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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Global Forum on Competition

INTERACTIONS BETWEEN COMPETITION AUTHORITIES AND SECTOR REGULATORS

Summary of Discussion

2 December 2022

This document is a summary of the discussion held during Session III of the 21st meeting of the Global Forum on Competition on 1 – 2 December 2022.

More documents related to this discussion can be found at oe.cd/icar.

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Summary of Discussion

By the Secretariat

1. Introduction by the Chair and the Secretariat

1. On 2 December 2022, the Global Forum on Competition held a discussion on the Interactions between competition authorities and sector regulators chaired by the President of Brazil's Administrative Council of Economic Defence (CADE), Alexandre Cordeiro Macedo.
2. The **Chair** introduced the topic. He pointed out that the activities of competition authorities in regulated sectors tend to overlap with the activities of the sector's regulators, which creates a risk that both agencies take inconsistent decisions or otherwise create uncertainty for market participants. Hence, co-operation between competition authorities and sector regulators is paramount to minimise these risks. This co-operation varies according to institutional designs, but in the most common setup, the competition agency is a stand-alone body in charge of competition enforcement in all sectors. Alternative models seek to facilitate co-operation through institutional solutions such as multifunction bodies, combining competition and regulatory authorities or concurrency arrangement.
3. The Chair noted that the objective of the session was to identify available tools and practical experience with co-operation in enforcement cases. The focus would be on the most frequent situation when the competition authority is a stand-alone body that enforces competition law in all sectors, but insights from different institutional setups would also be considered. He also indicated that the session would focus on enforcement cases, mergers and antitrust cases, and not only advocacy initiatives, which are perhaps the most frequent form of interaction between competition authorities and sector regulators and has been explored in past roundtables. In addition, he highlighted that the session would refer primarily to independent authorities with sector specific responsibilities, such as regulators for the telecommunications, transport, energy, water or financial service sectors.
4. The Chair introduced the three expert panellists:
 - **Martin Cave**, Chair of the United Kingdom (UK) Gas & Electricity Markets Authority (GEMA). He previously worked in the government and academia as an economist, specialising in competition issues and the regulation of network industries.
 - **Dr. Pablo Márquez**, Partner at ECIJA Colombia, Former Chairman of the Colombian Commission for Communication Regulation (CRC), and Former Superintendent for Antitrust at the Colombia Competition Authority (SIC).
 - **Nomfundo Maseti**, Regulator Member of the South Africa National Energy Regulator (NERSA), and Former Senior Economist at the South Africa Competition Commission and the Communication Authority of South Africa.
5. At this point, the Chair explained that the discussion would be divided in three main parts:
 - What are the main tools for co-operation, that is, the legal framework underpinning the co-operation? Legislation or other instruments, such as a memorandum of understanding (MoU)?

- Is there co-operation in enforcement cases, and what are the experiences in actual cases, including merger and antitrust?
- How co-operation may vary according to different institution setups for competition enforcement and what insights from alternative institutional framework could be useful to the most common setup, the standalone competition authorities?

6. The Chair gave the floor to the Secretariat for a brief overview of the Background Paper. The Secretariat indicated its goal was to have a practical focus in the discussion and raised some questions: What should MoUs look like? Which tools are the most useful for this type of co-operation? If a competition authority already has such tools, is there anything else it can do and how can it do better? If there is something to change, can one identify the main obstacles to co-operation? And, finally, what are the factors that affect the quality of co-operation? The Secretariat mentioned that there have been many sessions held by the Competition Committee and the Global Forum on Competition on this topic, but mostly focusing on the advocacy.

7. After analysing laws and MoUs of various jurisdictions, the Secretariat had a few observations. First, most of the legal frameworks cover consultation, requests for opinions, and the exchange of information. Second, while there is some variety on whether the working groups are set up, are they ad hoc, regular, bilateral, and/or multilateral? Third, the Secretariat observed that there is some variety in informing the other(s) authority(ies) of relevant cases and matters, and in terms of opinion requests: some frameworks provide that it is an option and others that is a requirement. The Secretariat indicated that it seems logical that both the competition authority and the sector regulator should be required to notify each other when they become aware of conduct that possibly could fall under the other authority's responsibility. Fourth, regarding the exchange of information, the legal provisions reviewed often include rules to preserve confidentiality. If the information is confidential, the party who transmits it can share a non-confidential version to preserve confidentiality. Fifth, informal co-operation is prevalent and considered very useful, but it is not something that one can find in press releases or other public sources.

2. The main tools for co-operation

8. The Chair turned to **Professor Martin Cave** and asked him to share his thoughts on the main issues of cooperation between competition authorities and sector regulators. Professor Cave started by noting the differences between a competition authority and a sectoral regulator. First, these agencies understand may understand differently the role of competition in the activity of sectoral regulators. While in some countries, such as the UK, there is a big emphasis on the role in promoting competition since after the privatisation of network industries in the 1980s, in other countries the focus on sectoral regulation upon the merits of competition is reduced. This is an important background factor in deciding how the interaction between the two bodies should occur. Second, these two agencies have different goals and duties; competition authorities are generally interested in promoting competition in all markets, and regulatory agencies are often interested expressly in consumer welfare. Moreover, sectoral regulators often have specific duties relating to vulnerable and disadvantaged customers, which influence their approach, for example, to the scope of competition. Third, the nature of individual contacts with the firms diverges. In most situations, competition authorities will only have episodic contact with individual firms (they might meet the firms once every ten years); on the other side, in the network industries and in industries which are not competitive, the regulator is in continuous contact

with the companies which it regulates. Fourth, the staff is also different. In competition authorities, personnel is more likely to be generalists, whereas, in a regulatory agency, it is likely to be technical and specialist.

