



**United Nations Conference
on Trade and Development**

Distr.: Limited
17 May 2017

Original: English

Trade and Development Board
Trade and Development Commission
Intergovernmental Group of Experts on Competition Law and Policy
Sixteenth session
Geneva, 5–7 July 2017
Item 3 of the provisional agenda
**Work programme, including capacity-building in and
technical assistance on competition law and policy**

**Model Law on Competition (2017) –
Revised chapter VII***

* This is a draft for discussion of the Model Law on Competition (2017), revised chapter VII, which is a revision of document TD/RBP/CONF.7/L.7. This document has not been formally edited.



Model Law on Competition (2017) – Chapter VII

The relationship between competition authority and regulatory bodies, including sectoral regulators

I. Advocacy role of competition authorities with regard to regulation and regulatory reform

An economic and administrative regulation issued by executive authorities, local self-government bodies or bodies enjoying a governmental delegation, especially when such a regulation relates to sectors operated by infrastructure industries, should be subjected to a transparent review process by competition authorities prior to its adoption. Such should in particular be the case if this regulation limits the independence and liberty of action of economic agents and/or if it creates discriminatory or, on the contrary, favourable conditions for the activity of particular firms – public or private – and/or if it results or may result in a restriction of competition and/or infringement of the interests of firms or citizens.

In particular, regulatory barriers to competition incorporated in the economic and administrative regulation, should be assessed by competition authorities from an economic perspective, including for general-interest reasons.

II. Definition of regulation

The term “regulation” refers to the various instruments by which Governments impose requirements on enterprises and citizens. It thus embraces laws, formal and informal orders, administrative guidance and subordinate rules issued by all levels of government, as well as rules issued by non-governmental or professional self-regulatory bodies to which Governments have delegated regulatory powers.

III. Definition of regulatory barriers to competition

As differentiated from structural and strategic barriers to entry, regulatory barriers to entry result from acts issued or acts performed by governmental executive authorities, by local self-government bodies, and by nongovernmental or self-regulatory bodies to which Governments have delegated regulatory powers. They include administrative barriers to entry into a market, exclusive rights, certificates, licenses and other permits for starting business operations.

IV. Protection of general interest

Irrespective of their nature and of their relation to the market, some service activities performed by private or government-owned firms can be considered by governments to be of general interest. Accordingly, the providers of services of general interest can be subject to specific obligations, such as guaranteeing universal access to various types of quality services at affordable prices. These obligations, which belong to the area of social and economic regulation, should be set out in a transparent manner.

Commentaries on Chapter VII and alternative approaches in existing legislation

Introduction

1. A country's economic policy framework that reflects the often conflicting interests of various stakeholders is generally complex and in constant change due to the dynamic nature of economies. Competition law and policy that aim at minimizing economic inefficiencies created by anti-competitive behavior form an important pillar of the policy framework of a market economy. As such, they are naturally subject to the interdependency and reciprocal influence that exists between the different parts of a country's policy framework and its translation into laws and other forms of regulation. In a democracy where pluralism of interests is the rule, tensions and frictions will necessarily arise between different economic policies and related norms, which will also influence the relationship between the respective enforcement bodies.
2. Against this background, Chapter VII of the UNCTAD Model Law on Competition is dedicated to the relationship between a country's competition authority and regulatory bodies, including sector regulators.

Definition of regulation

3. The Model Law on Competition has opted for a broad definition of regulation that covers various instruments by which governments impose requirements on enterprises and citizens. It embraces laws, formal and informal orders, administrative guidance and subordinate rules issued by all levels of government, as well as rules issued by non-governmental or professional self-regulatory bodies to which governments have delegated regulatory powers.
4. This broad definition of regulation encompasses all kinds of norms expressing the hierarchical relationship between a state and its citizens in the various areas of life and is not limited to economic aspects. That is to say, a country's competition law rules and rules applying to specific industry sectors would fall under the Model Law's definition of regulation in the same way as a country's criminal law, family law, or university regulation – to give just one example of regulation by a self-regulatory body.
5. While all of these types of regulation may have a bearing on competition, regulation applying specifically to economic players is most relevant from the perspective of competition law and policy. While certain regulation in this field may apply across all industry sectors, for example tax law or corporate law provisions, the so-called sector or industry specific regulation merits a particular emphasis.

Sector specific regulation

6. Sector specific regulation applies to particular industry sectors only. Traditionally, infrastructure service industries, such as energy, water, telecommunications and transport markets, have been subject to sector specific regulation. In a large number of countries, sector specific regulation actually preceded the introduction of competition law.
7. There are two main reasons why governments attach great importance to infrastructure service industries both in developed and developing countries and in economies in transition.
8. Firstly, these industries are fundamental to the performance of a country's economy, since they provide inputs for all other sectors of activity. Hence, they are sometimes referred to as the backbone of the economy. The state of their operations and their level of efficiency not only affect the general productivity and level of competitiveness of a country, but may also have an impact on social order and even political stability if

consumers express general dissatisfaction. It follows from the essential nature of these industries that they are often subject to public or universal service obligations, which means that the infrastructure operators are required to provide a particular service even when it is not profitable for them to do so. In this respect, Chapter VII of the Model Law on Competition states under the heading “Protection of general interest”, that “the providers of services of general interest can be subject to specific obligations, such as guaranteeing universal access to various types of quality services at affordable prices. These obligations, which belong to the area of social and economic regulation, should be set out in a transparent manner.” For the same reason, i.e. the protection of general interest, in almost all countries, it was traditionally the that provided directly or through State-owned enterprises for infrastructure services. This situation has, however, changed in a number of countries due to privatization and liberalization reforms in the past three decades.

