FORUMS

Global Forum on Competition

2005

Introduction

This publication includes the documentation presented at the fifth Global Forum on Competition held in Paris in February 2005.

Overview

The programme of the Forum included four main sessions on bringing competition to regulated sectors, the relationship between competition authorities and sectoral regulators, abuse of dominance in regulated sectors, and a peer review of Turkey.

Related Topics

Peer Review of Chinese Taipei (2006)
Peer Review of Russia (2004)
Preventing Market Abuses and Promoting Economic Efficiency, Growth and Opportunity (2004)
Peer Review of South Africa (2003)
Recommendation of the Council concerning Structural Separation in Regulated Industries (2001)
The Relationship between Regulators and Competition Authorities (1998)

OECD GLOBAL FORUM ON COMPETITION

-- 17-18 February 2005 –

PROGRAMME

KEYNOTE SPEECHES

Mr. Richard Hecklinger, Deputy Secretary General, OECD
Mrs. Neelie Kroes, European Commissioner for Competition

SESSION I. ROUNDTABLE ON BRINGING COMPETITION INTO REGULATED SECTORS

Executive Summary

Background note by the OECD Secretariat

Aide Memoire

Country contributions:

Chile
Chile (TDLC)
India
Indonesia
Kenya
Lebanon
Pakistan
Poland
Russian Federation
Thailand
United States
Vietnam
BIAC

SESSION II. THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS

Issues paper by the OECD Secretariat

Country contributions:

Algeria
Brazil
Chile
China (SAIC)
Estonia
Indonesia
Kenya
Lebanon
Pakistan
Romania
Russian Federation
Singapore
United States
Vietnam
BIAC

SESSION III. ABUSE OF DOMINANCE IN REGULATED SECTORS

Background note by the OECD Secretariat

Key issues for discussion in Sub-Sessions

Sub-Session 1

Latvia
Russian Federation
Zambia

Sub-Session 2

Jamaica
South Africa
Chinese Taipei

Sub-Session 3

China
Peru
Senegal

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

15-Feb-2005

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/GF/A(2005)1
Unclassified

Cancels & replaces the same document of 14 January 2005

Global Forum on Competition

PROVISIONAL FORUM AGENDA

To be held at the Château de la Muette, 2 rue André Pascal, Paris 16th on 17 and 18 February 2005, starting at 9:30 am

English - Or. English

JT00178679

GLOBAL FORUM ON COMPETITION

17 and 18 February 2005

THURSDAY 17 FEBRUARY

9:30-9:50 **OPENING REMARKS**

Richard **HECKLINGER**
OECD Deputy Secretary General

INTRODUCTORY COMMENTS

Frédéric **JENNY**
Chairman of the Competition Committee (France)

9:50-10:10 **KEYNOTE SPEAKER: Regulating for competition and growth**

Ms. Neelie **KROES**
Commissioner responsible for Competition Policy (European Commission)

10:10-1:00

SESSION I **ROUNDTABLE ON BRINGING COMPETITION INTO REGULATED SECTORS**

Chair: Helcio **TOKESHI**
Secretary, SEAE (Brazil)

10:10-10:25 **PRESENTATION BY THE SECRETARIAT**

Background Note DAF/COMP/GF(2005)1

10:25-1:00 **GENERAL DISCUSSION**

Written contributions[(1)]:

Chile	DAF/COMP/GF/WD(2005)3
Chile (TDLC)	DAF/COMP/GF/WD(2005)25
India	DAF/COMP/GF/WD(2005)12
Indonesia	DAF/COMP/GF/WD(2005)5
Kenya	DAF/COMP/GF/WD(2005)26
Lebanon	DAF/COMP/GF/WD(2005)31
Pakistan	DAF/COMP/GF/WD(2005)33
Poland	DAF/COMP/GF/WD(2005)37

(1) Written contributions are available in their original language only.

Russian Federation	DAF/COMP/GF/WD(2005)10
Thailand	DAF/COMP/GF/WD(2005)32
United States	DAF/COMP/GF/WD(2005)35
Vietnam	DAF/COMP/GF/WD(2005)7
BIAC	DAF/COMP/GF/WD(2005)29

1:00-2:30 OECD Buffet lunch

2:30-6:00

SESSION II **THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS**

Chair: Vinod **DHALL**
Member
Competition Commission of India (CCI)

Background documentation:

- Issues Paper DAF/COMP/GF(2005)2

2:30-3:30 **Oral Presentations**:

- Allan **FELS** (Australia)
- Eduardo **PEREZ MOTTA** (Mexico)
- Claes **NORGREN** (Sweden)
- Anatoly **GOLOMOLZIN** (Russian Federation)

3:30-4:10 **Panel discussion between the Presenters**

4:10-6:00 **GENERAL DISCUSSION**

Written Contributions[(2)]:

Algeria	DAF/COMP/GF/WD(2005)13
Brazil	DAF/COMP/GF/WD(2005)14
Chile	DAF/COMP/GF/WD(2005)4
China (SAIC)	DAF/COMP/GF/WD(2005)9
Estonia	DAF/COMP/GF/WD(2005)2
Indonesia	DAF/COMP/GF/WD(2005)6
Kenya	DAF/COMP/GF/WD(2005)27

(2) Written contributions are available in their original language only.

Lebanon	DAF/COMP/GF/WD(2005)30
Pakistan	DAF/COMP/GF/WD(2005)34
Romania	DAF/COMP/GF/WD(2005)1
Russian Federation	DAF/COMP/GF/WD(2005)11
Singapore	DAF/COMP/GF/WD(2005)24
United States	DAF/COMP/GF/WD(2005)36
Vietnam	DAF/COMP/GF/WD(2005)8
Mr. Fels (ANZOG)	DAF/COMP/GF/WD(2005)38
BIAC	DAF/COMP/GF/WD(2005)28

FRIDAY 18 FEBRUARY

9:30-1:00

SESSION III (**open only to country representatives and intergovernmental organisations)**

ABUSE OF DOMINANCE IN REGULATED SECTORS

Chair: Eduardo **PEREZ MOTTA**
Chairman of the Federal Competition Commission
(Mexico)

9:30-11:45 **Background Note** DAF/COMP/GF(2005)3

Key issues for discussion in Sub-Sessions
DAF/COMP/GF(2005)3/ANN1

BREAKOUT SESSIONS (9 Case studies)

Sub-Session 1: **Chair:** Andrej **PLAHUTNIK** (Slovenia)

Latvia	DAF/COMP/GF/WD(2005)17
Russian Federation	DAF/COMP/GF/WD(2005)20
Zambia	DAF/COMP/GF/WD(2005)21

Sub-Session 2: **Chair:** Peteris **VILKS** (Latvia)

Jamaica	DAF/COMP/GF/WD(2005)15
South Africa	DAF/COMP/GF/WD(2005)23
Chinese Taipei	DAF/COMP/GF/WD(2005)19

Sub-Session 3: **Chair:** Menzi **SIMELANE** (South Africa)

China	DAF/COMP/GF/WD(2005)18
Peru	DAF/COMP/GF/WD(2005)16
Senegal	DAF/COMP/GF/WD(2005)22

11:45-12:05 **COFFEE BREAK**

12:05-1:00 **REPORTS BY CHAIRS OF SUB-SESSIONS**

1:00-2:30 **OECD Buffet lunch**

2:30-5:30

SESSION IV
(open only to country representatives and intergovernmental organisations)

PEER REVIEW OF TURKEY'S COMPETITION LAW AND POLICY

Chair: Frédéric **JENNY**

Opening Remarks: Kemal **UNAKITAN**
Minister of Finance (Turkey)

Reviewers: **Norway (**Knut Eggum **JOHANSEN)**
South Africa (David **LEWIS)**

For discussion:

Competition Law and Policy in Turkey

Note by the Secretariat DAF/COMP/GF(2005)4

5:30-6:00

SESSION V
(open only to country representatives and intergovernmental organisations)

EVALUATION, FUTURE WORK AND CLOSING REMARKS

Chair: Frédéric **JENNY**
Chairman
Competition Committee (France)

Non classifié **DAF/COMP/GF/A(2005)1**

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development **16-Feb-2005**

Français - Or. Anglais

DIRECTION DES AFFAIRES FINANCIÈRES ET DES ENTREPRISES
COMITÉ DE LA CONCURRENCE

DAF/COMP/GF/A(2005)1
Non classifié

Annule & remplace le même document du 02 février 2005

Forum mondial sur la concurrence

ORDRE DU JOUR PROVISOIRE

qui se tiendra au Château de la Muette, 2 rue André Pascal, Paris 16ème,
les 17et 18 février 2005, à partir de 9 heures 30

TA26200 – 14/1/05 – 31/1/05

JT00178706

Français - Or. Anglais

FORUM MONDIAL SUR LA CONCURRENCE
17 et 18 février 2005

JEUDI 17 FEVRIER

9:30-9:50 **ALLOCUTION D'OUVERTURE**

Richard **HECKLINGER**
Secrétaire général adjoint (OCDE)

INTRODUCTION

Frédéric **JENNY**
Président du Comité de la concurrence (France)

9:50-10:10 **EXPOSE LIMINAIRE : Réglementer pour la concurrence et la croissance**

Ms. Neelie **KROES**
Commissaire responsable de la politique de la concurrence (Commission européenne)

10:10-1:00

SESSION I **TABLE RONDE SUR LE THEME : INTRODUIRE LA CONCURRENCE DANS LES SECTEURS REGLEMENTES**

Président : Helcio **TOKESHI**
Secrétaire, SEAE (Brésil)

10:10-10:25 **EXPOSE DU SECRETARIAT**

Note de référence DAF/COMP/GF(2005)1

10:25-1:00 **DISCUSSION GENERALE**

Contributions écrites[(1)]:

Chili	DAF/COMP/GF/WD(2005)3
Chili (TDLC)	DAF/COMP/GF/WD(2005)25
Inde	DAF/COMP/GF/WD(2005)12
Indonésie	DAF/COMP/GF/WD(2005)5
Kenya	DAF/COMP/GF/WD(2005)26
Liban	DAF/COMP/GF/WD(2005)31
Pakistan	DAF/COMP/GF/WD(2005)33
Poland	DAF/COMP/GF/WD(2005)37
Fédération de Russie	DAF/COMP/GF/WD(2005)10

(1) Les contributions écrites ne sont disponibles que dans leur langue d'origine.

Thaïlande	DAF/COMP/GF/WD(2005)32
Etats-Unis	DAF/COMP/GF/WD(2005)35
Vietnam	DAF/COMP/GF/WD(2005)7
BIAC	DAF/COMP/GF/WD(2005)29

1:00-2:30 Déjeuner-buffet offert par l'OCDE

2:30-6:00

SESSION II **LES RELATIONS ENTRE AUTORITES DE LA CONCURRENCE ET AUTORITES RESPONSABLES DE LA REGLEMENTATION SECTORIELLE**

Président : Vinod **DHALL**
Membre de la Commission de la concurrence de l'Inde (CCI)

Documents de référence :

- Note de discussion DAF/COMP/GF(2005)2

2:30-3:30 **Exposés** :

- Allan **FELS** (Australie)
- Eduardo **PEREZ MOTTA** (Mexique)
- Claes **NORGREN** (Suède)
- Anatoly **GOLOMOLZIN** (Fédération de Russie)

3:30-4:10 **Discussion en panel entre les orateurs**

4:10-6:00 **DISCUSSION GENERALE**

Contributions écrites[(2)]:

Algérie	DAF/COMP/GF/WD(2005)13
Brésil	DAF/COMP/GF/WD(2005)14
Chili	DAF/COMP/GF/WD(2005)4
Chine (SAIC)	DAF/COMP/GF/WD(2005)9
Estonie	DAF/COMP/GF/WD(2005)2
Indonésie	DAF/COMP/GF/WD(2005)6
Kenya	DAF/COMP/GF/WD(2005)27
Liban	DAF/COMP/GF/WD(2005)30
Pakistan	DAF/COMP/GF/WD(2005)34

(2) Les contributions écrites ne sont disponibles que dans leur langue d'origine.

Roumanie	DAF/COMP/GF/WD(2005)1
Fédération de Russie	DAF/COMP/GF/WD(2005)11
Singapour	DAF/COMP/GF/WD(2005)24
Etats-Unis	DAF/COMP/GF/WD(2005)36
Vietnam	DAF/COMP/GF/WD(2005)8
Mr. Fels (ANZOG)	DAF/COMP/GF/WD(2005)38
BIAC	DAF/COMP/GF/WD(2005)28

VENDREDI 18 FEVRIER

9:30-1:00

SESSION III **ABUS DE POSITION DOMINANTE DANS LES SECTEURS REGLEMENTES**

(**réservée aux représentants de pays et aux organisations intergouvernementales)**

Président : Eduardo **PEREZ MOTTA**
Président de la Commission fédérale de la concurrence (Mexique)

9:30-11:45 **Note de référence** DAF/COMP/GF(2005)3

Questions-clés à examiner en sous-groupes
DAF/COMP/GF(2005)3/ANN1

(Exposé du Secrétariat à chaque sous-groupe)

SEANCES EN SOUS-GROUPES (9 études de cas)

Sous-groupe 1 : Présidence : Andrej **PLAHUTNIK** (Slovénie)

Lettonie	DAF/COMP/GF/WD(2005)17
Fédération de Russie	DAF/COMP/GF/WD(2005)20
Zambie	DAF/COMP/GF/WD(2005)21

Sous-groupe 2 : Présidence : Peteris **VILKS** (Lettonie)

Jamaïque	DAF/COMP/GF/WD(2005)15
Afrique du Sud	DAF/COMP/GF/WD(2005)23
Taipei chinois	DAF/COMP/GF/WD(2005)19

Sous-groupe 3 : Présidence : Menzi **SIMELANE** (Afrique du Sud)

Chine	DAF/COMP/GF/WD(2005)18
Pérou	DAF/COMP/GF/WD(2005)16
Sénégal	DAF/COMP/GF/WD(2005)22

11:45-12:05 **PAUSE-CAFE**

12:05-1:00 **RAPPORTS DES PRESIDENTS DE SOUS-GROUPES**

1:00-2:30 **Déjeuner-buffet offert par l'OCDE**

2:30-5:30

SESSION IV

(réservée aux représentants de pays et aux organisations intergouvernementales)

EXAMEN PAR LES PAIRS DU DROIT ET DE LA POLITIQUE DE LA CONCURRENCE DE LA TURQUIE

Président : Frédéric **JENNY**

Remarques liminaires : Kemal **UNAKITAN**
Ministre des Finances (Turquie)

Examinateurs : **Norvège (**Knut Eggum **JOHANSEN)**
Afrique du Sud (David **LEWIS)**

Pour discussion :

Droit et politique de la concurrence en Turquie

Note du Secrétariat DAF/COMP/GF(2005)4

5:30-6:00

SESSION V

(réservée aux représentants des pays et aux organisations intergouvernementales)

EVALUATION, TRAVAUX FUTURS ET REMARQUES DE CLÔTURE

Président : Frédéric **JENNY**
Président
Comité de la concurrence (France)

GLOBAL FORUM ON COMPETITION
Paris, 17 February 2005

Opening remarks of
Mr. Richard Hecklinger
Deputy Secretary General
Organisation for Economic Co-operation and Development

Good morning, ladies and gentlemen, and welcome to the fifth meeting of the OECD Global Forum on Competition. I would like to extend a special welcome to Neelie Kroes, Commissioner for Competition Policy in the European Commission. And welcome to Frederic Jenny, our Chairman for this session and Chair of the OECD Competition Committee. I am delighted to see so many of you here. I am told that we have some 80 delegations here today, representing 70 countries and economies, as well as international and regional organisations, the business and labour communities, consumer groups, civil society organisations and the donor community. Over 290 participants in total, which I believe is a new record. This participation reflects the importance we place on competition both for good economic performance and for providing our citizens with high quality reasonably priced goods and services. In five years this Forum has become recognised as a place where competition leaders can share experience and take home good ideas. We are impressed by the many excellent written contributions that you have made to this meeting. We appreciate very much the financial support to the meeting provided by Chinese Taipei.

This year, the Global Forum will focus upon the relationship between competition and regulation. This theme reflects your own preferences– as you expressed them through the evaluation of last year's Forum, and a questionnaire sent with the invitation to this meeting.

Regulation is essential for well-functioning market economies. Over recent decades, policymakers in OECD and other countries became concerned that regulation was too intrusive, harming resource allocation and production efficiency. "Deregulation" became the primary policy objective for some time. This was necessary, and it still is necessary to reduce or eliminate many regulations. However, now the focus is shifting towards better regulation, for in some circumstances, effective competition may require more – not fewer – rules.

The questions on the agenda of this meeting include:

- How to introduce competition into sectors where it is absent, and what kind of regulation will you need?

- What should be the interaction between bodies responsible for regulation and those responsible for competition law enforcement? How can they support each other effectively?

- What are the opportunities and limits to competition law enforcement in regulated sectors?

Getting good answers to these questions and putting them into practice is crucial for improving economic performance. Regulations that increase the role of competitive forces will increase GDP per capita. More competition will:

- increase productivity,
- improve allocation of resources,
- promote innovation and diffusion of technology, and
- increase employment.

The experience of OECD countries demonstrates this relationship between sound competition law and policy and healthy economic growth. Let me take an example from the 2004 OECD economic survey of Australia that was released just two weeks ago. Australia's economic policies have become a model for countries seeking to improve their economic performance. In brief, the OECD survey said

> The tenacity and thoroughness of deep structural reform – as they were proposed, discussed, legislated, implemented and followed-up in virtually all markets -- created a deep-seated "competition culture". These reforms have conferred an enviable degree of flexibility on the Australian economy, resulting in a prolonged period of good economic performance. Today, the short-term outlook for Australia is for continuing strong growth of productivity and output, low inflation and budget surpluses accompanied by tax cuts.

Sounds good. And as we can see in our briefings, the Australian Productivity Commission estimates that Australia's strong competition policy has resulted in an increase in the Australian householder's average annual income of approximately 7,000 Australian dollars. But it is not just Australia which has benefited from strong competition policy. Those of you who attended last year's meeting of the Global Forum may recall the discussion we had on how enforcement against private anti-competitive conduct has contributed to economic development. Many of you, from economies at quite different stages of development, offered examples of the beneficial effects of promoting competition. The link between competition and growth applies to all countries.

