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Competition enforcement and regulatory alternatives – Summaries of contributions

7 June 2021

This document reproduces summaries of contributions submitted for Item 1 of the 71st OECD Working Party 2 meeting on 7 June 2021.

More documents related to this discussion can be found at https://www.oecd.org/daf/competition/competition-enforcement-and-regulatory-alternatives.htm

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Australia

Australia has regulators for specific sectors or areas of law. The roles and responsibilities of these regulators vary, but often incorporate elements of economic regulation.

Economic regulation carried out by other agencies sometimes intersects with areas of competition policy. That is, regulatory regimes may have components that are designed to promote competition and ensure competitive outcomes in markets. However, there is no conflict between competition law and economic regulatory measures insofar as breaches of regulations generally do not lead to ipso-facto competition law breaches.

Where there are market failures that limit the level of competition in a market, Economic regulation can be effective in offsetting the negative impacts, and ultimately deliver better public outcomes than would be possible in the absence of that regulation.

Australia's competition and consumer law framework allows for the implementation of mandatory industry codes of conduct. These can be used to address a wide variety of issues impacting competition and consumer welfare, for example significant imbalances in bargaining power.

Where there is crossover between regulatory responsibility and competition, a close relationship between the competition agency and the relevant sector regulator can be beneficial in addressing issues that impact competition in the sector.

Australia's national competition policy framework has established a strong foundation for economic regulators to incorporate the principles of competition into their activities. This in turn has supported the national competition agency's mission of maintaining and promoting competition in the Australian economy for the benefit of Australians.

BIAC

Competition law and regulatory regimes pursue different albeit often complementary goals. Competition enforcement traditionally focuses on correcting marketplace abuses after the fact, while economic regulation typically imposes governmental control over aspects of market activity to reflect particular policy priorities that may or may not be in tension with free competition. The healthy tension between these two different regimes is best met through the coordination of the work of competition authorities and regulators, rather than using competition enforcement as a catch-all for pursuing non-competition public policy goals. Confusing the objectives of competition laws by pursuing non-competition objectives, however, can have the effect of undermining credibility in competition enforcement.

The OECD Competition Committee has regularly considered the inter-relationship between competition authorities and sector regulators, including independent sector regulators, multi-functioning competition authorities, regulators with concurrent competition functions in relation to institutional design, and the relationship between competition authorities and regulators.

Fairness, legal certainty, and predictability of enforcement are vital to business. Pursuing the enforcement of specific non-competition regulatory objectives and laws through competition enforcement, or imposing conflicting or inconsistent standards on business through a mix of competition enforcement and regulatory means, creates an untenable situation that would chill both investment and innovation. Thus, reconciling competition and non-competition objectives and ensuring a consistent non-selective approach should be a fundamental governmental objective.

Competition enforcement aims to objectively ensure that competition on the market yields long-run consumer welfare. This requires neutrality towards the nationality of the firms in question, objectivity in assessment, and administrability of remedies. For businesses that are or may become subject to sector-specific or policy-driven regulations and competition enforcement, it is critical to have clarity regarding the scope of the regulation and the potential interaction between the two bodies of law.

Brazil[1]

In Brazil, from both the normative and enforcement perspectives, the Administrative Council for Economic Defense (CADE) and the sectoral regulatory agencies have separate, complementary jurisdictions. In any event, whilst the antitrust authority has the role of reviewing mergers and investigating antitrust violations (either in non-regulated and regulated sectors), regulatory agencies, for their part, are responsible for promoting free competition and fostering competition enforcement in the country.

CADE has assessed several cases involving regulated markets (both within merger reviews and administrative proceedings to punish anticompetitive practices). This document details some of these cases within the scope of the port infrastructure and services, telecommunications, aviation, and oil & gas sectors.

Through its advocacy role, CADE often contributes by providing technical opinions to regulatory agencies on the potential adoption, change or elimination of certain regulations in order to address competition concerns. In addition, the authority provides the Brazilian Congress with its input, issuing opinions on the potential impact of legislative bills on markets' competition and efficiency.