9. Secondly, infrastructure service industries are often characterized by the presence of natural monopolies, which means that, from an overall economic perspective, it is most efficient that one single operator provides the infrastructure service in question. Virtually all infrastructure service industries are network industries, where major investments would have to be made before a new network operator could enter the market. The costs for duplicating, for example, an electricity or water distribution network or a country’s railway system are generally so high that they constitute insurmountable barriers to entry in the respective distribution markets.¹ As a result, infrastructure service industries are characterized by the preeminence of a small number of incumbent firms. In other words, infrastructure industries generally suffer from a lack of competition/market failure.

10. Sector specific regulation that addresses these two main characteristics of the infrastructure service industry may comprise the following features: (i) “technical regulation” - setting and monitoring standards so as to assure compatibility and to address privacy, safety, and environmental protection concerns; (ii) “access regulation” - ensuring non-discriminatory access to necessary inputs, especially network infrastructures; (iii) “economic regulation” - adopting cost-based measures to control monopoly pricing; and (iv) “competition protection” - controlling anti-competitive conduct and mergers.²

Competitive impact of regulation

11. Before addressing the relationship between the competition authority and other regulators, including sector regulators, it appears necessary to shed some light on the interface between competition law and policy and regulation. While it is possible that competition law and policy and regulation co-exist without the latter having any bearing on competition, there are also situations where regulation produces effects on competition – in positive as well as in negative ways.

Compensating market failure

12. As mentioned above, industries that are subject to sector regulation are often characterized by natural monopolies and market failure. Therefore, one of the main objectives of sector regulation consists of mimicking competition in these industry sectors, e.g. through price regulation, which shall prevent the incumbent from charging excessive tariffs/prices for its services, or through access regulation, which ensures that competition among downstream operators is not distorted and that a country’s population has access to essential goods and services on a non-discriminatory basis. Sector regulation is typically viewed as aiming to alleviate market imperfections by substituting regulatory measures for the working of market forces. In addition, sector specific regulation may serve a number of

¹ In this context, it is worth mentioning that the qualification of a certain market as a natural monopoly is not everlasting. Due to innovation and development, duplication of certain networks may become technically and commercially feasible over time and allow for new entry and the establishment of competition.

² Organization for Economic Cooperation and Development Policy Roundtable, Relationship between Regulators and Competition Authorities 1998.

additional legitimate objectives such as environmental safety or income redistribution goals, which may seem as lying outside the field of competition policy. As opposed to competition law, which mainly intervenes *ex post* (except merger control), sector regulation applies *ex ante* and continuously. For example, price increases in regulated industries may be subject to prior approval by the specific regulator. *Ex ante* competitive assessment of regulatory policies and regulations should however primarily seek to promote competition and consumer welfare. It is therefore of utmost importance that when sector regulations are dictated by public interest, competitive process is at the core of regulatory assessment. Adverse effects of such regulations should therefore be carefully evaluated, which includes exploring whether the objectives of the regulations cannot be achieved by other less restrictive means.³

13. In a large number of countries, providers of infrastructure services which were traditionally under public ownership have been privatized in recent decades in order to remedy perceived inefficiencies of the respective industries and deficits of the public budget. Given the competitive features of infrastructure service industries, namely their restricted level of competition, sector specific regulation addressing these features is indispensable for successful privatization and liberalization processes.⁴ In short, replacing a public monopoly by a private monopoly does not generate any efficiency gains, if not accompanied by further measures facilitating new entry and ensuring that the privately owned monopolist does not abuse its market power.

14. In this sense, regulation can play an important role in introducing and stimulating competition in specific industry sectors. In natural monopolies, it may even replace competition.

Regulatory barriers to competition

15. As indicated by the definition of regulatory barriers to competition provided for by the present chapter of the Model Law on Competition, regulation may, however, also have negative impacts on competition. Measures which can negatively affect market entry, market exit and market operation take a wide variety of forms, such as:

- (a) Creating administrative hurdles, such as complex and lengthy authorization procedures, for the establishment of new market players;
- (b) Requiring compliance with uncommon norms and standards amounting to barriers to market entry;
- (c) Preventing foreign firms from competing in national markets;
- (d) Privileging certain market players, for example national champions, and thereby awarding them a competitive advantage; and
- (e) Arbitrary public procurement and state aid decisions which distort competition.

16. Recognizing the potentially detrimental impact of regulation on competition, some jurisdictions have adopted expressive provisions dealing with this issue.

Alternative approaches in existing legislation – Addressing regulatory barriers to competition

Country

³ See Organization for Economic Cooperation and Development, Recommendation of the Council on Regulatory Policy and Governance, 2012.

⁴ In this context, one should remember that a number of privatization and liberalization reforms in developing countries did not result in the expected outcome, because competition issues were insufficiently addressed during the reform process.

Country

China

Chapter V of the Anti-monopoly Law of the People's Republic of China describes administrative barriers.

Article 33 states that no administrative organ or organization empowered by a law or administrative regulation to administer public affairs may abuse its administrative power to block the interregional free commodity trading by taking any of the following measures: (a) setting discriminatory charges, implementing discriminatory charge rates, or fixing discriminatory prices for non-local commodities; (b) imposing technical requirements or inspection standards on non-local commodities that are different from those imposed on their local counterparts, or taking discriminatory technical measures, such as repeated inspections or repeated certifications of non-local commodities, so as to restrict the entry of non-local commodities into the local market; (c) adopting administrative licensing aimed at non-local commodities so as to restrict the entry of non-local commodities into the local market; (d) setting up barriers or adopting any other means to block either the entry of non-local commodities or the exit of local commodities; or (e) other activities that may block the interregional free commodity trading.

