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Summary of discussion of the roundtable on Independent Sector Regulators

Annex to the summary record of the 68th meeting of Working Party 2

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This document is the summary of discussion of the roundtable on Independent Sector Regulators held during the 68th Meeting of Working Party 2.

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

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Summary of Discussion of the Roundtable on Independent Sector Regulators

By the Secretariat

The **Chair** began with brief remarks on the history of independent regulation. Apart from the US, which has had independent regulators for many years, independent regulators were created at the start of the liberalisation and privatisation process of the 1990s. Before then, regulation, was largely ministerial as regulated companies were mostly state-owned public utilities. Separation between the regulated company and the "regulator" is important when regulated companies are owned by the state, because if a regulator is also the ministry in charge of the running of the company or has a controlling interest, this generates a conflict of interest. In order to resolve such potential conflicts of interest the OECD suggested regulators of state-owned enterprises should be a different public administration to the one that has the controlling stockholder interest, controls the management, appoints the management or controls the company itself.

Independent regulators were mostly introduced with privatisation and liberalisation. He suggested a simple explanation for this association: independent regulators are important at the time of privatization, because they assure investors and stakeholders that investments will not be expropriated. They both ensure prices do not fall once infrastructure is built and prevent high prices which exploit consumers. At the time of privatization, private companies were not willing to invest in public utilities unless there was an independent regulator subject to the rule of law and whose decisions could eventually be appealed in court. Independent regulation is what made private investment possible.

He noted that after the big wave of new regulators in the 1990s and 2000s, there has not been much talk, except for one country, of introducing new regulators. So, regulators were limited to public utilities, gas, electricity telecom, transport. The main exception is the UK, where independent regulators were regularly proposed and introduced, such as regulators for the professions, and even regulators for students, though the prospect of digital regulators now seems more widespread.

He noted that observers often take for granted cooperation between competition authorities and regulators is beneficial. What are the regulators' contributions in antitrust cases affecting regulated sectors? What is the competition authority's role in regulation? Many contributions have said that regulation is *ex ante*, antitrust enforcement is *ex post.* In temporal terms, this is certainly true. In substance it is not true because companies have to know what to do in terms of regulation and antitrust enforcement. So while antitrust is largely *ex post*, what is prohibited or what is allowed should be known *ex ante*, just as for regulation, otherwise the rules and legal system fail in their main purpose – to give indications to market players on what to do or what not to do.

The Chair noted that there were a number of experts with the Working Party for the roundtable. One is Professor Sean Ennis who is a professor of competition policy at the University of East Anglia and Director of its Centre for Competition Policy. He will briefly present the background report and some of his views. Anne Yvrande-Billon is the chair of the OECD network of economic regulators and a regulator herself in France; she will provide a perspective on the relationship between independent regulators and competition authorities on the side of the regulator. Anna Pietikainen from the OECD Secretariat will present new OECD data on the independence of regulators Marcus Bezzi will speak from the perspective of an authority that combines antitrust and regulatory functions.

The roundtable will be organized around two main themes. The first is the substance of the coordination. What is the role that regulators play and what is the role that competition authorities play? How efficient are the current mechanisms of coordination? When may it be desirable to consider new regulators? The second will focus on institutional structure, including the combination of antitrust and regulatory functions.

The chair turned to Professor Ennis to introduce the background paper that he prepared and review the issues to inform governments as they consider their own policies on these matters.

Professor Ennis noted that one of the reasons to be interested in this topic is that many independent regulators are especially likely to have overlapping objectives with competition authorities, notably with respect to enhancing consumer welfare. The investment that regulated companies make can arguably also be fit into the objective of enhancing consumer welfare. But he noted there is also a focus on stimulating more competition through things like tackling asymmetric information, dealing with behavioral biases that consumers may have, reducing barriers to entry and setting standards for access, portability (as with phone numbers) or interoperability. Even if the objectives overlap, the interpretation of that objective or the assessment of facts can lead to different outcomes between regulators and competition authorities. So, regulators and competition authorities can potentially act in ways that seem inconsistent even with a common objective. He noted that a number of regulators have more objectives than consumer welfare; for example, many financial regulators are tasked with ensuring stability and media regulators may be tasked with ensuring diversity of voice or focusing on public interest. As these objectives are somewhat different from ensuring an economic standard of consumer welfare there is further potential for conflicting decisions. This makes the relationships between the independent regulatory authorities and competition authorities extremely important.

When the details of regulation are built into legislation alteration can be particularly difficult. In an epoch of dramatic technological change, regulations often need to evolve quickly to take account new market circumstances. Independent regulators could benefit from an approach similar to competition law, with principle-based law, implemented by interpretation of regulators and substantial guidance, possibly, that they issue and which they can change at their own discretion while keeping in mind the need to provide sufficient corporate predictability. The flexibility in competition law has proven to be very valuable in addressing technological changes over time. Such flexibility might also be worth considering for independent regulators.

He noted that some of the rationales for independent regulation can apply in many sectors where there is not currently independent regulation. Governments may wish to consider expanding independent regulation to other sectors. There are quite a few sectors in which there is self-regulation; at times, a cost-benefit evaluation is worth undertaking about whether there are more benefits from being under self-regulation or independent regulation. Benefits of self-regulation include: it is relatively targeted; it is probably often a lower cost form of regulation than others; and there is substantial subject matter expertise that can be present under self-regulation that might not always be present under independent government regulators. There is sometimes a risk that self-regulation may be a mechanism for creating or sustaining market power. To the extent that risk is fulfilled, there is a particularly strong rationale for considering whether to extend independent regulation. Some of the areas where it may be worth considering include ports, airports, the education sector, the professions and parts of the finance sector. He noted that while one may think the finance sector is very highly regulated parts of it tend to be less regulated than others, such as fund transfer, mortgage guarantor companies and some alternative payment

systems. Therefore there is a case to be made for more assessment of whether independent regulation is worth expanding beyond the traditional sectors.