9. Professor Cave indicated that there are three main institutional arrangements: a general competition authority and a separate sectoral regulator; some of the competition authority's powers are vested in the sectoral regulator and removed from the competition agency's competence; and a form of power-sharing where both the separate agencies work with one another (concurrency). Concurrency means that when a potential competition infringement comes to light in the minds of either agency, they have a huddle and decide what they're going to do about it. In the UK, it means that an agreement is reached between the two agencies as to which one is best placed to do it. In Professor Cave's opinion, if it is fundamentally a competition question, where the general application of competition law has a very strong focus and bears a very strong weight in determining it, then the competition authority is probably best placed. If it is a very technical question, then the opposite is the case and the regulatory authority is in that position. He observed that, in his interactions as a sectoral regulator, that matter can be resolved quite amicably and rationally between the two sides. However, it is important to have clear rules, because a stand-off is not ideal; in the UK, if no agreement is reached, the competition authority decides. Professor Cave also added that competition authorities have an institutional memory about past cases and their consequences. In conclusion, what he suggested is that cooperative working by regulators and forms of concurrency are capable of supporting comparative advantage and appear to offer significant benefits to consumers, but he is reluctant to suggest any particular allocation of powers provided that cooperation is taking place.

10. After the introduction presentation by Professor Cave, the Chair invited **Nomfundo Maseti** to share her experience with the tools used for co-operation and the challenges authorities face dealing with them.

3. Co-operation tools used by the competition authorities and regulator sectors

11. Nomfundo Maseti started by explaining that, in South Africa, there are many industries characterised by high levels of concentration. Thus, the country needs to have a co-operative approach in addressing such challenges and the resulting negative effects, requiring co-operation between the competition authority and the sector-specific regulators. When South Africa deals with competition issues, the country's approach is harmonised between the sector regulator and the competition authority, to make sure that the same issues are addressed following the same approach, avoiding inconsistency. She added that when dealing with abuse of dominance cases on excessive pricing, there is a debate about which authority is the best placed to intervene: the competition authority or the economic regulator to regulate prices. In South Africa, they believe that co-operation is important in those cases to make sure to avoid ham but to constrain market power in those sectors. She indicated that in South Africa there is a memorandum of agreement containing a harmonised approach between the two authorities with concurrent powers to promote competition in the regulated sector. The competition authorities have no limitations in terms of intervening in competition matters, however, when it comes to the sector or the regulated industry, it is important that they cooperate with the sector-specific regulator. Nonetheless, the speaker added that the sector regulator and the competition authority try to not be limited by the content of the memorandum because some of its clauses can be quite limited. They try to be more informal, based on the fact that the staff of both agencies know each other, to make sure that they do not become too formalistic in the way they interact.

12. The Chair thanked Nomundo Maseti for her presentation. Next, the Chair introduced **Kenya** and asked the delegation to describe its framework, which requires co-operation between the authorities only in some sectors, and explain the rationale for different approaches in different sectors.

13. **Kenya** explained that co-operation between the competition authority and sectoral regulators is largely voluntary, in the sense that the relevant statutes of the regulators typically do not oblige them to co-operate with the competition agency. However, the Competition Act establishes that in cases of concurrent jurisdiction, the agency and the regulator shall establish procedures for managing the areas of concurrency. The co-operation between the competition authority and the sector regulators is voluntary, based on the agencies' efforts to achieve their mandates. However, in some instances, the primary statutes and sectoral regulations require the sector regulator to co-operate or establish a co-operation mechanism with the competition authority on competition matters. For instance, the telecommunications sector regulator is required to co-operate with the competition authority of Kenya in its enforcement. The reason is that the telecommunications regulator has powers to enforce compliance of its licensees with standards of fair competition. In fact, this regulator may apply sanctions for breach of fair competition, and so in this instance, co-operation can be seen as mandatory. Kenya indicated that the preferred tool of engagement for the competition authority has been MoUs. They have mostly worked well and examples include mergers in the banking sector, closely working with the Central Bank, and a case of abuse of buyer power in the insurance sector, where co-operation with the Insurance Regulatory Authority provided the authority with important market intelligence. Kenya indicated that the only disagreement with a sector regulator had occurred with the telecommunications regulator, when the two agencies had different views on the assessment of dominance of a market player. They eventually found common ground. However, had there been a formal disagreement, the opinion of the competition authority would have prevailed in this specific case.

14. The **Chair** turned to Chinese Taipei to ask about their MoU to clarify the responsibilities of the competition authority and the National Communication Commission.