Article 35 forbids administrative organs – or organizations empowered by law or administrative regulation to administer public affairs – to abuse their administrative power to reject or restrict either investment in their jurisdictions or to establish local branches by non-local business operators by imposing unequal treatments on them that are different from those imposed on the local business operators.

Article 36 forbids administrative organs – or organizations empowered by law or administrative regulation to administer public affairs – to abuse their administrative power to compel business operators to engage in monopolistic activities that are prohibited by the Anti-monopoly Law of the People's Republic of China.

Germany

The German Act against Restraints of Competition addresses the issue that specific competition regulations by trade and industry association may contain restrictive provisions.

According to Section 24(2), competition rules of trade, industry associations and professional organizations are defined as provisions which regulate the conduct of undertakings in competition for the purpose of counteracting conduct which violates the principles of fair competition or effective competition based on performance, and of encouraging conduct in competition which is in line with these principles.

The respective organizations and associations may apply to the Federal Cartel Office for recognition of competition rules, which has to check whether a notified competition rule violates any provision of German or European competition law. If this is not the case, the Federal Cartel office will issue a recognition, which implies that it will not challenge the notified regulation in the future. Nevertheless, the Federal Cartel Office is authorized to withdraw or revoke recognition if it subsequently finds that the conditions for refusal of recognition are satisfied.

Slovenia

Article 64 of the Slovenian Prevention of Restriction of Competition Act stipulates that the government, state authorities, local community authorities and holders of public authority may not restrict the free operation of undertakings in the market. According to Article 72 of the Act, the Competition

Country

Agency can submit an opinion on a proposed act or on decrees when it deems it necessary or when requested by a competent state authority. At the same time, the prime minister or the competent minister may request that the Competition Agency submits an opinion on proposed acts or decrees that have the following direct effects: (i) the introduction of quantitative restrictions in performing business activities in the market or access to the market; (ii) the introduction of exclusive rights in certain economic fields; and (iii) determining general conditions of operation.

The competition authority's role with respect to regulation

17. Taking into account the possible bearing of regulation on competition, Chapter VII of the Model Law suggests that the competition authority is awarded an advocacy role with regard to regulation and regulatory reform.

Advocacy

18. With respect to the design of sector regulation as part of a privatization or liberalization process, the advice of a competition authority is particularly valuable in ensuring that the newly created regulatory regime will indeed produce the expected outcomes in terms of enhanced efficiency. The expertise of a competition authority may, for example, be helpful to identify measures to facilitate new entry.

19. As to other forms of regulation, it is suggested that the competition authority is actively involved in the legislative process. This can, for instance, be realized by allowing the competition authority to actively participate in the process of drafting the legislation by having its representatives as members of drafting working groups, to comment on draft regulation or to submit an opinion on proposed regulatory reforms and projects.

20. In some cases, competition authority's unique expertise and experience might be used even before legislation is drafted. Competition authorities should be empowered and encouraged to perform market investigations, which could serve as the basis for identification of areas of (existing) regulatory framework that should be changed, amended or updated to reflect the needs of free market process. Proactive regulatory role of competition agencies is even more important when it comes down to new industries and markets, since experience shows that entry of new innovative market players often causes market distortions, whereas (only) competition authorities possess required expertise and experience to assess whether such alleged market distortions are real and might affect competitive process or not. Findings of such market investigations might be then used as the basis for future and subsequent regulation (one example what should and can be the role of competition agencies is presented in relation to collaborative economies in paragraph 29 below). In addition, competition authorities and sectoral regulatory bodies should collaborate in their regulatory reform programs and even allow cross-representation in their respective management boards.

21. Taking into account a competition authority's specific expertise, a number of competition law regimes expressively attribute to the competition authority an advocacy role on the legislative level.

Alternative approaches in existing legislation – Advocacy role of the competition authority

Country

Indonesia

According to Article 35 e. of Law No. 5/1999 concerning the Prohibition of Monopolistic Practices and Unfair Business

Country

Ireland	<p>Competition, the Indonesian Competition Authority (KPPU) shall “provide advice and opinion concerning Government policies related to monopolist practices and or unfair business competition”.</p> <p>According to Clause 10(1)(e) and 10(3)(a) of the Competition and Consumer Protection Act 2014 and Article 30(1) of the Competition Act 2002, the Irish Competition Commission has the following advocacy functions:</p> <p>[...]</p> <ul style="list-style-type: none"> – to advise and, as appropriate, make recommendations, to the Government, Ministers of the Government, Ministers of State, or any other public body in relation to any matter concerning, or which the Commission considers would be likely to impact on consumer protection and welfare, or competition, or both; – encourage compliance with the relevant statutory provisions, which may include the publication of notices containing practical guidance as to how the provisions of the Competition and Consumer Protection Act 2014 may be complied with; – to advise public authorities generally on issues concerning competition which may arise in the performance of their functions; – to identify and comment on constraints imposed by any enactment or administrative practice on the operation of competition in the economy; – to carry on such activities as it considers appropriate so as to inform the public about issues concerning competition. <p>Furthermore, the Minister may request the Authority to carry out a study or analysis of any practice or method of competition affecting the supply and distribution of goods or the provision of services or any other matter relating to competition and submit a report to the Minister in relation to the study or analysis; the Authority shall comply with such a request within such period as the Minister may specify in the request.</p>
Chile	<p>According to Article 18 (4) of the DL N° 211 of 1973, as amended by Law N° 20.361 of July 13 2009, the Competition Tribunal is empowered to propose to the President of the Republic, through the relevant State Minister, the modification of or derogation from any legal and regulatory precept that the Tribunal deems contrary to free competition, as well as the adoption of legal and regulatory precepts necessary for promoting competition or regulating the exercise of certain economic activities that are provided in non-competitive conditions.</p>
Brazil	<p>According to Article 9(1) of the Law N° 12.529 of November 30, 2011, the Plenary of the Administrative Tribunal of Economic Defense may demand from federal public administrative bodies and entities and require from the State, municipal federal district and territorial authorities to put in place the necessary measures in order to comply with competition protection legislation.</p> <p>Article 9(3) stipulates that all federal authorities, directors of independent entities, foundations, federal public companies and</p> <hr/>

Country

mixed capital companies and regulatory agencies are required to provide, subject to liability, all assistance and cooperation required by Administrative Council for Economic Defense (CADE), including developing technical opinions on matters within their competence.