In his concluding point, Professor Ennis talked about the value of ensuring consistency between independent regulators and competition authorities. There can be cases in which regulation fails and then a competition authority feels it needs to take action. One example can be margin squeeze cases. Ensuring consistency between independent regulators and competition authorities is difficult to achieve in part because of the independence of both. Even taking into account this independence, most countries have mechanisms for achieving or encouraging such consistency, either through organizational structure or forms of co-working. As a result of these mechanisms, there has been a very substantial level of cooperation and coordination which has helped to avoid some of the possibility of inconsistent decision making. But that possibility inherently continues to exist in most systems, so it is worth reviewing the mechanisms on occasion to see whether they are sufficient and appropriate.

The **Chair** noted that the working party previously met to discuss FinTech and he underlined what Professor Ennis said about the further need of an independent regulator in finance because non-banks are rapidly entering into the financial markets and the financial regulator in most jurisdictions tends to be bank oriented. An independent regulator would make such developments easier, and at the same time would allow for a smooth entry of these new players in the market. He then moved on to the US, where the report provides a short description of a public comment that the US antitrust authorities made to the US Federal Energy Regulatory Commission (FERC) suggesting that the FERC should stop analyzing mergers in a static way by looking at market share and concentration statistics and move to a more effect-based approach. The Chair asked how cooperation between the two agencies works and why the competition agency made such a public statement.

The **United States** noted that the competition agencies have a range of interactions with other agencies including regular informal interactions but also sometimes more formal public comments. Different agencies have different *ex parte* rules and so in some cases there are restrictions on having off-the-record conversations. FERC is one such agency where interactions are somewhat restricted. In this particular case the FERC had put out a notice of inquiry and were actively seeking public comments. FERC relies strictly on market concentration measures rather than looking at other factors such as the type of generating units that the parties own and what the portfolio would do jointly. So even though the FERC purports to apply the same guidelines that are used by US antitrust agencies, the competition authority felt that they had come to different outcomes from the competition authorities in a few cases where the competition authorities had applied the guidelines. For example, the FERC had adopted, when they issued their merger policy guidelines, the competition agencies' old guidelines, the 1992 guidelines. When the agencies brought out their 2010 guidelines, these adopted a more flexible approach including more factors however the FERC explicitly declined to adopt those 2010 guidelines. Therefore the agencies thought it was important to share advice through a public forum.

The **Chair** noted that the Czech office for competition describes a very positive coordination environment between the regulator and the office itself. However, in a specific case following its own sector inquiry the office concluded that the market of mobile data was competitive while the telecom operator took a different view. The European Commission was then asked for an opinion and agreed with the office. The Chair asked why they had to ask the European Commission.

The **Czech Republic** noted that it was the first time that the telecommunication office has asked at the European Commission for an opinion. It did so because of the conditions of

telecommunication law in the Czech Republic and the competition authority did not know all the sector inquiry details. The focus was not on the retail part of the market, but on the wholesale, using data from the operators with competitive point of view. The regulator found separate markets for the consumers and for company consumers. The competition authority found a market only on voice data services provided through the public mobile networks, though focused only on final consumers. The situation required deep cooperation between the telecommunications regulatory office and the competition authority, because the telecommunications sector and the part of the data in the Czech Republic are a matter of debate.

The **Chair** turned to Russia, noting that they have a specific institutional structure, with the regulators associated to the FAS board when cases affect regulated markets. He asked how they assess the system, and whether it was effective in making sure that there is some equilibrium between regulatory needs and antitrust concerns. He also asked whether the system is symmetric in the sense that someone from FAS would also participate in regulatory proceedings when there are proceedings that affect competition in the regulated market.

Russia started with one example that illustrates how this co-regulation mechanism can be very effective: it is co-regulation of violation of competition cases between Federal anti-monopoly service and the central bank of the Russian Federation. In all financial markets, for the last 15 years Russia has had such a system of co-regulation where representatives of the central bank of the Russian Federation take part in every Commission on the investigation of the cases of violation of competition rules on financial markets. The decision-making processes is made together with the Federal anti-monopoly service having a majority in this decision-making process because the FAS is the only regulator of competition and one and only supervisor of competition law enforcement in the Russian Federation. There is not a symmetry in this process, because FAS does not need to regulate the financial and credit system of the Russian Federation in general. Mechanisms are not limited to the joint decision-making of competition law. The practice of joint letters of the central bank and the Federal anti-monopoly service, signed by the head of the central bank and the head of the competition authority, is a very common, not only in the area of competition but in the area of unfair advertising for instance.

The delegate continued by noting that the second example is of the different nature: since 2015, the Federal anti-monopoly service is responsible for the tariff regulation in the Russian Federation. The decision-making institution in tariff regulation is the so-called *collegium* for tariff regulation under the Federal anti-monopoly service. This *collegium* is constituted, in accordance with the decree of the President and ruling of the government, by the representatives of Federal anti-monopoly service, Ministry of Economic Development, Ministry of Transportation, Ministry of Energy, Minister of telecom and digital development. If this *collegium* could not make a decision on the tariff regulation, the final decision would be passed to the government of the Russian Federation.

The third example is clearly advocacy. Many of the delegates know that the Russian competition Authority is surrounded by a number of expert councils, more than 30. These collaborate with the sectoral regulators and with the governmental authorities responsible for some areas of regulation of economic life to bring them to these meetings of the expert councils, just to listen to the sectoral representatives and to make more correct and pro-competitive decisions.

The **Chair** moved on to his second question about a case where the Minister of Education gave a list of textbooks for schools, excluding some publishers or some authors, and FAS issued a decision that they should stop this, or not do it, or they should change their rules. Was this an advocacy report or was this a decision? Under which powers?

Russia said that this was not advocacy but enforcement. In 2018, the Federal anti-monopoly service considered more than six thousand applications on the anti-competitive effects and actions of authorities. The Minister of Education case is one of these. The subject of the case is that a new official list of schoolbooks was published by the Minister of Education. Some very popular Russian secondary schoolbooks were not included. Many publishers and publishing agencies made claims about the list. The Federal anti-monopoly service had a proceeding with a case hearing and made a decision of the violation of the competition law in accordance with article 15 of the competition law. In such cases, sanctions can include the decision-making persons, who sign the anticompetitive act or letter that restrict competition. They could be banned to occupy their position in authorities. This would be for repeated violations and in accordance with the court decisions. The delegate noted that fines can be applied to the officials and they pay these fines personally.