15. **Chinese Taipei** explained that, after an amendment in the sectoral legislation, there was an overlap between the competencies of the authorities, which led to a negotiation between the two agencies. The competition authority transferred to the National Communication Commission part of its jurisdiction related to exclusive dealing and discriminatory treatment by programme providers. But kept jurisdiction on cartels, merger review or unfair practices. The post-agreement development seems to be quite positive, since both agencies now have a clear road map for exercising their jurisdiction, and both agencies could take swifter actions in conducting case reviews, and based on the agreement, they also engage in quite frequent and regular interactions regarding specific cases. Chinese Taipei answered that an MoU is better for solving the jurisdictional conflict and is the most complete and comprehensive agreement because the issue covered could be more thoroughly debated during the negotiation of the agreement. However, it took the authorities almost three years to complete its negotiation, so if one needs to address a pressing issue to be solved quickly, the delegation suggests that an ad hoc negotiation could be a more effective method.

16. The Chair thanked the Chinese Taipei delegation for its contribution. He indicated that some contributions mentioned recent changes in their legal provisions or MoUs that increased co-operation between competition authorities and sector regulators, such as Armenia, Egypt, Greece and the United States. The Chair asked **Greece** to clarify if the country has different co-operation tools applied to different sectors.

17. **Greece** indicated that co-operation takes place mainly in the form of exchange of information on pending cases and that it is generally, but not always, on a voluntary basis and not an obligation of the authorities involved. In most other respects, the legal framework regulating co-operation is fragmented with various provisions in place, usually included in the laws establishing authorities, which were put into effect at different points in time, thus resulting in a set of inconsistent rules. Despite the lack of an umbrella legal framework and the resulting inconsistency between rules in different sectors, the Greek competition authority and several sector regulators do in practice co-operate rather successfully.

18. Turning to the contribution of the United States, the Chair asked about the recent framework for co-operation between the Department of Justice (DOJ) and the US Department of Agriculture, established in 2022, and how this framework changed the interaction between the antitrust agency and the USDA. He also inquired about the co-operation in the inquiry into the infant formula crisis and the DOJ lawsuit against poultry processors.

19. The **United States** explained that President Biden's July 2021 executive order called for a whole of government approach to promoting competition. It also asked the competition agencies to work together with agencies that regulate specific industries to promote and maintain competitive markets. In February 2022, DOJ and the Department of Agriculture signed an MoU to enhance their co-operation, including information sharing and a system for referring cases. One of their joint initiatives was the “Farmer Fairness” online portal, allowing farmers and ranchers anonymously to report anticompetitive abuses, and the organisation of a competition training for Department of Agriculture staff. This partnership also led to a DOJ lawsuit alleging that two poultry processors engaged in deceptive practices.

20. The **United States** added that the Biden administration's executive order has renewed an emphasis on cross-government engagement. The FTC initiated an inquiry to assess the long-term causes of the infant formula supply crisis. The inquiry includes areas within the FTC's core mission, such as deceptive and fraudulent or otherwise unfair business practices and factors that led to concentration. But importantly, it also assessed whether the FTC or other state or federal agencies may have inadvertently contributed to fragile supply chains. And this is where the interaction with other regulators, particularly the US Department of Agriculture comes into play. The USDA is an important partner given that it administers a special nutrition programme for women, infants and children, that accounts for the purchase of about half of the baby formula in the United States. So, in partnership with the USDA, the FTC is assessing whether certain features of the programme may impede the programme's ability to effectively respond to market distortions as we saw earlier this year. This case is a nice example of a whole of government approach and of the USDA partnering with the competition agencies to bring the combined expertise to address this issue.

21. Regarding bilateral agreements, the Chair asked the Serbia delegation about its agreements with some sector regulators for joint investigations. **Serbia** explained that the laws governing both the competition authority and sectoral regulators provide the ability to co-operate with other public bodies. The Serbian Competition Authority has also entered into protocols of co-operation with other public bodies, including sectoral regulators. Usually, these protocols provide for the possibility of meetings and exchange of information, for example. But they also provide for the possibility in some cases to co-operate in their investigation proceedings. If the alleged competition infringement is related to a certain regulated market, the sectoral regulator and the competition authority may appoint designated staff to co-operate on these matters and to exchange information. This

option has been used frequently, most recently in the energy sector. Requests for information are also an important instrument of co-operation for sector inquiries.

22. In relation to working groups, the Chair questioned Malaysia about its special committee on competition, which is a platform that includes all sector regulators and is chaired by the Malaysian competition authority. **Malaysia** explained that the special committee on competition was set up to gather sectoral regulators to interact on matters related to competition law and policy. Since its formation in 2014, the special committee, consisting of nine members, among others representing telecommunications, energy, water, financial, intellectual property and the aviation sector, met eleven times. The meetings have served as a platform to discuss recent developments in competition law and policy across key sectors, and to exchange input and gain support from other sectoral regulators. The competition authority also signed an MoU with the Central Bank of Malaysia in 2014 to promote and protect competition in the Malaysian financial sector. In the latest special committee meeting, the Malaysian Communications and Multimedia Commission (the telecommunication regulator) highlighted the positive outcomes arising from the joint effort with the competition commission since 2020.