Article 19(1) further stipulates that the Secretary for Economic Monitoring of the Ministry of Finance (which is separate from CADE but still part of the Brazilian System for Protection of Competition) can propose the review of laws, regulations and other acts establishing norms or standards of the federal, state, municipal and federal district public administration, which affect or may affect competition in the various economic sectors in the country. The Secretary for Economic Monitoring can also submit to the competent body representation so that it can, at its discretion, take the appropriate legal measures, whenever any normative act has an anticompetitive character.

Competition law enforcement in regulated industry

22. Although not mentioned by the present chapter of the Model Law, it is worth noting that a competition authority may assume further functions with respect to regulated industries, namely enforcing general competition law provisions in regulated industries. The intensity of competition law enforcement in regulated industries mainly depends on two factors: firstly, the design of the interface between a country's competition law and its sector specific regulations; and secondly, on the relationship between the respective enforcement bodies.

Interface between competition law and sector regulation

23. In the event that a country opted for a specific sector regulation in addition to a general competition law regime, the question arises as to which law should govern competition issues in the regulated industries. There is no single answer to this question. A wide range of factors such as the social and economic context and the legal system may influence the design of the interface between the two legal regimes and the division of labour between the respective enforcement bodies. 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.

24. In fact, different countries have chosen different approaches to ensure coordination and policy coherence between sector regulators and the competition authority. These approaches can be classified into five types:⁵

1. to combine technical and economic regulation in the sector specific regulation and leave traditional competition law issues, such as the prohibition of anti-competitive conduct and merger control, to competition law;

2. to combine technical and economic regulation in the sector specific regulation and include as well some or all traditional competition law aspects;

3. to combine technical and economic regulation in the sector specific regulation and include as well some or all traditional competition law aspects, while ensuring that the sector regulator performs its functions in coordination with the competition authority;

4. to organize technical regulation as a stand-alone function for the sector regulator and include economic regulation into general competition law;

⁵ See UNCTAD (2004). Best Practices for defining respective competences and settling of cases, which involve joint action of competition authorities and regulatory bodies. TD/B/COM.2/CLP/44. Geneva. 19 August 2004.

5. to rely solely on competition law enforced by the competition authority.

Institutional set-up

25. Whereas some countries, e.g. the Netherlands, Peru and Spain, have opted for an integrated agency that is empowered to enforce both sector regulation and competition law, most countries established competition authorities and sector regulators as separate enforcement entities. Often, sector regulators actually preceded the establishment of competition agencies. In the second case, jurisdictional conflicts often belong to the enforcement reality, if respective competences of the competition authority and the sector regulators are not clearly defined by law. In order to prevent/remedy such jurisdictional frictions, a memorandum of understanding between the separate enforcement entities may offer a solution.

Alternative approaches in existing legislation – Interface between competition authority and sector regulators

Country

Integrated agency model

Netherlands

The ACM was established by the ACM Establishment Act on 1 April 2013, when three separate market authorities – the Netherlands Competition Authority (NMa), the Independent Post and Telecommunications Authority of the Netherlands (OPTA) and the Netherlands Consumer Authority (CA) – were formed into one new Authority for Consumers and Markets. On 1 August 2014, the Streamlining Act came into force. ACM implements over 20 pieces of legislation. The Streamlining Act had the objective of harmonising and simplifying various procedural rules and cutting inefficiencies relating to ACM's operations. Under the Streamlining Act, some competences that previously only applied to competition enforcement were extended to the areas of consumer protection and sector-specific regulation⁶.

The Netherlands Authority for Consumers and Markets (ACM) is charged with enforcement of general competition laws, consumer protection laws, and sector-specific regulation in the areas of telecommunications, transport, postal services, and energy.

The ACM is an autonomous administrative authority and is considered a part of the Dutch central government. The ACM has several specialized departments which include *inter alia* the Consumers Department; the Department for Energy Regulation; the Department for Telecom, Post and Transport Regulation; and the Competition Department.

When the ACM was being designed, there was an issue as to whether dominance and merger cases in the regulated sectors should be managed by the relevant sector-specific regulatory department or by the Competition Department. This issue was resolved as follows: the regulatory departments are responsible for dominance cases in the regulated sectors, but the Competition Department handles all merger cases (i.e. including those in regulated sectors).⁷

The ACM also regularly cooperates with other regulators, such

⁶ Source: <http://globalcompetitionreview.com/chapter/1067851/netherlands-authority-for-consumers-and-markets>

⁷ OECD (2014). Roundtable on Changes in Institutional Design of Competition Authorities. Note by the Netherlands. DAF/COMP/WD(2014)100. 17-18 December 2014, page 3.

