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Interactions between competition authorities and sector regulators[*] – Background Note

As competition authorities and sector regulators pursue their respective mandates in regulated sectors, there is a risk that they take inconsistent decisions or otherwise create uncertainty for market participants. Fruitful interaction between competition authorities and sector regulators can minimise these risks and help them to achieve their objectives.
Given the frequency and importance of these interactions, reviewing the methods of co-operation in use can be valuable to inform the design and implementation of co-operation models. As the topic has not been examined in a systematic way in the literature, this note analyses a small sample of legal frameworks to categorise the co-operation methods they envisage, noting advantages and disadvantages of different provisions.
This paper covers the interactions between competition authorities and sector regulators, formally and in practice, in the most frequent situation when the competition authority is a stand-alone body that enforces competition law in all sectors. In addition, it focuses on enforcement cases, describing procedural set-ups and the interplay of competition and regulation in these cases.

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Co-operation in merger control follows more structured procedures than co-operation on antitrust cases. The former tends to be regulated in the legal framework, while co-operation on antitrust cases usually falls under its general provisions unless it is conducted more informally.
The note also seeks to identify some factors that could contribute to explain why co-operation works better in some cases than in others.

Table of contents

Interactions between competition authorities and sector regulators − Background Note 2

1. Introduction 5

2. Objectives and institutional set-up 7
2.1. Objectives of competition authorities and sector regulators 7
2.2. Short description of different institutional models 8
2.3. Reasons for co-operation 10

3. Overview of co-operation tools 12
3.1. Legal framework for co-operation 12
3.2. Methods of co-operation 14

4. Co-operation on enforcement cases 21
4.1. Mergers 21
4.2. Antitrust 25
4.3. Why does co-operation work in some cases and not others? 27

5. Conclusions 31

Endnotes 33

References 35

BOXES

Box 1. Examples of MoUs 13
Box 2. Information sharing provisions in legal texts and MoUs 16
Box 3. The UK Digital Regulation Cooperation Forum 18
Box 4. The Australian Digital Platform Regulators Forum 19
Box 5. Examples of informal co-operation 20
Box 6. Mergers in the banking sector 22
Box 7. Examples of co-ordination on remedies 24
Box 8. Examples of legal frameworks for co-operation on antitrust 25
Box 9. Co-operation in jurisdictions with integrated regulator / competition authority or with concurrency arrangements 29

1. Introduction

1. When competition authorities advocate for pro-competitive rules or enforce competition law in regulated sectors, their activities tend to overlap with those of sector regulators. As competition authorities and sector regulators pursue their respective mandates in these sectors, there is a risk that they take inconsistent decisions or otherwise create uncertainty for market participants. Fruitful interaction between competition authorities and sector regulators can minimise these risks and help them to achieve their objectives. These objectives are sometimes aligned, as economic regulation often aims to address market failures that prevent competition from delivering its benefits, but they may be in contrast in some cases as regulators pursue broader goals.

2. Given the frequency and importance of these interactions, reviewing the methods of co-operation in use can be valuable to inform the design of co-operation models. While most information available concerns formal co-operation between authorities, informal co-operation is likely to be at least equally important as suggested by surveys on international co-operation in competition enforcement (OECD/ICN, 2021[1]) and international co-operation between sector regulators (OECD, 2015[2]).

3. Co-operation tools and their usefulness are linked to institutional design. In the most frequent institutional setting, where the competition authority is a stand-alone body responsible for competition enforcement and advocacy in all sectors, co-operation is especially important. Alternative set-ups, such as multi-function bodies combining competition and regulatory authorities, try to facilitate effective co-operation through institutional solutions. In these cases, co-operation tools may differ from those commonly used by the stand-alone competition authorities. Equally, different kinds of co-operation issues may arise in different settings. For instance, in the limited number of jurisdictions where a sector regulator has exclusive mandate to enforce competition law, the risk of inconsistency may arise not between the decisions by the competition authority and the sector regulator in the same sector, but by an uneven application of competition law across different sectors.

4. In light of these differences, this note covers the interactions between competition authorities and sector regulators, formally and in practice, in the most frequent situation when the competition authority is a stand-alone body that enforces competition law in all sectors. It focuses on enforcement cases and does not consider advocacy, which is perhaps the most frequent form of interaction with sector regulators and has been explored in past OECD roundtables. Moreover, the note focuses on competition authorities' interactions with sector regulators rather than horizontal regulators, such as the authorities dealing with privacy, data security or public procurement.

5. This note builds on and complements past OECD work on the topic and related issues, including a 2005 Global Forum of Competition (GFC) roundtable on the relationship between competition authorities and sectoral regulators, which focused on the importance of pro-competitive regulation and outlined ways to improve co-operation. More recently, a 2019 roundtable on independent sector regulators, held by Working Party No. 2 (WP2), explored the rationale for consistency between the approaches followed by competition authorities and by sector regulators, discussed advantages and disadvantages of the organisational structures for ensuring consistency and provided an overview of co-operation instruments. The work by the OECD Regulatory Policy Committee, such as the recent Recommendation on International Regulatory Co-operation to Tackle Global Challenges (OECD, 2022[3]), is also relevant.

6. Challenges remain in effective co-operation and these can hamper efforts by both competition authorities and sector regulators. Revisiting the topic in the 2022 GFC enables focusing on enforcement, as well as on the practical aspects of co-operation explored in the call for contributions for the roundtable. Given the lack of literature focusing on how competition authorities and sector regulators co-operate in practice, the GFC session can contribute to a better understanding of these mechanisms and to draw lessons on good examples of co-operation and areas for improvement.

7. The background note is organised as follows:

- Section 2 introduces the topic by setting out the main objectives pursued by competition authorities and sector regulators, noting scope for alignment and areas where they may be in contrast; it provides context to the discussion on co-operation by summarising the main institutional frameworks for competition enforcement, with a stand-alone competition authority responsible for competition enforcement in all sectors as the most common one; and it summarises the reasons for co-operation.
- Section 3 reviews the legal framework underpinning co-operation, whether in legislation only or better specified in Memoranda of Understanding (MoUs); it considers the main tools for formal and informal co-operation, noting the commonalities and distinguishing between provisions that require co-operation and those that merely provide for the possibility of co-operation.
- Section 4 focuses more specifically on co-operation in enforcement cases, both in terms of formal procedures and experience in actual cases; it also identifies some factors that could contribute to explain why co-operation works better in some cases than in others.
- Section 5 concludes.

2. Objectives and institutional set-up

8. The interaction between competition authorities and sector regulators requires an understanding of their objectives and roles, as well as of the institutional set-up in which this interaction takes place. In this note, sector regulator refers primarily to an independent authority with sector-specific responsibilities, such as regulators for the telecommunications, transport, energy, water or financial services sectors. While the examples throughout the note mostly refer to co-operation between competition authorities and independent sector regulators, in some jurisdictions these regulatory functions may be performed by ministerial departments. This section provides a brief overview of the objectives pursued by the different institutions (Section 2.1), of the most frequent institutional models for competition enforcement and sector regulation (Section 2.2) and of the rationale for co-operation (Section 2.3). These topics were covered by previous OECD roundtables, as indicated in the references below.

2.1. Objectives of competition authorities and sector regulators

9. As noted in (OECD, 2021, p. 7[4]), "competition law aims to prevent the illegitimate acquisition of market power and, where market power has already been accumulated, to control its exercise, so that the typical benefits of competition – lower prices, greater choice, higher quality – are realised fully" (Dunne, 2015, pp. 14-18[5])". Similarly, a Secretariat paper for the GFC in 2003 indicated that the core objectives of competition authorities were "to maintain and encourage the process of competition in order to promote efficient use of resources while protecting the freedom of economic action of various market participants" (OECD, 2003, p. 2[6]), while noting that, depending on the jurisdiction, competition authorities might pursue additional objectives, such as pluralism and preventing abuses of economic power.

10. Sector regulators tend to have broader aims and some of these are aligned with the promotion of competition. Governments address competition concerns and market failures not only through antitrust but also by giving regulatory authorities the power to address issues related to competition and market structure (Shelanski, 2018[7]). In fact, sector regulators have an important role "in promoting market-style outcomes or restricting the exercise of market power" (OECD, 2019, p. 4[8]). For instance, many regulators have the promotion of competition among their objectives and their main tasks include preventing dominant firms in a sector from abusing their market power. This is achieved mainly by imposing ex ante regulation on firms, such as requirements to provide access to upstream inputs that competitors cannot produce but need to compete downstream with the dominant firms (e.g. access to monopoly infrastructure). From this point of view, the objectives and role of sector regulators can be complementary to competition authorities' responsibilities. In regulated sectors, the regulator can be seen as "the *ex ante* controller of market power, via price, revenue and investment oversight, while the competition authority is considered the ex post controller of market power, via abuse of dominance and cartel enforcement" (OECD, 2019, p. 7[8]). Given this complementarity, flaws in ex ante regulation could be corrected by ex post competition enforcement.

11. Regulators also pursue other goals, such as equity, safety or public health (OECD, 2021[4]). Therefore, in some cases regulation is not required to correct market failures but to achieve objectives that may be in contrast with competition or, at least, considered more important than competition. For instance, a pharmaceuticals regulator may be more interested in the safety and efficacy of a drug than on whether there is competition in the sale of that drug (Dogan and Lamley, 2009[9]). As a result, the objectives of

sector regulators and of competition authorities may not be always aligned. To address this misalignment, OECD (2005) invites governments to embrace a "competition culture", arguing for competition authorities' advocacy role to identify policies that unduly restrict competition.[1]

12. It could be argued that whether competition authorities and sector regulators share common goals or not could affect the quality of their co-operation. For instance, (OECD, 2019, p. 18[8]) flags that when the two types of bodies have different objectives this may lead to challenges to consistency in approach. However, the literature does not seem to have devoted much attention to this observation. One of the exceptions is (Stern, 2015[10]), who argues that the UK's "strongly procompetitive infrastructure regulation system" was supported crucially by co-operation between sector regulators and competition authorities through the concurrency regime, under which both authorities have powers to enforce competition law in regulated sectors. (Dunne, 2021, p. 292[11]) warns that some enforcement cases in regulated sectors may be motivated by the belief that sector regulators are "not doing a good job" and may be attempts to expand jurisdiction or establish the primacy of competition law.