The important point which Australia, as well as other countries, illustrates is that a competition authority cannot by itself infuse competition everywhere. Instead, all parts of government need to adopt a pro-competition agenda. Whenever we look at new laws and regulations or existing rules, and new or existing policies and programs, we should ask: "Is there a more competition-friendly way to achieve our policy goals?" In this way, more effective competition can help clear the way for economic growth and greater welfare, without setting aside other policy goals like universal service obligations, public health and safety, or protection of the environment. Leaders of Government should both set an example and call upon competition authorities, sector and other regulators and law enforcement to pull in the same direction and support each other.

Unfortunately, competition authorities and sector regulators have often not pulled in the same direction. They often disagree about regulatory approaches and don't make sure that each others' views are taken into account. Competition authorities suspect that regulators are acting more in the interests of the firms they regulate, than in the interests of consumers or promoting competition. But sectoral regulators fear that competition authorities don't recognise broader social objectives and, instead, rigidly set competition above all other concerns.

This kind of friction is not necessary. In fact, competition authorities and sector regulators should be on the same side, because sound competition policy can be applied to governmental regulation in a way that improves economic performance, while meeting other, legitimate objectives.

The interest of Governments is to ensure that competition authorities and sector regulators co-operate. There are practical measures that Governments can take to enhance pro-competitive regulation and improve the relationship between competition authorities and sector regulators. And, maybe most important, the agencies themselves - including their leaders and staff – can work to improve mutual support and coherence in the interest of the citizens they serve. I expect that over the next two days you will learn what other countries have done in this respect, and also share your own experiences.

Dialogue to develop and refine economic policy is one of the OECD's core methods, open to all economies that are willing to take part. Another activity at the heart of OECD work is the critical review of government performance. Since 2003, such peer reviews have been a regular part of the Global Forum agenda. In previous meetings we reviewed the competition laws and institutions of South Africa and Russia. Tomorrow, we will have Turkey in the reviewed country's seat.

These peer reviews can be highly useful, for example as a lever in the domestic political process in favour of pro-competitive reform. Only three months ago, I joined a delegation including our Chair and three other senior competition officials from OECD countries on a visit to Moscow hosted by the Anti-Monopoly Commission of the Russian Federation. We met several Ministers and other representatives of the Russian Government, as well as leaders in the Federal Assembly and Duma and discussed with them the conclusions of the OECD's peer review of Russia. The impact of this review was noticeable. Political leaders are now taking positive steps on some of the most important recommendations of the report relating to the reform of the competition legislation of Russia. I believe we will hear more about this from the Russian Delegation when we open Session IV with the review of Turkey.

This is of course not the only outcome of peer reviews. An in-depth examination of a country's policies always provides lessons and inspiration to the benefit of other countries – including both examples to follow and areas that were less successful. I trust you will all find the review of Turkey tomorrow highly interesting.

As usual, the final Session will deal with future work. The input received from participants has been invaluable to the preparation of this meeting. This is your Forum, and therefore your feedback is crucial to ensuring its continued success. Evaluation forms will be circulated prior to the final session tomorrow and your views on agenda topics for future meetings will shape and determine how the Forum evolves.

I wish you all a fruitful meeting and hope that the discussions here will be of relevance to you in your important work in promoting competition back in your economies.

OECD Global Forum on Competition,
ParisThursday, 17 February 2005

"REGULATING FOR COMPETITION AND GROWTH"

NEELIE KROES

European Commissioner for Competition

Deputy Secretary General Hecklinger, Mr. Jenny,
Ladies and Gentlemen,

Introduction

It is a great pleasure to address you today. Since its creation in 2001, the Global Forum on Competition has earned a reputation as one of the world's leading competition conferences. It is great to see before me faces from such a wide range competition of authorities from all around the globe. We have a lot to learn from each other, and valuable experiences to share. I look forward to working with all of you over the next five years.

In the last months, we in the European Union have been doing a lot of thinking about how to increase our competitiveness in the coming years. Two weeks ago the European Commission proposed a new partnership for growth and jobs. A partnership focused on the actions which are really key to reinvigorating the economic and social reform process started in Lisbon in 2000. A partnership which mobilises support for change by bringing together stakeholders at all levels – institutions, Member States, businesses, citizens. A partnership to guarantee that the Union's economic development both is sustained and sustainable.

Competition policy is a key driver for delivering an attractive environment for growth and jobs, not just in Europe, but also in every region of the world. Today I would like to give you a taste of the competition policy initiatives we have planned as part of the renewed Lisbon strategy. I also want to describe how these ideas fit into the wider context of concerted global efforts to promote competitive practice.

International competition is no zero sum game. The benefits of competitiveness, growth and lasting social and environmental development are mutually reinforcing. A properly managed environment for business sustains and promotes competitiveness, productivity and growth, in global and regional trade markets, as well as at national level. That is the challenge all competition authorities face. And that is why opportunities to share thoughts and experience, such as the one we have in today's Global Forum, are so valuable to all of us.

The European partnership for growth and jobs in a global perspective

Growth is of course not an end in itself. The agenda we are promoting in Europe is intended to deliver the sustainable, dynamic growth needed to guarantee the standard of living and social protection which European citizens have come to expect. If weare to meet these fundamental social objectives, Europe needs to be competitive now and in the future. And the testing ground for competitiveness is the market, which today is often global.

The fact of a global market does not mean that competitiveness is simply a race against other economies regions or around the world. Although there are some people who would try to convince you otherwise, it is simply not true that wealth created elsewhere is lost prosperity at home. In the wider context of open markets within a globalising economy, efforts to deliver growth in one part of the world can create a multitude of opportunities elsewhere too.

But when we look at the global market place, we see that the European Union has still not reached its full potential for growth and productivity. The Union therefore fails to contribute as much as it could to creating opportunities for innovation, productivity and wealth-creation globally. Europe faces real structural problems: declining growth in productivity, an ageing population and decreasing employment rates. There is no doubt that Europe urgently needs to ndfi solutions to these challenges. Everyone agrees that we need to deliver more growth and more and better jobs. But views do differ as to how this should be done.

On one hand, some people say that Europe should turn its back on free competition on global markets.That the answer lies in "looking after Europe's own", in giving a few well-selected companies a helping hand to ensure they do well on the global market.

On the other hand, there are those – and I certainly count myself one of them – who do not agree. Who have seen at first hand that it is companies that face strong competition at home (wherever 'home' happens to be!) which become successful on a global scale. And who rightly fear the consequences of protectionist industrial policy: economic isolation, stagnated growth, lost prosperity.

We have no choice but to resist the temptation to turn inwards. This is as essential for the European Union, it asis for the OECD, as it is for the wider circle of friends brought here in the Global Forum.

For our part, the European Commission is committed to an industrial policy built on vigorous competition at home and abroad. That is why we intend to pursue policy goals which will create and maintain favourable terms to do business in a globalising economy; help develop a level playing field at global level; and sustain the openness of all our markets.

Competition policy and the partnership for growth and jobs

That is why, under the guidance President of Barroso, the new European Commission's proposals for reinvigorating the Lisbon economic and social policy reform process put so much emphasis on competition policy. Competition policy drives competitiveness which is the motor for sustainable growth and new jobs.

The programme we have proposed ambitious. Is it includes actions to complete our internal free market and improve European and national regulation. It opens the way for better infrastructures and more investment in innovation, research and development. It seeks to get more people into better jobs and modernise social protection systems.

I believe that this is the right basis for re-launching Lisbon, with policies that are aimed at enhancing market efficiency and bringing about increased competition. At the heart the of strategy is recognition that it is markets that generate wealth – and as a result of that, jobs - not governments. And as competition is the essential ingredient for well-functioning markets, the strategy includes three important competition policy strands.

Competition screening and sectoral inquiries

Firstly, there is what I would call 'competition advocacy'. By which I mean getting out there and actively promoting good competitive practice in the marketplace. Later today and tomorrow you will be discussing how to bring competition to regulated industries, as well as the relationship between competition authorities and sector regulators. In my view, you could not have chosen more pertinent themes!

In the world of competition authorities, prevention is far better than cure. Of course we should be tough when businesses break the rules. But that is not enough. We must also maker that the rules themselves are the right ones for a fair and competitive business environment.

That is not to say that de-regulation is the solution. But the regulations we do put in place should be smart and well-targeted. Regulatory methods should include tests to ensure that the measures proposed do not bring unintended side-effects which hold back competition. Both the regulatory framework itself and the way it is enforced in practice must create an environment which not only allows cross-border competition to happen, but which induces it to flourish.

There are two actions set out in the Lisbon programme which will help deliver this goal in the European Uion. Firstly, we will launch sectoral investigations at European level, to identify and remove remaining barriers to free competition. Such barriers could be regulatory, or they could be the result of private practice or even state subsidy. In a first phase, our investigations will focus sectors on which have a direct impact on overall competitiveness, such as financial services and energy.

Secondly, the European Commission will routinely examine draft European legislation for its potential impact on competitiveness. We want to weed out the unintended side-effects of poor regulation, by-products which at the end of the day harm both business and consumers.

This sort of competitiveness testing can of course be useful in all regulatory environments. So we will encourage EU Member States to make this sort of practice routine in designing their national regulation too.

State aid reform

From an EU perspective possibly the most important way in which competition policy can contribute to competitiveness is through the unique tool of state aid control. By state aid I mean the public subsidies that Member States' governments grant to business. Public subsidies can distort fair and effective competition between companies, and in the long run prevent market forces from rewarding the most competitive firms, so that overall competitiveness suffers.

This is why European law generally prohibits such subsidies unless there are reasons of general economic development that justify them. The European Commission is charge dithw supervising the compliance of public subsidies with EU rules. We do so in the spirit of the rallying call from our Heads of State and Government: 'less and better aid'.

Over the next few years, the Commission intends to review European state aid policy. We will set out a road map in a Communication published later in the spring. The aim is to make sure that public subsidies are really targeted whereyth can add real value. Intelligently-targeted support can fill the gapsft leby genuine market failures and hence empower more undertakings become to active competitors. The new rules should make it easier for Member States to use public funds to an appropriate degree to support measures which will boost innovation, improve access to risk capital, and promote research and development.

Effective enforcement of modernised EU competition law

The third area in which competition policy can make a real difference to competitiveness and growth is maintaining the pattern of effective enforcement of competition law. Is it the responsibility of all competition authorities to ensure that the spoils of free markets are not carved up in private by a handful of businesses.

Since 1 May 2004 Europe has benefited from a revised antitrust regime that creates a whole new framework for tackling private barriers to competition. We have also a mature merger control system, based on sound economics and the same standards all major global jurisdictions. The European Commission cooperates with a network of 25 national competition authorities to ensure that these rules are properly applied, and that decisions are taken at the most appropriate level.

So we have a good framework already place in Europe. My intention is to enforce it with persistence and vigour. But I also recognise that even the best competition authority cannot know at first hand every problem in every sector of the market. I therefore want to develop ideas for empowering damaged parties – customers and competitors - to bring their cases forward through the court systems.

I can also see the need for complementary action to underpin zero tolerance of cartels. The OECD has worked hard to increase awareness of the enormous damage cartel activity can bring to the interests of business and consumers alike. You have developed some very interesting ideas on ways to deal with cartels at global level. I can only encourage you to pursue this important work.

Effective leniency policy can be a pivotal tool in rooting out hard core cartels. I intend to explore the idea of a European-wide 'one-stop-shop' for leniency applications in cartel cases. Companies would be more willing to expose illegal concerted practices if they could access a once and-for-all Europe-wide guarantee of immunity from fines.

International cooperation

This leads me to a fourth defining element in my vision for European competition policy over the coming years. Europe cannot do it alone. The increasing integration of the world economy - as reflected by the rise in multi-jurisdictional mergers and anti-competitive conduct across borders - makes international cooperation vitally important for modern competition authorities. If we want to play our full part as promoters of sustainable growth in our national, regional and global markets, we, the competition authorities, need to do more to coordinate our actions and policies. We share a common objective: there should be no safe havens for those who engage in anti-competitive practices.

Active bilateral co-operation between competition authorities is of unquestionable value. It makes for more effective joint responses to anticompetitive practices, amongst other things by avoiding conflicting conclusions in cross-border cases. But with the growing number of competition authorities world-wide, bilateral cooperation is clearly not enough. A global market requires a multilateral response. I cannot stress enough the importance of the OECD and the International Competition Network as for a for promoting progressive convergence of competition policy around the world.

The OECD and the ICN have made substantial progress in developing common standards. And we can already see the fruits of this work: a shared commitment to ban hard core cartels and the development of common enforcement standards and practices for multi-jurisdictional mergers are just two examples. The European Commission is committed to playing its role in the vanguard of these efforts.
Finally, I think that giving agencies from developing and transition economies a role and a voice in multilateral for a is of paramount importance. That is why I am so pleased to have been asked to speak to you today. In our truly global competition community we all have a lot to learn from each others' experiences, successes and failures. The 'older generation' has a duty to support the young competition agencies that are growing around the world. This is not a mandate for blindly imposing one single model everywhere. More experienced agencies would be ill-advised to shut their eyes to new ways of thinking and doing things. We all have something to bring to the debate, and we all have something to learn from it. The standards we put in place should be built on the best practice drawn from genuinely collective experience. In the long run, this is the only way to create the critical mass of likeminded authorities needed to deliver coherent competition policy for growth on a global scale.

Mr. Hecklinger, thank you for inviting me to speak here in the Global Forum.

Ladies and gentlemen, thank you for your attention. I wish you a most fruitful exchange of views on the role of competition policy in regulated sectors.

OCDE

ROUNDTABLE ON BRINGING COMPETITION INTO REGULATED SECTORS

-- EXECUTIVE SUMMARY --

Organisation for Economic Co-operation and Development
Organisation de Coopération et de Développement Economiques

2005

EXECUTIVE SUMMARY

BRINGING COMPETITION INTO REGULATED SECTORS

1. In the light of the written submissions, the background note and the oral discussion, the following points emerge:

(1) *The concept of a "regulated sector" is potentially very broad. At one extreme the concept of a regulated sector might include only the traditional public utilities (telecommunications, electricity, and so on). At the other extreme, all economic activity takes place within a broader framework of rules and regulations.*

It is useful to divide different economic markets or sectors into three groups – (1) those sectors which can deliver efficient outcomes through competition operating under a framework of the general economic and commercial laws of an economy; (2) those sectors which can sustain competition but which will not, in the absence of sector-specific regulation, deliver efficient outcomes; and (3) those sectors which cannot sustain competition. The set of policies for enhancing competition is quite different in each of these groups.

This roundtable provided an overview of the policies for introducing competition in each of these three types of sectors – essentially covering at a high level the broad field known as "competition policy".

(2) *In the case of those sectors which can deliver efficient outcomes through competition operating under broad framework laws alone, the set of policies for promoting or enhancing competition includes the following: (a) Policies promoting investment, entrepreneurship and innovation; policies facilitating the raising of capital, contracting and enforcing contracts; bankruptcy laws and so on; (b) Policies to eliminate barriers to entry to a market, barriers to trade, barriers to foreign ownership and so on; (c) Policies to break-up concentrated markets (structural reform); (d) Policies to ensure that government and private businesses compete on a "level playing field" (competitive neutrality); (e) Removal of controls on prices or on the services that can be offered; (f) Ensuring that buyers are willing and able to respond to price changes (e.g., by reducing switching costs); (g) Tariff re-balancing and elimination of cross-subsidies (such as the provision of universal service in a way which is not threatened by competition); (h) Active enforcement of competition law.*

Many examples of these policies were raised in the submissions or in the discussion.

Especially in developing countries, competition may often be promoted by improving the general framework laws for all commercial activity – including laws governing setting up a business and raising capital. In Pakistan, a law that was intended to prevent undue concentration of wealth effectively prevented companies from raising capital externally, thereby limiting entry to the market. Lebanon's submission points out that Lebanon's domestic market is relatively concentrated due to "outdated commercial law, long delays in commercial dispute settlements, business unfriendly administrative regulations, corruption" and so on.

In regard to removing barriers to entry and barriers to trade, the WTO emphasised that multilateral trade promotion measures are complementary to domestic liberalisation efforts. While, on the one hand, domestic initiatives to promote competition will usually increase the scope for entry by foreign companies and thereby increase the scope for trade in services, it is also true that trade-promotion measures at the international level may promote domestic liberalisation. A clear example is the WTO "reference paper" on basic telecommunications services. This document, which was agreed in the late 1990s, was a key driver for domestic liberalisation of telecommunications in a number of countries. This example highlights the strong linkages between domestic competition policy and international trade policy. There is a need for continuing dialogue between competition authorities and trade policy-makers to ensure that competition-related insights are correctly applied.

In regard to removing controls on prices, Chile provided an example of how allowing tariff flexibility allowed the incumbent fixed-line telecommunications operator to compete with mobile service providers in low-income areas by offering a service with a lower fixed cost and higher variable cost.

India pointed out that in sectors which can sustain competition it is important to resist sector-specific regulations and the establishment of a sector regulator. There is a need to continue to review existing regulations to see if they are still needed. In the US, the regulatory authorities which used to have responsibilities for trucking and civil aviation have been abolished.

(3) *A number of sectors are able to sustain competition but for various reasons will not, in the absence of sector-specific regulation, deliver efficient outcomes. These sectors include, say, banking, taxis and professional services. In these sectors the best way to promote competition will depend on the precise nature of the "market failure". In general, however, the market failure should, as far as possible, be addressed in a manner which is compatible with competition and any remaining restriction of competition should be no larger than necessary to achieve the public objectives in this sector.*

In these sectors it is not possible to make general prescriptions on how to promote competition. There are a number of different types of "market failure". The particular approach to promoting competition in a sector will depend on the nature of that market failure and the extent to which addressing that market failure can be made compatible with competition.

For example, in the taxi industry the market failure relates to the inability of certain customers to "shop around" for the best price/service combination. Virtually all cities regulate prices for taxi services in some way. But it is less clear that there is a need to regulate the number of taxi licences. Croatia emphasised that limitations on the number of taxi licences in Zagreb were giving rise to prices considerably higher than in other comparable cities.

