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More documentation related to this discussion can be found at
<http://www.oecd.org/daf/competition/independent-sector-regulators.htm>.

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Independent Sector Regulators and their Relationship with Competition Authorities

Background note*

Independent sector regulators and competition authorities share many objectives and common interests, particularly because they both can play key roles in promoting effective and beneficial competition. In this note, the criteria and rationale for the independence of sector regulators and competition authorities are explained, along with a suggestion that independence may sometimes be especially critical for institutions with broad economic oversight and quasi-judicial responsibilities or, alternately, for institutions most subject to influence of special interests. The note suggests that sector regulators may benefit, in times of high technological change and uncertainty, from principle-based laws that allow regulators the flexibility to adjust their precise rules in light of evolving circumstances. Moreover, the note suggests that in some respects, the sectors subject to independent regulation may usefully include other sectors beyond those most traditionally associated with independent regulation. Ultimately, ensuring consistency and convergence between sector regulator and competition authority objectives and actions is important; ironically, independence can make ensuring such consistency through direct co-operation a challenge. Based on international experience, multiple mechanisms exist for achieving or encouraging such consistency; some combination of these merits consideration by designers of competition policy regimes.

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1. Introduction

1. This note explores the roles of independent sector regulators and their relationship with competition authorities. The sector regulators under consideration are both those that currently exist as well as possible new ones that might be created in the future. Independent regulators are those that operate autonomously subject to the control of judicial appeals and with limited influence from political forces or private entities; they contrast with ministerial regulators, that may run sector regulation within a government ministry and be subject to political oversight, and self-regulators that may administer regulation by private parties. While prior OECD work has focused substantially on independent sector regulators, and promoting independence of regulators as best practice (to the extent sector regulation is needed), the *relationship* between competition authorities¹ and these independent regulators has been a lesser focus of attention.²

2. There are at least three values to this focus:

- The first is that, where market failures exist, sector regulators often play a key role in promoting market-style outcomes or restricting the exercise of market power.³ For example, one role of regulators has been in establishing price regulation for enterprises⁴ with natural monopoly characteristics to ensure that regulated natural monopolies cannot exercise undue market power. Policymakers, while usually extending antitrust control to the whole economy with no exceptions, have made choices that some sectors will be subject to *ex ante*, expert sector regulation.⁵
- The second is that many sectors are subject to self-regulation that can, at times, have anti-competitive consequences and in which there is no independent regulator; in these occasions, competition authorities may consider whether competition law enforcement is sufficient or, as a sometimes preferred alternative⁶, advocate for creation of independent regulators which would reduce the conflict of interest inherent in self-regulation, implement price regulation or ensure competitively neutral access is provided to certain monopoly goods.
- The third is that regulators and competition law enforcers can influence the work of each other; as a result, it is worth cataloguing mechanisms to enhance and improve co-operation between independent sector regulators and competition authorities. Such co-operation can be useful to both but may not be easy to arrange absent a clear mutual understanding of what its real purpose should be.

3. Largely for these three reasons, even when the sector regulator has no jurisdiction over competition law, and the competition authority has no input into regulatory decisions, the independent sector regulator and competition authority share a plethora of mutual interests.

4. Independence of regulators and competition authorities has been a key topic in regulatory governance and has been a subject of work at the OECD in recent years, for example with *Being an Independent Regulator* (2016), as well as with recent Product Market Regulation indicators that include indicators on the quality of governance of sector regulators (<http://oe.cd/pmr>) and the *OECD Best Practice Principles on Governance of Regulators* (2012) and “Independence Of Competition Authorities - From Designs To Practices”⁷. In addition, the OECD held two roundtables on *Changes in Institutional Design of Competition Authorities*, one in 2014 and one in 2015, to learn more about experience with changes in design of competition authorities, along with the pros and cons of the

different designs, with one design including integration of regulators with competition authorities.

5. In this note, by “Regulator”, we refer to a sector-focused regulatory authority that could include classic regulatory authorities, such as those for telecommunications, transport, energy, water, financial services, as well as those for other sectors which may less traditionally feature independent regulators. Examples of the latter might include taxis, certain aspects of banking (e.g., payment and fund transfer rules, mortgage insurance coordination), educational institutions, healthcare providers, ports, local services like waste collection, the grocery sector, the professions and, more recently in light of developments in some countries like France, Netherlands and the UK, digital platforms⁸. Sector regulation is macro-economically important because of the large volume of economic activity in regulated sectors^{9,10}, the potentially large impact of exercising market power in these sectors due to the inelastic demand for goods like electricity, water and telecommunications (which enhances the potential mark-ups over competitive prices from exercise of market power) and the importance of these products as inputs that are crucial to production across the economy.

6. These sector regulators are distinct from “horizontal” regulators, which are not the focus of this note, and which would include consumer protection agencies, data protection agencies, securities regulators and, in many respects, competition law enforcers. For the purpose of this note, we do not regard a pure competition law-focused (or competition/consumer protection law-focused) competition authority as a regulator, unless other responsibilities are attributed to the authority that establish specific regulatory responsibilities in particular sectors.¹¹

7. This paper is structured as follows:

- Section 2 considers the common features of independent regulators, including core criteria necessitating independence, and levels of political involvement.
- Section 3 discusses how to ensure continued relevance of independent sector regulation in an era of rapid change and uncertainty about future technical developments.
- Section 4 considers whether, to the extent that market failures are addressed by non-independent regulators (such as self-regulation), greater degrees of independence in regulation may at times be desirable and worth advocating by competition authorities.
- Section 5 focuses on ways to enable linkages between independent regulators and competition authorities that help to maximise conditions of beneficial competition when there are market failures or competition law violations.
- Section 6 concludes.

8. Based on the analysis, the note suggests:

- Independence of decision-making is a key governance feature for both sectoral regulators and horizontal authorities, hinging crucially on budgetary predictability, appointment and dismissal standards for leaders. It is strongly related to mechanisms for accountability, while admitting general political guidance without allowing specific political directives on individual decisions. The particular needs of competition authorities as economy-wide quasi-judicial entities may arguably merit greater independence for them than for sector regulators, accompanied by

greater needs for accountability and enhanced internal processes. In these respects, it is worth noting that, to some degree, competition authority decision-making is entirely based on the law and its interpretation, while regulatory decision making is much more discretionary and flexible in some respects, being based on loose general principles of implementing law (such as how to calculate access costs or the appropriate level of capital investment). It is also worth noting that arguments, particularly related to reducing potential influence of special interests, could mitigate for more independence for sector regulators.

- The primary legislation enforced by competition authorities is often much more general than that of sector regulators, perhaps as a result of the *ex post* nature of most competition law enforcement as well as the horizontal nature of competition law. Independent sector regulators can usefully be given sufficient legal flexibility to quickly adapt their regulations without new primary legislation. In a time of rapid technical and business model change, *ex ante* regulation should be designed so that it can adapt appropriately in light of uncertainty, new technology and new business models.
- For many sectors, market failures are addressed through self-regulation rather than independent public oversight. The focus on understanding independence is crucial for considering whether self-regulated activities, government regulated activities and major unregulated market failures may, at times, merit independent regulation to avoid excessive risk of market failures or private restrictions on competition that may escape competition law¹². Competition law might not apply due to an explicit exemption, as when there is a legislative mandate behind self-regulation, or implicit, via discretion that competition law enforcers might give to the efficiency benefits of self-regulation. Efficiencies could arise when industry has the best information to elaborate certain regulations, as may be the case, for example, with medical qualifications and teaching standards.
- In order to ensure consistency and co-operation, institutional setup/design and a variety of instruments can be used, ranging from concurrent jurisdiction to MOUs and information sharing. This note briefly describes examples of the primary cooperation institutions and mechanisms in current use. Designers of competition law enforcement and competition authorities can usefully assemble a mixture of mechanisms that will fit their domestic situation.

2. Status and principles of independent sector regulators

9. Regulation has a key role of mitigating market failures, including monopoly power achieved through state support or natural monopolies (in which competition raises total costs of production). If market power as a consequence of natural monopoly is one of the reasons for regulation, regulators can perform activities such as overseeing pricing for the benefit both of consumers and of competitors being provided with access, determining acceptable returns on investment, establishing appropriate standards for a product and ensuring that social objectives are met. While some regulations may be established privately, via self-regulation, many regulations are established by government or their public agent, regulators.

2.1. Role of regulation and competition law

10. Regulation can serve as a substitute to competition law in many markets, with regulators have advantages over competition authorities in several respects:

- First, regulators have greater and more focused technical expertise in their given sector;
- Second, they typically have the ability to establish general *ex ante* standards that provide greater business certainty than competition law, potentially incentivising investment;
- Third, they typically can act to reach and implement decisions on a faster timeline than competition authorities;
- Fourth, depending on their remit and powers, regulators can address a broader array of topics than competition authorities; and
- Fifth, they may be better adapted to develop and administer price regulation and other standardisation schemes.

11. On the other hand, regulators are often considered more likely to have conflicts of interests and to be subject to capture.