<i>Country</i>	
	as the Netherlands Authority for the Financial Markets, the Dutch Data Protection Authority, the Netherlands Gaming Authority, the Dutch Central Bank, the Dutch Healthcare Authority, and the Dutch Media Authority.
Spain	<p>The Spanish National Authority for Markets and Competition (CNMC) is an independent authority in charge of both competition and regulatory matters. From the regulatory perspective, the CNMC supervises the following industries: energy; telecommunications; audio-visual products; transport; and postal services.</p> <p>The CNMC's decision-making body, the Council, has two chambers: the Competition Chamber deals with issues falling into competition enforcement, whereas the Regulatory Chamber is responsible for regulatory action. However, each chamber may issue an opinion on the issues considered by the other.⁸</p> <p>In cases involving both competition and regulatory issues, special teams of experts in both fields may be put together. For example, if the CNMC reviews a merger in the telecommunication industry, a horizontal case team can be established which would comprise of both competition law experts and telecom industry experts.⁹</p>
Separate enforcement entities with expressly attributed jurisdictions	
Australia	<p>The Australian Competition and Consumer Commission (ACCC) is an independent statutory authority whose role is to enforce the Competition and Consumer Act 2010 and promote competition. In addition, the ACCC also partially regulates some national infrastructure services (such as communications, energy and bulk water) and monitors other markets with limited competition.</p> <p>The Australian Energy Regulator (AER) is Australia's national energy market regulator which also operates under the Competition and Consumer Act 2010. It regulates wholesale and retail energy markets as well as energy networks, based on national energy legislation and rules.</p> <p>While specific tasks of the ACCC and the AER are different, the two authorities share many common objectives and both work to protect, strengthen and supplement competitive market processes.¹⁰</p> <p>In 2014, the ACCC, the AER and the Australian Energy Market Commission entered into a memorandum of understanding in which they agreed on information sharing, consultation and cooperation.</p>
Germany	The Federal Cartel Office (Bundeskartellamt) is an independent competition authority whose task is to protect competition in Germany. A legal framework for protection of competition is based on the Act against Restraints of Competition, which is

⁸ OECD (2014). Roundtable on Changes in Institutional Design of Competition Authorities. Note by Spain. DAF/COMP/WD(2014)103. 17-18 December 2014, page 5.

⁹ OECD (2016). Summary Record: Annex to the Summary Record of the 123rd Meeting of the Competition Committee Held on 15-19 June 2015. DAF/COMP/M(2015)1/ANN6/FINAL. Paris. 16-18 June 2015, page 8.

¹⁰ Source: <https://www.accc.gov.au/about-us/australian-competition-consumer-commission/about-the-acc>.

Country

commonly referred to as the “Basic Law of the Market Economy”.¹¹

The Act against Restraints of Competition also contains specific rules for certain industries (agriculture, energy, press, and water management), which complement the general competition rules; see chapter 5 of the Act: “Special provisions for certain sectors of the economy”.

The Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway (Bundesnetzagentur) is a separate federal authority. Its core task is to ensure compliance with the Telecommunications Act, the Postal Act and the Energy Act as well as respective ordinances.

The Federal Cartel Office and the Federal Network Agency hold no concurrent powers, i.e. there is a clear line between both authorities. The Federal Network Agency does not apply general competition law, but provisions of the general competition law are directly incorporated in the Telecommunications Act and the Energy Industry Act.¹²

The law also provides for a close co-operation between the Federal Cartel Office and the Federal Network Agency. This includes legal provisions for information exchange to ensure legal certainty and avoid misunderstanding and repetitive work.¹³

United Kingdom

In 2011 the Government of the United Kingdom of Great Britain and Northern Ireland undertook wide-ranging reforms to the competition, consumer protection and consumer credit regimes. The Office of Fair Trading’s (OFT) and Competition Commission’s (CC) functions were transferred to a range of successor organizations. The competition functions of the CC and the OFT were taken over by the Competition and Markets Authority (CMA)¹⁴. Certain OFT consumer functions were transferred to other organizations and responsibility for consumer credit was transferred to the Financial Conduct Authority. The Enterprise and Regulatory Reform Act 2013 created the CMA and brought into effect a number of significant institutional changes to the enforcement regime of the United Kingdom. The CMA formally took up its powers in 2014. The CMA is the current competition authority of the United Kingdom. In combination with its competition enforcement role, the CMA is also responsible for consumer protection and plays some roles in relation to regulated sectors.

Even though sector regulators of specific industries (e.g. energy, water, transportation, telecommunications etc.) are separate bodies from the CMA, they have powers to apply some aspects of competition law in relation to their particular industry sector. These aspects include especially the prohibitions on anti-competitive agreements and abuse of dominance under the applicable legislation. These competition

¹¹ Source:

http://www.bundeskartellamt.de/EN/AboutUs/Bundeskartellamt/bundeskartellamt_node.html.

¹² Groebel, Annegret. BNetzA as an independent multi-sector NRA – the evolutionary approach (Presentation). Madrid, 11 March 2015, page 29. Available at:

http://www.ceer.eu/portal/page/portal/EER_HOME/EER_INTERNATIONAL/CEER-ARIAE1/5th%20ARIAE-CEER%20Roundtable/5th%20ARIAE-CEER_Session%20V_Groebel.pdf

¹³ *Id.* at 29, 31.

¹⁴ More information on CMA at; <https://www.gov.uk/government/organisations/competition-and-markets-authority/about>

Country

powers are in addition to the sector regulator's regulatory powers and are concurrent with powers of the CMA.¹⁵ The use of general competition law as an enforcement tool in the regulated sectors should be preferred over taking specific regulatory measures. Therefore, sector regulators are required to consider whether the use of their competition law powers is more appropriate before taking enforcement action under their sector-specific regulatory powers.¹⁶

The Competition Act 1998 (Concurrency) Regulations 2014¹⁷ 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. The relevant provisions read as follows:

“Determination of the exercise of Part 1 functions

“4.—(1) If a competent person proposes to exercise any of the prescribed functions in respect of a case and it considers that another competent person has or may have concurrent jurisdiction to exercise Part 1 functions in respect of that case, it must inform that other competent person in writing of its intention to exercise prescribed functions in respect of that case.

