, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal and Togo.

¹³ Member States may ask the UEMOA Commission for exemption from the competition provisions where the application of the provisions would frustrate public interest objectives.

¹⁴ The Common Market for Eastern and Southern Africa. The members are Angola, Burundi, the Comoros, the Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

¹⁵ Caribbean Community and Common Market. The member countries are Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Lucia, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Suriname, and Trinidad and Tobago. Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, and the Turks and Caicos Islands are associate members.

¹⁶ Asia-Pacific Economic Cooperation. The member economies are Australia, Brunei Darussalam, Canada, Chile, the People's Republic of China, Hong Kong (China), Indonesia, Japan, the Republic of Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, the Philippines, the Russian Federation, Singapore, Taiwan Province of China (known in APEC as Chinese Taipei), Thailand, the United States and Viet Nam.

interest obligations, which belong to the area of social and economic regulation, should be set out in a transparent manner.

19. Different countries will apply different approaches according to their circumstances, and it cannot be expected that an approach that works for one country (or industry/sector) could be imposed on another. The powerful forces that shape nations' competition and regulatory systems are often unique to particular nations, and national differences impose significant limitations on harmonization. However, the OECD has identified a number of generalizations (see box 2) that seem reasonably certain to apply in most industries and countries.

20. One of the key guiding principles that filters through all the generalizations listed in box 2 is the principle of subsidiarity, which in this context holds that any particular form of regulation should be carried out at the level of governance consistent with regulatory effectiveness. Other principles that can be viewed as facilitating this application of subsidiarity are principles that serve to ensure access to the information necessary for making sound judgements (transparency); the participation by all parties likely to be affected by a regulation (due process; e.g. competition advocacy); and the elimination of unnecessary costs due to over-regulation or ineffective regulation (proportionality).

21. These principles apply equally at the regional level, where the principle of subsidiarity should keep regulation at the level of governance consistent with the achievement of regulatory effectiveness that takes into account an appropriate balance of economic efficiency, social objectives and political legitimacy.¹⁷

¹⁷ Imposing the same objectives on people who would otherwise opt for different ones creates a political cost and weakens both public understanding of the issues at stake and public acceptance of the outcome. Moreover, while it is possible to some extent to adapt regulations to take account of different circumstances, it becomes increasingly difficult to achieve this the more countries that are covered and the variation of conditions found in each country (see G. Feketekuty, The role of regional and global institutions in international regulatory integration. Paper presented at the Conference on Towards Rival Regionalism; US and EU regional Integration Policies and the Risk of a Transatlantic Regulatory Rift, held at Ebenhausen, Germany, 4-6 July 1996). This probably explains why the most successful and beneficial examples of convergence in regulation are usually those where economic integration is most advanced or economic conditions are not too dissimilar.

Box 2. OECD secretariat observations on apportioning competition-enhancing tasks between competition agencies and regulators.

1. It might not always be necessary to employ economic regulation to address problems arising from alleged market power either because such power could be too transitional to be worth worrying about or because light-handed regulation may possibly be a superior alternative;
2. Technical regulation will not likely fit well within competition agencies;
3. Since there are advantages in combining economic regulation with technical regulation, economic regulation should probably not be organized as a stand-alone function;
4. Given what has been said about technical and economic regulation, there seem to be three practical alternatives:
 - combine technical and economic regulation in a sector-specific regulator and leave competition law enforcement entirely in the hands of the competition agency;
 - organize technical regulation as a stand-alone function and include economic regulation within the competition agency;
 - combine technical and economic regulation in a sector-specific regulator and give it all or some competition law enforcement functions.
5. Separating competition law enforcement from regulation means sacrificing certain synergies and having to adopt measures ensuring firms that are not subjected to inconsistent demands, but it also ensures that both policies are administered by agencies thoroughly understanding them and having cultures suited to their implementation;
6. If a decision is made to combine competition law enforcement and economic regulation, serious attention should be paid to differences in how competition agencies and regulators conduct their principal functions because this could significantly influence how they would carry out a combined mandate;
7. In sectors expected to evolve reasonably quickly to being workably competitive (i.e. transition sectors), assuming a decision has been made to combine economic regulation with competition law enforcement, it would probably be better to locate these functions within the competition agency than within a sector-specific regulator;
8. In non-transition sectors, if it is decided to combine economic regulation with responsibility for ensuring non-discriminatory access to necessary inputs, this is probably better done within a regulator than within the competition agency;
9. Because competition agencies appear to have a comparative advantage over regulators when it comes to enforcing prohibitions of anti-competitive behaviour and reviewing mergers, such agencies should have exclusive jurisdiction in those domains, or at least retain concurrent jurisdiction along with a regulator;
10. There seem to be good reasons for organizing regulators as general rather than sector-specific agencies (moreover, some of the difference in performance expected from competition agencies and regulators would likely disappear if the regulator were general instead of being sector-specific in nature); and
11. Economic regulation, especially that being applied to markets in the process of liberalization, should be subject to sunseting, and should not be renewed unless the competition agency believes that is justified by continued market power; thought should also be given to requiring regulatory forbearance in any market which is workably competitive, and once again the competition agency could usefully be involved in that determination.

Source: OECD, Relationship between regulators and competition authorities, 1999. DAFFE/CLP(99)8.