The interaction between regulatory agencies and the antitrust authority in Brazil has increased in recent years, as a result of a number of joint collaborative agreements, statutes, and newly created governmental bodies, which enable better market monitoring, cooperation, and information sharing. This institutional relationship is contributing to the regulation of the Brazilian economy and the effectiveness of antitrust policies, in addition to granting greater legal certainty to regulated markets.

[1] This document has been written by Luiz Augusto Azevedo de Almeida Hoffmann, Commissioner of CADE, Rafael Rossini Parisi, Chief Advisor at the Office of Commissioner Hoffmann, and Gabriel Lima Lopes Brito, Trainee of the Office.

Canada

The Canadian Competition Bureau's (the "**Bureau**") submission, which is focused on the civil or reviewable trade practices provisions of the Competition Act (the "**Act**"), discusses the interaction between regulation and competition law enforcement in Canada through a series of litigated matters that advanced the Bureau's understanding of how this interplay may be addressed by the courts.

Through the Commissioner of Competition's (the "**Commissioner**") case against the Vancouver Airport Authority ("**VAA**"), the Competition Tribunal (the "**Tribunal**") provided guidance that regulated entities were not immunized from the abuse of dominance (section 79) provision and arguably other civil or reviewable trade practices provisions of the Act. Due to an interpretative doctrine that has arisen in Canadian jurisprudence known as the Regulated Conduct Doctrine (the "**RCD**"), the respondent in VAA had previously asserted that the Act should not apply as the conduct was authorized, expressly or impliedly, by other valid legislations.

In addition, respondents have also relied on regulation as a shield for anti-competitive conduct by claiming that compliance with applicable regulation or advancement of the public interest motivated or necessitated their conduct. In the Commissioner's case against the Toronto Real Estate Board ("**TREB**"), the court signalled that regulatory compliance can be a relevant factor in the analysis of whether the conduct in question is anti-competitive in nature or driven by legitimate business considerations. However, it is ultimately the burden of the respondent to put forward credible and compelling evidence that the conduct was required or motivated by the regulation in question.

There are also scenarios where the Tribunal has held that competition law remedies are not the most appropriate avenue to seek changes to potentially anti-competitive conduct, such as in the Commissioner's case against Visa and Mastercard. In cases involving complex markets where antitrust remedies may not fix the potential harm, and has the potential to introduce unintended consequences, the Tribunal has signalled a preference that regulation take precedence.

The submission describes how recent case law has provided valuable insights pertaining to the interplay between competition law enforcement and regulation, particularly where regulation could either serve as a remedy to the anti-competitive conduct or a basis for certain respondents to justify their alleged conduct. This is an area that will gain even more clarity as the Bureau moves forward with future enforcement actions as well as dialogue and engagement with its international partners.

Colombia

The present document provides the Superintendence of Industry and Commerce's (henceforth, SIC) contribution to the discussion on how competition enforcement interacts with regulatory alternatives. It introduces the SIC's approach and best practices concerning the interplay of antitrust rules and regulatory obligations and sets out some case examples by means of illustrating how it has in practice come to play. The cases presented show the synergies between competition enforcement, advocacy and regulatory alternatives, they concern instances where regulation has followed from competition enforcement, from the risks of potential restraints to competition in a given sector, and a case where a practice was enforced by the competition authority as an antitrust infringement after a breach of a regulatory obligation.

EU

In principle, competition enforcement and regulation present differences in terms of underlying rationale and approach. Conceptually, competition enforcement aims at strengthening the working of markets by prohibiting certain conducts, whereas regulation "limits" or corrects markets with interventions to achieve a set policy goal.

Notwithstanding, or rather thanks to, their differences, the Commission considers that generally competition law and regulation are broadly complementary. In the European Union ("EU"), indeed competition enforcement and regulation are interconnected in a mutually complementary relationship.