2.2. Short description of different institutional models

13. Before discussing co-operation tools and examples, it is helpful to identify the main institutional models with respect to the roles of competition authorities and sector regulators. Institutional models have been covered by past OECD sessions, such as (OECD, 2021[4]), (OECD, 2019[8]), (OECD, 2014[12]) and (OECD, 2015[13]). This background note focuses on the more frequent and standard set-up, in which the competition authority is responsible for enforcing competition law while regulators are separate entities charged with one or more sectors. However, there are alternative organisational structures aiming at improving consistency between competition and regulatory approaches, by combining the competition authority with one or more regulators or through a concurrency regime. Given their relevance for better co-ordination, these alternative models are also considered in this note even if they are not its main focus.

14. In the most widespread institutional model, the competition authority is a stand-alone agency with responsibilities for competition enforcement on all sectors.[2] Under this institutional set-up, a uniform approach to competition enforcement is ensured throughout the economy and the authority is less likely to risk regulatory capture, adopting over time the point of view of the industry it oversees. Compared to a model in which sector regulators have exclusive competition powers in the sectors they regulate, it also brings the benefit of greater efficiency: the competition authority can develop some high-level expertise in different products and services, while resources would be duplicated if each sector regulator were to develop competition policy expertise in that sector. However, when the competition authority is a stand-alone agency, there is a risk that it has a somewhat limited knowledge of the sector and of the relevant regulatory framework. This may lead to the risk of inconsistency between the efforts of the competition authority and of the sector regulators, even when they share common objectives. For this reason, co-operation with sector regulators is especially important in this scenario and is the focus of this note.

15. In order to improve synergies and consistency in the enforcement of competition and regulation, some jurisdictions (e.g., Australia, Estonia, the Netherlands, New Zealand and Spain) have integrated the competition authority with some sector regulators or have entrusted regulatory functions to the competition authority. The views on the advantages and disadvantages of this approach vary, as highlighted by the Roundtables on Changes in Institutional Design held in 2014 (OECD, 2014[12]) and 2015 (OECD, 2015[13]). The advantages mentioned during those discussions included enabling the authority to use a variety of tools to address a competition problem; increasing the coherence between competition and regulatory interventions; reducing the risk of regulatory capture compared with a regulator dealing with one sector only; having a competition culture also in sector regulation; granting legal certainty to market players; and operational benefits such as economies of scale and scope, making the authority more efficient. In relation to the improvement of coherence and co-ordination, (Jenny, 2016[14]) refers to Spain's submission to the

roundtable on changes in institutional design of competition authorities (Spain, 2014[15]), which explained that sector regulators were set up in early phases of sector liberalisation. As markets became more competitive, there was greater need for co-ordination between the competition authority and sector regulators.

16. Merging competition and regulatory responsibilities can also present challenges. For instance, (Jenny, 2016[14]) notes that it may be more difficult to prioritise cases in an integrated authority, given that it has many functions, and that it may not be easy for staff with different culture and approaches to work in the same organisation. In past OECD roundtables, arguments against integrated agencies included the possibility that competition enforcement could "undermine incentives for investment that is needed to promote the long-term interests of consumers in regulated sectors" (OECD, 2014[12]) and the different roles of a competition authority, which exercises powers similar to judicial powers, and a sector regulator, which is a rule-making body often co-operating closely with policy makers.

17. In some jurisdictions, certain sector-specific regulators have both regulatory powers and exclusive jurisdiction to enforce competition law. This was often the case in the financial sector, where the central bank was responsible for competition enforcement, "allowing for behaviour or transactions considered anti-competitive to be cleared on financial stability grounds" (Carletti and Smolenska, 2017, p. 25[16]). This model can deliver some of the benefits of an integrated competition and regulatory agency set out above, such as having a wider range of instruments to promote competition. However, the downsides of this model, such as the risk of inconsistent enforcement of competition law across different sectors, have made it very unusual in OECD countries.

18. The UK concurrency regime, in which both the competition authority and sector regulators have the power to enforce competition law, provides an interesting example of how co-operation has been strengthened to ensure more active competition enforcement in regulated sectors.[3] In this system, the competition authority has the role of an appeals body in regulated sectors and sector regulators may themselves make references to the competition authority for market investigations. In the UK, sector regulators traditionally had competition powers.[4] However, before the Competition and Markets Authority (CMA) was established, taking over competition powers from the Office of Fair Trading and the Competition Commission, there were only few competition cases brought by the CMA's predecessor and by the sector regulators (OECD, 2014[12]; 2015[13]). (Alexiadis and Da Silva Pereira Neto, 2019, p. 25[17]) report that, before the reform, there was a perception that regulatory authorities were hesitant in pursuing competition cases and making referrals for market investigations, preferring to carry out reviews themselves. At the same time, the authors note that the CMA is more comfortable than the previous enforcer to investigate competition cases also in regulated sectors.

19. Concurrency was strengthened to address this perceived under-enforcement in regulated sectors, among other reasons for the reform of the competition policy regime. The main objective of concurrency is to promote consistency in the application of competition policy in regulated sectors. With this in mind, the role of the competition authority as an appeals body has contributed to "regulatory deliberations […] lodged within a procompetition legislative and institutional framework" (Stern, 2015[10]), for instance compared with other jurisdictions where appeals go through the courts with outcomes that are potentially less pro-competitive. As is the case for integrated authorities, one benefit of a concurrency regime is that the sector regulator can use more tools to address potentially problematic conduct.[5] It has also been argued that the pro-competitive approach supported by concurrency helped sector regulators against the risk of government interference in regulated industries (Stern, 2015[10]). Concurrency is not without critics, though. Disadvantages could include lack of clarity in the allocation of responsibilities between the competition authority and the sector regulators. In addition, there is a risk that consensual co-operation suppresses viewpoints and does not encourage "robust disputation".

20. These institutional models provide for different distributions of the responsibilities between competition authorities and sector regulators. Even the "standard" model in which the competition authority

and sector regulators are separate institutions presents significant overlaps in their responsibilities. For instance, this is apparent in merger control where sector regulators are sometimes involved in the review of transactions, such as in cases involving a transfer of licences issued by a regulatory authority (see Section 4.1). Another example of overlap is given by market studies and investigations, which could be seen as examples of competition-regulatory hybrids (OECD, 2021[4]). Market studies can identify various reasons why competition may not be working in a market, and these are not limited to behaviours prohibited by competition laws. As such, they can be used more broadly to promote competition in a market and, in a way similar to regulators' tools, make forward-looking recommendations. In addition, these recommendations apply to all firms in a market and not only individual firms, as is the case in competition enforcement. The parallel is most obvious when, in a limited number of jurisdictions such as the UK, Mexico and South Africa, competition authorities' powers go beyond purely advisory recommendations and can also impose remedies in the context of market investigations.

2.3. Reasons for co-operation

21. The rationale for co-operation can be traced broadly to the need to ensure consistency between the actions of competition authorities and of sector regulators, reducing duplication and sharing resources, ultimately enabling them to achieve their objectives.[6] It is helpful to recall the benefits of international co-operation between competition authorities, as they emerge from the survey run by the OECD and the ICN (OECD/ICN, 2021[1]). In addition to consistency, these benefits include more efficient and better use of an authority's resources thanks to the sharing of expertise; obtaining information and evidence that would otherwise be slow, difficult or impossible to obtain; incentivising parties to be transparent with all authorities, recognising that many authorities can co-operate; and creating personal and organisational relationships of trust, which can serve as a basis for effective and deeper enforcement co-operation.

22. Co-operation is likely to reduce the incentive for market players to select which forum they bring their complaint or their merger to (i.e., "forum shopping"), based on a perceived better chance of success. The lack of clarity in the roles and mandates of competition authorities and sector regulators can be due to flaws in the legal framework. Co-operation, for instance through MoUs, can help clarify the respective responsibilities and close loopholes.

23. In enforcement co-operation, the exchange of information between authorities is one of the areas that could bring the most benefits, as highlighted in the context of international enforcement co-operation among competition authorities (OECD/ICN, 2021[1]). Similarly in domestic enforcement matters, sector regulators' knowledge can contribute to a well-informed analysis of cases. When competition authorities have access to this expertise, they can better understand the industry and assess how competition works. In addition, sector regulators often collect granular firm-level data to estimate aggregate market figures. The ability to access this detailed and confidential information already collected by regulators could speed data gathering by competition authorities and improve their quality, while reducing market participants' burden in responding to information requests. At the same time, legal limitations to the sharing of confidential information with other competition authorities are regarded as one of the main barriers to effective international co-operation. This issue arises equally in domestic enforcement matters, also considering that the legal framework may not be explicit in requiring or even allowing the exchange of confidential information (see Section 3.).

24. Co-operation between competition authorities and sector regulators can also contribute to more pro-competitive sector regulation. (OECD, 2005[18]) focuses on these benefits and on how competition authorities' advocacy and co-operation with regulators can help achieve this objective. To support these efforts, the OECD Recommendation on Competition Assessment [OECD/LEGAL/0455] calls for governments to seek ways to achieve their policy objectives without unduly restricting competition. (OECD,

2019[19]) provides guidance on reviewing the legislation to identify regulatory barriers to competition and developing alternative policies that are more pro-competitive.

25. Limited co-operation may be due to various reasons and may lead to different or even conflicting conclusions on the same case. As discussed in (OECD, 2019[8]), even when authorities share similar objectives, they may apply different substantive rules (e.g. on merger review, see Section 4.1) or procedural rules (e.g. leading to different information-gathering powers). Quoting the example of Spain in the 1990s, Jenny (2016, p. 21[14]) flags that when the responsibilities of the competition authority and the sector regulators are not well delineated and there is no clear procedure for these authorities to consult each other, the system may result in "confusion and dissatisfaction".

26. Potential gaps and under enforcement may result from poor co-ordination. For example, if there are limited contacts and exchanges between sector regulators and the competition authority, there could be situations where regulation is rolled back, while the competition authority does not intervene enough to address the market distortions previously addressed by *ex ante* regulation. (Shelanski, 2018[7]) argues that antitrust authorities should pay attention to changes in industry regulation so they can intervene if "competition-related rules" leave gaps. A number of co-operation tools, such as working groups, sharing information on market and regulatory trends, as well as informal contacts between authorities, can all contribute to this objective.

27. Absent co-operation there may also be a risk that the competition regime does not consider sufficiently other policy considerations. These arguments have become more common in the context of merger control, when some countries may have felt that pursuing competition-only objectives was not sufficient to achieve broader policy goals, such as protecting employment, preserving media plurality or ensuring the supply of critical goods. In several countries, sector regulators or government departments can apply public interest considerations, following a standard review of a merger by the competition authority (OECD, 2016[20]; 2016[21]).

