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I. Introduction

According to Majone, it is the phenomena of greater economic integration and increased international competition that has resulted in a reduced role for the positive, interventionist State, and a corresponding increase in the role of the “regulatory State”. As part of this thesis, international competition is said to take place not only among producers of goods and services but also, increasingly, among regulatory regimes.² Within the specific context of the European Union (“EU”), it is argued that the EU and the European Member States are “regulatory states” that have evolved in response to the demands of economic modernization. A very distinctive feature of the regulatory state in the EU, however, is that the general trend of deregulation over time – assuming that “markets” work effectively – coincides with the political will of greater European integration. This lends itself to the creation of regulatory agencies, irrespective of their apparent lack of “democratic” credentials.³ By contrast, an author like Jabko takes the view that the EU regulatory approach to sector-specific regulation is based on regulatory innovation, which often occurs in sectors with slow technological evolution and where increased economic efficiency cannot merely be achieved through incremental regulatory changes. Thus, according to this author, the achievement of the EU regulatory state is more the result of politics rather than economic modernization.⁴

The liberalization of utility sectors around the world began in the late 1980s.⁵ With the transition from monopoly provision to competitive markets, the impetus for creating well resourced, skilled and independent regulatory agencies to supervise those markets increased quickly. Irrespective of whether the principle driver for an era of regulation was economics or politics, it became clear early on in the liberalization process across the world that there were many common analytical steps that nation states

² Majone G., “From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance”, *Journal of Public Policy* (1997), Vol. 17(2), at pp. 139-168. See also Laughlin M. & Scott C., “The Regulatory State” in Dunleavy *et al.* (eds), *Developments in British Politics* (1997), Basingstoke, Macmillan Press, where the authors argue that the increasing use of regulation as a formal instrument of government may arise because of the need to ‘steer’ the behaviour of a variety of actors – both public and private – who operate to some degree removed from the State. The United Kingdom is cited as a particular example of this phenomenon, largely in response to certain changes in the role and structure of government. See Yeung K., “The Regulatory State”, in Baldwin R., Cave M. & Lodge M., *The Oxford Handbook of Regulation* (2010), Oxford University Press, at pp. 64-83, which points to the need for applying caution when using the label “regulatory State” to any given jurisdiction without having first identified its salient features. In other words, Yeung takes the view that *‘it must be more apt to refer to multiple regulatory states, with their own distinctive characteristics and dynamics, rather than to speak of a single or uniform regulatory state.’* (at p. 76.)

³ The classic US treatise of Waldo D., *The Administrative State* (1948), New York, Ronald Press Co., argues that scientific management and efficiency are not the core ideas which drive the government bureaucracy, but it is rather the idea of “service to the public”. Accordingly, Waldo believes that public administrative efficiency must be backed by a framework of consciously held democratic values, as they evolve over time.

⁴ Jabko N., “The Political Foundations of the European Regulatory State” in Jordana J. *et al.* (eds), *The Politics of Regulation – Institutions and Regulatory Reforms for the Age of Globalisation* (2004), Chetnham (UK), Edgar Publishing. See also Yeung K., *Securing Compliance* (2004), Oxford, Hart Publishing, which examines the sociological and normative strands of influence on regulatory compliance, reflecting on the inevitable value judgements that are made in the determination of whether and to what extent economic regulation is warranted.

⁵ Refer to discussion in Yarrow G. & Jasinski P., *Privatization: Critical Perspectives on the World Economy* (1996), London, Routledge Press, which provides an analysis of the privatization phenomenon affecting State assets in key industries and network utilities across industrialised nations.

had to take to ensure that their regulatory agencies were ‘fit for purpose’, but also that national and regional/local traditions might dictate that different paths be taken in the specific design of those agencies. Moreover, within the EU, the emergence of clear overlaps and conflicts over time between substantive and institutional issues generated tensions which required that regulatory models be modified and improved incrementally.

In 1989, at a critical point in the liberalization process in the EU, Hancher & Moran considered how different political contexts shape regulation, with many advanced capitalist countries being characterized by a high level of State intervention and the fact that large firms participate very actively in the regulatory process. In the view of the authors, economic regulation is largely a process of intermediation and bargaining between large undertakings which span the private and public domains of decision-making.⁶ This ‘intermediation’ function has further complicated the role of agencies in the regulatory state, as it has added layers of consultation, fact-finding and balancing of stakeholder interests to the decision-making process. While this trend has opened up the decision-making process to new levels of transparency, the parallel concern has developed that agencies should not be ‘captured’⁷ by any of the key stakeholders involved in most regulatory policy debates.

Ayres & Braithwaite argue that solutions to the problems of capture and corruption lie in the introduction of characteristics such as limits on discretion in decision-making, multiple-agency jurisdiction, and the rotation of personnel. Each of these characteristics inhibit the evolution of a spirit of cooperation between a regulator and the regulated market actors. In order to address the problem of regulatory capture, the authors have advanced the concept of “tripartism”, a regulatory policy which fosters the participation of public interest groups in the regulatory process through the same access to information as public agencies, participation in the bargaining process between public agencies and regulated firms, and the same *locus standi* as public agencies.⁸

Taking into account various observations on the role of the ‘regulatory state’, the aim of this paper is to explore, *inter alia*:

- the analytical bases upon which regulatory agencies are allocated sector-specific tasks in utility sectors;
- the momentum that exists around the world for the increasingly hybrid performance of competition law (*ex post*) and regulatory (*ex ante*) functions;

⁶ See Hancher L. & Moran M., “Organizing regulatory space”, in Hancher and Moran (eds.), *Capitalism, Culture and Regulation* (1989), Oxford Clarendon Press.

⁷ The concept of regulatory capture refers to a form of government failure that occurs when a regulatory agency, allegedly created to act in the public interest, instead advances the commercial or political concerns of special interest groups that are prominent in the industry or sector which it is charged to regulate. The origins of the theory of regulatory capture is usually associated with the writings of the economist George Stigler (see “The Theory of Economic Regulation” (1971) 2, *The Bell Journal of Economics and Management Science*, p. 3.). Following Stigler’s seminal article, Richard Posner further developed the concept. (See Posner R.A., “Theories of Economic Regulation” (1974) 5 *The Bell Journal of Economics and Management Science*, p. 335). These initial works forged a path for a long line of academic literature exploring the interface between law, economics and political science.

⁸ See Ayres I. & Braithwaite J., *Responsive Regulation – Transcending the Deregulation Debate* (1992), Oxford, Oxford University Press, who argue that features of regulatory encounters often foster the evolution of cooperation but also encourage the evolution of capture and corruption.

- the incorporation of competition law goals and tools into the sphere of regulatory activity, accompanied by closer institutional cooperation between National Regulatory Agencies (NRAs) and National Competition Agencies (NCAs);
- the tendency in some jurisdictions to collapse all regulatory functions into a single agency, including the performance of competition law functions;
- the importance of ensuring that agencies operate in an independent manner; and
- the increasing use of regional regulatory bodies in the EU in the reinforcement of harmonization and internal market policies.

In addressing these issues, the paper is concerned with the policy choices and trends related to institutional design of competition law and regulatory enforcement. To this end, it focuses on the different architectures that seek to reconcile and bring together tools used to regulate the behaviour of undertakings *ex ante* and to sanction eventual abuses *ex post*. These architectures are becoming ever more sophisticated, as both the language and the goals of regulation and competition law reach new levels of convergence.

While the focal point of the analysis will be on regulatory structures developed in the EU, references to other jurisdictions will be made wherever non-EU examples illustrate particular trends in the shaping of agency structures. What lies outside the scope of this paper, however, is a review of the processes of capacity-building, staffing and funding of such agencies.⁹ Similarly, the discussion is not intended to determine whether particular agency structure lends itself to better, or more effective, rule-making, but rather to exploring the strengths and weaknesses of the various approaches that have been adopted.

II. Sector-specific regulation

It is universally acknowledged that a critical aspect of public policy is for the regulatory state to be able to address market abuses or market failures through either competition rules (in the case of abuses) or through economic regulation (in the case of market failures). The regulatory architecture relied upon to achieve these twin objectives can vary between different jurisdictions, based on a range of factors such

⁹ As regards the dedication of resources to regulatory functions, in the studies performed by Domah, Pollitt & Stern in 2002, and revisited in 2010 by Pollitt & Stern, the most important factor by far in justifying staff numbers – both by reference to total numbers and professional staff – is the number of customers in the market, followed by the number of regulated companies. Refer also to discussion in Cave M. & Stern J., *Competition and Regulatory Policy and Institutional Design for Scotland*, Research Paper No. 11/2013, May 2013, the David Hume Institute, at p. 5. In Hanretty C., LaRouche P. & Reindl A.P., *CERRE Study on “Independence, Accountability and Perceived Quality of National Regulatory Authorities”*, 6 March 2012, the authors investigate how regulators from 5 EU Member States achieve high quality decision-making. See also Stern J., “The Evaluation of Regulatory Agencies” in Baldwin, Cave & Lodge, *op. cit.*, at pp. 223-258, who examines the intrinsic difficulties involved in measuring agency performance. According to the author: “*when it comes to evaluating the performance of regulatory agencies, the main difficulty lies in identifying the target of evaluation – be that a government policy or a regulatory regime designed to implement that policy. A further problem is that the counterfactual of no agency is far too much. The evaluator is not considering a marginal change; it involves having to consider what set of structural choices and decisions might have been taken by some alternative, hypothetical regulatory framework. As this is unworkable, the ex post evaluation focus turns to evaluating sets of decisions taken by the regulator, relative to other decisions that it might have taken. These decisions have to be big enough significantly to affect the consumer, efficiency and investment outcomes but not so large as to recast the sector. Finding enough such decisions can be difficult.*” (at p. 251.)

as available budgets (and recurring sources of financing),¹⁰ the size of the overall economy and the particular sector at issue,¹¹ different cultural and legal traditions regarding the exercise of executive power¹² and the extent to which effective judicial review is available to curb State decision-making,¹³ the extent to which stakeholders' views can be accommodated without compromising an agency's

¹⁰ The classic forms of agency financing are derived from up-front licensing fees, annual renewal licensing fees, recurring charges for access to scarce resources, and charges based on a percentage of turnover which are dedicated to the performance by the regulatory agency of its key functions. Within the EU, however, there are explicit restrictions on the extent to which NRAs can finance their operations, thereby ensuring that financial charges imposed on regulated firms are not excessive and do not thereby unreasonably raise their costs of doing business. Refer, for example, to: in telecommunications, Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorization of electronic communications networks and services (*Authorisation Directive*) and its successor, Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (*Recast*), Article 16; and in energy, the *Third Energy Package* (Directive 2009/72/EC on electricity, Directive 2009/73/EC on natural gas, Regulation (EC) No. 713/2009 establishing an agency for the cooperation of energy regulators, Regulation (EC) No. 714/2009 on the conditions for access to the network for cross-border exchanges in electricity, and Regulation No. 715/2009 on the conditions for access to the natural gas transmission networks. In the railway sector, EU Directive 95/18 establishes a regulatory framework and guidelines by which EU Member States may grant licences for the operation of railways, with the licensing of an operator in one Member State being generally valid in other EU Member States. Refer to EU Directive 95/18, as clarified by EU Directive 2001/13. Thus, an agency should not be able to achieve 'windfall' funding at the expense of the effective operation of the industry, as disproportionate costs in terms of licensing and operating fees would inevitably also raise disproportionately the costs faced by new entrants.

¹¹ The attraction of being able to operate on a nation-wide basis provides an effective platform for new entrants in large national markets, and justifies their absorption of higher operating costs relative to a smaller economy. Similarly, certain sectors are less burdened with public service obligations and ongoing maintenance and infrastructure upgrade costs, which facilitates greater revenue-generating possibilities; in these circumstances, the appetite of operators to bear higher administrative (regulatory compliance) costs is arguably higher when the costs can be offset by higher profitability.

¹² In Majone G., "The Rise of the Regulatory State in Europe", *Western European Politics* (1994), Vol. 17, pp. 77-101, the author proceeds on the assumption that regulation should be limited to correcting market failure and to promoting economic efficiency. However, Burton J., "Competitive Order or Ordered Competition? The UK Model of Utility Regulation in Theory and Practice", *Public Administration*, Vol. 75(2), pp. 157-188, in analyzing the institutional arrangements for UK utility regulation in the post-privatization period specifically with respect to the question of *de facto* independence from governmental/Ministerial influence, criticizes existing regulatory structures; this is because the regulatory system tends towards "ordered competition" rather than the achievement of open and effective competition (wherever feasible.) By contrast, Sunstein C., *After the rights revolution: Reconceiving the regulatory state* (1990), Boston, Harvard University Press, discusses a range of non-economic substantive goals that justify regulatory intervention. These include: public-interest redistribution of welfare; reduction in social subordination; the promotion of diversity of experience; the prevention of harm to future generations; the embodiment of collective desires and the shaping of endogenous preferences. In the United States, authors Osborne D. & Gaebler T., *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (1992), Reading MA, Addison Wesley, at p. 25, consider that it is also necessary to bring "the culture of the marketplace" to public administration, with a focus on performance measurement, business sense and market orientation. The authors argue that problems such as excessive and ineffective bureaucracy do not arise from failures in politics, but from a lack of managerial leadership, executive decision-making and decentralization.

¹³ The legal standard of review has a significant collateral effect on the workings of a regulatory agency in terms of the implementation of transparency measures, the running of stakeholder consultations and the ability to substantiate decision-making, all of which have the effect of raising administrative costs for an agency and increasing compliance costs for industry stakeholders.

effectiveness,¹⁴ and the pool of skilled technocrats and external advisors capable of administering public policy.¹⁵

At the heart of the regulatory State is the understanding that significant consumer and societal benefits can be driven by the liberalization of markets, which subjects them to the forces of competition. It is only at this point in time that we can speak of “competition” and the importance of developing operational standards for the application of economic regulation in a competitive environment.¹⁶ The functions of *ex post* (competition) and *ex ante* (regulation) intervention are inevitably performed in a free market environment by agencies which enjoy some form of independence from the State and clear independence from market operators in that economic environment. Each and every one of these agencies is subject to its very own set of checks and balances developed against the backdrop of the regulatory State’s political and economic goals.

Traditional separation of regulatory powers

The overwhelming number of OECD countries (including those of the EU) have institutional architectures which establish: (1) more than one specialist *ex ante* regulatory agency; and (2) an *ex post* competition enforcement agency that is distinct from those regulatory agencies.

Among the specialist, sector-specific regulatory agencies, the institutional pattern that is most often relied upon is that of:

- i. a sectoral regulator or National Regulatory Authority (“NRA”) covering **electronic communications** (or telecommunications) matters, whose mandate often extends to postal services and, on occasion, to issues relating to broadcasting or “content” from various media sources more generally (although this latter type of authority is much more controversial, given the cultural dimension to any such form of regulatory intervention);¹⁷ and

¹⁴ See Moran M., “The Rise of the Regulatory State in Britain”, *Parliamentary Affairs*, vol. 54(1), at pp. 19-34, who stresses the changed popular expectations and growing sensitivity to regulatory risks. Refer also to Ogus A., *Regulation: Legal Form and Economic Theory* (2004), Oxford, Hart Publishing, who considers arguments that are centered around private interest theory as a means of evaluating the economic efficiency of regulatory processes. The author contends that resources devoted to winning the regulation ‘game’ (*i.e.*, lobbying), often result in economic waste and are therefore socially unproductive. In turn, Croley P., “Theory of regulation: incorporating the administrative process” (1998), *Columbia Law Review*, vol. 1, at pp. 56-65, argues that the assumption of ‘interest-group competition’ (for desired regulatory outcomes) fails to appreciate that some interests are systematically underrepresented and that regulatory outcomes are therefore biased towards the organized few *vis a vis* the undetecting many.

¹⁵ It is not uncommon for smaller agencies, especially those operating in jurisdictions with a less developed regulatory or competition law cultures, to outsource some of their more high profile, politically sensitive tasks to external consultants, who often operate on a project-by-project or on a broader retainer basis. This has the benefit of keeping down operating costs overall, while at the same time avoiding the usual vulnerability of local employees being captured, because the external experts are usually not domiciled in the jurisdiction in question.

¹⁶ Refer to Case T-87/05, *EDP – Energias de Portugal SA v Commission* [2005] E.C.R. II-3745 at para. 116, where the General Court held that the European Commission was not entitled to apply competition rules where a sector continued to be subject to a legal monopoly.

¹⁷ The treatment of broadcasting services raises particularly interesting jurisdictional questions, given the fact that it raises so many public interest policy issues, including plurality of the media concerns. Cultural sensitivities have meant that broadcasting is therefore treated as a “cultural exception” to WTO Rules, for example, while the 1997 *Amsterdam Protocol* to the European Treaties means that there is no role for EU policymaking which might affect the public service remit of national broadcasters within the EU. Not surprisingly, therefore, it is exceedingly difficult to have broadcasting regulation situated within the same

- ii. a sectoral regulator covering **energy** issues (electricity and gas) which, on occasion, includes jurisdiction over other basic commodities or classic ‘utilities’ such as water and sewage.

As Cave & Stern have pointed out,¹⁸ the principal rationale for drawing the distinction between these two main groups of sector-specific regulators is the fact that the telecommunications and postal sectors are characterised by the existence of a monopoly or bottleneck network element at the local customer service point (*e.g.*, the so-called local loop), while there are real possibilities for competition at ‘core network’ level (especially in the case of telecommunications). By contrast, it is widely acknowledged that the electricity and gas (as well as water) sectors are all characterised by the existence of physically unavoidable central networks (often along with local distribution networks).

There are, of course, other sector-specific regulators which deal with industries as diverse as transportation (civil aviation, railways, ports and roads), banking, insurance, payment systems, *etc.*, which have their own idiosyncratic characteristics, which are driven by many other public policy considerations.¹⁹ For example, the commercial impact of new technologies has led to policymakers being put under pressure to expand the scope of traditional telecommunications sector regulation into areas that are more associated with specific types of content. In the case of Malta, for example, rather than resulting in the expansion of the telecommunication regulator’s mandate, this has resulted in the creation of a new regulatory agency - the Malta Digital Innovation Authority (“MDIA”) - with a view to recognising innovative technology arrangements brought about by the use of blockchain technology. The MDIA’s responsibilities include the grant, issuance, refusal, revocation, cancellation or suspension of authorisations regarding the provision of innovative technology arrangements.²⁰ Aside from its

agency as other regulatory powers. By contrast, the convergence of regulatory functions arguably occurs more readily in a country like China across the telecommunications, media and IT spaces because of the limits to free speech and pluralism concerns in a State-driven economy. Within the EU, a Member State such as France draws clear boundaries between the competence of a telecommunications regulator and its media regulator, whereas Italy combines both telecommunications and media regulation, even extending to content issues. Germany draws a bright line between the regulation of media issues, which are governed at the regional level of the Länder, and telecommunications sector issues, which are addressed at the federal level. By contrast, the United Kingdom’s OFCOM is responsible for the economic regulation of both telecommunications and broadcasting sectors, largely driven by the fact that cable TV and satellite operators have enjoyed a symbiotic relationship since their inception, with broadcasting content serving as a key wholesale input to their respective retail service bundles. In Belgium, that country’s unique pattern of cable TV infrastructure rollout has resulted in creeping regulatory powers being introduced into the media sector as a result of the regulation of cable networks under the scope of telecommunications regulation.

¹⁸ See Cave & Stern, *op.cit.*, at pp. 3-4.

¹⁹ Regulation relating to industries such as banking, insurance and payments systems focus more on ensuring equal operating conditions and facilitating cooperation in order to minimize risk contagion across an industry where retail customer security is paramount. By contrast, while sectors such as railways and posts are characterized by the existence of historical incumbents, the scope of economic regulation directed to addressing market power is more limited, given the continued emphasis in those sectors of public service obligations and the need for economies of scale for certain operations relating to the provision of such public service. In the maritime and civil aviation sectors, the lack of any insurmountable fixed costs in the provision of services means that much of the emphasis of competition rules and sector-specific regulation has been directed towards the opening up of bottleneck or essential facilities in the form of airtime slots (civil aviation) and ports (maritime). In addition, the very particular security issues surrounding the civil aviation industry means that most jurisdictions impose limits on the ability of non-nationals to own a majority stake in a national airline.

²⁰ Refer to the *Malta Digital Innovation Authority Act 2018*, which was enacted in July 2018. According to the Act, “innovative technology arrangements” include the software codes, computer protocols and other

monitoring and supervisory powers, the MDIA also has investigative and enforcement powers in relation to innovative technology arrangements provided in or from Malta. Regulatory decisions adopted by the MDIA are subject to appeal before an independent body, while the MDIA is also obliged to coordinate with other competent authorities whose competence might somehow extend to the same subject-matter. Although these other regulators are not the focus of this paper, many elements of institutional design discussed here are also applicable to them (especially those dealing with network industries with powers to regulate access and prices).

In addition, there is a range of institutional options to achieve the formal allocation of powers between **sector-specific regulators** and **competition** authorities. A clear differentiating factor between sector-specific regulation and competition law – at least in theory – is the widespread belief that the former can pursue a range of public policy goals that are able to shape an industry, whereas competition rules are there to apply rational economic theory across all commercial sectors with a view to maximising consumer welfare.²¹ The debates within the competition law family turn largely on whether the optimization of consumer welfare is to be appraised in the short term or in the longer term, whether overwhelming emphasis is to be placed on price considerations, whether a broader total welfare evaluation is the preferred alternative standard to be applied, and whether the maintenance of competitive structures is more important than the protection of individual competitors.²² Only in one instance – that of the telecommunications industry in New Zealand – has the liberalization of a network sector occurred while presuming that competition policy would be capable of resolving all market failures and addressing abusive practices. That experiment in the late 1980s has, over time, given way, to the understanding that at least some form of effective targeted access regulation is required to constrain the incumbent operator.²³

Over time, many NCAs have also embraced the application of unfair trade practices rules, or even consumer protection rules, within their competence. For example, within the EU, *inter alia*, Member States such as Italy, Denmark, Malta, Finland, the United Kingdom, Ireland and The Netherlands provide clear examples of the fusion of competition law and consumer protection powers. In the United States, Article 5(1) of the Federal Trade Commission Act, which prohibits “unfair methods of competition in or affecting commerce” is often identified by commentators as a broad power of market regulation that “spans the boundary between competition law and regulators”.²⁴

architectures used in the context of decentralised ledger technology, “smart” contracts and related applications.

²¹ That simple analytical split is compromised when one considers the amount of *de facto* industry re-structuring that takes place through the application of merger control rules, often with a view to reinforcing or introducing regulatory principles. See Alexiadis P. “Merger control in regulated sectors: a bridge too far?”, in *Liber Amicorum* (Vol. II) for Ian Forrester, *Concurrences* (2015), at pp. 3-56.

²² The traditional ‘Chicago’ school line of thinking (usually associated with authors such as Posner in the 1970s) is progressively giving way to an approach which attaches greater significance to non-price measures of welfare. For example, the “New Brandeis” movement – sometimes also referred to as “Hipster Antitrust”, places greater emphasis on the preservation of market structure and the competitive process itself; see, e.g., Khan L.M., “Amazon’s Antitrust Paradox” in *Yale Law Journal* (Vol. 126, No. 3) pp. 710-805. More generally, refer to Crane D.A., “Chicago, Post-Chicago, and Neo-Chicago” (2009), *University of Chicago Law Review*, pp. 1911-2009.

²³ Refer to the *Clear Communications* case before the New Zealand Court and the Privacy Council. See also to Blanchard C., “Telecommunications Regulation in New Zealand: How Effective is ‘Light-Handed’ Regulation?”, *Telecommunications Policy* (1994) Vol. 18, 2nd edition. Refer also to Table 1 on New Zealand.

²⁴ Refer to discussion in Dunne N., *Competition Law and Economic Regulation – Making and Managing Markets* (2015), Cambridge University Press, Chapter 5, at pp. 304-314. In this regard, refer also to Fels A.,

The specific market defect that might need to be remedied, the particular legal standard adopted for intervention, the legitimate objectives that can be pursued by the agency, and the remedies that might be available to that agency, are all highly relevant considerations in determining whether any particular agency is best positioned to take action.

Also, the different tool kits available to NCAs and NRAs in order for them to address different market defects tend to influence which agency is best suited to address the particular issue in question. On one hand, NCAs' *ex post* actions are usually based on the imposition of sanctions (*e.g.* fines for infringements) and structural remedies (*e.g.* divestitures, compulsory licensing of IP), with a more limited recourse to specific behavioural obligations. The assumption is that the remedy will be sufficient to (re)establish competition and to avoid continuous oversight. On the other hand, NRAs' *ex ante* actions rely on a broader tool kit of behavioural control, including access obligations, rate regulation, technical obligations, quality controls, *etc*. Indeed, as a general matter, the regulatory tools available to NRAs usually assume that a natural monopoly or a highly concentrated market will constitute the basic market structure, thereby requiring detailed obligations and continuous oversight.²⁵

Despite any specific allocation of powers between NRAs and NCAs, decisions taken under *ex ante* and *ex post* regimes are not taken in isolation, but are often taken in consultation between the various agencies responsible for the administration of these disciplines. That process of consultation can take various forms. Thus, Brazil implements a system where, in relevant cases, consultation occurs between the NCA and the NRA with a view to enforcing competition rules in the telecommunications sector.²⁶ In Germany, BNetzA is obliged to consult more generally with the Bundeskartellamt when formulating regulatory remedies and when considering the implications on competition of spectrum allocations. Italy has also worked hard since 2013 to forge greater cooperation between its respective NRA and NCA agencies. In Poland, the NCA is either consulted or obliged to provide an opinion on questions arising under telecommunications regulation. Significant cooperation between the NRA and the NCA also takes place in Turkey, with the NRA being obliged to seek the NCA's opinion with respect to

"Should Competition Authorities Perform a Consumer Protection Role?" in Liber Amicorum (Vol. 1) for Frédéric Jenny, *Standing Up for Convergence and Relevance in Antitrust*, Concurrences, at pp. 243-254, Fels considers the relevance of issues of institutional design where the responsibilities for both competition and consumer policy lie within a single agency. He considers the pros and cons of such shared responsibility, exploring the inherent limits to the possibilities for integration (especially given the very different nature of the tasks involved in implementing consumer policy and competition policy). The author concludes that conflicting pressures can be addressed through a range of different approaches, but what will be required in each case is that: (i) the NCA has in-house access to the skills involved in the formulation of consumer policy, while *inter alia*, having the scope to intervene in consumer policy decisions that have material competition implications; and (ii) an entity within the government provides "whole of government" oversight of consumer protection in a manner that is mindful of competition concerns.

²⁵ OECD compares the different approaches and remedies used by NCAs and NRAs along similar lines: "...*sector-specific regulators are often charged with attenuating the effects of market power, whereas competition agencies basically focus on reducing such power; (...) sector-specific regulators typically impose and monitor various behavioural conditions whereas competition agencies are more likely to opt for structural remedies; (...) sector-specific regulators typically intervene more frequently and require a continual flow of information from regulated entities, while competition offices rely more on complaints and gather information only when necessary in connection with possible enforcement action*". (OECD, Relationship between Regulators and Competition Authorities, Policy Roundtables, 1998, pp. 8-9, <http://www.oecd.org/regreform/sectors/1920556.pdf>).

²⁶ See for example, the decision in which the NCA (CADE) dismissing an investigation about certain Zero Rating practices, after receiving an opinion from ANATEL which took the view that the conduct was not anti-competitive and was actually efficient. See Administrative Inquiry 08700.004314/2016-71, Defendants: Claro S.A., TIM Celular S.A., Oi Móvel S.A. and Telefonica Brasil S.A., dismissed on 08.31.2017.

certain key issues. Significant cooperation also occurs in the United States between the NRA for telecommunications matters (the FCC) and one of the two NCAs (the FTC). The complexities of cooperation take a slightly different twist in jurisdictions such as New Zealand and South Korea, where regulatory traditions are modified by the actual or potential use of structural or functional separation remedies.

In the recently adopted rules set forth in the *4th Railway Package*, the level of cooperation anticipated between agencies in the railway sector is expressly prescribed in some detail. Thus, Article 56 (3) of SERA²⁷ specifies that railway sector NRAs are obliged to “cooperate closely” with the national safety authority (as understood within the meaning of Directive 2008/57/EC on the interoperability of the rail system within the EU) and the “licensing authority” (within the meaning accorded to that term by SERA). It is also specified that, at European level and with the help of the European Commission, NRAs in the rail sector shall exchange information about their work and decision-making principles and practices with the aim of developing a common approach in order to avoid conflicting decisions.

Exceptions to the general rule

The majority of European Union (“EU”) Member States endorses the form of institutional sector-specific regulatory architecture centred around the fundamental telecommunications/energy split, with notable exceptions being: the United Kingdom, which has a separate regulator for water;²⁸ Greece, which has an electronic communications regulator that also has sector-specific competition powers; and Spain, Germany, the Netherlands and Estonia, that have consolidated most of their relevant regulatory functions under one roof (as have countries such as Australia and Jamaica outside the EU). Small EU Member States such as Luxembourg and Malta also combine their telecommunications and energy functions within the same regulatory body. By contrast, in a small non-EU sovereign State such as Botswana, the regulator expressly assumes the responsibility for broadcasting regulation, but declines responsibility for electricity and water regulation, based on those sectors’ different network characteristics.

In Germany, the regulatory agency which had responsibility for the regulation of the Telecommunications and Postal Sectors (RegTP) was founded in 1998. In 2005, it was conferred additional competences in relation to the energy and rail sectors, being re-named as the Bundesnetzagentur (BNetzA, Federal Network Agency). Its internal organization was modelled after the German Competition Authority. Nonetheless, there has been criticism about its performance, largely because the BNetzA is subordinate to the Federal Ministry for the Economy & Energy. Concerns that have been expressed about the independence of the Authority do not relate to the daily decision-making powers of the Authority, but rather to its more general independence in developing a policy strategy, as the Minister has the power to instruct BNetzA.²⁹ Despite the proposal of the Monopolkommission (the advisory body to the Federal Ministry for the economy and energy) that BNetzA should be conferred with additional effective powers for controlling the rail sector (in particular setting the fees charged to

²⁷ Namely, Directive 2012/34/EU of 21 November 2012 establishing a single European railway area (“SERA”).

²⁸ Indeed, given the fact that the United Kingdom has introduced a much greater level of liberalization in the water sector than most of its EU Member State counterparts, it has deemed it appropriate to introduce a *sui generis* form of merger review by the CMA for that sector (while not departing altogether from the prevailing system of ‘concurrency of powers’ regime under the *Water Act 2014*, which came into effect in December 2015). See, for example, *Pennon Group plc./Bournemouth Water* (2015) and *Severn Trent/United Utilities* (2016).

²⁹ See Attendorf T. & Geppert M. in Beck’scher TKG-Kommentar [2013] 4th ed, TKG §116 para 18.

users of the tracks),³⁰ and BNetzA's own arguments in 2011 that its powers be extended to cover the water sector,³¹ its accumulated powers from 2005 have remained unaffected. In parallel, no debate has taken place as to the possible addition to BNetzA of competition law powers, as Germany's Bundeskartellamt has a long history of independence from all other forms of government involvement. Despite calls for the greater accumulation of regulatory powers to include rail and water, there seems to be residual concern in some circles that the traditional level of influence and direction of the German government in the policies pursued by BNetzA has been carried over into its new structure.³² In other words, an accumulation of regulatory powers does not appear to have quashed the idea that BNetzA is any more independent today than it was when its functions were more fragmented.

Outside the traditional telecommunications and energy regulatory paradigms, the treatment of the **transport** sector is subject to significant variations. Thus, airline regulators are only slightly more common than railway regulators, with regulatory responsibilities being usually associated with the existence of broad policy mandates rather than on targeted regulatory obligations designed to facilitate a better functioning market. The adoption of the 4th Railway Package in December 2018, however, will bring rail regulators into greater public prominence. Indeed, railway sector agencies are vested with powers which contain strong competition policy elements. Thus, it is specified in Article 56 (9) of SERA, that an EU Member State NRA in the rail sector, “[w]ithout prejudice to the power of the national competition authorities for securing competition in the rail services markets, shall, where appropriate, decide on its own initiative on appropriate measures to correct discrimination against applicants, market distortion and any other undesirable developments in these markets”. In light of the breadth of this provision, it is reasonable to conclude that some concurrency of competition powers exists uniquely in the railway sector at the EU level. Given the fact that rail liberalization is still at a relatively early stage of its development, however, only time will tell if NRAs avail themselves of these sweeping competition-style powers in the railway sector.