First, competition law can contribute to informing and shaping regulation. Competition law applies on a case-by-case basis to specific facts and conducts. However, the enforcement of competition law can help detect general patterns or systemic issues in certain markets, which may warrant a broader intervention, by introducing specific rules. Competition law enforcement can thus be one of the sources informing policy choices to introduce regulation in various sectors.

Second, regulation can complement competition enforcement. While competition is a flexible and general tool, it remains an instrument of ex post intervention, for specific cases. The outcome of a competition case may act as a precedent, establishing a principle or guidance on certain conducts for the future: nevertheless, competition enforcement remains a case-by-case exercise.

Therefore, where there is knowledge and evidence that certain issues are systemic and widespread, beyond an individual competition case, it may make sense to regulate them upfront rather than doing several repeat competition cases. Regulation can tackle ex ante a systemic issue, giving clarity and business certainty on what is permitted or prohibited, based on a policy choice informed by evidence gathering. Furthermore, there may be issues that are outside the scope of competition rules: regulation may offer an alternative to using the competition tools to address issues beyond the remit of competition enforcement.

Finally, even when regulation is in place and a sector is subject to regulation, competition enforcement remains relevant and applicable. The flexibility of competition law allows enforcers potentially to intervene to tackle issues that have escaped the regulator or remain unaddressed by *ex ante* rules. In such cases, it is competition law that complements regulation. However, it can also occur that competition enforcement applies to conducts that are subject to regulation. In this case, a conduct is potentially subject to the application of two instruments.

Greece

Governments intervene widely in markets to achieve various policy goals, either aligned with one another or conflicting goals that require policy trade-off responses, to pursue efficiency, to correct market failures and/or to ensure equity and distributive justice. Competition policy interfaces with state activity across many different levels. Competition policy goals and broader regulatory goals may enter in conflict, which can either be direct in case of economic regulation where core competition parameters may be restrictively affected by regulation or lateral in case of social or technical regulation where core competition dimensions are not directly targeted.

Competition law and regulation can operate as complements or substitutes. Complementarities arise in situations in which regulation intervenes a priori, in a more intrusive way, to control monopolies or to assure access to network infrastructure while competition law intervenes ex post to prevent and sanction abuses of market power across all sectors, usually in a less intrusive manner. Substitution, also, exists when markets or segments of network industries become competitive or when the interaction between competition and regulation proves problematic by permitting some conduct which can be later prohibited through competition law enforcement.

In EU Competition law it is accepted that competition law and regulation may apply cumulatively. Given that the national competition authorities possess a number of tools allowing ex ante intervention such as sector inquiries and the adoption of "prophylactic" or structural remedies, the distinction between competition and regulation can become blurred. The choice among the preferred instruments to be used under the specific case circumstances may be influenced by the time of intervention, the policy goals to be achieved and the need to adapt to rapidly emerging new business models (such as multi-sided platforms and the emergence of platform ecosystems).

In conclusion, the balance between competition law enforcement and regulation will depend on the dominant perception of the moment with regard to the likelihood of market failure vis-à-vis governmental failure and on the policy space that is left by EU law (primary and secondary) to Member States for regulatory intervention. Finally, as mentioned above, the distinction between competition and regulation becomes blurred considering the emergence of various competition authorities' quasi regulatory tools that may also allow for ex ante intervention.

Hungary

This contribution discusses the interplay between competition enforcement and regulation from a Hungarian perspective. The focal points of the contribution are the effects of the enforcement work undertaken by the Hungarian Competition Authority (GVH) on regulation; the cooperation and overlapping competences of the GVH and sectoral regulators; and the differences between regulatory and competition law compliance.

Firstly, the contribution discusses how *enforcement proceedings* of the GVH with respect to *card payments* played an important role in the evolution of domestic interchange fee regulation in Hungary. This section also covers a *sector inquiry* conducted by the GVH *into customer mobility* in retail banking, which led to *legislative changes*.