3. Overview of co-operation tools

28. This section describes the co-operation tools that are envisaged in legislation and in formal agreements between competition authorities and sector regulators, as well as ways in which authorities co-operate informally. The objective is to provide an overview of the tools in use and an indication of the most frequent features based on a sample of jurisdictions, to inform the design of co-operation models.[7]

29. Most examples are drawn from jurisdictions in which the competition authority is a stand-alone agency in charge of enforcement in all sectors, with some examples from jurisdictions with different institutional set-ups when relevant. Additional insights into international experience, especially on the tools used in enforcement practice, will be provided in Section 4 and in the country contributions for the session.

3.1. Legal framework for co-operation

30. The legal basis for co-operation between authorities is provided in the competition law or in legislation dealing with regulated sectors. For instance, in India the 2002 Competition Act states that the Competition Commission of India (CCI) and sector regulators may co-operate when analysing cases which can impact on the jurisdiction of the other. In Brazil, a 2019 law on regulatory agencies describes their jurisdiction as to competition matters and the role of the competition authority CADE in regulated markets (Brazil, 2021[22]).

31. As for the content of the legal provisions, they often enable generic co-operation, such as consultation in matters relevant to both the competition authority and the sector regulator, without specifying the details of how it will occur in practice. In some cases, the legislation *requires* co-operation, rather than *merely* enabling it. For instance, in France the communications regulator Arcep must refer to the Autorité de la Concurrence any abuses of dominant position or other anti-competitive practices occurring in the sectors overseen by Arcep. Similarly, the Autorité de la Concurrence is required to communicate to Arcep any referral within the regulator's area of responsibility.

32. In several jurisdictions, competition authorities and sector regulators sign agreements such as Memoranda of Understanding (MoUs). Written agreements spell out in more detail the co-operation already envisaged in legislation, even though in some jurisdictions such as France and Switzerland, co-operation relies merely on the legislation without the need for MoUs. While having MoUs in place does not ensure that co-operation will occur in practice, it offers a more formal framework for co-operation and signals a willingness of the authorities to engage in dialogue (OECD, 2013, p. 48[23]).

Box 1. Examples of MoUs

In Brazil, CADE has signed co-operation agreements and MoUs with other government bodies or agencies, including the following sector regulators: petroleum, gas natural and bio-fuel regulator (ANP); supplementary health services (ANS); health surveillance (ANVISA); waterway transportation (ANTAQ); land transportation (ANTT); telecommunications regulator (ANATEL); financial market (Central Bank); and auto-visual (ANCINE).

In 2021, the Egyptian competition authority (ECA) and the telecommunications regulator (NTRA) signed an MoU aiming to form a joint executive committee to enhance competition in the telecoms market. It reinforces co-operation between both agencies to achieve a common vision of the market.

The Icelandic Competition Authority (ICA) and the Post and Telecom Administration (PTA) co-operate in accordance with rules laid down in a co-operation agreement. The ICA has a long-standing co-operation with sector regulators, to prevent duplication, enhance effectiveness and ensure transparency and legal certainty.

In Norway, the competition authority has signed written co-operation agreements with the telecommunications regulator (Nkom) and the financial regulator (FSA). The agreement with Nkom states that collaboration shall strive for expedient, efficient, and satisfactory handling of cases where the two agencies have overlapping authority and responsibility. Unnecessary dual processing of cases is sought to be avoided, and forms of co-operation should be flexible and mutually binding. The agreement with FSA also stipulates that the authorities shall co-ordinate their proceedings in cases where they have overlapping interests, and keep each other informed on relevant cases. Both MoUs provide legal grounds allowing the sharing of confidential information.

The Competition Commission of South Africa (CCSA) has entered into MoUs with 14 independent sector regulators. MoUs usually have a duration of five years and aim at strengthening enforcement through the exchange of information and the sharing of resources.

Source: Brazil (www.gov.br/cade/pt-br/acesso-a-informacao/convenios-e-transferencias/acordos-nacionais/acordos-com-agencias-reguladoras); Egypt (www.tra.gov.eg/en/ntra-and-eca-sign-a-memorandum-of-understanding-to-enhance-free-competition-practices-in-egypts-telecom-market-2/); (Iceland, 2014[24]); Morocco (article 8 de la loi n° 20.13 qui encadrent les relations entre le Conseil de la concurrence et les régulateurs sectoriels); (Norway, 2019[25]); (South Africa, 2019[26]).

33. Compared with the provisions embedded in the legal framework, agreements between authorities bring some additional benefits. First, they can be more detailed than the legislation, which may only include a generic call for good co-operation among authorities. Second, they are shaped by the authorities themselves rather than by the legislator and therefore can be more relevant based on the experience accumulated by the authorities. However, unlike legal provisions, the agreements between authorities may not be legally enforceable.

34. An additional benefit is that agreements can be used to clarify the respective mandates of the authorities when the legislation is not clear. For example, the agreement between the Competition Commission of South Africa and the energy regulator (NERSA) explicitly states that the regulator "agrees that the Commission shall exercise its jurisdiction […] within the energy sector".[8] The objective of clarifying responsibilities is especially important when sector regulators have competition-related targets, as mentioned by the Korea Fair Trade Commission (KFTC) (Korea, 2019[27]). With this objective, the KFTC signed an MoU with the broadcasting and communications regulator (Korea Communications Commission), aiming to prevent overlapping decisions.

35. At the same time, laws and MoUs are unlikely to cover all possible situations and some degree of interpretation may still be needed. For instance, the Competition Authority of Kenya received a complaint in the jet fuel market and assessed whether it would fall under its jurisdiction or under the remit of the Energy and Petroleum Regulatory Authority (EPRA). It concluded that the matter was within the competition authority's responsibility and did not fall under the requirement for mutual notification (see Section 3.2.1) within the MoU with EPRA (Competition Authority of Kenya, 2021[28]). As a result, it appears that the authorities did not co-operate on this case. This example suggests that formal co-operation alone may not address all the potential scenarios of competition enforcement, but also that it should not be an obstacle to informal co-operation (Section 3.2.5). Even if a situation does not fall neatly within the provisions of a law or of an MoU, authorities should still consider co-operating informally.

36. The legal framework for international co-operation between competition authorities can shed some light on co-operation between competition authorities and sector regulators at the national level. At the international level, the legal basis for enforcement co-operation between competition authorities varies substantially, including national laws, regional integration arrangements, multi-lateral and bi-lateral competition agreements (e.g., MoUs), Free Trade Agreements (FTAs), Mutual Legal Assistance Treaties (MLATs), confidentiality waivers, letters rogatory and bi-lateral and multi-lateral non-competition agreements (OECD/ICN, 2021[1]).

37. Even though bi-lateral competition agreements are common, they are not the most frequently used nor the most relevant. According to a Survey conducted by the OECD and the ICN in 2019, national law provisions, confidentiality waivers, multi-lateral competition agreements and letters rogatory have higher scores in relevance and in frequency of use (OECD/ICN, 2021[1]).

38. While the content of MoUs vary, they mostly cover issues such as consultation among the signatories, sharing of information and data, and the establishment of working groups or contact points. These are described in Section 3.2 below. These provisions tend to be similar to the most common clauses in MoUs between competition authorities on international enforcement co-operation, as described by the OECD inventory of MoUs (OECD, 2021[29]), such as the provisions dealing with transparency, notifications, exchange of information and consultation.

3.2. Methods of co-operation

Notification and consultation

39. While public officials have a general duty to notify each other on any matter of interest to other public authorities, the legislation and the MoUs usually emphasise the need for competition authorities and regulators to notify each other when they become aware of potential violations of sector regulation or competition law, respectively. This system of mutual notification aims at avoiding that harmful conduct escapes enforcement simply because, even if detected by an authority, it does not fall under its mandate and powers to investigate and sanction, if needed. For instance, in Ukraine, the Law on the Electricity Market states that the electricity regulator (NEURC) shall inform the competition authority (AMCU) of any behaviour that may be considered as a violation of competition law (Ukraine, 2019[30]). Designating specific contact points in an MoU, such as the head of a specific department, can make the process clearer and smoother, especially if there is high staff turnover at an authority.

40. Moreover, the competition authority may consult the relevant regulator when it is dealing with cases in a regulated sector, to benefit from the regulator's expertise and to promote consistency between competition and regulatory interventions. In some jurisdictions, this is formulated as an obligation, making co-operation mandatory. According to the Philippine Competition Act, under these circumstances the sector regulator "shall be consulted and afforded reasonable opportunity to submit its own opinion and recommendation on the matter before the [Competition] Commission makes a decision on any case".[9]

41. Similarly, the involvement of the competition authority in regulatory procedures may be voluntary or compulsory. The 2012 Competition Act in Portugal requires the competition authority to issue an opinion on draft decisions by the sector regulators when they "make an assessment of issues concerning a possible breach of competition rules".

42. Based on the available laws and MoUs, it is usually not clear if opinions, even when they are required, are binding or not on the authority that issues the final decision, be it the competition authority or the sector regulator. Indeed, whether an opinion should be binding or not may depend on factors such as the specific institutional framework and the legal approach of a given jurisdiction. For instance, if a competition authority has the responsibility to enforce competition law in all sectors of the economy, an opinion by the sector regulator would be highly desirable but perhaps should not take precedence over the views of the competition authority. Section 4.1 reviews the provisions that specifically concern merger control, where opinions can sometimes be binding.

43. There may also be practical considerations to factor in when designing a system of mutual consultation between authorities. While consultation should certainly be encouraged, it should not delay or otherwise disrupt the process to reach a decision. At the same time, attaching deadlines to the provision of opinions may result in a burdensome process and possibly affect the incentives and usefulness of co-operation. These considerations may contribute to explain why the language on consultation is vague in the laws and MoUs reviewed for this background note (see endnote 7).

44. Finally, some MoUs may go beyond the simple notification or consultation and cover more substantive co-operation, even though these provisions do not seem very common. For instance, the MoU between the Competition Authority of Kenya and the Energy and Petroleum Regulatory Authority (EPRA) aims to promote joint investigations by the two authorities (Competition Authority of Kenya, 2021[28]). The MoU between the Competition Commission of South Africa and the National Energy Regulator of South Africa gives the parties the opportunity to participate in each other's proceedings in an advisory capacity.