Dealing with scarce resources

More limited departures from the traditional competition law/sector-specific regulatory architecture split are not uncommon. For example, the UK's Competition and Markets Authority (“CMA”) has the authority to conduct appeals from regulatory decisions. The US Federal Trade Commission and the Department of Justice have particular powers in relation to telecommunications sector transactions, while the former has limited regulatory-style powers that can be exercised in the sector along with the NRA, the Federal Communications Commission (FCC). The reasons for such partial extensions of competence are many and varied, including the need for greater objectivity in decision-making, greater efficiency and technical knowledge, and more effective oversight.

³⁰ See <https://www.zeit.de/mobilitaet/2015-07/deutsche-bahn-wettbewerb-schienenverkehr-monopol>; https://www.monopolkommission.de/images/PDF/SG/presse_s74.pdf.

³¹ See <https://www.zeit.de/wirtschaft/2011-09/wasser-preise-bundesnetzagentur>.

³² For example, the FAZ (Frankfurter Allgemeine Zeitung, <https://www.faz.net/aktuell/wirtschaft/20-jahre-bundesnetzagentur-gemischte-zwischenbilanz-15610372.html?service=printPreview>) writes that the Government seeks to shield historical incumbents, in particular in the postal sector, from the impact of competition and that the BNetzA is not doing enough to resist such pressure, but is a “*mere agent fulfilling the central planning of the State in the energy sector*”. It has also been widely acknowledged that the margin squeeze action brought by the European Commission against Deutsche Telekom in the electronic communications sector was just as much driven by an ineffectual application of cost calculations by sector-specific regulator BNetzA as it was by the foreclosing pricing practices of the defendant. In this regard, see the discussion in O'Donoghue R. & Padilla J., *The Law and Economics of Article 102 TFEU* (2013) (2nd ed.), pp. 415-422.

The responsibility for the administration of scarce resources is also an area where distinctly different approaches are taken. For example, whereas a number of EU and non-EU jurisdictions confer responsibility for the allocation and evaluation of spectrum to their NRAs, a large number still continue to regulate the availability of spectrum through their responsible Ministries.³³ This split reflects a fundamental difference in approach. On the one hand, sovereign States which confer exclusive powers in relation to spectrum management on their NRAs tend to view spectrum as a relevant input in the competitive process, and hence something that should be regulated by the NRA responsible for overall economic regulation in the sector.³⁴ Moreover, the large amounts of revenue generated by the sale of radiofrequencies also provides the basis upon which an NRA often funds its operations, and hence sustains its decision-making independence. By contrast, many sovereign States believe (not unjustifiably) that spectrum is a valuable national asset.³⁵ As such, the financial benefits derived from that asset should inure to the State more generally, which also creates an institutional dynamic that foresees the State as the appropriate vehicle to monitor all aspects of its allocation, use and valuation.³⁶ Both positions are not without merit.

Where the resources in question are very localised (*e.g.*, access to pipes, ducts, sewers, permits necessary to dig up roads and lay cabling, and so forth), regulatory powers often reside at the local level. Although EU rules establish a common legal framework for how resources are to be managed and valued, it is difficult for NRAs or even national governments to enforce EU liberalisation and harmonisation goals at such a local level, especially where there is an adverse impact on local revenue-raising possibilities.³⁷

³³ [Table 1](#) provides an overview of the key jurisdictional competences enjoyed by regulatory agencies with responsibility for the telecommunications sector in some of the major jurisdictions around the world. A growing number of regulatory agencies around the world are responsible for spectrum management issues, including nations as diverse as the United States, Australia, Brazil, Hong Kong, India, Japan, Mexico, Turkey, South Africa and South Korea. Within the EU, many Member States designate the regulation of spectrum issues to their respective NRAs, including Germany, Belgium, Italy and Poland. Even where spectrum management issues rest in general in the hands of an NRA, special derogations often exist for spectrum used for broadcasting and for socially-critical or security-critical services (such as those utilized by the armed forces or public broadcasters); the control of spectrum allocation and its release and economic valuation for such specialist uses continues to be held tightly by most governments.

³⁴ The extension of an NRA's competence into the field of spectrum allocation and valuation arguably makes it easier to justify regulatory intervention in relation to access to content issues where content is a common wholesale input that is valued by many competitors operating in a 'converged' telecommunications/broadcasting environment (*e.g.*, OFCOM in the United Kingdom); see Section 316 of the UK's *Communications Act 2003*, Chapter 21. Given the extent to which access to content obligations would be seen to be interfering with intellectual property rights, such access obligations would in general be considered to be disproportionate in most jurisdictions.

³⁵ In the airline sector, slots serve as an essential input into the airline business. Regulation 93/95, (as amended) regulates the distribution of slots of congested "Level 3" congested airports. In addition, an independent agency (*e.g.*, LOHOR in France, Air Coordination Limited in the United Kingdom) manages the allocation of slots. It is often the case that a material percentage of available slots are made available to new entrants. In the railway sector, a special regulatory framework exists for those bodies which control and regulate the allocation of railway lines to operators and the charges to be imposed for the use of those lines; refer to EU Directive 2001/14, replacing EU Directive 95/19.

³⁶ Directive (EU) 2018/1972 of the European Parliament and of the Council, Recitals 133 and 136 (OJ L 321 of 11 December 2018).

³⁷ For example, in the context of electronic communications legislation, it is provided that an NRA should "*define rules for apportioning the costs of the facility or property sharing, to ensure that there is an appropriate reward of risk for the undertakings concerned.*" See Directive (EU) 2018/1972 of the European

Next generation regulation

A recently issued report in the United Kingdom has promoted the idea of creating a new regulatory agency architecture which cuts across traditional utility sector regulation. This new multi-sectoral agency would consist of the creation of an “Essential Service Consumer Regulator”, while a second multi-sector agency would be responsible for a more traditional source of regulatory intervention – in the form of an Infrastructure Services Regulator.³⁸

The driver for this bifurcated regulatory model is said to stem from the perceived need to put consumers at the heart of markets which, rather than being vertical sector-specific silos, are being increasingly brought together by the twin phenomena of digitalisation and connectivity, thereby leading to increasing convergence. Such convergence is further boosted by the data-driven economy, as the collection, processing and management of data is opening up new possibilities in terms of managing supply and meeting demand. Indeed, as suppliers come to understand consumer needs, preferences and patterns at unprecedented levels, new types of personalized offers and bundles are being designed. This, in turn, results in new types of suppliers, intermediaries and aggregators being able to enter the market.

As a result of this fast-moving process, certain traditional individual products become “invisible”, becoming embedded in a broader range of products or services that are more desirable to consumers. In such an environment, it is argued that the focus of regulation will need to move from product regulation to one which regulates more integrated services (e.g., telecommunications and energy sector operators are gathering increasing amounts of data from users, in order to offer other integrated services, which often allows them to compete in adjacent markets). Moreover, identifying consumer harm in such circumstances will become an increasingly complex task, as consumers’ meaningful choices will need to be assessed in a multi-product world, which will also mean that they will increasingly focus on service value rather than merely on product cost (which is the focal point of today’s regulators). According to this line of argument, if these functions are not merged, consumers will either not be able to benefit from bundled services or will have to ‘unpick’ these complexities themselves, which would increase consumer harm.³⁹

Under the proposed bifurcated regime, the Essential Service Consumer Regulator would merge the consumer parts of the existing regulatory functions into one “consumer” regulator for essential services. In doing so, it would *inter alia* need to:

- Triage consumer vulnerability appropriately and merge consumer vulnerability responsibilities across all essential services.
- Merge the consumer advocacy role to reflect the new regulator’s remit.
- Adopt new consumer protection principles and identify next generation consumer risks.
- Develop a common essential services Ombudsman regime.
- Develop a ‘complexity’ labelling system.

Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (*Recast*).

³⁸ Refer to Sandys L., Hardy J., Rhodes A. & Green R., “*Redesigning Regulation*” (December 2018), Grantham Briefing Paper.

³⁹ Sandys *et al.*, *op. cit.*, at p. 23.

- Develop new standards by which to weigh and measure the new values developed in the regulation of essential services.⁴⁰

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

These proposals present an interesting potential direction for regulation to take in the United Kingdom and other developed economies. Subsuming all consumer-facing regulation under one roof offers some clear benefits, especially given the encroachment of consumer protection policy across all liberalised sectors. As proposed, however, the new bifurcated regulatory responsibilities do not seem to envisage how the existing concurrency of powers with competition law will operate. Possibly, the new Infrastructure Services Regulator, as the agency responsible for the regulation of access to bottlenecks, would be the agency with the largest interface with the competition authorities. The new regulatory model might arguably provide a blueprint for action in smaller nations keen to cut costs, promote efficiency and to develop scale, although one should presume that a prerequisite for the application of such a model will be a relatively high degree of broadband penetration,⁴¹ given the relative importance attached by the report to the widespread availability of ‘converged’ services.

That process of distinguishing consumer-facing regulation from platform/network regulation may, however, not be a straightforward exercise from a legal point of view, and will undoubtedly require changes in primary legislation at the Member State level. Decisions by policymakers to regulate across a particular value chain, which might combine various sectors, might depend on the approach taken (individually and collectively) to a number of factors, including whether:

- the level of complexity in the relationships across sectors, which might mean that there are likely to be less obvious ‘economies of scope’ in an agency expanding its powers across cross-sectoral value chains;
- the benefits of achieving universally ‘correct’ decisions by adopting consistent policies across sectors is possibly offset by the risk of arriving at a uniformly ‘wrong’ decisions on key issues (e.g., access costs) where there is no possibility of re-calibrating a particular approach;
- there are benefits in protecting vulnerable customers across all retail levels, as opposed to generating excessive intrusion of regulation at the retail level, where competition should in theory be most effective; and
- any ‘split’ along vertical or horizontal lines between regulatory functions results in material cost savings for regulatory agencies.⁴²

At the time of writing, it is not clear whether proposals presented in the report considered above will be implemented, nor how they will address some of the challenges identified above. Nevertheless, such a proposal captures a number of trends in recasting the regulatory debate given the existence of a new

⁴⁰ *Ibid.*

⁴¹ The proposed institutional model might be capable of implementation alongside the existing EU legal framework for electronic communications, including under the recently adopted *European Electronic Communications Code* of December 2018.

⁴² As developed by Cave M., LLM Lecture, Kings College, January 2019.

wave of convergence. Another possible tendency at the present juncture is the merging of *ex ante* and *ex post* functions into a single agency, as discussed immediately below.

III. The merging of *ex ante* and *ex post* functions: variations in institutional design

Given the “horizontal” nature of competition rules (*i.e.*, operating across all economic sectors) and the generally held view that sectoral expertise is required to address sector-specific regulatory issues, the conventional wisdom over the years has been that it is preferable for *ex post* and *ex ante* disciplines to be strictly separated and administered by separate agencies. However, more recently, there has been an increase in appetite among policymakers to bring together the worlds of antitrust and regulation, or at least to create hybrid agencies which can administer both disciplines, along with consumer protection powers. This has been inspired by, *inter alia*: the introduction of ‘regulatory antitrust’ measures into competition policy,⁴³ the increasing need of NRAs to adopt more flexible approaches towards the remedying of market failures, the perceived need for specialist sectoral expertise when applying competition rules, and the increasing realization that theories of harm in the world of antitrust are difficult to adapt to address structural market failures in many network industries.

Accordingly, it is increasingly seen as a viable option to have the architecture of sector-specific authorities that enjoy *ex ante* powers as part of the broader remit usually associated with an NCA.⁴⁴ According to some commentators, the empowerment of a particular agency with both competition law and regulatory authority would in theory be able to avoid poor policy choices as a result of regulatory

⁴³ See Alexiadis P., “Understanding How Regulatory Standards Influence Competition Law Standards of Review”, *Journal of European Competition Law & Practice* (2019) Oxford Journal of Competition Law (forthcoming). See also Ibáñez-Colomo P., “EU Competition Law in the Regulated Network Industries”, *LSE Law Society & Economy, Working Papers*, 08/2016. This concept of ‘regulatory antitrust’ in the hands of NCAs has been seen as necessary to fill the gaps in regulatory regimes exploited by dominant firms or the failings of under-resourced or ineffective NRAs. By the same token, many of the provisions contained in the Third Energy Package are directed towards the *improvement* of competitive conditions in energy markets, rather than addressing a particular market failure, while others consist of derogations from competition principles in order to pursue other public policy objectives. See various discussions in Alexiadis P., “Balancing the Application of *ex post* and *ex ante* disciplines in electronic communications markets: square pegs in round holes?”, in *Rights and Remedies in a Liberalised and Competitive Internal Market*, March 2012, Buttigieg (ed.). See also Cave M. & Crowther P., “Co-ordinating regulation and competition law – *ex ante* and *ex post*”, in *The Pros and Cons of Antitrust in Deregulated Markets* (2004), Swedish Competition Authority publication; cf. Monti G., “Managing the Intersection of Utilities Regulation and EC Competition Law, *Competition Law Review* (July 2008), Vol. 4, Issue 2, at pp. 123-145; cf. Ibáñez Colomo P., “On the Application of Competition Law as Regulation: Elements for a Theory”, *Yearbook of European Law* (2010), Vol. 29 (Eeckhout & Tridimas, eds.)

⁴⁴ This consolidation of *ex ante* sector-specific powers and traditional antitrust *ex post* powers in NCAs was dubbed by Oliveira & Pereira Neto as ‘antitrust regulation’. Although not discussed here in detail, another extreme model of consolidation of all *ex ante* and *ex post* functions into a single agency would be to attribute *ex post* competition law powers in regulated sectors to NRAs to the exclusion of the NCA over that sector altogether, through an ‘antitrust exemption’, *i.e.*, such an approach should go far beyond the ‘concurrency of power’ approach used in the United Kingdom. For a discussion of these alternative institutional designs, refer to Oliveira T. & Pereira Neto C.M., ‘Regulation and Competition Policy: Towards an Optimal Institutional Configuration in the Brazilian Telecommunications Industry - Second Annual Latin American Competition and Trade Round Table’ (1999), 25 *Brooklyn Journal of International Law* 311, pp. 316-321.

and competition agencies' power struggles.⁴⁵ In the words of Decker & Gray,⁴⁶ the enhancement of the "functional substitutability" of the various agencies as "market supervisory tools" is increased where the respective competition and regulatory functions are merged. This cross-fertilisation of expertise is seen in some quarters as being more cost efficient and capable of leading to higher quality decision-making. Moreover, a mixed set of competences in principle facilitates the transition (at least in theory) to a unitary system of competition law operating in isolation, with sector-specific regulation having been rendered redundant over time.⁴⁷ However, as noted by Dunne, "*the blurring of the lines between antitrust and regulation at an institutional level may increase opportunities for capture, and thus diminish the independence and objectivity of decision-making, particularly in the competition law context.*"⁴⁸

Jurisdictions exhibiting a combination of competition powers with the powers of at least one NRA include nations such as Australia, Estonia, New Zealand, the Netherlands and Spain. By contrast, jurisdictions with a clear separation of powers include the United States, Canada, Japan, the large majority of EU Member States and Brazil. A third 'hybrid' category is reflected in the powers of regulators such as those in Greece, Ireland and the United Kingdom, which exercise various concurrent or selective *ex ante* and *ex post* powers (refer to Table 1).

The 'federal' structure within the EU is reflected in the fact that most decision-making is taken at the national level by NRAs under most sector-specific initiatives.⁴⁹ The policy objectives for various sector-specific issues are set at local level where particular characteristics of the industry call for specific actions (*e.g.*, water and certain aspects of energy), while competition policy is, by contrast, set centrally. Indeed, the bulk of activity in competition matters occurs at national level, given that the European Commission is not in a position to investigate all potential infringements due to a lack of resources (see discussion below in Section VI).

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

⁴⁵ Refer to Dunne, *op. cit.*, at p. 266.

⁴⁶ See Decker C. & Gray H., "Antitrust and Arbitration in Regulated Sectors" (2011), *Competition Law International*, p. 7.

⁴⁷ The somewhat naïve view that regulation could be rendered completely redundant over time was initially pioneered by the *Littlechild Report* (1983), Department of Industry, "Regulation of British Telecommunication" Probability Report to the Secretary of State".

⁴⁸ See Dunne, *ibid.*; cf., Cave & Stern, *op. cit.*, who express the view that: "*Our preference is for separation between competition and regulatory agencies, based largely on concern about regulatory opportunism and about the resulting suppression of multiple viewpoints.*" (at p. 9).

⁴⁹ The implementation of certain types of EU-origin regulation can also occur more directly under certain specific regimes such as REMIT (Regulation (EU) No 1227/2011 on wholesale energy market integrity and transparency (OJ L 326/1 of 8 December 2011). Under the umbrella of the REMIT scheme, the Commission is empowered to set certain regulatory parameters with effect for the whole EU Single Market, while the Agency for the Cooperation of Energy Regulators (ACER) is responsible for the monitoring of European wholesale energy markets and ensuring that NCAs carry out their tasks under REMIT in a "coordinated and consistent way".

Pros and Cons

Commentators have identified a number of positive factors which support the view that *ex ante* and *ex post* powers should be combined, including:⁵⁰

- i. limits on the ability of a firm to engage in regulatory “forum shopping” by having its issues adjudicated by the forum most likely to judge its case favourably;
- ii. the lowering of costs for the government, and hence the taxpayer, which include “bureaucratic transaction costs” related to the “complexity of inter-institutional operating routines” required by the process of cooperation among different agencies;⁵¹
- iii. the use of sector-specific expertise can be harnessed by the *ex post* regulator to arrive at better informed results;
- iv. it avoids unnecessary rivalry between agencies as to which is best placed to deal with any particular issue, and prevents unnecessary competition for the public purse, especially when prompted by populist sentiments; and
- v. it minimizes the risk of conflicting decisions between different agencies and the resulting legal uncertainty that this produces.

By contrast, some commentators have also identified the positive factors that can be associated with the maintenance of separate sources of supervision that would otherwise be lost if regulatory and competition powers converged into the same institutional hands,⁵² including:

- i. By combining all powers in a single Authority, that institution has the power to choose its *easiest* instrument through which to pursue intervention, rather than that which is *most appropriate*. This would arguably lead to an inherent tendency to promote more onerous *ex ante* interventions and remedies, instead of the better targeting these regulations and eventually replacing them by *ex post* controls⁵³ (which is what should in theory occur if markets are operating effectively). Thus, a converged regulator would not only have an enhanced armoury of remedies with which to intervene, but might also be tempted to opt for the weapon that is the most damaging, regardless of whether it is absolutely necessary.
- ii. It is harder in principle for a market operator to “capture” multiple institutions, including an agency (*i.e.*, the NCA) with broad cross-sectoral powers and no deeper responsibility for any specific industry, as opposed to a single large institution that will have more identity with the deeply regulated industries under its mandate (although the counter-argument is that it may be

⁵⁰ For example, refer to Cave & Stern, *op. cit.*, at pp. 8-9; cf. discussion in Dunne, *op. cit.*, at chapter 5.

⁵¹ The concept of “bureaucratic transaction costs” is inspired by the work of Ronald Coase & Oliver Williamson on the theory of the firm and markets. For a more detailed discussion of this concept and its role in designing optimal institutional configurations between NCAs and NRAs, refer to Oliveira & Pereira Neto, *op. cit.*, at p. 322.

⁵² For example, see Trillas F., *The Institutional Architectural Regulation and Competition – Spain’s 2012 Reform* (April 2013), IESE Business School Working Paper No. WP-1067-E, SSRN: <https://ssrn.com/abstract=2353526> or <http://dx.doi.org/10.2139/ssrn.2353526>; cf. Laffont J. & Martimort D., “Separation of regulators against collusive behaviour” (1999), *RAND Journal of Economics*, at pp. 257-258.

⁵³ For example, certain NRAs have foreseen expressly the eventual disappearance of *ex ante* regulation (*i.e.*, through the use of ‘sunset clauses’ in a jurisdiction such as The Netherlands, prior to the fusion of all regulatory powers in one entity in that Member State).

harder to capture one very large and integrated, financially secure entity which has multiple sectoral agendas running in parallel).

- iii. There is a risk of certain ‘Cinderella’ sectors being created because intervention is limited across all sectors, which means that over-stretched regulators (particularly in smaller jurisdictions) have to identify specific sectoral targets that need to be prioritised at the expense of others.
- iv. Competition between regulators allows for greater transparency and a better flow of ideas, so that errors in public policy-making can be identified more easily and be more likely to be corrected (either in real time or in the future). This resembles the checks and balances available within sectoral agencies, embedding a self-correction mechanism in the institutional architecture.
- v. Specialist sector-specific policies can get “lost” in a more broadly-based agency. For example, certain types of “build or buy” regulatory strategies work most effectively in certain sectors at particular stages of industry development, whereas an agency with accumulated powers would find it exceedingly difficult to do anything other than adopt a relatively uniform policy position across sectors, for fear of being accused of acting inconsistently or arbitrarily.⁵⁴
- vi. Issues regarding the scope of powers of search and seizure, confidentiality of submitted information and the legitimate use of company data can create enforcement problems, as each jurisdiction does not necessarily adopt the same approach to such matters across both its NCA and NRA.⁵⁵

⁵⁴ When an NRA mandates a wholesale access obligation in a given industry, it must be mindful of the investment signals it is giving to new entrants as to whether they should be encouraged to build their own infrastructure, or remain dependent indefinitely on access to the infrastructure of the historical incumbent operator. The NRA’s dilemma is exemplified in the different decisions taken by the CMC in Spain both before and after its accumulation of powers with respect to promoting operator incentives to deploy telecommunications networks in certain regions of Spain while they seek access in other regions of Spain (as opposed to adopting a unitary policy). This shift in policy orientation has also not coincided with policy shifts at EU level as regards “build or buy” decisions by operators. By way of example, note the potential shift in emphasis between the recently adopted European Electronic Communications Code at EU level and the current EU Regulatory Framework for electronic communications networks and services when it comes to the treatment of investors in upgraded infrastructures: see Alexiadis P. and Shortall T., “European Commission signals strong policy shift under the European Electronic Communications Code (EECC)”, *Utilities Law Review* (2019) Vol. 22 Issue 3. As regards the regulatory incentives provided to new entrants in order that they deploy networks (rather than merely providing services), refer to Cave M., “Encouraging infrastructure competition via the ladder of investment”, *Telecommunications Policy* (2006), Vol. 30, Issues 3-4 (April-May), pp. 223-237.

⁵⁵ Because antitrust (competition law) investigations have a quasi-criminal element attached to them in many jurisdictions, it follows that the legal systems of most jurisdictions tend to establish much higher standards in support of the rights of defence where such investigations take place. Accordingly, in a multi-purpose agency, the rights of defence might be compromised if information legitimately obtained for one discrete purpose is used for another. The rights of defence, for example, are much more rigorously upheld in the context of antitrust investigations than many other forms of investigations or fact-finding by agencies. In those situations where the standards adopted for the rights of the defence are very different depending on the specific circumstances in which they are exercised, it will therefore be necessary to establish information barriers to ensure that information gathered for one distinctive purpose is not used for another. Even within the field of competition law enforcement, information gathered under a Sector Inquiry, for example, cannot be used directly to support a separate competition law investigation under Articles 101-102 TFEU, although the

- vii. Separate institutional structures allow for specialization, thereby benefiting from sectoral expertise within the respective NRAs and from more general cross-sectoral welfare enhancing policies practised by NCAs.

The intensity of the pros and cons identified above may vary in different institutional environments. Indeed, institutions are not created in a political or institutional void, as they are heavily dependent on the socioeconomic context in which they operate, the history of regulation and the human and material resources available in each jurisdiction. For example, countries with a strong history of horizontal competition enforcement, and highly trained officials, may reap the benefits of the separate accumulated experience in this area. These factors may in turn lead to some ‘path dependency’ regarding the particular institutional design chosen,⁵⁶ whereby different weights are attributed to the positive and negative factors associated with the types of joint or separate supervisory agencies indicated above.

Conflicting policy goals

The fusion of *ex ante* and *ex post* powers is an emerging trend which is gaining support in a number of jurisdictions, whether for sound analytical reasons or simply as a cost-saving measure. In bringing together *ex ante* and *ex post* disciplines, however, thought has been given to whether or not the regulatory mindset of a particular jurisdiction sits comfortably with a competition law regime which tends to prize short-term consumer welfare above other public policy priorities.

Some smaller jurisdictions do not emphasise their pursuit of competition policy at the expense of other policy goals. For example, a number of smaller Eastern European EU Member States such as the Czech Republic and Latvia (but also an EU Member State such as Ireland) have tended to support, either directly or indirectly, the growth of local infrastructure players through a variety of means, as opposed to service providers who do not invest in infrastructure.⁵⁷ Thus, while the importance of achieving competitive markets tends to be a focal point for most governments, it is not uncommon that policy remits designed to deliver consumer welfare often give way in network (infrastructure) industries to the need for “balance” between the interests of the consumer and those of the industry, or at least to condition the pursuit of consumer welfare by reference to the financial constraints imposed upon the infrastructure owner or to the investment priorities that they must satisfy. In this way, an uneasy balance often exists between the need to prop up a “national champion” and measures designed to foster an open market. Many regulatory regimes therefore become more concerned about preserving industry structures to deliver consumer welfare are not necessarily likely to opt for a ‘pure’ competition model.⁵⁸

broader-based UK procedures governing “market enquiries” expressly envisage the use of information gathered in such an investigation for use in a competition law infringement action (see later discussion).

⁵⁶ For further analysis of the concept of path dependency in institutional development, see discussion in North D.C. & Ors., *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, 1990) <http://ebookcentral.proquest.com/lib/kcl/detail.action?docID=1103733> accessed 1 March 2019.

⁵⁷ See Cave & Stern, *op. cit.*, at p. 2.

⁵⁸ For example, policy decisions to promote infrastructure deployment or services-based competition, or the use of particular cost modelling methodologies or cost accounting standards, can have a critical impact on the decisions of new entrants to invest, and hence upon the ultimate structure of an industry. By the same token, many network sectors present themselves as irresistible targets to certain NRAs, which see their function as in part performing an indirect role as a “tax collector”. For example, an NRA has the potential to extract significant levies from energy sector market actors to support renewable energy initiatives, while NRAs in the telecommunications sector have on many occasions not been able to overcome driving up spectrum pricing for respective 3G, 4G and 5G spectrum auctions in a number of key EU Member States, either through the pursuit of a revenue maximization goal or inadvertently through the application of a particular auction mechanism. In the United States, the recent merger review by the DOJ of the *Sprint / T-Mobile* mobile

At the EU level, some tension is building between merger review under competition rules and *ex ante* controls over foreign direct investment ('FDI'). Indeed, the European institutions adopted in February 2018 a legal framework for the screening of foreign direct investments ("FDIs") on grounds of public policy and public security. Currently, over half of the current 28 EU Member States have some form of FDI screening mechanism on public policy/security grounds, while major EU trading partners such as the United States, Japan, Canada and Australia have had in place FDI regimes for long periods of time. The proposed Regulation is not designed to harmonise such regimes but, rather, to enhance cooperation on such issues between Member States themselves and between Member States and the European Commission, while at the same time allowing Member States sufficient scope for intervention according to their own public policy priorities. That scope is reflected in the range of issues in relation to which they can intervene on the basis of an FDI rationale, namely: likely effects on critical infrastructure, critical technologies, the supply of critical inputs, access to sensitive information, freedom and pluralism of the media, and the extent to which an investor is controlled (directly or indirectly) by a foreign State.

An additional policy tension within the EU stems from the fact that, whereas EU Member States are obliged to implement EU competition law standards found in Articles 101 and 102 TFEU, they also have some leeway in adopting their parallel domestic competition law standards which often contain unique substantive and procedural elements. For example, broad consumer protection powers are available in a number of EU Member State jurisdictions, while procedural elements such as the United Kingdom's "market investigation" mechanism mean that the United Kingdom's CMA has much more sweeping investigatory powers than those available under the European Commission's analogous "Sectoral Inquiry" mandate.⁵⁹

Another debate that has gained traction over the years is whether sector-specific regulators should exercise *ex post* competition-style intervention powers or remedies rather than the more prescriptive style of *ex ante* regulatory intervention. Conversely, it is just as clear that a number of regulatory

telecommunications merger in the wake of a divestiture package and 5G rollout commitments by the parties post-merger has been met with the support for the deal expressed by the sector-specific regulator, the FCC: see report in *USA Today*, 20 May 2019; cf. *Forbes*, 20 May 2019. This support is understood to reflect the industrial policy direction that much of the mobile industry in the United States would like to see adopted in order to foster new 5G investments, which might not necessarily find favour with the strict interpretation of antitrust review conducted by the DOJ.

⁵⁹ Both Sector Inquiries under EU Law and Market Investigations under UK Law reflect a hybridised form of *ex ante/ex post* intervention. Under EU competition rules, Sector Inquiries are investigations that the European Commission carries out in particular sectors of the economy or in relation to certain types of agreements across various sectors where it believes that a market failure is occurring, possibly exacerbated by a breach of competition rules. The Commission exercises its discretion to intervene under the power conferred upon it by Article 17 of Regulation 1/2003 by drawing upon evidence of: limited cross-border trade; a lack of new entry; price rigidity; and other circumstances indicating restrictions or distortions of competition. Sector Inquiries have thus far been instigated predominantly in sectors characterized by utility or network elements or by relatively high levels of regulation (*e.g.*, local loops, leased lines, roaming, 3G services, e-commerce, energy, pharmaceuticals, financial services). By contrast, under Section 134(2) of the United Kingdom's *Enterprise Act 2002*, the CMA is *required* to decide whether: "*any feature or combination of features of each relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom*". If that proves to be the case, this constitutes an adverse effect on competition which, if found to exist, *obliges* the CMA to decide whether or not to take action in its own right or to recommend to other bodies (*i.e.*, NRAs) to take action to remedy, mitigate or prevent such an adverse effect on competition or any resulting effect on consumers.

paradigms affecting certain commercial practices have slipped relatively unnoticed into competition law practice over the years.⁶⁰

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

There is also a somewhat misplaced understanding that concurrent competition powers are necessary in order to foster a level of sustainable competition, whose continued existence will ultimately render redundant the need to exercise regulatory powers. However, as has been pointed out elsewhere, the reality underlying liberalized markets in many infrastructure-based sectors (especially network industries) is that they are inevitably characterised by elements of natural monopoly or complex oligopoly;⁶¹ this means that some residual use of regulatory powers in these sectors will probably need to be sustained indefinitely, irrespective of whether there is broad consensus that effective competition powers offer a “better” system of intervention in markets (and irrespective of whether *ex ante* rules need to be better refined or targeted.) This means that market failures may occur which have little likelihood of being addressed by traditional competition rules (which focus on market abuse and agreements to restrict competition).

Competing competences

The question remains as to how competing competition and regulatory agencies are to determine which of them should assert their jurisdiction over the same subject-matter, either in the alternative or cumulatively.⁶² In the context of the United Kingdom’s “concurrency of powers” model (see below), formal rules determine how *ex ante* and *ex post* powers are to be exercised by multiple agencies,

⁶⁰ In addition, the increasing use of settlements under Article 9 of Regulation 1/2003 also presents NCAs with the possibility of obtaining quasi-regulatory solutions, given that cooperation with the European Commission might often tend to result in far-reaching commitments from the party(ies) to an investigation which arguably would exceed what would otherwise be imposed by the Commission under an infringement decision adopted under Article 7 of Regulation 1/2003. The Commission has some flexibility in obtaining such optimal commitments through the Article 9 settlement route, given that the principle of proportionality to which the Commission is bound under Article 7 decisions is not the same in the context of Article 9 commitments. See *Alrosa Case*, Case No. 3951 – Swedish Interconnectors, Judgment of 14 April 2010 available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39351/39351_1211_8.pdf. By contrast, one particular author takes the view that Article 9 commitments can also give rise to sub-optimal results, given that undertakings may be acting strategically when submitting them: see Dunne N., “Commitment Decisions in EU Competition Law”, *Journal of Competition Law & Economics* (2014), Vol. 10, Issue 2, at pp. 399-421. Refer also to the more general discussion on ‘regulatory antitrust’, *op. cit.*, and Alexiadis P., “Understanding How Regulatory Standards Influence Competition Law Standards of Review”, *op. cit.* The use of commitments to obtain quasi-regulatory solutions is also growing in other jurisdictions, such as Brazil, where the NCA has imposed changes to the business practices of dominant firms in markets as diverse as electronic payments, e-bookings, telecommunications and stock exchanges.