In the case of professional services certain consumers may not have the ability to determine the quality of the services offered in advance (or after) a sale. Most countries therefore mandate minimum quality standards for the provision of certain professional services. But those quality standards should be proportionate to the risks to which consumers are exposed. On occasions, professional associations seek to expand the range of services for which entry is limited. In the US, state laws defining which services are reserved to lawyers are sometimes drafted in a way which is overly-broad and includes, say, conveyancing services. The US described their

experience promoting competition in real-estate conveyancing services, through a combination of advocacy and legal challenges to state laws.

Many OECD countries have explicit policies and institutions charged with regularly reviewing new or existing regulations to make sure they are compatible with competition and/or achieve their objectives with as little disruption to competition as possible. It is often desirable to have such a requirement enshrined in legislation – either in broad legislation (such as the EC Treaty) or in sector-specific legislation.

(4) *Some sectors have features which make traditional in-the-market competition infeasible, such as the "natural monopoly" sectors of telecommunications, electricity, airports, and so on. These sectors are often subject to various forms of controls on the market power of the provider of the natural monopoly service. In these sectors, promoting competition is primarily a matter of identifying the components or sub-sectors of these industries which can sustain competition and ensuring efficient and timely access to any essential facilities. In many cases ensuring efficient and timely access to essential facilities will require a new body of regulation. Liberalisation is therefore often not a matter of "deregulating" but of changing the nature of the regulation.*

Ensuring efficient access to essential facilities is primarily a regulatory problem. It raises issues such as how to set the access prices, and ensuring efficient levels of quality and investment. In many cases, a regulator will be established to set access prices and resolve access disputes and define other technical regulations. There is a need for independence of the regulator from government, on the one hand, and the provider of the essential facilities, on the other. The policies listed above (such as structural reform, competitive neutrality, reducing switching costs, eliminating cross-subsidies) can play an important role in enhancing competition in the competitive segments of these industries.

In some industries, vertical separation of the provider of the essential facilities from the competitive components will be an important tool for enhancing competition. Lastly, in some industries, competition for-the-market (competitive tendering) can be a tool for improving regulatory outcomes, although experience with this tool has been mixed.

The specific policies for promoting competition in public utility industries have been the subject of many other OECD roundtables and were not discussed in detail in this session. However, a number of individual points were emphasised:

The WTO emphasised that the concept of essential facilities should be neither under-utilised nor over-utilised. If the concept of access to essential facilities is under-utilised there will be limited scope for entry by firms in the competitive segments of these industries and competition will be limited. Conversely, if the concept of access to essential facilities is over-utilised the incumbent will have little incentive to invest in maintaining or expanding the essential facilities themselves.

In some countries the dominant incumbent firm remains state-owned. This can often give rise to tensions or conflict of interest between the government in its role as regulator and in its role as owner of the incumbent firm. Furthermore, such firms may have undue weight in the policy-making process and may argue for the need to develop "national champions" in order to prevent the rise of competition.

Some services are regularly subject to competitive tendering. For example, many local council services, such as the collection of solid waste, are regularly and

successfully subject to competitive tender. Many countries also use competitive tendering for subsidised transport services (such as bus services). However experience with tenders in other sectors has not been as successful. Consumers' International pointed out that at present 45% of the concession contracts in the provision of water and sanitation are in distress (that is, financially insolvent or involved in litigation). It would be desirable to better understand the circumstances under which competitive tendering is likely to be an effective tool.

(5) *The role of the competition authority in promoting competition in regulated sectors varies from country to country. Regulated sectors should not be exempt from the competition laws. Therefore, at the least, competition authorities have a role to play in actively enforcing the competition laws. Indeed, one of the landmark events in the twentieth century in the promotion of competition in regulated sectors (the break-up of AT&T) was itself the result of competition enforcement action by a competition authority.*

Many other competition authorities have an informal or formal role in advocating for policy changes to improve competition in certain sectors. A few competition authorities must formally be consulted or have the right to issue an opinion in the process of privatisation or reform of sectoral regulations.

For many countries, there are concerns over the relationship between competition authority and other sectoral regulators. Specialist regulators are more likely to have detailed technical expertise while competition authorities are more likely to take into account the interests of the economy as a whole. In some countries these roles are combined in a single agency. Many countries have explicit arrangements or agreements for co-operation between different agencies. France recommended overlapping responsibilities, so that no one agency has exclusive authority.

Although many sectors have, in the past argued, that they are "different" and should be exempt from competition law (e.g., banks, insurance, broadcasting), it is now widely accepted that competition laws should apply to all sectors without exception. At a minimum, therefore, competition authorities should have the ability to prevent the worst anti-competitive practices (at least those which are not specifically authorised by regulation).

In many countries the competition authority is also a primary advocate for competition-promoting reforms. The Indonesian Competition Commission, for example, pointed out that it promotes public awareness through seminars, workshops and other public events to encourage competition.

Some countries give certain special duties to the competition authority. The Korea Fair Trade Commission, for example, is a member of the government Regulatory Committee and the Chairman of the KFTC participates in Cabinet meetings. The Russian Federal Antimonopoly Service is a member of the Directorate of the Federal Service for Tariffs, In Poland, the Office for Competition and Consumer Protection has a role in issuing opinions on privatisation transactions. During the period 1990-1995, around 1500 such opinions were issued.

In many countries, there are concerns over the relationship between the competition authority and the sectoral regulator. A few countries reported that the competition authority was viewed by the sectoral regulator or the regulated industry as an "irritant". This is particularly likely to be a problem when the regulator is overly-focused on the welfare on the regulated sector (in which case the regulator is said to be "captured" by the industry). Nevertheless, both agencies are likely to have

specialist expertise which is mutually beneficial. Many countries seek to promote co-operative arrangements between the competition authority and the sectoral regulator through explicit arrangements such as an MOU[1]. In other countries (such as Australia) the role of competition authority and sectoral regulator has been, at least in part, combined.

(6) *Several countries emphasised that bringing competition to regulated industries should be viewed as a process of transition that will need to be managed in a different way at each stage of the process.*

The need for direct regulatory control and oversight depends, in part, on the level of market power of a firm. As market power is eroded over time regulatory controls can be relaxed and/or targeted where they are most needed. For example, in the US telecommunications industry the declining dominance of AT&T in the long-distance business eventually led to the lifting of all price controls in that market. In the US rail industry, the remaining regulatory controls of freight tariffs are targeted on the tariffs charged to so-called "captive shippers". Regulatory arrangements, including the relative powers of the sector regulator and the competition authority, therefore need to be dynamic and kept under review as market conditions change.

Finally, competition advocacy is often politically sensitive because promoting competition will often cause short-term pain to specific, identifiable companies or individuals, while the benefits from competition are often diffuse. Chinese Taipei emphasised that bringing competition to regulated sectors is never an easy task and is sometimes frustrating, and therefore recommended patience.

1. Memorandum of Understanding.

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Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development **25-Jan-2005**

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

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Global Forum on Competition

ROUNDTABLE ON BRINGING COMPETITION INTO REGULATED SECTORS

(Background Note by the Secretariat)

-- Session I --

This note by the Secretariat is submitted FOR DISCUSSION under Session I of the Global Forum on Competition to be held on 17 and 18 February 2005.

English - Or. English

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BRINGING COMPETITION TO REGULATED INDUSTRIES[1]

Background Note

by the Secretariat

1. Introduction

1. It is now conventional wisdom in most countries that competition has a key role to play in ensuring productive, efficient, innovative and responsive markets. Competitive forces drive firms to innovate, to develop new and more efficient production processes and to adjust their products in response to changing consumer demand. Policies to stimulate competition are a key driver for improving the microeconomic and macroeconomic performance of both member and non-member economies[2].

2. This paper summarises the set of policies which governments might pursue in order to promote competition in those sectors which are or were subject to government regulation. In other words, the subject matter of this paper is "competition policy" in the broadest sense (as opposed to competition law), and its application to regulated industries. It is intended that this paper will act as a framework for thinking about competition policy, and/or a guide for developing competition-oriented reforms. Given the enormous breadth of the field of competition policy, this paper inevitably only touches on many key ideas and policies. The OECD has published many documents which discuss in more detail many of the issues which are raised here.

3. This paper is primarily about the policies, tools and techniques for bringing competition to regulated sectors. The focus is on competition and not on ideas which are often closely related in practice but which do not relate directly to competition, such as policies for improving the quality of the regulation of a natural monopoly or the performance of a regulated firm. This paper will not discuss, for example, privatisation – which, where it is feasible, is a powerful tool for improving the performance of government-owned firms. Neither will it discuss the issue of optimal setting of regulated prices except, insofar as those prices have an impact on competition.

2. Competition as a tool for achieving broader government objectives

4. Competition is not an end in itself. Rather, competition is a policy tool to achieve broader government objectives for the economy or for a given industry. These objectives differ in their details from industry to industry, but it is common for governments to seek some combination of the following objectives: that the goods and services that consumers and users want are produced efficiently, with the quality and variety that they desire, are sold at an efficient price, and with on-going investment and innovation in the industry to develop new products and improve the efficiency of production over time. These objectives are sometimes summarised as the pursuit of "economic efficiency". Allan Fels, former head of the Australian Competition Authority has said:

> "Whilst the pursuit of competition is an important economic goal, it is not pursued for its own sake. Competition is valued because of the economic results to which it gives rise. The ultimate economic goal of competition policy is to achieve economic efficiency".[3]

5. In most markets, reliance on the forces of competition is by far the best way to achieve these objectives. In a healthy competitive environment those firms which produce goods and services which best meet the needs and desires of users and consumers, and which do so most efficiently, prosper, thrive and

attract funds for investment and expansion. At the same time those firms which do not meet the needs of users and consumers or which produce inefficiently suffer a reduction in output, releasing resources to be used more efficiently elsewhere in the economy. The desire to obtain a competitive edge over rivals drives firms to develop new products and services, or new ways of producing or marketing goods and services. Firms are induced to respond flexibly to changes in technology and in market conditions over time.

6. In those markets which can sustain effective, healthy competition, the government's rule-making powers can be focused on maintaining and improving basic market rules and institutions which underpin all trade, exchange and investment. These rules and institutions include the framework of laws within which enterprise, investment and competition operate and the institutions necessary for enforcing those laws and private contracts. These framework laws establish the basic "rules of the game" and ensure that each firm's competitive energy is directed towards socially-productive ends rather than socially-destructive or welfare-reducing ends. These framework laws include, for example, laws governing property rights, contracts, firm structures, how firms can raise capital, insolvency and so on. Included amongst these framework laws are, of course, consumer protection laws and competition law.

7. For many markets, promoting competition-enhancing reforms is primarily a matter of ensuring that the forces of competition can operate without hindrance. This might imply, for example, removing barriers to entry; removing barriers to trade (such as tariffs or quotas); removing controls on the nature or range of goods and services which can be offered; restructuring the industry to enhance the number of independent participants; eliminating rules which favour certain industry participants over others; enforcement of competition rules against collusion or concentration; and so on. These policies are discussed further in the next section.

8. Unfortunately, however, there are some markets for which reliance on competition and these framework laws alone will not yield satisfactory outcomes. This might be, for example, because there will be too few firms in the market to sustain effective competitive pressure. It might also be because consumers do not have enough information to make informed choices, or because the actions of one firm have an impact on other firms or individuals which are not correctly priced.[4] These issues are discussed further in section 4.

9. Many regulated industries have a cost structure such that the only sustainable long run outcome is for the entire market demand to be supplied by a single firm. In these markets it is not possible to rely on conventional competition in-the-market between integrated firms to achieve the objectives set out above. However, in some cases, there still remains scope for competition for-the-market. This possibility is discussed in section 5.

10. Even in those industries which have natural monopoly elements, there often are significant components which are potentially competitive. In such industries, regulating to ensure access to the natural monopoly components can greatly enhance the scope for reliance on competition in the competitive components of the industry. The pros and cons of this approach are discussed in section 6.

11. In those industries in which there is a desire to promote competition by mandating access to essential inputs, it may be that the degree of competition can be materially enhanced through structural reform – that is, by preventing the owner of any remaining essential facilities from providing competitive services using those facilities. This, and other, vertical structural reforms are discussed in section 7.

12. Finally, section 8 addresses issues relating to the design of the reform process itself and how the design of regulatory institutions may affect competition. The precise role of the competition authority varies from country to country. In some countries, competition authorities have a direct role in developing economic policies which affect competition, such as policies regarding market structure, or the rules

governing market entry. In other countries, the role of competition authorities is limited to giving advice on competition-related matters, or simply enforcing the competition law. The extent to which the competition authority may be able to be involved in developing some of the policies set out below will therefore vary from country to country. In any case, section 8 argues that it is desirable for there to be at least one government agency or institution which is empowered to advocate for competition-oriented reforms along the lines of those set out here.

3. Promoting competition in competitive markets

13. As already noted, in most economic markets, the objectives set out above can be best achieved through primary reliance on competition between a number of independent firms operating against a background of framework laws and institutions. Promoting competition in such markets is largely a matter of ensuring that these framework laws and institutions operate effectively, ensuring that the conditions for competition are in place and ensuring that the firms in the market have the freedom to choose the range of services they provide and how they will provide and market those services. In particular, promoting competition may involve one or more of the following policies:

3.1 Improvement of the "framework" laws and institutions

- In many developing and transition countries the single biggest impact that governments can have on competition is through improving the "framework" laws and institutions against which all investment, trade and exchange takes place. As noted above, these framework laws establish the basic "rules of the game" that ensure that each firm's competitive energy is directed towards socially-productive ends rather than socially-destructive or welfare-reducing ends. These framework laws include, for example, laws governing property rights, contracts, firm structures, how firms can raise capital, insolvency and so on. Equally important are the institutions for enforcing these laws including, most importantly, the judiciary.

- Almost all except the most trivial transactions require investment by one party. Policies which improve the overall climate for investment will increase the scope for competition. Economic actors will not make investments if they fear that their investment will not be protected by legal rules and institutions. Action to improve access to the courts, the independence of the judiciary and control of corruption[5] can all improve competition and investment.

- Reforms to property and contract law can also have an impact on competition. For example, in a market in which the recipient of goods cannot be certain of receiving good legal title, there will be a "chilling effect" on transactions and the process of exchange. Laws governing enterprises and commercial activity can also have a material impact on competition. For example, if the bankruptcy law allows insolvent firms to continue trading, rival firms may be unable to charge a price high enough to enable them to cover their true cost of capital. In addition, the threat of bankruptcy will impose little discipline on incumbent management to improve performance.

- Even in those countries which have a very long and well developed legal tradition governing private property, competition can often be enhanced through the creation of new rights. In recent years property rights have been defined or clarified in a number of sectors, such as tradeable rights to radio spectrum, fishing rights (in the form of tradeable quotas)

and/or tradeable rights to water. This process will continue as technological developments change the costs of monitoring and enforcing property rights.

- In a few cases the strengthening of these framework laws may conflict with a desire to promote competition. For example, intellectual property laws enhance the incentive on firms to innovate and to develop new intellectual property, thereby promoting long-term growth and economic welfare. However, these same laws also create exclusive rights which may confer significant market power. Careful attention is needed to ensure that firms are not able to use intellectual property laws to inappropriately restrict competition.

- The quality of a country's framework laws and institutions will affect the extent to which it is feasible or desirable to implement some of the other reforms discussed below.

3.2 Application and enforcement of competition law

- Even in those markets which can potentially sustain competition, competition may be limited or reduced through the actions of firms in the market. It is important therefore that the competition law apply as widely as possible (including, especially, in regulated industries) and be actively enforced. This will involve, amongst other things, detecting and preventing collusive agreements between firms, preventing mergers that would otherwise restrict competition and prohibiting those vertical arrangements which are anticompetitive.

- Competition law enforcement is particularly important in industries which have historically been heavily regulated. In such industries, a move to introduce competition often does not mean an end to government intervention, but rather a change in its focus – and, in particular, a change in focus towards control of anticompetitive behaviour.

- Firms in these industries which have recently been subject to competitive pressure may seek to replicate some of the anticompetitive effects of regulation through arrangements between firms, or to re-merge to restore a concentrated industry structure. In addition, in such industries there is often a dominant firm which can restrict competition by restricting access to essential inputs or through attempting to force rivals to exit the market (perhaps through predatory pricing). For these reasons, competition enforcement is even more important in industries which are or were tightly regulated.

3.3 Removal of barriers to entry and barriers to trade

- In some regulated markets, the promotion of competition is primarily a matter of lifting restrictions on entry and exit. Aviation and trucking, for example, are two industries which can be transformed primarily by simply removing barriers to entry, allowing new and innovative firms to enter the industry.

- In the case of internationally-traded goods or services, competition can also be promoted by lowering barriers to trade by eliminating quotas or tariffs. Reducing barriers to trade will usually enhance the benefits of domestic competition-oriented reforms. Some barriers to entry still exist in both trucking and airlines – particularly at the international level, where bilateral agreements still place quantitative limits on the number of services that can be offered on certain routes.

- In some industries, ownership restrictions on participants in the market may limit competition. For example, in markets with economies of scale or scope the most likely new

entrants to a market may be existing foreign firms. In this context, controls on foreign ownership may limit the number of entrants and therefore the extent of competition.

- Ideally, domestic and foreign firms should compete on an equal footing in the market. There is no guarantee, of course, that all domestic firms will survive in a market with foreign competition – although some will prosper, others will not be competitive and will be displaced. This process both benefits domestic consumers and frees up resources which are used inefficiently to be used elsewhere in the economy.

- In those industries in which a licence is required to compete in the market, barriers to entry can be reduced through "mutual recognition" of the licences and regulatory standards of other states or nations, where those standards meet minimum acceptable levels. The EC is, of course, active in establishing minimum EU-wide regulatory regimes in many industries. More generally, regional economic integration initiatives can enhance cross-border trade in goods and services and (as discussed further below) can increase the size of the relevant market – which, other things equal, increases the number of firms which can thrive in the market.

3.4 Structural reform

- Naturally, competition cannot thrive without a reasonable number of independent market players. In those industries which were previously dominated by a single (usually state-owned) firm, the promotion of competition has almost always involved some kind of structural reform – particularly horizontal separation into competing companies.