Information sharing

45. Access to information already collected by another authority can facilitate and speed up competition enforcement, as well as potentially reducing the burden of information requests on market participants. The exchange of data has become increasingly important as competition authorities develop screening tools to detect collusion and need access to the large amounts of data, at times already collected by sector regulators, as discussed in the Working Party No. 3 (WP3) session on Data Screening Tools for Digital Investigations (OECD, 2022[31]).

46. A distinction needs to be made between publicly available information and confidential information. The former is already in the public domain, whether it is accessible in practice or not (such as court decisions or ministerial circulars that may not be available online). The latter may include different types of information that is not in the public domain. For instance, staff theories of harm and analysis of cases are usually considered confidential or sensitive by an authority, even though there is no legal prohibition to share them. Other types of confidential information may have been obtained from market players during an investigation and are protected in many jurisdictions, even though the actual definition of what is confidential information varies (OECD/ICN, 2021, pp. 167-169[1]). The OECD Recommendation on Transparency and Procedural Fairness in Competition Enforcement [OECD/LEGAL/0465].

47. The legislation can include blanket provisions enabling information sharing, which can be described more in detail in MoUs. When dealing with confidential information, MoUs need to balance the protection of confidentiality and the compliance with any rules in this regard, on the one hand, with the benefits of sharing information, on the other hand.

48. A review of selected laws and MoUs suggests that they cover the following issues, among others, with respect to confidential information:[10]

- The parties may request confidential information that the other party holds.
- When sharing confidential information, the party that transmits the information notes if the information is confidential.[11]
- If the information is confidential, the party that shares it can transmit a non-confidential version or request the consent of the third party to share it with the sector regulator.
- The receiver of confidential information ensures the same level of confidentiality as the party that shares the information,[12] unless required by a law or judicial decision.

Box 2. Information sharing provisions in legal texts and MoUs

In Belgium, the competition authority (Belgian Competition Authority) has formal co-operation agreements (Royal decrees) with the energy sector regulator (CREG) and the telecom and postal sector regulator (IBPT). They cover information sharing between the authorities, including confidential information (except information obtained from European Competition Network authorities or leniency applicants).

In Croatia, the Competition Act requires public authorities to submit to the Croatian competition authority (Croatia Competition Agency) any requested data and documentation, including the data and documentation covered with business secrecy obligations.

In Indonesia, the MoU between the competition authority and the Financial Services Authority covers the exchange of data and information.

In Malta, the Competition and Consumers Affairs Authority Act empowers the authority to "enter into agreements for the exchange of information and other form of collaboration with public authorities".

In Peru, INDECOPI and all the regulatory agencies (e.g. water and sewage – SUNASS; energy and mining – OSINERGMIN; transport infrastructure – OSITRAN) have agreements to facilitate the exchange of information (Peru, 2019[32]). For instance, the competition authority can request from the Supervisory Agency for Investment in Energy and Mining data and information on the market, as well as technical reports, such as in the case of the LPG market.

In Chile, the competition authority (FNE) entered into MoUs with certain sector regulators, which include the exchange of public information. For example, the 2014 MoU between FNE and the Chilean National Energy Regulator (CNE) enables FNE to access the CNE's database that provides a real-time picture of the retail fuel prices in all gas stations in the country. Likewise, according to the 2013 MoU between FNE and the civil aviation regulator (DGAC) the latter should provide the former with its database on the sector.

In Romania, the MoU between the competition authority and the central bank covers the exchange of information, provided that confidentiality is ensured. The ability to share information proved valuable when the competition authority conducted a sector investigation on financial services in Romania.

Source: (Belgium, 2019[33]); MoU between the competition authority and IBPT (https://www.abc-bma.be/sites/default/files/content/download/files/20140508_kb-ar_ibpt-bipt.pdf); (Croatia, 2019[34]); MoUs signed by the Indonesian Competition Authority: https://eng.kppu.go.id/cooperation-agreement/; Malta Competition and Consumers Affairs Authority Act, https://legislation.mt/eli/cap/510/20210831/eng; (Romania, 2019[35]); Chile MoUs (https://www.fne.gob.cl/advocacy/acuerdos-nacionales-de-cooperacion-2/).

49. Authorities can also co-operate in the collection of information. For example, the Italian competition authority and the transport regulator can carry out joint inspections. In addition, agreements may include a requirement to forward relevant documents, such as decisions, to each other. In the UK, under the concurrency regime, the CMA and sector regulators exchange key information and comments in respect of the cases that they have been investigating, including emerging thinking and draft decisions (CMA, 2022[36]).

Working groups and staff exchanges

50. Co-operation tools such as establishing fora or working groups are designed to improve communication and to facilitate discussions between the authorities to reach a shared understanding and approach. The designation of contact points, for instance the officials responsible for updating the other authority, also helps establish and maintain regular communications channels. There are several examples of provisions concerning working groups and designated contacts. For example in Norway, following a co-operation agreement between the competition authority and the telecommunications regulator (Nkom), each of them appointed a contact person (Norway, 2019[25]). Some working groups may involve two authorities and be set up by bilateral MoUs, such as the Joint Working Committee between the Competition Commission of South Africa and the Ports Regulator (CCSA and PRSA, 2015[37]).

51. Working groups may also bring together the competition authority with a number of regulators. For instance, the Forum of Indian Regulators gathers the Competition Commission of India and 37 federal and state-level regulators. In Malaysia the competition authority chairs the Special Committee on Competition, which includes nine regulators such as the communications regulator, the energy regulator and the central bank, and has met once a year in recent years (Malaysia Competition Commission, 2020[38]).

52. As for the purpose of these institutions, this may include both holding general discussions and more targeted co-operation on specific cases. In the Czech Republic two permanent working groups were created by the competition authority, with the telecommunication regulator and with the energy regulator, in which information is exchanged and joint positions or opinions are prepared (Czech Republic, 2019[39]). The UK Competition Network consists of the competition authority and the sector regulators with concurrent competition powers[13] and aims to facilitate co-operation and "to consider more generally how best to promote competition and competitive outcomes for the benefit of consumers in the regulated sectors" (UK, 2014[40]). For instance, it organises workshops on procedural or substantive issues. It also publishes information on cases in regulated sectors and produces an annual report dealing with competition enforcement in regulated sectors and reporting on co-operation in the previous year, such as information sharing and case allocation (CMA, 2020[41]).

53. The activities of these fora and working groups may also include the organisation of training that is beneficial to the members, such as in the case of Singapore's Community of Practice for Competition and Economic Regulation. The group also organises bi-annual seminars for the participating authorities to discuss current issues in competition and regulation in Singapore.[14]

54. Fora and working groups are also being used in some forms of ex ante regulation of digital platforms, for example in the United Kingdom (Box 3) and Australia (Box 4). This illustrates how co-operation between competition authorities and other domestic public bodies can be useful in developing new regulatory approaches to address the challenges of the digital economy.

Box 3. The UK Digital Regulation Cooperation Forum

In July 2020, the Competition and Markets Authority (CMA), the Information Commissioner's Office (ICO) and the Office of Communications (Ofcom) established the Digital Regulation Cooperation Forum (DRCF). Its goal is to foster greater co-operation between the three authorities with respect to regulation of digital markets. The Financial Conduct Authority (FCA) joined as a full member of the DRCF in April 2021.

These public entities hold different competences regarding regulation of digital markets, comprising matters of competition, consumer protection, information rights, the regulation of online content, media and news plurality, and financial services. In order to ensure coherent, informed and responsive regulation, the newly established DCRF has six objectives:

- Collaborate to advance a coherent and effective regulatory approach by the competent bodies that are in charge of different aspects of the digital economy, through open dialogue and joint working;
- Inform regulatory policy making by using the expertise of all member bodies to develop solutions to regulate the digital space;
- Improve regulatory capabilities by sharing knowledge and resources to ensure that all bodies have the expertise, tools and skills to carry out their functions in an effective way;
- Foresee future developments in online services by promoting common understanding of emerging digital trends;
- Promote innovation by sharing experiences and knowledge;
- Strengthen international engagement by exchanging information and best practices concerning approaches to the regulation of digital markets.

The DRCF does not have any decision-making powers and does not provide formal advice or direction to its members. Co-ordination with other networks and government bodies beyond its members will also be possible.

In March 2021, the DCRF published its work plan for 2021/2022, announcing that it would focus on three priority areas:

- Providing strategic response to industry and technological developments;
- Developing joint and coherent regulatory approaches;
- Building skills and capabilities by sharing knowledge, expertise and resources.

The DRCF has already contributed to better co-operation on cases. In January 2021, the CMA opened a formal investigation into Google's plan to remove third party cookies and other functionalities from Google Chrome and replace them with a new set of tools for targeting advertising and other functionality that will allegedly better protect consumers' privacy. In order to address legitimate privacy concerns without distorting competition, the CMA discussed with the ICO through the DRCF. Moreover, the DRCF is acting as a co-operation forum in the ICO's investigation into the use of personal data in real time bidding in digital advertising. While ICO focusses on the data protection aspects of such a system, the DRCF will ensure that the CMA's considerations on the impact on competition are duly included in the probe.

Source: Reproduced from (OECD, 2021[42])

Box 4. The Australian Digital Platform Regulators Forum

The Australian Competition and Consumer Commission (ACCC), the Australian Communications and Media Authority (ACMA), the Office of the Australian Information Commissioner (OAIC) and the Office of the eSafety Commissioner (eSafety) created the Digital Platform Regulators Forum (DP-REG) aiming to increase co-operation and information sharing between digital platform regulators.

There are various initiatives across the Australian government seeking to regulate digital platforms, and the respective regulators face similar challenges, such as addressing emerging consumer harms, encouraging innovation while balancing protections, as well as countering the market power of large, complex and diverse multinational entities. A critical and overarching focus is considering how competition, consumer protection, privacy, online safety and data intersect in issues that the various regulators consider.

Therefore, DP-REG aims to streamline and reduce duplication of regulatory approaches on digital platforms in Australia, seeking to promote proportionate, cohesive, well-designed and efficiently implemented digital platform regulation.

The Forum has no decision-making powers and does not change any of its members' existing legislative functions or responsibilities. DP-REG enables its members to implement a flexible collaboration, grounded on their legal limitations.

The scope of activities of the Forum includes regular senior-level meetings, a contact list of relevant staff working on digital platform issues, information and data sharing, where permissible (e.g., relevant proposals of upcoming initiatives), as well as the enhancement of regulatory capabilities and collaboration opportunities.