“(2) Where a competent person has informed another competent person of its intention to exercise prescribed functions in accordance with paragraph (1) in respect of a case, all such competent persons (“the relevant competent persons”) must agree who is to exercise Part 1 functions in respect of that case.

“(3) When agreement has been reached in accordance with paragraph (2), the CMA must as soon as practicable inform in writing the other relevant competent persons which competent person is to exercise Part 1 functions in respect of the case.

“Dispute

“5.—(1) If the relevant competent persons are not able to reach agreement in accordance with regulation 4(2) within a reasonable time, the CMA must notify the other relevant competent persons that it intends to determine which relevant competent person is to exercise Part 1 functions in respect of the case.

“(2) Any relevant competent person may make representations in writing to the CMA no later than 5 working days after the date upon which the CMA notifies its intention to make a determination in accordance with paragraph (1).

“(3) The CMA must within 10 working days of notifying its intention in accordance with paragraph (1)—

“(a) determine which competent person is to exercise Part 1 functions in respect of the case; and

“(b) inform in writing all other relevant competent persons—

“(i) which competent person is to exercise jurisdiction in respect of the case,

¹⁵ OECD (2014). Roundtable on Changes in Institutional Design of Competition Authorities. Note by the United Kingdom. DAF/COMP/WD(2014)105. 17-18 December 2014, page 7.

¹⁶ *Id.* at 8.

¹⁷ The Regulations are available at: http://www.legislation.gov.uk/ukxi/2014/536/pdfs/ukxi_20140536_en.pdf.

Country

“(ii) the date of the determination, and

“(iii) the reasons for the determination.

“(4) In making a determination in accordance with paragraph (3)(a) the CMA—

“(a) must take into consideration any representations made in accordance with paragraph (2); and

“(b) (subject to paragraph (5)) may decide that it is to exercise Part 1 functions in respect of the case rather than another relevant competent person, where the CMA is satisfied that its doing so would further the promotion of competition, within any market or markets in the United Kingdom, for the benefit of consumers.

“(5) Where Monitor is one of the relevant competent persons, the CMA may not make a determination in accordance with paragraph (1) and (3)(a) that a competent person other than Monitor is to exercise Part 1 functions in relation to the case unless the CMA is satisfied that the case is not principally concerned with matters relating to the provision of health care services for the purposes of the NHS in England.”

In order to foster mutual cooperation and coordination, the CMA has entered into bilateral memoranda of understanding/agreements with most of the sector regulators.

Uruguay

The task of protection of competition has been generally vested in the Commission on the Promotion and Defense of Competition, which is a decentralized body of the Ministry of Economic Affairs and Finance.

However, separate regulatory bodies have been granted exclusive powers to enforce competition law in the industries they regulate. Under Article 27 of the Defense of Competition in Trade Act, protection and promotion of competition in regulated sectors is the responsibility of specialized regulatory bodies charged with oversight or supervision over these sectors. This power of sector regulators extends to markets that might be related to a regulated market, as long as the relationship may affect the competitive conditions in the regulated market. Furthermore, if an action affects more than one market, only one of these markets needs to belong to a regulated sector for the competition authority to be excluded from examining the case.¹⁸

Separate enforcement entities without expressive repartition of competences

Namibia

Competition laws in Namibia are enforced primarily by the Namibian Competition Commission.

Namibia has a number of sector regulators in key industrial sectors, such as the financial services sector (the Bank of Namibia and the Namibia Financial Institutions Supervisory Authority), the communications services sector (the Communications Regulatory Authority of Namibia), the regulation of ports (the Namibian Ports Authority), and the distribution of electricity (the Electricity Control Board).

Competences of the Competition Commission, the Bank of Namibia, the Communications Regulatory Authority of

¹⁸ UNCTAD (2016). Voluntary Peer Review of Competition Law and Policy: Uruguay, page 40. UNCTAD/DITC/CLP/2016/1. Available at: http://unctad.org/en/PublicationsLibrary/ditclp2016d1_en.pdf.

Country

	<p>Namibia, and the Electricity Control Board with respect to competition in the respective regulated sectors overlap. The Competition Commission has suggested that based on the fact that legislation does not define competition mandate for the sector regulators, complicated situations may arise making it difficult to carry out mandates of the respective authorities.¹⁹</p> <p>In order to mitigate the potential conflicts, Section 67 of the Competition Act 2003 envisages the conclusion of agreements between the competition authority and sector regulators on concurrent jurisdiction on competition. As of 2014, the Competition Commission had negotiated and concluded cooperation agreements with four sector regulators: the Communications Regulatory Authority of Namibia, the Bank of Namibia, the Electricity Control Board, and the Namibian Ports Authority.²⁰</p>
Mauritius	<p>The Competition Commission of Mauritius is a statutory body established to enforce the Competition Act 2007. The Competition Commission does not need approval by a sector regulator to carry out an investigation in the respective sector, nor can regulators exercise powers under the Competition Act 2007.</p> <p>However, in order to enhance cooperation with sector regulators, Mauritian competition law requires that the Competition Commission and specific sector regulators enter into memoranda of understanding governing their respective competences. The relevant provision of the Competition Act 2007²¹ reads as follows:</p> <p>“66. Memorandum of Understanding between Commission and regulators</p> <p>“The Commission and regulators shall enter into a memorandum of understanding governing the effective exercise of their respective responsibilities and establishing mechanisms for practical cooperation in the exercise of those responsibilities, including the use of the sector-specific expertise of the regulators in respect of investigations under this Act.”</p> <p>As of 2017, the Competition Commission has concluded memoranda of understanding for example with the Bank of Mauritius, the Information and Communication Technologies Authority, the Ministry of Renewable Energy and Public Utilities, and the Financial Services Commission.</p>
South Africa	<p>The South African Competition Commission is a statutory body constituted in terms of the Competition Act and empowered to investigate, control and evaluate restrictive business practices, abuse of dominant positions and mergers in order to achieve</p>