- Structural separation of this kind is common, for example, in the electricity industry – many countries have split up the generation sector into a number of competing parts. In some cases, however, that separation did not go far enough. For example, for many years the electricity market in the UK was plagued with problems arising from the exercise of market power by the two dominant incumbent generating firms.

- Horizontal separation of this kind should be handled using the same tools as a competition authority would use to handle a merger proposal – that is, the relevant markets should be identified and (ideally) the separation should be carried out to the point where there is effective competition in all the relevant markets. Ideally, separation into two or more parts should be carried out if re-integration of those parts would be blocked by competition law. In markets in which the total market demand is small relative to the minimum efficient scale of operation of firms, a trade-off will need to be made between productive efficiency and enhancing competition. As mentioned earlier, the need for this trade-off can be reduced by increasing the size of the market by reducing barriers to international trade.

- In some countries, competition authorities have explicit powers to require changes to the structure of an industry (e.g., to force divestiture of certain facilities, perhaps as a remedy for an "abuse of dominance"). One of the most well-known cases of structural reform – the break-up of AT&T in the US – was the result of an antitrust action taken by the US competition authorities. In any case, given the expertise of the competition authority in defining the relevant markets and assessing the level of competition in markets with different structural arrangements, it is natural for the competition authority to be involved in such structural decisions. The competition authority in Mexico, for example, was closely involved in designing a competition-promoting structure of the Mexican rail sector.

- In addition to horizontal structural separation, other forms of separation may also prove to be important. Vertical separation of competitive and essential-facility elements of the industry are discussed further in section 5. It may also make sense to separate a monopoly business from any competitive businesses (even when the competitive businesses do not purchase any essential inputs from the incumbent) in order to prevent cross-subsidisation from regulated to competitive parts of the business. This was one of the reasons behind the break-up of AT&T. Similar concerns have also been expressed about possible cross-subsidisation of Deutsche Post's parcel business from its monopoly letter services, or possible cross-subsidisation at La Poste of its banking services.[6]

Example #1: Electricity Restructuring[7]

In a certain country there is an integrated incumbent electricity company. The network in this country consists of two regions connected by a single interconnector. The government decides to restructure this company by dividing the generators into four companies – one company for the "base load" and the "peaking" generation in each region. The government argues that this will create four independent generating companies which should be more than enough for effective competition (and indeed, it is more divestiture than some countries carried out in their electricity reforms). Each company only has a 25% share of the total generation capacity. Should your agency accept this plan?

Although four equal-sized competing firms would not be too problematic in many industries, key features of the electricity industry gives cause for concern. For example, the inelasticity of the demand curve in electricity implies that any given level of concentration will yield more market power in electricity than in other industries. In addition, since electricity cannot be economically stored in large quantities, it is important to differentiate electricity markets by time – market power is particularly likely to be high at times of peak demand.

In this example, the scope for competition across the regions depends on the size of the interconnector. Once the interconnector has reached its capacity the two regions are effectively isolated. If the capacity of the interconnector is small and often congested, these two regions would be better treated as two separate markets, significantly increasing the apparent concentration.

Furthermore, at off-peak times, only the "base load" generation will be active in the market. It can price up to the cost of the "peaking" generation without any risk that the peaking generation will increase output. Therefore, at least at off-peak times, the relevant market definition should focus on just the "base load" generation, again significantly increasing the apparent concentration.

In addition, the inelasticity of the demand curve for electricity means that, in any case, at peak times, once demand exceeds 75% of the total capacity any one of these four firms has unlimited market power (since it is required to produce some output to meet the total demand).

In summary, the proposed market structure is highly questionable. Possible improvements include increasing the interconnector capacity, reorganisation so that all four companies include both base load and peaking generation in a single generation portfolio and further separation in both regions – ideally to form at least four balanced companies in each region (eight firms in total). Whether or not such separation is possible will depend on the size of the market relative to the minimum efficient scale of each generating plant.

3.5 Competitive neutrality

- In many countries, the government itself is a major participant in certain markets, through so-called state-owned enterprises. But government owned firms do not always compete on an "equal footing" with other enterprises. In particular, government owned firms often benefit from favourable terms on inputs such as relief from taxes, implicit government-guarantee or borrowings, or discounted valuations on historic assets.[8]

- Promoting competition in these markets is often a matter of ensuring "competitive neutrality" – that is, promoting the famous "level playing field" between government-owned and private firms. This might require, for example, eliminating any implicit government guarantee on the borrowing of the state-owned enterprise. It is also likely to require placing strict limits on access to subsidies or aid of various kinds, such as the limits found in the EC Treaty.

- In many cases, when a dominant firm remains government owned it may be very difficult for the government to make a credible commitment that it will not act in a way to favour its own firm in the future. The inability to commit can itself be an obstacle to competition as potential entrants may fear entry if their entry or expansion would trigger a response by the government (perhaps in the form of higher subsidies to the state-owned enterprise). Privatisation, by allowing the government to commit to not favour any one firm over the others, can therefore be a tool for improving competitive neutrality and thereby promoting competition.

Example #2: Subsidies and cross-modal competition[9]

In a country the rail industry provides predominantly freight services and faces significant competition from other transport modes – particularly from road and water transport. The market share of the incumbent integrated rail company has been declining over time and the size of the subsidy from the government has been increasing. Your agency recommends splitting up the rail company into several competing entities, but the railway company responds that it already faces strong competition from other transport modes and therefore there can be no benefit – and only harm – from such restructuring. Is this argument valid?

The problem with this argument is that it ignores the impact of access to government subsidies on the incentives for efficiency within the rail mode. While it is true that competition from other transport modes limits the prices the rail mode can charge, as long as the government cannot commit to limit the subsidies to the rail sector, the incumbent rail company will have limited incentive to improve productivity, increase service quality and to be more responsive to customer desires.

Introducing competition within the rail mode allows the government to implement competition for the subsidy – thereby stimulating efficiency and minimising the size of the subsidy. Competition from other transport modes is of limited use in stimulating productivity in the presence of open-ended subsidies.

3.6 Removal of controls on the prices, output, range of goods and services that can be offered, or the forms of business organisation

- Firms cannot compete effectively if they do not have the freedom to lower their prices. In some industries, promoting competition is primarily a matter of removing price floors. Prices for many agricultural products, for example, have often been subject to a price floor. As another example, for many years there was a ceiling on the interest rate which retail banks in many countries were allowed to pay on transactions accounts.[10]

- In other industries, firms are or were limited in the services which they were allowed to provide – for example, historically, some countries limited the services that could be provided by trucks in order to preserve certain traffic for the rail sector. A few countries still place limits on "backhauls" by trucking firms, thereby forcing some trucks to return to their origin empty, effectively reducing competition at any given location to those firms which have trucks originating at that location.

- In still other industries, there are controls on the way in which firms may organise themselves. In some countries, for example, legal practitioners must be organised as partnerships and not as limited liability companies. In some countries pharmacies must be owned by a pharmacist and there are strict limits on the number of pharmacies a pharmacist can own. Such restrictions limit the extent of competition to pharmacies from large, efficient chain-store retailers. (Foreign ownership restrictions which may similarly limit competition were mentioned earlier).

- In some cases, limits on the dimensions over which firms can compete may facilitate collusion over the remaining dimensions. For example, in Italy, the government liberalised the price at which petrol stations could sell petrol, but retained controls on opening hours, and the other products and services which petrol stations could offer. The result was very limited competition on price (as petrol station owners feared sparking a price war if they lowered their prices). It was not until the government liberalised the other services provided by petrol stations that more effective competition emerged.

3.7 Encouraging demand-side responsiveness to prices

- Competition only operates effectively if buyers of goods and services are willing and able to seek out the best price-quality combination on offer. Competition does not operate very effectively if consumers are not very responsive to price – that is, if they do not reduce their output or switch to another supplier in the event of a price increase. In some industries – especially those which were previously supplied by a monopoly firm – consumers may have little experience in how to exercise their power to choose and may need to be actively encouraged to do so.

- The inelasticity of demand is particularly a problem in the electricity industry. Many countries have established an active wholesale or "spot" market for electricity. But the resulting spot price is often quite volatile. As a consequence, most end-users do not purchase directly on the spot market but, instead, purchase electricity combined with a form of insurance in the form of a fixed retail price for electricity which does not vary with the wholesale price. As a result generators face a wholesale demand which is almost completely unresponsive to the wholesale price in the short-term. This significantly increases the opportunities for the exercise of market power.

- In some cases the purchaser may not even care about the price paid – this might be the case for say, local government services, where the local government receives a substantial part of its revenue from central government. In this case promoting competition may involve taking steps to ensure that the local government has incentives to purchase as efficiently as possible.

- Even where end-users are directly exposed to the price, they may be reluctant to change to a different supplier if there are switching costs. Switching costs are a recognised problem, for example, in telecommunications. Customers may be unwilling to switch local

telecommunications service provider if doing so requires them to change their telephone number. As a result, many countries have implemented some form of "number portability" – allowing customers to keep their telephone number when switching suppliers.

- Similar issues also arise in banking. Some retail customers are deterred from switching banks due to the significant costs of re-organising any payments or receipts directly to or from their existing accounts. In an analogy with telecommunications, some commentators have proposed some form of "account number portability" as a tool for reducing the cost of switching between banks.

- In some cases, switching costs may be the result of a decision by the firm. For example, some firms deliberately use fixed-term contracts, or "loyalty" schemes to "lock in" customers. Frequent flyer programs, for example, are now virtually ubiquitous amongst the major (full-service) airlines. Concerns have arisen that these schemes may have the effect of reducing competition from smaller airlines. The EC has, on at least one occasion, taken action to reduce the consequences of loyalty schemes in airlines.

Example #3: Airline deregulation[11]

A country has a domestic airline monopoly. The government decides to enhance competition in its domestic airline industry. It proposes to do this by removing the barriers to entry by foreign or new domestic airlines. Do you foresee any problems with this approach?

Removing the barriers to entry is an important first step in liberalisation in this case, and could be expected to have an immediate impact on prices and services. In some countries this step alone may be sufficient to achieve an adequate level of competition. However, there are reasons to believe that the dominance of the incumbent airline will continue, for two reasons. First, many customers prefer travelling on an airline which offers more frequent services (i.e., there are economies of "route density"). This means that either a new entrant is forced to enter with a frequent service schedule and a high network density, or the incumbent has a competitive advantage.

More importantly, the incumbent can offer a wider variety of destinations and therefore can offer a more attractive frequent flyer programme. Again, this reduces the attractiveness of the new entrant airline relative to the incumbent.

Although it might be possible to offset these advantages through regulatory intervention (for example, the regulator might force the incumbent to allow access to its frequent flyer programme), it is likely to be easier to address these problems through structural changes, such as further division of the incumbent into competing parts.

3.8 Tariff-rebalancing and eliminating cross-subsidisation

- In many cases restrictions to competition are linked to the presence of tariffs which are in excess of underlying costs, often in order to provide some other services below cost. For example, many countries historically adopted the policy of charging above-cost for long-distance and international telecommunications services in order keep the cost of line rentals and local services as low as possible. In postal services and electricity it is common to charge geographically-uniform prices, even though the costs of providing services in remote and/or rural areas is much higher than in urban areas.

- The presence of below-cost services funded through internal cross-subsidisation is a major obstacle to competition. The reason is simple. If competition were allowed, new entrants would focus on the high-margin business (e.g., long-distance telecommunications services, or postal services in urban areas), thereby reducing the margins and eliminating the source of funds necessary to maintain the cross-subsidy. In other words, allowing competition places under threat either the financial viability of the incumbent or the continued provision of the subsidised services. Politically, the incumbent firm and the beneficiaries of the non-commercial services are likely to be powerful opponents of competition-oriented reform.

- Promoting competition in these circumstances requires either (a) rebalancing the tariffs so that all services are provided at a price which at least covers their incremental cost; or (b) establishing a separate mechanism for funding the non-commercial services. This mechanism might involve funding the non-commercial services from general government revenues or by establishing a "tax" on other services which is competitively neutral. In the case where the provision of competitive services requires access to an essential input (discussed in Section 5 below) this "tax" can, in principle, be included in the price of the essential input. Ideally, the tax or cross-subsidy should be made transparent to end-users.

Example #4: Universal Service and Competition[12]

A country has a goal of increasing the penetration of telecommunications services. At present the price for renting a domestic telephone line is kept very low, in order to promote take-up of this service. The cost of below-cost local telephone service is funded through cross-subsidies from long-distance and international service. These services are currently provided by a monopoly which has consistently resisted opening the market to competition on the grounds that it will undermine the country's universal service goals. Is there a way to promote universal service without sacrificing competition?

These two goals can be reconciled through, amongst other things, an explicit source of funds for providing below-cost local loops. These funds could be raised, for example, by a tax on certain telecommunications services – this tax could be on long-distance and international services (as it is at present) but would be more efficiently charged to local services for those consumers whose demand for telephone service is inelastic (where those consumers can be identified). Efficiency in the use of the funds could be ensured by careful targeting of the subsidies and the use of competitive tendering for the provision of service in below-cost areas.

Once a universal service funding mechanism of this kind has been established there is no conflict between competition and universal service – and, indeed, competition could be expected to enhance the penetration goal by strengthening incentives for productive efficiency and for creating innovative and desirable products and services.

4. Promoting competition in markets in which there may be a "market failure"

14. In some markets we cannot rely solely on competition, operating against the background of the "framework laws", to deliver the objectives set out in section 1. In these markets, some form of additional regulatory intervention is required.

15. The most appropriate intervention will differ from case to case, according to the market and the particular problem which is being addressed. However, as a general rule, this additional regulatory intervention should, as far as possible, be designed to facilitate rather than restrict competition. In some cases it may be necessary to restrict competition in some way. However, the restriction on competition

should be no greater than necessary to achieve the given objective and should be kept under review, so that it may be eliminated when market conditions change.

16. For example, in the case of many forms of professional services, some customers are not able to judge the quality of the services they will receive in advance. As a result, there is a danger that, in the absence of regulatory intervention, competition between providers will force quality down below the efficient level. This argument is used, for example, as an excuse for the need to limit entry into many professions.

17. In some cases, however, it may be possible to intervene in a way which does not restrict competition. For example, the government might seek to intervene by directly providing consumers information on the quality of services provided. Alternatively, mechanisms might be established by which consumers who have been wronged through low quality services can be compensated (such as through warranties or guaranties).

18. Where these are not feasible or effective it may be necessary to introduce minimum quality standards. Inevitably this implies a restriction on supply, as only those practitioners who meet certain standards would be allowed to provide services. However, this restriction on supply should be directly related to the need to ensure a minimum quality of services and should be set no higher than necessary to maintain the minimum quality of services. In some cases, where entry criteria have been stricter than necessary to provide certain services, new professions have been created with lower entry criteria, in order to stimulate competition. Examples include "licensed conveyors" in the legal profession and "nurse practitioners" in the medical professions.

19. Similar principles apply to say, the regulation of safety or the control of pollution. In each case the regulatory mechanism to control the harmful effect should be, as far as possible, compatible with market processes and should enable and encourage firms to allocate resources and to find new ways to meet the desired standards in the most efficient way possible.

20. The examples below illustrate these principles further. The first example illustrates a situation where it may be necessary to restrict competition somewhat to achieve a given objective. The second example illustrates how additional regulatory interventions can have a significant impact on the level of competition in the market.

Example #5: Taxi regulation[13]

A certain city currently has no regulatory controls on taxis. As a result there are a very large number of taxis operating – both motorised and pedal-powered. However concerns have arisen that these taxis are over-charging tourists (who are unaware of routes, distances, or appropriate fares), that fights are breaking out between taxi drivers over potential customers and that the taxis themselves are poorly maintained, with an unacceptable rate of accidents. The government has proposed a licensing regime which will significantly restrict the number of taxis allowed to operate. Your agency is invited to comment on this proposal. Should you oppose this proposal on the grounds that it is a clear restriction of competition?

It is true that this proposal will restrict competition. However there is also a potential "market failure" in that some users of taxis (especially those from out-of-town) are unaware of appropriate fares and are unable to assess the maintenance of the taxi before embarking. How should this market failure be addressed? One possible approach would be to educate taxi users about the need to "shop around" before accepting a ride. However, this might be impractical, especially at those sites (such as major airports) where efficiency of queuing essentially requires that customers take the first cab off the rank. As a result, it might be necessary to licence taxis, to impose standardised meters, and strictly enforce

rules that taxis take the shortest route. Even in this case, though, the number of taxi licences need not be restricted. Free entry and exit of taxi drivers will eliminate any rents and will determine the number of taxis available for service at any point in time. The taxi fares should be carefully calibrated to ensure that there is neither a shortage nor a surplus of taxis at both peak and off-peak times.

However, at the same time, locals who are highly familiar with routes, distances and fares and are able to "shop around" may not need such protection. Therefore, it may make sense to develop a "two-tier" taxi system with one tier highly regulated, with the right to service locations mostly used by newcomers to the city (e.g., airports and major hotels) and a second tier, largely unregulated, who can serve all other customers on demand. A two-tier system of this kind operates in the London metropolitan area.

Example #6: Bank regulation[14]

A particular country has no history of competition between banks – instead there has been a single, dominant, government-owned bank operating under strict controls which set a floor on the interest rate it can pay on deposits and a ceiling on the rate it can charge on its lending. The government decides that this is a sector which is potentially competitive and therefore decides to liberalise entry to the banking sector. At the same time the government decides to lift the controls on the state-owned bank. Should your agency support this proposal?

The liberalisation of entry and the removal of controls are to be welcomed but, in and of themselves, they may not be sufficient to achieve effective competition. In the absence of any further intervention, the outcome is likely to be that consumers are worse off than before. The reason is that consumers often find it difficult to assess the prudential risk taken on by a bank. Where this is the case, competition between banks will drive banks to increase their risk to the point where the risk of failure is unacceptably high. To avoid this outcome, consumers may decide that they are better off remaining with the state-owned bank, on the basis that it enjoys an explicit or implicit government guarantee. The net result is that there is unlikely to arise effective competition between banks. With the removal of interest rate controls, consumers are likely to be paid less for deposits and charged more for borrowing, leaving consumers worse off than before.