Source: (DP-REG, 2022[43])

55. Staff exchanges contribute to improving a common understanding, building relationships between authorities and overall enhancing informal co-operation. The UK Competition Network notes that secondments "continue to be an important way of sharing expertise and transferring knowledge between the CMA and the sector regulators" (CMA, 2020, p. 43[41]). In the UK, several staff exchanges take place between the competition authority and the sector regulators, but also between the sector regulators themselves. Other authorities, such as the Australian Competition and Consumer Commission (ACCC) and the US Department of Justice, engage in staff exchanges with various regulators.[15]

Informal co-operation

56. The OECD/ICN Report states that a commonly agreed difference between informal and formal co-operation is that the latter is supported by some written instrument, even though this difference may not always be clear. In practice, both types of co-operation are often used simultaneously in an overlapping fashion (OECD/ICN, 2021, p. 62[1]).

57. The same rationale applies to co-operation between competition authorities and sector regulators within a jurisdiction. Although the boundaries between formal and informal co-operation may not always be clear, informal co-operation can be described as the activities that go beyond those explicitly included in legal instruments, such as legislation or MoUs. Just like international co-operation (OECD/ICN, 2021, p. 63[1]), domestic co-operation between competition authorities and sector regulators may involve activities such as keeping each other informed of the progress of cases of mutual interest, ad-hoc meetings to discuss substantive or procedural issues, and exchanges of public information.

58. According to the 2021 OECD/ICN Report on International Co-operation in Competition Enforcement, informal co-operation is the most common form of international enforcement co-operation among competition authorities, since it does not require burdensome formal processes, can be easily implemented at case-handler level, and is even likely to reduce co-operation costs (OECD/ICN, 2021, pp. 65, 136[1]).

59. Informal co-operation also seems to prevail between national sector regulators. For example, in a survey of 34 water regulators carried out by the OECD between 2013 and 2014, more than 80% regulators reported that the main form of co-ordination with the different tiers of government involved in regulating water services was ad hoc meetings (OECD, 2015, p. 27[2]).

60. While there is no corresponding survey or report on informal co-operation between competition authorities and sector regulators, (Stern, 2015, p. 869[10]) indicates that informal co-operation between competition authorities and utility regulators is common in many jurisdictions. Several examples suggest that this is the case (see Box 5).

Box 5. Examples of informal co-operation

In Australia, the ACCC has been increasingly co-operating with the financial regulatory agencies through the Council of Financial Regulators (CFR), a non-statutory co-ordinating body for Australia's main financial regulators. Although the ACCC is not a member of the CFR, it has been invited to participate on issues relating to market contestability and competitiveness. This allows the competition authority to share information, discuss regulatory issues and, if necessary, co-ordinate responses to potential threats to financial stability with sector regulators (Australia, 2019[44]).

In Chinese Taipei, the FTC organises consultation meetings with independent regulatory agencies aiming to diminish overlapping issues and avoid unregulated "grey areas" (Chinese Taipei, 2019[45]).

In Israel, regulators consult the competition authority for its expertise, including in areas in which they are not required to do so (Israel, 2019[46]).

In Norway, the competition authority and the pharmaceuticals regulator hold annual informal meetings to discuss the market, even though there is no formal agreement between the authorities (Norway, 2019[25]).

The Romanian competition authority and the insurance regulator co-operate even though a former protocol between the agencies is no longer in force. For instance, the sector regulator provided the competition authority with useful data that helped it to better understand the market during an investigation (Romania, 2019[35]).

Extensive informal co-operation also exists in the United States, for instance between the Department of Justice and the Federal Communications Commission (FCC), aiming to reduce the risk of inconsistent outcomes. The agencies share non-confidential industry information and discuss theories of harm and proposed remedies (United States, 2019[47]).

61. Based on the limited information available, it is usually not possible to conclude whether this co-operation concerns enforcement cases. However, there may be reasons to conclude that once co-operation has been established, for instance in joint advocacy activities, they contribute to foster co-operation between the agencies and at the same time make this co-operation visible to market participants. An example of a joint public event occurred in Brazil in 2018, where the competition authority and the civil-aviation regulator organised a seminar to discuss regulatory improvements and challenges in the sector, including a discussion on past cases (ANAC, 2018[48]). The Moroccan competition authority and the securities markets regulator organised a joint event in 2022, in which they presented to market players how the agencies interact with each other (Autorité Marocaine du Marché des Capitaux; Conseil de la Concurrence, 2022[49]).

4. Co-operation on enforcement cases

62. This section provides an overview of co-operation by enforcement area, including the relevant framework and examples of specific cases competition authorities and sector regulators have co-operated on, to the extent this information is available. Finally, the section attempts to outline some factors that could potentially explain effective co-operation.

4.1. Mergers

63. When a merger takes place in a regulated sector, several jurisdictions require the involvement of the regulator. For instance, this is the case when the transaction involves the transfer or modification of a licence issued by the regulator. The rationale is that the regulator granted the licence after assessing certain pre-requisites and therefore it should assess if those pre-requisites still hold for the new entity that would acquire the licence.

64. Different authorities perform different types of reviews. For example in the US, transactions in regulated sectors (such as banking, agriculture, energy, telecommunications, transportation and medical industries) are subject not only to review by the competition authorities, but also by the sector regulator with jurisdiction over the industry.[16] While sector regulators usually assess whether the transaction serves the public interest, competition authorities examine if it does not substantially lessen competition in a given relevant market (United States, 2019[47]).

65. The degree of involvement of the regulators varies according to the institutional and legal framework adopted by each sector or jurisdiction. In some jurisdictions, mergers are subject to review by both the competition authority and the relevant sector regulator. In other countries, the competition authority is responsible for merger control, but it is required to ask for an opinion from the regulator.

66. When both the competition authority and the sector regulator review the transaction, it is especially important that the two authorities co-operate, for instance through consultation. This reduces the risk of conflicting decisions, which is likely to create legal uncertainty, further increase the duration of the proceedings (as another body – e.g., a court – may ultimately need to issue a final decision) and increase costs for market participants.

67. Based on the review of a sample of jurisdictions, it does not appear that the co-ordination process is always spelled out in detail in formal agreements, leaving room for the authorities to shape it and possibly adapt it to the specific cases at hand. To facilitate consultation between the authorities, the timelines of the parallel reviews may be aligned. South Africa offers one example of jurisdiction where sector-specific regulatory authorisation must be obtained besides the approval of the competition authority (Magubane, 2021[50]). The parties are required to submit the necessary information to both agencies, within their respective mandates. For instance, according to the agreement between the Competition Commission of South Africa (CCSA) and the National Energy Regulator of South Africa (NERSA), the authorities assess the transaction independently and “may consult each other as far as competition matters are concerned”, aiming to ensure a consistent outcome (CCSA and NERSA, 2021[51]). A similar approach is followed in the

broadcasting, electronic communications, and postal services sectors (CCSA and ICASA, 2019[52]). In those cases, the competition authority and the sector regulator's timelines for approval run concurrently.

68. Parallel reviews take place in other jurisdictions too. In Namibia consultation between the competition authority and the regulator is mandatory in the communications sector, but not in banking (NaCC and CRAN, 2012[53]; NaCC and Bank of Namibia, 2021[54]). In Korea, among other elements, sector regulators consider whether the transaction is likely to raise competition concerns. Although there is a duplication of reviews, the risk of inconsistency is addressed by the legal requirement that the sector regulator consults the competition authority on whether the transaction will substantially restrict competition before taking a decision (Korea, 2019[27]).[17]

69. Box 6 provides some examples from the banking sector, where sector regulators often play a role in merger control and "in a number of jurisdictions, enforcement of parts of competition policy (such as mergers) is either delegated to prudential regulators, or prudential carve-outs are in place, allowing for behaviour or transactions considered anti-competitive to be cleared on financial stability grounds" (Carletti and Smolenska, 2017, p. 25[16]).

Box 6. Mergers in the banking sector

The competence to approve mergers in the Brazilian financial sector was a matter of intense debate. Some argued that the Brazilian Central Bank was the only competent authority to assess such transactions, while CADE understood that it had concurrent jurisdiction in this matter. The debate was finally settled in 2018, when the authorities signed an MoU stating that both authorities have powers to analyse mergers in the financial sector, which require a double "green light" to be cleared. Although each of the authorities reviews the merger independently following its own procedures, the MoU provides for the sharing of information and studies to ensure convergence. Nevertheless, the MoU establishes that the Central Bank can approve a transaction unilaterally in the case of a potential systemic risk to the financial sector. In such cases, the Central Bank must notify CADE, which shall clear the merger based on the financial regulator's reasoning (OECD, 2019, p. 148[19]).

In the Philippines, the competition authority (PHCC) and the financial regulators (BSP, PDIC, SEC and CDA) signed an agreement in 2021 to streamline the merger, consolidation, and acquisition process among banks. The agreement aims to harmonise the requirements and synchronise the timelines in processing merger applications involving banks. It also eliminated duplicate functions of the relevant authorities, which allowed lowering overall processing time (PCC-BSP-PDIC-SEC-CDA, 2021[55]).

In the United States, mergers in the banking industry are reviewed both by the DoJ and the Federal Reserve and the Federal Deposit Insurance Corporation (FDIC), under different legislation (the Clayton Act by the DoJ, and the Bank Merger Act and the Dodd-Frank Act by the Federal Reserve and FDIC) and with different concerns. While the DoJ focuses on maintaining a level playing field, the banking regulators examines the efficiency and competitiveness of financial firms and potential risks of concentration on stability of the US financial system. They may clear even anti-competitive mergers if the negative effects are "clearly outweighed in the public interest by the probable effect of the transition in meeting the convenience and need of the community to be served". Nevertheless, the DoJ has the power to block a bank merger within 30 days after the banking regulators have approved the transaction. In practice, however, both banking regulators and competition authority have achieved similar outcomes when reviewing mergers (Varney et al., 2019[56]).

70. When the competition authority takes the lead in reviewing mergers, it is often required to request an opinion from the sector regulator. This may help the competition authority to better understand the market and to take into account technical and regulatory considerations provided by the sector regulator. It may be more efficient and provide greater legal certainty to market participants, compared to parallel reviews by two authorities. There are a few examples of this set-up. In France, when assessing a transaction involving an editor or distributor of radio and television services under Phase 2 investigation, the Autorité de la Concurrence shall seek the opinion of the audio-visual and digital communications regulator (Arcom).[18] Likewise, in Italy, the competition authority (AGCM) must request the opinion of the communications regulator (AGCOM) within 30 days when it analyses transactions involving undertakings active in the communications sector.[19] In Croatia, the competition authority is also required to request an opinion from the sector regulator (AEM) when assessing mergers in the electronic communications industry (Haid, 2018[57]).