12. Many regulators have a legislative role to encourage competition (e.g., by providing for access to monopoly infrastructure) and to prevent use of market power by monopolies in their sector, holding responsibilities such as price regulation, rate of return regulation, cost-plus regulation or other types of regulation to influence pricing and investment. To the extent that preventing use of market power is a goal of independent regulators, their operation can be highly complementary to the work of competition authorities. In regulated sectors, the sector regulator has sometimes been considered 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 (see Box 1). To the extent that this characterisation is correct, it suggests that failures in *ex ante* regulation could result in needs for *ex post* action.¹³

Box 1. *Ex ante* and *ex post* regulation in EU telecommunications markets

The European Union regulation of telecommunications markets provides an interesting case study in explicitly distinguishing the roles for *ex ante* regulation and *ex post* intervention by competition law. The 2014 Explanatory Note discusses how the Commission defined the markets by taking into account competition law principles, and describes the application of a three criteria test.

The note observes that “*the Framework Directive is based on the premise that there is a need for ex ante obligations in certain circumstances in order to ensure the development of a competitive market (see e.g. recital 25). Regulation must be targeted and balanced in a way that addresses the true obstacles to effective competition in the sector: an excessive regulatory burden on operators would stifle investment and innovation, whereas too little regulation and a failure to apply it where it is needed would reverse the achievements of the past decade of liberalisation, consumer choice and competitive dynamics in the sector.*”

The three criteria test is:

1. The presence of high and non-transitory structural, legal or regulatory barriers to entry;
2. The market structure does not tend towards effective competition within the relevant time horizon, having regard to the state of infrastructure-based and other competition behind the barriers to entry; and
3. Competition law alone is insufficient to adequately address the identified market failure(s)

The third criterion is of particular interest, with the Explanatory Note stating: “*Only markets where national and EU competition law is not considered sufficient by itself to redress market failures and to ensure effective and sustainable competition over a foreseeable time horizon, should be identified for potential ex ante regulation. Ex ante regulation would for example be considered to constitute an appropriate complement to competition law in circumstances where the regulatory obligation necessary to remedy a market failure could not be imposed under competition law (e.g. access obligations under certain circumstances or specific cost accounting requirements), where the compliance requirements of an intervention to redress a market failure are extensive and must be maintained over time (e.g. the need for detailed accounting for regulatory purposes, assessment of costs, monitoring of terms and conditions including technical parameters and so on) or where frequent and/or timely intervention is indispensable, or where creating legal certainty is of paramount concern (e.g. multi-period price control obligations). However, differences between the application of competition law and ex ante regulation in terms of resources required to remedy a market failure should not in themselves be relevant.*”

Under these three criteria, the 2014 recommendation identifies four markets for ex ante regulation, down from 7 in 2007 and 18 in 2003. The technical and market features of telecommunications helped to make the determination of ex ante markets for review dynamic and subject to change over time. The four markets recommended in 2014 are:

- Market 1: Wholesale call termination on individual public telephone networks provided at a fixed location;
- Market 2: Wholesale voice call termination on individual mobile networks;
- Market 3: a) Wholesale local access provided at a fixed location; and b) Wholesale central access provided at a fixed location for mass-market products; and
- Market 4: Wholesale high-quality access provided at a fixed location.

See European Commission (2014) Explanatory Note accompanying the Commission Recommendation on relevant product and service markets within the electronic communications sector, SWD(2014) 298, 9.10.2014.

13. As a result, governments often create bodies that apply and enforce both regulation and competition law to achieve ex ante control of sectors with market failures and to ensure that blatantly anti-competitive behaviours are prevented. Such bodies can lie either inside a ministry or outside. When they have functionally autonomous decision-making powers, they may be characterised as independent while noting that de jure independence is not always accompanied by de facto independence. The set of factors that affect this independence may include:

- Budget determination;

- Standards for appointment;
- Conditions for dismissal of senior decision-makers; and
- Accountability and reporting on actions.¹⁴

14. These factors affect autonomy in different ways. Budget determination can affect autonomy of decision making because dissatisfied governments that have not been able to affect a decision may seek to lower the body's budget.¹⁵ Allowing bodies to determine their own budget, without external oversight, would likely not be appropriate either, as such budget autonomy would imply a lack of accountability for the body's actions. The appointment and dismissal of senior decision makers, such as heads of agency and commissioners, can be particular routes by which autonomy can be compromised. The ways in which a body can be held accountable and reports on its actions can also be routes to ensure that independence is maintained, and decisions properly explained.¹⁶

2.2. Why does independence matter?

15. The independence of regulators and competition authorities can help to (1) address the time inconsistency problem of government, in which it may commit to one approach prior to investment or entry and change approach post-investment or post-entry (particularly after a change in political control)¹⁷, (2) ensure consistency in application of rules (particularly when government has state ownership of one or more actors in the sector)¹⁸, (3) ensure that no party has excessive weight in decisions, in particular those with market power¹⁹. Independence can create professionalism and expertise in the staff when the regulator's budget is sufficient to perform its work and assured in a way that limits the threat of reducing budget in light of its decisions.

16. The reasons for independence differ for sector regulators and competition authorities. For sector regulators, these reasons include:

- The need to re-assure investors that, after making investments, a future changed government would not be inclined to expropriate the returns from those assets in ways that were electorally popular, such as requiring prices that would not permit a return on investment or through preferential treatment of SOEs. The creation of independent regulators can help to solve this time consistency problem. Ultimately, creating independent regulators would be expected to allow both greater income for the state (e.g., from concessions or privatisation), given the higher likelihood of an adequate return when independent regulators are created, and greater investment, to the extent that future investment levels depend on the expected return from investment, which can be affected by the expectation of a competitively neutral environment. This reason helps explain in some countries why independent regulators are particularly present in infrastructure sectors such as airports, electricity, gas, private roads, railways, telecommunications and water, especially after privatisation.
- Valuing the creation of stable, predictable, technical regulation that may be better for economic performance and stability in the affected sectors.

17. In some respects, the risk of special interest influence may be particularly great for sector regulators compared to competition law oversight, suggesting that if this risk is predominant, sector regulators may merit greater levels of independence than competition authorities.

18. For competition authorities, the reasons for rationales for independence include²⁰:
- The need to act impartially and based on objective evidence, in order to be treated as a credible enforcer by the business community *as a whole*, requiring high confidence by business in the competition authority impartiality.
 - The need to deal with companies *in all or almost all commercial industries*, which may at times include SOEs and can affect *many* politically sensitive sectors, not just one.
 - The *economy-wide impacts of precedent* from one case (that can be contrasted with sector-wide impact of precedent for sector regulators)²¹
 - The nature of competition authorities as quasi-judicial bodies, with certain powers and procedures resembling those of a court of law or a judge. Even though decisions by competition authorities are appealable in court, the timing the appeal may be quite long so that a highly politicised authority would be scarcely disciplined by the system of appeals. This point is even more important to that extent that appeals are not common in some types of cases, such as merger decisions. The size of fines by competition authorities, the wide breadth of information that they can demand and the possibility of criminal prosecutions that can follow from their actions are particular signatures of their different role compared to standard sector regulators.
19. The reasons justifying the need for competition authority independence, varying from the breadth of impact to the quasi-judicial nature of their activity, may suggest that competition authorities require higher degrees of independence than sector regulators. In this vein, Vickers has suggested that competition authorities merit more independence than central banks, due to the diffuse private impacts of central bank decision monetary decision making and the concentrated private impact of competition authority decision making.²² Similarly, greater independence has been seen as one of the most important factors needed to attain the objectives of competition law and policy. In a 2003 survey by KPMG, this need was identified as the most important factors for competition authority by both companies and by competition authority officials.²³
20. Greater independence could be associated with stricter accountability mechanisms. These may include transparent reporting on impact and decision making, and the need to justify actions not only by reasoned decision but also to parliament, the executive or through appeal of decision to the judiciary. One intuitive finding from the 2018 OECD indicators on the governance of sector regulators is that greater autonomy or independence of a regulator is typically accompanied by higher levels of accountability structures to government, parliament, industry and the population as a whole.²⁴ This association may be a natural technique to restrain the powers given to unelected officials in a democracy.
21. A more subtle impact from the quasi-judicial nature of competition authorities, and related greater levels of independence in competition authorities, may include not only external accountability, such as through specialised judicial review, but internal institutional design. Procedural safeguards via due process built into the procedures of the competition law enforcers and the appeals body may in some respects be more extensive for competition law cases than regulatory cases, potentially explaining part of the long length of competition law cases compared to many regulatory matters.²⁵ In short, greater levels of independence can lead to a variety of internal differences with regulators, in addition to potentially stronger requirements for external accountability.²⁶

22. The effects of independence on reducing political intervention may be significant. Recent OECD work described in Annex 1 finds that when regulators are positioned within ministries as opposed to in outside administrative structures, more than 50% have received political directions with respect to individual cases, matters and regulatory decisions²⁷. While many do not report receiving such directions, the higher frequency with which such direction occurs suggests that the creation of separate, independent regulators does have beneficial impacts.

3. Moving towards principle-based regulation

23. One weakness with the existing regulatory system in many sectors is that highly detailed rules governing regulatory actions is quite detailed and difficult to change. When technical progress is slow, this difficulty of changing regulation can be an advantage. In contrast, when technical progress and business forms are rapidly changing, as may be the case in many sectors at this time, the density and specificity of regulation can hold back innovation, investment and technical progress.

24. At a time of technological changes that challenge existing economic relationships, the way that regulatory rules can be changed has particularly significant impacts. When regulation is controlled by ministries, there are substantial risks that legal lobbying by incumbent industry players will outweigh the potentially diffuse benefits of technological progress, pushing for regulatory protection of the existing industry structure. Such protection can take various forms, like non-neutral technical preferences²⁸, standards²⁹, refusals to issue licenses³⁰ or simple banning of alternatives³¹. Governments need to address the risk of regulations becoming out of date and slowing down inevitable changes and market adaptation.³² In contrast, when regulatory details are under the control of independent regulators, the modernisation and changing of regulation may be easier.