The contribution deals with coordination between the GVH and sectoral regulators, which may be voluntary or stipulated by the law. We cite the examples of *telecommunication and energy laws for compulsory coordination* and describe the efforts of the GVH with respect to *voluntary cooperation*.

The contribution describes cases concerning collecting societies setting *blank copying levies* and *network sharing agreements* concluded between mobile operators in which the GVH investigated potential antitrust infringements, while the sector regulators did find the conducts compliant with sectoral laws.

Finally, the contribution discusses the way an *incumbent rail operator* endeavoured to keep its market position on the rail freight market following the *liberalisation of the market* in Hungary, and the enforcement efforts of the GVH with respect to this conduct.

India

With the liberalisation of the Indian economy, many independent regulatory bodies were set up to govern sectors such as telecommunications, electricity, oil & gas, insurance etc. as these sectors were perceived to be at a greater risk of market failures. The sector regulators in India are majorly entrusted with the task of laying down entry conditions, regulation of tariffs, terms of service, etc. and are also responsible for promoting competition and efficiency in their respective sectors. The Competition Commission of India (CCI/ the Commission), which is the competition regulator of India, and the sector regulators share the common purpose of fostering competition and fair play in markets and that of protecting consumer interest.

The primary role of a sector regulator is to promulgate and implement rules/regulations *ex ante* in the sector and to perform supervision of the enterprises competing in the sector. On the contrary, the role of a competition regulator is to remedy anti-competitive behaviour of enterprises *ex post*. Thus, the role of a sectoral regulator and the competition regulator is envisaged to be complementary in nature. The significant and inevitable overlap in their objectives and jurisdiction makes interaction between sector regulators and the CCI pivotal in ensuring a coherent and effectual regulatory architecture, while also creating room for tension and debate with respect to the appropriateness and effectiveness of regulation vis-à-vis antitrust enforcement, as is borne out by the short history of competition regime in the country.

The Competition Act, 2002 has enabling provisions, sections 21 and 21A, which allow for mutual consultation between the Commission and the other statutory authorities. The Commission has acknowledged the regulatory oversight of the sectoral regulators and has benefitted from their expertise while dealing with antitrust cases pertaining to regulated sectors. For instance, in a case alleging abuse of dominant position by distribution companies in the electricity sector, considering the nature of issues involved, the Commission decided to seek the views of the Delhi Electricity Regulatory Commission (DERC). Similarly, while evaluating mergers and devising remedies, the Commission takes notes of the relevant regulations in order to see if some of the identified potential harms are addressed by them. For instance, in assessing spectrum transactions in the telecom sector, the Commission noted the safeguards provided in the Spectrum Trading Guidelines of the Department of Telecommunications.

The interaction between the CCI and sector regulators extends beyond the enforcement context. The Commission actively pursues its mandate of competition advocacy through the various means of market studies, workshops etc. in regulated sectors with particular emphasis on eliciting expert views of the sector regulator on matters relevant to competition and competition enforcement. The CCI recently conducted a market study and a workshop on the Telecom Sector in India wherein the enabling regulatory levers and mechanisms that are catalysts for growth and efficiencies and competition challenges to the eco system were the main focus. The Commission also conducted a technical workshop on "Competition Issues in the Healthcare and Pharmaceutical Sector" in 2018 and issued a Policy Note documenting the issues raised and recommendations made by stakeholders who participated in the Workshop. Among the issues highlighted in the Note were the alleged unreasonably high trade margins in pharmaceutical products. The National Pharmaceutical Pricing Authority (NPPA) subsequently issued a notification dated 25.02.2019, wherein it brought 42 anti-cancer drugs under trade margin rationalization while referring to the CCI's Policy Note.