¹⁹ UNCTAD (2014). Voluntary Peer Review of Competition Law and Policy: Namibia, page 34. UNCTAD/DITC/CLP/2014/3. Available at:

http://unctad.org/en/PublicationsLibrary/ditccp2014d3_en.pdf

²⁰ *Id.* at 34.

²¹ The Act is available at: <http://www.ccm.mu/English/legislations/Pages/Legislation.aspx>.

Country

equity and efficiency in the South African economy.

Sectors regulated by special legislation were initially exempted from the jurisdiction of the competition authority, but later Competition Act was amended to remove this exemption.²²

According to the Competition Act (see below), sector regulators and the Competition Commission now 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 regulators have an explicit mandate over competition matters in their sector – i.e. this does not imply agreements with every sector regulator). In 2004, the competition authority had agreements with regulators in the broadcasting and electricity sectors, and under these agreements the Competition Authority is the lead investigator in concurrent jurisdiction matters.

As of 2017, the Competition Commission has a number of memoranda of understanding/agreements with sector regulators such as the Construction Industry Development Board, the National Liquor Authority, the National Gambling Board, and the Ports Regulator of South Africa.²³

The relevant provisions of the South African Competition Act²⁴ read as follows:

“3. Application of Act

“This Act applies to all economic activity within, or having an effect within, the Republic, except –

[...]

“(1A) (a) In so far as this Act applies to an industry, or sector of an industry, that is subject to the jurisdiction of another regulatory authority, which authority has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 of this Act, this Act must be construed as establishing concurrent jurisdiction in respect of that conduct.

“(b) The manner in which the concurrent jurisdiction is exercised in terms of this Act and any other public regulation, must be managed, to the extent possible, in accordance with any applicable agreement concluded in terms of sections 21(1)(h) and 82(1) and (2).

“21. Functions of Competition Commission

“(1) The Competition Commission is responsible to –

[...]

“(h) negotiate agreements with any regulatory authority to coordinate and harmonize the exercise of jurisdiction over competition matters within the relevant industry or sector, and to ensure the consistent application of the principles of this Act;

²² Weeks, Keith. Defining the interface between sectoral regulation & competition enforcement in regulated sectors - the South African experience (presentation), 18 November 2009. Available at: <http://www.oecd.org/gov/regulatory-policy/44942587.pdf>.

²³ Source: <http://www.compcom.co.za/mou-sa-regulators/>.

²⁴ The Act is available at: <http://www.compcom.co.za/the-competition-act/>.

Country

- (i) participate in the proceedings of any regulatory authority;
(j) advise, and receive advice from, any regulatory authority;
[...]
- “82. Relationships with other agencies
- “(1) A regulatory authority which, in terms of any public regulation, has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 within a particular sector –
- “(a) must negotiate agreements with the Competition Commission, as anticipated in section 21(1)(h); and
- “(b) in respect of a particular matter within its jurisdiction, may exercise its jurisdiction by way of such an agreement.
- “(2) Subsection (1)(a) and (b), read with the changes required by the context, applies to the Competition Commission.
- “(3) In addition to the matters contemplated in section 21(1)(h), an agreement in terms of subsection (1) must -
- “(a) identify and establish procedures for the management of areas of concurrent jurisdiction;
- “(b) promote cooperation between the regulatory authority and the Competition Commission;
- “(c) provide for the exchange of information and the protection of confidential information; and
- “(d) be published in the Gazette.
- “(4) The President may assign to the Competition Commission any duty of the Republic, in terms of an international agreement relating to the purpose of this Act, to exchange information with a similar foreign agency.”

The collaborative economy: new challenges facing competition and regulation

26. In recent years, economies all over the world witnessed an unprecedented expansion of new, innovative business models based on collaborative platforms capable of reshaping whole industries. These business models, commonly referred to as “collaborative economy” or “sharing economy”, use internet platforms (accessible through computers, mobile phones or other devices connected to the internet) to interconnect owners of under-used assets with users in need of such assets, in other words to “create an open marketplace for the temporary usage of goods or services often provided by private individuals.”²⁵ Such platforms are being used for example to facilitate ride-sharing, home-sharing or lending money among individuals.

27. Although collaborative economy may bring new opportunities for consumers and businesses,²⁶ it also raises various issues in relation to competition. The issues that are currently being debated involve, for example, the following: whether collaborative platforms should be subject to market access requirements applicable to traditional providers; which actors participating in collaborative economy should be considered as economic units subject to competition rules; whether collaborative economy needs to be

²⁵ European Commission. A European agenda for the collaborative economy. Brussels, 2 June 2016, page 3. Available at: <http://ec.europa.eu/DocsRoom/documents/16881/attachments/2/translations/en/renditions/pdf>.

²⁶ It is argued that collaborative economy allows for more efficient use of resources and thus may result in lower prices and increased supply.

separately regulated; what factors should the competition authorities take into account when assessing proposed mergers between incumbent providers and rival collaborative platforms; or how market power of a collaborative platform which does not itself provide the final services should be evaluated.