71. This process works well under the assumption that the competition authority duly considers the views of the sector regulator. In the UK, where the Competition and Markets Authority (CMA) is solely responsible for mergers, despite the concurrent model (see Section 2.) whereby both the competition authority and the sector regulator have competition enforcement powers, sector regulators provide valuable input and assistance. For instance, from April 2021 to March 2022, the CMA reported that it had co-operated with sector regulators on 38 merger cases, in sectors such as aviation, communications, financial services, energy, payment systems, rail, water, and healthcare. Through this joint work, the CMA benefited from the expertise of the sector regulators, which helped the competition authority to understand the markets and to design better remedies (CMA, 2022[36]).

72. Opinions by sector regulators can be binding, depending on the jurisdiction and the sector. Indeed, making opinions binding may be one way to ensure that the points of views of all authorities are properly taken into account. However, this process could be open to risks too, as binding opinions could lead to delays or even go against the objective of preserving competition. A more nuanced approach may be to consider, sector by sector, if there are any specific reasons for the regulator's opinion to be binding. For example in Portugal, where the competition authority (PTA) must request the opinion of the sector regulator before issuing a final decision on mergers in regulated sectors, only negative opinions of the media regulator as regards freedom of speech and the expression of differing opinions are binding (Portugal, 2014[58]). An alternative approach to safeguard the effectiveness of merger control while reflecting the regulators' views could be to respond in writing or in a meeting to the opinion submitted by the regulator.

73. When reviewing mergers, competition authorities can consider whether potential competition concerns are addressed by sectoral regulation. For example, in a merger in the direct-to-home television (DTH) sector in India, the Competition Commission of India (CCI) concluded, after consulting with the telecoms regulator (TRAI), that the potential harm arising from the merger was largely addressed by existing regulations and cleared the transaction (India, 2021[59]). Similarly, in a merger in the energy sector, the Chilean competition authority (FNE) considered that most competition concerns arising from the transaction were addressed by the sectorial regulation. According to FNE, the regulatory framework set most of competitive variables (such as access, prices, and quality of service) and there was effective enforcement of these regulations, which reduced the risk of abuses post-merger. Therefore, the merger was cleared unconditionally (FNE, 2021[60]).

74. In other cases, the competition authority may reach different conclusions with respect to sector regulation. For example, in a merger involving Brazil's largest railroad operator and a logistics company, CADE cleared the transaction subject to behavioural remedies, although the sector regulator (ANTT) approved the transaction without remedies, on the grounds that sectoral regulation was sufficient to deal with potential market foreclosure. According to CADE, absent remedies, there were many incentives for discriminatory practices post-merger, and it would be difficult for the sector regulator to monitor and prosecute these practices (CADE, 2015[61]). While it is not clear whether the competition authority and the

sector regulator worked closely together on the merger, there might always be situations in which findings diverge.

75. Conversely, competition authorities may consider the impact of the merger on the effectiveness of regulation. The UK Competition and Markets Authority (CMA) may be required to assess whether a transaction in the water sector has or is likely to prejudice the Water Services Regulation Authority's (Ofwat) ability to make comparisons between water enterprises (CMA, 2022[36]). This special merger regime applies when two or more water enterprises (each with a turnover that exceeds £10 million) merge with each other. In this case, Ofwat is also required to provide the CMA with an opinion of the impact of the merger in phase 1 of a merger investigation (Ofwat, 2022[62]).

76. Authorities can also work together on remedies to ensure that they duly take into account the regulatory framework and, when both the competition authority and the sector regulator have jurisdiction to review the merger, co-ordinate on remedies as shown in Box 7.

Box 7. Examples of co-ordination on remedies

Traditionally, US competition authorities have been collaborating with sector regulators to avoid inconsistences, in particular conflicting remedies (Varney et al., 2019[56]). The Merger Remedies Manual, for instance, states that the DoJ should co-operate with the regulatory agency when designing a remedy for a merger in a regulated sector, to ensure that their remedies work together efficiently and effectively (Antitrust Division of the U.S. Department of Justice, 2020[63]).

In the T-Mobile/Sprint case, a merger between the third and fourth largest US wireless carriers, the DoJ cleared the transaction subject to a set of structural and behavioural remedies designed to facilitate competitors' entry into the market. The Federal Communications Commission (FCC) imposed additional behavioural remedies aiming to enhance the universalisation of the service (Varney et al., 2019[56]).

However, occasionally the competition authorities and the sector regulator may reach different conclusions for the same merger. This happened, for instance, in the Bell Atlantic/NYNEX and the Comcast and Time Warner/Adelphia cases, in which the DoJ cleared the transactions, while the FCC imposed conditions on their approval (Varney et al., 2019[56]) and (United States, 2019[47]).

In Brazil, in a recent merger involving the largest telecom operators, CADE cleared the transaction subject to a divestiture measure and behavioural remedies. When designing the remedies, CADE considered the conditions previously imposed by the telecom regulator (ANATEL) when it had approved the same transaction (CADE, 2021[64]).

77. Finally, public policy considerations may be factored in merger assessment, and this is the case in many jurisdictions (see Section 2.3). For instance, in the UK the relevant Secretary of State may intervene on certain specified public interest grounds (national security, media plurality, or the stability of the financial system) (United Kingdom, 2016[65]). Under these circumstances, sector regulators play a role in the merger review even though they normally do not have jurisdiction to carry out merger investigations, which rests only with the competition authority (CMA, 2022[36]). For example, the Office of Communications (Ofcom) is required to investigate mergers of newspapers or broadcast media companies should such an investigation be requested by the Secretary of State. In this case, Ofcom implements the media mergers public interest test to take into account plurality considerations (Ofcom, 2004[66]).

4.2. Antitrust

78. The importance of co-operation between different authorities in antitrust cases can be illustrated by a landmark case in the telecommunications sector. Following a monopolisation suit brought by the US Department of Justice (DoJ), with support by the telecommunications regulator (FCC), vertically integrated incumbent AT&T agreed to divest its local operating companies in 1982 to focus on long-distance telephony. The synergies between the competition authority and the sector regulator were crucial for the outcome of the case. In fact, since the 1960s, the sector regulator had started to shift telecommunications regulation from a regulated monopoly model towards a competition-focused approach, and the DoJ had been active in the proceedings brought by the FCC, such as the 1967 decision to allow consumers to use equipment that was not produced by the manufacturer owned by AT&T (Dunne, 2015, pp. 63-64[5]; Posner, 2008[67]).

79. Laws and MoUs usually do not regulate specifically co-operation on antitrust cases, but their general provisions on tools, such as notifications and consultations, can be used in this context too (see Box 8). As mentioned in Section 3.2, informal co-operation complements these more formal co-operation tools.

Box 8. Examples of legal frameworks for co-operation on antitrust

As with mergers, competition authorities and sector regulators often request each other's opinions. In France, the competition authority shall obtain the opinion of the audio-visual and digital communications regulator (Arcom) on investigated anti-competitive practices in the telecommunications sector. The competition authority is also required to inform the sector regulator of any referral in that market.*

In Portugal, sector regulators shall be informed about facts taking place within the regulated sector concerned which are likely to be deemed as prohibited practices. They may issue an opinion on these issues and on the decision envisaged by the competition authority (PTA). Sector regulators shall also inform the competition authority whenever they assess issues concerning a possible breach of competition rules. Moreover, the PTA shall issue an opinion before a final decision is taken by the sector regulator. The PTA may also stay its decision to initiate formal proceedings or stay an on-going proceeding for the period considered necessary, which may ensure a better co-ordination with the sector regulator (Portugal, 2014[58]).

Note: * Article 41-4, of Law No. 86-1067 of 30 September 1986.

80. The interaction between competition law and sector regulation shapes the co-operation between competition authorities and regulators.[20] As mentioned in Section 2, it is important that authorities co-operate and inform each other of behaviour that could go against competition law or sector regulation, to avoid that potentially harmful practices go undetected. This co-operation goes both ways and there are cases in which antitrust enforcement follows or precedes regulatory intervention, as shown by the following examples:

- The intervention by the competition authority can take place after earlier regulatory proceedings, such as in the AT&T break-up case. This could happen when breaching regulatory requirements leads to an abuse of dominance. For example, the Colombian communications regulator (CRC) referred a breach of number portability[21] requirements to the competition authority (SIC), who opened an investigation and sanctioned a telecom firm for abuse of dominant position. SIC found that the company held a dominant position in the relevant market and violated regulatory provisions issued by CRC, which had limited or

prevented third-party access and restricted competition in the mobile services market (Colombia, 2021[68]).

- Conversely, a competition case can open the door to regulation and the competition authority can help influence its design if it works with the relevant authorities. For instance, in Hungary the competition authority (GVH) brought a case on inter-change fees which was quashed by the courts, but co-operation with the sector regulator led to the adoption of a regulatory solution by the Hungarian Parliament (Hungary, 2021[69]).

81. As for the type of cases authorities co-operate on, a few cases in infrastructure sectors such as energy or telecommunications involve abuse of dominance. These sectors were opened to competition but while some services, such as the retail provision of phone calls and internet, attracted entry, other parts of the sectors were not opened at all to competition or did not attract much entry, such as the local network. As a result, the incumbent is often a vertically integrated firm, which controls access to an upstream input that its downstream competitors require. A few cases in the European Union concern precisely the dominant firm's refusal to provide access to this input at terms considered to be fair (Dunne, 2021[11]). Co-ordinated behaviour cases seem less frequent in regulated sectors, and therefore co-operation in this area seems to be less common. One prominent example of co-operation in a collusion case is the bank cartel setting LIBOR (London Interbank Offered Rate) and other rates. In this case, a multitude of competition authorities, anti-fraud agencies and financial market regulators worldwide closely co-operated in investigating the conduct of banks (Huizing, 2015[70]). In the US, the Financial Fraud Enforcement Task Force provided the framework allowing 30 government agencies, including the DOJ, the CFTC (Commodity Futures Trading Commission), the SEC (Securities and Exchange Commission) and the FTC, to co-ordinate investigation and prosecution of several financial misconduct cases (Huizing, 2015[70]).