There may also be instances where a complete regulatory vacuum allows such industry practices to flourish that attenuate competition and harm consumers but do not neatly fall in the categories of anti-competitive agreements or abuse of dominance which could be remedied by the competition law. In India, the Real Estate sector proved to be a case in point. Based on its understanding of the issues facing the sector during the course of antitrust proceedings, the CCI deemed it appropriate to recommend the need for its regulation. Subsequently, the Parliament of India enacted the Real Estate Regulation and Development Act (RERA), 2016 to regulate the real estate space. Similarly, in the e-commerce sector, it is probable that the self-regulation measures that were suggested by the Commission in the e-commerce market study, may take shape of formal regulations as the draft e commerce policy has taken cognisance of the areas of concern pointed in the market study.

Going forward, emphasis has to be placed on ensuring consistency and continuity in the approach towards competition and regulation to avoid any unintended and undesirable conflicts and to provide a stable and predictable regulatory environment to the industry and well-functioning markets to the consumers.

Lithuania

The Note by Lithuania overviews the legal framework of the regulated electronic communications sector and possible overlap of competences between the sectoral regulator and the competition authority. The Lithuanian sectoral law stipulates main principles for the regulation of electronic communications activities and confers the Communications Regulatory Authority a function of ensuring effective competition in this sector. The Lithuanian Competition Council has significant responsibilities in the electronic communications sector as well. From the legal standpoint, responsibilities of these two authorities seem to be defined and delimited. However, in practice, the boundaries of jurisdiction regarding responsibilities of the sectoral regulator and national competition authority may not be evident. This problem is discussed referring to a specific decision adopted by the Lithuanian Competition Council. It illustrates how the power to apply margin squeeze test ex post exercised by the Communications Regulatory Authority in principle corresponds to the respective power of the Competition Council to investigate abuse of dominance in the form of margin squeeze under the Competition Law. More in-depth collaboration between the sectoral regulator and the national competition authority should be merited in such ambiguous situations.

Mexico

Federal Economic Competition Commission (COFECE)

Articles 94 and 96 of the Federal Law of Economic Competition (LFCE) provide enforcement mechanisms that can impact price and/or access regulation. This contribution includes some examples of their use by the Federal Economic Competition Commission (COFECE or Commission), and in the case of Article 94, it describes its possible use in digital markets. Moreover, the document describes the interaction that exists between potential enforcement of the antitrust act and sectoral regulations, in particular in the Mexican hydrocarbons sector, which was liberalized in 2013. This implied a transition from a model with a monopoly SOEs to one open to competition in several markets within the sector. Asymmetric regulation was introduced as part of the liberalization process to control the monopoly power of state-owned enterprise (SOE) to proscribe certain conducts, to make prices transparent, to allow the entry of new competitors using the SOE's infrastructure, among others. Recent reforms that eliminate said asymmetric regulation increase the possibility of the SOE breaching the LFCE and therefore imply a greater need of vigilance by the Commission and increased likelihood of enforcement actions by the competition authority.

Federal Telecommunications Institute (IFT)

In Mexico, there is no divergence in the protection and promotion of competition between the competition authority and the regulator of the telecommunications and broadcasting (T&B) sectors, since the Federal Telecommunications Institute (IFT) has a double mandate, acting as both the regulator and the competition authority in those sectors.

This document presents an overview of the IFT's legal and institutional framework; it explores the impact of competition enforcement in economic regulation; it shares some of the tools and its experience on competition enforcement and regulatory alternatives using such tools and describes case studies.

The cases presented focus on the role of the IFT as competition authority in the design of sectoral regulation and in the application of tools provided by the Federal Economic Competition Law (LFCE) and by the Federal Telecommunications and Broadcasting Law for:

1. Preponderance and the Preponderant Economic Agent in the telecommunications sector and the Preponderant Economic Agent in the broadcasting sector;
2. Substantial market power in pay TV service;
3. Wholesale unbundling services; and
4. Dark fiber leasing service.