⁶¹ As noted by Dunne, *op. cit.*, at p. 272: “[the shift from] effective regulation to competition becomes self-defeating for the self-interested regulator. More practically, the persistence of natural monopoly in certain segments of utilities markets means that it is difficult for even the most selfless of regulators to dispense entirely with the need for regulation.”

⁶² As regards the growing tendency around the world to integrate *ex ante* and *ex post* functions, refer to www.gwlc.com/world-competition-database.html.

although this particular agency model presumes the existence of a mature and integrated political system to avoid unnecessary friction in reporting competing competences.⁶³

Within the EU, the primacy of competition law above and beyond sector-specific regulation is clear, as is reflected in a series of Commission Decisions involving margin squeezing practices in the telecommunications sector, as endorsed by the European Courts.⁶⁴ By contrast, the US approach has consistently been to endorse the primacy of sector-specific regulation above antitrust rules, with the issue having been clarified in a series of Judgments delivered across the US court hierarchy.⁶⁵

The resolution to this *ex post* vs *ex ante* dilemma exemplifies the importance of different legislative traditions, given that both the US and EU approaches are based on sound policy principles consistent with their institutional backgrounds. Thus, in the United States, the doctrine of “primary jurisdiction” established in *Ricci*⁶⁶ in 1973 had the US Supreme Court holding that antitrust proceedings should be stayed pending the outcome of a parallel investigation by the relevant sector-specific regulator, based on the working assumption that the latter had the more appropriate powers to sanction the alleged violation. The principle in *Ricci* has been adopted in the financial services sector by the *Credit Suisse Case*⁶⁷ and in the telecommunications sector by the cases of *Trinko* and *Linkline*.

The rationale for the US antitrust regime deferring to the regulatory framework stems from the understanding that sector-specific regulation is likely to “cover the field” in terms of subject-matter, thereby leaving little or no scope for the application of antitrust rules. By contrast, the approach undertaken in the EU has been that competition rules override regulation unless it can be demonstrated that the alleged infringer had no opportunity to exercise any discretionary behaviour in light of the broad sweep of regulation. The rationale behind this approach in the EU is driven by, among other matters, the primacy accorded to competition rules in the EU legal order⁶⁸ and the clear legislative indicators

⁶³ The UK’s Competition and Markets Authority (CMA) has been publishing annual concurrency reports since 2014, in accordance with its statutory obligation to assess the operation of the concurrency arrangements which came into effect in the UK on 1 April 2014. Refer to the latest Annual Report on Concurrency, published on 10 April 2019. In the most recent example of how the concurrency of powers regime operates in the United Kingdom, the energy sector regulator, OFGEM, found that two energy suppliers and an energy software and consultancy service, had infringed Chapter I of the UK’s Competition Act 1998. The parties were fined collectively £870,000. According to OFGEM, the parties had entered into an anti-competitive agreement spanning January to September 2016 which prevented the suppliers from actively targeting one another’s customers through face-to-face sales. To facilitate this agreement, the suppliers shared commercially sensitive information in the form of customer meter point details. The energy software and consultancy service facilitated this arrangement by designing, implementing and maintaining software systems that allowed customer meter point details to be shared, and the recruitment of each of the suppliers’ customers to be blocked. Refer to OFGEM Press Release of 30 May 2019.

⁶⁴ Refer to Case C-280/08P, *Deutsche Telekom v. European Commission* [2010] E.C.R. I-9555; cf. Case 52/09, *Konkurrensverket v. TeliaSonera* [2011], E.C.R. I-527; cf. Case C-295/12P, *Telefónica SA v. Commission*, ECLI:EU:C:2014:2069; cf. Case 851/14, *Slovak Telekom a.s. v. European Commission*, ECLI:EU:T:2018:929.

⁶⁵ Refer to US Supreme Court Judgement in *Verizon Communications v. Law Offices of Curtis v. Trinko LLP*, 540 US 398 (2004) and in *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 555 US 438 (2009).

⁶⁶ *Ricci v. Chicago Mercantile Exchange et al.*, 409 US 289 (1973).

⁶⁷ See *Credit Suisse Securities (USA) LLC v. Billing*, 551 US 264 (2007), where the US Supreme Court held that securities markets are exempt from the scope of US antitrust laws.

⁶⁸ For example, competition rules occupy a higher place in the EU legal hierarchy (*i.e.*, primary law in the form of constitutional level normative standards contained at Treaty level) than secondary level normative rules found in Directives, the principal legal basis for the regulation of industrial sectors.

that competition law and regulation are to play a complementary role, rather than the application of one discipline to the exclusion of the other.

Other jurisdictions also follow closely one of these two approaches. For example, in India, a similar approach to that put forward in *Ricci* has been taken recently by the Indian High Court when awarding the stay of an antitrust action until the impact of an action brought under the regulatory regime on the same subject-matter had been resolved.⁶⁹ By contrast, Brazil is more aligned to the EU approach, with broad authority being conferred upon the NCA even in regulated sectors,⁷⁰ with the general proposition being that competition law applies unless regulation completely eliminates the discretion of the firms to select the relevant competitive strategy under scrutiny.⁷¹ In the banking sector, where there was some controversy over whether CADE (the Brazilian NCA) or the Brazilian Central Bank would retain competition law powers, a Memorandum of Understandings between the two authorities clarified the existence of a regime of concurrent jurisdiction.⁷²

Hybrid options

Beyond the incorporation of an antitrust regime and a sector-specific regulatory regime into an integrated system of intervention, there remains a range of options available to policymakers around the world as to how to deploy some form of hybrid *ex ante/ex post* institutional structure. These hybrid models may lean towards two different directions. On the one hand, they might be structured in a way that both NRAs and NCAs have concurrent jurisdiction to apply the same types of competition law tools (e.g., *ex post* sanctions for anti-competitive behaviour or merger control). On the other hand, the regulatory regime might be structured in a more complementary way, where NRAs may simply refer cases to NCAs in regulated sectors, or may take up some specific roles in these investigations, in cooperation with the NCA, while leaving the final decision regarding competition law enforcement to the NCA.⁷³

For example, the United Kingdom deploys a “concurrency” regime with respect to regulated network (ex-monopoly) sectors, whereby competition law can be enforced by sector-specific regulators within their sectoral remits, in parallel with the competition powers exercised by the specialist United Kingdom Competition Authority, the CMA. Under this regime, a highly consensual procedure is in place that is designed to ensure that the appropriate agency is seized of competition law jurisdiction in any particular investigation. This consensual model is most likely to succeed in a country with a highly mature and integrated system of power sharing. It also reflects the belief that regulation would one day become obsolete as regulated markets develop their own sustainable market dynamics. It also requires that sector-specific regulators actively promote competitive outcomes in their sectors. Given the way in which the scope of competition interventions has expanded over the years, the strategic decision of the United Kingdom to retain the concurrency model has been criticised in some quarters as lacking a strong

⁶⁹ Refer to *Competition Commission of India v. Bharti Airtel Limited & Ors.*, (2018) Delhi High Court, Judgment of 12 September 2018.

⁷⁰ Refer to Law 12.529/11, Article 31.

⁷¹ One of the early precedents adopting this approach was the case of *BH Trans*, which dismissed the allegation against providers of municipal bus transportation because their actions were strictly conditioned by regulation, which allowed them no scope to adopt different conduct. See CADE, Administrative Procedure No. 08000.002605/1997-52, (*BHTRANS Case*).

⁷² Refer to ‘Memorandum of Understanding Between CADE and the Brazilian Central Bank’ http://www.cade.gov.br/noticias/banco-central-e-cade-assinam-memorando-de-entendimentos/memorando_cade_bc.pdf.

⁷³ These two general types of hybrid models are labeled ‘Concurrent Jurisdiction’ and ‘Complementary Jurisdiction’ in Oliveira & Pereira Neto, *op. cit.*, at 318-319.

analytical foundation, especially given that sector-specific regulators in the UK have consistently aired their views that they would prefer having exclusive regulatory powers rather than nominal competition powers afforded to them under the concurrency model.⁷⁴

The concurrency model pioneered in the United Kingdom has found some support in a number of jurisdictions linked historically to the British Commonwealth. In Hong Kong and Singapore, for example, the NCA and the NRA exercise concurrent powers to enforce competition rules in the telecommunications and broadcasting sectors, although the NRA takes the role of the lead agency. Concurrent powers in the telecommunications sector are also exercised by South Africa's ICASA. Similarly, concurrent enforcement powers in the telecommunications sector exist in India, although a recent Indian High Court Judgment suggests that competition rules should defer to sector-specific regulation. Japan and South Korea provide an interesting non-Commonwealth examples of concurrency, with certain sector-specific competition powers capable of being exercised by the NRA in each case. By contrast, in Brazil, the telecommunications regulator used to have some specific powers to enforce competition rules in the sector, which were removed after the competition law reforms of 2011 came into force, thereby establishing a clearer system of complementary jurisdiction between CADE (NCA) and ANATEL (NRA).

What has changed over the years in the United Kingdom, however, is that the usual deference practised by the previous competition regulator in the United Kingdom, the OFT (the Office of Fair Trading), towards sector-specific regulators, has given way to the current CMA approach, according to which it is that agency which is more comfortable exercising general competition powers across a number of regulated sectors. Perhaps this trend signals a response to the fact that, for over a decade, sector-specific regulators in the United Kingdom had engaged in practices consistent with the under-enforcement of competition rules within their spheres of competence. This was reflected in the perception that NRAs had been reluctant to prosecute competition claims outright (preferring to arrive at negotiated settlements) and had preferred to conduct in-house reviews of problematic market outcomes rather than referring them to the CMA under the "market investigation" reference procedure afforded under the legislation. The official response of the United Kingdom government since 2013 has been, somewhat surprisingly, to maintain the concurrency regime while at the same time pushing NRAs into a more proactive antitrust enforcement role.

A classic hybrid enforcement agency model, which has many of the hallmarks of a 'super-regulator' (see discussion in Section IV below), can be found in Australia. The current Australian enforcement model is one that reflects the findings of the landmark *Hilmer Report* of 1993,⁷⁵ which advocated the combination of competition and regulatory powers with respect to network sectors in the hands of one agency, the ACCC. These regulatory functions now extend to the telecommunications, energy, transport and postal sectors. The rationale for this fusion of functions at the federal level was, according to one commentator, prompted by an approach which placed the pursuit of efficiency at the heart of the Australian economy.⁷⁶ The ACCC's powers not only apply traditional competition rules to these sectors but also extend to telecommunications-specific regulatory provisions (including a specific access regime), while excluding technical issues of regulation. The ACCC's powers in relation to the energy sector are more complex, as it shares powers with a variety of agencies, including the Australian Energy Regulator (AER), an independent statutory body that is located within the ACCC itself. In this way, the ACCC's powers in relation to the energy sector include competition law, consumer protection and

⁷⁴ Refer to Dunne, *op. cit.*, at pp. 267-272.

⁷⁵ *Hilmer Report*, Independent Committee of Inquiry into Competition Policy, *National Competition Policy* (1993), Australian Government Printing Service.

⁷⁶ See Dunne, *op. cit.*, at pp. 272-275.

regulated access in specified network sectors, while other types of regulatory issues fall *outside* the ACCC's remit.⁷⁷

Mexico presents yet another interesting hybrid model, similar to that being used in Greece since the liberalization of the telecommunications sector in that EU Member State. Mexico recently introduced a new bifurcated regime by which a specialist telecommunications sector regulator (IFT) also exercises competition rules in that sector, thereby excluding the authority of the general NCA (COFECE) in the regulated sector. This regime differs from that which prevails in Australia, in which a general NCA has absorbed regulatory powers, while Mexico provides an example of a sector-specific regulator that has absorbed exclusive competition powers over that regulated sector. The general NCA (COFECE) remains responsible for the enforcement of competition rules in all other sectors of the economy. The same approach is adopted by Peru, where the NRA (OSIPTEL), applies competition law to the telecommunications sector, thereby excluding the authority of the general NCA (Indecopi).

In a world of increasing liberalization of regulated sectors and the reasonable convergence of goals and remedies as between regulation and competition policy, hybrid models will necessarily lead to more intense institutional dialogue between NCAs and NRAs. Where there is concurrent jurisdiction, one important element of this dialogue is the consensual allocation of competition law jurisdiction, as in the case of CMA and sector-specific regulators in the United Kingdom (described above). However, another important aspect of this dialogue refers to signals sent by competition authorities to NRAs regarding the need to improve the regulatory framework. Within the EU, after relevant competition law enforcement occurred in the electronic payments sector, an important round of regulations was enacted, including caps in interchange fees in 2015.⁷⁸ These concerns were also felt in the United Kingdom, where the new Payments System Regulator (PSR) was created in 2015.⁷⁹

In Brazil, the evolution of regulation of leased lines also provides an interesting example. After a series of cases where the NCA (CADE) found the largest telecommunications incumbents to be abusing their dominant position in the offer of leased lines to competitors,⁸⁰ the NRA (ANATEL) decided to regulate these offers.⁸¹ In a subsequent decision, the NCA pointed out that the regulation was excessively restrictive,⁸² because it forbade any price differentiation, thereby limiting the ability of incumbents to compete. Following this decision, the NRA enacted a new regulation allowing more flexibility in incumbents' leased line offers.⁸³ Thus, it was the interaction between competition law enforcement and regulation that was effectively responsible for the evolution of the sector-specific regulatory framework.

These examples illustrate that hybrid institutional systems in liberalized markets are likely to generate reciprocal interaction between *ex post* enforcement by NCAs and *ex ante* regulation by NRAs. Indeed, NCA decisions may identify market failures that need to be addressed by regulation. By the same token, NRAs' regulatory decisions may contribute to the expansion of competition and the extension of

⁷⁷ Subsequent to the *Hilmer Report*, Australia conducted another major review of its trade practices (antitrust) rules. See 2015 Competition Policy Review ("Harper Review"); available at <http://competitionpolicyreview.gov.au/final-report/>.

⁷⁸ Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 ('on interchange fees for card based payment transactions'), Articles 3-5.

⁷⁹ See 'on interchange fees for card based payment transactions', *Financial Services (Banking Reform) Act* 2013, Chapter 33, Part 5.

⁸⁰ The first Brazilian case in the series was Administrative Procedure No. 53500.05570/2002 (*Telefónica Case*).

⁸¹ See Resolutions No. 402/2005 and No. 437/2005.

⁸² CADE's Chairman Decision No. 175/2006.

⁸³ ANATEL Resolution No. 590/2012.

competition law theories of harm in a given regulated sector (as in the case of liberalization in telecommunications and energy markets), thereby inviting further action to be taken by NCAs. One can already see how the interplay between *ex ante* and *ex post* disciplines is something which will inevitably mould most jurisdictions' approaches towards addressing perceived market failures in digital platform environments.

Conclusions

As discussed above, there is a wide range of institutional arrangements which can manage the relationship between *ex ante* and *ex post* regulatory functions. These institutional arrangements can be structured across a spectrum of possibilities, depending on how much authority is concentrated in NCAs or NRAs respectively.⁸⁴

At one extreme of the spectrum, where the exercise of any powers by a sector-specific NRA are frowned upon, there have been very few attempts to extinguish sector-specific *ex ante* powers in their entirety in favour of exclusive competition law enforcement. The New Zealand experience with 'full deregulation' in the late 1980s was probably the closest attempt to achieving this extreme position, but it was eventually rolled back, with the recognition of the continued need for targeted *ex ante* regulation in some markets.

Within the same extreme of the governance architecture spectrum, that excludes any powers from NRAs, lies the situation where the NCA takes the lead across the full range of *ex ante* regulatory powers, while at the same time being responsible for implementing competition law over the whole economy (*e.g.*, Australia, Spain and the Netherlands).

There are also a number of hybrid models which are given effect in the form of at least two broad alternative models (although subject to many variations). For example, some institutional configurations are structured as 'complementary jurisdictions', whereby they attribute exclusive *ex ante* regulatory authority to an NRA and exclusive competition law authority to an NCA (*e.g.*, most EU Member States, Brazil). Others adopt a "concurrent jurisdiction" model, whereby both NRA and NCA exercise competition law powers in relation to regulated sectors, even though the mandates of NRAs are usually broader than the mere implementation of competition rules in the relevant regulated sector (*e.g.*, United Kingdom, South Africa, Hong Kong).

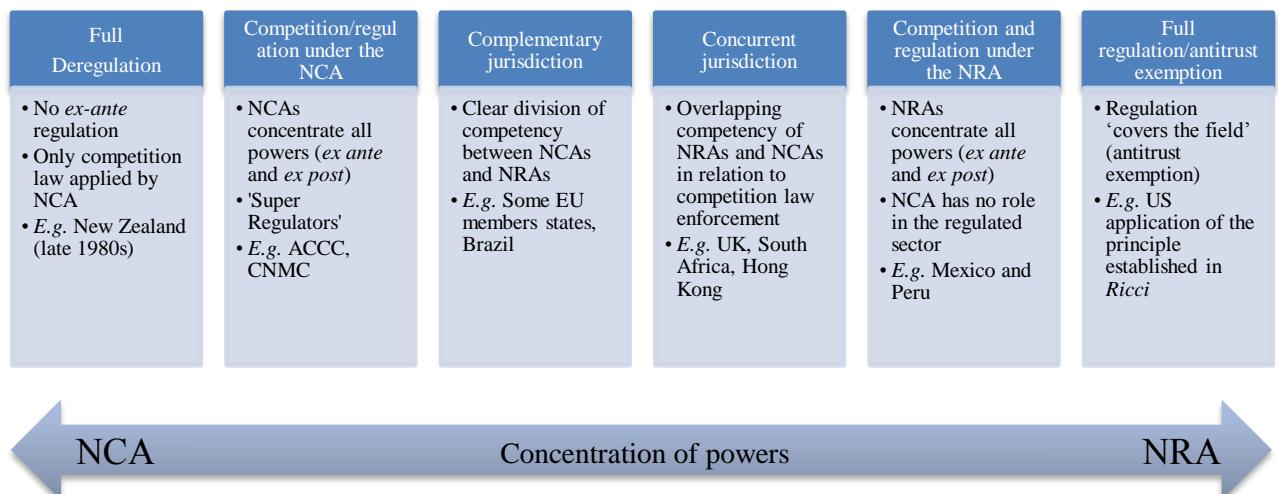
There are also institutional frameworks that allocate all competition law powers over a particular industry to the relevant NRA, thereby excluding any authority of the NCA over the relevant regulated sectors (*e.g.*, Mexico, Peru and Greece). In these countries, there is an effective integration of competition law enforcement in the NRA's remit regarding a specific sector of the economy.

Finally, in the extreme of case of concentrated regulatory powers in NRAs, certain models frame *ex ante* regulation so broadly as to eliminate the need any role for *ex post* enforcement of competition law. This approach has been adopted in the US in some circumstances, based on the principle established in *Ricci*, and has been extended expressly in the case-law to some regulated industries. This scenario is dramatically opposed to the 'full deregulation' model that was originally pioneered in New Zealand.

The Figure bellow illustrates the different models discussed above, across a spectrum that spans the exclusive jurisdiction of NCAs absent *ex ante* regulation, on the one hand, to the exclusive jurisdiction of NRAs with no competition law enforcement powers, on the other.

⁸⁴ A systematic approach to the allocation of functions between NCAs and NRAs is provided in Oliveira & Pereira Neto, *op. cit.*, at p. 320.

Figure 1 – Governance Architectures – Variations in Institutional Design



It is important to note that all these regimes present their own variations and, as in any typology, there may be institutional configurations that fall between the regimes identified above. For example, the U.S. regime has some features of concurrent jurisdiction, with the FTC and FCC overseeing mergers in telecommunications; the Hong Kong regime of concurrent jurisdiction clearly appoints the NRA as the lead authority in competition investigations in the telecommunications sector, coming closer to the model of a concentration of powers in the hands of the NRA (as in the case of Mexico, Peru and Greece). Nevertheless, the organization of these regimes along this spectrum of possibilities is helpful in understanding the different alternatives available in the institutional design of an agency.

As has also been mentioned above, there has been an escalation in the debate in recent years around the benefits of merging *ex ante* regulatory powers into NCAs which have competition law powers in relation to the entire economy, thereby creating 'super regulators'. This is discussed immediately below.

IV. The creation of “super regulators”

As explained above, the understanding that there are positive outcomes flowing from competition between agencies has long been understood, as is the desire of policymakers to encourage such inter-agency competition⁸⁵ while achieving the benefits of specialization. As long ago as 1932, Justice Brandeis commented that the decentralised State system in the United States should provide the States with room to experiment, especially for changing social and economic needs, thus leading to

⁸⁵ Refer, for example, to Engel C., "Legal Experiences of Competition Among Institutions", in Gerken & Lüder (eds.), *Competition Among Institutions* (1995), London, Macmillan Press, pp. 89-118; cf. Haines F. & Gurney D., "The Shadow of the Law: Contemporary Approaches to Regulation and the Problem of Regulatory Conflict" (2003), 25 *Law and Policy*, at p. 353. Refer also to Townley C., *A Framework for European Competition Law: A Co-ordinated Diversity* (2018), Hart Publishing, Oxford Chapter 5 – Regulatory Competition. See also Kovacic W.E., "Downsizing Antitrust: Is it Time to End Dual Federal Enforcement?" (1996), 41 *Antitrust Bulletin* 505, at pp. 532-535, where the author explains that, while the DoJ and the FTC compete to some degree in terms of effectiveness, competing competences might raise costs in terms of inter-agency coordination, two sets of overhead expenditures, etc.

innovation.⁸⁶ The scope and strength of these competitive pressures are capable of affecting the manner in which the agencies enforce their respective powers in any given case.

As a consequence, the policy choice of bringing together *all* regulatory functions under one roof is a controversial one. While the World Bank advocated such an institutional architecture in the 1990s for smaller countries, this advice had generally gone unheeded until the onset of the financial crisis in 2007, which provided a strong financial rationale (*i.e.*, cost-cutting) for the consolidation of all *ex ante* and *ex post* competences under one agency roof.

Of the major jurisdictions around the world that were willing to experiment with the idea that all key regulatory structures would all be administered by the same agency, **Australia** has been a front-runner.⁸⁷ As noted earlier in Section III, the concentration of regulatory functions and competition law powers in Australia's ACCC finds its genesis in the much-heralded *Hilmer Report* of 1993.⁸⁸

The *Hilmer Report*'s rationale for creating a 'super-regulator' included factors such as:

- the desirability of developing a perspective on economic regulation which takes into account the whole economy;
- the need to avoid the regulatory capture of individual sector-specific regulators that are likely to have strong industry links; and
- the cost savings that would be likely to flow from the combinations of numerous administrative functions within a single integrated agency.⁸⁹

While the ACCC's novel institutional structure has been credited in certain quarters with its success, and while the overlap between its various functions has been attributed by the ACCC to the overlaps which exist between the two disciplines, there are others that have questioned whether the ACCC's structure is delivering material results which are any better than those that would be delivered by a more fragmented regulatory structure.⁹⁰ There is also a widespread feeling that the ACCC, given that its regulatory focus is fundamentally driven by network access, is often overly deferential to network operators.

A comprehensive report, issued in 2015 by Australia's Competition Policy Review Panel, suggested that a spin-off occur of the "access and pricing functions" of the ACCC to a separate "Access Pricing Regulator" (APR), given that "although synergies between competition and consumer functions are strong, synergies between competition enforcement and access and pricing regulation are weaker".⁹¹ Based on this analysis, the Panel proposed a spin-off of the economic regulatory activity of the ACCC, while at the same time retaining APR as a cross-sector regulator (with powers over the telecommunications, electricity, gas and water sectors). Decisions of the APR would in turn be subject to review by the Australian Competition Tribunal, the same body that reviews the ACCC's decisions. Considering the leading role of Australia in the unification of its respective competition law enforcement and regulatory authorities, the analysis and recommendations of this Report – as yet not

⁸⁶ *New State Ice Co. v. Liebmann*, 285 US 262 (1932), at pp. 310-311.

⁸⁷ Refer to discussion above in Section III.

⁸⁸ *Hilmer Report*, *op. cit.*

⁸⁹ See *Hilmer Report*, *op. cit.*, at p. 327.

⁹⁰ See discussion in Dunne, *op. cit.*, at pp. 272-275.

⁹¹ Competition Policy Review: Final Report (Commonwealth of Australia 2015), p. 470 http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report_online.pdf.

implemented – may be highly influential in any future institutional restructuring that is considered in other countries. Then again, the observation that there is more in common between antitrust enforcement and consumer protection, on the one hand, rather than antitrust enforcement and access pricing, on the other, may strike many policymakers as somewhat inconsistent.⁹²

Within the EU, the fusion of all regulatory and competition law functions has proceeded in Spain and The Netherlands, and in a smaller jurisdiction such as Estonia.

In **Spain**, competition and regulatory functions were combined comprehensively in 2013 in the form of the CNMC. The economic rationale that underpins the structural design of the CNMC is said to be the systematic defence and promotion of economic efficiency in the Spanish economy as a means of increasing consumer welfare.⁹³ According to the Preamble to Law No. 3/2013, the CNMC reform was aimed at fulfilling three main principles:

- respect for the rule of law and the value of institutional reliability;
- the ability to reap the benefits of economies of scale; and
- greater adaptation of the regulatory bodies to technological change.⁹⁴

In support of the merging of its regulatory and competition law functions, it has been argued that the CNMC's efficiency has supposedly increased insofar as it:

- Created synergies through the coordination between sectoral units inside the CNMC, which give rise to more antitrust investigations across a range of regulated sectors.
- Coherence in policy and regulatory actions as between regulated sectors.

According to the OECD,⁹⁵ coordination between the different directorates within the CNMC (competition, telecommunications, energy, postal and transport services) allows the agency to adopt more informed decisions on competition and regulatory issues.⁹⁶ Moreover, its larger size and greater diversification of activities arguably constitute a solid safeguard for its independence. In the words of the OECD: “[f]our years after its inception, the CNMC is reaping the fruits of this institutional framework.” Since the expression of that view, however, some have called into question the independence - and indeed, the legality - of the re-constituted CNMC.⁹⁷

⁹² In the EU, for example, a more symbiotic relationship exists between the mandating of access under competition rules and access prices under regulation, as the traditional cost modelling standards developed in an *ex ante* context have found their way over time into competition law jurisprudence under Article 102 TFEU when identifying whether or not a dominant undertaking is acting reasonably in terms of its access pricing, and whether or not a complainant is acting as an “as efficient” competitor when compared to the dominant undertaking. Refer to *Telefonica* Judgment, *op. cit.*

⁹³ See OECD Report [https://one.oecd.org/document/DAF/COMP/AR\(2018\)15/en/pdf](https://one.oecd.org/document/DAF/COMP/AR(2018)15/en/pdf).

⁹⁴ Refer also to Xifre R., “*Competition and Regulation Reforms in Spain in 2013: The CNMC – an international perspective*” (2013), IESE Business School Working Paper No. WP-1108-E, p. 12.

⁹⁵ See OECD Report [https://one.oecd.org/document/DAF/COMP/AR\(2018\)15/en/pdf](https://one.oecd.org/document/DAF/COMP/AR(2018)15/en/pdf).

⁹⁶ Although one must query whether coordination is effective in practice in such a ‘Byzantine’ structure involving so many separate functional chambers.

⁹⁷ Refer to Judgment of the European Court of Justice in Case C-424/15, *Ormatxe Garai and Lorenzo Almendos*, Judgment of 19.10.2016 (ECLI:EU:C:2016:780), in response to a request for a Preliminary Ruling regarding the Royal Decrees in Spain which brought to an end the terms of office of two senior Spanish officials (Member of the Board and President, respectively) of Spain’s sector-specific regulator (the CMT), when creating the new super-regulator (the CNMC).

Further to the OECD's recommendations in relation to small nations, a classic example of the fusion of regulatory and competition law functions with a view to saving administrative costs and building scale can be seen in the agency structure adopted in **Estonia** in 2008.⁹⁸ At that time, the Technical Regulatory Authority ("TRA") was formed, the design of which was intended to implement national economic policy in the railway, electronic communications and energy sectors. The TRA operates under the Ministry of Economic Affairs & Communications. As of 1 January 2018, the TRA merged with the Estonian Consumer Protection Board, forming the TTJA. At the time of its formation, the residual concern expressed about the TRA, and by implication its successor TTJA, was that it is susceptible to government direction, which adversely impacts upon its decision-making independence.

Estonian legislators have sought to address such concerns by ensuring *inter alia* that:

- an effective system of appeals to the courts is in place (on average, 5-6 appeals are lodged per year);
- decisions of the TTJA cannot be revoked or changed by the Government or a Minister;
- there is independence in the agency's spending, even though financing occurs through the State budget; and
- the Director-General is subject to clear rules regarding the duration and security of their tenure.

In **the Netherlands**, a "super-regulator" known as the ACM became operational in April 2013, which combined all the functions of the previously independent NCA and two other independent regulatory agencies. The activities of the ACM now cover the telecommunications, postal, energy, and transport sectors, along with a full range of consumer protection functions. The avowed aim in creating the ACM was to have a smaller combined agency that was better adapted to the demands of internationalization, technical developments dynamic markets and market trends. Its ability to better satisfy these goals was said to lie in the fact that it would be more flexible and was in a position to reallocate resources more effectively. As such, its aim was to put itself in a position to improve effectiveness, efficiency and the quality of market regulation in the Netherlands.

However, it is also hard to escape the conclusion that the creation of a super-regulator – a policy option that had been earlier rejected by the Dutch government as a result of debates that had occurred in the period 2004-2007 – was not prompted by immediate budgetary concerns. Simultaneously, the combined agency was to be equipped with all the investigative and enforcement powers enjoyed by its three separate predecessors.⁹⁹ During the legislative process, the combined ACM had been the subject of two particular residual concerns, namely: the potential "use and abuse" of information and data that has been gathered on the basis of different legal powers for *ex post* and *ex ante*; and the level of independence of the agency from the Dutch Ministry of Economic Affairs, Agriculture and Innovation.¹⁰⁰

⁹⁸ The previous institutional framework, consisting of 10-20 personnel for each agency, was arguably inefficient in terms of scale, it being understood that at least 50 personnel are required to generate critical mass in decision-making. By the same token, it is acknowledged that the previously pivotal roles played by agency heads in sectoral decision-making have now given way to the Director-General of the combined NRA being little more than an "administrator".

⁹⁹ Refer to the discussions in Schäfers T. & Houdijk J., "The Netherlands' New Authority for Consumers and Markets: Towards a problem-Based Approach", *World Competition*, 35 No.4 (2012), pp. 659-670. See also the discussion in van der Vijver T., "Competition Law reform in the Netherlands: The establishment of 'super regulator' ACM", *Concurrences*, No.1-2014, at pp. 248-253.

¹⁰⁰ See Schäfers and Houdijk, *op. cit.*, at p. 669.

According to its first Chairman of the Board, the synergies achieved by the ACM in bringing together competition and regulatory experts has been successful from both a financial point of view (having achieved the Dutch government's aims in reducing budgets) and from a substantive perspective (with positive outcomes in terms of the robustness of solutions and in the optimal use of the nominally independent office of the Chief Economist across all sectors).¹⁰¹ In order to ensure that information received by the competition chamber of the ACM from another specialist regulatory chamber of the NCA is not misused within the broader organisation, safeguards have been apparently introduced that such information is not used beyond the competition law competences of the ACM. Moreover, practical experience suggests that an integrated regulator such as the ACM is better placed to administer behavioural remedies, which is an important consideration when one takes into account the fact that sector-specific experience lends itself to the crafting of such remedies and their monitoring.¹⁰² Interestingly, the new ACM has, since its creation, adopted a number of decisions which have also taken into account a range of cultural and social issues which go well beyond the traditional economic welfare remit usually associated with the application of competition rules alone.