25. To facilitate regulatory modernisation and flexibility, independent regulators can be given a general set of responsibilities under primary legislation, which they can implement through a principle-based approach that may involve easily changed secondary legislation (issued by the regulator) or guidance. Centralised and principle-based regulation can be particularly important to ensure that regulation can adapt to market developments. For example, many taxi regulations were developed and legislated prior to the development of smart phone applications. As a result, the regulation of the taxi industry remains outdated in many jurisdictions. If independent regulators themselves can update the application of general principles to reflect new technology themselves, the regulatory environment might adapt more easily to new technology. The benefits of a principles-based approach to primary legislation can be seen in the way that competition law can be relatively easily adapted in light of technical developments.³³

26. There is no direct measurement of the extent of principle-based regulation. However, the absence of guidelines and standard setting responsibilities in some regulators may be an indicator that regulators do not operate with what we are describing in this paper as principle-based regulation. The OECD database on independent regulators shows that many regulators do not issue guidelines nor set consumer or industry standards, as shown in Figure 1.

Figure 1. Which activities do regulators engage in?



Source: Casullo et al (2019) from OECD 2018 Database on Governance of Sector Regulators

27. In light of this indication of the likely absence of principle-based regulation in many countries, and in an era of increasing uncertainty about future market structure and technology, there is a particularly strong case to be made for encouraging principle-based primary legislation. This can give broad discretion to independent regulators to adapt their *ex ante* regulations in ways that will be appropriate for new sector conditions. It can also reduce the risk that existing regulations serve as Luddite regulatory dikes, holding back the waters of innovation and standing in the way of more efficient new options that may or may not require regulation.

4. Should more independent sector regulators be created?

28. The question of when independent regulators should be created is increasingly crucial, as there appear to be many markets in which key governing conditions for an economic activity either have no oversight, have informal government oversight or are determined by the suppliers. Many of these markets may not have the economic features of natural monopolies common to the large infrastructure industries. Yet the existing governance mechanisms may, at times, create risks of market power.

29. Expansion of regulation is, however, a delicate balancing act. Market systems operate fundamentally by leaving supply choices to suppliers and purchase choices to consumers. The possibility of modest improvements in operation of a sector is not alone a justification for increased government intervention. Absent a compelling justification for government intervention, expansions of regulatory mandates should be weighed with great care, due to their intervention in normal market processes, and potential investment- and innovation-stymieing effects of the expansion of government intervention and mandates.

30. Having said this, many sectors are not subject to public economic regulation but would merit consideration for oversight due to the presence of market failures. At times, such oversight is simply not present. In other instances, this may arise from policy rules issued by ministries that can change from one day to another, or by purchasing decisions of government as a buyer. In other instances, this oversight is provided by government through legal endorsement of self-regulatory governance. Self-regulation involves oversight by the sector actors themselves. Such oversight is neither independent nor does it involve effective government oversight. It is worth emphasising that in these three cases (of no regulation where there are market failures, informal government oversight or self-

regulation) further consideration of whether to increase public input and independence can be of value.

31. Examples of sectors with markets that might benefit from independent regulation include, in some countries, taxis, certain banking activities, educational institutions, healthcare institutions, ports and professions. This list is illustrative and not intended as a complete list.³⁴

32. Before focusing on whether such sectors merit independent regulation, we will explain the rationales for self-regulation of sectors.

4.1. Rationales for self-regulation compared to public regulation

33. For those sectors for which the need for regulation is recognised, and for which public regulation does not exist, rationales for self-regulation include that regulation run by industry can be better targeted, less costly and ensure presence of the subject-matter expertise needed for oversight. While self-regulation can pose substantial risks to competition, the rationale for establishing self-regulatory systems is that they could result in better quality or better cost-benefit than public regulation. At times the benefits of self-regulation can exceed the costs of alternatives, so we do not suggest the elimination of self-regulation; rather we suggest that where there is a need for regulation that includes a market power element, independent regulators may be preferable to self regulation. We will discuss this approach by first identifying some of the benefits of self-regulation, and then focusing on some of the benefits, notably for competition, of moving from self-regulation to independent regulation.

34. The benefits for self-regulation can include:

- *Better targeted.* The boundaries of regulation overseen by the state may over time grow and increase in breadth above that which initially justified regulation. In contrast, when the regulation is self-provided, there will be times in which the regulation remains better focused on what the industry actors deem to be the essential features of the regulation. Standard setting activities are very often run by those who will apply the standard and can target the standards on the exact product needs, safety risks and interoperability needs.
- *Low costs.* The costs of government-run regulation include both direct and indirect costs. Direct costs would include the costs, to the government, of running a regulatory body. They would also include the costs, to those regulated, of complying with government standards that would not have been implemented via self-regulation, whether through excess paperwork or changed processes that are needed to meet an external regulator's objective. Indirect costs of government regulation could include slower technological diffusion, though at times the self-regulated may also seek to establish barriers to technological diffusion, as may be the case with taxis and ride-hailing applications or doctors seeking to stop digital consultations.³⁵
- *Subject matter expertise.* It is clear that in many highly specialised functions, which in some cases involve also the rapid evolution of technology, government may not be sufficiently expert to determine the appropriate training and medical procedures. Moreover, in order to ensure those closest to an activity are the ones who determine standards for their activity, governments may wish not to lead regulation. For example, a government-led regulator of medical specialties would need to

determine, for each medical specialty, the precise criteria that may need to be satisfied in order to practice on patients.³⁶ Many patients, moreover, may prefer that the professionals determine who would serve as a specialist, rather than the government. As a result, the government has often devolved to medical professions that ability to determine when a student may take on the activities of unsupervised practitioner.

35. Having described the benefits of self-regulation, it is also worth considering the possible downsides, notably the possibility that self-regulation may both create market power and the mechanism to exercise that power.

4.2. Possibility of exercise of market power

36. While self-regulation may deliver societal benefits, many concerns that have, in part, motivated the creation of independent regulators in infrastructure sectors also apply in self-regulated sectors. Yet recent literature on independence of regulators places relatively little emphasis on the consideration of whether self-regulated systems can at times benefit from transitioning to independent and publicly regulated systems, or hybrid arrangements that involve active public oversight. The operators in such sectors may have incentives to create and maintain entry barriers and implicitly, or at times explicitly, create geographic barriers to entry and raise prices to consumers of their service. Such impacts cannot easily be limited under self-regulation, particularly because such limits would run contrary to the financial interests of many members.³⁷ Even ignoring the incentive of self-regulators to limit competition, they may simply not think in terms of market power and thus would leave market power problems unaddressed. As a result, public policy to address the possible market failures of self-regulation can suggest consideration of transforming self-regulation into independent regulation to ensure market power is duly addressed. This would require weighing the costs of benefits of such a transformation and might often apply only to one part of the activity that is under self regulation.

37. Examples of sectors that are in large part self-regulated include:

- Ports may oversee various necessary services for shippers, such as waste processing, pilot services, dock availability, and transport connections, all of which are necessary functions for an operational port, but which may, at times, provide opportunities for exercise of market power.
- Educational institutions may decide jointly which entities can be certified to offer specific degrees and may seek to limit the ways in which support are provided to students.
- Banks, while highly regulated in many of their activities related to stability and consumer protection, may self-regulate various aspects of their activities. For example, they may oversee the transfer of funds (and keep funds overnight during the process of a transfer), they may oversee conditions of mortgage lending (for example, through private companies that are owned by banks) or decide the pricing of alternative payment systems.
- Professions have used self-regulation to create and implement ethical codes, training rules and qualification rules. Their actions have been replete with many examples of restricting competition, including medical, dental. In addition to price setting and explicit restrictions on competition, competition restrictions have come from requirements over what constitutes a product covered by the profession,

decisions over how to train new professionals (including how many), and decisions over sub-professions that may be under the oversight of the self-regulating profession.

38. The topic of self-regulating activities, their benefits and their potential risks to competition, has been discussed at length under the many sector-specific roundtables. (See Annex 2.) This topic may merit additional focus in future studies on independent regulation, following results from Kleiner and Soltas (2019) that suggest total welfare losses of 12% from licensing an occupation³⁸.

39. One approach to dealing with competition problems that arise from self-regulation is to apply competition law to such sectors. However, there can be challenges to doing so. These include:

- The difficulty of identifying violations;³⁹
- The natural monopoly features of some self-regulated industries, such as ports in many countries, that can prevent development of competitive alternatives and require price and access oversight to facilities;
- The presence on occasion of antitrust exemption or of state-legislated endorsement of their activities that open self-regulation to the defence that it has been authorised by the state⁴⁰;
- The difficulty of prosecuting trade associations or professional associations, that can simply dissolve and be restructured as a new entity to avoid financial penalties; and
- The likelihood that many restrictions on competition in these sectors originate from inaction rather than action and are consequently difficult to address by competition law.

40. To the extent that competition law enforcement is not perceived as the ideal tool to address policy challenges arising from self-regulation, greater consideration of creation of public and independent regulators merits consideration, subject to an appropriate cost-benefit analysis.