23. The Chair noted that one of the most relevant co-operation tools is information sharing, which can facilitate and speed up competition enforcement. While MoUs can establish the procedures for the exchange of information, in some cases, this does not mean that co-operation will occur in practice. The Chair asked the Paraguay delegation about the challenges it faced even with an MoU in place.

24. **Paraguay** indicated that it has been facing challenges due to the lack of awareness or knowledge of competition law. This is why the competition authority has been organising training events for regulators and other public entities that cover the basics of competition law and to find opportunities for collaboration between the regulator and the competition authority. Paraguay also identified some areas for exchange of information and shared two examples. The first relates to its co-operation with the telecommunications regulator which entails some working sessions to enable the exchange of information and, with time, ensure that it can take place smoothly and quickly. The second case refers to a sanction set against the tax agency due to its lack of co-operation in relation to a merger case assessed by the competition authority. This was the first fine issued by the competition authority to public body.

4. Experiences on co-operation in enforcement cases

25. **Pablo Márquez** began his presentation on the main lessons learnt about co-operation and the challenges ahead. He stated that collaboration is difficult and it depends on the framework; Referring back to Professor Cave's intervention, he acknowledged that when regulators and competition authorities have concurrent functions, co-operation tends to be easier. The speaker noted that although MoUs are useful for planning and introducing an operational framework, they cannot cover what the law does not cover. He emphasised that an MoU is an essential tool and it is important that it is published so that third parties are aware that authorities collaborate and can observe the protocols for this collaboration. The speaker also added that the process for effective collaboration is very important and the authorities should determine through the MoU details such as when one authority contacts the other, when collaboration is triggered, and about the limitations regarding information exchange.

26. He noted that MoUs are easy to sign, but sometimes not easy to execute because authorities may not have resources to co-operate. He also believes the co-operation should be transparent to third parties and stakeholders. Mr. Márquez added that it is essential to have formal collaboration, instead of informal collaboration because it is the way that the competition authorities and regulators create legitimacy, credibility and confidence in the regulatory process in general. The speaker noted that third parties may be able to trigger co-operation at certain stages of a case, sharing information and encouraging authorities to work together to ensure consistency. Informal collaboration is easy and it helps, but it does not create trust in third parties.

27. The speaker added that there are several very good practices that can help regulators provide assistance to competition authorities, and those include not only MoUs, but also exchange of experiences through, for example, secondments. Secondments are a really good way to bring talent and knowledge from the competition authority, and for the regulators to promote further knowledge of their sectors within the competition authority. He concluded that these could help with more consistency in the approaches followed by regulators and competition authorities. In this respect, he flagged inconsistencies in market definition between the competition authority and the sector regulator in some cases in Latin America.

28. The **Chair** thanked Pablo Márquez and highlighted that a number of country contributions, such as Turkey, Colombia and Ecuador, mentioned the possibility of using the outcome reached in advocacy initiatives to increase co-operation in enforcement cases. He then asked Ecuador to share its experience on how competition advocacy can improve co-operation with sector regulators.

29. **Ecuador** mentioned that it had recently issued a methodology for the identification and review of legal barriers. Ecuador also shared that it used the methodology to analyse a draft regulation from the Ministry of Tourism dealing with accommodation services, such as Airbnb. The competition authority found that the draft regulation could negatively impact market efficiency and innovation and could limit the free participation of new competitors, harming the development of the country's potential.

30. The Chair thanked Ecuador for sharing its experience. He also added that most of the contributions mentioned the possibility that the competition authority consults the relevant regulator when it is dealing with cases in regulated sectors. However, in a number of jurisdictions, these consultations are not mandatory or regulators' opinions are not binding. The Chair invited Argentina, where the competition authority is required to request the regulators' opinion when assessing a merger, to share its experience.

31. **Argentina** indicated that its competition law establishes that when a merger takes place in a regulated sector, the competition authority (CNDC) shall require their respective regulatory agency to provide a reasoned opinion on the proposed economic concentration. The regulator must issue its decision within fifteen days, after which it is presumed not to object to the transaction. Argentina mentioned that, usually, the regulators' opinions are not divergent from the conclusions reached by CNDC on how transactions affect the markets involved.

32. The **Chair** thanked Argentina and turned to Hungary, to ask why the GVH (competition authority) is required to obtain the opinion from the sector regulator in mergers in the electronic communications network or the printed press markets but not in other sectors.

33. **Hungary** clarified that when there is a merger of parties bearing editorial responsibility and their primary objective is to distribute media content, the Hungarian competition authority (GVH) is obliged to obtain the opinion of the Media Council. While the competition authority assesses competition, the Media Council examines media pluralism. In

this sense, the market definition by both authorities can be different, as they examine the transaction from different perspectives. In case the Media Council establishes conditions for the merger or decides to block it, then GVH is obliged to refuse approval of the merger. However, other types of decisions issued by the Media Council, for instance authorising the merger, do not prevent GVH from blocking it or imposing remedies on the transaction.

34. The **Chair** then invited Brazil, where there is a provision allowing sector regulators to appeal against merger decisions issued by the General Superintendence of CADE, how this framework works in practice.