After two years of operation, the OECD passed a very favourable verdict on the workings of the ACM, concluding that an external evaluation of its operations supported the effectiveness of ACM's oversight strategy in terms of consumer efficiency and success before appeal courts, and in terms of efficiencies generated from cost savings. According to the OECD, gains from the ACM's oversight have thus far comfortably surpassed the costs borne to generate such gains.¹⁰³

Conclusions

While the jury may still be out on whether the 'super regulator' model provides the most effective solution for each jurisdiction to achieve the most effective goals of the regulatory State, it clearly appears to have produced some positive outcomes in terms of coherent decision-making in an economy the size of, and a political culture characteristic of, the Netherlands. Smaller nations will no doubt increasingly entertain the creation of a 'super regulator', if only because of the cost savings it appears to produce and the greater likelihood of limited resources being more effectively deployed, measured in large part by the number of qualified personnel available to address a full range of sector-specific issues.

However, the fusion of all *ex ante* and *ex post* functions in one regulatory body does not appear to necessarily render it more likely to be able to combat government "interference" in its policy orientations. If anything, a more cross-disciplinary approach has a tendency to have the combined agency take a more holistic view of its policy options, which may veer towards resembling the policy direction preferred by the government. Whether the creation of a super-regulator displays more of the pros than the cons listed in Section III above when deployed in larger, more sophisticated jurisdictions, is more problematic. While there are some signs that such a model produces a number of positive outcomes, the experiences thus far have not been met with universal approval. In fact, the most recent proposal for spinning off relevant regulatory powers of the ACCC suggest that a cautious approach be adopted where large jurisdictions seek to join the 'super regulator' bandwagon. What is less in doubt is the appetite of policy makers to be willing to explore more hybrid forms of competition and regulatory functions, irrespective of whether they fall short of a comprehensive accumulation of powers –

¹⁰¹ Interview with Fonteijn C., Chairman of the Board, Netherlands Authority for Consumers and Markets", *The Antitrust Source*, www.antitrust source.com, June 2014, at p. 1.

¹⁰² Interview with Chris Fonteijn, *op. cit.*, at p .6.

¹⁰³ OECD, *Annual Report on Competition Policy Developments in The Netherlands (2015)*, Report of 29-30 November 2016, DAF/COMP/AR(2016) 34, at p. 3.

including the possibility of creating a segregated regulatory agency with authority across sectors, as proposed by the Australian Review Panel.

TABLE 1: ALLOCATION OF POWERS – ELECTRONIC COMMUNICATIONS SECTOR

National Regulatory Authority for Telecoms	Sector-specific	Extended Sectoral Power	Competition Powers	Integrated Powers	Formal Cooperation Instrument	Comments
Argentina (ENACOM)	✓	•Telecommunications (Internet, Cable and Satellite TV, mobile and fixed telephony).	✗	✗	Law 27.078/2014, as modified by Decree 267/2015 (Law Argentina Digital) Law No. 27442, of 2018 (Law for Protection of Competition), Article 17	Originally, CNDC (Argentinian NCA) used to have broad powers over regulated sectors. The institutional relationships it had with the sectoral agencies was considered to be particularly intense in the telecoms sector. On 15 May 2018, Law No. 27.442 entered into force and modified numerous aspects in Argentinian competition law, including its institutional structure. Accordingly, Article 17 of the Law establishes that, in the merger review of transactions in regulated sectors, the NCA will request a non-binding opinion from the NRA (ENACOM). The NRA does not have specific competition enforcement powers in merger review or investigations in conduct . However, the authorization for the transfer of licenses shall take competition concerns into consideration.
Australia (ACMA)	✓	•Telecommunications •Broadcasting •Radio-communications •Internet •Radiofrequency management	✗	✓	Part XIB, XIC of the Competition and Consumer Act 2010 Part 26, s 515 of the Telecommunications Act 1997 Telecommunications (Consumer Protection and Service Standards) Act 1999, ss 149, 151, 156	A ‘converged’ regulator in TMT space (excluding postal and competition powers), with activities spanning 4 levels of the converged value chain ((i) applications / content; (2) devices; (3) transport; (4) infrastructure). ACMA is required to take into account the impact of its actions on competition. Role of ACCC (Competition Authority) with exclusive competition power for access and pricing issues. Significant regulatory developments foreseen as a result of the adoption of the Telecommunications Legislation Amendment (Competition & Consumer) Bill 2017, designed to lower the regulatory burden on the telecoms and broadcasting sectors (including increased emphasis on self-regulation but greater powers in relation to issues such as interactive gambling).

National Regulatory Authority for Telecoms	Sector-specific	Extended Sectoral Power	Competition Powers	Integrated Powers	Formal Cooperation Instrument	Comments
Austria (Komm Austria)	✓	•Telecommunications •Broadcasting & Media	✗	✗	Para 6a of the BGBI. I Nr. 83/2001 (last amended by BGBI. I Nr. 115/2017)	The NCA consults with Komm Austria on all matters affecting its sector of responsibility, particularly the competition considerations about the allocation of broadcasting frequencies
Belgium (BIPT)	✓	•Telecommunications •Postal •Radiofrequency management	✗	✗	Law of 13 June 2005 (telecoms); Law of 15 May 2007 (media); Law of 21 March 1999 (postal)	Unique position as the media regulator in the Brussels-Capital Region. Creeping regulatory powers into the media space through the regulation of cable networks under the Telecoms Regulatory Framework.
Brazil (ANATEL)	✓	•Telecommunications (including fixed and mobile telephony, Internet access, spectrum, cable TV, satellite)	✓ (limited)	✗	Law N° 9472, of 1997 (General Law for Telecommunications), Article 19, XIX.	Law N° 9472/97 establishes the regulatory agency for the telecoms sector, including its competences, and addresses general principles (such as free competition between operators, consumers' free choice and data protection, etc.). It also embraces rules on consumer rights and quality standards. Originally, the General Telecommunications Law conferred antitrust authority on ANATEL, carving out the specific powers of CADE (the Brazilian NCA), in Article 19, XIX, of the Telecommunications Act. Until 2012, ANATEL was responsible for antitrust investigations and for issuing opinions on mergers in the telecommunications sector, while the CADE was responsible for the final decisions on these matters. After 2012, when the new Competition Law N° 12.529/11 came into force, CADE consolidated all general powers on competition law enforcement. CADE still consults ANATEL on relevant competition matters in the sector and ANATEL retains the power to evaluate mergers (e.g., transfer of licences and spectrum authorizations) and some anti-competitive conduct (e.g., illegal cross-subsidies) from a regulatory perspective.

National Regulatory Authority for Telecoms	Sector-specific	Extended Sectoral Power	Competition Powers	Integrated Powers	Formal Cooperation Instrument	Comments
Canada (CRTC)		<ul style="list-style-type: none"> • Telecommunications (Internet access, mobile and fixed telecom services) • broadcasting services (radio and television programing and broadcast distribution). 	✓	*	<p>Telecommunications Act (S.C. 1993, c. 38) Broadcasting Act (S.C. 1991, c. 11) Competition Act (R.S.C., 1985, c. C-34)</p> <p>Interface Agreement between CRTC and Competition Bureau (1999)</p>	<p>The Competition Bureau (Canadian NCA) and the CRTC (Canadian NRA) entered an “Interface Agreement” in 1999 specifying those areas where one body or the other has jurisdiction and those areas where jurisdiction is shared. Subjects where CRTC and the Bureau both have authority include merger review, whereas interconnection issues are dealt with only by the CRTC, while traditional anti-competitive practices, such as conspiracies to fix prices (which is a criminal offense in Canada), being dealt by the Bureau.</p> <p>Regarding merger review, under the Telecommunications Act, CRTC has specific responsibility for ensuring compliance with foreign ownership and control limitations and may include other regulatory issues arising as a result of the transaction - prior approval, per se, is not required. In its turn, the Bureau has authority to review all mergers and those which exceed proscribed economic thresholds must be formally pre-notified to the organization.</p> <p>Under the Broadcasting Act, prior approval of the CRTC is required for changes of control or ownership of licensed undertakings. Whereas the Bureau's examination of mergers relates exclusively to competitive effects, the CRTC's consideration involves a broader set of objectives under the Act.</p>

National Regulatory Authority for Telecoms	Sector-specific	Extended Sectoral Power	Competition Powers	Integrated Powers	Formal Cooperation Instrument	Comments
Chile (SUBTEL)	✓	•Telecommunications •Radio •Internet •Television (with CNTV)	✗	✗	Decree N° 1.762/1977 (role of SUBTEL) Law N° 18.168/1982 (LGT) Law N° 19.724/ 2001 Law N° 19.733/2001 (Press Law), as modified by Law N° 20.361/2009 (article 38)	Subtel is competent to dictate fundamental technical plans (<i>e.g.</i> , use of spectrum), technical standards (<i>e.g.</i> , technical standards that regulate the use of the band 700 MHZ-4G services), and to interpret technical regulations. With respect to television, Subtel's authority is limited to technical aspects, while the CNTV regulates content and grants both broadcasting and cable licences. Neither Subtel nor CNTV have competition law powers. Competition law is enforced by two separate two bodies, which have the respective powers of: a prosecutor (Fiscalía Nacional Económica FNE) and a tribunal (Tribunal de Defensa de la Libre Competencia, TDLC). All transferences of control of communications companies under the public concession regime must be submitted to FNE, regardless of turnover thresholds, which represents an expansion of the general merger review system in this sector. The most recent regulatory changes have been driven by decisions of the NCA (<i>i.e.</i> , the regulation of IP telephony, number portability, differentiation of the off-net/on-net rates, service bundling, facilities for virtual mobile operators).
China (MIIT)	✓	•Telecommunications •Postal service •Internet •Wireless •Broadcasting •Production of electronic and information goods •Software industry	✓	✓	Telecommunications Regulations of the People's Republic of China (Arts. 4, 12, 42 and 72)	A ‘converged’ regulator in the TMT space (but no competition powers). Ministry of Industry and Information Technology (MIIT) only has limited powers over competition issues – including (a) factoring market competitions into consideration when issuing licences to telecoms companies; (b) supervising unfair competition in telecoms industry; (c) imposing fines for unfair competition. The primary competition powers remain in the hands of anti-monopoly enforcement institutions. In March 2018, China announced that it would combine the duties of its three existing competition agencies into a centralised Competition Authority.

National Regulatory Authority for Telecoms	Sector-specific	Extended Sectoral Power	Competition Powers	Integrated Powers	Formal Cooperation Instrument	Comments
Colombia (CRC)	✓	Telecommunications (including telephone services, broadcasting, Internet access)	✗	✗	Law No. 1340, of 2009 (Law for Protection of Competition), Article 6, first paragraph	Telecommunications regulation, originally part of the regulatory regime established by Law No. 142 of 1994, was substantially overhauled by the enactment of Law No. 1341 of 2009. Also from 2009, the Colombian Competition Law (Law No. 1340) establishes, in Article 6, first paragraph, that the Colombian NCA (SIC) shall exercise the exclusive power for investigating, sanctioning and taking other administrative decisions related to infringements to the legislation for the protection of competition. The Competition Law expressly sets forth the technical support that NRAs shall provide when it makes such an assessment.
France (ARCEP)	✓	• Telecommunications • Postal	✗	✗	Art. L5-8 and Art. L36-6 of the Postal Code and Electronic Communications Code respectively	The NCA needs to consult with ARCEP before taking <i>ex post</i> action in its sectoral responsibilities. ARCEP needs to consult with the CSA (Audiovisual Regulator) before taking <i>ex ante</i> action that might affect audio-visual services.
Germany (BNetzA)	✓	• Telecommunications • Postal (since 1998) • Electricity & Gas (since 2005) • Rail (since 2006) • Spectrum Allocation	✗	✗	Paras. 123, 123a of TKG	Exclusion of broadcasting, which falls within the exclusive competence of the Länder. Detailed consultation procedure with NCA regarding regulatory remedies (including functional separation) and in relation to spectrum allocation; NCA consults BNetzA on <i>ex post</i> actions in the sector.
Greece (EETT)	✓	• Telecommunications • Postal	✓	✗	L. 4070/2012 (as amended) L. 4053/2012	Exercise of sector-specific competition powers. Cooperation with NCA. Exclusion of broadcasting and content from remit. Includes consumer protection remit in responsible sectors. Data security issues addressed by a separate body. Cybersecurity and data protection issues are addressed by other regulatory bodies.

National Regulatory Authority for Telecoms	Sector-specific	Extended Sectoral Power	Competition Powers	Integrated Powers	Formal Cooperation Instrument	Comments
Hong Kong (CA)	✓	<ul style="list-style-type: none"> • Telecommunications (Internet access, mobile and fixed telecom services) • Broadcasting • Radio spectrum management 	✓	✓	<ul style="list-style-type: none"> • MOU between the Competition Commission and the Communications Authority (effective 14 December 2015) • Competition Ordinance (Cap. 619) (Section 159) 	<p>The Communications Authority (CA) has concurrent jurisdiction with the Competition Commission to enforce the Competition Ordinance ("CO") in relation to undertakings operating in the telecoms and broadcasting sectors, including merger and acquisition activities involving carrier licensees.</p> <p>For cases involving the telecoms or broadcasting sectors falling within concurrent jurisdiction powers, the CA will ordinarily take the role as the lead authority, assuming responsibility to exercise the relevant powers and functions conferred under the CO.</p>
India (TRAI)	✓	<ul style="list-style-type: none"> • Telecommunications • Broadcasting • Spectrum Allocation 	✓	✓	<p>Section 60, 62 of Competition Act 2002</p> <p>Sections 11-13 of Telecoms Regulatory Authority of India Act 1997</p> <p>Telecoms Tariff (Sixty Third Amendment) Order 2018</p>	<p>The Competition Authority (CCI) generally has concurrent enforcement powers with sector regulators such as TRAI, unless there is an apparent conflict of jurisdiction, where the CCI prevails. The CCI's pre-eminence in the telecoms sector was cast into doubt by the Bombay High Court in 2017. The CCI has appealed to the Supreme Court on whether it has exclusive jurisdiction over the telecoms sector. TRAI intervened in the proceedings, seeking a declaration that TRAI has exclusive jurisdiction. The High Court held that antitrust actions should be stayed until the results of regulatory action are clear.</p> <p>TRAI is capable of making recommendations, <i>inter alia</i>, about (i) the need for market entry by new service providers; and (ii) competition and efficiency in the operation of telecoms services. It has broad competition powers relating to the telecoms sector, primarily with respect to unilateral conduct and unfair competition practices. TRAI has the power to commence competition investigations on its own motion, but its powers do not include "dawn raid" inspections.</p> <p>TRAI adopted an Ordinance in February 2018, restricting telecoms operators with a market share of 30% or above from price discrimination and predatory pricing with respect to end users.</p>

National Regulatory Authority for Telecoms	Sector-specific	Extended Sectoral Power	Formal Cooperation Instrument			Comments
			Competition Powers	Integrated Powers		
Italy (AGCOM)	✓	•Telecommunications •Broadcasting & content •Spectrum management (other than for radio & TV) •Postal (as from 2011)	✗	✗	Law 249/1997 See also Article 21, paragraphs 13-20 of Law Decree No. 201 of 2011 Refer to 2016 Cooperation Protocol between AGCOM and the NCA	Competition between <i>ex ante</i> and <i>ex post</i> disciplines for jurisdiction has given way to consecutive increases in cooperation in 2013 in relation to unfair trade practices, to the 2016 Cooperation Protocol and to added cooperation with the Data Protection Authority (in December 2016).
Japan (MIC)	✓	•Telecommunications •Broadcasting •Spectrum management •Postal	✓	✗	Article 168 of the Telecommunications Business Act (Concurrency of competition powers)	The Telecommunications Business Act provides for sector-specific competition powers, including the prohibition of specific conduct by telecoms carriers with a dominant position, while the Japan Fair Trade Commission independently has powers in relation to such issues also.

National Regulatory Authority for Telecoms	Sector-specific	Extended Sectoral Power	Competition Powers	Integrated Powers	Formal Cooperation Instrument	Comments
Mexico (IFT)	✓	<ul style="list-style-type: none"> • Telecommunications (including networks, fixed and mobile telephony, Internet access, cable TV, satellite) • Broadcasting (including free-to-air TV and AM/FM radio) • Television and content • Spectrum allocation • Certain OTT services • User/audience rights • Cross-ownership relating to news outlets 	✓	✓	N/A	<p>In June 2013, a Constitutional reform entered into force, the main features of which were: (1) the creation of two independent competition authorities: the Federal Institute of Telecommunications (“IFT”), in charge of the telecommunications and broadcasting sectors, and the Federal Economic Competition Commission (“COFECE”), in charge of all other sectors; (2) the creation of District and Circuit Courts specialized in telecommunications, broadcasting and competition law matters; and (3) the imposition of a whole chapter of asymmetric measures that can be imposed on an identified incumbent by the IFT.</p> <p>The current legal framework invests the IFT with regulatory and competition law powers, including: (i) the regulation and supervision of all aspects of telecommunications and broadcasting services and networks; (ii) the issuing of regulations and technical standards related to telecommunications and broadcasting; (iii) investigating anti-competitive behaviour (cartel activity, abuse of dominance and illegal concentrations); (iv) merger control; and (v) regulation and guarantee of access to essential facilities; among others. By contrast, COFECE does not have authority to apply competition rules to the telecoms sector.</p>
Netherlands (ACM)	-	-	✓	✓	Establishment Act of Netherlands Authority for Consumers & Markets 2014; see also ACM Procedure for the inspection of digital data	<p>Includes consumer protection power. Operates as a fully independent integrated regulatory & competition law body.</p>

National Regulatory Authority for Telecoms	Sector-specific	Extended Sectoral Power	Competition Powers	Integrated Powers	Formal Cooperation Instrument	Comments
New Zealand (CC)	x	<ul style="list-style-type: none"> • Telecommunications • Electricity transmission and distribution • Airports • Dairy 	✓	✓	Commerce Act 1986 (as amended)	<p>In the late 1980s, the telecoms sector was privatised and deregulated, relying principally on competition law through the 1990s to restrain the exercise of market power by Telecom – the formerly State-owned provider of fixed line telecommunications services. From 2001 onwards, the sector has been gradually re-regulated, and in 2011 Telecom was de-merged into separate wholesale (Chorus) and retail (Spark) businesses.</p> <p>The current framework requires Chorus to operate exclusively as a wholesale provider, and directs the Commission to determine the prices and terms on which Chorus is required to supply specified wholesale access services, backhaul and co-location services to retail service providers, based on a TSLRIC model.</p> <p>The Government is revising the regulatory framework, in part motivated by the transition from copper to fibre fixed-line services. The current proposal directs the Commission to determine a revenue cap for Chorus' fibre access services, with specified 'anchor services' remaining subject to individual price caps (with copper being progressively de-regulated).</p>
Peru (OSIPTEL)	✓	<ul style="list-style-type: none"> • All telecommunications services offered to the public in exchange for a fee, including: <ul style="list-style-type: none"> - public final communications services (<i>e.g.</i> fixed and mobile telephony, telegraph, pager services); - cable television services; - satellite services; - value-added services 	✓	✓	Law No. 27336 (published on August 5, 2000), Article 26 (Telecommunications Law)	<p>The legal framework foresees extensive powers conferred onto OSIPTEL (Peruvian NRA), including the important role of promoting competition in the telecoms sector. Besides its regulatory responsibilities, OSIPTEL is responsible for the application of the Peruvian Competition law (Legislative Decree No. 1034) to telecoms services, thereby excluding the authority of Indecopi (Peruvian NCA) in this sector. OSIPTEL has its own set of procedural rules in the application of competition law. Indecopi is responsible for the enforcement of competition rules in all other markets, except for telecoms.</p>

National Regulatory Authority for Telecoms	Sector-specific	Extended Sectoral Power	Formal Cooperation Instrument			Comments
			Competition Powers	Integrated Powers		
		(e.g., voice-mail, Internet, or e-mail services).				
Poland (UKE)	✓	•Telecommunications •Postal •Spectrum management	✗	✗	Articles 16, 25c, 116, 118a, 118d, 122 and 1221 of the Act of 16 July 2004 – Telecommunications Law	Highly interactive cooperation mechanism with the Polish NCA. In cases enumerated in the Telecommunications Act, the NCA is either consulted or obliged to give an opinion. Areas of cooperation include market definition, SMP findings and spectrum management.
Singapore (IMDA)	✓	•Telecommunications •Broadcasting •Data Protection	✓	✓	Section 69C Telecommunications Act (Chapter 323) Sections 8 and 11 of the Telecoms Competition Code (last updated in January 2018)	The IMDA must consider competition concerns (e.g., high entry barriers preventing efficient competitors to enter the market) to determine whether it is in the public interest to order separation remedies against a telecoms provider. IMDA has specific competition enforcement powers to counter the abuse of dominance in telecoms markets. The IMDA can now enforce competition law against dominant operators which have not yet been formally classified as a “Dominant Licensee” for (<i>ex ante</i>) regulatory purposes, aligning the Telecoms Competition Code to the general competition law framework of the NCA under the Competition Act.

National Regulatory Authority for Telecoms	Sector-specific	Extended Sectoral Power	Competition Powers	Integrated Powers	Formal Cooperation Instrument	Comments
South Africa (ICASA)	✓	•Telecommunications •Broadcasting (since 2000) •Postal (since 2005) •Spectrum management	✓	✗	MOU No. 1747 between the NCA and ICASA (2002)	<p>Concurrent powers with the NCA.</p> <p>To the extent that a merger requires notification to both ICASA and the NCA, both regulators will perform independent investigations of the proposed transaction (but may interact with each other during the process). To the extent that the regulators arrive at different decisions, the MOU provides for a process to resolve this.</p> <p>To the extent that a merger requires notification to only one of the regulators, that regulator will make an independent determination (but may have regard to the input of the other regulator).</p> <p>Insofar as complaints are concerned, a similar process is followed (and ICASA and the NCA do have concurrent jurisdiction in respect of certain conduct).</p>
South Korea (KCC)	✓	•Telecommunications •Postal •Internet •Broadcasting •Data Protection •Radio frequency management	✓ (partial)	✗	Article 18, Section 6 and Article 54 of the Telecommunication Business Act (“TBA”); Article 85-2, Sections 3 and 6 of the Broadcasting Act	<p>Concurrent powers with the NCA. However, where a telecommunication business operator or broadcasting business operator is subject to a corrective measure or an administrative fine under the TBA or the Broadcasting Act, it shall not be subject to similar measure under the Monopoly Regulation and Fair Trade Act on the same grounds.</p> <p>KCC is in charge of <i>ex post</i> regulation on telecom or broadcasting business operators, while MSIT is in charge of <i>ex ante</i> regulation including the granting of telecoms and broadcasting business licenses and of promoting telecoms and broadcasting businesses.</p>

National Regulatory Authority for Telecoms	Sector-specific	Extended Sectoral Power	Competition Powers	Integrated Powers	Formal Cooperation Instrument	Comments
Spain (CNMC)	✓	•Telecommunications •Media •Energy •Postal •Transport (rail, aviation)	✓	✓	Act 3/2013 creating the National Markets and Competition Commission, supplemented by Royal Decree 657/2013. See also Competition Act 15/2007, and General Telecommunications Act 32/2003, Law 9/2014 on Telecommunications.	The CNMC is a unique “super regulator”, joining together 8 independent authorities, including the NCA. The CNMC divides itself primarily in two chambers: regulatory and competition chambers. The CNMC has private dispute resolution powers over electronic communications matters. The legality of the “super regulator” was disputed by former members of the Telecoms NRA, being referred to the CJEU (C-424/15). Although its legality was upheld. In early 2017, the Spanish Government announced that the CNMC is likely to be separated into two independent regulators. A White Paper and public consultations on this issue have been completed, leading to draft legislation.
United Kingdom (OFCOM)	✓	•Telecommunications •Broadcasting (since 2003) •Postal (since 2011)	✓	✓ (partial)	Enterprise and Regulatory Reform Act 2013 MOU between CMA and OFCOM dated 2 February 2016 (Concurrency of competition powers with CMA)	The UK Competition Network (UKCN), chaired by the CMA, facilitates communication and cooperation between sector-specific regulators (including OFCOM) and the specialist competition body, the CMA. Despite the “concurrency of powers” regime, the CMA has legal power to take over a competition case from OFCOM even if OFCOM is already investigating the case.

National Regulatory Authority for Telecoms	Sector-specific	Extended Sectoral Power	Competition Powers	Integrated Powers	Formal Cooperation Instrument	Comments
Turkey (BTK)	✓	<ul style="list-style-type: none"> • Telecommunications • Postal • Consumer protection issues • Internet content supervision • Radiofrequency management (excluding Radio TV) • Data Protection issues • Technical standardization of equipment • National Numbering Plan 	✓	✓	<p>Electronic Communications Act No. 5809 (2008)</p> <p>Law No. 2813 on Establishment of Information and Communication Technologies Authority</p> <p>Postal Services Act No. 6475 (2013)</p> <p>Law No. 5651 on Regulation of Publications on the Internet and Suppression of Crimes Committed by Means of such Publications</p>	<p>The BTK is authorised to issue regulations to create and protect competition and to eliminate the practices which obstruct disrupt or limit competition. It has the power to investigate alleged competition law violations in the electronic communications sector, to impose sanctions (including fines) and to seek the opinion of the NCA.</p> <p>The BTK and the NCA have signed two Cooperation Protocols, one in 2011 which covers electronic communications services and an expanded protocol in 2015 which also covers postal services, under which the NCA is required to ask for the BTK's advisory opinion and refer to the BTK's regulations on the relevant matter (if any), before taking decisions on electronic communications sector and postal services (including, preliminary investigations, in-depth investigations and mergers and acquisitions). The BTK can also seek the NCA's advisory opinion on competition-related issues in the sector but it is not required to do so other than with respect to market analyses that are conducted by the BTK.</p>

National Regulatory Authority for Telecoms	Sector-specific	Extended Sectoral Power	Competition Powers	Integrated Powers	Formal Cooperation Instrument	Comments
United States of America (FCC)	✓	• Telecommunications • Broad authority to regulate “interstate and foreign commerce in communication by wire or radio.” 47 U.S.C. § 151 (“Telecom service”, telephone (including VoIP), broadcast television, radio, cable, satellite, spectrum, broadband internet access service)	✓	✗	FCC-FTC 2017 MOU (Online Consumer Protection) FCC-FTC 2015 MOU (Consumer Protection) FCC-FTC 2003 MOU (Telemarketing Enforcement) MOUs between the FCC and the FTC provide for coordination, joint enforcement, and information sharing concerning areas of concurrent or overlapping jurisdiction.	<p>The FCC is authorized to interpret statutory terms, including those governing the scope of its regulatory authority/jurisdiction, subject to judicial review under <i>Chevron</i> and the Administrative Procedures Act (APA). Its interpretations of various statutory terms has changed over time; <i>e.g.</i>, the FCC’s 2017 “Restoring Internet Freedom” Order re-classified broadband Internet as an “information service” rather than as a “telecommunications service” subject to common carrier obligations (including “Net Neutrality” principles), reversing its 2015 “Order.”</p> <p>In addition to the powers expressly enumerated in the Communications Act, Federal Courts have recognized that the FCC possesses “ancillary authority” under Section 4(i) of the Communications Act to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.” 47 U.S.C. § 154(i). The outer bounds of that authority has been subject to substantial litigation (the FCC is required to tie its actions it to an express grant of statutory authority). <i>See, e.g.</i>, <i>EchoStar Satellite L.L.C. v. FCC</i>, 704 F.3d 992, 1000 (D.C. Cir. 2013).</p> <p>The FCC possesses regulatory and enforcement authority over the areas of competition (<i>i.e.</i>, in the sense of public interest powers), consumer protection, and licensing and authorizations in the communications sector. 47 U.S.C. §§ 214(a), 310. This authority is provided under the Communications Act and is separate to, and distinct from, Section 7 of the Clayton Act that governs antitrust review by the DOJ and FTC.</p>

V. Ensuring the independence of regulators

Independence from government or industry influence for an institution responsible for administering sector-specific regulation or competition rules is critical to the effective implementation of both *ex ante* and *ex post* disciplines. Concerns about independence in this context are very different when considering conflicts of interest in the broadcasting sector, where the public policy response to propaganda in the period leading to WWII led to the insistence that broadcasts be independent of external interests (the so-called “Staasferre” concept). The academic literature consistently takes the view that the key rationale for agency independence is that it provides a sound basis to guarantee consistent and impartial decision-making in technically complex cases, driven by the opinions of experts in the field and consistent with fundamental principles regarding “effective, efficient and fair decision making”.¹⁰⁴ This is particularly important in the context of sector-specific regulation, given that it is primarily asymmetric in nature, imposing regulatory obligations on those entities with market power or some proxy of market power. In such an environment, it is vital that the institution responsible for the imposition of such obligations (especially where wholesale access-related or retail price control obligations are imposed) is free from bias in interpreting and applying complex economic data and in making delicate policy trade-offs when formulating such measures.

In the *ex ante* field, concerns about regulatory “capture” are therefore at their highest precisely because the degree of independence of the agency might be compromised either because its members are drawn from the ranks of the historical incumbent operator subject to regulation¹⁰⁵ (or expect to join one of the operators in the regulated sector after leaving the agency)¹⁰⁶ or because they are unlikely to apply economic regulation independently of political influence (usually directed at supporting the historical incumbent). These concerns are heightened in institutional contexts where State-owned enterprises are competing with private providers, which is still common in many countries around the world. In these cases, because the State maintains a material economic interest in a specific provider, the lack of independence can also lead to the “capture” of the regulator by the government itself in favor of the State-owned enterprise.¹⁰⁷

The imperative for a competition regulator to act in such an independent fashion is just as strong – if not even stronger – but is less likely to require detailed rules to ensure independence given that the risk of “capture” across a broad range of sectors is more difficult to orchestrate, and the fact that the

¹⁰⁴ See Tridimas T., “Community Agencies, Competition Law and ESCB Initiatives on Securities Clearing and Settlement” (2009), 28 *Yearbook of European Law*, Oxford University Press, at pp. 216-307. See also Lavrijssen S. & Ottow A.T., Independent Supervisory Authorities: a Fragile Concept” (2012), 39 *Legal Issues of Economic Integration* 419, at pp. 419-445. See also Hancher L., Larouche P. & Lavrijssen S., “Principles of good market governance” (2003) 4, *Journal of Network Industries*, pp. 353-389.

¹⁰⁵ Thus, the commonality of experience between the regulator and the regulated firms will often mean that they see things through a common frame of reference, which does not necessarily lend itself to impartial, objective or non-discriminatory treatment in a liberalized environment.

¹⁰⁶ Given that members of the regulatory agencies tend to be highly specialized, if and when they leave that agency, they are likely to continue to work in that regulated sector. This also contributes to the maintenance of an identity and a potential alignment of views that may ultimately undermine their impartiality.

¹⁰⁷ For a discussion of the risks of this particular type of capture, see Pereira Neto C.M., Lancieri F.M. & Adami M.P., “O Diálogo Institucional das Agências Reguladoras com os Poderes Executivo, Legislativo e Judiciário: Uma Proposta de Sistematização” (Institutional Dialogue of the Regulatory Agencies with the Executive, Legislative and Judicial Powers: A Proposal for Systematization), in Sundfeld & Rosilho. (Org.). *Direito da Regulação e Políticas Públicas*. (2014), p. 149.

industrial policy directions of government may vary greatly across all of the sectors of the economy (especially in larger economies, which are not overly dependent on a handful of ‘flagship’ companies). An *in extremis* example of EU law where Member State authorities are not considered to be in a position to exercise independence in the application of competition rules is State aid law, where the European Commission has exclusive competence.¹⁰⁸

Hallmarks of independence

As has been noted in an OECD survey on competition policy, “*greater independence was the factor most frequently identified as likely to lead to a better promotion of competition law objectives*”.¹⁰⁹ To this end, the OECD has concluded that there is a broad consensus among OECD member countries that the independence of NCAs constitutes “best practice” for all competition regimes.¹¹⁰

In order to secure independence of NRAs and NCAs, it is usual for legal systems to establish certain measures that could insulate the agency from pressures and undue influence directed by private parties and the central government.¹¹¹ Some of the common institutional features to guarantee the independence of NCAs and NRAs are: (i) fixed and stable mandates for senior officials; (ii) administrative autonomy and absence of hierarchical controls from central government; and (iii) financial and budgetary autonomy.¹¹²

¹⁰⁸ Given that the essence of State aid law found in Articles 107-108 TFEU is the prohibition of State funding of firms which is likely to distort competition, the founders of the Treaty considered it to be unrealistic that a Member State could act independently in the review of its own State aids schemes. In this regard, it comes as somewhat of a surprise to have the European Union negotiating with third nations to include some form of State aid review mechanism as the basis upon which they are to enjoy favorable negotiating conditions with the EU (e.g., China and post-Brexit United Kingdom). These third countries are poorly equipped to vet the compatibility of decisions to grant State aid, given that the entity conferring the aid in question is the very entity which confers powers of review on the relevant national agency.