82. While publicly available information on co-operation is limited, there are many examples of antitrust cases that have overlapped with regulatory decisions. These suggest a few issues that need addressing so that authorities have a clear and predictable framework in which they can co-operate, including the following questions: (i) can the same conduct be investigated both under competition law and sector regulation? (ii) when the institutional framework is unclear, how to limit risks of forum shopping? (iii) can competition law correct regulatory interventions that pursue objectives at odds with competition?

83. First, co-operation is especially crucial if the same facts are assessed by the competition authority and the sector regulator, as highlighted in a recent decision of the European Court of Justice. In Belgium, the postal sector regulator (BIPT) and the competition authority conducted a review of the same conduct, under different legislation. First, BIPT imposed a sanction for infringement of the sectoral regulation. Then, the competition authority concluded that the same firm had committed abuse of a dominant position for the same facts. When setting the fine, the competition authority considered the fine previously imposed by the sector regulator. Under a preliminary ruling procedure, the European Court of Justice stated that a legal person can be fined for an infringement of competition law where, on the same facts, that person has already been subject of a final decision following proceedings relating to a sectoral regulation infringement, as long as the procedures have been carried out in a sufficiently co-ordinated manner within a close timeframe.[22]

84. This approach is not universally agreed though and the legal framework may provide for other ways to clarify the respective roles of competition law and sector regulation. For instance, in Korea, when the telecommunications regulator imposes any measure or surcharge against a firm for infringing sectoral regulation, KFTC is prevented from sanctioning the company for the same conduct under the competition law (Korea, 2019[27]).

85. Related to the point above, when both competition authorities and sector regulators assess the same facts, the agencies may achieve different outcomes. For example, in 2010, the DoJ sued a distributor of electricity for an alleged illegal swap agreement with a financial institution that had given the electricity firm an indirect financial interest in a competitor's electricity sales, incentivising it to raise market prices unilaterally. The sector regulator (FERC) reviewed the same facts under a different legal framework and

concluded that the conduct of the electricity firm did not violate regulatory provisions (United States, 2019[47]). Different outcomes may increase legal uncertainty in the market and differences should be minimised.

86. Second, antitrust complaints and investigations sometimes reveal flaws in the institutional framework that occasionally requires clarification by the courts. Lack of clarity in the mandates of the competition authority and the sector regulator could, for example, be exploited by complainants who may bring complaints to different authorities, when they feel that one of them is not sympathetic to their cause or does not reach the conclusion they hoped for. The lack of clarity makes co-operation between authorities problematic and needs addressing. In certain jurisdictions, when the competition authority's jurisdiction overlaps with that of sector-specific regulators (such as in the telecommunications and financial sectors), the latter are given primary jurisdiction to investigate anti-competitive behaviour. This is the case in India, where sector regulators have the power to decide antitrust cases in the first instance, allowing the competition authority to assess the issues at a later stage, after the facts have been established by the sector regulator (McConnell, 2018[71]; McConnell, 2022[72]).

87. Formal co-operation tools may be introduced to clarify jurisdiction and a consultation system when assessing cases, which can also prevent attempts by firms to bring issues at the intersection between regulation and competition to their preferred forum. In Tunisia, following a parallel investigation of the same case by the Competition Council and the National Telecommunications Authority (INT) in 2012, the authorities signed an MoU to prevent such conflicts going forward. According to the MoU the Competition Council has no jurisdiction to issue judgements on cases related to INT's decisions, while INT has no jurisdiction on appeals submitted to it involving anti-competitive practices. However, INT commits to submit a request to the Competition Council for an opinion on competition matters or file a complaint if it has information about anticompetitive practices in the sector (OECD, 2022[73]).

88. Third, there may be circumstances where the objectives of the regulator and of the competition authority are not aligned, as illustrated by the example of the Deutsche Telekom case in the European Union. In this margin squeeze case, the German telecommunications incumbent was found to have abused its dominant position by squeezing competitors in the retail fixed line market, through high wholesale charges and low retail prices.[23] (Dunne, 2021, p. 304[11]) considers that the decision does not sufficiently take account of the German regulator's policy objective to "maximise access to telephone lines for poor consumers, who were effectively subsidized by higher call costs for heavy users". There is a question of whether competition enforcement is the most suitable solution in these cases and whether co-operation with the regulator may be preferable to make the legal framework more pro-competitive.

4.3. Why does co-operation work in some cases and not others?

89. There is no extensive research dealing with the effectiveness of co-operation between competition authorities and sector regulators. While some information can be gleaned from studies on the institutional framework for competition and regulation, such as (Alexiadis and Da Silva Pereira Neto, 2019[17]), their focus is not on co-operation. There are similar limitations in the field of international regulatory co-operation,[24] which could have offered useful analogies for this background note. (Kauffmann and Malyshev, 2015[74]) report that evidence on what works best in different jurisdictions and sectors in international regulatory co-operation is scarce, and most information is anecdotal, not granular enough or purely qualitative. The (OECD/ICN, 2021[1]) survey on international competition enforcement can provide some leads to consider, since it identifies the limitations and challenges encountered by competition authorities. The main difficulties listed by respondents are limited resources, difficulties in co-ordination, legal limitations in relation to sharing confidential information and investigative assistance, trust and reciprocity, and practical issues such as language and time differences. Some of these elements may not help explain why co-operation works with one authority and not with another in the same country (for

instance, legal limitations are likely to apply to all authorities in a similar way), while other elements such as resources and trust are worth considering.

90. This section reviews a set of complementary reasons that may help explain why co-operation between competition authorities and sector regulators works better in some cases than in others.

91. A mature competition authority supports an effective co-operation. Jurisdictions with young competition authorities usually show lack of co-operation and co-ordination of policy with regulatory bodies. According to a survey conducted in 2019 by the ICN among 27 authorities with less than 15 years of existence or that had undergone significant changes, 63% reported to face challenges related to the enforcement of some policies within the government that hampered the competition policy. The ICN report concluded that this could be due to the recent introduction of competition laws, sometimes without the requisite clauses to address conflicting prior legislation or where competition law and other sector regulation have concurrent jurisdiction (ICN, 2019, pp. 23-24[75]).

92. The maturity of sector regulators can also influence the development of co-operation. Young regulatory agencies may not have procedures in place or the means to ensure co-operation, for instance to be able to preserve the confidentiality of the information shared by the competition authority. This is likely to prevent deeper co-ordination between them.

93. Indeed, establishing a co-operative relationship between a competition authority and a sector regulator is a dynamic process and takes time. A strengthened relationship requires a minimum common understanding of the rules and the market, as well as trust and commitment of civil servants from both agencies – especially in the case of informal co-operation. For instance, the Czech competition authority reported that the co-operation with the energy regulator (ERO) was not smooth at the beginning, but over time both agencies gradually built a shared view on important issues, allowing better solutions for the market (Czech Republic, 2019[39]).

94. The experience of integrated authorities, combining competition and regulatory functions, and of the UK concurrency system can shed light on alternative ways to promote a shared culture through formal and informal co-operation channels (see Box 9).

Box 9. Co-operation in jurisdictions with integrated regulator / competition authority or with concurrency arrangements

Co-operation is also relevant in jurisdictions where the competition authority is not a stand-alone agency in charge of enforcement in all sectors.

In fact, one reason for jurisdictions to implement integrated authorities is to exploit synergies from a holistic approach encompassing the functions of competition and regulation within a single authority (OECD, 2014[12]). For instance, in Spain, although sector regulators, on the one hand, and competition advocacy and enforcement, on the other, remain in different divisions, internal co-ordination allows mutual learning. This co-ordinated approach increases coherence of policy decisions, as well as allowing for operational savings (Spain, 2021[76]).

Co-operation is an important objective of the concurrency system in place in the United Kingdom. A 2010 report from the UK National Audit Office concluded that the lack of co-ordination between competition authorities and sector regulators had reduced the effectiveness of the UK competition regime, which had fewer cases in regulated sectors than its European counterparts. In 2016, a new report from the National Audit Office mentioned that the establishment of the UK Competition Network aimed at enhancing co-operation between the competition authority and regulators. The report recognised that the network improved co-ordination in several ways, including better allocation of competition work around the system and more sharing of expertise and support in enforcement activities, although cases in regulated sectors were still less frequent than in other European countries (National Audit Office, 2016[77]). Fewer competition cases ex post may also be explained by effective ex ante regulation, as well as by the relative "suitability of regulatory remedies to solve regulated markets problems alongside constraints of capacity and expertise faced by regulators", as noted by (Dunne, 2021[11]) based on the findings of a 2019 UK government review (Department of Business, Energy and Industrial Strategy, 2019, pp. 49-50[78]). The CMA has also signed MoU with several sector regulators to promote greater co-operation and co-ordination when dealing with cases for which they have concurrent powers, including as regards case allocation.*

Note: * For example, the MoUs between CMA and the Civil Aviation Authority, the Office of Communications, the Financial Conduct Authority, and the Water Services Regulation Authority.

95. Another challenge that may prevent deeper co-operation concerns agencies' resources. As mentioned above, a parallel can be drawn with international co-operation between competition authorities. The 62 respondents to a survey conducted by the OECD and the ICN in 2019 reported that lack of resources and time was a key challenge and limitation to international enforcement co-operation. The respondents indicated that implementing co-operation is costly, including resource costs, time related costs and the administrative burden of communication and co-ordination. Moreover, some smaller authorities referred to the existence of initial addition resource cost, which may be difficult to address. More mature authorities, in contrast, have invested the necessary resources to establish regular systems to support international co-operation (OECD/ICN, 2021, pp. 63, 136-137[1]). National authorities may face some of the same challenges and limitations, and agencies more equipped are likely to perform better co-operation than those with a lack of resources.

96. The legal framework may play a role. A legal basis establishing the need for co-operation is likely to help competition authorities and sector regulators to enhance their relationship. Likewise, some sector regulators have the promotion of competition among their objectives, which facilitates co-operation. The Czech competition authority, for instance, stated that is has more experience with the telecommunications (CTO) and the energy regulators (ERO) because the respective sectoral legislations provide clear references to the need to ensure competition in those sectors (Czech Republic, 2019[39]).

97. The variation in the relationship between competition authorities and sector regulators can also be explained by the specificities of each sector. Industries are significantly different, in approach, in market structure, in technology, and in the policy framework (i.e., more or less pro-competitive) (Price, 2014[79]). Hence, some markets are more open to competition, which may create more incentives for co-operation. For example, co-operation between competition authorities and sector regulators seems more advanced in the telecommunications and the energy sectors than in other sectors, as those markets were liberalised earlier than others such as railways, also related to the point above about maturity. Hence, the market is usually more open to competition and sector regulators tend to grant greater deference to the role of competition authorities. In the EU, for example, competition law concepts were adopted in the regulatory framework of the telecommunications sector, which facilitates co-operation (Tapia and Mantzari, 2013[80]).