It may be possible to educate consumers about the need to assess the riskiness of the bank they choose. Laws requiring banks to disclose their credit risk would facilitate such comparisons. However, as long as the state-owned bank enjoys an implicit guarantee it will have a competitive advantage. Privatisation would eliminate this advantage but, where this is not politically feasible, the only remaining solution is to create a system of deposit insurance which removes the risk of loss of deposits from all competing banks. This would, naturally, need to be backed up by a system of prudential regulation and oversight of the competing banks. In this case, the regulatory infrastructure (in the form of prudential regulation of banks) is necessary in order to support competition between banks.

5. Competitive tendering or competition for-the-market

21. Earlier it was noted that it is not possible to rely on competition to deliver the government's objectives in those markets in which the only sustainable outcome in the long run is a single firm. This happens, for example, when the entire market demand can be produced more cheaply by a single firm than with two or more firms. Such markets are referred to as "natural monopolies". Almost all of the conventional "public utility" industries have significant "natural monopoly" elements.

22. In most countries, public utility services such electricity, telecommunications and water services have been for many years provided by a single monopoly firm in each region. This firm was sometimes

explicitly regulated by an arms-length regulator but often was state-owned and subject to implicit regulation. In the next section we will explore how in recent years competition has been promoted within the competitive parts of these industries. In this section we will focus on those cases where competition for-the-market has been used as an alternative to regulation of an integrated firm.

23. Suppose therefore that the government has decided that certain services will be provided by an integrated natural monopoly firm. In this case the government cannot rely on conventional competition in-the-market to deliver the objectives in section 1. Instead, the government has a choice between relying on regulation, or a form of competition for-the-market, in the form of "competitive tendering".

24. Under competitive tendering the government specifies the services it would like to see delivered (including the quality, variety, and so on), and any other obligations (such as investment requirements) and invites bids from interested firms – either in the form of the amount the bidder is willing to pay (or would be willing to accept) to provide the given services at the specified price or, alternatively, the price the bidder would charge for the service given the size of the subsidy offered by the government.

25. Competitive tendering is widely used in many countries, particular for those services which are conventionally the responsibility of local governments – such as solid waste disposal services, ambulance services, fire protection services or urban commuter rail services. In some countries competitive tendering of certain local government services is mandatory.

26. The effectiveness of competitive tendering in achieving the objectives above depends in part, of course, on the level of competition present in the tendering process. Many governments have explicit rules governing procurement processes which seek to maximise the degree of competition in competitive tendering for services.

27. Competition for-the-market can be enhanced through careful attention to the factors discussed earlier in section 3 – such as minimising barriers to entry, ensuring a competitive industry structure, and ensuring competitive neutrality between government-owned and private businesses. Barriers to entry can be reduced by, amongst other things, ensuring that the franchise is long enough to fully recover the costs of any sunk investments which must be made by the successful franchisee. Alternatively, the government could retain ownership of any long-lived assets required and lease them to the successful franchisee at pre-determined rates.

28. Problems can arise with competitive tendering when the incumbent franchisee acquires a competitive advantage over other rivals at the time when the franchise comes up for renewal. This advantage might arise from, say, "inside" knowledge, for example, on the quality of any assets involved, the likely need for future maintenance, and the cost of that maintenance. The incumbent might also have tied up in contracts any inputs which are in short supply such as personnel which have built up skills specific to the provision of the given service. The presence of a competitive advantage to the incumbent is a deterrent to bidding by rivals. In these cases governments can promote competition by taking actions such as ensuring that part of the existing workforce is taken over by the new successful franchisee, and by maintaining a pool of firms providing similar services in neighbouring franchises.

29. Competitive tendering does not eliminate the need for regulation – in fact, competitive tendering yields very high powered incentives on the successful franchisee to reduce expenditure to a minimum. This incentive must be balanced by a strong regulatory incentive to maintain service quality and to maintain the quality of any long-lived infrastructure which outlasts the franchise period.

30. Competitive tendering is very difficult in those circumstances where the decision by a successful franchisee to cease providing services imposes large costs on the government or on consumers. These costs

might arise from the costs of service interruption or from the costs of having to re-run the tendering process. Where these costs are large the government is subject to a "hold-up" problem ex post – the successful franchisee can seek to renegotiate the franchise terms and conditions ex post. Anticipating this, the franchise bidders may be over-optimistic ex ante. In the case of competitive tendering of rail services in the UK, many of the successful franchisees subsequently became insolvent. The government eventually decided to substantially increase the subsidies paid to existing franchisees.

31. The longer the franchise period, the greater the uncertainty over the evolution of the cost of providing the franchise services. If the franchisee faces a fixed price, the longer the franchise the greater the risk faced by the franchisee. For longer franchises, this risk can be reduced by allowing automatic processes for revising the franchise price. For very long franchises the price adjustment processes may, themselves, need to be revised by a neutral arbiter. In effect, the longer the franchise period, the closer that competitive tendering approaches to conventional regulation.

32. In summary, like other forms of regulation, the success of competitive tendering depends on effective regulatory institutions which have the incentives necessary to promote competition in the franchising process, to ensure that the franchise requirements are monitored ex post, and to ensure a successful transition when the franchise comes up for renewal.

Example #7: Non-commercial rail services[15]

A country wishes to reduce the subsidy involved in ensuring the provision of certain non-commercial passenger transportation services in a remote area. These services are currently provided by the incumbent, heavily subsidised, integrated monopoly rail company. The track gauge in this remote area is non-standard. The government proposes holding a competitive tendering process for rail services in this area. The government invites bids for the subsidy required to provide a given level of rail transport services in this area for one year. In the first year the only bid received is from the incumbent rail provider. In the following year your agency is approached for advice on how the level of competition in the competitive tendering process could be improved.

The decision to make use of competition for-the-market to minimise the cost and enhance the productivity of these services is commendable. However, the government's approach runs the risk that there will not be adequate competition in the tendering process. There are several features of the tendering process which might deter potential bidders from competing:

First, the incumbent, which already provides these services, is at a strong information advantage relative to other firms as to the true costs of providing these services. This can act as a deterrent to other firms bidding against the incumbent. Second, there is nothing in the bidding process which prevents the incumbent from cross-subsidising from its other monopoly services. Third, the fact that the track in this region is non-standard means that any investment by a new entrant in rolling stock or locomotives would be, in part, a sunk investment. The short length of the franchise period rules out the possibility that this sunk cost could be recovered over the life of the franchise.

There are several ways the tendering process could be improved. First, and most importantly, the range of potential bidders could be expanded by allowing other non-rail transport modes to bid to provide these services. Bus companies, especially, may be able to provide a service which meets the government's objectives. Second, the need for sunk investment should be eliminated by leasing any required rolling-stock and locomotives to the successful franchisee. The franchise period should probably also be extended to allow the franchisee to recover any other sunk costs. Finally, consideration could be given to preventing the incumbent from participating in the bidding process. In order to eliminate the risk of cross-subsidisation.

Example #8: Competition in local bus services[16]

A government is considering a thorough reform of local bus services. These are currently provided by a state-owned firm but the government has determined that there are little or no economies of scale in the provision of bus services and therefore decides to open this market up to competition. The government considered competition for-the-market in the form of competitive tendering but recognised that this implied an on-going regulatory role for the government in determining what services will be provided and at what quality and has instead proposed conventional in-the-market competition. The government argues that such competition will ensure that the services that people want will be provided, with a high level of efficiency and innovation. Should your agency support the proposed approach?

Unfortunately, the answer is probably no. In the case of local bus services (unlike, say, long-distance bus services), passengers do not purchase tickets in advance which commit them to travel on a certain company at a certain date and time. Instead, they merely wait for the first bus to come along. This means that any attempt by a local bus company to invest in a fixed operating schedule (by, say, announcing a schedule in advance and posting it at the bus stops) risks being "hijacked" by another bus company which simply operates its buses to arrive just before the announced times, thereby collecting all of the waiting passengers. The company which made the investment in the timetable is penalised for doing so. In addition, rival bus companies have an incentive to "race" each other to the next stop to be the first to collect the waiting passengers. In the absence of a fixed schedule, customers are less likely to choose to travel by bus.

These problems can be eliminated with competitive tendering for the right to operate certain routes. It is true that the government must specify the routes, fares and minimum quality standards and will have to enforce these requirements. But, on balance, these costs outweigh the problems arising from conventional in-the-market competition. In addition, certain other conditions could be imposed in the tendering process which enhance the inter-operability of the overall bus network (for example, ensuring through-ticketing, ensuring that certain connections are guaranteed and so on).

6. Access to essential facilities

33. In the previous section we looked at how, in some industries, it is possible to introduce a form of competition for the right to provide a given service while maintaining an integrated monopoly firm. But, in many of the traditional public utility industries this approach is simply infeasible for the bulk of the services provided by the industry. Instead, in most countries, governments have historically relied primarily on regulation of an integrated (usually state-owned) firm to achieve the objectives set out above.

34. But, on closer examination, we find that in virtually all of the traditional public utility industries there are parts of the industry which can sustain competition and other parts which are natural monopolies. Perhaps the most significant development in regulatory policy-making in the last twenty years has been the realisation that the objectives set out above can usually be better achieved by facilitating competition in those parts of the industry which can sustain competition.

35. The promotion of competition in the competitive parts of public utility industries involves, amongst other things, a shift in the focus of regulation away from the regulation of end-user prices and quality to a focus on the regulation on the prices and quality of essential inputs (also known as "access services"). Government intervention in the competitive segments of these industries can then be limited to the kinds of intervention set out in section 3 above (i.e., reducing barriers to entry, promoting a competitive structure, ensuring competitive neutrality, minimising switching costs and so on).

36. The primary advantage of regulating access to essential facilities is that, as already noted, it allows the government to rely primarily on competition to deliver the objectives set out above, reducing the

scope for regulation. A secondary benefit is that it allows incumbent firms to offer an expanded range of "seamless" services[17].

37. The primary disadvantages of mandating access to essential facilities are that (a) the task of the regulator in ensuring efficient prices and quality of access may in some respects be harder than the task of the regulator in ensuring efficient prices and quality of integrated end-user services; and (b) there may be a loss of certain economies of scope arising from the joint provision of the essential input and the competitive service within the same firm.

38. This section focuses on the case where the owner of the essential facility is also allowed to provide the competitive services. (The case of vertical separation is discussed in the next section). In this case, the incumbent is in a position to restrict the growth of competition in the competitive segment by raising the price or lowering the quality of access to the essential inputs. Depending on the nature of the regulation governing the incumbent, the incumbent may also have the incentive to use its position to restrict the development of competition. Therefore, in order for competition to develop in the competitive parts of these industries, the government must establish a mechanism for ensuring efficient and non-discriminatory access to the essential facilities provided by the incumbent.

39. Regulation of access to essential facilities is largely a regulation problem – that is, it is primarily a matter of ensuring that the required services are delivered, at the efficient quality and price, with on-going innovation and investment in the infrastructure. However, there are several ways in which the approach to the regulation of access also affects the level of competition in the competitive segments. We will focus on these aspects of the access regulation problem.

40. First, for effective competition to develop, the level and the structure of the access charges should be the same for all firms competing in the competitive segments. In the case where the owner of the essential facility also competes in the competitive segment, this implies, in particular, that the access charges paid by the rival firms should be the same as the access charge "paid" by the owner of the essential facility to itself. The price paid by the essential facility owner to itself can be inferred as equal to the downstream or end-user price less the marginal cost of the competitive segment. Many countries have forms of "imputation" or "price squeeze" tests which, in effect, seek to ensure that access charges do not exceed the end-user price less the marginal cost of the competitive segment. This price is also known as the "efficient component pricing rule".

41. Just as important as the level of the access charges is the question of the structure of the access charges. Where there is differentiation between the end-users, the incumbent may be able to price-discriminate in a way which divides the end-users into groups which each pay a different price. This differentiation may be efficient and may be necessary to fully recover the fixed costs of the essential facility. Such price-discrimination should also be reflected in the access prices – otherwise, if the access charges are set at an average level, the effect of competition will be to force down the price for those end-users which were paying higher-than-average prices, thereby eliminating the ability of the incumbent to efficiently price discriminate.[18]

42. Not only is the (relative) price charged to rival firms important in determining the resulting level of competition – but also the relative quality and timeliness of service. The incumbent may be able to provide service at a lower quality or with such a delay as to preserve the competitive advantage of its own downstream firm.

43. In the case where the essential facility has limited capacity, there may arise a point at which it is not technically possible to provide any more services from the essential facility. In this case economic efficiency requires that this limited capacity be rationed amongst the downstream firms in an efficient

manner. As usual, the most efficient way to ration capacity is through market prices. However, this raises a potential problem. If the regulator is unsure of the capacity of the facility, the incumbent firm may seek to limit the capacity, in order to limit the quantity of services available for its rivals and/or raise the market price.

44. In summary, when the owner of the essential facility also provides services in the competitive segment (and certain other conditions hold), the owner of the essential facility has both the ability and the incentive to restrict the development of competition. In this case, the development of competition depends strongly on the incentives and effectiveness of the regulator in setting efficient prices, quality and enforcing non-discriminatory access to the essential facility.

45. In most countries, competition law control on abuse of dominance would guarantee a form of access to essential facilities (since the failure to provide access to an essential input at acceptable terms and conditions would normally be classified as an abuse of dominance). In practice, it is not common to rely exclusively on competition law provisions to ensure effective and timely access to essential facilities. The reason is that most competition law provisions can only be enforced once a breach has occurred and the enforcement procedures are typically too slow and cumbersome to ensure timely access. As a result, it is common to mandate access to designated services in sector-specific legislation. Australia is one country which has a generic "access regime" in legislation (as part of the competition law) which ensures effective and timely access to any facilities which are designated to fall under the regime. However, there may be essential inputs which are not specifically mentioned in sector-specific legislation and for which new entrants must rely on enforcement of competition law to obtain access. Ensuring access to such inputs is usually a task which falls on the competition authority.

Example #9: Mandating access for mobile roaming[19]

A country has had free entry into the mobile telephone industry for many years. However only a very limited number of networks have been established. In fact, only two networks have a geographic coverage of the whole country. There is also a third network which covers the major cities (90% of the population of this country live in the major cities), but because consumers seem to have a strong preference for selecting a network with broad geographic reach, this last network is not seen as a viable alternative for many consumers. For many years the market shares of these businesses have remained largely static, with the largest network around 60% of the market, the next largest with 32% and the smallest network with 8%. Although there has been a significant amount of price competition in the mobile telephone industry in the past this competition has now "settled down" and prices have remained static, or have even increased slightly in real terms. The government of this country has become concerned that there is a lack of effective competition in the mobile industry and has sought the opinion of your agency as to what can be done. What do you recommend?

The economics of mobile networks is such that in regions with a high population density there is probably scope for several financially-viable networks operating simultaneously in the market. The problem is that as long as consumers prefer networks with a wide geographic reach, in order to compete in the urban market, a mobile company must also establish a network in remote areas. Put another way, the costs of duplicating the network in remote areas is reducing the level of competition in urban areas. In this context, by regulating to allow new entrant networks access to the existing networks in remote areas, there may be scope for significantly increasing competition in urban areas. One possible way to increase competition in this industry, therefore, is to introduce a requirement on the existing networks to provide "roaming" services to new entrant networks in remote areas, in exchange for payment of an access fee.

Example #10: Access for internet services[20]

An incumbent telecommunications company has a subsidiary which provides internet services in competition with other, independent internet service providers. Your agency is called upon to set the terms and conditions of access by internet service providers to the incumbent's telecommunications network. You have determined that the costs of providing the access service are approximately $10 million dollars and there is forecast demand for approximately 10 million hours of access, so you set the price for access at $1 per hour. However, subsequently the incumbent's internet service provider introduces a new retail price for its internet service. The new price is a price of $50 per month for unlimited access to the internet. This offer quickly proves very popular, especially amongst the heaviest users of the internet. The rival internet service providers complain to your agency that they cannot compete with this price. The incumbent points out that the average usage per customer is 50 hours per month, so that the rivals should be able to compete with this price.

While it is true that the average usage per customer is 50 hours per month, different customers will expect to have different levels of usage of the Internet and therefore will be attracted to different charging schemes. A "flat-rate" charging scheme is more attractive to heavy users and a "metered rate" charging scheme is more attractive to light users. By implementing the flat rate charging scheme the incumbent is able to "siphon off" the heaviest users (who may also be the most profitable), leaving its rivals with the smallest users.

The solution to this problem is to ensure that any price differentiation which is present in the retail charges should also be reflected in the access charges. If the incumbent offers a flat-rate retail charge to its retail customers, there must be a corresponding flat-rate access charge offered to its rivals to enable them to offer a competing retail charge with the same structure.

7. Vertical separation

46. The previous section discussed how, when the owner of the essential facility also competes in the provision of competitive services, the owner of the essential facility has an incentive to use its control over the price and quality of access to restrict the growth of competition downstream. The regulator will, of course, seek to control this behaviour, but the incumbent firm has a continual incentive to develop new ways to restrict the quality, reduce the timeliness and raise the price of access. The regulator faces an "uphill battle" in constantly controlling the actions of the regulated firm and is unlikely to be perfectly effective at controlling all such behaviour.[21]

47. Instead of attempting to control the behaviour of the regulated firm, the regulator may be able to achieve a higher level of competition by instead, controlling the incentive on the regulated firm to restrict competition by changing the structure of the ownership of the essential facility.

48. For example, it might be possible to arrange for "joint" or "club" ownership of the essential facility by all of the firms which compete in the downstream segment. For example, it is quite common for a group of airlines to jointly own an airport (or, at least, to jointly "own" the slot-coordination functions at an airport). A group of large gas consumers may choose to jointly own a gas pipeline, and so on. The primary competition policy concerns in this context are to ensure that the joint ownership does not become a mechanism for downstream collusion and to ensure that new members are admitted to the "club" on request.

49. An alternative, and sometimes simpler, arrangement is simply to prevent the owner of the essential facility from providing services in the competitive segment. In Australia, for example, airlines are

prevented from owning more than 5% of the shares in an airport. In many countries the electricity generation sector has been entirely separated from the transmission and distribution networks.