35. **Brazil** explained that a provision in its Competition Act that allows regulators to appeal against merger decisions issued by the General Superintendence of the Brazilian competition authority (CADE). However, Brazil indicates that such an appeal is extremely rare and it is more common for the sector regulators to co-ordinate with CADE. The only two cases that were challenged occurred this year and involved the National Gas and Oil Agency. One was a case involving the gas distribution sector, and the other involved the sale of an oil refinery from Petrobras, a state-owned energy company in Brazil, to a private group. Despite these challenges, Brazil stressed that co-operation agreements between the authority and other sectoral agencies are a primary mechanism for co-operation and align expectations in providing legal certainty. They also foster collaboration to fight against anticompetitive conduct more effectively and promote free competition in regulated sectors.

36. The **Chair** thanked the Brazilian delegation and moved to experiences related to antitrust cases. He mentioned that although there is usually no specific legal framework for co-operation in such cases, the general provisions on tools can be used in this context. He asked Georgia to share its experience about cases in which formal and informal co-operation was essential for the final decisions.

37. **Georgia** clarified that sector regulators have exclusive jurisdiction over competition enforcement in their sectors, but there is the possibility of formal and informal co-operation, and both the competition authority (GNCA) and regulators are very actively using this mechanism. GNCA is involved in two joint investigations with sector regulators. The first is in the communication sector and is related to possible anti-competitive agreements by TV broadcasters. The second is an alleged abuse of dominance practice in the energy sector. Both cases included formal co-operation, which encompasses the right to access case materials, to take part in explanatory and summary hearings, and to express positions and commitments, final draft decisions and impose fines. In addition, several informal meetings were held between GNCA and sector regulators, which confirms that not only formal mechanisms for co-operation are important, but informal meetings and conclusions are also very useful for both.

38. The **Chair** then turned to Albania, where sector regulators are often requested to contribute to antitrust investigations carried out by the competition authority, and asked what kind of support they receive and whether this includes access to confidential data.

39. **Albania** replied that the competition authority regularly requests sector regulators to contribute to antitrust investigations, in particular, the competition agency receives data regarding the know-how on the relevant market analysis that this regulatory sector has compiled, and also statistical data on market operators. However, the authority mentioned that it does not receive confidential data.

40. The **Chair** then asked Bulgaria about the importance of data provided by sector regulators to the competition assessment.

41. **Bulgaria** illustrated the importance of the data provided by sector regulators to the competition assessment by illustrating its Toplofikacia Sofia case. This case involved an integrated company with a dominant position in three markets: production, transport and supply of heating in Sofia. It used abusive commercial clauses in its contracts. The delegation explained that this was a good example of co-operation between the Bulgarian Competition Authority and the Commission for Energy and Water Regulation in Bulgaria. The interactions between the two commissions encompassed consultations, exchange of information, provision of advice, and joint working groups. In addition, the Bulgarian authority obligatorily asks for the opinion of the sectoral regulators in the sector where such authority is present. The co-operation between the competition authority and the sector regulator had a good result, as the energy regulator gave an important opinion on the proposed commitments, ensuring they were sufficient and effective.

42. The **Chair** turned to Mexico to ask whether they request opinions from sector regulators and what happens if they disagree.

43. **Mexico** noted that Mexican law provides for two instances in which an opinion of a sector regulator is required. One is related to the preliminary opinion issued by the investigative authority in a market investigation. Specifically, when this opinion includes corrective measures, for example, to eliminate possible barriers to competition or to regulate access to an essential facility. In this case, COFECE must request a non-binding technical opinion from the sectoral regulator for such corrective measures. If COFECE receives such an opinion, it will be included in the case file to be reviewed and decided by the Board of Commissioners. The other instance is foreseen in the procedure for the development of directives, guidelines, and guides for technical criteria, specifically in the stage of the procedure where draft documents are submitted for public consultation, interested parties including sector regulators may present their opinion on the draft, and at the end of this public consultation, COFECE will issue a report explaining how the comments and opinions received were considered. In these two situations, the opinions of sectoral regulators are non-binding, so the Commission is not obliged to agree with them.

44. The **Chair** turned to Latvia to share the successful experience of co-operation between the Competition Council (CC) and the Public Utilities Commission (PUC), in particular as regards the Latvia Gas case.

45. **Latvia** described the co-operation between the Competition Council and the Public Utilities Commission on the Latvia Gas case. In 2013, the Competition Council found that Latvia Gas was dominant and abused its market power. In this case, the practice that the Competition Council found abusive was previously accepted by the Public Utilities Commission, the sector regulator. Latvia Gas also argued that the Competition Council could not intervene since it was regulated by the Public Utilities Commission. The Competition Council co-operated with the regulator throughout the investigation by organising meetings and discussing the issue. At first, the opinion on the legality of Latvia Gas' practice differed between the competition authority and the regulator, but the two bodies later agreed that the practice was abusive. The court upheld the decision of the competition authority, showing that the decisions of the Public Utilities Commission are not binding on the competition authority.

46. The **Chair** asked the European Union to comment on the recent decision by the European Court of Justice on the Bpost case and its reference co-operation between competition authorities and sector regulators. He also asked the delegation to draw the judgement's implication for the DMA.