¹⁰⁹ *Principles for the Independence of Competition Authorities*, Alves S., Capiau J. & Sinclair A., April 2015, p 15, available at [file:///C:/Users/21784/Downloads/CLI_11_1_April_2015_Alves_Capiau_Sinclair%20\(8\).pdf](file:///C:/Users/21784/Downloads/CLI_11_1_April_2015_Alves_Capiau_Sinclair%20(8).pdf); See also OECD, Global Forum on Competition, ‘The Objectives of Competition Law and Policy: Note by the Secretariat’ (2003) Session 1, Doc No CCNM/GF/COMP(2003), available at <http://www.oecd.org/daf/competition/prosecutionandlawenforcement/34375749.pdf>

¹¹⁰ See Alves S., Capiau J. & Sinclair A., April 2015, *ibid*; See Alemani E. et al, ‘New Indicators of Competition Law and Policy in 2013 for OECD and non-OECD Countries’ (2013) *OECD Economics Department Working Papers*, No 1104, available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=ECO/WKP\(2013\)96&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=ECO/WKP(2013)96&docLanguage=En).

¹¹¹ “*De jure independence refers to the grounding of a regulator’s independence in law and is necessary to formally protect regulator’s structural independence against undue influence. It can be expressed for example by provisions on budgetary independence, the conditions and process for the appointment and dismissal of the members or head of the regulatory agency, as well as whether the executive withholds powers to set tariffs or prices and review or approve contract terms with the regulated entities.*” (OECD, Regulatory Policy Outlook 2018, p. 113, available at <https://doi.org/10.1787/9789264303072-en>).

¹¹² The OECD provides a more detailed list: “*(...) the most frequently used dimensions of regulatory independence are: (i) budget independence; (ii) conditions for dismissal of the head of the regulatory agency; (iii) appointment of members/head of the regulatory agency by parliament or the legislature; (iv) accountability and reporting to executive, legislature, or representatives from regulated industry; (v) power to set tariffs or price-setting by the executive; and (vi) power to review or approve contract terms between*

The heads of the agencies and members of the Board assume an important leadership role in those agencies and are specially exposed to pressure from private and public sources. In order to insulate these individuals from external pressures and to guarantee their independence, national and supranational legislation tends to be particularly concerned with the appointment process and the stability of tenure for senior officials. As regards the appointment process, this usually follows a transparent procedure, often including checks and balances between the Executive and Legislative branches (e.g., it is not uncommon to find an appointment by the President and an approval by the Parliament taking place). In addition, these individuals are usually appointed for a fixed term and cannot be removed before the end of their mandate, other than in exceptional circumstances. This stability confers greater freedom to implement decisions that may contradict the interests of private parties or political actors.

At the organizational level, independence requires some degree of administrative autonomy from central government. This usually translates into the need for a separate staff that responds only to the leadership of the agency. Most importantly, it means that an agency is not under the hierarchical control of the central government and its Ministers and is not required to follow directions. Finally, this autonomy usually requires limitations on the ability of the central government to overrule an agency's decisions. Even where such an ability exists, it must be treated as being exceptional and needs to be exercised in a transparent manner.

Some level of financial and budgetary autonomy is also critical in order to ensure independence. Where the central government controls the budget and the allocation of resources to the agency, it may also direct its priorities and ultimately affect its capacity to take decisions that may oppose certain political interests. Thus, having some relatively stable source of revenues that does not depend on the central government's appropriation, as well as freedom to allocate these resources to priorities established within the legal mandate of the agency, also contribute to the guarantee of the independence of the agency from the political process.¹¹³

Independence in an EU context

The axiom that a regulator must be able to act independently of political influence is reinforced in the EU context, where it is necessary that an NRA or and NCA must also be acting in the defined interests of the integration goals of the EU, rather than in the national self-interest.¹¹⁴ This policy imperative for independence is not surprising in the institutional landscape of the EU, particularly given that the European Commission is itself subject to an express obligation of independence. Thus, Article 17(3) TEU establishes that: “[in] carrying out its responsibilities, the Commission shall be completely independent”, and that “members of the Commission shall neither seek nor take instructions from any Government or other institution, body, office or entity. They shall refrain from any action incompatible with their duties or the performance of their tasks”. Moreover, the EU Member States are themselves

regulated entities or market actors.” OECD, *Being an Independent Regulator, The Governance of Regulators*, 2016, p. 42, DOI: <https://dx.doi.org/10.1787/9789264255401-en>.

¹¹³ The OECD explains the particular aspect of agency independence related to its financial security: “Appropriate funding is essential to determine the extent to which the regulator can carry out its mandate and act independently. Moreover, the way in which funding needs are determined, funds are decided and the extent to which the regulator can manage these funds autonomously could be more relevant than the source of funding.” OECD, *Creating a Culture of Independence: Practical Guidance against Undue Influence, The Governance of Regulators*, 2017, pp. 23-33, available at <http://www.oecd.org/gov/creating-a-culture-of-independence-9789264274198-en.htm>.

¹¹⁴ See, for example, Recital 34 in the *Framework Directive* for electronic communications and Directive 2009/72 EC Article 35 for the energy sector.

bound to respect the independence of members of the Commission, and are obliged to not to seek “*to influence them in the performance of their tasks*” (Article 245 TFEU). The public policy imperative that regulators be immune from *political* influence is less profound in jurisdictions outside the EU because of the understanding that the pursuit of purely national interests is not necessarily incompatible with the goal that regulatory measures be applied objectively and in a non-discriminatory fashion. Within the EU, by contrast, the policy of not supporting ‘national champions’ or ‘national only’ solutions has long been a cherished goal of EU competition law enforcement.

At the very least, the importance of achieving a separation of powers is assumed to be a cornerstone of an effective independent sector-specific regulator. However, even achieving this goal is not a straightforward exercise when small countries are involved. Where these small countries have “tight-knit local political, legal, commercial and economic elites”,¹¹⁵ they can often struggle to achieve a genuine separation of powers between the government, regulatory agencies and the senior managements of regulated network operators. This malaise is most often identifiable in the developing world (*e.g.*, historically on issues in countries such as Botswana and Jamaica), although it has also proven to be an issue with many of the ex-CEE countries of the EU that obtained EU membership in 2004.

Where NRAs and NCAs are funded directly through their respective national governments, there are of course limits to the extent to which they can be considered to be completely autonomous of those governments. Nevertheless, there are certain important characteristics which are designed to ensure that in both its operational decision-making and in its legal decision-making, there is a significant degree of independence of action available for those agencies. As a general rule, individual sector-specific NRAs are financed through their own resources wherever possible, especially where licensing fees or annual administrative fees are involved. At times where an NRA has jurisdiction over the allocation and/or valuation of scarce resources such as spectrum, it might find itself relatively flush with funds (a situation which few other government bodies will be able to enjoy).¹¹⁶ This places the NRA in the enviable position of being able to exercise its relative independence from the interference of central government. By contrast, the accumulation of powers into one agency will have the inevitable effect of also bringing together funding capabilities into central government which, by definition, is capable of having an adverse effect on an agency’s independence.

Within the EU, the notion of the truly “independent” regulatory institution has evolved over time, but has been driven since the 1990s by the model of independent regulators developed in the UK in the late 1980s and embraced by many member nations of the British Commonwealth. Based on that early British model, the high-water mark of insistence on regulatory independence can now be found in the EU, where legislation sets forth very explicit conditions that need to be followed at Member State level to ensure that NRA and NCA independence can be ensured.¹¹⁷ This is particularly important at a time

¹¹⁵ See Cave & Stern, *op.cit.*, at p. 3.

¹¹⁶ For example, a health service, education system or pensions office will always be relatively cash strapped, and will need to be funded through central budgets. By the same token, some regionally organized police forces complement their basic centrally funded budgets through the direct use of penalty payments generated locally – *e.g.*, parking fines and speeding fines, at times resulting in a ‘windfall’ cash surplus for those bodies.

¹¹⁷ In this regard, the availability of an independent review of decision-making by courts operating at arm’s length from the agency *and* also independently of the governments, operates as an invaluable corrective mechanism to the (potentially abusive) power of an agency. As noted by Wils W.P.J., “Independence of Competition Authorities: The Example of the EU and its Member States”, forthcoming in *World Competition*, Vol. 42, Issue 2, June 2019, “*it is generally accepted that independence should go hand in hand with accountability. As independence means absence of controls, and accountability means controls, the crucial issue is to determine which types of controls are inappropriate and which are appropriate to ensure that competition authorities fulfil their task*”. (at p. 10 and supporting footnote 30) Accordingly, Recital 22 of the *ECN+ Directive* provides that the “*operational independence of national administrative competition*

when EU legislation increasingly promotes the use of more flexible, discretionary powers by NRAs to implement evolving policy.¹¹⁸ If this discretion is exercised in the shadow of populist movements at national level, there is a heightened risk that consistent, harmonized EU policymaking may be blown off course.

In a Request for a Preliminary Ruling to the Court of Justice from the Tribunal Supremo in Spain,¹¹⁹ the ex-President and a Board Member of Spain's CMT (the sector-specific regulator for telecommunications) claimed that their respective dismissals under certain Royal Decrees were illegal, as they had been removed without recourse to any disciplinary proceedings or any reasons being cited for such dismissals. The dismissals had occurred on the eve of Spain's creation of the CNMC, Spain's 'super-regulator'. The Court stated that, although Member States enjoy institutional autonomy with regard to the organization and structuring of their NRA within the meaning of Article 2(g) of the *Framework Directive* 2009/140/EC, that autonomy may only be exercised in accordance with the objectives and obligations laid down in that Directive. Moreover, where a Member State moves from a sector-specific agency to a multi-sectoral agency, the latter body needs to satisfy the organizational and operational requirements to which the Directives subject NRAs. Such an accumulation of powers can occur, provided that the new agency satisfies the requirements of competence, independence, impartiality and transparency laid down in the *Framework Directive* for electronic communications, and an effective right of appeal is available against its decisions to a body independent of the parties involved. While the European Court of Justice considered that it was a matter for the national courts to decide whether the CNMC had satisfied those requirements, its own initial assessment was that the CNMC was likely to have satisfied those requirements when taking action in its role as an NRA. The fact that the CNMC had its own assets which were independent of those of the general Spanish administrative authorities, as well as sufficient autonomy and legal capacity necessary to manage its resources, were key aspects of its independence. As regards the Government's dismissal of those two senior CMT officials prior to the end of their term of office in parallel with the creation of the CNMC, such dismissals would only be problematic in the absence of any rules guaranteeing that such dismissals do not jeopardise the independence and impartiality of those members.

As highlighted in the discussion above, ensuring the independence of NRAs and NCAs is a complex matter. Implementing a legal framework capable of guaranteeing formal independence, coupled with the role of independent courts enforcing these rules, are essential steps in this direction. However, experience demonstrates that even these formal guarantees may be insufficient to establish an effectively independent agency, as the real policy space of the agency (and its 'actual' independence) will depend on several other factors, including:

- how established the rule of law is in a particular country;

authorities should not preclude either judicial review or parliamentary supervision in accordance with national law. Accountability requirements should also contribute to ensuring the credibility and legitimacy of the actions of national administrative competition authorities”.

¹¹⁸ In an attempt to find a bright line between “policy-making” (legitimately residing with government), on the one hand, and “implementation” (the domain of the agency), on the other, authors Hanretty C., Larouche P. & Reindl A.P., “Independence, accountability and perceived quality of regulators – a CERRE Study (2012), explain that: “*general policy rules issued by the [M]inister can, for example, stipulate that the energy regulators must contribute to the promotion of the European environmental and climate targets, an adequate level of network investments and the security of supply. However, the regulatory authority has the responsibility to decide on the methods through which these goals must be achieved, such as the choice for a specific tariff method and the design of regulatory methods to be used for the realization of these goals.*” (at p. 14)

¹¹⁹ Case C-424/15, *Ormaetxea Garai and Lorenzo Almendros, op. cit.*

- the existence of players in the policy space where the agency operates who can exercise veto rights;
- the political importance of the sector in which the agency exercises its powers; and
- the relationships with other institutions from the Executive, Legislative and Judicial branches.¹²⁰

Thus, when analyzing independence, focus only on the *static* view of formal guarantees might lead to a rather naive and limited analysis of the regulatory environment and, more importantly, to a false perception of independence. A more *dynamic* analysis must be focused on the *quality* of the independence, which is dependent on the actual relationship among *all* institutions that can affect, whether directly or indirectly, the regulatory process.¹²¹

While we examine below the key elements deemed necessary to ensure independence in relation to both competition law and sector-specific policy in the respective electronic communications and energy sectors, an overview of European competition practice under Article 106 TFEU also provides an insight into the critical concerns about the lack of independence of a decision-making body.

Guiding principles regarding conflicts of interest established under Article 106 TFEU

At the heart of the desire to ensure independence in decision-making is the idea that regulators need to be structured in such a way as to avoid conflicts of interests. The administrative practice of the Commission under Article 106(1) TFEU¹²² provides some insight into the sort of public policy mischief which a conflict of interest can generate. Article 106 is a quasi-regulatory tool that is used by the Commission to achieve liberalisation or to curb the excesses of State intervention through measures directed towards Member States but ultimately affecting market actors.

¹²⁰ For an interesting discussion of the distinction between formal and actual independence, see Hanretty C. and Koop C., "Shall the Law Set Them Free? The Formal and Actual Independence of Regulatory Agencies" (2013) 7 *Regulation & Governance*, 195. The OECD also refers to this distinction, when it comments that: "...this formal independence needs to be accompanied by *de facto* independence in the regulator's day to day work, which is more difficult to map out." (OECD, *Regulatory Policy Outlook 2018*, p. 113, available at <https://doi.org/10.1787/9789264303072-en>). See also Pereira Neto, Lancieri and Adami, *op. cit.*, at pp. 149-185.

¹²¹ For an analysis of this dynamic process that influences 'actual' independence, as well as examples drawn from the Brazilian experience, see Pereira Neto, Lancieri & Adami, *op. cit.*, at pp. 149-185. To illustrate the point, it is worth mentioning one particular example. The Brazilian General Law of Telecommunications establishes formal guarantees of independence to ANATEL (the Brazilian NRA), including stability of senior officials, administrative autonomy, and relative financial independence. However, despite these guarantees, in 2004, after intense disputes between ANATEL and the Ministry of Communications regarding the implementation of a rate readjustment, the President of the agency resigned, allowing the President of Brazil to appoint a new head of the agency prior to the end of their mandate. This case demonstrates certain practical limits on the actual independence of ANATEL. For a discussion of pressure to induce resignation as a means of exercising Presidential control over independent regulatory agencies, see Prado M.M., 'Assessing the theory of presidential dominance: empirical evidence of the relationship between the executive branch and regulatory agencies in Brazil', in Rose-Ackerman S., Lindseth L. & Emerson B., *Comparative Administrative Law: Second Edition* (Edward Elgar Publishing 2017), pp. 185-186.

¹²² Article 106(1) TFEU specifies as follows: "*In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.*"

Thus, in *MOTOE*,¹²³ ELPA was responsible for organising and marketing motorcycling events in Greece, which included the right under local law to co-decide upon authorisation requests for the organisation of motorcycling events by independent service providers. ELPA was found to have had a conflict of interest by reason of its dual role in satisfying regulatory objectives while also pursuing commercial activities. The Greek law led to a conflict of interest because ELPA had an economic interest in limiting the access of other providers/competitors to the market to its own advantage, while having been conferred the legal means by which potentially to prevent other service providers from entering the Greek market. This potential abuse of dominance was also reinforced by the mere fact that, unlike its competitors, ELPA was not subject to any restrictions, obligations or controls in relation to the grant or refusal of its consent regarding the authorisation of motorcycling events.

Similarly, the allocation by the Belgian State to a public operator of the national telecommunications network (RTT) of the exclusive right to supply and approve equipment for network connections was found to be contrary to the terms of Article 106 TFEU, as it placed the public operator at a competitive advantage *vis a vis* its competitors.¹²⁴ Unlike the situations in *MOTOE* and *RTT*, however, in the *Albany Case*,¹²⁵ the existence of judicial scrutiny in the decisions of a sectoral pension fund meant that the pension fund was in practice not in a position to act arbitrarily or in a discriminatory manner.

The Article 106 case-law on conflicts of interest even encapsulates conflicts of interest which occur where an undertaking with special or exclusive rights has a conflict of interest as between different commercial activities. In both the *ERT* and *Solvano Raso Cases*,¹²⁶ the beneficiaries of certain exclusive rights granted by the Greek and Italian governments respectively had conferred upon them an advantage under national law when dealing with certain products in relation to which they competed against third parties, thereby providing them with the opportunity to distort otherwise equal conditions of competition (usually by favouring their own products).¹²⁷

Adopting these broad principles, the administration of competition rules and the various Directives covering the liberalisation of the electronic communications and energy sectors provide for a series of minimum standards that need to be satisfied by Member States regarding the financial and functional independence of NRAs, and the personal independence of their senior personnel.¹²⁸

¹²³ Case C-49/07, *Motosykleistiki Omospondia Ellados NPID (MOTOE)* v. *Elliniki Dimosio*, ECLI:EU:C:2008:376.

¹²⁴ Case C-18/88, *RTT v. GB-Inno-BM*, ECLI:EU:C:1991:474.

¹²⁵ Case C-67/96, *Albany International BV v. Stichting*, ECLI:EU:C:1999:430.

¹²⁶ See Case C-260/89, *ERT & Ors v. DEP & Ors*, ECLI:EU:C:1991:254 and Case C-163/96, criminal proceedings against *Silvano Roso & Ors*, ECLI:EU:C:1998:54.

¹²⁷ While it is doubtful that a Member State's NCA could ignore such national rules, the European Commission was able to act under Article 106(1) TFEU.

¹²⁸ The adoption of appropriate safeguard measures to prevent an agency being prone to a conflict of interest is also reflected in measures taken against the regulated firm itself, at least where it enjoys a privileged position across the value chain or where it is vertically integrated. Thus, in the electronic communications sector, conflicts of interest arising in the dealings of a regulated firm with its downstream competitors is addressed primarily through the use of access remedies imposed at wholesale level. By contrast, the same effect is achieved in the energy sector through the use of structural unbundling remedies which differentiate clearly between the transmission and distribution arms of an energy provider. The presumption that a conflict of interest will exist in the vertically integrated railway sector also leads to the need for an unbundling of infrastructure and transport services, which is complemented by the appointment of an infrastructure manager, the need for separate accounts, specific requirements where rail-related services are also involved, and the independence of the body responsible for allocation of train paths and the charging for the use of

1. EU Competition Law

As noted above, the OECD recommends the maintenance of the independence of NCAs as a key aspect of their effectiveness. Nowhere is the relative importance of this independence promoted more overtly than in the European Union. Even a jurisdiction such as the United States, which prides itself on the importance of objectivity and impartiality in decision-making, does not go to the lengths pursued by the European Commission to ensure independence in NCA decision-making. This is largely because the heads of US authorities are openly political appointees, whereas it is the avowed aim of a centrist-liberal body such as the European Commission to act independently of national interests; it therefore seems only reasonable to assume that the roles of NCAs within the EU should be expected to satisfy similar criteria.

At EU level, the essential elements necessary to establish the independence of NCA decision-making within the EU can be found Council Regulation 1/2003,¹²⁹ the procedural legislation which sets forth the *modus operandi* of the Commission and national EU Member State NCAs when applying EU competition rules. Neither Regulation 1/2003 nor its predecessor Regulation 17¹³⁰ contained any detailed prescription regarding the need for independence of NCAs *vis a vis* their Member State governments. Thus, while, Article 35 of Regulation 1/2003 states that “[...] *Member States should designate and empower authorities to apply Articles [101] and [102] of the [TFEU] as public enforcers.* [...]”, it provides no substantive guidance regarding the level of empowerment that a Member State should provide to its NCA.

Even as regards the European Commission itself, the longstanding criticism levelled at that institution for decades has been that it is not in a position to act as a truly independent antitrust enforcer because it holds the cumulative powers of an investigator, prosecutor and enforcer. The Commission has sought, over time, to address these criticisms through a series of its own internal restructuring initiatives aimed at rendering its own workings more transparent and thus more robust, both in terms of form and substance.¹³¹

infrastructure. In the railway sector, unbundling principles are complemented by the existence of behavioural remedies in the form of access obligations, which need to satisfy a number of principles in terms of transparency, costing, non-discrimination, and so forth (as is the case of the electronic communications sector). See, in particular, Articles 4, 13, 27, 29, 31, 32, 35, 36, 56 and 61 of SERA. See also Articles 46, 47, 50-54 of SERA as regards capacity allocation principles. Thus, Article 7(1) of Directive 2012/34 provides that, in order to ensure the independence of the infrastructure manager *vis a vis* the rail undertakings which operate the trains, Member States must ensure that “*essential functions*” or an infrastructure manager may only be entrusted to bodies or firms “*that do not themselves provide any rail transport services.*”

¹²⁹ Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1, 4 January 2003.

¹³⁰ EEC Council Regulation No. 17/62, OJ O.13, 21 February 1962.

¹³¹ Thus, over time, aside from the traditional role played by the European Commission’s Legal Service (a separate part of the Commission which assesses the legality of Commission actions), the role of the Hearing Officer has been expanded to correct certain procedural excesses surrounding the rights of the defence; this supervisory role has been complemented by the increasing interest of the European Ombudsman when investigating the fairness and principle of sound administration that should typify competition law investigations. In addition, complex competition decisions are subject to a process of internal review by a cross-section of the Commission’s Services, while the input of the office of the ‘Chief Economist’ subjects to economic scrutiny the positions taken by DG Competition’s case teams. Moreover, Member State NCAs are consulted in more problematic cases through their participation on an Advisory Committee with which the Commission’s DG Competition consults.

With the influx of ten (10) new Member States in 2004,¹³² however, the momentum to specify working rules to ensure NCA independence increased significantly. This resulted in a series of warnings issued by the European Commission to various Accession Member States, which foreshadowed infringement actions being brought against a number of those Member States.¹³³ The aftermath of these actions has, in turn, led to a significant ramping up of legal prerequisites for NCAs to ensure their independence in the implementation of the next generation of the EU competition law procedures, which can be found in the recently adopted *ECN+ Directive*.¹³⁴

The ECN+ Directive

In proposing the *ECN+ Directive*, the European Commission was particularly concerned that “*a genuine risk of influence by other state bodies exists where state-owned companies or activities by state bodies are subject of an investigation by the NCA or where its enforcement action would interfere with other public interests*”.¹³⁵ As noted by Wils, the specific risks posed by State-owned undertakings which need to be addressed by respect for the principle of equal treatment is something which depends very much upon the assurance that NCAs maintain their independence from their national governments and broader political considerations.¹³⁶

Although the European Commission did not consider it necessary to pursue infringement actions for a number of years against individual Member States for the lack of independence of their NRAs, the European Court of Justice had the opportunity on a number of occasions to review the breadth of Article 35 of Regulation 1/2003. For example, in *VEBIC*, the Court ruled that national legal provisions that prevent an NCA from defending its own decision in judicial proceedings fell foul of the independence obligation contained in Article 35, which is designed to ensure the effective application of Articles 101

¹³² Namely, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia, which became EU Member States on 1 May 2004.

¹³³ As is reflected in the list of telecommunications sector infringement actions taken against EU Member States, contained in [Table 2](#). Note that comparable actions against Member States for failure to ensure the independence of their respective energy NRAs has not occurred to the same extent as in the telecommunications sector. This is arguably due to the twin pressures of: (1) network unbundling obligations in the energy sector, which minimizes the role which NRAs can play in the crafting of asymmetric regulatory obligations; and (2) the relative importance of NRAs working collectively to address cross-border energy flows and interconnector issues, which inevitably transcend narrow national decisions that would be taken unilaterally. The only substantive infringement actions in the energy sector have been brought against Germany (Infringement N°: 201422858; Case C-718/18 *Commission v. Germany*) and Spain (Infringement N°: 20142186). With respect to Germany, the grounds of challenge related to the failure of the NRA to enjoy full discretion in the setting of tariffs, and with respect to its competence to set fines of up to 10% of annual turnover. Other actions relate primarily to the faulty transposition of EU legislation into national law.

¹³⁴ Directive EU 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of Member States to be more effective enforcers to ensure the proper functioning of the internal market, OJ L.11, 14 January 2019. For a wide-ranging discussion of the relevance of independence under the *ECN+ Directive*, refer to the discussion in Wils, *op. cit.*

¹³⁵ See Commission Staff Working Document, “*Impact Assessment accompanying the Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities if the Member States to be more effective enforcers and to ensure the proper functioning of the internal market*”, SWD (2017) 114 of 22 March 2017, Part 1/2, at p.26.

¹³⁶ Refer to Wils, *op. cit.*, at p.16.

and 102 TFEU.¹³⁷ Moreover, in *Schenker*,¹³⁸ the Court concluded that, in order for there to be an effective application of Articles 101 and 102 TFEU, such an application needed to be uniform between Member States.

Accordingly, the *ECN+ Directive* has now gone on to specify in several provisions that NCAs must be independent by reference to a number of specific criteria. In particular, it introduces guarantees aimed at insulating the staff and management of NCAs from external influences, including political pressure, when enforcing EU competition rules. More specifically, Article 4 of the *ECN+ Directive* establishes that Member State must ensure that:

- a) the staff and the members of the decision-making body of the NCA can perform their duties and exercise their powers for the application of Articles 101 and 102 TFEU independently from political and other external influence;
- b) the staff and the members of the NCA neither seek nor take any instructions from any government or other public or private entity when carrying out their duties and exercising their powers for the application of Articles 101 and 102 TFEU;
- c) the staff and the members of the NCA refrain from any action which is incompatible with the performance of their duties and exercise of their powers for the application of Articles 101 and 102 TFEU;
- d) the members of the NCA may be dismissed only if they no longer fulfil the conditions required for the performance of their duties or have been guilty of serious misconduct under national law;¹³⁹ and
- e) NCAs have the power to set their priorities for carrying out tasks for the application of Articles 101 and 102 TFEU, as defined in Article 5(2) of the *ECN+ Directive*. To the extent that NCAs are obliged to consider complaints which are formally filed, this shall include the power of those authorities to reject such complaints on the grounds that they do not consider them to be a priority. This obligation is without prejudice to the power of NCAs to reject complaints on other grounds defined by national law.

Through these provisions, the *ECN+ Directive* thus reinforces significantly the requirement of independence for NCAs, while establishing clearer objective criteria designed to satisfy these requirements. As such, it is an important addition to the institutional framework of European competition law.

Public policy override

The practical implication of the provisions of the *ECN+ Directive* is that NCAs are provided with a different degree of leeway when implementing competition rules which are of a uniquely domestic hue (*i.e.*, not EU competition rules). This situation should be contrasted with the situation that exists in a

¹³⁷ Case C-439/08, ECLI:EU:C:2010:739 (at paras 56-64).

¹³⁸ Case C-681/11, ECLI:EU:C:2013:404 (at paras 36, 46 and 49).

¹³⁹ The grounds for dismissal should be laid down in advance in national law. Dismissals cannot occur for reasons related to the proper performance of their duties and exercise of their powers in the application of Articles 101 and 102 TFEU, as defined in Article 5(2). See also, in this regard, Case C-288/12, *Commission v. Hungary* [2014] ECLI:EU:C:2014:237, at para. 53, where the Court of Justice ruled that Member States need to respect the length of a mandate for directors of a national Data Protection Authority, and that such a mandate can only be terminated on the basis of strong legal reasons. Accordingly, changes in the institutional structure of an agency need to take due account of such tenure under any transitional measures.

number of jurisdictions around the world, the most prominent of which is Germany, where the merger ruling of the German Cartel Office can be overridden by the Minister of the Economy & Energy on the basis of overtly public policy (*i.e.*, public interest) grounds.¹⁴⁰ In so doing, however, the decision to override the NCA's ruling on public interest grounds is exercised in a transparent manner, with the rationale being that the voting public is in a position to judge at the ballot box the decisions of responsible Ministers who seek to override a purely economic assessment by an NCA by reference to various public interest criteria. This regime also explains why, in Germany, it is perfectly reasonable for the NCA and the German government to be at odds with one another decisions relating to specific cases.¹⁴¹ Comparable rules also foresee the ability of the responsible Government officials in Spain¹⁴²

¹⁴⁰ According to Section 42 GWB, a merger that is otherwise prohibited by the Bundeskartellamt may be authorized by the Minister for the Economy & Energy. The basis for receiving such a Ministerial exemption lies in the fact that the competitive restraint identified by the Bundeskartellamt is considered to be outweighed by advantages to the economy as a whole, or the merger is justified by an overriding public interest. There is a limit to the Minister's exercise of this discretionary power, insofar as the market economy system must not be jeopardised by the Ministerial authorization. In turn, it is subject to an appeal to the courts. The decision granting the Ministerial authorization is open to appeal to the Oberlandesgericht Düsseldorf on the basis of procedural errors and errors in reasoning. Past practice suggests that maintaining valuable technical know-how, improving the security of supply, stabilizing agricultural markets, and successful participation in international competition have been acknowledged as advantages that can lead to a Ministerial authorization. In general, preserving job security is – in and of itself – not a viable advantage. Overriding interest of the general public has been found to be the case in the relief provided to the State budget through the privatization of a State-owned company and where environmental policy goals can be achieved by an approval of the merger. (See Riesenkampff A. & Steinbarth S. in *Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann, Kartellrecht [2016]* 3rd ed, GWB § 42, paras 2 - 7).

In total, 22 applications for Ministerial authorization have been granted since the 1970s. (The full list of authorisations is available at: <https://www.bmwi.de/Redaktion/DE/Downloads/Wettbewerbspolitik/antraege-auf-ministererlaubnis.pdf?blob=publicationFile&v=5>).

The most recent instance of Ministerial authorization occurred in 2016, which related to a supermarket merger, and which was subject to significant controversy. (See Deutsche Welle (www.dw.com) <https://www.dw.com/en/regulators-overruled-in-supermarket-takeover/a-19122420>). Such authorization was challenged and suspended by the Düsseldorf Court (See <https://www.dw.com/en/germanys-economics-minister-in-the-firing-line-again/a-19421048>). Shortly after this decision, the German Law was amended to restrict the possibility of appeals by third parties against the Ministerial authorization, under the Ninth Amendment of the Act Against Restraints of Competition.

¹⁴¹ As occurred, for example, in the *Telefónica/E-Plus* Case in 2016 and in the *Alstom/Siemens* Case in 2019, both of which were reviewed by the European Commission under the EU Merger Regulation, but which witnessed the adoption of dramatically opposed views by the Bundeskartellamt (which opposed both mergers) and the German government (which supported both mergers). It is highly unlikely that this institutional policy of “agreeing to disagree” would be capable of being endorsed in most other political cultures outside Germany, whose modern history is characterized by an elaborate set of checks and balances designed to promote plurality in all its various forms.

¹⁴² Spain's *Competition Act* enables the Council of Ministers to re-assess any decision of the CNMC that may have blocked a merger or subjected it to commitments. The Minister of Economy has 15 days from the adoption of the relevant CNMC Decision to raise the issue with the Council of Ministers, which has one month in which to adopt a final Decision on the matter (*Competition Act*, Article 60). When re-assessing the concentration, the Council of Ministers can take into account criteria other than competition policy, including the maintenance of national security and defence, the protection of public health, the promotion of technological investigations and developments, and the maintenance of the objectives of sectoral regulation (*Competition Act*, 10(4)).

and France¹⁴³ to be able to overturn a merger ruling of their respective NCAs. It should also be contrasted to the situation which prevails in a number of jurisdictions around the world such as Canada, Australia and the United States, which have a separate regime for the review of investments by foreign nationals in strategic industries.¹⁴⁴ The EU has recently adopted legislation which streamlines such foreign direct investment reviews which are based on public policy grounds, in addition to the usual review process available for mergers.¹⁴⁵

¹⁴³ In France, the Minister for the Economy holds residual powers in two circumstances as regards the review by the French NCA of “concentrations”, namely: (1) even if the concentration is cleared by the NCA at the end of the first phase of review, the Minister has the discretion to request the NCA to open a second phase in-depth review of the concentration (*Code de Commerce*, Article L430-7-1 (I)) and within a period of 5 days after the Decision is adopted by the French NCA, the Minister of the Economy can request that the NCA conduct a thorough examination of the concentration; and (2) irrespective of the final decision adopted by the NCA at the end of the second phase, the Minister can substitute his or her decision based on public interest grounds (*Code de Commerce*, Article L430-7-1 (II)). Within a period of 25 days from the moment the Minister has received the Decision of the NCA, he or she has the right to evoke the “strategic mergers” exception for reasons of general interest other than the maintenance of competition (*i.e.*, mergers raising issues of public policy other than competition, such as industrial development, the competitiveness of the undertakings concerned with regard to international competition or the creation or maintenance of employment). In doing so, the Minister must adopt a reasoned Decision and can only rule on the transaction in question after having heard the observations of the parties to the concentration. The Minister’s Decision can, in the appropriate circumstances, be made conditional on the effective implementation of commitments. Failure of the parties to comply with the commitments prescribed by the Minister can result in a series of censures by the Minister (*Code de Commerce*, Article L430-8, IV).