Norway

Economic regulation and competition policy are interdependent instruments of economic policy which have distinct, yet largely complementary scopes. However, in some cases or areas tensions can arise. The Norwegian Competition Act has provisions that represents a tool to resolve such conflicts by regulation. If this tool is used, it will limit the competency of one or the other regulatory authority. To date, this tool has not been invoked. Instead, the Norwegian Competition Authority (NCA) has established operative cooperation agreements with several other regulatory authorities, in addition to more informal contact and cooperation. This contribution presents some examples of such formal and informal cooperation mechanisms. Good relations also increase the chances of success in the NCA advocacy work. Some recent examples of successful advocacy to influence regulation in a direction promoting competition are also presented in this contribution.

The Act also has provisions providing a tool to exempt specific sectors or markets from the prohibition regulations of the Act by regulation. The interaction between sectors exempt and those not, present various enforcement challenges. In addition, a political pressure to introduce additional exemptions might ensue. Some cases illuminating challenges in this regard are presented.

In addition to enforcement, the NCA also has a role in designing, implementing and eventually the removal of regulation when regulation is no longer called for. The Act has a specific tool in this regard, which states that if necessary to promote competition in the markets, specific regulation can be introduced which intervenes against terms of business, agreements or actions that restrict or are liable to restrict competition contrary to the purpose of the Act.

Russian Federation

Economic regulation and competition policy are interdependent instruments of economic policy. Despite the fact that antimonopoly legislation and economic regulation differ from each other, they still overlap and in many ways complement each other.

In accordance with the established powers, the FAS Russia carries out activities on tariff regulation, including in the sphere of natural monopolies.

According to the FAS Russia, the state tariff policy should stimulate natural monopoly entities to reduce their own costs, and in order to increase their efficiency (optimization of operating and investment costs, financial and economic activity) tariffs for services provided by natural monopolies should be formed according to the "inflation minus" principle, which makes it possible to prevent the indexation of citizens' payments by more than the amount of inflation.

The use of long-term approaches and stable tariffs for infrastructure services are a key instrument of state regulation that has a positive effect on reducing macroeconomic uncertainty.

Having regard to the above, the Decree of the Government of the Russian Federation developed by the FAS Russia dated October 13, 2020 No. 2648-r2 was approved, in which the key approach remains "tariff growth is less than inflation".

According to the FAS Russia, the implementation of given provisions will allow consumers on a long-term basis to predict the dynamics of tariffs for the transportation of oil and oil products through main pipelines, and will also serve to improve the investment climate in the oil industry as a whole.

South Africa

There has been much debate in South Africa as elsewhere about the relationships between competition authorities and regulators, and between competition and regulation. There have also been court cases regarding the boundaries of the jurisdiction of regulators and the competition authorities, especially in telecommunications in South Africa. Tensions between competition and regulation can arise in instances where regulation limits the scope of competition laws and instances where regulation makes it increasingly difficult to enforce the competition law. The former has mainly been addressed in the South Africa as the Competition Act no.89 of 1998 (as amended) **(the Competition Act)** was amended early on to give the competition authorities jurisdiction over all sectors including those that have sector regulators.

The four case studies of the interventions of the CCSA in healthcare, banking, communication and ports markets have demonstrated the importance of competition regulation in South Africa, particularly also in those sectors subject to sector regulation. The broad architecture of the Competition Act provides for mechanisms for effective competition regulation in all sectors of the economy, particularly with the increasing use of market inquiry powers that allow for the CCSA to identify and propose policy recommendation as well as market correcting measures to address competition concerns in markets.

Competition regulation has proved an important instrument within South Africa's policy framework to contribute to structural transformation. The competition authorities have been able to intervene in markets that are of strategic importance to South Africa's development. Moreover, the competition authorities have also sought to intervene in a meaningful way by using innovative remedies beyond the imposition of administrative penalties to effectively address the identified competition harm as well as improve the competitive dynamics of markets. This the CCSA has undertaken in individual enforcement cases and advocacy initiatives, with the latter illustrated in the recommendations on policy and legislative changes.