47. The **European Union (EU)** commented on a recent decision by the European Court of Justice (ECJ) ruling (Bpost case) that co-operation between competition authorities and sector regulators is required by the law when the same facts are assessed by different authorities to prevent double jeopardy. In Belgium, the same pricing model applied by the Belgian post company (Bpost) was subject to investigation by the sector regulator and by the competition authority. A Belgian court posed a question to the European Court whether the *ne bis in idem* principle was applicable in this case, i.e. the principle that prevents the application of double sanctions for the same conduct. The European Court of Justice clarified that co-operation between a competition authority and sector regulators is not only welcome but also required, in cases where the same facts are under scrutiny by different authorities, to avoid issues of double jeopardy. The delegation also explained that the Digital Markets Act (DMA) was adopted after the Bpost judgement, so the EU was able to take into account the ruling by the ECJ. The regulation establishes a system of fines and periodic penalty payments (including for violation of its obligations), which could lead to potential situations of double jeopardy with competition enforcement cases. Whenever there is the possibility of double intervention by the Commission and national authorities, the DMA is the obligation to cooperate between the Commission and other authorities who want to apply their legislation on competition law.

48. The **Chair** thanked the EU and asked Ukraine about the MoU signed between the Ukrainian Competition Authority (AMCU) and the Ukrainian energy regulator (NERC) and its outcomes. **Ukraine** mentioned that the MoU increased legal certainty for market players. Before the MoU, both agencies would have to intervene simultaneously, spending resources of both authorities inefficiently. Ukraine mentioned that after the MoU, the clear separation of powers between the competition authority and the regulator contributed to the further effective resolution of issues that arose in energy markets and it made it easier for undertakings to understand in which cases and to which authority to turn to. The signature of the memorandum also contributed to the exchange of information between the authorities. Between 2021 and 2022, AMCU received more than 10 submissions from NERC regarding possible violations of competition rules.

49. After thanking Ukraine, the **Chair** moved to the challenges faced by competition authorities when co-operating with sector regulators in antitrust cases. He asked India to comment on the conflict between the Indian Competition Authority (CCI) and sector regulators, and how the Supreme Court decided on this matter.

50. **India** explained that this case arose when one of the parties in a cartel case challenged the competition authority's jurisdiction over that matter before a federal court, arguing that the telecommunications regulator had jurisdiction over a cartel case and not the Indian competition authority (CCI). The federal court concluded that since the case concerned technical issues, the sector regulator was more competent to handle the issue, finding that the Competition Act could not be applicable in this case. The competition authority appealed to the Supreme Court, which held that the functions of a telecom regulator and the competition authority are distinct from each other. The Supreme Court found that the telecom regulator is a specialised sectoral regulator, armed with sufficient power to ensure a fair, non-discriminatory and competitive market in the telecom sector. It also considered that firstly, the telecom regulator looks into the issue and if the competition authority observes violations of the Competition Act, then it can start an investigation too. The court also underscored the requirement of consultation between regulators that the Competition Act actually provides for. The Supreme Court stressed the importance of opinions, even if non-binding, rather than litigating before courts. After this case, the competition authority embarked upon an investigation where they held discussions with the Central Bank, the telecom regulator, and the insurance regulator. The competition

authority found that thanks to co-operation and the findings provided by the regulators, it was able to close certain cases rather than going for a full investigation.

51. Following a question by the Chair, the **Consumer Unit Trust Society (CUTS)** intervened to suggest one approach that could reduce legal uncertainty in India. First, CUTS outlined some problems. First, there are ambiguities in the regulatory laws, because all sector regulatory laws in the preamble are required to promote competition and consumer interest. Second, government works in silos, leading to a lack of coherence between different bodies. Third, the competition authority was established after the sector regulators, which can view the competition authority as an “intruder” in their work. Fourth, considering that sector regulators in India are independent and are subject to various ministries, it is difficult to decide administratively about conflicts. CUTS believes that consultations should be mandatory and not optional because as optional, the result is not effective. CUTS believes that a second solution is to look at the laws, rules and regulatory tools and verify if they create incoherence. Third, they could do something similar to the UK experience, which is a convergence among the sectoral regulators and the competition authority in terms of the appellate body, i.e. the Competition Appeals Tribunal that decides on appeals against decisions by both the competition authority and the sector regulators.

