

Unclassified

English - Or. English

17 November 2020

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

Working Party No. 2 on Competition and Regulation

Executive Summary of the roundtable on Independent Sector Regulators

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

2 December 2019

This Executive Summary by the OECD Secretariat contains the key findings from the discussion held during the 68th Meeting of Working Party 2 on 2 December 2019.
More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/independent-sector-regulators.htm>

Please contact Mr Chris PIKE if you have questions about this document.
[Email: Chris.PIKE@oecd.org]

JT03468587

Executive Summary of the Roundtable on Independent Sector Regulators

By the Secretariat*

Considering the discussion at the roundtable held by Working Party No. 2 on Competition and Regulation on 2 December 2019, the delegates' submissions, the panellists' presentations and the Secretariat's background paper, several points emerged:

1. Where there are market failures, independent regulation serves a crucial role in creating effective markets and protecting consumers from the exploitation of market power. This is important function regardless of whether service providers are publicly or privately owned. Independent regulation also plays an important and sometimes overlooked role in incentivising private investment.

In recent decades, independent regulation was put in place to ensure that private sector market power arising from privatised natural monopolies was constrained, for the benefit of consumers, while competitive incentives and market mechanisms were introduced. It also helped to incentivise the private purchase of state assets and subsequent investment in renewing and replacing those assets.

Increasing public debate focuses on the ability of regulators to protect consumers, and whether the incentives for privatised monopolists that are created by independent regulation have generated sufficient investment. It has therefore reopened the debate on whether marketization needed to be accompanied by privatisation, and hence whether state owned enterprises should be allowed to compete in the markets that have been created. While the focus on consumer prices in this debate is important, it risks forgetting the important role that independent regulators play in protecting and motivating private investment in the service. For example, if regulatory activities reduce price-setting capacities, this risks leading to lower investment than would otherwise be the case.

The objective to increase investment is also less emphasised by competition authorities' focus on enhancing consumer welfare. However, many competition authorities do recognise that to be effective competition needs to deliver investment and innovation as well as low prices. Regulators and competition authorities, for instance in the context of market studies, can both have significant effects on investment and innovation as well as price and quality, and consequently pay particular heed to each of these potential effects.

2. The relationship between independent regulators and competition authorities is particularly important because they often share the common objective of achieving competitive outcomes.

The interests of independent regulators and competition authorities converge in many respects. This is because (i) where market failures exist, regulators often encourage outcomes that constrain market power; (ii) where regulation does not exist in sectors subject to industry self-regulation or substantial and sustained market power, competition authorities may advocate for creation of independent regulators; and (iii) regulators and

* This Executive Summary does not necessarily represent the consensus view of the Working Party. It does, however, encapsulate key points from the discussion, the delegates' written submissions, and the panellists' presentations.

competition authorities can influence each other's work, and potentially issue inconsistent decisions, which can be prevented by better forms of coordination and co-operation.

Competition authorities have much to learn from the sectoral expertise of specialised regulators, while sector regulators can learn from the breadth and application of the principles enforced by competition authorities.

3. Broad economic oversight roles with quasi-judicial responsibilities may require independence. Equally, a sector specific focus can necessitate strong independence. International benchmarking of independence can provide a useful way to preserve and improve that independence.

The fact that competition authorities have broad economic oversight roles may make them less susceptible to special pleading by particular industries, but also may mean that greater political independence is required. This is because the economic consequences of the exercise of political favouritism could be much more significant for actors with an economy-wide ambit, and their actions may affect many politically sensitive sectors, not just one. The quasi-judicial nature of competition authorities, with low appeals rates for some types of decisions (mergers) and very long appeals for others (cartels and abuse of dominance), means that political influence could have particularly strong effects when present.

On the other hand, the risk of special interest influence might be particularly important for sector regulators, suggesting the need not only for independence from government but also for accountability to government to guard against regulatory capture.

As a general rule, as independence of a government created entity increases, its accountability checks to government, parliament, industry and the population as a whole grow stronger. Stronger checks are a natural way to ensure that independent bodies remain within and actively pursue their intended mandate. Independent regulators are likely to be well-placed to report on whether their relationship with government is consistent with international best practice standards on independence and the OECD Network of Economic Regulators collects and publishes data on precisely these issues.

4. At times of rapid technological change, independent sector regulation can benefit particularly from principle-based rules, such as those of competition authorities, that allow regulators to update their frameworks, without new parliamentary legislation, to reflect new circumstances.

Principle-based regulation is above all adaptable. Principles as opposed to narrowly written specific rules, can help to ensure regulation is free to develop as required. Changing parliamentary endorsed legislation can require a high bar, due to the scarcity of legislative time and need for political consensus, suggesting that needed modifications may be much delayed, even if they were considered technically sound and reasonable.

The absence of guidelines and standard-setting responsibilities from many regulators is highly suggestive of the conclusion that many regulators do not operate with principle-based regulation. The taxi industry, for example, has illustrated the impacts of having highly specific regulation that is difficult to adapt and subject to special interest lobbying.

In contrast, competition authorities tend to have general legislative framing, with competition authorities issuing guidelines that establish more specific rules, bringing cases that interpret these rules and consequently approaches can adapt, such as to market definition and specific harms, without high-level governmental intervention.

5. When industry self-regulation exists and appears not to resolve market failures, there may be benefits from the creation of new independent regulators. However, a

careful weighing of the costs and benefits of introducing new regulatory obligations is important.

The decision to create new regulatory obligations should not be taken lightly. Not all market failures merit regulation, particularly given the unanticipated consequences that can flow from regulation, and the potential for political intervention and political influencing activities once regulation is put in place.

One approach to competition problems that arise from self-regulation is to apply competition law to the relevant activities. Challenges to this can arise from difficulty in prosecuting self-regulating associations that can simply dissolve and restructure.

In a number of instances, competition authorities have successfully advocated for either increases in independence of regulators, as with the Irish competition authority and the Dental Council, and the Chilean competition authority and notaries, or for creation of new regulators, as with the Romanian and UK experience in ports and education respectively.

6. Consistency and co-operation between competition authorities and regulators can be facilitated by institutional design and application of instruments of cooperation. Different ways of cooperating seem to work for different agencies, but many options are now well-known and have been used successfully.

Challenges to consistency in approaches between independent regulators and competition authorities can arise from: differences in objectives, differences in substantive rules, differences in procedural rules and information collecting abilities (with many regulators having less extensive information gathering capabilities than competition authorities), and differences over evaluation of cases.

Mechanisms for enhancing consistency include organisational structures for co-operation and co-operation instruments. Organisational structures include integrating responsibilities within one institution, as in Australia, Estonia, The Netherlands and Spain, concurrent enforcement powers as in the UK, and common appeal mechanisms as in the EU and US.

Co-operation instruments include MOUs and information sharing laws including the Korean and Mexican experience in which new laws affecting competition receive comments from the competition authority. Contact points are another approach including presence for decision making as in Russia. Staff exchanges and secondments are another valuable tool for developing common approaches, as occurs in Australia, France, the UK, and the US. Joint reports can also play valuable roles, as evidenced by Italy, though having three or more institutional authors can create substantial coordination challenges.