In July 2018, the French Minister of Economy and Finance exercised for the first time the power set forth in Article L.430-7-1 of the French Commercial Code, allowing the minister to re-assess a merger on public interest grounds. In doing so, the Minister concluded that the acquirer of a “ready-made meals” business did not need to divest a certain brand as a pre-condition of merger clearance, which had been deemed necessary on competition law grounds as a result of the French NCA’s clearance Decision in June 2018 (*Financière Cofigeo/Agripole group*, Decision No 18-DCC-95, 14 June 2018). The Minister’s concerns were focused on the negative impact of the remedy on employment, in a sector which required ‘revitalisation’ that could be achieved only through the merger. In return for such Ministerial dispensation, the buyer gave a commitment to maintain present employment levels for a period of at least two years post-merger.

¹⁴⁴ In this regard, refer to: Investment Canada Act [1985] - Canada; Foreign Acquisitions and Takeovers Act [1975] and Foreign Acquisitions and Takeovers Fees Imposition Act [2015] - Australia; and The Foreign Investment Risk Review Modernization Act of 2018 (CFIUS) – United States.

¹⁴⁵ Within the EU, a minority of Member States had adopted their own forms of foreign direct investment legislation over the years. However, with the adoption of the *Foreign Direct Investments Regulation* (Regulation (EU) 2019/452 of 19 March 2019, the “*FDI Regulation*”), whose provisions will be fully operational by 11 October 2020, a legal framework for the screening of foreign direct investments by Member States on the grounds of either public security or public order has now been established across the EU. The regime set forth in the *FDI Regulation* establishes a cooperation mechanism between Member States and the European Commission that is aimed at making the taking of decisions on such grounds both more transparent and more analytically coherent (unlike its US counterpart, CFIUS, which establishes a centralized – albeit somewhat arbitrary – mechanism for the review of FDI by the Committee on Foreign Investment in the United States). A non-exhaustive list of public policy/public security grounds has been drawn up under the *FDI Regulation*, based on which investments can be screened in accordance with the following legitimate lines of enquiry: critical infrastructure (both actual and virtual); critical technologies; the supply of critical inputs; access to sensitive information; and media freedom and pluralism. The regime foresees that the European Commission may release opinions to the Member States regarding the appropriateness of their interventions under these provisions, although such opinions are, strictly speaking, non-binding as a matter of law. However, where the subject-matter in question affects EU interests (*e.g.*, matters relating to the

2. Telecommunications Sector

Given that the liberalisation of the electronic communications sector in the United Kingdom pre-dates the broader liberalisation trend in the EU, it is not surprising that the United Kingdom model of an “independent regulator” established a benchmark for decision-making independence by the regulatory agency in that sector. These requirements at EU level, however, were only formalised to a meaningful degree with the adoption of the so-called *Framework Directive* in 2002.¹⁴⁶

The *Framework Directive* 2002/21/EC provides a number of references on the importance of Member States acting as guarantors of an NRA’s independence. For example, Article 3 requires that Member States guarantee the independence of NRAs by ensuring that they are (i) legally distinct from and (ii) functionally independent of, all organisations providing electronic communications networks, equipment or services. To the degree that Member States retain the ownership of control of an operator in the sector, they are required at least to ensure an “*effective structural separation of the regulatory function from activities associated with ownership or control*” (Article 3.2). Moreover, Member States are required to ensure that NRAs “*exercise their powers impartially and transparently*” (Article 3.3). To this end, NRAs should be “*in possession of all the necessary resources, in terms of staffing, expertise and financial means, for the performance of their tasks.*”¹⁴⁷

In addition, Article 8 of the *Framework Directive* establishes that Member States shall ensure that, in carrying out their regulatory tasks, their NRAs shall take all reasonable measures in order to:

- i. promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services;
- ii. contribute to the development of the internal market; and
- iii. promote the interests of the citizens of the European Union.

After a period of time in which it should have been widely understood that Member States need to ensure the decision-making independence of their regulatory agencies, even where certain regulatory functions (*e.g.*, spectrum allocation) remained with the State, the European Commission escalated its scrutiny of certain Member State practices, which culminated in a series of infringement actions being launched in the telecommunications sector (summarised in Table 2) against a wide range of Member States.¹⁴⁸ The challenges included actions based on the following:

aerospace industry, transport networks, energy policy), Member States are bound to “*take the utmost account*” of the Commission’s opinion. While Member States are not obliged to introduce an FDI system into their national legal frameworks, where they elect to do so they must *inter alia* include some basic screening requirements, including the availability of judicial review of FDI decisions, respect for the principle of non-discrimination among third party States, and transparency in decision-making. The *FDI Regulation* also opens up the possibility of encouraging international cooperation on FDI screening by expressly stating that the Member States and the European Commission may also cooperate with other responsible authorities of (like-minded) third countries.

¹⁴⁶ Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) OJ L.108/33 of 24 April 2002.

¹⁴⁷ See *Framework Directive*, Articles 3(2) and 3(3), Recital 11.

¹⁴⁸ Actions have been brought against Members States such as Poland, Germany, Italy, Bulgaria, Latvia, Lithuania, Slovakia, Slovenia, Romania, Cyprus, Luxembourg, Greece and the Netherlands.

- State shareholdings and the maintenance of control relationships in telecommunications operators (and business interests more generally in the sector).
- The lack of objective conditions for the appointment of NRA senior personnel and the lack of clarity in terms of appointment directions.
- Overlaps between the personnel of the telecommunications agency and other regulatory bodies.¹⁴⁹
- The lack of structural separation between regulatory functions and the management functions in operators.
- Arbitrariness in appointments or dismissals of Chairmen of the NRA (*i.e.*, excessive government discretion).
- Unnecessary interference of the State in the exercise of an NRA’s discretionary powers of economic regulation, whether in terms of the scope of remedies to be mandated by the NRA beyond those remedies already expressly set forth in EU legislation, or in terms of the types of “markets” which it can subject to regulation.¹⁵⁰

As can be seen from the above list, the tendency within the EU has been to expand the scope of the notion of “independence” so that it even embraces actions which might run counter to the furtherance of EU mandates. Many outside the EU will feel that such action goes well beyond the idea of traditional notions of political and operational independence to avoid conflicts of interest.

Building on the original requirements of the *Framework Directive*, the Directive establishing the European Electronic Communications Code (Recast) (“EECC”),¹⁵¹ which was adopted in December 2018, lays down several provisions concerning the degree of independence that a Member State should guarantee to its NRAs “*to ensure the impartiality of their decisions*”. While Article 8 of the EECC also maintains that Member States shall guarantee such independence by providing that they are (i) legally distinct from, and (ii) functionally independent of, any natural or legal person providing electronic communications networks, equipment or services, it additionally provides that NRAs must be “*in possession of all the necessary resources in terms of staffing, expertise and financial means, for the performance of their tasks*”. That being said, there is still a certain degree of permissible control over NRAs by Member States, given that NRAs report back on an annual basis to their Member State governments, *inter alia*, on:

¹⁴⁹ Clearly, this issue should not be problematic if an integrated “super-regulator” is in place. Personnel overlaps do raise issues, however, where the respective agencies in question are supposed to be operating under clear, differentiated mandates. In an integrated agency, concerns would more likely arise as to the quality of decision-making of certain analytical standards adopted by NCAs and NRAs respectively become ‘blurred’ (although refer back to the earlier discussion on ‘regulatory antitrust’).

¹⁵⁰ See, for example, Case C-424/07 *Commission v. Germany* [2009] E.C.R. I-11431, where a successful infringement action was brought by the Commission against Germany because the latter limited *inter alia* the discretion of its NRA in the electronic communications sector by requiring the NRA not to regulate those markets considered to be “new” markets. It was also problematic to have the NRA accord priority to a particular regulatory objective among a number of legitimate policy objectives in the analysis of such markets (this level of interference was said to be contrary to key policy directions set forth in the *Framework Directive*, the *Access Directive* and the *Universal Service Directive*).

¹⁵¹ Proposal for a Directive of the European Parliament and of the Council establishing the European Electronic Communications Code (Recast), COM/2016/0590 final.

- i. the state of the electronic communications market;
- ii. the decisions they adopt;
- iii. their human and financial resources; and
- iv. how those resources are attributed, as well as on future plans.

This level of oversight, however, should not be of such a nature as to influence their decision-making (especially as regards access and interconnection issues) and their role in the resolution of disputes. These are the types of functions which must be performed independently “*both from the sector and from any external intervention or political pressure.*” Any such external influence renders an NRA compromised in its ability “*to act as [an NRA] under the regulatory framework.*”¹⁵²

The EECC therefore reflects a comprehensive set of conditions which need to be satisfied by EU Member State NRAs in order not to jeopardise their independence, even when allowing for an appropriate degree of oversight by government authorities. The Commission’s track record in bringing infringement proceedings (see description above and Table 2 below) also suggests, however, that it is willing to take a very broad view of the types of issues that might affect the independence of an NRA in the telecommunications sector. Indeed, infringement actions brought against Member States that actions which impair the scope of an NRA’s *discretion* will be interpreted as constituting a challenge to that NRA’s independence, at least where that level of discretion has been conferred upon the NRA through an EU legal instrument. The breadth of this approach might be seen in many quarters to be too far-reaching outside the EU environment; this is because regulatory harmonization measures in the EU have the unique goal of creating an internal market, with the institutional interplay between the various EU institutions and the different legal instruments being used to achieve regulatory policy goals.

3. Energy Sector

The requirement of independence is no less important in the administration of regulation in the energy sector, where national incumbent operators were historically owned and operated by government bodies. Having said that, the energy sector operates in a manner which takes into account a wide range of public policy concerns, which has a tendency to modify a ‘pure’ economic approach to regulation. Thus, where the critical interventions in that sector consist of the structural and functional separation of retail and wholesale functions, NRAs in the energy sector arguably have a more limited role to play in terms of ‘pure’ economic regulation than their telecommunications NRA counterparts, while at the same time intervention occurs in areas which have clear social and environmental implications. In such circumstances, the analysis required to determine whether an operational conflict of interest exists becomes much more complex.

At EU level, the prescriptions designed to ensure independence and to avoid NRA conflicts of interest in the sector have been strengthened incrementally, largely in response to shifts in economic regulation which demanded ever-growing sensitivity to independent decision-making.

While Regulation No. 1228/2003 in the 2nd Energy Package, for example, did not provide any express provisions as regards the need for NRA’s independence, accompanying Directives 2003/54/EC and 2003/55/EC (covering electricity and gas respectively) establish that Member States shall ensure that regulatory authorities shall be wholly independent from the interests of the electricity/gas industries (respectively Articles 23 and 25 of those Directives). Thus, the concept of independence under the 2nd Energy Package is tackled by reference to concerns stemming from the close ties between the NRA and

¹⁵² See Recital 37, *EECC*.

private operators, rather than with respect to the relationship between the NRA and Member State in question.

The 3rd Energy package adopted in 2009 takes the concept of independence one step further by specifying that the NRA must be legally distinct and functionally independent of “*any other public or private entity*”¹⁵³ and must be responsible for staff and persons responsible for its management. Thus, the NRA in the energy sector must: (i) act independently from any market interest; and (ii) must not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks.

Furthermore, in order to preserve the independence of the NRA, Member States shall ensure that:

- a) the NRA can take autonomous decisions, independently from any political body, and has separate annual budget allocations, with autonomy in the implementation of the allocated budget, and adequate human and financial resources to carry out its duties; and
- b) the members of the board of the NRA or, in the absence of a board, the NRA’s top management, are appointed for a fixed term of five up to seven years, renewable once.

Finally, similar to the situation which prevails in the telecommunications sector, the Commission took infringement proceedings against Germany with respect to measures that deprived the German NRA of full discretion in the setting of network tariffs and other terms and conditions of access to networks and the ‘balancing’ of services, given that many of the terms and conditions of tariffs had been to a large extent already laid down in detailed regulations adopted by the Federal Government.¹⁵⁴

These requirements are without prejudice to close cooperation, as appropriate, taking place with other relevant national authorities or to general policy guidelines issued by the Government that are not related to the regulatory powers and duties listed under Article 37 or Article 41 of Directives 2009/72/EC or 2009/73/EC respectively, namely: (i) fixing or approving transmission or distribution tariffs or their methodologies; and (ii) reporting annually on their activity and the fulfilment of their duties to the relevant authorities of the Member State in question.¹⁵⁵

Lavrijssen¹⁵⁶ contends that, in the field of energy law, Member States have been reluctant to grant the adequate discretionary powers and level of independence to NRAs, both of which are necessary for them – whether acting individually or through their pan-European representative body, ACER – to realise the transition to a low carbon energy system within the EU as part of the recently adopted “clean air” initiative at EU level. In a Member State such as the Netherlands, for example, the levels of independence and discretion envisaged for an NRA tend to be seen to cut across national constitutional principles, including fundamental notions of democracy and legality. Lavrijssen feels, however, that such *prima facie* conflicting principles between the EU and its Member States are reconcilable where the exercise of powers is subject to adequate checks and balances at both EU and national levels.

¹⁵³ Article 35 of Directive 2009/72/EC (electricity); see also Article 39 of Directive 2009/73/EC (gas).

¹⁵⁴ *Commission v. Germany* (Infringement Action No. 20142285 of 28 April 2016).

¹⁵⁵ The recast Renewable Energy Directive (EU) 2018/2001, the Energy Efficiency Directive 2018/2002 and the Energy Union and Climate Action Governance Regulation (EU) 2018/1999 (*i.e.*, the “Renewable Energy Package”), do not add anything to the existing specifications ensuring independence.

¹⁵⁶ See Lavrijssen S., “Independence, Regulatory Competences and the Accountability of National Regulatory Authorities in the EU”, *TILEC Discussion Paper*, November 2018, at pp. 1-16.

4. Rail Sector

Within the EU, the latest phase of rail sector liberalization insists upon the maintenance of independence of railway undertakings and of infrastructure managers from Member States (specified in terms of the need to control their own assets, budgets and accounts). This independence will, in turn, influence whether the railway undertaking can be managed according to the performance parameters which apply to commercial companies for the provision of efficient and appropriate service provision.¹⁵⁷

NRAs in the rail sector must thus be in a position to act independently in terms of their organisational, functional, hierarchical and decision-making capabilities. To this end, the rail sector NRA must be legally distinct and independent from any other public or private entity (as in the case of an NRA in the more advanced liberalised sectors such as electronic communications and energy), and must have the necessary organizational capacity to fulfil its tasks, both in terms of human and material resources. In addition, its decisions are subject to judicial review and need to be published (although the standard of judicial review is not specified in EU legislation).¹⁵⁸

5. Airports

In the aviation sector, the independence of airport coordinators is set forth in Article 4 of Council Regulation (EEC) No. 95/93.¹⁵⁹ According to the EFTA Court, that requirement of independence is framed in terms of the need to ensure that “*neither the authorities of the [Member State] concerned nor any other party can unduly influence the coordinator before, during and after the allocation process*”.¹⁶⁰ One needs to question whether the caveat of “unduly” before the word “influence” is based on the common law origins of that adverb (as with the expression “undue discrimination”) or whether it has some more profound significance insofar as it considers that independence cannot be absolute given the number of checks and balances imposed on the actions of airport coordinators, especially in terms of accountability obligations such as respect for the rights of the defence.¹⁶¹

While there is no equivalent regulation of allocations in the context of ports, competition for maritime space has highlighted the need for the management of EU waters to be more coherent. Accordingly, the concept of Maritime Spatial Planning (‘MSP’) works across borders and is designed to ensure that human activity at sea (including the regularization of maritime routes and traffic flows) takes place in an efficient, safe and sustainable manner.¹⁶² The MSP system is administered by “competent authorities” designated by each Member State.¹⁶³ Beyond this high level regulatory activity,

¹⁵⁷ Refer to Article 4 of Directive 2012/34/EU of 21 November 2012 establishing a single European railway area (“SERA”). See also Article 5 of SERA.

¹⁵⁸ Refer especially to Articles 55 and 56 of SERA. Refer to Article 56 (10) of SERA as regards the availability of judicial review.

¹⁵⁹ Regulation of 18 January 1993 on common rules for the allocation of slots at Community airports.

¹⁶⁰ Case E-18/14 *Wow air v. Icelandic Competition Authority & Ors.*, Judgment of 10 December 2014.

¹⁶¹ See Wils, *op. cit.*, at p. 11.

¹⁶² Refer to Directive 2014/89 EU of 23 July 2014 establishing a framework for maritime spatial planning, OJ L 257/135 of 28 August 2014. See Article 4 and Recital 3 of Directive 2014/89 EU. See also Article 8.

¹⁶³ Refer to Article 13 and the Annex to Directive 2014/89 EU on “Competent Authorities”, which do not refer to the concept of “independence” in terms of the legal status or the membership of the relevant competent authority.

intervention is largely left to NCAs, which have long applied the “essential facilities doctrine” where discriminatory access or the denial of access to port facilities has been at issue.¹⁶⁴

6. Data Protection

European policymakers have taken the view that the importance of achieving independence is at its most compelling when the protection of a European citizen’s personal data is at issue. Thus, when exercising their powers of overview under the recently implemented *General Data Protection Regulation (GDPR)*,¹⁶⁵ the standard that has been satisfied over the years is that of “*complete independence*”.¹⁶⁶ Recourse to such a high standard probably reflects the sanctity accorded at EU level to data privacy issues, but also their vulnerability to being circumvented by national authorities on the basis of politically inspired ‘security’ reasons. In order to implement this absolute standard of independence, further details are provided regarding the requirements that affect the various organizational, financial and personnel-related issues relevant to the independence of authorities responsible for data protection issues.¹⁶⁷

Under Article 28(1) of the former EU *Data Protection Directive* 95/46/EC, data protection authorities were also obliged to act “*with complete independence in exercising the functions entrusted to them*”. In a series of infringement proceedings opened by the European Commission against Germany and Austria for the infringement of EU law, the Court of Justice confirmed that the legal requirement of “independence” could not be satisfied where, for example:

- the managing member of the Authority is an official of the administration subject to supervision;
- where the Authority was integrated with a departments of the administration; and
- where the Government has an unconditional right to retrieve information covering all aspects of the work of the Authority.

¹⁶⁴ Unlike the airport environment, the frequency of arrivals and departures for aircraft is not as high, and the implications of cargo vessels being “parked” in areas outside the immediate port facilities are not as critical in terms of economic impact.

¹⁶⁵ See Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data. Refer especially to Articles 51-54 of the *GDPR*.

¹⁶⁶ See Article 52 of the *GDPR*.

¹⁶⁷ With regards to the independence of data protection NRAs more generally, it is worth considering the Brazilian experience. Notwithstanding the existence of an NRA in this sector in Brazil, only two months after the enactment of Law n. 13,709/2018 (the Brazilian General Data Protection Law), the legislation was changed by a provisional measure (a Presidential Act with the force of law), in order to modify the institutional design of the Data Protection Authority. In particular, the Authority lost its formal independence, being linked directly to the President and having its senior officers nominated by the President. This model was said to have been primarily chosen for budgetary reasons, in order to avoid new public expenditure. Although senior civil servants shall continue to retain job stability – there are specific situations in which they can be removed – the institutional design is far from that of a truly independent NRA. The provisional measure can still be modified by the Brazilian Congress but, as it currently stands, it clearly puts Brazil on a very different track to the European Union. See Mari A., ‘Brazilian Government to Create Data Protection Authority’ (ZDNet) <<https://www.zdnet.com/article/brazilian-government-to-create-data-protection-authority/>>.

However, the Court of Justice held that the Authority's independence was not compromised by the lack of a separate budget.¹⁶⁸ In another case brought against Hungary, the Court of Justice confirmed that the requirement of independence compelled Member States to not terminate prematurely the tenure of the data protection supervisor.¹⁶⁹

Under the *GDPR*, the requirement of independence of data protection authorities has been expanded, so that the members of the relevant Authorities “*remain free from external influence, whether direct or indirect, and shall neither seek nor take instructions from anybody*”, while “*each supervisory authority chooses and has its own staff which shall be subject to the exclusive direction of the member or members of the supervisory authority concerned*” and will have “*separate, public annual budgets, which may be part of the overall state or national budget*” which will be “*provided with the human, technical and financial resources, premises and infrastructure necessary for the effective performance of its tasks and exercise of its powers*”. Court of Justice precedent is also reflected in the *GDPR*, including the observation that financial control of a Data Protection Authority’s actions by the Member State in question shall not affect its independence.¹⁷⁰

7. Regional Fora

Somewhat surprisingly, the “independence” characteristic has also been extended to the respective bodies representing all EU-based NRAs in the telecommunications and energy sectors where the NRAs act as a collective forum (see discussion in Section VI below). According to Jordana & Triviño-Salazar: “*the functional and political dynamics that have informed the creation at EU agencies ... appear to have produced an institutional design that in most cases allow agencies to gain some independence from their public stakeholder, but also requires significant levels of accountability of them. In fact, the independence and accountability mechanisms have drawn important attention in the study of EU agencies. Since their institutional designs vary considerably, we can assume that some agencies replicate the design of their national counterparts by enjoying independence from their principals.*”¹⁷¹

Thus, in the field of energy, Regulation (EC) No. 713/2009 currently establishes that:

- i. the Administrative Board (“AB”) of the Agency for the Cooperation of Energy Regulators (“ACER”) should act independently and objectively in the public interest and should not seek nor follow political instructions (Article 17); and
- ii. ACER should have the necessary powers to perform its regulatory functions in an efficient, transparent, reasoned and, above all, independent manner. In particular, the Board of Regulators should:
 - avoid conflicts of interests; and
 - not seek or follow instructions or accept recommendations from: (i) the Government of a Member State; (ii) the Commission; or (iii) another public or private entity (Article 18).

¹⁶⁸ See Case C-614/10 *Commission v Austria* ECLI:EU:C:2012:631; Case C-518/07 *Commission v Germany* ECLI:EU:C:2010:125.

¹⁶⁹ See Case C-288/12 *Commission v Hungary* ECLI:EU:C:2014:237.

¹⁷⁰ Refer to Article 52(1) to (6) *GDPR*.

¹⁷¹ Jordana J. & Triviño-Salazar J., *European Union Agencies: A transnational logic?*, Paper 2017/54, Institut Barcelona Estudis Internacionals (IBEI), at p. 10.

Under the recently adopted “Renewable Energy Package”, certain changes will align the workings of ACER to the more standard agency governance model used for EU Member State NRAs.¹⁷²

In the field of electronic communications, the pan-European regulatory body for NRAs in the sector is known as BEREC,¹⁷³ which was formed in 2010.¹⁷⁴ Its mission is to ensure the independent and consistent application of EU harmonisation policies by developing best practices that can be shared among its NRA members, in cooperation with the European Commission (upon request or on its own initiative.)

BEREC is mandated to perform its allocated tasks “*independently, impartially and transparently*”. In order to guarantee that independence, members of the Management Board needed to undertake that they are not subject to any direct or indirect interest that is capable of prejudicing their independence, and need to recuse themselves from taking positions on issues where conflicts of interest arise.¹⁷⁵ These standards have been reinforced by an assurance that senior positions would be open to a transparent hiring procedure. However, the independence of an individual NRA representative turns on their ability to represent the “interest of the Union” in parallel to their own NRAs from which they are drawn. Moreover, financial independence is based on the existence of the NRA’s own budget. Nevertheless, much of BEREC’s budget is drawn from the European Commission. With respect, the links between BEREC’s fortunes and European Commission funding and the pursuit of EU (*i.e.*, synonymous with the goals pursued by the Commission) somewhat stretches the concept of true “independence” beyond its natural meaning.¹⁷⁶ The existence of such a pan-European body such as BEREC, which is so closely tied to the European Commission in terms of the Commission’s oversight of its deliberations and its funding, would almost certainly be seen to be compromising its independence were it not the fact that its genesis is designed to facilitate the pursuit of “European” harmonization goals. The pursuit of these goals transcends the idea of national regulatory capture, which will inevitably be seen to be the more pernicious public policy failing.

Some of these excesses have been addressed in the recently adopted EECC, which emphasises the importance of maintaining the independence of NRA representations and identifying ‘regulatory capture’ as a policy mischief which the concept of “independence” needs to address.¹⁷⁷

8. Conclusions

The history of liberalization has gone hand in hand with the perceived need to ensure independence in agency decision-making and the insulation of that decision-making from actual and potential conflicts of interest. As discussed above, the design of regulatory frameworks in which NCAs and NRAs operate have incorporated structural and organizational guarantees in order to insulate these agencies from

¹⁷² For example, according to the proposed recast of the Regulation establishing ACER, legislative proposal 2016/0378(COD), ACER will have regulatory oversight over future “Regional Coordination Centers”, a regional cooperation mechanism for Transmission System Operators to remedy the negative effects of fragmented and uncoordinated national actions.

¹⁷³ The Body of European Regulators for Electronic Communications (BEREC) was established by Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018, OJ L 321/11 of 17 December 2018 (amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No. 1211/2009).

¹⁷⁴ With Regulation (EC) No. 1211/2009, OJ L 337/1 of 18 December 2009, BEREC replaced the European Regulators Group for electronic communications networks and services.

¹⁷⁵ See Article 42 Regulation (EU) 2018/1971.

¹⁷⁶ See Article 24 of Regulation (EU) 2018/1971.

¹⁷⁷ Refer to Article 8 of the EECC, *op. cit.*

undue external influence, thereby allowing them to establish their enforcement priorities and to pursue longer term goals with autonomy.

However, the prevention of conflict of interests and the insulation of NRAs from undue influence does not (and cannot) mean a disconnect from constituencies and stakeholders that are involved in the regulatory process.¹⁷⁸ Indeed, there is little doubt that the additional policies of participation, transparency and accountability – including the possibility for judicial review – have improved the legitimacy of the way in which NRAs exercise their competences. Furthermore, as Lavrijssen comments: “*these elements enhance the base of support among stakeholders about decisions of the NRAs. In this light, the NRA’s functioning can be said to be (partially) legitimized through legal and traditional democratic accountability mechanisms, but also through other types of control mechanisms, such as public participation.*”¹⁷⁹ It is undeniable that true independence, as perceived by stakeholders and citizens alike, has as much to do with whether there exists some mechanism by which those parties can challenge and contribute to NRA decision-making, as well as the ultimate accountability of the NRA to the independent courts of a country.¹⁸⁰ In turn, NRAs are often obliged by law to consult with stakeholders and to embark upon appropriate regulatory action where circumstances so justify. In turn, this transparency in the context of a stakeholder consultation mechanism means that a regulatory Decision is arguably less likely to be challenged before a national court. Conversely, the merits of an NRA Decision are more susceptible to appropriate review by the European Commission, thereby improving the effectiveness of EU law. By being subject to these requirements to take appropriate action, NRAs are thereby subject to a series of checks and balances on their behaviour.¹⁸¹

As is well summarised by Lavrijssen: “*The European rules concerning market oversight are increasingly moving toward a checks-and-balances approach, in which a mix of political, public and judicial accountability mechanisms are put in place to secure that independent regulatory authorities exercise their powers in a rightful and reasonable manner.*” This effectively means that the European requirement of independence of NRAs and NCAs has evolved into a multi-layered system. That system brings together formal guarantees, transparency requirements, openness to participation of different stakeholders, and judicial review as part of the full spectrum of accountability measures which, in turn, reinforces the importance of the NRA being independent.

However, as that author also notes: “*The influence of European laws has grown far beyond what could have been foreseen by many politicians or academics about a decade ago.*”¹⁸² Accordingly, while many of the measures introduced over time might still be coherent in an EU institutional and policy context, they have elements which do not lend themselves to ready adoption by nations outside the EU which

¹⁷⁸ For a discussion about the independence of NCAs and legitimacy, see Townley, *op. cit.*, Chapter 3.

¹⁷⁹ See Lavrijssen, *TILEC Discussion Paper*, *op. cit.*, at p. 15.

¹⁸⁰ In this regard, the novel introduction (at the time in 2002) of a requirement that NRA decisions in the electronic communications sector should be reviewed “on the merits” (rather than a mere standard of administrative law review), is a very strong confirmation of this principle. See Article 4 of the *Framework Directive* and Article 31 of the EECC.

¹⁸¹ Under Article 56 (7) of SERA, for example, railway sector NRAs within the EU are obliged to consult with industry stakeholders (more specifically, user representatives of rail/freight and passenger transport services) at least every two years in order to determine the competitive state of the market. This is to be contrasted with the mandatory obligations on NRAs under the current regulatory framework in the electronic communication sector to conduct market analyses for the purpose of import the *ex ante* regulation every three years, extended to every five years under the new framework due to come into effect in December 2020. Refer to Articles 14 and 15 of the *Framework Directive* and to Articles 63 and 64 of the EECC.

¹⁸² See Lavrijssen, *TILEC Discussion Paper*, *op. cit.*, at p. 16.

do not have comparable market and political integration cultures. Yet, at least at the more fundamental level of addressing conflicts of interests and avoiding regulatory capture from both private entities and political actors, the discussion on independence within the EU remains relevant to other jurisdictions, many of which have been using similar tools to guarantee independence.

TABLE 2: CHALLENGES TO LACK OF “INDEPENDENCE” OF NRAS IN THE TELECOMS SECTOR

Country	Citation	Date of action	Allegations
Cyprus	Infringement No.: 20052079	13 October 2005	Lack of adequate safeguards to ensure that the NRA is legally distinct from and functionally independent of all telecoms operators. The Minister of Communications & Works, as well as the Council of Ministers, retain regulatory functions and corporate control over the telecoms incumbent.
Germany	Infringement No.: 20062559	02 May 2007	German legislation impaired the independent decision-making of the NRA in the electronic communications sector through measures requiring the NRA not to regulate markets considered to be “new” markets. In doing so it, limited the NRA’s discretion to regulate such markets.
Bulgaria	Infringement No.: 20072428	28 November 2007	Board of telecoms incumbent consists of the Chairperson of another Authority with some regulatory competences - the State Agency for Information Technology & Communications. This raises a conflict of interest that may jeopardise the independence of the NRA.
Luxembourg	Infringement No.: 20072429	31 January 2008	Public officials exercise both regulatory functions and management functions for an operator. (The Commission closed the case following the re-organisation of the Media & Communications Department, ensuring the structural separation of regulatory and management functions.)
Poland	Infringement No.: 20062505; Case C-309/08 <i>Commission v Poland</i>	11 July 2008	The State has extensive shareholdings in numerous telecoms undertakings. Simultaneously, the NRA is appointed by the Prime Minister, who is entitled freely to disband it at any time without reasons. A lack of provisions defining the duration of the term of the NRA and an absence of detailed conditions for its disbandment results in a situation of political dependence, leading to a risk that State-owned operators will be treated preferentially.
Latvia	Infringement No.: 20082257	18 September 2008	The Telecoms Ministry performs certain regulatory functions concerning numbering, frequency management and universal service while exercising corporate control in state-owned telecoms companies, thereby potentially undermining the impartiality of their regulatory decisions.
Lithuania	Infringement No.: 20082259	18 September 2008	The Telecoms Ministry performs certain regulatory functions concerning numbering, frequency management and universal service, while exercising corporate control in State-owned telecoms companies, thereby potentially undermining the impartiality of regulatory decisions.
Romania	Infringement No.: 20082366	29 January 2009	Reorganisation of NRA through emergency legislation in 2006, thereby preventing a Court Order to re-install the NRA’s President which had been removed by the Prime Minister in 2005.
Slovakia	Infringement No.: 20092132	14 May 2009	The Parliament dismissed the NRA Chairman on 4 December 2008. The procedure followed was not compatible with the legal requirement of regulatory independence because such interference risked undermining the impartiality of the NRA.