41. According to OECD (2007), liberal professions have argued they should receive more lenient antitrust treatment than that which is generally applied because “(1) *the asymmetry of information between professionals and their clients; (2) considerations related to the quality of care, health and public service in connection with the delivery of professional services, which may have an impact not only on the direct purchaser of the service but also on third parties*58; and (3) *the public service aspect of professions which, in some cases, are considered to offer public goods that are valuable for the society as a whole.*”⁴¹ To some extent, courts have supported such claims.⁴²

4.3. Potential for advocacy by competition authorities

42. To the extent that unregulated or self-regulated sectors merit increased government oversight or changed governance mechanisms, competition authorities are particularly well placed to advocate for change. The value of competition authorities in this regard comes from the breadth of economic activities covered by competition law and the expertise of competition authorities in identifying market failures.

43. One role of many competition authorities is to prepare market studies. According to the OECD, “Market studies assess whether competition in a market is working efficiently and identify measures to address any issues that are identified. These measures can include recommendations such as proposals for regulatory reform or improving information dissemination amongst consumers. They can also include the opening of antitrust investigations.”⁴³

44. Examples of ways in which competition authorities have advocated for introducing more independent regulation (and, to the extent self-regulation exists, moving away from self-regulation) are described in Box 2.

45. The examples in this box suggest two points. One is that the actual changes to self-regulation can be slow and competition authorities do not always succeed in their advocacy. The advocacy is more likely to succeed when competition authorities develop a specific factual basis for assessing the exercise of market power. Another is that advocacy seems more present, at least in these examples, in sectors with self-regulation than in sectors with no regulation at all, suggesting that self-regulated areas of activity may be particularly fruitful for considering whether an increase in the independence of regulation is desirable.

Box 2. Examples of competition authority advocacy for creation of independent regulator

Education regulator in UK. In 2015, the UK’s CMA released a report “An effective regulatory framework for higher education: A policy paper”. This report found that there were “*gaps and discrepancies in regulatory oversight*” making it difficult for students to select their preferred institutions with full information, that regulations were different for different types of institutions, meaning that higher education institutions were not competing equally, and that students were insufficiently protected in case of exit, suggesting that a system needed to be put in place both to ensure exit could happen while at the same time protecting student interests. This CMA report was followed in 2017 by the passage of the Higher Education and Research Act and subsequently by the creation, on 1 January 2018, of the Office for Students, a higher education regulator with responsibility to promote choice and consider student, employer and taxpayer interests in its regulatory actions. While helping to create a market for schools, the government is not providing a regulator of that market, unless the department of education and more local funding providers are in some respects seen as serving that function. In some respects, this illustrates a contrast between improving market competition via buying functions in contrast to regulation.

Dentistry in Ireland. After examining the dentistry profession in Ireland and the ways that dentistry services had to be provided, the Irish competition authority issued a report that advocated, among other things, for a different structure of the governing body of the Dental Council which, until the time of the report, was in majority controlled by dentists. In response to calls for reviewing the extent of self-regulation in the dental sector, the makeup of the Dental Council was revised. At the time of writing, the dentistry council includes 7 elected dentists, 5 government officials, and 7 members nominated either by the Medical Council, Royal College of Surgeons Ireland and from Trinity College and University College Cork.

Ports in Romania. During an OECD competition assessment in Romania that included freight transport, evidence was found that various port services, such as piloting, were substantially more expensive in Constanza port, the main port of Romania, compared to

other ports in more competitive parts of Europe. In addition, the Romanian competition authority performed a market study of the port sector in Romania. As a result of these findings from the competition assessment and from the market study, the assessment suggested that it would be valuable to create regulatory oversight of various port activities. These responsibilities for port oversight were ultimately given to the Romanian competition authority as of 2016.

Legal sector in UK. In 2016, the UK's Competition and Markets Authority released a market study of UK legal services.¹ This study emphasised the value of independence of legal sector regulators. It found:

“Our main concern is that the current, title-based model [i.e., barrister and solicitor] is insufficiently flexible to apply proportionate, risk-based regulation which reflects differences across legal services areas and over time. We therefore propose that the government launches a review of the regulatory framework with the aim of making the regulatory regime more flexible and risk-based in the long term. We also consider that regulators should be independent from government and representative bodies. The number of regulators should be a consequence of the regulatory structure; moving from a model that is primarily title-based to a risk-based model is likely to lead to a reduction in the number of regulators.”

The government responded in December 2017 to the market study by recognising the legitimacy of many of the concerns raised in the market study and emphasising that existing investigations and incremental reforms were underway and suggested, until the outcome of these was known, not to launch a broad government review at the time of writing the response.²

Notaries in Chile. On 2 August 2018, the National Economic Prosecutors Office (FNE) of Chile published a study of the notary market, its regulation and its outcomes. The report found that the “regulatory framework requires a structural modification so that this market can operate properly.”³ The FNE found that annual savings from structural reform could amount to USD 149 million. In September 2018, the Chilean president signed a bill that aimed to reduce paperwork for which notarial services were necessary and changed the systems of designating notaries.⁴

Notes:

¹ See <https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>. This study was not the first venture of the competition authority into legal services, with previous studies having focused on solicitors, for example, in 2010. This 2010 study was carried out under the OFT's general function of obtaining information and conducting research under Section 5 of the Enterprise Act 2002.

² See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/669507/Govt-Response-to-CMA-study.pdf.

³ See <https://www.fne.gob.cl/en/notaries-market-study-press-release/>.

⁴ See <https://www.competitionpolicyinternational.com/chile-presents-government-bill-reform-project/>.

5. Routes for ensuring consistency of competition and sector regulator approaches

46. When independent sector regulators are operational, there is a need for consistency across public bodies in how they act. This section of the paper considers pathways for ensuring consistency between competition policy-related approaches of competition

authorities and regulators. The focus of this section is exclusively on competition impacts, not other areas of potential coordination with sector regulators.

5.1. Rationale for consistency

47. The benefits of consistency in approach on competition policy between sector regulators and competition authorities are evident, to the extent that both may have an institutional interest to maintain competitive forces. On the one hand, competition authorities do not have many of the powers to contain market power nor to increase competition, such as overseeing price setting by natural monopolies and even, at times, by self-regulating organisations. On the other hand, regulators often have fewer powers to investigate anti-competitive behaviour or may find that suspicious behaviour of interest is outside their constrained set of responsibilities or beyond their ability to collect information and affect corporate incentives and behaviour.

48. Challenges to consistency in approach between sector regulators and competition authorities can arise for a number of reasons.

5.1.1. Difference in objectives between a regulator and competition authority.

49. Financial regulators typically have a primary responsibility to ensure financial stability, which can in turn hinge on the financial strength of the entities they oversee. One elemental way to ensure financial strength of financial companies like banks is to ensure profits are sufficiently high and that competition to a level of threatening firm profitability, and potentially risking bankruptcy for less successful operators, is avoided. At the same time, very few financial regulators have a responsibility to promote successful competition.⁴⁴ For example, regulations in Costa Rica under the 1924 (amended) Regulatory Law of Insurance Markets, Article 56, the financial regulator was able to approve mergers with potential anticompetitive effects for firms under their oversight. In such instances, the law needs to determine which objective would prevail.⁴⁵

5.1.2. Difference in substantive rules.

50. Regulators may have different substantive rules that they apply, even if their objectives are similar. For example, a regulator may apply one rule for merger review, while a competition authority might apply a different type of rule. In the United States, the FCC, after the 1996 Telecommunications Act, sought to protect competition and applied a statutory rule that prevented any one company from owning more than 8 stations that serviced a market and no more than 5 of one type, whether FM or AM. In contrast, U.S. Department of Justice cases applied a standard closer to that of the Horizontal Merger Guidelines, while also suggesting that antitrust counsel should be brought in if market shares are 35% or above or consolidate a large part of a particular format.⁴⁶ In the UK, the legislated objectives of regulators have expanded over the last two decades, making them wider-ranging than those of the competition authority⁴⁷.

5.1.3. Difference in procedural rules and information collecting abilities.

51. Sector regulators often do not have the same extent of information gathering powers as competition authorities but may have very substantial amounts of information reported to them as parts of their regulatory mandate⁴⁸. As a result, they may not have the same extent of information at their disposal. Examples of ways in which regulators may not have the same level of information as competition authorities include for documents, data that is

not mandated under their statutory duty to collect and dawn raid collection of information. Another respect in which regulators may not have an ability to collect information includes from third parties who may have products that are related to those in a proceeding but not covered by the proceeding.

5.1.4. Difference in evaluation.

52. A different evaluation of the same facts can arise between regulators and competition authorities. Regulators may have different perspectives on market definition or market developments than a competition authority. Different assessments could arise when assessment of what matters for the public interest varies, when regulators have different and potentially more technically informed analyses or if regulators are, in some sense, more likely to be “captured” by the industry they oversee than the competition authority, as the competition authority would typically have less frequent interaction with companies in a specific sector than the sector regulator⁴⁹. More fundamentally, though, it is normal that differences in evaluation will occur between two neutral parties looking at the same complex sets of facts.

53. One notable case of different evaluation between a regulator and competition authority occurred in the U.S. merger between railroads Union Pacific and Southern Pacific. Under U.S. law, railroad mergers were under the exclusive review of the Surface Transportation Board (STB). As a result, the U.S. competition agencies were not in a position to challenge the merger directly but had to do so by submitting evidence directly to the STB. The US Department of Justice called the merger “*the most anticompetitive rail merger ever proposed*” in testimony before the STB⁵⁰. The merger was approved by the STB two days after this testimony⁵¹.