The **Chair** moved on to Italy. He noted that the Italian report describes a very cooperative environment where regulators and the antitrust Authority work often together, especially on market studies. He wondered how the system works in Italy, whether there is one drafter, or whether agencies work together in a team to produce market studies and what would happen if there were conflicts in opinion, between regulator and authority and how would these be solved?

Italy stated that the competition agency has a continuous exchange with some sector regulators as there are express provisions in the legislation to ensure coordination in some regulated sectors such as the communication sectors. The relationship is fluid and at the operational level. At the board level there are not regular meetings. Discussions are case-by-case, to handle specific situations. In recent years the competition authority has performed a number of joint investigations with other regulators, mainly in the energy sector and in the communication sector. In 2018, a sector enquiry was launched together with the communication regulator and the privacy regulator into big data. The competition authority does not have a leading role in the drafting, so the situation differs from that in the UK. The reports are written together, which is complicated, of course. To ensure an effective cooperation, it is very important to define the objective before starting the drafting. The transaction costs with joint drafting increase with the number of authorities involved in the enquiry. For example, in the Big Data sector enquiry, the authorities involved organized common hearings and drafted about ten common requests for information. Doing this with three teams is difficult. Cooperation is easier when there is a tradition of cooperation with the regulator and when there are frequent exchanges, otherwise different cultures and ways of working may emerge. Of course, there may arise some divergences; the regulators may need to balance competition with other legitimate public objectives, like pluralism or privacy. For example, in the big data sector inquiry there is an inherent tension between competition and privacy, for example in data portability, which may increase competition, but may reduce privacy.

The **Chair** noted that in the UK, joint consultation would often occur in which the regulator and the competition authority share the objective of promoting competition; what Italy are describing with a privacy regulator is cooperation with a regulator that does not have competition as a main or secondary objective. The different objectives may be irreconcilable.

The Chair moved on to Japan. He noted that the Japanese report speaks on the cooperation between the JFTC and the electricity regulator. In a recent 2017 case, the JFTC issued a warning against the Hokkaido Electric Power Company. The question was an issue of price discrimination where the company would apply lower rates to new customers and maintain higher rates to what were called “returning” customers. Was this an antitrust or a consumer

protection case in this particular instance? Finally, the chair asked why was the JFTC in charge of this case and not the energy regulator itself?

Japan stated that in June 2017 the JFTC issued a warning against Hokkaido Electricity Power Company, which applied favorable rates to new customers where it uniformly charged high prices to the previous customers that became its customer again after turning to other retailers. The reason why these customers returned to Hokkaido Electric Power Company was that there was a retailer of electric power which drew away business and was then subject to bankruptcy. There were three kinds of customers: previous customers of Hokkaido Electric Power Company which returned from other retailers, customers which stayed with Hokkaido Electric Power Company throughout the period and new customers with no prior experience with the other retailer. Customers which remained with Hokkaido Electric Power Company throughout the period and new customers were given a more favorable price than the customers which returned after turning to the other retailers. This case involved a possible violation of the antimonopoly act and of guidelines for a proper electric power trade. An unduly high charge to a consumer who wants to be a customer again deprives the consumer of choice of a business partner and the business activities over the utilities and might be illegal under the antimonopoly act approach. As for the reason why the JFTC handled this case, it was that the JFTC based on the antimonopoly act had the authority to investigate such case.

The **Chair** moved on to Croatia. Croatia notes a coordination problem between the telecom regulator and antitrust authority associated with merger control. The telecom regulator took a possible negative decision on mobile mergers, even though they were not notified to the antitrust authorities. The regulator received notification on all mergers, irrespective of the turnover while the Croatian Competition Authority receives notification only when a turnover threshold is reached. The Chair asked what is the standard of harm applied by the regulator in such instances and what are the reasons for the notification to the regulator, whether for competition reasons or for other reasons?

Croatia said that according to the provisions of the Electronic Communication Act, undertakings with significant market power and undertakings who have been granted licenses to use radio frequencies are obliged to notify the sector regulator of any intention to merge or consolidate or any other type of joint or coordinated action without regard for the turnover threshold set out in the competition law. Prior to the implementations of any such operation, the regulator must issue an approval. If the merger also fulfills all conditions from Competition Act including thresholds, a notification also has to be filed with the Croatian Competition agency which may invite sector regulators to comment on the case. In the past the competition authority only had one case in which the merger review was done solely by the sector regulator. During the assessment the sector regulator asked the competition authority for its expert opinion. The case was finally closed with conditional approval subject to remedies offered by the parties.

The **Chair** suggested this experience could suggest the value of a change in Croatia in the threshold mechanism because the issues that have been mentioned are, in fact, very common in the digital economy where big companies are buying maverick companies, for high prices though the small companies have a low turnover thresholds so these acquisitions very often escape the competition authority.

The Chair moved on to the association of consumers, BEUC. He noted that their report is very much based on a new initiative by Consumer International, the partnership for the enforcement of European rights which was established to explore cross sector and cross authority cooperation at EU level on issues such as smart meters, the internet of things, data privacy, data protection, bundled products and alternative business resolutions to the benefits of consumers. The question is whether it has already provided some benefits in

terms of information. A major aim of the partnership seems to be allowing information sharing between authorities operating on the same area.

BEUC noted that PEER, which is the Policy for the Enforcement of European Rights, has been established by the network of energy regulators at EU level. The idea is basically to bring together different networks of regulators that exist at a European level, from telecom regulators to enforcement authorities like data protection authorities and consumer protection authorities, as well as competition authorities, with the aim to discuss issues of common interest such as bundled offers in which a consumer can combine offers of a package of different things from telecom services to financial services and energy services because there will be different pieces of legislation that will apply to the bundle. Therefore, different enforcement authorities are trusted with oversight of these markets. This cooperation is recent – only two years – but has proven efficient. One of the first deliverables was guidance both to companies and to enforcement authorities about how to approach bundled offers and combined offers, from the design of the of the offers through to the enforcement of specific rights that would apply to different components of the of the bundled offers.