50. The primary advantage of separation of this kind is that it eliminates the incentive on the owner of the essential facility to deny access to rivals. It therefore makes the regulation task easier and likely leads to a higher level of downstream competition.

51. The primary disadvantage of separation of this kind is that it forces the loss of economies of scope that arise from the joint provision of the essential facilities and the competitive segments. Such costs include, for example, the costs of coordinating investment between the essential facility and the competitive segment, the cost of monitoring the downstream firms to ensure they do not cause damage to the essential facility, the cost of maintaining adequate quality and investment in the essential facility (as opposed to the cost of maintaining adequate quality and investment in the end-user services which make use of that facility); and the costs of not pricing access efficiently.

52. It will not always be efficient to prevent the owner of the infrastructure from providing competitive services of its own. Whether or not vertical separation is appropriate (and the most appropriate form of separation) will depend on a case-by-case analysis. However, in a number of industries it appears that vertical separation results in a material increase in competition, outweighing any possible losses from the foregone economies of scope. In particular, vertical separation is common in aviation and maritime transport, and is becoming increasingly common in the electricity and gas industries. It is not yet clear whether vertical separation is the most efficient approach in the rail industry. In any case, the optimal approach will, almost certainly vary form country to country and from industry to industry.

Example #11: Generator-transmission integration[22]

A country has several years of successful operation of a liberalised electricity market. In the process of establishing that market, the generation sector was separated from the electricity transmission and distribution networks. However recently the owner of a regulated transmission network has applied to purchase some major generation assets. In their application the applicants undertake to treat all generation in a non-discriminatory manner. Should this application be accepted?

This question comes down to whether or not such integration will give the incumbent owner of the transmission network the ability to discriminate against rival generators in a manner which is difficult to effectively control ex post. The factors over which the owner of the transmission network has control will depend on the design of the wholesale market. For example, it may be that the amount that each generator produces is determined by a "system operator" which is independent of the transmission owner. Nevertheless there are likely to remain a very large number of actions which the transmission owner can take which could restrict the output of rival generators – for example, by conducting maintenance on transmission lines to rival generators at peak times, or by failing to maintain those lines so that they have a higher failure rate, or by failing to upgrade facilities connecting to rival generators in a timely manner. The transmission owner may even have control over the ratings of the lines connecting to rival generators – it may decide that a lower rating on these lines is justified for safety or security reasons.

Many of these actions would be very hard to detect and even harder to prove as discriminatory. On balance it would seem to be undesirable to allow generators to re-integrate with a transmission network.

Example #12: Structural reform in the rail sector[23]

A country in transition (part of the former Soviet Union) has a dense rail network with major freight flows particularly on routes to and from the capital and on east-west trade routes with other countries. Railway services are currently provided by a government owned monopoly which suffers from low productivity. The railway monopoly has been loss-making overall but the government believes that certain services (particularly shipment of bulk freight) are profitable but, at the moment, does not know which services are profitable and which are not. The government is reluctant to see a reduction in passenger services (in some parts of the country the roads are impassable under certain weather conditions). The country has little experience with independent regulation and little knowledge of regulatory processes. Your agency is invited to make a proposal for competition-oriented reform.

As the discussion in this paper has highlighted, there are several ways to conceive of introducing competition into the rail sector. In particular, it is possible to conceive of competition between vertically-integrated rail companies (either competition for-the-market or competition in-the-market) or competition between train operating companies. The choice between these approaches will be, at least in part, a matter of balancing the pros and cons.

Mandating access to the infrastructure offers the potential for effective competition in train services. But the development of effective competition between train operating companies requires careful and effective regulation of access to the track infrastructure. While this might be possible to develop, the country's lack of experience and lack of tradition in regulation suggests that this will be difficult and may not be effective.

Given that the rail network is dense, it may be possible to divide the network up in such a way that there is competition between different rail companies on at least the major trade routes. Although this competition will inevitably be imperfect, it does not require complex and resource-intensive regulation of access to the track infrastructure. In addition, it may be possible to use competitive tendering to select a service provider on some parts of the infrastructure (such as spur lines or urban commuter networks which are currently loss-making). The rail company could be invited to nominate which parts of the network are unprofitable – these services could then be put out for competitive tender.

8. Regulatory institutions, processes and managing the transition

53. Effective regulation of the prices and services of natural monopoly firms requires skilled regulatory authorities. In order to protect investment by the firms they are regulating, it is conventional to require that these authorities are independent of the government, and transparent in their decision-making.[24] In the case where entry into competitive sectors requires access to an essential input, it is essential that the authority responsible for regulating access also be independent of the owner of the essential facility. (This may require, for example, a limit on the ability of the regulator to take up employment with the owner of the essential facility after the end of his/her appointment as a regulator).

54. There has been much discussion over whether it is better to have single or multi-sector regulatory agencies and whether there is value in combining regulatory and competition enforcement roles (as in Australia and, to an extent, the Netherlands).[25] The most appropriate structure is not yet clear. There is some suggestion that sector-specific agencies may eventually end up identifying closely with the interests and arguments of the sectors they regulate and, in some cases, may end up opposing the removal of regulation and/or the introduction of competition. This tendency is likely to be less in multi-sector regulatory authorities. An argument for combining the competition law enforcement role and the regulatory role is that it ensures a consistent approach to matters of market definition and assessments of the level of competition. Some commentators argue that combining the competition law enforcement and regulatory roles ensures that a competition-oriented "culture" and "mindset" permeates the regulatory

functions. In any case, the actions of regulatory authorities and competition authorities should be compatible and coordinated, for example through explicit coordinating agreements and institutions (such as regular meetings).

55. In many cases, the introduction of competition into competitive sectors has involved the establishment of quasi-regulatory not-for-profit entities tasked with ensuring non-discriminatory access to essential facilities. For example, in the aviation sector, many airports have established an authority responsible for allocating take-off and landing slots; in the electricity sector, responsibility for operating the electricity spot market and dispatching generators in the presence of transmission network limits is often in the hands of an independent, not-for-profit system operator. In the telecommunication industry, scarce resources such as numbering allocations or electronic addresses (including Internet domain names) are often managed by independent quasi-regulatory bodies. The governance of these bodies can also be important in ensuring the development of competition – in particular, these bodies should not be allowed to act in a discriminatory manner against existing firms or potential new entrants.

56. The introduction of competition into a formerly monopolised segment may involve a large potential disruption to incumbent firms and the creation of a large number of new institutions and processes which will take time to learn how to operate effectively. It may also take time for a new regulatory institution to develop a reputation for independence and credibility. For these reasons it is sometimes appropriate to consider a staged or gradualist introduction of competition. Many European countries, for example, are in the process of slowly opening their electricity market by reducing the size of the threshold above which electricity consumers are allowed to choose their electricity supplier. A primary consideration is that the transition process of opening to competition not be made contingent on the actions of the incumbent firms (for example, contingent on the development of a given level of competition at a given stage). Otherwise, the incumbent firms will have a further incentive to take action to delay or put off indefinitely the introduction of competition.

57. There are some economic arguments and some experience which suggests that a reform process is more likely to be successful when it involves bringing competition to many sectors simultaneously, instead of one at a time. Companies may be less resistant to the introduction of competition in their output markets when they expect that competition will simultaneously be introduced in their input markets – driving down the cost and improving the quality of the inputs they use. This is the primary reason why trade liberalisation talks simultaneously involve many sectors and many countries. The "National Competition Policy" reforms in Australia in the mid 1990s is a prime example of a broad-based attempt to enhance the level of competition across the economy. For many other countries, broad-based reform is a result of a "competition principle" enshrined in statutes or in a constitution (such as the EU treaty).[26]

58. There is one instance where simultaneous liberalisation is particularly important. In some industries there are restrictions on competition at two stages of the supply chain – for example, one firm may have a monopoly over gas production and transmission and another firm may have a monopoly over gas distribution and retailing (accounting for the majority of gas consumption). In this case liberalisation of this industry should occur on both levels at the same time. Liberalising the downstream industry alone risks heightening the market power of the upstream monopoly. Liberalising the upstream industry risks creating a downstream monopsony. Arguments of this kind have been used to justify delaying liberalisation of the gas industry in those countries whose primary source of gas is a single foreign producer.

59. Both theory and experience suggest that an economy-wide competition-oriented reform program is more likely to be successful when it does not rely on on-going political will, but rather empowers an institution with responsibility for either publicly advocating for reform or for directly carrying out the reforms themselves. For example, in Australia, the National Competition Policy reforms required state and local governments to carry out a review of existing legislation to assess its effect on competition. The task

of ensuring that these reviews were carried out was given to a new authority, known as the National Competition Council.

60. In many countries, the competition authority has a key role to play in promoting or, at least, guiding competition-oriented reforms. At a minimum, in some other countries the competition authority must be consulted on legislative or regulatory proposals which may have an impact on competition. In some countries, the competition authority may even have the right to participate in government bodies making decisions on, say, privatisation or trade liberalisation.[27] In some countries, the competition authority has the right to independently carry out investigations and to make public recommendations on the need for competition-oriented reforms. In a few cases (e.g., the EC and Korea) the head of the competition authority sits alongside other government ministers and is involved in making all key economic policy decisions.

61. In all these cases, the empowerment of an institution with the on-going task of promoting competition ensures that competition-oriented reforms can cover as much of the economy as possible without being subject to changing political enthusiasm for competition.

8. Conclusion

62. This paper has briefly surveyed the broad field known as "competition policy" with a particular focus on competition policy in regulated industries. Competition is a powerful tool for the promotion of efficiency and for ensuring that markets work to the ultimate benefit of users and consumers. Healthy, effective competition is not an accident but requires careful and deliberate intervention of the kinds set out here. Competition authorities have a key role to play in advocating for both greater reliance on competition and for implementing policies which will make that competition feasible, effective and sustained across all sectors of the economy.

Appendix

Empirical studies of the effects of increasing competition on microeconomic and macroeconomic performance indicators

A number of studies have attempted to find a link between either measures of competition or measures of government regulation, on one hand, and microeconomic and macroeconomic outcomes, on the other. Some of these studies are summarised below:[28]

On the link between competition-restricting regulation and productivity growth, Nicoletti and Scarpetta (2003) find that "reforms promoting private governance [i.e., privatisation] and competition … tend to boost productivity. In manufacturing the gains to be expected from lower entry barriers are greater the further a given country is from the technology leader. Thus, regulation limiting entry may hinder the adoption of existing technologies, possibly by reducing competitive pressures, technology spillovers, or the entry of new high-tech firms. At the same time, both privatisation and entry liberalisation are estimated to have a positive impact on productivity in all sectors…. These results … point to the potential benefits of regulatory reforms and privatisation, especially in those countries with large technology gaps and strict regulatory settings that curb incentives to adopt new technologies."

On the link between competition-restricting regulation and investment, Alesina, Ardagna, Nicoletti and Schiantarelli (2003) find that "tight regulation of the product markets has had a large negative effect on investment. The data for sectors that have experienced significant changes in the regulatory environment suggest that deregulation leads to greater investment in the long-run". "The implications … are clear: regulatory reforms, especially those that liberalise entry, are very likely to spur investment".

On the link between competition-restricting regulation and employment levels, Nicoletti and Scarpetta (2001) report that, although differences in employment protection laws, benefit policies and taxes explain much of the cross-country differences in employment rates, product-market regulation also has an impact. They estimate that pro-competition policy developments in New Zealand and the UK have added around 2.5 percentage points to their employment rate over the period the period 1978-1998. Countries with more modest reforms, such as Greece, Italy and Spain have only added between 0.5 and 1 per cent to the employment rates through such reforms. (This material is summarised in the addendum to the Secretariat note prepared for the second meeting of the Global Forum on Competition February 2002, CCNM/GF/COMP(2002)8).

On the link between competition and incentives to innovate, Carlin, Fries, Schaffer and Seabright (2001) and Carlin, Schaffer and Seabright (2004) find that a move from monopoly to some degree of competition (a few rivals) increases the rate of growth of sales and labour productivity and increases the incentive to innovate. However this effect is not monotonic – a further increase in the level of competition (as measured by the number of competitors) is associated with a slower rate of sales growth.

On the link between competition and antitrust enforcement and economic growth, Dutz and Hayri (1999) find that "the effectiveness of antitrust and competition policy enforcement is positively associated with long-run growth".

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NOTES

1. This paper was prepared by Darryl Biggar, a consultant for the OECD (13 January 2005). Email: darryl.biggar@stanfordalumni.org

2. The appendix to this paper briefly summarises some empirical studies on the benefits of competition-oriented reforms on different microeconomic and macroeconomic measures.

3. Fels (1999), page 13. Chadwick Teo of the Ministry of Trade and Industry in Singapore has summarised this succinctly: "Efficiency is the goal, competition is the process".

4. Economists refer to the circumstances under which competitive markets fail to deliver the objectives above as "market failures". The recognised sources of market failure are (a) natural monopoly and/or market power; (b) public goods; (c) externalities; and (d) asymmetric information.

5. See for example the work of the OECD Development Centre. They write: "The last few years have seen a growing awareness of the crippling effect of corruption on economic development. Corruption increases inequality, distorts the state's redistribution role, wastes human and financial resources and degrades public services. Several empirical studies have shown that it significantly lowers investment levels and the productivity of capital. These effects are especially harmful in developing countries, which have few resources and higher average levels of corruption than the industrialised countries.", OECD (2001a)

6. Even where competition is not directly enhanced, structural separation may improve the quality of regulation. For example, separation of a regional monopoly into a number of smaller regional monopolies may enhance the scope for inter-firm comparisons in the regulatory process (also known as yardstick competition or "competition by comparison").

7. This case study loosely reflects experiences in Australia. More information on electricity restructuring can be found in OECD (2003).

8. Government-owned firms also sometimes face competitive burdens which are not shared by their rivals, such as limits on the amount they can borrow, rules governing the terms and conditions on which they can hire labour, or, in some case, historic contracts which were entered into in the past at above-market prices which must be honoured (also known as "stranded costs").

9. This case study is loosely based on the experience of rail reform in New Zealand. More information on rail competition can be found in OECD (1998).

10. Maximum prices can also, in certain circumstances, restrict competition. This might be because the price ceiling restricts profitability and therefore reduces the incentive for entry. It might also be the case that the price ceiling acts as a "focal point" for collusive behaviour by firms in the market.

11. This case study is loosely based on experience in the UK. For more information see OECD (2000a).

12. Many countries have established universal service funding mechanisms of the kind described here. This issue was discussed in OECD (1995).

13. This case study is drawn from OECD (2001b)

14. This case study is drawn from OECD (1998b).

15. The issue of enhancing competition in procurement is discussed in OECD (1999) and OECD (2000b).

16. This case study is based on the experience in the UK. More information can be found in OECD (2001b).

17. Allowing access by one rail company to the track of another company allows the first rail company to provide a wider range of end-to-end services without the need for the passengers or freight to change trains. Allowing access by one post company to the delivery system of another allows customers of the first post company to deliver their letters to a wider range of addresses. Note that in both these examples mutual or reciprocal access is likely to be agreed even without government policy intervention.

18. For more on this see OECD (2004).

19. This case study is based on an issue which arose in Australia. For more information see OECD (2002) and OECD (2004).

20. This case study is based on an issue which is described in more detail in OECD (2002).

21. For more on this see OECD (2001d).

22. This case study is based on the experience in Australia and the US. More information on competition in the electricity industry can be found in OECD (2003a).

23. This case study is based on experiences with railway reform in China and Russia. See the OECD publications OECD (2001c) and OECD (2003b) and the forthcoming roundtable on structural reform in railways.

24. For more on this see Joskow (1998), page 26.

25. See, for example, the OECD report OECD (1999b)

26. This is discussed further in Heimler (1999).

27. The Romanian Competition Council participates in monthly meetings of the "Inter-Ministerial Group on Competition" which includes representatives of the Ministry of Economy and Trade, Ministry of Justice, Public Finance Ministry, Ministry of Communications and Information Technology, Ministry of Environment and Water Administration, Ministry of Health and Ministry of Education and Research.

28. See also the papers submitted for the Second Global Forum on Competition on the relationship between competition policy and economic development.

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

14-Feb-2005

Français - Or. Anglais

DIRECTION DES AFFAIRES FINANCIÈRES ET DES ENTREPRISES
COMITÉ DE LA CONCURRENCE

DAF/COMP/GF(2005)1
A usage officiel

Forum mondial sur la concurrence

TABLE RONDE SUR LE THEME : INTRODUIRE LA CONCURRENCE DANS LES SECTEURS REGLEMENTES

(Note de Référence par le Secrétariat)

-- Session I --

La présente note du Secrétariat est soumise POUR EXAMEN au cours de la Session I du Forum Mondial sur la Concurrence qui se tiendra les 17 et 18 février 2005.

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Français - Or. Anglais

INTRODUCTION DE LA CONCURRENCE DANS LES SECTEURS RÉGLEMENTES[1]

Note de Référence

par le Secrétariat

1. Introduction

1. Il est désormais admis dans la plupart des pays que le rôle de la concurrence est essentiel pour assurer que les marchés sont productifs, efficients, innovants et souples. Le jeu de la concurrence pousse les entreprises à innover, à élaborer de nouvelles techniques de production plus efficaces et à adapter leurs produits en fonction de l'évolution de la demande du consommateur. Les mesures de stimulation de la concurrence sont un facteur essentiel d'amélioration des performances microéconomiques et macroéconomiques des économies membres aussi bien que des économies non membres. [2]

2. Le présent document récapitule un ensemble de mesures que les pouvoirs publics pourraient mettre en œuvre en vue de promouvoir la concurrence dans les secteurs qui sont ou étaient réglementés. En d'autres termes, le thème du présent document est « la politique de la concurrence » au sens le plus large (par opposition au « droit de la concurrence »), ainsi que son application aux secteurs réglementés. Ce document est censé constituer un cadre de réflexion sur « la politique de la concurrence » et/ou un guide d'élaboration des réformes orientées vers la concurrence. Étant donné l'ampleur du domaine de la politique de la concurrence, le présent document ne peut que survoler les nombreuses idées et politiques majeures concernées. L'OCDE a publié de nombreux documents qui analysent en plus amples détails nombre des questions soulevées ici.