The CCSA's intervention into the various sectors has markedly contributed to opening up concentrated markets, dealing with cartel behaviour and clearing mergers that are likely to result in efficiencies in the broader economy (and blocking anti-competitive mergers too). South Africa is still not competitive in many other sectors thus requiring ongoing pro-competitive regulatory intervention by both the competition authorities and sector-specific regulators. Competition regulation in South Africa has extended to those areas regulated by sector-specific regulators as illustrated by the four case studies. Concurrent jurisdiction between competition regulators and sector-specific regulators has ensured sufficient checks and balances to ensure markets are regulated with due regard to the impact of regulatory interventions on competition.

Spain

An integrated institutional model such as the one of the CNMC in Spain (combining competition policy with competences in sectoral regulation and supervision) can be optimal to exploit synergies and ensure consistency.

The integrated model can foster competition enforcement in the form of improved access to information, better regulation and enhanced ex officio detection of anticompetitive behaviors in regulated sectors.

The interaction of competition policy and regulation is also relevant in advocacy tools such as regulatory reports and market studies. Not only when dealing with general government regulation but also when assessing sectoral regulation.

Digitization has added more complexities to this framework. The interplay of competition policy (both enforcement and advocacy) and regulation is crucial in dynamic and fast-changing markets such as digital ones. The links between competition and regulatory objectives must be taken into account both in horizontal regulation (such as data and privacy protection) and in a possible forthcoming sectoral regulation of digital markets. The objective must be to ensure consistency and minimize potential overlaps in order to achieve maximum legal certainty in a sector where this is most needed in order to keep adequate levels of business entry and innovation.

This contribution by the Spain's National Commission for Markets and Competition1 (CNMC) addresses the subject of the roundtable on the "Competition Enforcement and Regulatory Alternatives", to be held in the June 2021 meeting of the Working Party No.2 on Competition and Regulation (WP2).

It is structured as follows. The first section addresses the institutional design of the CNMC addresses the interaction between competition and regulation. The second section deals with competition enforcement in regulated sectors. The third section analyses the interplay between competition advocacy and regulation. The four section describes new issues and debates that have arisen due to developments in digital markets. The fifth and last section concludes with the main takeaways.

Chinese Taipei

The interactions between economic and industrial regulations and competition law in Chinese Taipei can be summarized as follows:

- There has been a trend toward deregulation and pro-competitive regimes in many regulated sectors in Chinese Taipei. Aligning with the trend, the FTA explicitly states that the Act takes precedence over other applicable laws when addressing competition issues arising from business conduct. Other applicable laws can prevail only if the same conduct is set out in the applicable laws and the laws do not conflict with the FTA's legislative purposes. Once there is overlapping jurisdiction, the CTFTC has discretion to initiate a consultation meeting with an applicable government agency.
- One example associated with successful advocacy initiated by the CTFTC is the abolishment of the remuneration provision under the Certified Public Accountant Act. The CTFTC's concerns were addressed by means of agency-to-agency consultations. In terms of competition law enforcement, the CTFTC considers relevant regulatory rules, industrial policies and future industrial growth where it is necessary and appropriate. For example, the CTFTC imposed remedies on certain acquiring parties in cases concerning copyright and patent licensing in order to minimize potential harm arising from the proposed mergers.
- Nonetheless, sector regulators do not always support competition when the CTFTC makes suggestions about changes in their regulatory rules. One example relates to the Attorney Regulation Act (ARA). The sector regulator, the MoJ, argued that every bar association was granted the authority to set standard fees for legal services in its articles of association under the ARA. Despite this, the CTFTC concluded that the ARA's provision did not necessarily require lawyers to charge consultation fees. The CTFTC considered that the request made by the bar association to charge consultation fees went beyond the scope of the ARA. The 2019 amendments to the ARA removed the remuneration provision in support of the CTFTC's decision.
- Economic and industrial regulations and competition law enforcement have close and complementary relationships. However, conflict may sometimes arise. Any progress made toward pro-competitive regulation does not always guarantee a free market. Influential interest groups' lobbying and legislators' attitudes can both interrupt the progress, and even lead to a revival of regulatory provisions that impair competition. For the purpose of ensuring competition in economic sectors, how the CTFTC dedicates itself to effective advocacy and enforcement to create and maintain a cooperative and collaborative relationship with individual sector regulars continues to be a challenge.