28. Disruptive entry into market by collaborative platform can often lead to friction between regulation and competition policy.²⁷ While adequate regulation can serve legitimate goals including consumer protection and public safety, excessive regulation (e.g. in the form of barriers to entry) could chill innovation and competitive forces to the detriment of consumers.²⁸ Regulatory bodies in many jurisdictions have already made attempts to regulate new collaborative platforms, usually arguing that such regulation is necessary to protect public interest.²⁹ However, regulators should be cautious when imposing new regulation on collaborative economy as experience shows that such regulation can be in some cases induced by lobbying of incumbent providers who feel threatened by the new entrant.³⁰

29. Competition authorities, with their unique knowledge of markets and expertise in competitive processes, could play a vital role in protecting competition against both overregulation and anticompetitive behaviour of private entities (whether incumbents, new collaborative platforms, or others). The experience shows that competition authorities can relatively effectively engage in a dialogue with legislators and regulatory bodies and advocate for solutions which will not unnecessarily hamper competition. The following table shows examples of actions taken by competition authorities in relation to regulation targeting collaborative economy.

Examples of competition authorities' responses to regulation of the collaborative economy

European Union	<p>In June 2016, the European Commission published a relatively comprehensive communication explaining its position on the collaborative economy, entitled "A European agenda for the collaborative economy". Its purpose is to provide "legal guidance and policy orientation to public authorities, market operators and interested citizens for the balanced and sustainable development of the collaborative economy."³¹</p> <p>The communication suggests how existing laws of the European Union should be applied to the collaborative economy. In particular, five key issues are addressed in the communication: market access requirements; liability regimes; protection of users; self-employed and workers in the</p>
----------------	---

²⁷ See OECD. Hearing on Disruptive Innovation: Note by United States. DAF/COMP/WD(2015)54. 16-18 June 2015, page 7. Available at:

[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/wd\(2015\)54&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/wd(2015)54&docLanguage=En).

²⁸ See Federal Trade Commission. The "Sharing" Economy: Issues Facing Platforms, Participants & Regulators. November 2016, page 6. Available at: <https://www.ftc.gov/reports/sharing-economy-issues-facing-platforms-participants-regulators-federal-trade-commission>.

²⁹ For instance, the Urban Redevelopment Authority of Singapore decided to regulate home-sharing platforms by issuing guidelines which do not allow home-owners to sublet their premises for stays of less than six months. More or less similar regulations were adopted also in cities like Berlin, Germany; Barcelona, Spain; or New York, USA.

³⁰ See OECD. Hearing on Disruptive Innovation: Issues paper by the Secretariat. DAF/COMP(2015)3. 16-18 June 2015, page 7. Available at: [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP\(2015\)3&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2015)3&docLanguage=En).

³¹ European Commission. A European agenda for the collaborative economy. Brussels, 2 June 2016, page 2. Available at: <http://ec.europa.eu/DocsRoom/documents/16881/attachments/2/translations/en/renditions/pdf>.

	collaborative economy; and taxation.
	The European Commission in its communication warns against unreasonable regulatory action targeting collaborative economy and stifling competition. For example, the European Commission emphasized that “service providers are not to be subject to market access or other requirements, such as authorisation schemes and licensing requirements, unless they are non-discriminatory, necessary to attain a clearly identified public interest objective and proportionate to achieving this interest (. . .).” ³²
	The European Commission also made it clear that absolute bans or quantitative restrictions of any such activities should be adopted only as a measure of last resort. As the European Commission suggested with respect to home-sharing platforms, for example, “banning short-term letting of apartments appears generally difficult to justify when the short-term rental use of properties can for example be limited to a maximum number of days per year.” ³³
United Kingdom	In 2015, the United Kingdom’s Competition and Markets Authority published a response to new regulations of private hire vehicles (including ride-sharing platforms) proposed by Transport for London. In its response, the Competition and Markets Authority <i>inter alia</i> argued that some of the proposed regulatory changes could (i) affect entry, expansion or innovation in the private hire vehicle market, (ii) harm competition between traditional taxis and private hire vehicles, and (iii) result in higher prices or services of a lower quality. ³⁴
South Africa	In 2016, the Competition Commission of South Africa received a complaint alleging that one of the ride-sharing platforms engages in various anticompetitive practices, including non-compliance with South African public rules and regulations. Following an investigation into these allegations, the competition authority took a view that the alleged conduct does not contravene the competition laws of South Africa and decided not to prosecute the case. ³⁵
United States of America	In 2013, the District of Columbia Taxicab Commission proposed new regulations which would in effect restrict the operation of ride-sharing platforms in the District of Columbia. In reaction to the proposed rules, the Federal Trade Commission sent the District of Columbia Taxicab Commission a letter in which it pointed out the possible anticompetitive outcomes of these regulations. ³⁶

³² Id. at 3.

³³ Id. at 4.

³⁴ Competition and Markets Authority. Competition and Markets Authority response to Transport for London’s private hire regulations proposals. 2 December 2015. Available at: <https://www.gov.uk/government/publications/cmas-response-to-tfls-private-hire-regulations-proposals>.

³⁵ Competition Commission. Statement on the decisions of the Competition Commission. 20 October 2016. Available at: <http://www.compcom.co.za/wp-content/uploads/2016/01/Commission-Statement-20-October-2016-Final.pdf>

³⁶ Federal Trade Commission. Letter Re: Second Proposed Rulemakings Regarding Chapters 12, 14, and 16 of Title 31. 7 June 2013. Available at: https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comments-district-columbia-taxicab-commission-concerning-proposed-rulemakings-passenger/130612dctaxicab.pdf.