3. Le présent document porte en premier lieu sur les mesures, outils et techniques d'introduction de la concurrence dans les secteurs réglementés. L'accent est mis sur la concurrence et non sur les notions qui s'y rapportent souvent dans la pratique sans pour autant la concerner directement, comme les politiques d'amélioration de la qualité de la réglementation d'un monopole naturel ou la performance d'une entreprise réglementée. Ce document n'abordera pas, par exemple, la privatisation qui, lorsqu'elle est possible, est un puissant outil d'amélioration des performances des entreprises publiques. Il n'examinera pas non plus la question de la fixation optimale des prix réglementés sauf lorsque ces derniers influent sur la concurrence.

2. La concurrence, moyen de réalisation d'objectifs plus larges par les pouvoirs publics

4. La concurrence n'est pas une fin en soi. La concurrence est un moyen d'action des pouvoirs publics en vue d'atteindre des objectifs plus larges portant sur l'économie ou sur un secteur en particulier. Si, dans le détail, les objectifs diffèrent d'un secteur à l'autre, les pouvoirs publics cherchent souvent à conjuguer les résultats ci-après : une production efficace des biens et services souhaités par les consommateurs et les utilisateurs, d'une qualité et d'une variété satisfaisantes pour ces derniers, vendus à un prix efficient, avec un investissement et une innovation continus dans le secteur en vue d'élaborer de nouveaux produits et d'accroître la productivité au fil du temps. On récapitule parfois l'ensemble de ces objectifs en parlant de recherche de « l'efficience économique ». Allan Fels, ex-chef de la Commission australienne de la concurrence a déclaré :

> « La recherche de la concurrence est certes un objectif économique essentiel mais elle n'est pas une fin en soi. La concurrence n'a de valeur que par les résultats économiques auxquels elle

conduit. En définitive, l'objectif économique de la politique de la concurrence est d'atteindre l'efficience économique.[3] »

5. Sur la plupart des marchés, le jeu de la concurrence est de loin le meilleur moyen de réaliser ces objectifs. Dans un environnement concurrentiel sain, les entreprises qui produisent des biens et services répondant le mieux aux besoins et désirs des utilisateurs et consommateurs, et qui le font de la manière la plus efficiente, prospèrent, croissent et attirent des fonds aux fins d'investissement et de développement. Parallèlement, les entreprises ne répondant pas aux besoins des utilisateurs et consommateurs ou dont la production est inefficiente voient cette production baisser et laissent ainsi échapper des ressources qui devraient être utilisées plus efficacement ailleurs dans l'économie. Le désir de détenir un avantage concurrentiel sur leurs rivales pousse les entreprises à élaborer de nouveaux produits et services, ou de nouvelles techniques de production ou de commercialisation de produits et services. Les entreprises sont incitées à faire preuve de souplesse pour s'adapter à l'évolution des technologies et des conditions du marché au fil du temps.

6. Sur les marchés aptes à maintenir une concurrence efficace et saine, les pouvoirs réglementaires de l'administration publique peuvent mettre l'accent sur le maintien et l'amélioration des règles et institutions de base du marché qui sous-tendent tout commerce, échange et investissement. Ces règles et institutions s'étendent au cadre juridique qui délimite le champ d'action des entreprises, des investisseurs et de la concurrence, ainsi que des institutions nécessaires à l'application de ces lois et contrats privés. Ces lois-cadres définissent les principales « règles du jeu » et garantissent que l'énergie concurrentielle de toute entreprise est destinée à des fins socialement bénéfiques et non socialement destructrices ni préjudiciables au bien-être social. Ces lois-cadres englobent, par exemple, la législation régissant les droits de propriété, les contrats, les structures des entreprises, les modalités de collecte de capitaux par ces dernières, leur insolvabilité, etc. Ces lois-cadres s'étendent également bien entendu aux lois de défense du consommateur ainsi qu'à la législation sur la concurrence.

7. Pour de nombreux marchés, la promotion de réformes favorisant la concurrence consiste d'abord à faire en sorte que le jeu de la concurrence puisse se déployer sans entrave. Il peut s'agir par exemple de supprimer les barrières à l'entrée et les obstacles aux échanges (comme les tarifs douaniers ou les quotas), d'éliminer les restrictions à la nature ou à la gamme des biens et services pouvant être offerts, de restructurer tel ou tel secteur en vue d'accroître le nombre d'acteurs indépendants, d'éliminer les règles favorisant certaines entreprises d'un secteur par rapport à d'autres, de veiller à l'application de la réglementation en matière de concurrence en vue de prévenir toute collusion ou concentration, etc. Ces moyens d'action sont analysés plus en détail à la prochaine section.

8. Toutefois, il existe malheureusement certains marchés pour lesquels le seul recours à la concurrence et à ces lois-cadres ne sera pas bénéfique. Cela peut tenir par exemple au nombre trop faible d'entreprises susceptibles de résister à une pression concurrentielle réelle, ou bien au manque d'informations à la disposition des consommateurs pouvant les orienter dans leurs choix, ou bien encore au fait que les agissements d'une entreprise ont, sur d'autres entreprises ou d'autres personnes physiques, des effets dont les conséquences au niveau des prix ne sont pas correctement valorisées.[4] Ces questions sont analysées plus en détail à la section 4.

9. De nombreux secteurs réglementés sont dotés d'une structure des coûts telle que la seule issue de long terme viable est qu'une seule entreprise pourvoie à l'ensemble de la demande du marché. Sur ce type de marchés, il n'est pas possible de s'en remettre au jeu traditionnel de la concurrence au sein du marché entre des entreprises intégrées en vue de réaliser les objectifs énoncés ci-dessus. Toutefois, dans certains cas, ces marchés peuvent toujours offrir la possibilité d'une concurrence pour le marché. Cette possibilité est analysée à la section 5.

10. Même les secteurs qui présentent des éléments de monopole naturel recèlent souvent d'importantes composantes potentiellement concurrentielles. Dans ces secteurs, la réglementation visant à assurer l'accès aux éléments de monopole naturel peut grandement étendre les possibilités de recours à la concurrence au sein des composantes concurrentielles du secteur. Les arguments « pour » et « contre » cette approche sont analysés à la section 6.

11. Dans les secteurs où l'on souhaite promouvoir la concurrence en autorisant l'accès aux intrants essentiels, il est peut-être possible d'augmenter sensiblement le degré de concurrence au moyen d'une réforme structurelle – c'est-à-dire en empêchant un propriétaire de toute infrastructure essentielle restante de fournir des services compétitifs en utilisant ces infrastructures. Cette approche ainsi que d'autres réformes structurelles verticales sont analysées à la section 7.

12. Enfin, la section 8 aborde les questions de conception du processus de réforme à proprement parler et comment la conception des institutions réglementaires risque d'affecter la concurrence. Le rôle précis de l'autorité de la concurrence diffère d'un pays à l'autre. Dans plusieurs pays, les autorités de la concurrence participent directement à l'élaboration des politiques économiques affectant la concurrence, comme les mesures concernant la structure du marché, ou la réglementation régissant l'accès à celui-ci. Dans d'autres pays, la contribution des autorités de la concurrence se limite à un rôle consultatif sur les questions liées à la concurrence, ou bien elles se contentent de faire respecter la législation sur la concurrence. La mesure dans laquelle l'autorité de la concurrence peut contribuer à l'élaboration de certaines des mesures énoncées ci-dessous différera ainsi d'un pays à l'autre. Dans tous les cas, la section 8 fait valoir qu'il est souhaitable qu'il y ait au moins une administration ou un organisme public habilité à préconiser des réformes orientées vers la concurrence selon les principes décrits dans le présent document.

3. Promotion de la concurrence sur les marchés concurrentiels

13. Comme signalé ci-dessus, dans la plupart des marchés économiques, les objectifs déjà énoncés seront le mieux réalisés si l'on fait d'abord jouer la concurrence entre un certain nombre d'entreprises indépendantes intervenant dans les limites fixées par les lois-cadres et les institutions. La promotion de la concurrence sur ces marchés suppose en grande partie que soient garantis le fonctionnement efficace de ces lois-cadres et de ces institutions, ainsi que les conditions de la concurrence et la liberté pour les entreprises sur le marché de choisir la gamme des services qu'elles fournissent et de décider de leurs prochains modes de prestation et des techniques de commercialisation de ces services. En particulier, la promotion de la concurrence peut englober une ou plusieurs des mesures ci-après :

3.1 Amélioration des lois-cadres et des institutions

- Dans de nombreux pays en développement et en transition, le plus grand impact que les pouvoirs publics peuvent avoir sur la concurrence consiste à améliorer les lois-cadres et les institutions régissant tout investissement, échange et commerce. Comme signalé ci-dessus, ces lois-cadres élaborent les « règles du jeu » de base assurant que l'énergie concurrentielle de chaque entreprise est destinée à des fins socialement productives et non à des fins socialement destructrices ou préjudiciables au bien-être social. Ces lois-cadres concernent, par exemple, la législation sur les droits de propriété, les contrats, les structures des entreprises, les modalités de collecte de capitaux par ces dernières, leur insolvabilité, etc. Les institutions qui veillent à l'application de ces lois, en premier lieu les autorités judiciaires, jouent un rôle tout aussi essentiel.

- Presque toutes les transactions, à l'exception des plus anodines, nécessitent un investissement de la part de l'une des parties. Les mesures rendant le climat général plus

favorable à l'investissement donneront plus de place à la concurrence. En effet, les acteurs économiques n'investiront pas s'ils craignent que leur investissement n'est pas protégé par la législation et les institutions. À l'inverse, toute mesure améliorant l'accès aux tribunaux, favorisant l'indépendance de la justice et contrôlant la corruption[5] est susceptible d'améliorer la concurrence et l'investissement.

- Les réformes de la législation sur la propriété et les contrats peuvent également influer sur la concurrence. Par exemple, les parties à des transactions et des échanges peuvent être « refroidies » sur un marché où les acheteurs de biens ne sont pas assurés de se voir reconnaître un titre de propriété en bonne et due forme. Les lois régissant les entreprises et l'activité commerciale peuvent également avoir un impact considérable sur la concurrence. Par exemple, si la législation sur les faillites autorise des entreprises insolvables à poursuivre leur activité, les entreprises concurrentes risquent d'être dans l'incapacité de fixer un prix suffisamment élevé pour leur permettre de couvrir leur coût réel du capital. En outre, la menace de faillite incitera peu la direction en place à améliorer les performances de l'entreprise.

- Même dans les pays caractérisés par une très longue et solide tradition juridique régissant la propriété privée, la concurrence peut souvent être améliorée par l'établissement de nouveaux droits. Ces dernières années, des droits de propriété ont été définis ou précisés dans un certain nombre de secteurs, comme les droits négociables d'accès au spectre radioélectrique, les droits de pêche (sous la forme de quotas négociables) et/ou les droits négociables d'accès à l'eau. Ce processus se poursuivra à mesure que les améliorations technologiques entraîneront une modification des coûts de suivi et de respect de l'application des droits de propriété.

- Dans un petit nombre de cas, le renforcement de ces lois-cadres peut aller à l'encontre de la volonté de promotion de la concurrence. Par exemple, la législation sur la propriété intellectuelle incite davantage les entreprises à innover et à promouvoir la propriété intellectuelle, en favorisant ainsi la croissance à long terme et le bien-être économique. Toutefois, ces mêmes lois créent également des droits exclusifs pouvant conférer un grand pouvoir de marché. Il faut travailler très attentivement à ce que les entreprises ne soient pas en mesure d'utiliser la législation sur la propriété intellectuelle pour imposer des restrictions inappropriées à la concurrence.

- La qualité des lois-cadres et des institutions d'un pays influera sur la mesure dans laquelle il est possible ou souhaitable de mettre en œuvre certaines des autres réformes analysées ci-dessous.

3.2 Application et mesures assurant le respect du droit de la concurrence

- Même sur les marchés qui ont la capacité de la maintenir, la concurrence peut être limitée ou réduite par l'action des entreprises présentes sur le marché. Il importe ainsi que le droit de la concurrence s'applique le plus largement possible (en particulier dans les secteurs réglementés). Il s'agira alors notamment de détecter et de prévenir les accords de collusion entre les entreprises, d'empêcher les fusions qui autrement limiteraient la concurrence et d'interdire les accords verticaux anticoncurrentiels.

- L'application du droit de la concurrence est particulièrement importante dans les secteurs traditionnellement très réglementés. Dans ces secteurs, l'ouverture à la concurrence ne

constitue pas une finalité de l'intervention des pouvoirs publics, mais plutôt un recentrage de son action, en particulier, sur le contrôle des pratiques anticoncurrentielles.

- Les entreprises des secteurs récemment exposés à des pressions concurrentielles peuvent chercher à retrouver certains des effets anticoncurrentiels de la réglementation en nouant des accords entre elles, ou à refusionner en vue de rétablir une structure sectorielle concentrée. En outre, il existe souvent, dans ces secteurs, une entreprise dominante capable de limiter la concurrence en restreignant l'accès à des intrants essentiels ou en cherchant à exclure les concurrents du marché (éventuellement par l'établissement de prix d'éviction). Pour toutes ces raisons, le respect du droit de la concurrence est plus important encore dans les secteurs qui sont ou étaient strictement réglementés.

3.3 Suppression des barrières à l'entrée et barrières aux échanges

- Sur certains marchés réglementés, la promotion de la concurrence consiste en premier lieu à lever les restrictions à l'entrée et à la sortie. Les transports aérien et routier, par exemple, sont deux secteurs qui peuvent être transformés en premier lieu par une simple suppression des barrières à l'entrée permettant ainsi à des entreprises nouvelles et innovantes d'y accéder.

- Dans le cas de biens et services négociés au niveau international, la concurrence peut également être favorisée par l'abaissement des barrières aux échanges en éliminant les quotas et les tarifs douaniers. La réduction des barrières aux échanges améliorera en général les avantages des réformes axées sur la concurrence à l'intérieur du pays. Certaines barrières à l'entrée existent toujours tant pour le transport routier que pour les compagnies aériennes – en particulier au niveau international où les accords bilatéraux fixent encore des limites quantitatives au nombre de services pouvant être offerts sur certains itinéraires.

- Dans plusieurs secteurs, les restrictions imposées aux acteurs du marché en termes de détention du capital des entreprises peuvent limiter la concurrence. Par exemple, les nouveaux acteurs les plus susceptibles d'entrer sur les marchés avec des économies d'échelle ou de gamme sont des entreprises étrangères. Aussi, les limitations éventuellement apportées en matière de détention de capital par les étrangers peuvent-elles limiter le nombre d'entrants et restreindre ainsi le degré de concurrence.

- Dans l'idéal, les entreprises nationales et étrangères devraient rivaliser sur un pied d'égalité sur le marché. Rien ne permet de garantir, bien entendu, que toutes les entreprises nationales survivront sur un marché exposé à la concurrence étrangère – certaines se développeront, tandis que d'autres seront évincées faute d'être concurrentielles. Ce processus profite aux consommateurs domestiques et libère des ressources utilisées de manière inefficace qui peuvent alors être mises à profit ailleurs dans l'économie.

- Dans les secteurs où l'octroi d'une licence est requis pour faire face à la concurrence, les barrières à l'entrée peuvent être abaissées par la « reconnaissance mutuelle » de licences et de normes réglementaires entre États et nations, lorsque ces normes satisfont à des niveaux de qualité minimaux. Bien entendu, la CE s'emploie activement à établir des cadres réglementaires minimaux applicables à de nombreux secteurs dans l'ensemble de l'UE. Plus généralement, les initiatives d'intégration économique à l'échelon régional peuvent favoriser les échanges transfrontières de biens et de services et (comme analysé ci-dessous) accroître la taille du marché correspondant – ce qui, toutes choses étant égales par ailleurs, augmente le nombre d'entreprises pouvant se développer sur le marché.

3.4 Réforme structurelle

- Naturellement, la concurrence ne peut se développer sans un nombre raisonnable d'acteurs indépendants. Dans les secteurs dominés auparavant par une seule et même entreprise (publique en général), la promotion de la concurrence s'est presque toujours accompagnée sous une forme ou une autre d'une réforme structurelle – en particulier d'une séparation horizontale donnant naissance à plusieurs entreprises concurrentes.

- Une séparation structurelle de ce type est courante, par exemple, dans le secteur de l'électricité que de nombreux pays ont divisé en plusieurs entités concurrentes. Dans certains cas, toutefois, cette division n'a pas été poussée suffisamment loin. Par exemple, pendant de nombreuses années, le marché de l'électricité au Royaume-Uni a été confronté à de multiples problèmes soulevés par l'exercice du pouvoir de marché détenu par les deux entreprises dominantes de production électrique en place.

- Une séparation horizontale de ce type devrait être gérée en utilisant les mêmes outils que ceux qu'utiliserait une autorité de la concurrence pour examiner un projet de fusion - autrement dit en identifiant les marchés correspondants et en divisant le secteur (dans l'idéal) jusqu'à ce qu'apparaisse une concurrence efficace sur tous les marchés correspondants. Idéalement, il conviendrait de procéder à la séparation en deux entités ou plus si la réunification de ces deux parties devait être interdite par le droit de la concurrence. Sur les marchés où la demande totale est faible relativement à l'échelle efficace minimale d'activité des entreprises, un compromis devra être trouvé entre la productivité et le développement de la concurrence. Comme indiqué plus haut, un tel compromis devient moins nécessaire si l'on augmente la taille du marché par un abaissement des barrières aux échanges internationaux.

- Dans plusieurs pays, les autorités de la concurrence sont explicitement habilitées à exiger l'introduction de réformes structurelles au sein d'un secteur donné (par exemple, forcer la cession de certaines infrastructures comme remède éventuel à « l'abus de position dominante »). L'un des exemples les mieux connus de réformes structurelles – le démantèlement d'AT&T aux États-Unis – a été le résultat d'une action intentée au titre des lois antitrust par les autorités américaines de la concurrence. De toute manière, l'autorité de la concurrence peut naturellement participer à la prise de ces décisions structurelles du fait de ses compétences pour ce qui est d'identifier les marchés appropriés et d'évaluer le degré de concurrence sur des marchés ayant des structures distinctes. L'autorité de la concurrence au Mexique, par exemple, a étroitement participé à l'élaboration d'une structure de promotion de la concurrence dans le secteur ferroviaire mexicain.