5.1.5. Conclusion.

54. As a result of these differences, a variety of mechanisms have been put into practice in order to ensure greater consistency between competition authority and sector regulator approaches. The following sections describe some of these organisational structures and tools that have been used.⁵²

5.2. Organisation structures for co-operation

55. Organisational structures for ensuring consistency across competition authority and regulatory approaches take a variety of forms, some inherent to the responsibilities of the authorities, some based on outside mechanisms. These include common appeal mechanisms, integration of competition authority and regulatory functions, and concurrent enforcement powers. These are described below.

5.2.1. Integrated regulator/competition authority

56. There are several countries that have established substantially integrated regulators and competition authorities to one extent or another, as analysed in detail in OECD (2014, 2015)⁵³. These include Australia, Estonia, The Netherlands and Spain. Bodies in other countries have mooted the possibility of some greater integration, as with the UK’s National Audit Office suggestion that “*More radically, the government could consider greater pooling of competition enforcement resources across the concurrent regulators.*”⁵⁴

57. The rationales used for cross-body integration have often included an expectation of savings, efficiencies and increased coherence of decisions. The basic setup of integrated regulatory and competition systems are described below.⁵⁵

Australia.

58. The Australian Competition and Consumer Commission is not only a competition authority and consumer protection authority⁵⁶, but also oversees access regulation in communications, rail, air and the water sector. Specifically, as the ACCC states:

“We have a range of regulatory functions in relation to national infrastructure industries as well as a prices oversight role in some markets where competition is limited. Our functions include:

determining the prices and access terms and conditions for some nationally significant infrastructure services

monitoring and enforcing compliance with industry-specific laws for bulk water, energy and communications

monitoring and reporting on prices and quality of particular goods and services to provide information about the effects of market conditions

disseminating information to help stakeholders understand regulatory frameworks and the structure and operation of infrastructure markets

providing advice when requested by governments and policy agencies on how efficient regulatory outcomes and competitive, well-functioning markets can be achieved.”⁵⁷

Estonia.

59. The Estonian Competition Authority has a Competition Division and a Regulatory Division, with the Regulatory Division holding regulatory responsibilities for energy, water, post, communications and railways. These responsibilities were given to the competition authority by the Establishment of Price Restrictions and Monopolies Act which took effect as of 1 November 2010.

The Netherlands.

60. The Netherlands Authority for Consumers and Markets (ACM) was created on 1 April 2013 by combining the Netherlands Consumer Authority, the Netherlands Competition Authority (NMa) and the Netherlands Independent Post and Telecommunications Authority (OPTA). They also have powers to promote competition in transport and healthcare⁵⁸.

Spain.

61. Act 3/2013 of June created the Spanish National Markets and Competition Commission (the Comisión Nacional de los Mercados y la Competencia - CNMC). This authority merged together the existing competition authority (CNC) with sector regulators responsible for telecom, energy, railways, airports, and audio-visual.⁵⁹ Reportedly, there were subsequently discussions during 2017 between political parties about the possible separation of the competition authority from the regulatory body, along with proposals for a different appointment system for commissioners, though at the time of writing of this

report, no dissolution had occurred and likely plans were underway to extend appointments due to political stalemate.⁶⁰

62. At this point, the author is not aware of any *ex post* analyses of the effectiveness and cost containment from multi-utility regulators combined with competition authorities. Combined entities could in principle provide some benefits from uniformity of application of principles across multiple areas. They might also be subject to less capture due to their horizontal nature. For example, principles of determining an appropriate rate of return or access to rights of way – necessary for pipes, telecom wires and fibre and electricity distribution and retailing infrastructure – could share many common elements across regulators. On the competition side, some jurisdictions have determined that regulatory decisions over pricing should apply only to cases in which a dominant firm exists. Competition authorities may have a particular expertise over the determination of dominance, while sector regulators may have better expertise for the price regulation, suggesting a combination of the two is valuable.

63. Nonetheless, a number of disadvantages from creation of a multi-utility regulator do exist. These include:

Reduced focus and clarity of mission.

64. There is a risk that as the number of sectors covered by a regulator is increased, its focus and clarity of mission will become broader. Maintaining a tight focus can be particularly challenging in multi-sector regulators, yet maintaining a clear focus in terms of purpose and objectives is often considered a key feature of successful regulators.⁶¹ While in principle the clarity of objectives can be maintained across multiple sectors, in practice the reduced focus on any one sector, from the management and a single board view, may be inevitable.

Conflict between ex ante regulatory function and ex post antitrust function.

65. There are possibilities of incompatibility between the *ex ante* regulatory function and the *ex post* antitrust function, largely due to different objectives for each function. Perhaps most emblematically, financial regulators may have a primary function to protect stability while competition regulators may have a primary function to protect competition. These two functions can collide when mergers are under consideration at times of substantial financial risk. More generally, the different objectives of regulators and competition authorities may be difficult to reconcile, as well as the approach to different tools, with competition authorities often reluctant to engage in price regulation.⁶²

Less board level expertise in the regulator's sectors and competition.

66. Reducing the extent to which any board member is an expert in the domain, as board membership searches will often focus on obtaining skills related to the specific board. While some professionals have multi-domain expertise, whether their base expertise lies in law, economics or other fields, the number of experts with both multi- and single-domain expertise will necessarily be larger.

Non-transferrable staff expertise.

67. The expert staff in regulators are themselves often not very easily transferred from one to another. For example, water regulators may employ many experts with specific training or built-up expertise that would have less relevance to a digital regulator, a telecom

regulator or an energy regulator. While staff mobility might be one natural feature of an integrated regulator, such mobility may actually result in a reduction in domain-specific expertise and thus, if anything, would be likely to push downwards the level of expertise and possibly the quality of subsequent regulatory decisions.

Incompatibilities in organisational culture.

68. The integration between existing regulators could involve combining different organisational cultures. While cultural integration can seem theoretically abstract, the practical implications, and subsequent human resource uncertainty or staff morale, are often detrimental and can be associated with output implications when change is announced and not yet implemented. Even when implemented, substantively, the style of regulatory activity, including need for speed of action and deliberation, could be quite different between regulators in the identified domains. A water regulator, whose stability and approach may need to assure 30-50 year asset lifespans, needs to be set up to provide high long-term confidence for investors. An energy regulator may oversee generation infrastructure with shorter lifespans. A digital regulator, envisioned by some countries such as the UK and the Netherlands in the future, overseeing products with much shorter lifespans, may need to prove agile and act with speed to prevent the build-up of market power and blockages. Meanwhile, many competition authorities prefer to avoid actions that can be interpreted as price regulation, while this is a core task of many infrastructure regulators.

Conflicting needs for budgeting.

69. A multi-purpose regulator must balance competing functions and obligations. The budget aspects of allocating funds across activities can prove difficult to determine, especially when weighing the relatively long-term value to society of more highly resourced action in one domain than another against the immediate needs and legal requirements for action in each domain. According to the OECD, “*Multi-purpose regulators face a greater challenge in balancing the competing functions*”⁶³.

70. Overall, between the board expertise dilution, the staff focus, cultural differences, speed of action requirements and budgeting challenges, there are a number of disadvantages from combining the infrastructure regulators and competition authorities. Nonetheless, a full consideration of costs and benefits would need to be carried out in individual cases before determining whether the benefits, whether financial or substantive, from integration would outweigh these potential disadvantages.⁶⁴

71. In practice, integration is much more common between competition law enforcers and consumer protection authorities than with regulators. While regulatory integration may appear in about 12% of OECD jurisdictions⁶⁵, consumer protection integration occurs in about 36%⁶⁶. Reasons for this greater frequency of integration with consumer protection authorities may include (1) the closeness of goals between competition law enforcers and consumer protection authorities, which are often centred on consumer welfare and ways to raising consumer welfare; (2) the close causal connection between misleading consumers and distorting competition; and (3) the horizontal nature of both competition law and consumer protection authorities.

5.2.2. Concurrent enforcement powers

72. Concurrent jurisdiction for competition law enforcement permits a sector regulator, in addition to the competition authority, to take enforcement actions against competition law violations. Such concurrent jurisdiction is relatively rare in OECD countries.

73. One country that has featured concurrent jurisdiction is the UK. For example, “*in April 2015, [the Financial Conduct Authority was] ... given powers to enforce against breaches of competition law, alongside the Competition and Markets Authority, for the provision of financial services generally.*”⁶⁷ *In April 2019, [the] concurrent jurisdiction was expanded to include claims management services provided in Great Britain.*”⁶⁸

74. The ultimate value of concurrent jurisdiction is that it allows cases to be allocated in ways that help address the need for consistency; such as allocating a competition case to a sector regulator, if that may be desirable, to ensure consistency with other regulatory responsibilities, or if the sector regulator is better able to appreciate the substance of a case considering regulation in the sector or expertise of its staff. Cases may be more likely to be addressed by the competition authority if they involve criminal or covert activity or may have precedential impact on cases beyond the sectors covered by the sector regulator. It is also possible, more generally, that concurrency could allow authorities to act when they have diverging priorities, diverging evaluations or diverging resources. Reportedly, the UK competition authority has also tended to defer to sector regulators within their domain, while sector regulators have tended to use their regulatory as opposed to competition law powers. The powers of issuing decisions under concurrent jurisdiction have consequently rarely been used in the UK and, in some respects, competition law may have been under-enforced in the regulated sectors.⁶⁹ The first and, at the time of writing, sole decision by the FCA under the competition law, was made on 21 February 2019.⁷⁰ The case involved asset managers sharing strategic information about their intentions during an Initial Public Offering. As a result, firms that should have been competing for purchase of shares were aware of plans of other computing purchasers. The case could be seen as a market manipulation case in the financial sector and represents a type of conduct that has typically been mostly within the focus of financial regulators in other countries besides the UK. In order to ensure companies are not investigated simultaneously by the competition authority and sector regulator, guidance on concurrent application of competition law to regulated industries has been produced.⁷¹

75. Other countries have a degree of what might be termed systematised informal concurrency as well, such as Austria, Belgium and France.⁷²

76. Concurrency creates questions about which body has institutional primacy, whether there is an opportunity for forum shopping and whether one of the holders of the competition law enforcement powers may be overly focused on public service objectives, compared to competition objectives.⁷³ One of the advantages of concurrency is that regulators, such as the Financial Conduct Authority may then create competition teams who ensure both regulator and competition authority act in consistent ways, to the maximum extent possible. Such units can help the regulators to adopt more competition-oriented forms of thinking.