52. The **Chair** gave the floor to **BIAC** to comment on the risk that competition authorities and sector regulators achieve inconsistent or conflicting outcomes and what could be done to reduce these risks. **BIAC** shared its concerns about situations when competition authorities and sector regulators have parallel jurisdictions to apply different legislation. When there is a lack of clarity over respective objectives, this can lead to the risk of conflicting outcomes, a lack of legal certainty and increased cost through duplication. One example from the US concerns mergers in the electricity sphere, which are often subject to non-exclusive review by the Federal Energy Regulatory Commission, the antitrust agencies and the states, and **BIAC** sees differences in competitive effects analysis by the regulator and the antitrust agencies which have led to both reaching different conclusions on whether an electricity merger harms competition, the potential remedies, and creating a lack of legal certainty which may unnecessarily increase the costs for merging parties that face conflicting or inconsistent outcomes at both agencies. **BIAC** also added that the UK has reviewed its legislation to further clarify roles and responsibilities between the competition authority and the sectoral regulators, providing a way that these agencies should work together. As a result, the UK's lead competition authority, the CMA, has enhanced leadership. They can decide which regulator will act in a concurrent sector following consultation, they can also take over a case that they wish, and there are also protocols for information sharing, for the avoidance of double jeopardy and the sector regulator is actually prohibited from exercising concurrent competition powers in a case if it has already been agreed that the CMA will lead on this. In conclusion, **BIAC** strongly encourages the adoption of all these different mechanisms to continue ensuring efficient outcomes in the marketplace.

53. The **Chair** asked **Kazakhstan** to share the challenges faced in the interaction of the competition authority and the Ministry of Health.

54. **Kazakhstan** recalled that, during the pandemic, the authorities co-operated well and managed to achieve concrete results together to curb price hikes and enhance market mechanisms. When the competition authority started to dig deeper into the root causes of those price hikes and how the system worked within the Ministry of Health, however, it faced certain difficulties in terms of getting information from the ministry. The delegation concluded that when authorities are facing common short-run goals, such as price spikes, they are able to achieve concrete results, but when talking about long-term solutions, it is more difficult.

5. Institutional framework for competition enforcement and co-operation

55. The **Chair** thanked Kazakhstan and proceeded to the third part of the discussion, which was related to institutional frameworks for competition enforcement and co-operation. There are different institutional models relating to the roles of competition authorities and sector regulators. In most cases, the competition authorities are stand-alone agencies with responsibilities for competition enforcement in all sectors. Alternative setups, among other objectives, aim to improve consistency between competition and regulatory approaches by combining the competition authority with one or more regulators, or through concurrency. The Chair asked Consumers International to provide an overview of how competition authorities and sectoral regulators co-operate under different institutional designs.

56. **Consumers International** explored some of the principles of the allocation of work between the two functions: competition policy and regulatory policy. The delegation mentioned that, in Australia, the competition regulator is fully in charge of telecommunication regulation. The key argument that led to the integration of the functions was the view that the competition culture should dominate all regulatory decisions. But where the agencies are separated, it is quite important also to focus on the relationship between the two bodies, such as rules about who does what, but nevertheless, there are often tensions between the two entities. Those tensions can be reflected also in the ministries to which they are attached. The regulator of energy or telco might be an independent agency, but linked to the energy or the telecommunications ministries, and the economic regulator might be attached to the Treasury or the Attorney General or other body. So, it is important to focus on the oversight of the relationship, which oversees how they work together, and is an important part of that relationship and can help to resolve tensions and difficulty.

57. Following this intervention, the **Chair** gave the floor to the United Kingdom (UK) to describe the main mechanisms in place in the UK to ensure that the competition authority and the sector regulators work well together and to illustrate how these mechanisms can work in a concrete case.

58. The **United Kingdom (UK)** explained the unique concurrency regime where both the competition authority and certain sector regulators share some competition law powers. These include antitrust enforcement and the ability to do market studies. These arrangements have been in place since 2000, but changes were made in 2013 to enhance the regime. There is co-operation right at the start of the enforcement process, at the pipeline stage, there are requirements for the CMA and the regulators to share information with each other about suspected infringements of competition law in the regulated sectors, whether or not they intend to pursue enforcement themselves. There are rules for case allocation, and for instance, a case may be allocated to a regulator because the investigation would particularly benefit from sector-specific expertise. Alternatively, it might be allocated to the CMA because it has experience in dealing with a similar type of suspected infringements across other sectors. Regardless of which authority is chosen to investigate a case, an authority with shared jurisdiction will continue to be involved throughout the life of the case in a supporting role.

59. A key feature of the regime is that the investigating authority must share with the supporting authority drafts of certain key documents in advance, such as the statement of objections and infringement decision, or a proposed decision to accept commitments, and this allows the supporting authority the opportunity to provide comments on the proposed approach, drawing on their expertise. In practice, the CMA and the sector regulators engage in more frequent dialogue about casework than what is simply required under the framework, and this includes a lot of sharing of know-how and best practices. There is also co-operation on specific cases, underpinned by strong institutional mechanisms. The CMA

and the sectoral regulators have staff with specific responsibility to manage these concurrency arrangements and it has frequent secondments of staff between both agencies.

60. The **Chair** noted that in some jurisdictions competition law is enforced by more than one authority. For instance, this is the case of Costa Rica, where COPROCOM is in charge of competition enforcement on all sectors, except telecommunications, where SUTEL has the exclusive power to enforce competition law. This institutional set-up may raise more challenges to ensure coherence. He therefore turned to Costa Rica to ask to what extent COPROCOM co-operates on competition enforcement in the telecommunications sector.