Country	Citation	Date of action	Allegations
Romania	Infringement No.: 20092288	29 October 2009	Infringement proceedings taken over the independence of the NRA, with a failure to ensure that members of the NRA had no business interest in the telecoms market, thereby neglecting the effective structural separation of the regulatory function from corporate control.
Slovenia	Infringement No.: 20102026	18 March 2010	Rules that permit the government to remove the Director of the NRA confer too much discretion on the government, potentially undermining his/her protection against political interference.
Italy	Infringement No.: 20122138	21 February 2013	Italian legislation reduced its NRA's independence by imposing on the NRA a duty to impose on undertakings with significant market power the provision of "sufficiently unbundled offers". In doing so, the NRA would be deprived of freedom to determine whether or not to impose obligations at all, or specifying the content of such obligations.
Netherlands	Infringement No.: 20124144	25 April 2013	Dutch government interferes with NRA's independent decision-making on remedies by obliging NRA to impose prescribed measures without discretion: First, broadcasters subject to "must-carry obligations" are forced to offer for resale their television programmes, and the transmission service that carries them, at wholesale level at "cost-oriented" prices (to prevent undue profits). Second, the NRA must order companies found to have significant market power to resell their programmes to competitors at cost-oriented prices.
Estonia	Infringement No.: 20112143	30 May 2013	The Ministry of Economic Affairs & Communications carries out regulatory tasks over the allocation of radio frequencies and procedures for granting frequency authorisations. Simultaneously, it exercises control over the State-owned incumbent TV and radio broadcast network operator, which also provides telecoms services, resulting in a conflict of interest.
Greece	Infringement No.: 20162073	16 January 2016	Greek legislation reduces NRA's independence and provides disproportionate penalties for the non-use of spectrum.

VI. Centralised versus localized enforcement

The means by which *ex ante* and *ex post* enforcement regimes operate and interact is subject to a unique institutional dynamic in the EU, given the quasi-federal nature of the EU and the jurisdictional power-sharing which occurs between the European Commission at the centre of a loose “federal” structure with the Member States at its periphery. The interaction between centre and periphery within the EU is complicated by a number of factors, all of which have some direct or incidental impact in the determination of how the agency structures are shaped. For example:

1. According to the concept of **subsidiarity**,¹⁸³ decision-making should occur at the level of authority which is most appropriately situated relative to the public policy mischief that needs to be addressed. Thus, sector-specific NRAs need to be able to exercise their decision-making at national level to take due account of local competitive market conditions.¹⁸⁴ Similarly, the resolution of competition issues has, since 2003 (*i.e.*, through Regulation 1/2003), been devolved in large measure to NCAs, which now account for over 85% of competition law enforcement in the EU. By contrast, the European Commission is best equipped to address regulatory issues which affect pan-European markets, at least where they affect cross-border trade.¹⁸⁵
2. Where the goal of **harmonisation** is paramount, the overarching role of the Commission is either to have veto powers over an NRA’s *ex ante* decision-making¹⁸⁶ or to be able to establish important precedents at EU level which will govern the legality of emerging commercial practices. Similarly, in the area of remedies, Member States must not enforce laws which have a negative impact on the effectiveness of EU law.¹⁸⁷
3. European Commission Decisions are subject to **appeals** to the European Courts and are challengeable under the general administrative law standard of “manifest error”, it being generally understood that the Commission is subject to a wide margin of discretion in the interpretation and

¹⁸³ Defined in Article 5 TEU. Specifically, it is the principle whereby the EU does not take action (other than with respect to those cases falling within its exclusive competence), unless it is more effective than action taken at national, regional or local level. It is closely linked to the principle of proportionality, which requires that any action taken by the EU should not exceed what is necessary to achieve the objective of the Treaties.

¹⁸⁴ In telecommunications, NRAs impose asymmetric market obligations respectively under Articles 14 and 15 of the *Framework Directive* (now, under Articles 63 and 64 of the EECC) whereas, in the field of energy, NRAs act cooperating within the framework provided by the Agency for the Cooperation of Energy Regulators (ACER), as laid down by Article 7 of Regulation (EC) No 713/2009 of the European Parliament and of the Council (OJ L 211 of 14 August 2009).

¹⁸⁵ The enforcement of competition rules within the EU occurs under two tiers of enforcement, namely: large matters enforced by the Commission where significant trans-border elements are involved; and enforcement by NCAs of more localised or national issues. This is a byproduct of the debate that occurred in the 1990s that is associated with the enactment of the *Maastricht Treaty*.

¹⁸⁶ For example, in the field of electronic communications, refer respectively to Articles 7 of the *Framework Directive* and 32 of the EECC.

¹⁸⁷ The doctrine of “effectiveness” has been declared by some authors to be a general principle of EU law and therefore a part of the primary law of the EU. See Tridimas T., *General Principles of EU Law*, Oxford 2006, at p. 418 *ff*. Refer also to Stepkowski L., “The notion of effectiveness in the law of the European Union”, *Studie nad Autorystaryzmen I Totalitayzmen* (2016) 38, No. 2, pp. 81-96.

application of economic evidence when arriving at its Decision.¹⁸⁸ By contrast, the trend has been increasing at Member State level for the decisions of NRAs to be reviewed “on the merits”,¹⁸⁹ with the standard of legal review of competition law Decisions adopted by NCAs turning largely on the standards of review developed under the legal traditions of the individual Member States. In addition, anything falling short of an exercise of a European Commission veto over an NRA decision in the context of a telecommunications ruling is not considered to be a legal “act” under the EU legal order, and hence is not susceptible to judicial review.¹⁹⁰ These conflicting standards of legal review, when combined with the uncertainties created by the centralisation or (as the case may be) of decision-making has the potential to create a patchwork of enforcement which varies as between sectors, legal instruments and Member States.¹⁹¹

4. The inherent delays in moving from policy debate on the direction of EU policy to the stage when EU law is implemented effectively in the domestic legal orders of the Member States means that the adoption of new laws can take years (especially when given effect through a Directive). This has resulted in the increasing use of “soft law” legal instruments¹⁹² at Community level, pursuant to which regulatory policy can be pursued relatively quickly. While the use of such soft law instruments allows the Commission to adapt existing legal precedents to technological change more

¹⁸⁸ Refer to discussion of EU case law in Laguna de Paz J.C., “*Judicial Review in European Competition Law*”, see https://www.law.ox.ac.uk/sites/.../judicial_review_in_european_competition_law.pdf.

¹⁸⁹ Refer respectively to Articles 4 of the *Framework Directive* and 31 of the *EECC*.

¹⁹⁰ Refer to discussion in Kovács A., Táth T. and Forgács A., “The Legal Effects of European Soft Law and their Recognition at National Administrative Courts” (2014), *ELTE Law Journal*, pp. 53-70.

¹⁹¹ The standard of judicial review can also have a material impact upon appetite of an NCA to initiate infringement proceedings or to block a merger. Thus, in the United States, the full review of the Courts *de novo* of all DoJ or FTC Decisions undoubtedly imposes a severe constraint on enforcement strategies by either of those two competition agencies in pursuing novel theories of harm. The natural byproduct of this standard of review is that US antitrust authorities are less inclined to risk being overturned by courts on appeal. By contrast, the European Commission feels less constrained in its enforcement policy because it is subject to a review by the European Courts on the basis of the standard of ‘manifest error’. In France, for example, merger review occurs *de novo* (on the assumption that engaging in a merger scenario is a ‘neutral’ act which carries no presumption or inference of illegality), while infringement decisions of the NCA are reviewed on appeal by the Conseil d’Etat under an administrative law standard of review. In Singapore, a separate administrative body has jurisdiction to hear appeals from merger decisions of the local NCA *de novo*.

¹⁹² Primary legal instruments in the EU legal order consist of the EU Treaties, Regulations and Directives. The provisions in such legal instruments have the force of law as a matter of general application, whereas Decisions are legally binding only on the addressees of those Decisions. However, in order to address regulatory policy initiatives which need to adapt to changes in technology, reflect different enforcement strategies, or to illustrate new administrative precedents, it may be important for EU policymakers to act with the sort of speed which is not characteristic of the legislative process that produces the instruments of primary law. In such situations, “soft law” in the form of Guidelines or Recommendations may be adopted by the Commission relatively quickly, usually after some form of stakeholder consultation deemed appropriate for the subject-matter. While technically speaking *not* binding in proceedings before a national court, the adoption of such soft law instruments is generally understood to bind the Commission in its decision-making. National judges in many Member States (especially those in the Mediterranean Member States) attach significant weight to those soft instruments which renders them virtually indistinguishable from primary legal instruments in terms of their legal effect. See Chalmers D., Davies G. & Monti G., *European Union Law*, 3rd ed., CUP, 2014.

effectively and quickly, they also lack the force of binding law on national judges; this means that their persuasiveness in a national EU Member State context can vary significantly.¹⁹³

5. The institutional “cocktail” created by the above-listed factors means that there has been a growing importance attached to the building of consensus among Member States through the creation of **pan-European institutions**, which bring together the respective sector-specific NRAs into an environment where “best practices” can be shared and a common approach can be developed that is directed towards the resolution of common analytical problems.¹⁹⁴

The creation of pan-European regulators falling short of formal EU agencies with executive powers established under the Treaties (and, by analogy, other regional organizations in other parts of the world), raises a series of questions about:

- whether these bodies can legitimately engage in the making of policy choices rather than merely advising on technical issues;
- whether these bodies are democratically accountable; and
- the extent to which such bodies are subject to effective judicial review.

In many instances, pan-European groupings of NRA representatives increasingly play a role which is very close to that of an ‘agency’, although not subject to the same level of judicial review that one would expect of a true European agency.

For example, Eberlein & Grande¹⁹⁵ identify a dilemma for EU regulatory policy, insofar as despite the rising need for uniform EU-level rules in the internal market, the bulk of formal powers and the institutional focus of regulatory activities continues to be located at the national level, which results in a supranational regulatory “gap”. The authors contend that this gap is partly filled by transnational regulatory networks. Under certain conditions, such regulatory networks therefore provide a back route to the informal Europeanization of government regulation.

In the view of Jordana & Triviño-Salazar: “*Considering agencies as being embedded in the multi-level coordination scheme turns them into actors whose potential is realized depending on their ability to interact and develop their own capacities. This position prompts important questions on the role of agencies: How do agencies perceive their role in the overall EU governance scheme: as a clear mandate to offer technical information and influence decisions on specific policy areas? Or do they see themselves as a melting pot of different interests and services that force them to strictly abide by this mandate?*”¹⁹⁶ Given the proliferation of such agencies over the past fifteen years and the different roles which they play, the questions posed by those authors remain unanswered, as agencies assume different roles in a multi-layered governance system, acting at different intensities in each of these layers, through a web of institutional relationships at national, multilateral and supra-national levels.

¹⁹³ Thus, at the risk of generalization, a Member State judge is more likely to accord great weight to a “soft law” pronouncement by the European Commission than would a UK, Swedish or Dutch judge, which would have a tendency to focus on its actual legal effect in the domestic legal order. See also Joined Cases C-392/04 and C-422/04 *i-21 Germany GmbH and Arcor AG v. Germany* (2006), ECLI:EU:C:2006:586.

¹⁹⁴ The most important of the pan-European institutions that have been established to assist the Commission in its role of achieving harmonisation and the creation of an internal market are listed overleaf in Table 3.

¹⁹⁵ See Eberlein B. & Grande E., “Beyond Delegation: Transnational Regulatory Regimes and the EU Regulatory State”, *Journal of European Public Policy* (2005), Vol. 12(1), at pp. 89-112.

¹⁹⁶ Jordana & Triviño-Salazar, *op. cit.*, at p. 21.

Pan-European sectoral regulators¹⁹⁷

Given the many pan-European agencies that have been formed over the past decade and the many and varied roles which they play, some scholars have already sought to classify such agencies by relevance to certain analytical categories. Thus, there is much truth to the statement that: “*Scholars studying EU agencies have explicitly or implicitly followed different approaches, most of which are supported by two distinct theoretical backgrounds: either emphasizing the intergovernmental nature of agencies or considering the relevance at a supranational logic in their development.*”¹⁹⁸

Accordingly, the driving force behind the creation of the pan-European body of NRAs in the electronic communications sector, **BEREC**, is the perceived need for a forum through which common experiences can be shared with respect to a wide range of policy issues that are susceptible to rapid technical change and that might require potential new directions in enforcement. As such, they require the forging of consensus as the driving force behind the creation of a “Europeanization” of regulation which strives to achieve workable measures of harmonization. A good example of the harmonization efforts of BEREC can be seen in the guidelines for the application of Net Neutrality rules, where the pan-European body has been deeply involved since 2010, issuing Guidelines in 2016,¹⁹⁹ and a report on the evaluation of application of these guidelines.²⁰⁰

Of course, as the Net Neutrality example shows, efforts towards implementation of complex policies at national and supranational levels are heavily dependent on the eventual constraints imposed by judicial review. Indeed, the debates around net neutrality first started and flourished in the US, but the policy was later reversed, with the interplay between the Courts and the telecommunications NRA (the FCC) undermining the original rules and ultimately resulting in their abandonment. By contrast, in Europe, the doctrine has been held together by the interaction of regulatory and legal review institutions, with NRAs, BEREC and the Courts developing and enforcing standards in a mutually supportive way.

Because of the importance of BEREC in developing “best practices”, it also plays a relatively unique role in the shaping of individual NRA Decisions, which are the cornerstone of the EU regulatory framework in the electronic communications sector. As has been pointed out elsewhere, the importance of the regional role to be played by BEREC in the direction of future economic regulation in the electronic communications sector has been increased dramatically under the newly adopted European Electronic Communications Code (EECC). Under the EECC, BEREC will be entrusted with a major policy development role which goes well beyond its current responsibilities.²⁰¹

In the energy sector, the analogous role to BEREC is played by **ACER** which, while also built upon a culture of sharing of best practices among its NRA members, is arguably more necessary in acting to

¹⁹⁷ Refer to list of regulatory bodies in [Table 3](#).

¹⁹⁸ Jordana & Triviño-Salazar, *op. cit.*, citing Egeberg publications from 2015 and 2017, at p. 2.

¹⁹⁹ See “BEREC Launches Net Neutrality Guidelines”, at https://berec.europa.eu/eng/news_and_publications/whats_new/3958-berec-launches-net-neutrality-guidelines.

The guidelines are available at

https://berec.europa.eu/eng/document_register/subject_matter/berec/regulatory_best_practices/guidelines/6160-berec-guidelines-on-the-implementation-by-national-regulators-of-european-net-neutrality-rules.

²⁰⁰ See Report on the Implementation of Regulation (EU) 2015/2120 and BEREC Net Neutrality Guidelines’, at https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/8256-report-on-the-implementation-of-regulation-eu-20152120-and-berec-net-neutrality-guidelines. The full range of BEREC working papers, guidance notes, *etc.*, can be accessed via its website.

²⁰¹ Alexiadis & Shortall, *op. cit.*, at p. 113.

perfect a true common market in energy trading. Unlike telecommunications markets, which have remained persistently national in scope at both retail and wholesale levels, upstream energy markets display real signs of pan-European geographic scope.

In terms of ensuring the creation of an internal market for electricity, ACER plays an important role. It does so by monitoring whether there are sufficient interconnectors and identifying their lack of utilization, having developed sophisticated algorithms to ensure that there is sufficient cross-border interconnector capacity available on the market. In addition, ACER plays an important role in achieving harmonization by ensuring that national rules are compatible with its EU Network Codes.

ACER's relatively unique importance in forging an European electricity market is also reflected in its institutional design. For example, it is constituted by a Board of Regulators (drawn from the NRAs), an Administrative Board (which deals with budgets and related issues), and a Board of Appeals, which acts as an arbitrator when the NRAs cannot agree on the application of a particular policy within a specified timeframe.

ACER is thus principally focused on cross-border issues, and has achieved notable successes in terms of producing target models for electricity, gas hubs, over a dozen Network Codes, extensive annual monitoring of the European market (*i.e.*, the so-called ACER-EEER Market Monitoring Report), and REMIT.²⁰²

It is worthwhile noting that, in parallel with their participation in groups such as BEREC and ACER, NRAs within the EU also devote significant resources to two parallel organizations which bring together their senior decision-makers beyond the influence of the European Commission (*i.e.*, the IRG and the CEER, respectively in the fields of electronic communications and energy). Those multi-NRA groupings allow the participating NRAs to speak freely and openly about their key common issues, but without concerns about reporting back to or consulting with the Commission or their own responsible national Ministries. Somewhat counter-intuitively, this very lack of transparency in operating

²⁰² As noted earlier, REMIT (the EU Regulation on Wholesale Energy Market Integrity and Transparency, Regulation No. 1227/2011), which came into effect in 2011 and which was implemented more comprehensively in 2014 (REMIT Implementing Regulation No. 1348/2014), establishes common EU-wide rules whose aim is to prevent abusive practices in wholesale energy markets and to enhance market transparency. The REMIT regime is, however, overseen by ACER, rather than by individual Member State NRAs in the energy sector. Under that regime, abusive practices are identified and defined as regards 'market manipulation' practices and insider trading practices, while a monitoring system is put in place for European energy markets. In turn, NRAs have powers to enforce the rules, investigate problematic conduct and impose sanctions for the infringement of the rules.

ACER's role is exemplified in the recent imposition of a fine on Energy Denmark as a result of an investigation commenced by Denmark's Energy Regulatory Authority (the DUR) and referred to the Danish State Prosecutor for Serious Economic and International Crime. The case brought by DUR alleged that the defendant had hoarded capacity on the interconnectors for electricity by trading with its own affiliates on 10 separate occasions in 2015. The defendant was charged a fine of approx. 100,000 Euros by the State Prosecutor, based on the finding that the capacity hoarding had generated (or had the potential of generating) misleading signals or artificial prices on the "intraday wholesale electricity market". ACER welcomed this first decision adopted under the REMIT regulatory framework, given the fact that the efficient use of interconnectors across the EU is a critical element in the development of a single European electricity market. To this end, ACER has issued a guidance note on cross-zonal transmission capacity hoarding, which provides various examples of trading practices that could constitute "market manipulation" under the REMIT regime. (Refer to <http://www.mondovisione.com/media-and-resources/news/acer-energi-danmark-fined-for-market-manipulation-on-the-nordic-wholesale-elect/>.) Refer also to Guidance Note 1/2018 of 22 March 2018 on the *Application of Article 5 of REMIT on the Prohibition of Market Manipulation: Transmission Capacity Hoarding*.

procedures arguably lends itself to greater “independence” (at least in one sense), albeit with virtually no countervailing responsibilities.

ERA²⁰³ is the EU Agency for railways which is established to provide EU Member States and the Commission with sector-specific assistance in the development and implementation of the Single European Railway Area (SERA). Its task is to promote a harmonised approach to railway safety. To this end, it is responsible for deciding the technical and legal framework in order to enable the removal of technical barriers. It is also responsible for acting as the “system authority” for ERTMS²⁰⁴ and telematics applications. It also plays a role in the improved accessibility and use of railway system information. Most importantly, however, it acts as a genuine European Authority under the 4th Railway Package in issuing vehicle (type) authorisations and simple safety certificates, while also playing a role in the improvement of the competitive position of the railway sector. In performing these tasks, ERA’s mission statement emphasizes the importance it places on stakeholder focus.

By contrast, one can imagine that the work of the **ERGP**,²⁰⁵ the pan-European consultative organ of NRA postal regulators, might play an increasingly important role over time in seeking to forge an European market for postal services in a commercial environment where the cross-border delivery of parcels assumes ever greater importance. Created in 2015, the comparable body for water regulation, **WAREG**,²⁰⁶ is the most recent and informal of these pan-European regulatory bodies, and is essentially limited to the sharing of best practices; this function cannot be of as high importance as other sectors in achieving the harmonization goal, given the more limited and fragmented levels of competition available across the Member States with respect to the provision of water services.

Other pan-European regulators include **ENISA** (European Union Agency for Network and Information Security)²⁰⁷ and **EASA** (European Union Aviation Safety Agency).²⁰⁸ These bodies resemble European agencies more than networks of NRAs. Their boards are composed of representatives of each Member State and other stakeholders, and they rely on professional staff. ENISA plays an advisory role to EU institutions and to Member States, with the aim of strengthening cyber-security in Europe. As for the agency responsible for civil aviation safety, EASA, besides playing an assistance role to the Commission, Member States and NRAs, it also plays the role of an active regulatory body by formulating opinions, conducting investigations and by performing tasks on behalf of Member States in order to fulfil obligations under international conventions.

It is therefore clear that the various EU level agencies are characterized by very different characteristics, focuses of attention and policy missions. As has been expressed by two noted authors: “*the basic principle behind the transnational dynamics is that agencies respond to multiple interactions based on the mandate, tasks and operations they perform, beyond the hierarchical principle that the intergovernmental and supranational perspectives assume. Within these transnational dynamics, the transgovernmental character is based on their composition, formed by representatives from EU*

²⁰³ See <https://www.era.europa.eu>.

²⁰⁴ The European Rail Traffic Management System (ERTMS) is a simple interoperable train control and command system in the EU. It is designed to enhance cross-border interoperability, thereby creating a seamless EU-wide railway system.

²⁰⁵ See http://ec.europa.eu/growth/sectors/postal-services/ergp_en.

²⁰⁶ See <http://www.wareg.org>.

²⁰⁷ See <https://www.enisa.europa.eu>.

²⁰⁸ See <https://www.easa.europa.eu/>.

institutions, [Member States] and in some cases, stakeholder related to the policy sector of the agency.”²⁰⁹

While it is clear that the harmonisation goal and the desire to create a common market in the provision of certain services is facilitated by the creation of pan-European institutions such as those listed above, it is just as clear that the creation of a truly European institution with executive powers needs to satisfy the legislative requirements of a Treaty change so that the institution in question is imbued with powers comparable, for example, to those of the European Central Bank.²¹⁰ Insofar as these pan-European institutions are created in the absence of a legislative basis that lies in the Treaties, their ability to serve as a focal point for EU law enforcement becomes increasingly problematic, especially in the absence of any real accountability before the European courts or in terms of appeals available before a national or EU court. As has been noted by Eberlein & Grande, this dilution in the formality of governance procedures renders the regime of cooperation between so many institutional players vulnerable to conflict which, in turn, raises some unresolved problems about democratic legitimacy.²¹¹

Outside the EU

As regards the extent to which this level of regional cooperation can or should be realised in other parts of the world beyond the EU, a heavy dose of scepticism may be required. The relative success of these EU-wide organisations is partly due to the unique federal system of law enforcement that exists among a group of jurisdictions bound by a common set of legal traditions and a sense of political cohesion towards achieving “the European project”. It is difficult to imagine how African, Asian or South American nations could combine effectively to achieve comparable results, especially considering the differences in the stages of development and institutional maturity of many of the national jurisdictions in these other regions of the world. Given the unique levels of political and economic integration within the EU, it is thus not surprising that other regions of the world do not sustain the same level of cooperation between NRAs associated with organisations such as BEREC and ACER. This, whereas telecommunications NRAs in the Middle East region meet regularly, they do so merely to share experiences and best practices, but the organisation does not play an integral role in a harmonised rule-making process along the lines practised by BEREC.

At the Ministerial level in the Southeast Asian region, meetings occur within the TELMIN group, the ASEAN Telecommunications and IT Ministers Meeting²¹² and AMEN, the ASEAN Energy Ministers Meeting,²¹³ both of which provide sectoral fora for regional Ministerial meetings. In the Americas, some coordination and harmonization occurs under the umbrella of Inter-American Telecommunications

²⁰⁹ Jordana J. & Triviño-Salazar J., *op. cit.*, at p. 3.

²¹⁰ In this regard, refer to the old case-law in *Meroni v. High Authority* [1957/1958] ECR 133, which relates to the extent to which EU institutions may delegate their tasks to regulatory agencies. The doctrine is relatively controversial insofar as some commentators consider it to be somewhat anachronistic in light of the way in which EU competences have developed over time. (See Hatzopoulos V., *Regulating Services in the European Union* (2012), Oxford University Press, at p. 325). Having said that, the Meroni doctrine does have the inescapable benefit of limiting the extent to which effective enforcement of Community law would be adversely affected because its responsibilities for enforcement would be exempt from effective judicial review.

²¹¹ Refer to Eberlein & Grande, *op cit.* Although *query* how much additional democratic legitimacy exists if action is pursued through the European Commission rather than through pan-European bodies, which at least reflect the participation of national regulatory institutions.

²¹² See <https://asean.org/asean-economic-community/asean-telecommunications-and-it-ministers-meeting-telmin/>.

²¹³ See <https://asean.org/asean-economic-community/asean-ministers-on-energy-meeting-amem/>.

Commission (CITEL), linked to the Organization of American States (OAS).²¹⁴ At the global level, a degree of sharing of best practices occurs through the regular meetings conducted by the International Telecommunications Union (the ITU).

Outside regulated network sectors, a more formal structure is in place in Australia and New Zealand with respect to foodstuffs, which is reminiscent of EU-level structures, in the form of a common Food Authority (Australia New Zealand Food Authority (ANZFA)).²¹⁵

Competition Networks

European Union

As opposed to their regulatory counterparts, the level of cooperation between NCAs operating within the European Union occurs under two tiers of enforcement, namely: (i) the enforcement by the Commission of large matters involving significant trans-border elements; and (ii) the enforcement by NCAs with respect to more national or localised issues. This is a by-product of the great ‘subsidiarity’ debate that occurred in the early 1990s and which is associated with the enactment of the Maastricht Treaty. Cooperation between NCAs in the EU, for example, occurs via the **European Competition Network (ECN)**.²¹⁶ This organisation, while geared to some degree towards developing best practices in terms of analytical approaches regarding certain commercial conduct and theories of harm, is primarily focused on the most effective means of exercising jurisdictional competence in the adjudication of competition disputes or the review of mergers where multiple jurisdictions might be affected.

This cooperation is most evident in the system of decentralised enforcement introduced through *Regulation 1/2003*²¹⁷ and in the administration of the “one stop shop” rule established under the *EU Merger Regulation*.²¹⁸ When cooperating under the ECN structure, however, the individual NCAs and the European Commission are cooperating in their own capacity as individual entities in relation to a very clear set of tasks that are already set forth under primary EU legislation, rather than simply as cogs in a larger cohesive institution. Given the general supervisory role conferred upon the European Commission by Article 105 (1) TFEU, there is nothing inherently inconsistent in an NCA being “independent” in its own right at national level, while at the same time being deferential to the European Commission as regards its exercise of jurisdiction in competition matters.²¹⁹

²¹⁴ Refer to <https://www.citel.oas.org/en/Pages/About-Citel.aspx>. There are also some sub-regional efforts at coordination, such as a subgroup on communications (SGT.1 – Communications) within Mercosur and the Andean Committee of Telecommunications Authorities (CAATEL) within the Andean Community of Nations. See Bruszt L. & McDermott G.A., *Leveling the Playing Field: Transnational Regulatory Integration and Development*, Oxford University Press, 2014.

²¹⁵ See <https://dfat.gov.au/trade/agreements/in-force/anzcerta/Pages/australia-new-zealand-closer-economic-relations-trade-agreement.aspx>.

²¹⁶ Refer to http://ec.europa.eu/competition/ecn/index_en.html.

²¹⁷ Refer to Recitals 19, 34 and 35.

²¹⁸ Council Regulation 139/2004, at Recitals 8 and 11; Refer also to the *Jurisdictional Notice*, EC OJ C95-1 of 16.4.2008.

²¹⁹ In the view of Wils, *op. cit.*, at p.18: “*This lack of full independence of NCAs vis a vis the European Commission is however unproblematic The Commission’s powers vis a vis NCAs do not endanger the fulfilment by the NCAs of their task of applying Articles 101 and 102 TFEU effectively and uniformly in the general interest, but rather constitute a safeguard to ensure the fulfilment of this task. The Commission’s powers vis a vis NCAs, and more generally the close cooperation within the European Competition Network,*

Aside from the ECN, the recent tendency in Europe has been for certain forms of sub-regional cooperation to take place. A good example is the Nordic Cooperation Agreement entered into in 2017 between Denmark, Iceland, Norway, Sweden, and Finland.²²⁰ The Agreement envisages a significant degree of cooperation at the enforcement level, including the exchange of information about investigations and merger control, and mutual assistance in the conduct of dawn raids related to allegedly anti-competitive commercial practices under investigation. More importantly, the Nordic authorities agreed to request information on behalf of other authorities, thereby effectively expanding the reach of their respective national competition laws extraterritorially. This level of cooperation at an EU sub-regional level clearly goes beyond the fulfilment of harmonization goals and implementation of “best practices” foreseen under Regulation 1/2003, but could arguably not occur in the absence of the broader level of cooperation foreseen under that Regulation.

A similar form of cooperation exists on the continent of Africa, at least as regards merger control review, with two organisations providing two different merger notification regimes for mergers whose activities affect their territories (*i.e.*, COMESA and CEMAC²²¹).²²² The genesis of those organisations was prompted more by the desire of a number of fledgling African merger regimes to be better able to review mergers that would often slip under their enforcement radar, rather than smoothing over potential jurisdictional disputes.

In Latin America, there have been some attempts made to structure cooperation among NCAs. At a broader level, the OECD and IDB have a common initiative to build cooperation in the region.²²³ Sub-regional activity is built around common market initiatives, such as Mercosur and the Andean Community, but they have not been successful. Mercosur has never been able to establish substantive collaboration and the NCAs have tended to drift apart over the years.²²⁴ The members of the Andean community have experienced substantial differences in enforcement over the years, despite similarities in their laws.²²⁵ More recently, they faced a significant political crisis when the regional authority decided to fine a company that had been granted immunity in two national jurisdictions, thereby jeopardizing their respective national leniency programs.²²⁶ Thus, despite some efforts in the past 20 years, most of the cooperation in the region remains limited to the sharing of best practices and implementing specific bilateral cooperation regarding cases that affect more than one jurisdiction.

Global cooperation

can also help ensuring the NCAs’ independence from their national government and politics, as NCAs may be able to call upon the Commission’s authority when put under pressure in their Member State”.

²²⁰ Refer to <https://www.kkv.fi/en/facts-and-advice/competition-affairs/international-cooperation-related-to-competition-affairs/nordic/agreement-on-cooperation-in-competition-cases/>.

²²¹ The European Community of Central African States, <https://www.cemac.int/>. The members of CEMAC are Cameroon, Central African Republic, Chad, Republic of Congo, Equatorial Guinea and Gabon. The organization was formed in 1994, and superseded by another agreement in 1999.

²²² Refer to <https://www.comesa.int> (the Common Market for Eastern and Southern Africa), established in 1994.

²²³ Refer to <http://www.oecd.org/competition/latinamerica/>.

²²⁴ See Mota Prado M. and Bertrand V., ‘Regulatory Cooperation in Latin America: The Case of Mercosur’ 78 *Law and Contemporary Problems*, 26.

²²⁵ See ‘SICE - Competition Policy - Competition Policy in the Andean Countries’ <http://www.sice.oas.org/compol/articles/cpandea.asp>.

²²⁶ See <https://www.competitionpolicyinternational.com/the-end-of-leniency-programs-in-the-andean-region>.