5.2.3. Common appeal mechanism

77. One approach for ensuring that economic regulators and competition authorities act in ways consistent with each other’s objectives is to install a common appellate procedure for matters that could yield otherwise inconsistent decisions or principles across different

bodies. In some instances, such appeals run through a common court procedure that is common across activities overseen by the government (as in the EU or the US). In other instances, the common appeal route involves, at the beginning, a specialist court specifically for competition or economic regulation, as with the Competition Appeal Tribunal of the UK, which “*decides cases involving competition or economic regulatory issues*”⁷⁴ prior to any appeal to common higher instances.⁷⁵ In France, the Court of Appeals of Paris is a specialised appeal court for cases from the Autorité de la Concurrence, specialist commercial courts that can also rule on competition law but not issue fines, and regulatory matters.

78. Even when a court does not have jurisdiction over sector regulation cases, a common appeal system can ensure consistency across courts. In Chile, the investigative process is run by the competition authority, the National Economic Prosecutor’s Office, while the first level of adjudication is performed by a specialist court, the Competition Tribunal (TDLC). The initial adjudication of sector regulator cases does not flow through the TDLC. But the ultimate oversight of the decisions by sector regulators lies through the Supreme Court in appellate proceedings, as the court of last appeal. Having said this, a common appeal mechanism will not necessarily result in convergence if some types of cases or topics are generally not appealed.

5.3. Co-operation instruments

79. In addition to governance mechanisms for ensuring that regulators and competition authorities consider mutual impacts, there are a number of instruments that can further such co-operation. These include:

- MOUs and laws;
- Bilateral and multilateral contact points;
- Staff exchanges; and
- Joint reports.

80. These are further described, with examples, below.

5.3.1. MOUs and laws

81. The mechanisms for co-operation can include both a soft law (such as MoUs) and a hard law requirement.

82. As an example of soft law requirements, many competition authorities have MoUs with regulators. MoUs may establish modes of co-operation and, in particular, how and when information will be shared. Many competition laws provide for authorities to enter into such agreements and can offer protections to information shared from such agreements. In Ireland, for example, co-operation agreements exist between the CCPC and ComReg and the Central Bank of Ireland, as well as having older agreements with the Commission for Energy Regulation, the Broadcasting Authority of Ireland, the Commission for Aviation Regulation, the Health Insurance Authority, and the National Transport Authority.⁷⁶

83. In Korea, Article 63 of the Monopoly Regulation Act requires other regulatory and government bodies to consult with the KFTC prior to establishing laws or regulations that would restrict competition. In Mexico, regulatory and government bodies are required to consult with COFECE concerning new laws or regulations that may restrict competition,

as well as operating through the regulatory impact reviewers CONAMER. In 2018, this resulted in a review of 49 regulations.⁷⁷ In situations like those of Korea and Mexico, the extent to which regulators need to respond to, address or accept competition authority opinions or advice is specified by law.

5.3.2. Bilateral or multilateral contact points

84. Regular contacts between regulators and competition authorities can help to ensure that opportunities for communication arise. Bilateral contact points are particularly common. Sometimes these are formalised with designation of individuals as contact points with responsibility to meet and update each other regularly, and in particular to make the other institution aware when matters of interest to it begin and come under consideration.

85. Multilateral mechanisms are somewhat rarer. In the UK, the UK Competition Network has been created bringing together the competition authority with regulators including those for civil aviation, communications, energy, gas, payment systems, rail and road and water. This reflects an interest of government to ensure that competition law and regulation remain closely linked, particularly in light of the UK's concurrent application of competition law by regulators.

5.3.3. Staff exchange

86. Many competition authorities have engaged in staff exchanges with regulators. Some of these movements of staff are quite natural career development processes, in which a person applies for a job with another agency. Others are more structured, in which there is a two-way exchange of personnel that ensures both can gain expertise in the other authority and that personnel numbers and salaries may lie unaffected. Staff exchanges can help to ensure that informal paths of communication between competition authorities and regulators remain open. The UK's Ofgem, for example, seconded staff to the OFT, the US Department of Justice has allowed staff to be seconded to the communications regulator the FCC and SEC, and many other governments have legal and economic services in which staff can move with relative ease. The existence of common personnel regulations and common pension schemes can be particularly helpful for facilitating such moves.

5.3.4. Joint reports

87. While in principle joint reports could be prepared by a competition authority and a regulator, in practice, such joint work is rarely produced. Reasons for this can include the need for independent regulators to establish official positions that may, at times, take account of different considerations and result in different conclusions as well as, in some jurisdictions, the absence of a statutory basis in some countries for producing such reports. Interestingly, joint reports do exist between competition authorities across geographic boundaries, as with a recent report by the French and German competition authorities, suggesting that it may be easier for competition authorities to engage in joint authorship across borders than within.⁷⁸ Moreover, regulators can recognise the importance of competition authority opinions to their work in ways that can include presenting and referring to relevant competition law cases in a systematic way, to acknowledge the interdependence, as done by some French regulators.

6. Conclusion

88. This note examines the interconnections and relations between independent sector regulators, competition policy and competition law enforcement. The rationales for creating independent regulators and independent competition authorities differ, as do the level of risks from non-autonomous decision making in each type of activity. These differences can explain different degrees of independence that may be required in the two types of authorities. In the future, greater emphasis may be needed to provide regulators with the same principle-based legislative structure that is common to competition authorities. Furthermore, greater attention may be needed for deciding whether competition law or regulation would govern various activities in which there is a need for regulation but no current independent regulator. In the longer run, great attention is needed to ensure consistency of decision-making between regulators and competition authorities, especially to the extent that their goals differ. In light of the analysis in this note, several points emerge:

- Independence of decision-making is a key governance feature for both regulators and competition authorities. It is strongly related to mechanisms for accountability, while admitting general political guidance without allowing specific political directives on individual decisions.
- The particular needs of competition authorities as economy-wide quasi-judicial entities may arguably merit greater independence for them than sector regulators have, accompanied by greater needs for accountability and internal processes. On the other hand, sector regulators may be argued to merit greater independence to reduce influence of special interests.
- Independent sector regulators can usefully be given sufficient legal flexibility to quickly adapt their regulations without new primary legislation. In a time of rapid technical and business model change, ex ante regulation should be designed so that ex ante regulations can adapt quickly to uncertainty, new technology and business models.
- Where market failures are present, independent regulation may at times be preferred to existing self-regulated activities, those activities overseen by government and those activities with market failures but with no oversight.
- Designers of governance for competition law enforcement and for regulation can usefully assemble a mixture of mechanisms for ensuring due co-operation and consistency that will fit their domestic situation.

Endnotes

¹ This note follows standard convention and does not refer to competition authorities, in their role as enforcers of a competition law, as regulators.

² This relationship has also been discussed at the OECD in some respects in the past. See, e.g., [https://one.oecd.org/document/DAF/COMP/LACF\(2017\)6/en/pdf](https://one.oecd.org/document/DAF/COMP/LACF(2017)6/en/pdf) and <http://www.oecd.org/daf/competition/cooperation-between-competition-agencies-and-regulators-in-the-financial-sector.htm>.

³ When regulation is established, the main economic reasons for doing so are often listed as: (1) market power; (2) public goods (and free riding); (3) externalities; (4) asymmetric or imperfect information; (5) factor immobility; and (6) lack of clear property rights. The mere existence of market power will not generally lead to regulation, with the view that market power may be acceptable when earned through competition on the merits. Regulated utilities, for example, have often been granted special access to public rights of way or public facilities (spectrum). In contrast, other monopolies may not be subject to regulation.

⁴ Enterprises for this purpose can include those with full or partial state ownership or operation.

⁵ An ex ante role of competition law enforcers often exist for merger review.

⁶ Reasons for preferring competition law or regulatory action can be found in OECD (2005) “The relationship between competition authorities and regulators” at [https://one.oecd.org/document/DAF/COMP/GF\(2005\)2/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2005)2/en/pdf).

⁷ See <http://www.oecd.org/competition/globalforum/independence-of-competition-authorities.htm>.

⁸ See Digital Competition Expert Panel (2019) “Unlocking competition” at <https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel>. The French government calls for better regulation of digital platforms in <https://www.economie.gouv.fr/transparence-plateformes-numeriques-decrets-renforcent-legislation>. The Netherlands in <https://www.government.nl/latest/news/2019/05/27/dutch-government-change-competition-policy-and-merger-thresholds-for-better-digital-economy>.