The **Chair** said that after having heard the antitrust authorities and how they cooperate with a regulator, the question remains of what is expected from the regulator in antitrust cases. Some submissions speak of data issues, competition assessment in the sector, potential entry, and whether the regulator comments on the restriction of competition that the antitrust authority identifies. The Chair gave the floor to Anne Yvrande-Billon, the chair of the OECD's Network of Economic Regulators and a vice president of the French Transport regulatory agency.

Anne Yvrande-Billon said she would present a little bit of the history of transport regulation in France to illustrate the very close cooperation that exists in France between the competition authority and the regulatory authority, the Transport Regulatory Authority (TRA). The TRA is an independent public authority created in 2009 as a regulatory authority for rail activities, transposing a 2001 directive, which required the creation of independent authorities to open the rail transport market in Europe and create a single market. Independent regulatory authorities were established to control the conditions of access of service operators on the downstream market to the incumbent facilities on the upstream market.

In an opinion of the competition authority in 2008, 08A17, one can already find the idea of the importance of creating a regulatory authority in rail transport to ensure transparent and non-discriminatory conditions of access to the market, at a time when there was no competition on the French rail transport market.

In the second step in the history of the regulator, a 2014 reform maintained the choice of an integrated rail system organisation structure, but in the form of holding companies with subsidiaries. The competition authority issued opinions, in 2011 on the management of passenger stations and in 2013 analysing the draft law reforming the rail sector, arguing that if an integrated structure is to be maintained, a strong sectoral regulator needs to control access conditions upstream and impose sanctions in the event of non-compliance with the principle of transparent and non-discriminatory access. These opinions of the competition authority have been followed.

In 2015, the market for intercity coach services was liberalised in France, partly as a result of a sectoral opinion from the French competition authority that recommended the opening of this market and accompanying regulatory powers. Another opinion, that year, from the competition authority, on the operation of the concession motorway sector in France, highlighted the imperfection of the control exercised by the concession grantor over the

motorway concessionaires and called for control by an independent third party. In 2015, a law transformed the regulatory authority for rail activities into a regulatory authority for rail and road activities.

In 2018, another law reforming the rail system opened up the French domestic rail transport market, outlining additional powers for the regulators. In 2019 the TRA received responsibilities for airports and in 2020 the transport regulator will be entrusted with the regulatory mission of the metro infrastructure manager, the RATP, and the regulation of transport data. The idea of entrusting a role to an independent regulator with the resources and technical expertise to analyse the weighted average cost of capital, for example, or the pricing and technical conditions of access to essential infrastructures, was found in various opinions of the competition authority, notably one from 2010 and one from 2013.

European regulation obliges transport service providers in France to open up all their static or dynamic transport data, whether public or private. The transport regulator will be in charge of verifying compliance with this obligation, as well as checking the neutrality of the algorithm used by multimodal information providers in the transport sector.

There are several ways to achieve coherence with the competition authority. Firstly, the legal bases: the articles of the transport code include the obligation for the regulator and competition authority to inform each other of their relevant activities of mutual interest.

She moved on to the importance of the organisational structure of the system. She noted that in the transport code the mission for the TSR includes, only following an opinion of the competition authority, actions such as (i) approving the rules of accounting separation, (ii) defining the relevant markets and assessing and characterising the market position of bus terminal operators or (iii) defining the relevant markets and taking into account possible leverage effects between different sectors and different markets.

There are also coordination mechanisms on a voluntary basis that are not anchored in legislation such as exchanges of staff, regular meetings and common guidelines.

What one sees in the French case is a very active role of the competition authority to push for the creation of a strong sectoral regulator, while there are obviously injunction powers and commitment procedures that can be used by the competition authority that could "overlap" the prerogatives of the sectoral regulator, with all having the same objective of good market functioning. Access to essential facilities raise classic competition problems that can be dealt with by the competition authority. Decision 12.D25 by the competition authority involves use of confidential information by SNCF on competitors to SNCF. A sanction was imposed on the historic rail transport company for practices that occurred when the sectoral regulator did not exist.

There may be situations in which the only remedy is in related markets, such as markets related to the regulated transport markets, while the remedy may be essentially in infrastructure markets, which are not regulated and for which there is no provision for the sectoral regulator to intervene, like the market in rolling stock, the market in access to rolling stock, the market in access to spare parts, the market in access to spare parts to ensure the compatibility of equipment on the network, the market in equipment certification. These markets are not covered by the scope of sectoral regulation, according to the texts, although there could be barriers to access to the transport service market through discriminatory practices on these markets. The same applies to the distribution of tickets. At the moment, only the competition authority could help complainants.

The **Chair** noted that the point about related markets was important and would be an input to the discussion later about the possibility of combined regulators and competition authorities able expand into sectors not covered by the regulation or to retract from sectors

that have been covered by regulation but where competition is now struggling, and does not need a regulation anymore.

The Chair then turned to Norway, noting that the Norwegian submission considers many more regulated sectors than the other submissions. Concentrating only on the agricultural sector, the Norwegian agriculture agency sets production quotas, limits production, manages exports or surplus production, organizes the seasonal storage, etc. The report mentions that the agricultural regulator and competition Authority meet on a yearly basis. Are these meetings a voluntary decision of the two authorities or are the meetings required by law?

Norway noted that the competition authority has a very good relation to the Norwegian agricultural Authority. The meetings are a consequence of the tasks of each and the competition authority's strategic goal to push for competition in all markets. The primary agricultural producers in Norway are exempt from the competition law, as are the fisheries. The Norwegian agricultural authority is an agency of the Norwegian Ministry of agriculture and also administers all agricultural markets in Norway. This cooperation occurs mainly because there are interactions between the markets that are exempt and the markets where competition law applies. The agencies have a common interest in maintaining and increasing competition between the large cooperatives and their competitors in these different markets. One example is with regard to the implementation and working of the effective firewall between the operations of an entity that are entrusted with the tasks as a market regulator and at the same time operates in the market. as with the major dairy producer in Norway or the major producer of meat which operates both in the market and also has tasks as a market regulator. Another example of topics of discussions includes the agricultural authority's allocation of import licenses through an electronic and highly effective auction. The agricultural authority ultimately implemented a scheme of independent bid determinations, after discussion with the competition authority, so now all the importers that are part of this auction have to sign this certificate.