98. In particular about the EU regime, (Tapia and Mantzari, 2013[80]) state that the experience of national regulatory authorities is heterogeneous, in spite of the fact that most agencies have broad duties and extensive powers. In practice, the strategies and behaviours of sector regulators have varied, also because of different level of “politisation” or independence, as well as distinct scope of jurisdiction and degree of discretion.

99. Finally, political considerations may also reduce the scope of co-operation when governments attempt to use sectoral regulation to strengthen a given firm in the market, in particular State-Owned Enterprises (SOEs). For example, Indian competition law only provides for non-mandatory consultation between the competition authority (CCI) and sector regulators, and initiatives to implement a compulsory consultation have failed so far. Some argue that this is due to the fact that the government tends to favour SOEs in order to consolidate them as “national champions” (Singh, 2019[81]).

5. Conclusions

100. Co-operation between competition authorities and sector regulators is an important topic, but it has not been examined in a systematic way in the literature. This background note analyses a small sample of legal frameworks to categorise the co-operation methods they envisage, noting advantages and disadvantages of different provisions. It then drills down on co-operation in merger control and antitrust, describing procedural set-ups and the interplay of competition and regulation in these cases. For some countries it was possible to have full access to the legislation or MoUs, while in other cases these were not publicly available and therefore secondary sources were used, such as country contributions to previous roundtables or publicly available reports.[25]

101. This note finds a variety of provisions that can be grouped mostly around three main methods of co-operation: notification and consultation; information sharing; and working groups. The first two are covered virtually in all legal frameworks reviewed for this note, while there is more variation on whether formal working groups are established, for instance meeting regularly, or whether more informal ad-hoc groups on specific topics are encouraged. Informal co-operation with sector regulators also seems to be important in competition enforcement, based on anecdotal evidence and by analogy with the conclusions of surveys on international enforcement co-operation (OECD/ICN, 2021[1]) and on international co-operation among regulators (OECD, 2015[2]). While the available information does not make it possible to conclude which tools are used more frequently or are considered more important by the authorities, it is likely that "each instrument needs to be adapted to the objectives that co-ordination seeks to achieve", as concluded by the OECD on co-operation between sector regulators (OECD, 2016, p. 45[82]).

102. Co-operation in merger control follows more structured procedures than co-operation on antitrust cases. The former tends to be regulated in the legal framework, which provides for two main models: on the one hand, parallel reviews by both the competition authority and the sector regulator and, on the other, full responsibility for merger control assigned to the competition authority, which however requests an opinion from the regulator on the transaction. Co-operation on antitrust cases is usually not described specifically in the legal framework on co-operation, but rather falls under its general provisions unless it is conducted informally, and is made more complicated by the fact that the same conduct may be scrutinised both under competition law and sector regulation.

103. From the information available, some initial conclusions can be drawn:

- Clarity of roles and mandates as set out in competition law and sector legislation matters. When they are not clear, co-operation can be difficult. Moreover, legal challenges to jurisdiction brought by market players can slow down and even derail cases, whether they are brought by the competition authority or the sector regulator. While competition authorities and sector regulators are not responsible for legislation, they can advocate with policy makers since this can have a clear impact on the quality and effectiveness of their co-operation, as well as on achieving their objectives. Moreover, MoUs can spell out the roles and mandates of competition authorities and sector regulator when the legislation is not clear, since these instruments are shaped by the authorities themselves.

- Competition law and sector legislation should include provisions that make co-operation possible and encourage it. This is already the case in the countries reviewed for this background note. The peer reviews conducted by the OECD Competition Committee and Global Forum on Competition also recommend that competition authorities and sector regulators reach MoUs and improve their co-operation.
- While public officials have a general duty to notify each other of any matter of interest to other public authorities, the legal framework should emphasise this requirement to promote co-operation. Both the competition authority and the sector regulator should be required to notify each other if they become aware of conduct that potentially falls under the other authority's responsibility. This mutual notification would be best formulated as a requirement in legislation or MoUs, as opposed to an option, to ensure that potentially harmful conduct does not go undetected.
- Based on the information reviewed for this paper, requesting opinions from another authority can be an option or a requirement, depending on the jurisdiction and sometimes the sector within a jurisdiction. While imposing a requirement to consult another authority would seem appealing to promote co-operation, this involves broader consideration of factors such as the institutional structure and the broader legislative tradition of a country. Whether or not an authority's opinion is required in proceedings may depend on the primacy of competition law or sector regulation and on the institutional set-up. (Alexiadis and Da Silva Pereira Neto, 2019, p. 22[17]) note that "there is a question 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". A requirement to co-operate may be desirable in some cases: for instance, if the sector regulator has exclusive competition policy powers it may be required to ask for an opinion from the competition authority to ensure consistency of enforcement across sectors.
- Informal co-operation appears to be common and could pave the way for more formal co-operation. At the same time, it has some limitations, as it does not allow for the sharing of confidential data and information. This is supported by one of the findings of the survey on international enforcement co-operation (OECD/ICN, 2021, p. 118[1]): respondents valued formal co-operation "especially where it enabled the exchange of information or the provision of investigative assistance that would not have been permitted without certain formal legal frameworks".

104. In order to draw more definite conclusions on co-operation and to inform better the design and implementation of co-operation mechanisms, more work would be needed on the topic. This could include a survey on the actual practices and the tools that make co-operation more effective, or consultation with the OECD Regulatory Policy Committee, which has recently developed a Recommendation on International Regulatory Co-operation to Tackle Global Challenges (OECD, 2022[3]).

Endnotes

[1] The competition assessment of laws and regulations can help identify regulatory barriers to competition, for instance using the OECD Competition Assessment Toolkit (OECD, 2019[19]).

[2] The cases in which the sector regulator has exclusive responsibility for competition enforcement in a sector, such as the communications regulators in Costa Rica, Mexico and Greece, are increasingly rare.

[3] The concurrency model is also found to some extent in other jurisdictions, such as Singapore, South Africa and India (Alexiadis and Da Silva Pereira Neto, 2019[17]).

[4] The financial, airport and health regulators were granted competition powers at a later stage.

[5] An example could be Ofcom's assessment of closely related facts under competition law and under sector regulation. The incumbent increased its call termination charges on non-geographic numbers and a competitor filed a complaint. The regulator found that the incumbent did not abuse its dominant position (see Ofcom decision dated August 2008, available at www.ofcom.org.uk/__data/assets/pdf_file/0014/80204/nccn_500.pdf) under the Competition Act. Subsequently, the competitors brought a dispute on a narrower set of facts related to the same price increase (see Ofcom decision dated June 2010, available at www.ofcom.org.uk/__data/assets/pdf_file/0029/65693/final_determination.pdf).

[6] Given that this background note is prepared for the Global Forum on Competition, the focus is on competition-related objectives and not on co-operation in the context of other objectives that sector regulators may pursue, such as ensuring affordable access to services to all citizens.

[7] The paper relies on the full text of laws or MoUs in the following jurisdictions: Australia, Belgium, Brazil, Chile, France, India, Ireland, Italy, Kenya, Malta, Mexico, Namibia, Philippines, Portugal, South Africa, Switzerland, Tunisia, UK. The text is also based on laws and MoUs from secondary sources in the following countries: Chinese Taipei, Costa Rica, Croatia, Czech Republic, Egypt, Iceland, Indonesia, Israel, Korea, Morocco, Norway, Peru, Romania, Singapore, Ukraine.

[8] As mentioned in the agreement, the legal basis is provided in the Competition Act No. of 1998 as amended, section 21(1) (h) read with section 82(2), which states that the Competition Commission "has to negotiate agreements with any regulatory authority which, in terms of any public regulation, has jurisdiction in respect of conduct regulated by the Competition Act".

[9] Philippine Competition Act, Sec. 32, available at www.phcc.gov.ph/wp-content/uploads/2019/02/Philippine-Competition-Act-PCA-1.pdf

[10] See endnote 7 for the list of countries.

[11] Protocollo d'intesa AGCM - Banca d'Italia, 2 aprile 2007, available at www.agcm.it/chi-siamo/normativa/dettaglio?id=e8425d1c-67bc-4322-9f74-1dc524879b0d&parent=Protocolli%20di%20intesa&parentUrl=/chi-siamo/normativa/protocolli-di-intesa

[12] Malta Competition and Consumer Affairs Authority Act, Article 27, available at https://legislation.mt/eli/cap/510/20210831/eng.

[13] The healthcare regulator Monitor has observer status, see www.gov.uk/government/groups/uk-competition-network.

[14]See the website of the Competition & Consumer Commission Singapore, www.cccs.gov.sg/approach-cccs/for-government-agencies/community-of-practice (accessed on 5 September 2022).

[15] For instance, the ACCC had staff seconded from ACMA (Australian Communications and Media Authority) for its digital work. The US DoJ seconded staff to the FCC (Federal Communications Commission) and SEC (Securities and Exchange Commission).

[16] In some sectors the competition authorities have exclusive jurisdiction over merger review, while in others the sector regulator has exclusive jurisdiction over mergers (Varney et al., 2019[56]).

[17] Mergers in finance, broadcasting and communications sectors require the approval of both the sector regulator and the Korea Fair Trade Commission (KFTC).

[18] Article 41-4, of Law No. 86-1067 of 30 September 1986.

[19] Article 1, para. 6, lett. c), n. 11, of Law No. 249/1997. If the regulator does not issue the opinion within the 30-day deadline, the competition authority's decision can be adopted anyway.

[20] This interplay is discussed in (OECD, 2021[4]), as well as widely in the literature, e.g. (Dunne, 2021[11]) (Ibanez Colomo, 2016[84]).

[21] Number portability enables telephone users to keep their numbers when changing operators.

[22] Judgment of the Court (Grand Chamber), 22 March 2022, in Case C-117/20 (bpost v. Autorité belge de la concurrence).

[23] Case COMP.37451, Price squeeze local loop Germany, available at https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_37451.

[24] International regulatory co-operation is defined "as any agreement or organisational arrangement, formal or informal, between countries (at the bilateral, regional or multilateral level) to promote some form of co-operation in the design, monitoring, enforcement, or ex post management of regulation" (OECD, 2013, p. 153[23]).

[25] See endnote 7 for the list of countries.

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