⁹ For example, electricity alone can often account for 4% of the household budget, and 3% on communications services.

¹⁰ The 10 largest private utility companies in the OECD have annual recurring revenue of about USD 372 b. Author calculation for revenue of top 10 private energy utilities by market capitalisation: Duke Energy, Engie, National Grid, NextEra, EDF, Enel, Dominion Resources, Iberdrol, Southern Company, Exelon, with data primarily reported for 2018.

¹¹ This note takes no view on whether digital platform regulators like the “Digital Market Unit” being considered in the UK after the Digital Competition Expert Panel Report would be sector regulators or horizontal regulators.

¹² Private restrictions that might escape competition law could arise when a government explicitly gives a self-regulatory body (e.g., a particular profession) the right to govern use of terms (e.g., “nutritionist”) and entry to the profession.

¹³ In some respects the distinction between ex ante and ex post review could be considered artificial, as well-constructed laws can be construed as creating rule that are known ex ante, otherwise their ex post enforcement would not be predictable.

¹⁴ Various OECD documents have discussed independence with respect to both regulators and competition authorities. These include: <http://www.oecd.org/competition/globalforum/independence-of-competition-authorities.htm> and <http://www.oecd.org/daf/competition/changes-in-competition-institutional-design.htm>.

¹⁵ The extent to which budgets of competition authorities come from fees, fines and government can be related to independence, with each source having strengths and weaknesses. Fees and fines, in particular, may be subject to high natural variability.

¹⁶ The OECD has prepared guidance for creating a culture of independence, available at <http://www.oecd.org/gov/regulatory-policy/creating-a-culture-of-independence-9789264274198-en.htm>.

¹⁷ See, e.g., Gilardi, F. and M. Maggetti (2010) “The independence of regulatory authorities” in *Handbook of Regulation*, Edgar Elgar, Cheltenham.

¹⁸ See, e.g., Edwards, G. and L. Waverman (2006) “The effects of public ownership and regulatory independence on regulatory outcomes”, *Journal of Regulatory Economics*, 29(1): 23-67.

¹⁹ See, e.g., Stigler, G. (1971) “The theory of economic regulation,” *The Bell Journal of Economics and Management Science* 2(1):3-21. In a more applied sense, see former CMA Chair David Currie (2014) “The Currie Lecture”, Cass Business School, London, 21 May 2014 arguing that independently administered regulation “is more likely to deliver focused, effective interventions, because it will be less susceptible to diverse lobbying influences.”

²⁰ The key distinguishing feature of independence may be characterised as decisional autonomy.

²¹ See Vickers (2010) Vickers, J. (2010) *Central Banks and Competition Authorities: Institutional Comparisons and New Concerns*, BIS Working Papers No 331. <http://www.bis.org/publ/work331.pdf>.

²² See Vickers (2010) Vickers, J. (2010) *Central Banks and Competition Authorities: Institutional Comparisons and New Concerns*, BIS Working Papers No 331. <http://www.bis.org/publ/work331.pdf>. The point can be made about regulators in addition to competition authorities.

²³ See KPMG (2007), *Peer Review of UK Competition Policy*, 06 June 2007.

²⁴ Casullo et al (2019), p. 20, further confirming findings in Koske et al. (2016) “Regulatory management practices in OECD countries”, OECD Economics Department Working Papers, No. 1296, OECD Publishing, Paris, <https://dx.doi.org/10.1787/5jm0qwm7825h-en>.

²⁵ This point can be nuanced by noting that some regulators have internal tribunals for first instance appeals.

²⁶ For prior OECD work on this topic, see, for example, <http://www.oecd.org/competition/globalforum/independence-of-competition-authorities.htm> and <http://www.oecd.org/daf/competition/changes-in-competition-institutional-design.htm>

²⁷ Political direction can also apply to competition law enforcement matters, but through a transparent procedure that involves an explicit over-ruling of competition authorities, as has occurred in France, Germany, the Netherlands and the UK in recent years. Substantial and strong public interest arguments for governments to over-rule independent regulators and competition authorities, though the OECD has suggested that such events should be rare, transparent and justified.

²⁸ One example is medical rules that only allow face to face consultations.

²⁹ Hotels are protected from competition by placing limits on the number of days that people can rent out their furnished apartments.

³⁰ Transport regulators may deem ride hailing services as illegitimate providers of transport services and refuse to issue licenses.

³¹ Various new financial products may be banned, such as stock issues of small-scale enterprises over the internet.

³² See, for example, the recent digitalisation update of the OECD's Competition Assessment Toolkit.

³³ While there may be risks should regulators have unlimited abilities to update their own rules, the principles would limit the way that regulators could update their rules.

³⁴ Others could include a variety of publicly-funded markets like elderly care, employment services, probation and prisons.

³⁵ Self-regulation also includes costs, often from fees to its members.

³⁶ Independent regulators can also make such assessments, particularly with the advice of neutral medical specialists.

³⁷ See North Carolina Dental Association vs FTC ruling on the anti-competitiveness of self-regulated bodies <https://www.ftc.gov/sites/default/files/documents/cases/130604ncboardopinion.pdf>.

The ABA analysis is also relevant in terms of its conclusions on the behaviour of associations: https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/2016/volume-24-number-1/lessons_learned_the_nc_dental_board_decision_a_state_bar_officer_and_antitrust_lawyer/

³⁸ See Kleiner, Morris M. and Evan J. Soltas (2019) "A Welfare Analysis of Occupational Licensing in U.S. States", Staff Report 590, Federal Reserve Bank of Minneapolis.

³⁹ Those who are knowledgeable about negative impacts on competition (e.g., members of a trade association) may be precisely those who gain the most from self-regulation and have the least incentive to complain to a competition authority.

⁴⁰ This is sometimes referred to as the state-action defence.

⁴¹ OECD (2007) Trade Associations, <http://www.oecd.org/regreform/sectors/41646059.pdf>.

⁴² For example, Goldfarb v. Virginia State Bar Association, 421 US 773, 778, n. 17(1975). "[t]he public service aspect, and other features of the professions, may require that a particular practice, which could be viewed as a violation of the Sherman Act in another context, be treated differently [in a professional context]" or Case C-309/99, *Wouters*, [2002] ECR I-1577.

⁴³ See <http://www.oecd.org/daf/competition/market-studies-and-competition.htm> .

⁴⁴ Notable exceptions to this rule exist in the UK with its Financial Conduct Authority and its central bank, the Bank of England. The FCA role "*includes protecting consumers, keeping the industry stable, and promoting healthy competition between financial service providers.*" (See <https://www.gov.uk/government/organisations/financial-conduct-authority>.) "*When the FCA was created in 2013, we were given an objective to promote effective competition in consumers' interests in regulated financial services. ... Our competition objective also applies to regulated claims management activity. We also have a competition duty. Together, this mandate empowers us to identify and address competition problems and requires us to adopt a more pro-competition approach to regulation.*" (see <https://www.fca.org.uk/about/promoting-competition>.) The Bank of England has a "secondary" objective of competition (see

<http://www.oecd.org/daf/competition/cooperation-between-competition-agencies-and-regulators-in-the-financial-sector.htm>.

⁴⁵ Examples of outcomes in which decisions may differ include mergers that are considered necessary for financial stability, newspaper mergers that may reduce pluralism. Pure co-operation is not sufficient to resolve inconsistent goals.

⁴⁶ See Assistant Attorney General Joel I. Klein DOJ Analysis of Radio Mergers (February 19, 1997). <https://www.justice.gov/atr/speech/doj-analysis-radio-mergers>.

⁴⁷ See Harker and Reader (2018) and CCP (2019) mimeo on regulatory objectives, also at <https://www.nic.org.uk/publications/technical-annex-duties-diagrams-for-water-energy-and-telecoms-centre-for-competition-policy/>.

⁴⁸ This information can, at times, be a valuable resource for competition authorities.

⁴⁹ Martimort, David (1999) “The Life Cycle of Regulatory Agencies: Dynamic Capture and Transaction Costs.” *Review of Economic Studies* 66: 920–947. Dal Bo, E. (2006) “Regulatory Capture: A Review”, *Oxford Review of Economic Policy*, Vol. 22(2) : 203-225.

⁵⁰ See Assistant Attorney General Anne K. Bingaman, Testimony before the Surface Transportation Board (July 1, 1996), available at <http://www.usdoj.gov/atr/public/testimony/0718.htm>.

⁵¹ Surface Transportation Board, *Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233 (1996).

⁵² Prior OECD work on co-operation includes <http://www.oecd.org/daf/competition/cooperation-between-competition-agencies-and-regulators-in-the-financial-sector.htm>.

⁵³ See <http://www.oecd.org/daf/competition/changes-in-competition-institutional-design.htm>.

⁵⁴ See NAO (2016) “The UK Competition Regime” at <https://www.nao.org.uk/wp-content/uploads/2016/02/The-UK-Competition-regime.pdf>.

⁵⁵ For further details, see the OECD roundtable on Changes in institutional design of competition authorities, <http://www.oecd.org/daf/competition/changes-in-competition-institutional-design.htm>.

⁵⁶ The combination of the competition and consumer authorities is relatively frequent. Such combinations are beyond the scope of this paper, which is specifically focused on sector regulators and competition authorities.

⁵⁷ See <https://www.accc.gov.au/regulated-infrastructure/about-regulated-infrastructure/acccs-role-in-regulated-infrastructure>.