The **Chair** moved to South Africa. The contribution, also in South Africa mentions different regulators - not just telecom, gas, electricity, transport but also a Construction Industry Development Board. It has a regulatory function because it runs the grading system that companies use for public procurement contracts. A company with a lower grade can only participate in smaller contracts. The competition authority perceived a number of anti-competitive concerns in the grading system. What are the concerns? What is cooperation usually like between the competition authority and the regulators?

South Africa said the CIDB is the construction industry development board. It is an independent sector regulator for the construction industry which oversees standards in the sector. Contractors or firms in the sector must register with the CIDB for them to be able to bid for public sector contracts; in registering they are then graded into level one to nine, nine being for the most complex and large scale work, based on a company's financial and work capability. Contracts require a certain grade depending on the nature of the contract. A firm can only undertake work within its grade. Tenders for work in the sector may specify required grades.

One of the largest cartels prosecuted by the South African competition authority was in the construction sector in 2013 with over 300 projects which had been cartelized and including, according to the authority, all 15 of the grade 9 listed as cartel members.

The competition authority engaged with the CIDB to probe further into, first, if and how the grading system was facilitating collusive behavior, second the issue of work allocation, where the competition authority found that smaller firms, particularly black-owned and woman-owned firms were in the lower grades, while the larger firms were incumbents, so

the system maintained the *status quo* of inequality in the industry and third, the CIDB composition with a board comprised of members of the industry with incentives to perpetuate the status of larger firms. To address some of these challenges, the competition authority entered an MoU with CIDB around issues of concurrent jurisdiction and engaged the Department of Public Works, the ministry which oversees the CIDB, around board composition and to advocate for removing the grading system in public procurement. The competition authority advocated with the National Treasury for a certificate of independent bid determination. This certificate now forms part of all tender documents in South Africa at national, provincial and local level.

The **Chair** noted that competitive neutrality could favour the idea that regulated industry not be part of the regulatory process, as in this construction board example. The Chair turned to the UK and asked that they speak about their institutional setting.

The **UK** stated that several speakers have mentioned the UK arrangements, and the UK did not submit a paper in on this occasion. The UK concurrency regime has been discussed on a number of occasions, both in this working party and the committee, most recently, in the session on institutional design of competition authorities. The delegate noted that in the UK, for competition law enforcement, enforcement capability is shared between the CMA and the sector regulators. When a case comes in, the CMA and the regulator will come to a conclusion as to which is the best placed authority to investigate that. With their markets tools, it can be more likely that the competition authority and regulator work together on market investigations or market studies. This has happened in the past, including through staff exchanges and other flexible arrangements for working together. There are a number of regulators that have been set up in the UK, but for whom there are no concurrency arrangements, such as the Office for Students was at the meeting or the Grocery Codes Adjudicator. Some regulators without concurrency may nonetheless have a competition objective, potentially as a secondary objective like the Prudential Regulatory Authority.

The **Chair** moved to the institutional part of the discussion, starting with Australia. He asked for an explanation of the statement of expectation issued by the Australian Government on the role and responsibilities of the ACCC.

Australia said that all of the independent regulators in Australia including the competition regulator receive a statement of expectations from the government. These are public and outline the government's expectations about the role and responsibilities of the regulators in a high-level way. It makes clear that it does not seek to impede the independence of the regulator; the main policy issue is the government's commitment to deregulation and minimising compliance costs on business. The ACCC takes this into account. The ACCC publishes its own response, a statement of intent, to the statement of expectations where it publicly recognises the government's expectations. There is a range of other accountability documents that the ACCC provides annually, including a compliance and enforcement priorities document which sits underneath the statement of expectations. There is also a regulator performance framework that the government sets as well with six particular criteria for the ACCC to report against.

The **Chair** moved to Anna Pietikainen, from the OECD Secretariat, to present a study by the Governance Directorate of the OECD on independence and accountability.

Anna Pietikainen noted that she coordinates the work of the Network of Economic Regulators (NER). She noted that she will speak about some of the results of the survey on the governance of sector regulators that took place in 2018-2019. An Economics Department working paper presents results of this work. Three components are a particular focus: the first one is independence. This looks at the extent of sector regulators protection from undue influence from government and the regulated industry. It also focuses on

regulatory agency staffing, its autonomy and funding in particular. Under the component of accountability the focus is accountability obligations by the regulator in law vis a vis the various stakeholders to government, the parliament and the public. This includes questions on data collection, publication and reporting obligations of the regulator. The third component looks at the scope of action. Under scope of action, the OECD does not say that a sector regulator should or should not have a specific function. The survey looked at the range of activities and the range of powers and functions including enforcement and sanctioning powers that regulators have.

The working paper that is available online looks at five sectors: energy, e-communications, rail transport, air transport and water. It includes data from 38 countries, OECD as well as non-OECD member-countries. 169 sector questionnaires were analyzed by the Secretariat, amounting to 13 000 questions that were fact-checked by the team.

One of the first observations is that governance arrangements across sector regulators vary greatly, according to jurisdiction as well as between sectors, even in a similar jurisdiction. There is the most convergence on the independence indicators. There is least divergence in practice on independence across the sectors. In general, over the different indicators that were measured, energy regulators and e-communications regulators tend to be the best performers. For the energy sector this is probably linked to the fact that many of the regulators surveyed are in the EU, whose directives are quite prescriptive about the governance of energy sector regulators.

Another area discussed is the type of guidance sector regulators receive from government. The majority of sector regulators usually do not receive guidance from government on their annual work program, decisions on individual cases or appeals. This is a very good thing when discussing the independence of sector regulators. However, for long-term strategy, a majority of regulators in most sectors do receive guidance from the government. Again, practice varies very much between jurisdictions and not in all jurisdictions is this guidance are as transparent or as predictable.