61. **Costa Rica** clarified that each authority has its exclusive powers and competencies in its respective markets. Nevertheless, SUTEL has the obligation to consult COPROCOM regarding investigations and merger control. In these cases, the law establishes that prior to any final decision made by SUTEL, it will seek COPROCOM's opinion, notwithstanding the fact that COPROCOM's opinion is not binding on SUTEL but should the latter set aside the opinion, SUTEL's decision must be justified, requiring a qualified majority backing it. To avoid duplication and omissions in administrative duties, COPROCOM and SUTEL signed the Institutional Competition, Co-ordination and Co-operation Agreement in 2019. This agreement includes, among its conditions, coordination, activities, efforts such as joint discussion of cases and enforcement of competition rules, joint opinions, technical cooperation through the exchange of official practices and internships, as well as the possibility of mutual consultation between the parties in order to achieve consistency of decisions.

62. The **Chair** asked Mexico to comment on Costa Rica's intervention, since both countries have a similar model.

63. **Mexico** presented its model, which is similar to Costa Rica's. The Mexican Constitution establishes that the Federal Telecommunications Institute (IFT) is the competition authority in the telecommunications and broadcasting sectors, while the Federal Competition Commission (COFECE) is the competition authority in all other sectors. The relation between COFECE and IFT is not between a competition authority and a sectoral regulator, but between two competition authorities in mutually exclusive sectors. So, besides collaborating in some areas like advocacy, COFECE and IFT interact formally in cases in which it is not clear if a specific case falls under the authority of IFT or COFECE. However, these interactions are by nature very limited, as the decision of authority over specific or in dubious cases, belongs at the end to the judiciary. This arrangement allows also to accommodate some additional objectives that are traditionally not the concern of competition authorities but are somehow related, such as the prevention of excessive concentration of media at a national and local level, or even public policy objectives related to access or affordability of telecommunications services.

64. The **Chair** thanked the Mexican delegation and he turned to the jurisdictions with an integrated regulator and competition authority. He mentioned that such a model could be particularly interesting for small jurisdictions and gave the floor to Fiji to explain how the different departments in the same body co-operate.

65. **Fiji** explained that its population is spread over 300 islands, with two important consequences. First, it increases the relative importance of competition enforcement, because it means that within narrow geographic markets, it is relatively easy to have a considerable degree of market power. So, competition is very important for Fiji. Second, within relatively small markets, it is quite difficult to sustain regulatory regimes which simultaneously have the kind of technical expertise that you require to operate and enforce technical regulations, while at the same time avoiding the risk of regulatory capture. This

is why Fiji adopted a multi-sector regulator; to have the manpower and regulatory expertise that would not be possible in another institutional framework.

66. The **Chair** moved to Estonia, another jurisdiction with an integrated authority, to ask how co-operation within different divisions of the same institution works.

67. **Estonia** pointed out that when the Estonian Competition Authority was established, it was a stand-alone competition enforcement agency. However, approximately a decade ago, the Minister of Economy merged the energy regulator, the railway regulator and certain duties of the communication board with the Estonian Competition Authority. Before that, the Estonian government had previously rather successful examples of merging public authorities into one. The reason for merging these agencies was the standardisation of functions, the increase of efficiency, and the synergy between ex-ante and ex-post measures. Having several policy instruments within the same agency enables to increase administrative efficiency, as well as to deepen certain synergies between different policies. For example, people working with several functions are better suited to solve jurisdictional questions and find common grounds and solutions, to be more concrete. For instance, the competition division has relied on the financial expertise of the regulatory division, in the competition enforcement cases regarding unfair pricing and pricing-related abuse cases for example. The regulatory division, on the other hand, has informed the competition division of potential competition concerns in energy markets. Estonia believes that the one shop stop system works well and benefits the economy as it enables the daily exchange of know-how and that significantly helps to contribute to the speed and quality of the proceedings.

6. Conclusions

68. The **Chair** gave the floor to the external experts to share their final thoughts based on the discussion.

69. **Martin Cave** noted that it was very encouraging to hear about cooperation and the benefits that this brings to consumers and markets. He also observed that he had not heard about evaluating this co-operation. He acknowledged that it can be difficult to assess co-operation because the only people who have the information are the people who have been cooperating, but he hoped that there could be some work on this in the future.

70. **Nomfundo Maseti** emphasised that the goal should not be to compete against other bodies' expertise. Rather, agencies should try to exploit synergies. In particular, she added that sectoral regulators would need support in terms of capacity building, especially with regard to competition assessments, that may be useful for the cases that are evaluated by the competition authorities.

71. **Pablo Márquez** concluded by saying that most of the experiences show that there is a path for collaboration between the regulator and the competition authority. He also noted that different bodies will always bring to the table different perspectives regarding what is the role of each other, mostly when there are no concurrent obligations under the law. He reiterated his belief that competition authorities should aim to make collaboration more transparent for third parties as well. In addition, he thought that this roundtable provided more knowledge regarding best practices and the principles that might guide other countries in collaboration between competition authorities and regulators.

72. The **Chair** closed the discussion by noting that co-operation between competition authorities and sector regulators is paramount to ensure more convergence and reduce legal uncertainty, helping authorities to better achieve their objectives. Although co-operation is already a reality in many jurisdictions, there is room for improving the way competition authorities and sector regulators interact, and he hoped that the experiences shared during this roundtable can contribute to this.