United Kingdom

Competitive and innovative markets that benefit consumers can best be achieved by the combination of timely, targeted competition enforcement and smart, practical and proportionate ex ante regulation which should be developed by drawing on a breadth of market experience. This requires that we are flexible in our interventions, with a focus on what we think would work best for consumers, businesses and the wider economy.

The UK competition concurrency arrangements – under which the sector regulators can enforce ex post competition law alongside their ex ante regulatory powers – aims to deliver this flexible and joined up approach in order to promote competition across the regulated sectors.

As well as this well-established arrangement, the CMA has more recently taken on a new role in relation to pro-competitive regulation in digital markets, expanding the CMA's remit to a new regulatory function. This follows findings from a range of reports indicating the limitations of ex post competition enforcement in this area.

This paper sets out the UK's approach of applying the right balance of competition enforcement and regulatory alternatives to ensure competition is promoted via the most effective means possible. This draws upon the following areas:

1. First, it highlights the key features of the UK competition concurrency arrangements. This includes the rationale and background behind concurrency. In addition, it details the primacy obligation and its rationale.
2. Second, it explains that competition enforcement and pro-competitive regulation have complementary roles to play in promoting competitive outcomes. This is evidenced through explaining the role the CMA and sector regulators play in promoting pro-competitive regulation across sectors in order to address structural or systemic issues in markets.
3. Third it explains the importance of pro-competitive regulation in digital markets given the limitations of competition enforcement in this area. However, the CMA is clear that competition enforcement will still have an important role to apply alongside this new pro-competitive regulation in order to address specific firm conduct.

United States

In the United States, competition enforcement and economic regulatory instruments both play important roles in ensuring that markets function efficiently for the benefit of consumers. Competition through free enterprise and open markets is the organizing principle for the U.S. economy. The federal antitrust laws generally apply to interstate commerce or any activity affecting interstate commerce, whether or not the conduct at issue is subject to state or federal regulation. In most cases, regulation serves goals that Congress has determined are distinct from, but not inconsistent with, the competition standards of the antitrust laws.

Some regulatory statutes, however, do displace the antitrust laws to a limited extent, either expressly or by implication. Congress may provide an express statutory exemption when it determines that specific conduct otherwise prohibited by the antitrust laws should be permitted or required to further non-antitrust goals, or that competition should be "balanced" with other factors that can best be evaluated by a specialized regulatory agency. Even absent express statutory exemptions, the Supreme Court has held, in limited situations, that regulatory statutes may be construed as intended by Congress to create implied exemptions from the antitrust laws to the extent necessary to avoid conflict with a regulatory scheme. In addition, the "state action doctrine" exempts a state government's conduct from liability under the federal antitrust laws.

In the past several decades, the United States has eliminated or reduced regulation in many previously regulated sectors and sought instead to introduce competition and market disciplines to the greatest extent possible. Where industry-specific regulation is still in place, sectoral regulators have increasingly emphasized competition analysis and the benefits of free markets in pursuing their broader objectives.

U.S. experience demonstrates that competition enforcement is a highly effective tool for addressing anticompetitive conduct or transactions in nearly all industries. In general, enforcement is most successful where remedies can be fashioned that allow the market to return to the state of competition that existed prior to the targeted practice, such that market forces, rather than continuing monitoring by the government, will again determine prices and output.

Regulation can be appropriate, however, where legitimate market failures impede competitive markets. Even where regulation is needed, however, regulators should beware of unintended consequences to ensure that regulation to address a demonstrated market failure does not unduly restrict competition.