Another key area when discussing the independence of regulators, and competition authorities, is nomination, appointment and dismissal of agency heads, board members and commissioners. Regarding appointments; the analysis found that most leadership is confirmed by one government entity or by one government agency, usually a ministry. A majority of agency leadership across all five sectors can be dismissed solely through a government decision, usually from one body from the executive branch. Another key question asked of the sector regulators that participated in the survey looks at the revolving door syndrome. Obviously, the independence of decision-making can be safeguarded by governing the revolving door between the regulated industry as well as the sector regulators. A majority of regulators have some form of restriction in place. The characteristics of the cooling-off periods vary greatly between jurisdictions.

Finally, analysis of the survey responses found that there was a positive correlation between the independence indicator and the accountability indicator. Obviously there is often a lot of criticism of arm's-length agencies as being their own free agents and these findings show actually quite the contrary: that it is probably much more difficult to be an independent agency than it is to be a ministerial agency in the sense that the independent agencies are asked to show their value and report on their activities in a much more stringent manner. Anna Pietikainen noted that the full data is available on the OECD website.

The **Chair** suggested this research was quite interesting, along with this last suggestion because the same question could be addressed with respect of the antitrust authority itself. The way accountability is introduced may affect the behavior and the strategy of the authority itself.

The Chair then turned to Chinese Taipei. The liberalization of public utilities was introduced in the 1990s. There were six regulators. What is interesting is that in Chinese Taipei, the authority suggests that independence is not a prerequisite of good and forward-looking regulation, and it is certainly true in this does not guarantee good regulation. The Chair asked whether their report is saying that independence is not necessary or is it saying that it is not sufficient?

A delegate from **Chinese Taipei** suggested first the submission is not saying that independence is not important. Rather it is saying that in the extensive expertise of the competition authority, changing fast in regulating industries in a timely way to make more tailored to regulation in the policies is of the same importance. Second, in the innovative industries, whether regulators are independent or not, is not so relevant whether the National Communication Commission (NCC), an independent regulator, or the Financial Supervisory Commission's (FSC) – an executive branch. Operators with a professional ability to face challenges and impact resulting from innovative technologies are important, whether they are independent or not. Finally, Chinese Taipei appreciates the independence in sector regulators for independence could reduce the possibilities of intervention both from political power in the commercial interest; however, to secure independence it is important to recognise that the culture of respect and professionalism of the experts who are in charge is important.

The **Chair** turned to Colombia. The Colombian experience could be characterised by regulatory agencies that are accountable to the executive branch of government. The submission also cites a study by some academics where they say that in Colombia, regulators are not independent, because they report to the executive branch of government.

Colombia stated that during the 1990s many of the public companies were opened for privatization. In Colombia's 1991 political Constitution, the role of the state in the provision of public utilities was switched. Before this constitution the state was expected to oversee the guarantee of provisions of such service services to all the inhabitants mainly through state-owned companies. Following this the state had to create different regulators. The new path led to the introduction of private investment in sectors traditionally held by the state, and thus the beginning of provision of public utilities in the line with the most recent international developments in the field. Colombia largely emulates the US provision of independence regulatory committees, controlled by a plural number of members, independent from the executive, but depending on the executive. The competition authority overlooks all sectors except the financial sector, which has no independent regulatory body. The Constitution sets the framework but the challenge is mostly on a day-to-day basis.

The **Chair** moved to BIAC. According to the BIAC report, regulators tend to focus more on market structure and giving effect to some ideas of industrial policy while competition authorities have a much more open mandate to maintain open competition systems and to pursue consumer welfare. Competition authorities also tend to pursue open competition based on rules that are not focused on a particular structure or outcome. He wondered what type of institutional structure does BIAC envisage?

BIAC observed the number of sectoral regulators has increased, and that is set to continue, clearly from some of the discussion already today and given some of the digital policy trends that have been mentioned. When one sees a proliferation of agencies, it is critical that there are effective interagency interactions. This is to avoid duplicating efforts and inconsistent approaches. The benefits of self-regulation can be that one uses industry expertise where that may have a better understanding of the issues and the dynamics but obviously that does raise the risks of anti-competitive effects by creating unnecessary barriers to entry or allowing the dominant players in the sector who will also dominate the standard-setting practices to then dictate the entry barriers and make it more difficult for

others to compete. In terms of *ex ante* and *ex post,* it is worth emphasising that from the business perspective, legal certainty is critical. There is a need to have clear and predictable rules, to ensure the industry knows what is required to comply and can act in good faith with that guidance and that clarity. BIAC would support a principle based approach over rigid regulatory rules. Principled frameworks allow greater flexibility, because markets will adapt over time and that gives more room for competitive dynamics.

The **Chair** noted that he was quite in favour of the principle-based approach because regulation should apply only when there are market failures, and market failures evolve. So, one may have a market failure today, and the market failure due to technical technological progress may disappear tomorrow. He fully agreed that a principle-based approach, as Sean Ennis mentioned, would make the exit from the regulation of a historic market failure easier.

The Chair turned to Korea. In Korea, regulators attend Council of Ministers meetings. This allows for coordination of policy decisions. He wondered if participation was limited to the Korea Fair Trade Commission (KFTC) chair, or if other regulators also participated.

A delegate from **Korea** said that the Korean National Council is the final decision making stage of drafting government legislation. The KFTC chairperson is not a member of cabinet as a minister, but as a ministerial level head of the Fair Trade Commission, is required to participate in every meeting of that National Council, so that they can present their own opinion on any issue related to competition. There is another system, called the prior consultation system which is stipulated by Korean competition law. It requires other government bodies to consult with the KFTC prior to establishing laws and regulations that would potentially impact market competition. This process does not have a binding effect for other government parties however the rate of acceptance by the consulted government body is high. In practice, at meetings of the national council, each agenda with issues related with the competition or consumers leads to consultations in advance in accordance with the prior consultation system. Therefore, most of the sensitive issues regarding competition are resolved before they are tabled at National Council meetings. Only when the competitive issue is not resolved by consulting with the KFTC does it go to the table of the National Council. Even though the KFTC chair does not have a voting right in the council meeting, he can present opinions for every issue on the table. Regarding the participation of the other regulatory agencies, the heads of ministerial-level independent regulators are required to participate in cabinet meetings but will only intervene about their sectors.