Irrespective of the shortcomings in regional cooperation discussed above in relation to some parts of the world, the discipline of competition law, unlike the many and varied approaches which characterise regulatory policy in different sectors of the economy, arguably lends itself to a more consistent approach across physical borders and different legal cultures. Accordingly, looser forms of cooperation and information sharing (*i.e.*, ‘best practices’) occur at the global level among competition policy organisations such as the ICN,²²⁷ OECD²²⁸ and UNCTAD.²²⁹ These organisations, which also work closely with regional organisations, operate in a complementary, non-hierarchical manner, and are designed to achieve commonly agreed standards and better cooperation in the challenges posed by globalisation and digitalisation. Each organisation reflects the needs of their specific memberships, and increasing attention is being paid to the coordination of their efforts.²³⁰ Efforts have been made in the past to include the meaningful codification of cooperative efforts into the WTO regime, but these have generally given way to the more flexible approach associated with the workings of the ICN.²³¹

Indeed, the ICN has been quite active in pushing for best practices not only in relation to substantive analysis but also at the procedural level. A good example of this latter activity is the 2019 ICN Framework on Competition Agency and Procedures (“ICN Framework”), which details fundamental principles of procedural fairness, encouraging their adoption by the members of the network.²³² This initiative reflects an agenda that has been promoted by the US Department of Justice and Federal Trade Commission over a number of years.²³³

The 2019 ICN Framework includes recommendations as regards the following aspects of procedural fairness: (i) non-discrimination between foreign companies and nationals; (ii) transparency and predictability of procedures and regulations; (iii) opportunity to have a meaningful participation in the investigative process; (iv) reasonable timing to conclude investigative proceedings; (v) clear policies and rules on the confidentiality of information during investigations; (vi) avoiding conflicts of interest; (vii) providing formal notice of, and respecting the right of defense in, investigations and enforcement procedures; (viii) recognition and discipline of legal representation and privileged information; (ix) issuing final decisions in written form when imposing sanctions or remedies; (x) the right to an independent review of the final decision by an adjudicative body.

Even though the ICN does not have powers to enforce the principles and recommendations contained in the ICN Framework, their voluntary adoption by the member NCAs is both a powerful tool for dissemination and transparency, as well as a way of building commitment around these principles. At the level of transparency, the ICN Framework requires those members which adhere to its terms to

²²⁷ Refer to <https://www.internationalcompetitionnetwork.org>.

²²⁸ Refer to <http://www.oecd.org/>.

²²⁹ Refer to <https://unctad.org/en/Pages/Home.aspx>.

²³⁰ Refer to Mundt A., “Development of Multilateral Cooperation from a National Competition Authority’s Point of View”, in *Liber Amicorum*, (Vol. 1) for Frédéric Jenny, *op. cit.*, at pp. 3-17.

²³¹ Refer to <https://www.internationalcompetitionnetwork.org/>.

²³² Refer to https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/04/ICN_CAP.pdf.

²³³ As regards the various examples of how the United States has been promoting its agenda on procedural fairness at the international level, refer to: *The Antitrust Guidelines for International Enforcement and Cooperation* (<https://www.justice.gov/atr/internationalguidelines/download>); and recent speeches delivered by DOJ officials, Makan Delrahim (*e.g.*, “International Antitrust Policy: Economic Liberty and the Rule of Law”, *at* <https://www.justice.gov/opa/speech/file/1007231/download>) and Alford R. (*e.g.*, “Designing a System to Secure the Fair Administration of Competition Laws”, *at* <https://www.justice.gov/opa/speech/file/1110716/download>).

provide a “Template with information regarding its Competition Law investigation and enforcement procedures”, which is made publicly available on the ICN network website. In addition, given that the ICN Framework also encourages member authorities to communicate with each other, it identifies out potential procedural concerns and provides clarifications whenever questions arise, thereby exerting pressure on those participating authorities that do not comply.

All in all, at the global level, these multiple cooperation efforts of NCAs have created some convergence around the development of best practices in areas as diverse as cartel investigations, leniency agreements and merger reviews. Such convergence is usually incorporated in guidelines and recommendations issued by international organizations and networks.²³⁴ These efforts have also led to an increase in direct exchanges among NCAs in multi-jurisdictional cases, especially those concerning international cartel investigations and mergers with a global dimension which have been simultaneously reviewed by different authorities around the world.

Despite these potentially positive outcomes, informal webs of cooperation among NCAs may be skewed by an imbalance of power between those more structured, resourceful and established NCAs, on the one hand, and relative latecomers to the discipline of competition law enforcement, characterized by fewer resources and prestige in the international arena, on the other. It may be the case, however, that the positions advocated by leading NCAs may not necessarily always produce the best results to all agencies involved in the interaction. Different sociopolitical contexts and different policy goals may lead to the need for a degree of diversity in enforcement decisions that should arguably not be diluted by cooperation efforts.²³⁵ Accordingly, striking the right balance in these cooperation networks is anything but an easy task.

²³⁴ Refer, for example, to the ICN Merger Remedy Guide, published in 2016, available here: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_RemediesGuide.pdf.

²³⁵ Calling attention to the importance of diversity in enforcement of competition law, see Townley, ‘A Framework for European Competition Law: Co-Ordinated Diversity’, *op.cit.*

TABLE 3: PAN-EUROPEAN REGULATORY BODIES

Regulatory Body	Appointment	Scope of action	Remedies
ACER (Agency for the Cooperation of Energy Regulators)	<p>Regulation (EC) 713/2009 establishes ACER, consisting of: an Administrative Board of 9 members and 9 alternates appointed for 4 year-periods from Commission, the Council and the European Parliament (Article 12, 13) to ensure ACER carries out its mission and tasks assigned to it; a Board of Regulators, represented primarily by 1 senior NRA officer and one alternate and 1 non-voting representative of the Commission (Article 14, 15); a Director, appointed for 5 years which may be extended by a further 3 years, to represent and manage the Agency (Article 16, 17); and a Board of Appeal (comprising 6 members and 6 alternates) appeals lodged by any natural or legal person, including NRAs, (Article 18).</p>	<p>ACER focus is on transborder issues within Europe, and in putting in place a common framework (<i>e.g.</i>, common EU-wide network codes).</p> <p>ACER has an expanding role, <i>e.g.</i>, Third Energy Package (2009), REMIT (Regulation 1127/2011), Infrastructure (Regulation 347/2013), measures to safeguard the security of gas supply (Regulation 2017/1938). The Clean Energy for All Europeans legislative proposals (currently under negotiations) proposes a wide range of tasks for ACER.</p>	<p>ACER can issue Opinions and Recommendations to Transmission System Operators/ENTSOs, NRAs, the European Parliament, the Council and the Commission (Article 41).</p> <p>In some circumstances, ACER can take Individual Decisions on technical issues (<i>e.g.</i>, on terms and conditions for access to and operational security of cross-border infrastructure or on TPA/Unbundling exemptions) or on Terms and Conditions or Methodologies for the implementation of the electricity Guidelines or decisions on cross-border cost allocation for Projects of Common Interest (TEN-E Regulation) and under the Regulation safeguarding security of Gas Supply).</p> <p>ACER decides if: (a) the concerned NRA fails to reach an agreement within a pre-specified period; or (b) upon request of the concerned NRAs.</p>

Regulatory Body	Appointment	Scope of action	Remedies
BEREC (Body of European Regulators for Electronic Communications)	<p>Regulation (EC) 1211/2009 establishes BEREC, which is constituted by senior representatives of the 28 NRAs of the EU Member States (Article 4).</p> <p>A Chair, chosen among the NRA representatives, has tenure for only one year (Article 4)</p>	<p>BEREC disseminates among the NRAs regulatory best practices and, when requested, provides them with assistance on regulatory issues (Article 2).</p> <p>BEREC delivers Opinions on draft Commission documents, issues reports, provides advice and delivers Opinions to the European Parliament and Council, on any matter regarding electronic communications falling within its competence (Article 2).</p> <p>When requested, BEREC assists the European Parliament, the Council, the Commission and the NRAs in exchanges with third parties.</p>	<p>BEREC has no jurisdiction to interfere with the Decisions adopted by NRAs taken under the EU Regulatory Framework. It can, however, issue a recommendation requiring the NRA to amend or withdraw its draft measure (Article 7). Under Article 7 of the Framework Directive, the NRAs shall take the “utmost account” of comments of other NRAs and the Commission.</p>
ERGP (European Regulators' Group for Postal Services)	<p>Under Commission Decision 2010/C-217/07, the ERGP is composed of the postal NRAs of the 28 Member States, represented by the heads of those authorities (Article 3).</p>	<p>The ERGP advises and assists the Commission :</p> <ul style="list-style-type: none"> - in consolidating the internal market for postal services; - on any matter related to postal services within its competence; - on the development of the internal market for postal services and the consistent application in all Member States of the regulatory framework for postal services (Article 2). <p>The ERGP can consult with consumers and end-users, if this is done with the consent of the Commission (Article 2).</p>	<p>The ERGP is a consultative organ which advises and assists the Commission. Although it is designed to facilitate cooperation with the NRAs, it has no power to interfere with their Decisions.</p>

Regulatory Body	Appointment	Scope of action	Remedies
WAREG (European Water Regulators)	WAREG is composed of 25 entities responsible for the regulation of water within European Member States, and 5 observers, all of which apply for membership. It has been established as an informal gathering of regulators based on the fulfilment of the policy goals of the Water Directive, taking inspiration from the regime used in the energy sector.	<p>The role of WAREG is:</p> <ul style="list-style-type: none"> - to exchange and share common practices; - to enhance technical and institutional cooperation among WAREG members; - to promote capacity building, stable regulation and consumer protection; - to conduct an open dialogue with EU institutions. 	This body has no decision-making powers.
ECN (European Competition Network)	The ECN is composed of the Commission and the National Competition Authorities (NCAs) designated by the Member States. Under the Commission Notice on Cooperation within the Network of Competition Authorities, the Advisory Committee of the ECN is composed of experts from the various competition authorities (Article 58).	<p>The Commission and the NCAs cooperate with each other through the ECN when dealing with cases involving Articles 101 or 102 of the Treaty on the Functioning of the European Union.</p> <p>Under some circumstances, the Advisory Committee of the ECN shall be consulted by the Commission prior to adopting Decision (Articles 59 and 60). NCAs are advised to discuss case allocation of important cases with the Advisory Committee (Article 61 and 62).</p> <p>The Advisory Committee can be consulted on draft Commission regulations, notices and guidelines (Article 63 and 64).</p>	The ECN has a consultative function. The discussion and opinion are neither binding upon the Commission nor upon the NCAs. The fundamental role of the ECN is to share best practices in competition law cases and to deal efficiently with jurisdictional overlaps in the context of the decentralized enforcement regime adopted under Regulation 1/2003.

Regulatory Body	Appointment	Scope of action	Remedies
EUAR (European Union Agency for Railways ²³⁶)	<p>Regulation (EU) 2016/796 on the European Union Agency for Railways (EUAR) repeals Regulation (EC) No 881/2004 which established the European Railway Agency (ERA).</p> <p>Regulation (EU) 2016/796 provides that the Management Board of the EUAR is constituted by one (1) representative from each Member State and two (2) representatives of the Commission, all with a right to vote. The Management Board also includes six (6) representatives, without a right to vote, acting in the interests of a number of stakeholders such as: (a) railway undertakings; (b) infrastructure managers; and (c) the railway industry. The term of office of the members is four (4) years and is renewable. (Article 47)</p> <p>The Management Board elects, by a two-thirds majority of its members entitled to vote, a chairperson from among the representatives of the Member States and a Deputy Chairperson from among its members. (Article 48)</p>	<p>EUAR contributes to the development and effective functioning of a single European railway area, by guaranteeing a high level of railway safety and interoperability, while improving the competitive position of the railway sector through the monitoring of rules for national railways. (Article 2)</p> <p>EUAR issues Recommendations and Opinions to the European Commission, and addresses Recommendations to Member States. It issues Opinions and Guidelines to NRAs (and other non-binding documents) facilitating the application of railway safety and interoperability legislation. (Article 4)</p> <p>When required, and without prejudice to Member States' competences, the EU Institutions and the European External Action Service, the EUAR can conclude agreements, develop contacts and enter into administrative arrangements with supervisory authorities, international organisations and the administrations of third countries. (Article 44)</p>	<p>EUAR examines the drafts of proposed national measures submitted to it. In the case of a positive outcome from that examination, the EUAR informs the Commission and the Member State concerned of its positive assessment in order for the Member State to introduce the new rule(s). Conversely, in the event of a negative assessment, the EUAR informs the Commission and the Member State in question of the reasons why the national rule(s) should not enter into force or be applied.</p> <p>(Article 25)</p> <p>When the Member State concerned adopts the national rule(s) in disregard of the EUAR's negative decision without providing convincing arguments for having done so, the Commission can adopt, by way of implementing acts, a Decision addressed to such a Member State, requiring it to modify or repeal that rule. (Article 25)</p> <p>The above procedure does not apply when Member States need to issue an urgent preventive measure, in particular following an accident or an incident.²³⁷ (Article 25)</p>

²³⁶ ERA was established in 2004 and commenced operations in 2006. It underwent a name-change in 2016, becoming the European Union Agency for Railways (EUAR).

²³⁷ Article 8(3) of and point (b) of Article 14(4) of [Directive \(EU\) 2016/797](#).

Regulatory Body	Appointment	Scope of action	Remedies
ENISA (European Union Agency for Network and Information Security)	<p>Regulation (EU) No 526/2013 concerning the European Union Agency for Network and Information Security (ENISA) repeals Regulation (EC) No 460/2004 which established the European Network and Information Security Agency.</p> <p>Regulation (EU) No 526/2013 provides that the Management Board of the ENISA is constituted by one (1) representative from each Member State and two (2) representatives of the Commission, all with a right to vote. The term of office of the members is four (4) years and can be renewed. (Article 6)</p> <p>The Management Board elects a Chairperson and a Deputy Chairperson from among its members. The term of office of the Chairperson and a Deputy Chairperson is three (3) years and can be renewed. (Article 7)</p>	<p>ENISA contributes to a high level of network and information security within the Union. (Article 1)</p> <p>In particular, ENISA assists: (a) the EU Institutions, bodies, offices and agencies in developing and implementing policies in network and information security; and, when requested, (b) Member States in enhancing and strengthening their capability and preparedness to prevent, detect and respond to network and information security problems and incidents. (Articles 2-3)</p> <p>ENISA assists: (a) the Commission by means of advice, opinions and analyses on all the Union matters related to policy development in the area of network and information security, including Critical Information Infrastructure Protection and resilience (Recital 21); and (b) Member States through the facilitation of the cooperation (i) among them and (ii) between the Commission and other EU Institutions, bodies, offices and agencies and Member States. (Recital 23)</p> <p>ENISA assists the European Union in its relationships with third countries and international organisations in order to promote international cooperation on network and information security issues, namely: (i) organizing international exercises, and analysing and reporting on the outcome of such exercises; (ii) facilitating the exchange of best practices of relevant organisations; and (iii) providing the European Union institutions with expertise. (Article 3)</p>	<p>Decisions taken by the ENISA concerning the processing of confirmatory applications with reference to public access to European Parliament, Council and Commission documents ²³⁸ can be the subject of a complaint to the Ombudsman or an action before the Court of Justice of the EU. (Article 18)</p> <p>ENISA's contracts are governed by the law applicable to the contract at issue, and the Court of Justice of the EU has jurisdiction: (i) to issue judgments with reference to any arbitration clause contained in a contract concluded by ENISA; and (ii) in any dispute relating to compensation of damages caused by ENISA's employers in the performance of their duties. (Article 27)</p>

²³⁸ Article 8 of [Regulation \(EC\) No 1049/2001](#).

Regulatory Body	Appointment	Scope of action	Remedies
		ENISA welcomes the participation of third countries to its work when such third countries have concluded agreements with the European Union. (Article 30)	
EASA (European Union Aviation Safety Agency)	<p>Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and amending Regulations ((EC) No 2111/2005, (EC) No 1008/2008, (EU) No 996/2010, (EU) No 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations ((EC) No 552/2004 and (EC) No 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No 3922/91.</p> <p>Regulation (EU) 2018/1139 provides that the Management Board of the EASA is constituted by one (1) representative from each Member State (and two (2) alternates) and two (2) representatives of the Commission (and their alternates), all with a right to vote. The term of office of the members (and their alternates) is four (4) years and can be extended. (Article 99)</p> <p>The Management Board elects a Chairperson and a Deputy Chairperson from among those members which have voting rights. The term of office of the Chairperson and a Deputy Chairperson is four (4)</p>	<p>EASA contributes to ensuring the proper functioning and development of civil aviation in the EU in accordance with a number of objectives laid down by Regulation (EU) 2018/1139 such as: (i) improving the overall performance of the civil aviation sector; and (ii) facilitating the free movement of goods, persons, services and capital in order to provide a level playing field for all actors in the internal aviation market and improving the competitiveness of the EU's aviation industry. (Articles 1 and 75)</p> <p>EASA, <i>inter alia</i>: (i) formulates opinions; (ii) assists the Commission through the preparation of measures (<u>Note</u>: without prior coordination with EASA, the Commission cannot change the content of such measures where they comprise technical rules); (iii) conducts inspections, investigations and other monitoring activities when necessary to fulfil its tasks, or as requested by the Commission; (iv) carries out, on behalf of Member States, functions and tasks ascribed to them by applicable international conventions, in particular the Chicago Convention; and (v) assists NRAs in carrying out their tasks, in particular by providing a forum for the exchange of information and expertise. (Article 75)</p> <p>EASA, upon request, assists the Commission in its management of relations with third countries and</p>	<p>Acts of the EASA intended to produce legal effects <i>vis-à-vis</i> third parties can be brought before the Court of Justice of EU by means of actions for: (i) failure to act; (ii) non-contractual liability; and (iii) contractual liability for damages (pursuant to an arbitration clause). (Article 114)</p> <p>Decisions taken by the EASA (e.g., reallocation of responsibility upon request: (i) of Member States; and (ii) of organisations operating in more than one Member State), can be brought before the Court of Justice of the EU by means of action for annulment only after all appeal procedures²³⁹ within EASA have been exhausted. (Article 114)</p> <p>EU Institutions and Member States can bring actions against decisions of the EASA directly before the Court of Justice of the EU, without being required to exhaust the appeal procedures within the EASA. (Article 114)</p>

²³⁹ Article 105 of [Regulation \(EU\) 2018/1139](#) provides that the Board of Appeal of the EASA is responsible for deciding against a number of EASA's Decisions such as reallocation of responsibility upon request (i) of Member States; and (ii) of organisations operating in more than one Member State

Regulatory Body	Appointment	Scope of action	Remedies
	years and is extendable once for a further four (4) years. (Article 100)	international organizations. In particular, such assistance contributes to: (i) the harmonisation of rules; (ii) the mutual recognition of certificates, in the interest of European industry; and (iii) the promotion of European aviation safety standards. (Article 90)	
EDPB (European Data Protection Board)	<p>Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, established the European Data Protection Board (EDPB). (Article 68)</p> <p>Regulation (EU) 2016/679 repeals Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.</p> <p>Regulation (EU) 2016/679 provides that the EDPB is composed by the head of: (i) each National Data Protection Authorities (DPAs); and (ii) the European Data Protection Supervisor (EDPS) or their respective representatives (<i>i.e.</i>, one (1) person per Member State and one (1) person of the EDPS). The European Commission takes part in the meetings of the EDPB, but without voting rights. (Article 68)</p> <p>The EDPB elects one (1) Chair, and two (2) Deputy Chairs from amongst its members by simple majority. The term of office of the Chair and of the Deputy Chairs is five (5) years and is renewable once. (Article 73)</p>	<p>The EDPB ensures the consistent application of Regulation (EU) 2016/679. (Article 63)</p> <p>To this end, the EDPB performs, on its own initiative or, where relevant, at the request of the Commission, a number of tasks such as:</p> <ul style="list-style-type: none"> a. monitoring and ensuring the correct application of Regulation (EU) 2016/679 through: (i) the issuing of opinions when DPAs intend to adopt certain relevant measures; and (ii) the adoption of binding decisions in specific cases which require dispute resolution; b. advising the Commission on any issue related to the protection of personal data in the EU, including on any proposed amendment of Regulation (EU) 2016/679; c. advising the Commission on the format and procedures for the exchange of information between controllers, processors and DPAs for binding corporate rules; d. issuing guidelines, recommendations, and best practices on procedures for erasing links, copies or replications of personal data from publicly available communications services. (Article 70) 	<p>Regulation (EU) 2016/679 does not provide any appeal procedures as regards the EDPB's binding decisions. However, the EDPB shall respect the rule of good administration and shall ensure that all persons that might be adversely affected by its binding decisions have been heard. (EDPB Rules Of Procedure - Article 11(1))</p>

VII. Conclusions

This paper has addressed the key recent developments and trends that are shaping the architecture of regulatory and competition law governance. Drawing heavily on the European experience, while also being mindful of developments in other parts of the world, the authors have sought to assess some of the key institutional issues of our time: alternative configurations for the institutional relationship in the enforcement of *ex ante* regulation and *ex post* competition rules; the contours of independence of NRAs and NCAs in the quest for impartiality in decision-making; and the centralization and decentralization of regulatory and competition law enforcement.

Lessons learned

As regards the essential competences of sectoral regulators and antitrust authorities, the lessons learned from around the world suggest that the concentration of regulatory and competition law functions in the hands of a smaller number of agencies is something that is increasingly prominent on the political agenda. The concentration of expertise in the hands of a single agency seems to make sense when one considers the budgetary and human resource constraints that small nations need to address. Those pressures are far less pronounced, however, where larger nations in terms of market size, GDP and regulatory sophistication are involved. Nevertheless, there are a number of examples of nations not being able to resist the urge to merge their traditional regulatory functions across diverse utility sectors. Moreover, they are increasingly beginning to graft competition functions onto such agencies and to include a consumer protection remit to the combined agency's competences. The usual rationale for such an accumulation of powers revolves around the creation of economies of scale and scope, the benefits of utilising multi-disciplined teams, the development of coherent policy approaches across sectors and the belief that better working markets may lead to more focused *ex ante* regulation and a broader role for the *ex post* enforcement of competition law.

Growing enforcement impetus

More recently, we have watched a growing interest around a revival of so-called Brandeisian antitrust, reframing the goals of competition law to include a greater emphasis on the competitive structure of markets, the adoption of a broader public interest standard, and a demand for more active intervention from NCAs.²⁴⁰ If successful, this movement could reinforce an approach which encourages the greater accumulation of powers under one agency, especially where that agency is no longer bound to follow narrow consumer welfare standards as its driving goal. At the very least, Brandeisian reformers might ask that broader powers be made available to NCAs, with potentially greater interaction and overlap with NRAs in different sectors. What is less clear is whether this new wave of active competition enforcement would favor more *ex ante* regulation or stronger traditional antitrust remedies like 'old style' break-ups (*e.g.*, *Standard Oil* and *AT&T* cases in the United States).²⁴¹ One way or another, the intense debate about the expansion of antitrust goals tends to add more steam to the ongoing discussions

²⁴⁰ Tim Wu has been one of the most active defenders of the expansion of antitrust goals beyond consumer welfare. See Wu T., '*The Curse of Bigness: Antitrust in the New Gilded Age*', Columbia Global Reports, 2018. Some NCAs are also considering a reversal in the burden of proof so that certain types of abusive practices can be prosecuted more readily: see recommendations of the *Digital Competition Expert Panel* (UK) of 13 March 2019. Refer also to the European Commission's *Digital Expert Report* of 4 April 2019.

²⁴¹ *Ibid.*

about the (re)design of competition and regulatory institutions especially at a time when politicians are renewing traditional ideas about the break-up of vertically integrated entities.²⁴²

While our initial instincts are to presume that narrowly configured sector-specific regulators are more likely to be prone to “capture” by large historical incumbents and more likely to yield to political pressure exercised by government, it is by no means clear that a larger agency with a wide portfolio of powers will be any more successful in warding off these dangers. Moreover, given that a multi-function agency will inevitably need to draw upon resources from central government for its funding, one can foresee that this might generate its own dangers of capture from central government and other forms of concentrated political pressure.

Also, as the Australian Competition Policy Review Panel considered after a detailed assessment of two decades of experience of the ACCC, the synergies between *ex ante* access and pricing regulation, on the one hand, and *ex post* competition policy enforcement on the other, may not be so substantial, at least for larger jurisdictions. In addition, consolidating powers in a single agency and expanding its goals may result in a loss of enforcement focus, possibly leading to less objectivity and transparency in enforcement.²⁴³ Such a concentration of powers might also shift the traditional balance in the management of the risks by agencies making “Type 1” (false positive) and “Type 2” (false negative) errors, given that *ex ante* regulation is usually more intrusive and therefore more prone to incur in Type 1 errors that lead to over enforcement.

Checks and balances

Given these risks, what is clear is that ever greater concentration between regulatory and competition law functions will require a very delicate set of checks and balances to be introduced which is sensitive to the legal and political culture of the particular legal system implementing such a change in institutional architecture. Indeed, because institutions are not created in a void, but are a product of historic socioeconomic and political choices, accumulated experience and the availability of resources, any substantial institutional overhaul of institutional structures must take into account the original regulatory environment where it will be implemented.²⁴⁴ While we may be feeling increasingly comfortable that *ex ante* and *ex post* disciplines in mature liberalized markets bear sufficient similarities to one another to facilitate the sort of cross-pollination that makes for a successful blend of powers, there is still some analytical distance between competition law functions and consumer protection goals, even allowing for the growing role of ‘regulatory antitrust’ measures.

Even allowing for these analytical differences between *ex post* and *ex ante* disciplines, however, it is arguable that much more thought should be given to extending the degree of cooperation between NCAs and NRAs in terms of operational issues. This is especially the case in the formulation and implementation of remedies, which affect the effectiveness of rule-making in regulated network sectors (absent a policy decision not to accumulate such tasks in the hands of one super-regulatory agency). Within the European Union, it has been commonplace for NCA Decisions adopted in merger reviews to rely on the existence of effective regulatory access obligations as the basis upon which potential theories of harm can be addressed, without the need for additional merger-specific remedies being

²⁴² See, for example, New York Times, March 8, 2019; cf Fortune.com, March 8, 2019. See also <https://techcrunch.com/>.

²⁴³ Defending the superiority and predictability of the consumer welfare standard, see Wright J.D. & Ginsburg D.H., ‘The Goals of Antitrust: Welfare Trumps Choice Symposium: The Goals of Antitrust’ (2012), 81 *Fordham Law Review* 2405.

²⁴⁴ The accumulation of those factors inevitably leads in many cases to a form of ‘path dependence’.

imposed.²⁴⁵ By the same token, with the exception of one high profile merger decision in the broadcasting sector,²⁴⁶ there has been no official mechanism by which a behavioural remedy imposed in a merger decision at EU level can be enforced at national level by the relevant NRA. This is despite the fact that the enduring Achilles' heel for those NCAs seeking to impose behavioural (especially access-related) remedies is their effective ongoing implementation.²⁴⁷ The extension of such inter-agency cooperation to expand the NRA remit to enforce NCA-inspired behavioural remedies has sound policy support in the fact that NRAs are best placed to exercise technical expertise in the evaluation of remedies over time and in their effective enforcement under national law and before national courts. A policy choice to increase the scope of NRA powers in this way could also arguably serve as a counterweight to the diminished role of NRAs over time as such agencies are down-sized because the relative importance of sector-specific regulation is weakened in the face of markets operating more competitively and effectively.²⁴⁸ In this way, the balance between NRAs and NCAs could be re-calibrated, with the effectiveness of either set of institutions not being compromised.

A different model?

Seen in this light, perhaps the most recent variant in institutional architecture – the United Kingdom proposal that regulatory agencies be split along the lines of omnibus consumer-oriented retail services, on the one hand, and network access wholesale services, on the other – might have real merit. Such a functional split seems to be sensitive to the twin pressures created by globalisation and digitalisation, which is inspiring a new wave of convergent services, while at the same time allowing competition rules to play their traditional role. Such a division of competences would at least allow for some residual element of “regulatory competition” between agencies while at the same time facilitating a significant degree of concentration of powers where policy goals and outlook are more closely aligned. A split along such lines would arguably also have the benefit of avoiding the possible tendency of having a “super-regulator” orienting its actions to comport with Government economic policy more broadly, rather than exercising its powers of economic regulation in an independent way.

By the same token, the adoption of such an approach is prone to a number of risks, namely: (i) it is arguable that those agencies that focus only on infrastructure access (*e.g.*, BNetZa, ACCC) are more likely to be captured by pro-investor preference;²⁴⁹ (ii) a consumer-centric agency might tend to be in conflict with a rival network access-based agency; (iii) the consumer protection remit will always sit uncomfortably against a competition law assessment, unless a more holistic approach towards consumer welfare is adopted under competition law analysis; and (iv) confirmation biases and the desire to maintain the *status quo* might continue to be driven by an excessive reliance on outputs rather than outcomes.²⁵⁰ How these dangers can be addressed in new institutional designs, whether by embedding

²⁴⁵ Refer to discussion in Alexiadis P., “*Merger control in regulated network sectors: a bridge too far?*”, *op. cit.*

²⁴⁶ Refer to Case No. COMP/M.2876 – *Newscorp/Telepiù*, Commission Decision of 2 April 2003.

²⁴⁷ The inherent limits of the European Commission’s powers in the enforcement of its behavioural remedies imposed under merger control rules are reflected in its recent investigation into Telefónica Deutschland’s alleged breach of its merger clearance commitments when securing clearance of its acquisition of fellow mobile operator E-Plus in Germany. Refer to EC Press Release of 22 February 2019, IP/19/1371.

²⁴⁸ Consistent with the predictions in the *Littlechild Report*, *op. cit.*, regarding the eventual disappearance of *ex ante* regulation in properly functioning markets.

²⁴⁹ In this context, refer to the emphasis in the new *EECC* on the importance of broadband investment ahead of competition between network operators: see Alexiadis & Shortall, *op. cit.*, pp. 111-112.

²⁵⁰ See, for example, Cooper J.C. & Kovacic W.E., “Behavioral Economics: Implications for Regulatory Behavior” (2012), *Journal of Regulatory Economics*, Vol. 41, No. 1. See also Cave, Kings College LLM

effective internal checks-and-balances and/or establishing external mechanisms to dilute the impact of disputes between agencies, is still an open question to be addressed by policymakers.

Ultimately, each jurisdiction around the world would need to find its own blend of checks and balances to ensure that policy goals held in common by all can be fulfilled in different cultural and institutional environments.

Independence

Beyond the debate around the optimal institutional configuration of *ex ante* regulation and *ex post* competition enforcement, this paper has also sought to address another important dimension of regulatory governance: agency independence. Overall, independence has been considered to be a cornerstone of modern regulatory systems, neutralizing potential conflicts of interest and avoiding “capture” by key government and industry stakeholders. As noted by the OECD, “*although legal independence does not automatically bring about de facto independence, it still matters. Aspects of legal independence provide ... those minimum safeguards which may not prevent all political pressures, but nonetheless make it less probable*”.²⁵¹ Institutional guarantees such as transparency in appointments, fixed mandates for senior officials, administrative autonomy and financial stability have been implemented in most jurisdictions.

The European Union has taken the independence debate one step further than other jurisdictions, considering it to be an essential element in the pursuit of market integration, in order to avoid the pursuit of national self-interested policies. As demonstrated above, this has included additional requirements regarding how European NRAs and NCAs must be structured and operated, in a complex system that blends elements of formal guarantees, transparency requirements, openness to stakeholder participation and accountability measured in terms of *inter alia* the availability of judicial review and respect for the rights of the defence). While such a detailed framework for independence is extremely difficult to reproduce in other (non-EU) contexts, it nevertheless presents a broad set of tools that can be implemented in different institutional settings in accordance with their particular national circumstances.

Cross-border enforcement

Finally, this paper has also addressed the issue of centralized and decentralized enforcement of regulation and competition law. Given the quasi-federal nature of the EU, there is a clear necessity to structure a complex system of jurisdictional power-sharing. This institutional framework articulates the relationship between the European Commission and the Member States, as well as the horizontal relationships among NRAs and NCAs (based on broad legal principles (*e.g.*, subsidiarity), formal regulations and ‘soft law’ instruments, subject to some degree of judicial review, although we have questioned whether the rise of so many multi-party agencies at EU level turns the risk of undermining the value of full legal scrutiny by the courts over agency decision-making).

In recent years, the emergence and consolidation of pan-European regulatory agencies such as ENISA), regulators (*e.g.* BEREC and ACER) and competition agency networks (*e.g.*, the ECN) has added important new actors to this institutional space. Here again, the European experience seems to be relatively unique, with an institutional apparatus that is unlikely to be reproduced *in totum* in other contexts. Nevertheless, looser forms of cooperation and truly international networks of cooperation (*e.g.*, ITU, ICN, OECD) have emerged and are growing in importance worldwide. These developments

Lecture, *op. cit.*, who emphasizes the continued potential impact of the “three C’s” – capture, culture and cognition.

²⁵¹ Refer to OECD Background Paper, *op. cit.*, at p. 18.

are helping to change the institutional landscape and creating momentum towards a ‘soft’ institutional framework for power-sharing at a global level.

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31 May 2019

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