⁵⁸ See <https://www.acm.nl/en/about-acm/our-organization/the-netherlands-authority-for-consumers-and-markets>.

⁵⁹ See https://ec.europa.eu/competition/ecn/brief/03_2013/es_cnmc.pdf.

⁶⁰ See <https://www.osborneclarke.com/insights/farewell-to-the-young-cnmc/>, and <https://www.competitionpolicyinternational.com/spain-political-conflict-will-affect-relief-in-cnmc/> on continuation of performance of duties.

⁶¹ See OECD, 2014. *The Governance of Regulators*, 10.1787/9789264209015-en, p. 30.

⁶² While the precise patterns in individual jurisdictions will depend on the law, competition authorities on their own typically encourage market-based solutions, e.g. via switching, to restrain potential high price strategies of companies, while regulators would be more inclined to price regulate to remove high-priced options.

⁶³ See OECD, 2014. *The Governance of Regulators*, 10.1787/9789264209015-en, p. 36.

⁶⁴ The calculation can vary in particular depending on the size of the regulated markets, for which the size of the jurisdiction can be a relevant proxy, as with Estonia, Latvia, Luxembourg, Guernsey and Jersey, etc.

⁶⁵ Australia, Estonia, The Netherlands and Spain.

⁶⁶ Author calculation from <https://www.ftc.gov/policy/international/competition-consumer-protection-authorities-worldwide>.

⁶⁷ These powers were provided for under the Financial Services (Banking Reform) Act 2013.

⁶⁸ See <https://www.fca.org.uk/about/promoting-competition>.

⁶⁹ See Dunne, N. (2014), ‘Recasting Competition Concurrence under the Enterprise and Regulatory Reform Act 2013’, *The Modern Law Review*, 77:2. See also NAO (2010) Review of the Competition Landscape at https://www.nao.org.uk/wp-content/uploads/2010/03/0910_competition_landscape.pdf.

⁷⁰ <https://www.fca.org.uk/news/press-releases/fca-issues-its-first-decision-under-competition-law>.

⁷¹ See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/704663/CMA10.pdf. Letters have also documented the outcome of discussions between a competition authority and regulator. See https://www.ofcom.org.uk/consultations-and-statements/ofcomresponses/concurrency_ofc.

⁷² See Stern, J. (2014), ‘The Use of Competition Powers by Sector Regulators – The Origins, Experience and Potential Future of the UK’s Concurrence Arrangements’, CCRP Working Paper No. 27, Annex Table 3.

⁷³ See Dunne, N. (2014), ‘Recasting Competition Concurrence under the Enterprise and Regulatory Reform Act 2013’, *The Modern Law Review*, 77:2.

⁷⁴ See <https://www.catribunal.org.uk>.

⁷⁵ Reviews by the common appeal route of the CAT may be particularly important given that appeals from the CAT may not always go to the same body. For example, the CAT decision reviewing an OFCOM decision on selection and authorisation of mobile satellite services could be appealed to the Appeals Court or the Court of Session of Scotland, depending on the relevant geography.

⁷⁶ See <https://www.ccpc.ie/business/about/co-operation/>.

⁷⁷ See https://www.cofece.mx/wp-content/uploads/2019/03/CFCN2018_v270319.pdf#pdf.

⁷⁸ See https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/10_05_2016_Big%20Data%20Papier.html and <http://www.autoritedelaconurrence.fr/doc/reportcompetitionlawanddatafinal.pdf>.

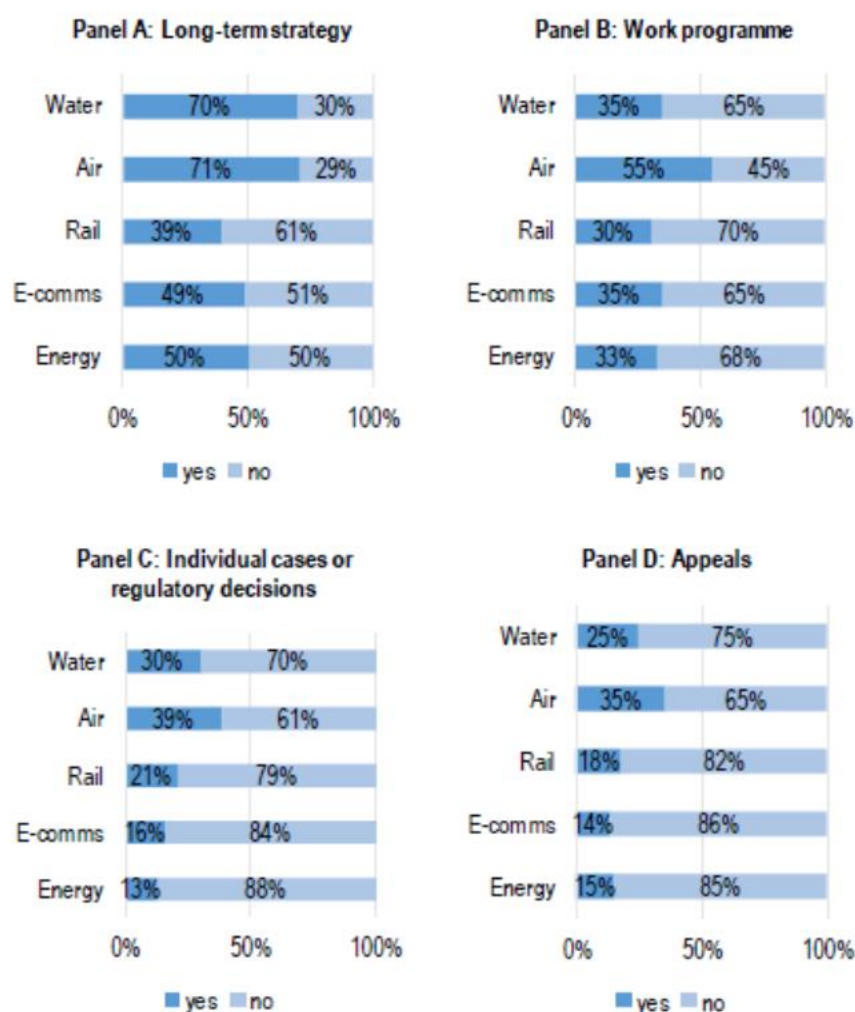
Annex 1. Does independence imply no political input?

One key feature of regulatory independence is the extent to which independent regulators interact with and receive guidance from governments or parliaments. Regulators inevitably interact with a variety of actors, including ministries that typically develop the policies implemented by regulators, parliaments that ultimately enact the legal foundation for such policies, the industry actors who are potentially affected by decisions of regulators and citizens.¹ In the interactions that take place, the weighing of appropriate interaction and inappropriate influence can be a fine balance. The extent to which political input is appropriate is particularly sensitive. Absolutist approaches that reject political input may be unrealistic and actually create risks that political support for independence will waiver. While some government input to regulators is thus inevitable and desirable, the independence of the regulator may be a crucial factor in maintaining private industry confidence in the overall regulated system. To the extent that investment is based on such confidence, the ensuing levels of investment and quality of regulated infrastructure and services may benefit from such independence.²

¹ See OECD (2016) Being an Independent Regulator, <https://dx.doi.org/10.1787/9789264255401-en>.

² Some researchers have suggested that monopolists may make the highest levels of investment, but even so, in such instances, regulators have an important role to oversee the extent to which such companies earn excess profits.

Figure 2. Nature of political input provided to regulators



Source: OECD 2018 Database on the Governance of Sector Regulators

The OECD has typically deemed appropriate the provision of guidance by government to regulators on long-term strategy. A major concern, though, has been the extent to which government may intervene in individual case and regulatory decisions. Casullo et al. (2019) finds that especially when regulators are located within a ministry, the good practice of not providing government directions for individual cases is not well followed. Of the ministerial regulators surveyed by the 2018 OECD survey, “3 of 4 in the energy sector, 4 of 6 in e-communications, 5 of 7 in rail transport, 9 of 15 in air transport and 4 of 5 in the water sector” do “accept guidance from the government regarding individual cases or regulatory decisions.”³

For the moment, the author is not aware of comparable evidence related to competition authorities.

³ See Casullo et al (2019), p. 27.

Annex 2. OECD competition studies on activities that are at times subject to self-regulation

Trade Associations <http://www.oecd.org/regreform/sectors/41646059.pdf>

Education <http://www.oecd.org/daf/competition/publicly-funded-education-markets.htm>

Healthcare <http://www.oecd.org/daf/competition/designing-publicly-funded-healthcare-markets.htm>,
<http://www.oecd.org/daf/competition/50527122.pdf>

Liner shipping <http://www.oecd.org/daf/competition/competition-issues-in-liner-shipping.htm>

Payment systems <http://www.oecd.org/daf/competition/PaymentSystems2012.pdf>,
<http://www.oecd.org/daf/competition/abuse/39531653.pdf>

Ports <http://www.oecd.org/daf/competition/sectors/48837794.pdf>

Professions:

--Audit <http://www.oecd.org/daf/competition/sectors/44762253.pdf>

--General <http://www.oecd.org/daf/competition/sectors/1920231.pdf>

--Health <http://www.oecd.org/daf/competition/sectors/35910986.pdf>

--Legal <http://www.oecd.org/daf/competition/sectors/40080343.pdf>

Taxis <http://www.oecd.org/daf/competition/taxis-and-ride-sharing-services.htm>,
<http://www.oecd.org/daf/competition/sectors/41472612.pdf>