The **Chair** moved to Romania. He noted that in Romania, some regulators are part of the Romanian Competition Council (RCC), and in particular the railway and the maritime supervisory council. He suggested that the maritime authority was taken within the RCC because of the OECD report on competition assessment in Romania which was issued three or four years ago. Others are autonomous, such as the central bank, financial sector regulator, telecommunications regulator and energy regulator.

Romania stated that the Railway Supervision National Council, was established in 2005 within the Ministry of Transport. However, this decision did not comply with the provision of the EU directive 34 from 2012. The European Commission launched infringement procedures in order to eliminate any doubts regarding the independence of this particular regulator. Therefore, the railway regulator was disjoined from the Ministry of Transport and became an independent regulator that operates within the national competition authority. Similar to this regulator, the Maritime Supervising Council is organized as a structure without legal personality that exists within the Romanian Competition Council's framework since 2017. It was established in the RCC, in observance of the European provision which states that member states shall ensure that Member States should designate

one or more bodies which shall be legally distinct from and functionally independent of any managing body of the port or providers of port services for handling complaints. The independence of the Maritime supervision council was also recommended by the OECD in its 2016 competition impact assessment of the Romanian legislation, that examined three key sectors of the Romanian economy, including freight transport.

The delegate stated that the RCC is the only regulatory agency that still has the appointment process where both the government and the president have to be involved and also one has a non-political selection body. This is unique among all the regulatory agencies.

The **Chair** suggested that the Romanian system of appointment of the chair and the members of the competition authority is quite special and valuable. The Chair said it was the only country he was aware of where there is a selection on technical grounds by an outside committee of people that are not associated either with parliament or with a government. That ensures some independence and technical capacity of the people chosen. It is a good sign for Romania that this system is still in place. All the competition authorities can look at Romania as a good example.

The Chair moved on to Israel, where there is a distinction between "statutory corporation" and "auxiliary unit". It looks as if the degree of independence is somehow not the same. The report says that the competition authorities is an "auxiliary unit". Being an auxiliary unit is the same status as a public hospital. Why is the system like this?

Israel said that when the government wished to establish a regulator and to provide regulators with independence, there is a broad variety of methods or tools to do so. Regulators can be established for example as part of ministries, auxiliary units or corporations. These structures to some extent overlap in the level of independence. Various considerations apply regarding which structure is the best fit for each regulator. The government takes into consideration the aims of the regulation, and its area of activity. As for the ICA, within what is defined as those units, there is also a broad variety of structures and a broad area of independence. The economic competition law provides the ICA with specific and explicit authorities. It is granted with almost complete independence regarding its authorities, meaning neither the minister nor the government is allowed to intervene in these authorities or in their implementation. This applies, of course, to merger control, restrictive arrangements and enforcement tools which are naturally subject to judicial review but are completely independent of political intervention. The ICA is authorized to initiate and promote legislative amendments and secondarily legislation, and represents the government in the Israeli Parliament.

The **Chair** moved to the final part of the roundtable with a presentation on the Australian system by Marcus Bezzi.

Marcus Bezzi noted his plan to cover six topics. (1) The issue of specialization, which is an important one; (2) The broad framework; (3) What the situation looks like in Australia for economic regulators and competition; (4) Independence; (5) The ACCC's regulatory functions on access regulation in Australia; and briefly (6) the recommendations the ACCC made in its digital platform inquiry about regulatory functions in the digital economy.

On the topic of specialization: the ACCC is, as has been said, a competition, consumer protection and economic regulator. To complicate things further, the ACCC has within its organization the Australian Energy Regulator and the National Competition Council, which are both independent regulators, completely independent from the ACCC, although the AER has had a cross appointment arrangement and the NCC uses ACCC staff.

He noted that the complex arrangement means that although the ACCC has an important economic regulatory role, it is not exclusive within Australia: there are a number of

economic regulators, both at a state level and national level that exist in addition to the ACCC.

The ACCC addresses the competition aspects of economic regulation. The ACCC draws upon the expertise of the economic regulators. He noted that within his area of responsibility, which is agriculture and water and financial services, he has seen how having people with expertise that are brought in to the ACCC, with expertise in agriculture, water and financial services, has deepened their capacity to deal with issues in those sectors. It has also given the ACCC a stronger relationship with a range of regulators that exist in those sectors, such as the Murray Darling Basin Authority which provided staff for a market study.

As for independence, putting in place an independent regulator is more of an art than a science. He noted that having the right structure is important because structure can enhance independence. If the agency is broad based, then that it is going to be less prone to special interests lobbying and influence. It is easier to threaten abolishing an agency if it is small with a narrow set of responsibilities.

The ACCC has got a range of regulatory functions. He noted that he would only give a broad outline and not go into all the details. Essentially the functions involve determining prices for access in many circumstances, along with monitoring and enforcing industry specific laws, and a new role in the area of the consumer data rights. The list of sectors for which the ACCC has a responsibility is very broad, ranging from communications to the export of wheat and wheat ports. Access regulation in Australia relates to "declared services", as determined by the National Competition Council. That helps to enable people who want to use monopoly assets to get access to those assets on more reasonable terms than might be offered by the monopolist.

In the digital economy the ACCC has some existing responsibilities. Consumer data rights are a new one. The ACCC has some pre-existing functions in communications and the traditional anti-competitive conduct in the communication sector. Australia has a government-owned company providing wholesale broadband services with regulation by the ACCC. The ACCC monitors and reports on prices and competition in the communication sector. The ACCC has also recommended additional regulatory measures in the digital economy, such as creation of a specialised digital platform branch and an industry code of conduct.

The **Chair** moved to Spain. He noted that the Commission Nacional del Mercado de la Competencia was recently created, integrating the antitrust and the regulatory functions into one agency. The Spanish contribution very much praises this new system, with convincing arguments with respect to the benefit of integration and efficiency of integration. The Chair asked about the board and whether for board members, because they have to know competition law to make decisions, or technical regulatory subjects to take decisions.

Spain said that in its current structure the board of the CNMC has ten members. They meet either in a plenary formation or in specialized chambers, one for competition and another one for regulatory matters. The regulatory chamber looks at regulation in the transport sectors, the post sectors, the telecoms and the energy sectors. Before the creation of the CNMC, there was a competition agency and three specialized regulators. In terms of numbers there has been a decrease from about 20 board members to only 10. Looking at the competition functions of the CNMC, there was not a loss because there were five board members before and, in the CNMC, five board members specialise in competition issues. In regulation, the CNMC applies common regulatory principles and faces similar market

issues in different markets. So there are economies of scale at the level of the board and a greater assurance of cross-sector consistency.

For the more technical issues the CNMC has maintained separate directorates, so technical specialization is maintained via separate directories for competition and for each of the sectors that CNMC regulates. Consistency between competition and regulation is assured because board members who deal with regulatory matters are more aware of, and have a more direct contact with, competition law issues and competition law principles. The competition board members are more aware of the regulatory principles and vice versa. This way of working has an advantage which may be highly relevant as regards to digital markets, and the challenges that digitalisation poses, which is that the CNMC has more flexibility to address new issues or changing issues.

The **Chair** compared this to Australia where the possibility of an access declaration can allow the ACCC to intervene even directly in sectors without a legal provision. If one argues that some feature of data is a monopoly – and the Chair emphasized he was just making a hypothesis – the body responsible for access declarations can make a declaration and then access-type solutions could be applied against any monopoly providers of data.

The Chair moved on to two final contributions on another aspect of integration, now focusing on two jurisdictions where the antitrust authority is part of a sector regulator, not with concurrent power, with exclusive powers. One is Peru. In INDECOPI, there is the general competition law but OSIPTEL, has exclusive power on antitrust enforcement in telecommunications. The Chair asked what type of arrangement there is in Peru with respect to making sure that antitrust law is applied with a common standard across all sectors.

Peru said that INDECOPI is in charge of the application of all the competition in all the sectors in economy, apart from one – the telecom sector – because IDECOPI shares the competition act with OSIPTEL. When a telecom case arises in Peru, INDECOPI has a strong coordination with OSIPTEL, so INDECOPI and OSIPTEL have an MoU with a protocol of coordination between the entities in order to exchange criteria and jurisprudence and, ultimately, to avoid any kind of contradictions. Regarding multi-market cases, INDECOPI has the power to apply the Competition Act in all the economic sectors as well as telecommunications. INDECOPI has the policy of asking for specialised opinions to other public entities that are regulators or the supervisors of certain sectors, for example energy, water, sanitation, transportation, etc. or transversal entities such as the Peruvian public procurement organism for bid rigging cases. For example, OSINERGMIN provided information to INDECOPI that has been especially helpful to evaluate and measure the scope of anti-competitive practices.

The **Chair** turned to a similar situation in Mexico, where there are two competition authorites. The Federal Telecommunications Institute (IFT) operates both as the regulator and the antitrust enforcer, with exclusive competences in Mexico. For regulatory powers, there is an extensive description of what IFT does and they exercise regulatory powers according to when preponderant market condition is reached, which is not dominance. Is this defined similarly to dominance, or is it a mechanical description?

Mexico stated that in 2013, there was a constitutional reform in Mexico. As a part of this reform, two competition authorities were created: the Federal Telecommunications Institute and the Federal Competition Commission. The IFT is the exclusive competition authority and also the sectoral regulator for telecommunications and broadcasting. The constitutional reform also created a new legal term: "preponderant economic agent", a regulatory measure designed to apply only to those two sectors. Preponderance is declared by IFT when an agent has 51% or more market share in a sector - telecommunications or

broadcasting. When it occurs, the IFT applies asymmetric regulations. This figure is in the Constitution and in the sectoral law, in the law of telecommunication and broadcasting, not in the competition law. If this figure is used, there is no need to define relevant markets nor to analyze if an agent has significant market power. For example, in the telecom sector, the IFT established regulation in interconnection services for the mobile and fixed operator declared as preponderant economic agent. The IFT also has ample powers to establish further regulation to other agents. Each authority is responsible for competition enforcement in their sectors. If there is a conflict of jurisdiction, it will be submitted to and decided by a specialized court.

The **Chair** thanked the delegations and speakers. He opened for questions or comments.

Spain asked whether the measures to prevent revolving doors took into account the possibility that people working in the regulator moved to the industry that was regulated or that they could move to the government as well?

Anna Pietikainen said that the question asked in the survey was "can the agency head or board member accept jobs in government in entities in government related to the regulated sector and/or in the sector that is regulated by the regulator?" In most cases where regulators have a restriction, it is likely to be on returning to the industry rather than going to the government.

Germany made a comment, taking from the discussion and also from the background paper that it seems to be rare to have joint functions or joint reports between competition agencies and regulators. The delegate mentioned that the Federal Network Agency and the Bundeskartellamt have one function that they perform together: a monitoring report that summarises key developments in the German electricity and gas markets.

Russia mentioned that many participants of this discussion talked about the institutional design and decision-making process inside the multifunctional agencies. The delegate noted that in 2015, FAS was given all functions of former federal tariff services of the Russian Federation. FAS chose to incorporate tariff people to existing sectoral departments which created a synergy of powers and knowledge about the sectors of economy. The combination helps them to implement the general pro-competitive policy in a tariff area.

India noted that sometimes government takes decisions based on many parameters keeping general welfare in mind. Since competition law is economic law, the action of the government may seem to be anti-competitive, but it may still be desirable. The delegate noted the decisions which FAS has taken to sanctions government officers who pay the fine from their pocket.

Russia said that it is a FAS power to impose the fines on the officials, and it is the right of officials to appeal them to the court. Often officials pay fines and do not go to the court at all.

The **Chair** thanked the delegates and speakers. He noted this discussion showed commonality across jurisdictions on the independent competition authority and regulator relationship. Everywhere there is a lot of coordination, cooperation and understanding. However, as was mentioned at the beginning, across many economies, there is a strong evolution in sectors and markets. This group has discussed how the taxi commissions that were enforcing very general rules had an easier adaptation to new technological developments than in countries with a fixed system of law. If one needs the government or the Parliament to intervene either to introduce a new legislature or to change the legislation, the process is very much slower which is a problem given the strong and fast innovations occurring in many sectors. He concluded that a more flexible approach would certainly help the economies to adapt in a more innovation and competition-friendly way.