- Outre la séparation structurelle horizontale, d'autres formes de séparations peuvent également s'avérer importantes. La séparation verticale des infrastructures concurrentielles et essentielles du secteur en question est analysée plus loin à la section 5. Il peut également être fondé de séparer une société en situation de monopole de toute entreprise concurrente (même dans le cas où les entreprises concurrentes n'achètent pas d'intrants essentiels à l'entreprise en place) afin de prévenir toute subvention croisée par les entités réglementées des entités soumises à la concurrence. C'est une des raisons qui ont motivé le démantèlement d'AT&T. Des préoccupations similaires ont été également soulevées sur le risque de subvention croisée des activités d'acheminement de colis de la poste allemande par ses services de courrier postal en situation de monopole, ou de La Poste par ses services bancaires.[6]

Exemple #1 : Restructuration du secteur de la production électrique[7]

Un pays donné a une compagnie d'électricité intégrée en place. Le réseau du pays couvre deux régions reliées par un seul et même réseau d'interconnexion. Les pouvoirs publics décident de restructurer cette compagnie en répartissant les unités de production entre quatre nouvelles compagnies – dans chaque région, une compagnie devra assurer la « charge minimale » et une autre la production électrique de « pointe ». Les pouvoirs publics font valoir que cette restructuration donnera naissance à quatre compagnies de production électrique ce qui devrait plus que suffire pour assurer une concurrence efficace (et que le degré de démantèlement obtenu est de fait supérieur à celui auquel ont abouti les réformes menées par certains pays dans leur secteur de la production électrique). Chaque compagnie représente seulement 25 pour cent de la capacité de production électrique totale. Les autorités de la concurrence devaient-elles approuver ce projet ?

L'existence de quatre compagnies concurrentes de taille égale ne poserait certes guère de problèmes dans de nombreux secteurs, mais les principales caractéristiques du secteur de l'électricité font que cela est moins évident. Par exemple, l'inélasticité de la courbe de la demande d'électricité fait que tout niveau donné de concentration engendrera un pouvoir de marché supérieur dans le secteur de la production électrique que dans tout autre secteur. En outre, dans la mesure où il n'est pas économiquement possible de stocker l'électricité en grandes quantités, il importe de différencier les marchés de l'électricité en fonction du temps – le pouvoir de marché est particulièrement susceptible d'être élevé en périodes de pointe de la demande.

Dans cet exemple, les possibilités de concurrence entre les régions dépendent de la taille de l'interconnecteur. Lorsque le réseau d'interconnexion a atteint sa capacité maximale, les deux régions sont de fait isolées. Lorsque la capacité du réseau d'interconnexion est faible et souvent saturée, ces deux régions seraient mieux desservies si elles correspondaient à deux marchés distincts, la concentration apparente étant ainsi sensiblement plus élevée.

En outre, durant les heures creuses, seule la production de la charge minimale sera assurée sur le marché. Il est possible d'augmenter son prix de manière à couvrir le coût de la production de pointe sans que celle-ci ne risque d'entraîner une hausse de la production. Ainsi, la définition du marché approprié devrait se concentrer sur la seule production de la charge minimale, du moins durant les heures creuses, augmentant encore une fois sensiblement la concentration apparente.

En outre, l'inélasticité de la courbe de la demande d'électricité signifie que, dans tous les cas, durant les heures de pointe, lorsque la demande dépasse 75 pour cent de la capacité totale, chacune des quatre entreprises dispose d'un pouvoir de marché illimité (dans la mesure où il est nécessaire d'arriver à une production satisfaisant la demande totale).

En résumé, ce projet de structure de marché est très critiquable. Des améliorations consisteraient notamment à accroître la capacité du réseau d'interconnexion ; à restructurer le secteur de sorte que chacune des quatre compagnies puisse assurer une charge minimale ainsi qu'une production électrique de pointe sur la base d'un seul portefeuille de production ; et à accentuer la division du secteur pour arriver dans l'idéal à au moins quatre compagnies d'égale importance dans chacune des deux régions (soit un total de huit entreprises). La possibilité ou non de cette division dépendra de la taille du marché par rapport à l'échelle efficace minimale de chaque centrale de production.

3.5 Neutralité du point de vue de la concurrence

- Dans de nombreux pays, les pouvoirs publics eux-mêmes sont un acteur majeur sur certains marchés par l'intermédiaire des entreprises dites publiques. Toutefois, ces entreprises ne rivalisent pas toujours sur un pied d'égalité avec les autres entreprises. En particulier, elles

bénéficient souvent de conditions favorables en matière d'intrants : allégements fiscaux, garantie tacite par l'État ou prêts de l'État, valorisation minorée d'actifs historiques, etc.[8]

- La promotion de la concurrence sur ces marchés consiste souvent à assurer une « neutralité du point de vue de la concurrence » – autrement dit, à encourager l'égalité des chances entre les entreprises publiques et les entreprises privées. Ceci pourrait nécessiter par exemple de supprimer la garantie tacite par l'État des emprunts contractés par les entreprises publiques. Il pourrait également être nécessaire d'imposer des restrictions strictes à l'accès aux subventions ou aides de différentes sortes, comme les restrictions énoncées dans le Traité CE.

- Souvent, lorsqu'une entreprise dominante reste publique, il peut être très difficile pour les pouvoirs publics de s'engager de manière crédible à ne pas agir à l'avenir en la favorisant. Cette incapacité de s'engager peut en soi constituer un obstacle à la concurrence dans la mesure où les éventuels nouveaux acteurs risquent de redouter leur entrée sur le marché si le fait d'y accéder ou de s'y développer pousse les pouvoirs publics à réagir (éventuellement en augmentant les subventions accordées à l'entreprise publique). La privatisation, au moyen de laquelle les pouvoirs publics s'engagent à ne pas favoriser une entreprise par rapport aux autres, peut alors constituer un outil d'amélioration de la neutralité du point de vue de la concurrence et, partant, un instrument de promotion de la concurrence.

Exemple #2 : Subventions et concurrence entre modes de transport[9]

Dans un pays donné, le secteur du transport ferroviaire fournit surtout des services de transport de marchandises et subit la forte concurrence des autres modes de transport – en particulier du transport routier et du transport par voie d'eau. La part de marché de la société ferroviaire intégrée en place a diminué au fil des ans tandis que le volume des subventions que lui accordent les pouvoirs publics a augmenté. Les autorités chargées de la concurrence recommandent de diviser la société ferroviaire en plusieurs entités concurrentes. Toutefois, la société ferroviaire répond qu'elle subit déjà une forte concurrence de la part des autres modes de transport et qu'il n'y a, par conséquent, aucun avantage à attendre de cette restructuration mais seulement des inconvénients. Cet argument est-il valable ?

Le problème de cet argument est qu'il ne tient pas compte de l'impact négatif de l'accès aux subventions accordées par les pouvoirs publics sur les incitations à l'efficacité dans le transport ferroviaire. Il est vrai que la concurrence exercée par les autres modes de transport limite le prix que la société ferroviaire peut fixer, mais la société ferroviaire en place sera faiblement incitée à améliorer sa productivité et la qualité de ses services, ainsi qu'à être plus sensible aux désirs de ses consommateurs tant que les pouvoirs publics ne pourront s'engager à limiter les subventions qu'ils accordent au secteur.

L'introduction de la concurrence dans le transport ferroviaire permet aux pouvoirs publics d'instaurer la concurrence pour l'octroi des subventions – en stimulant ainsi l'efficience et en réduisant autant que possible le volume des subventions. La concurrence exercée par les autres modes de transport contribue peu à stimuler la productivité si le secteur ferroviaire est assuré d'obtenir des subventions indéfiniment.

3.6 Suppression des contrôles des prix, de la production, de la gamme des biens et services pouvant être offerts, ou des formes d'organisation d'activité

- Les entreprises ne peuvent faire face à la concurrence de manière efficace si elles n'ont pas la liberté de faire baisser leurs prix. Dans certains secteurs, la promotion de la concurrence consiste d'abord à éliminer les prix plancher auxquels par exemple ont été souvent soumis les prix de nombreux produits agricoles. Comme autre exemple, nous pouvons citer le

plafonnement, en vigueur durant de nombreuses années, du taux d'intérêt que les banques de dépôts dans de nombreux pays étaient en droit de verser sur les comptes courants.[10]

- Dans d'autres secteurs, les entreprises sont ou étaient soumises à des restrictions aux services qu'elles étaient en droit de fournir – par exemple, pendant très longtemps, plusieurs pays ont limité les services pouvant être fournis par le transport routier afin de maintenir un certain trafic dans le secteur ferroviaire. Un petit nombre de pays continuent encore de limiter le « retour à charge » pratiqué par les entreprises de transport routier, forçant ainsi certains camions à retourner vers leur lieu de départ vides et réduisant véritablement la concurrence pour les entreprises dans toutes les zones d'où leurs camions proviennent.

- Dans d'autres secteurs encore, des réglementations existent qui limitent le mode d'organisation des entreprises. Dans certains pays, par exemple, les avocats doivent s'organiser en société en nom collectif et non en sociétés à responsabilité limitée. Il existe également des pays où les pharmacies doivent appartenir à un pharmacien diplômé et où des limites strictes restreignent le nombre de pharmacies qu'un pharmacien est en droit de posséder. Ces restrictions limitent le degré de concurrence que doivent affronter les pharmacies efficientes intégrées dans les groupes de la grande distribution. (Les restrictions à la présence des étrangers dans le capital des sociétés, susceptibles de limiter la concurrence de la même manière, ont été mentionnées ci-dessus).

- Dans certains cas, les restrictions concernant les services pour lesquels les entreprises peuvent être en concurrence risquent de faciliter les phénomènes de collusion autour des autres services. Par exemple, en Italie, le gouvernement a libéralisé le prix auquel les stations-service pouvaient vendre leur essence tout en continuant à réglementer les heures d'ouverture, ainsi que la vente des autres produits et services que les stations-service pouvaient proposer. Il en est résulté une concurrence très faible au niveau du prix (les propriétaires de stations-service craignant de déclencher une guerre des prix s'ils abaissaient les leurs). Il a fallu attendre que le gouvernement libéralise les autres services fournis par les stations-service pour qu'apparaisse une concurrence plus réelle.

3.7 Promotion de la réactivité de la demande aux prix

- La concurrence n'est efficace que si les acheteurs de biens et services sont disposés et prêts à rechercher la meilleure offre qualité-prix. À l'inverse, elle n'est pas très efficace si les consommateurs ne sont pas très sensibles aux prix, autrement dit s'ils ne réduisent pas leur budget ou s'ils ne changent pas de fournisseurs face à une hausse. Dans certains secteurs - notamment ceux desservis auparavant par une entreprise en situation de monopole, les consommateurs risquent d'avoir peu d'expérience dans leur liberté de choix et peuvent avoir besoin d'être activement encouragés à la développer.

- L'inélasticité de la demande est notamment un problème dans le secteur de la production électrique. De nombreux pays ont mis en place un marché de gros ou un marché au comptant pour l'électricité. Toutefois, le cours au comptant est souvent très volatile. Aussi la plupart des utilisateurs finaux n'achètent-ils pas l'électricité directement sur le marché au comptant et préfèrent se la procurer, avec une espèce d'assurance sous forme d'un prix de détail fixe qui n'évolue pas selon le prix de gros. Les producteurs d'électricité doivent alors faire face à une demande en gros qui est complètement insensible, ou presque, à l'évolution du prix de gros sur le court terme. Cela accroît sensiblement les possibilités d'exercice d'un pouvoir de marché.

- Dans certains cas, l'acheteur peut ne pas même se soucier du prix payé – ce peut être le cas par exemple des services des administrations locales, lesquelles reçoivent une part substantielle de leurs revenus de l'État. Dans ce cas, la promotion de la concurrence peut passer par l'introduction de mesures garantissant que l'administration locale est incitée à acheter avec le plus d'efficience possible.

- Même lorsque les utilisateurs finaux sont directement exposés au prix, ils peuvent être peu disposés à changer de fournisseur s'il leur faut assumer des coûts de transfert. Les coûts de transfert constituent un problème bien connu, par exemple, dans les télécommunications. Les clients peuvent être peu désireux de changer de fournisseur de services de télécommunications local, si leur nouveau fournisseur leur demande alors de changer de numéro de téléphone. De nombreux pays ont ainsi mis en œuvre une forme de « portabilité du numéro » permettant aux clients de garder leur numéro de téléphone lorsqu'ils changent de fournisseurs.

- Des problèmes similaires se posent également dans le secteur bancaire. Les coûts élevés de réorganisation de tous les paiements ou encaissements effectués directement à partir des comptes existants dissuadent une partie de la clientèle des particuliers de changer de banque. De la même manière que dans les télécommunications, certains commentateurs ont préconisé une forme de « portabilité du numéro de compte bancaire » afin de réduire les coûts de transfert d'une banque à l'autre.

- Dans certains cas, les coûts de transfert peuvent résulter d'une décision prise par l'entreprise. Par exemple, certaines entreprises utilisent à dessein des contrats, ou des programmes de fidélité de manière à retenir les clients. Les programmes de fidélisation, notamment, sont une pratique à peu près généralisée parmi les principales compagnies aériennes (à services complets). On s'est inquiété de savoir si ces programmes de fidélisation ne risquaient pas de réduire la concurrence exercée par les petites compagnies. La Communauté européenne est intervenue, à une occasion au moins, pour réduire les effets des programmes de fidélisation proposés par les compagnies aériennes.

Exemple #3 : Déréglementation du secteur du transport aérien[11]

Un pays a une compagnie aérienne en situation de monopole pour les vols nationaux. Le gouvernement décide de favoriser la concurrence sur le marché des lignes intérieures. Il propose pour ce faire de supprimer les barrières à l'entrée des compagnies nouvelles et étrangères. Prévoyez-vous des problèmes que pourrait poser une telle approche ?

Dans cet exemple, l'élimination des barrières à l'entrée constitue une première étape importante de la libéralisation, et pourrait bien avoir un impact immédiat sur les prix et services. Dans certains pays, cette seule mesure pourrait suffire à atteindre un degré concurrentiel approprié. Toutefois, deux raisons inclinent à penser que la compagnie en place conservera sa position dominante.

Premièrement, de nombreux clients préfèrent voyager avec une compagnie qui offre des services plus fréquents (c'est-à-dire, avec des économies de « densité de parcours de ramassage »). Autrement dit, la nouvelle compagnie doit pouvoir proposer d'entrée de jeu des horaires de vol fréquents avec une couverture très dense du réseau pour que la compagnie en place n'ait pas un avantage concurrentiel.

Deuxièmement, aspect plus important encore, la compagnie en place peut offrir un plus grand éventail de destinations et ainsi proposer des programmes de fidélisation plus attrayants, ce qui réduit une nouvelle fois l'intérêt pour les compagnies nouvellement entrées sur le marché par rapport à la compagnie en place.

Il serait possible de compenser les avantages détenus par la compagnie en place par une intervention réglementaire (par exemple, les autorités réglementaires pourraient forcer la compagnie en place à autoriser l'accès à ses programmes de fidélisation), mais il serait probablement plus facile de résoudre ces problèmes en procédant à des changements structurels, par exemple, par une séparation plus poussée de la compagnie en place en entités concurrentes.

3.8 Rééquilibrage des tarifs et élimination de toute subvention croisée

- Dans de nombreux cas, les restrictions à la concurrence sont liées à l'établissement de tarifs supérieurs aux coûts sous-jacents, souvent pour fournir d'autres services à un prix inférieur aux coûts. Par exemple, de nombreux pays ont depuis toujours choisi de facturer les services de télécommunication de longue distance et internationaux au-dessus du coût de manière à maintenir aussi bas que possible le coût des abonnements et des appels locaux. Pour les services postaux et l'électricité, il est courant de faire payer des prix uniformes dans toutes les régions géographiques, même si les coûts de prestation des services en zones reculées et/ou rurales sont beaucoup plus élevés qu'en zones urbaines.

- L'existence de services, fournis à un prix inférieur au coût, financés par des subventions croisées internes, est un obstacle majeur à la concurrence. La raison en est simple. Si la concurrence était permise, les nouveaux entrants privilégieraient les activités à forte marge (par exemple, les services de télécommunication de longue distance ou les services postaux en zones urbaines) réduisant ainsi les marges et éliminant la source du financement nécessaire au maintien des subventions croisées. En d'autres termes, permettre la concurrence menace soit la viabilité financière de l'entreprise en place soit la poursuite de la fourniture des services subventionnés. D'un point de vue politique, la société en place et les bénéficiaires de services non-commerciaux sont susceptibles de s'opposer fortement aux réformes orientées vers la concurrence.

- La promotion de la concurrence dans ces circonstances nécessite soit (a) un rééquilibrage des tarifs de sorte que tous les services sont fournis à un prix suffisamment élevé pour au moins couvrir leur coût marginal soit (b) la mise en place d'un mécanisme distinct de financement des services non-commerciaux. Ce mécanisme pourrait être le financement de services non-commerciaux par le budget de l'État ou l'établissement d'un « impôt » sur les autres services, neutre du point de vue de la concurrence. Lorsque la fourniture de services concurrentiels nécessite d'avoir accès à un intrant essentiel (analysé à la section 5 ci-dessous), cet « impôt » peut, en principe, être intégré dans le prix de cet intrant essentiel. Il conviendrait dans l'idéal d'assurer la transparence de l'impôt ou de la subvention croisée du point de vue des utilisateurs finaux.

Exemple #4 : Service universel et concurrence[12]

Un pays se fixe pour objectif d'accroître la pénétration des services de télécommunications. Actuellement, le prix d'abonnement à une ligne téléphonique intérieure est maintenu à un niveau très bas afin de promouvoir l'utilisation du service. Le coût du service de téléphone local facturé à un prix inférieur aux prix de revient est financé par des subventions croisées provenant du service des appels longue distance et internationaux. Ces services sont actuellement fournis par une entreprise en situation de monopole qui a toujours résisté à l'ouverture du marché à la concurrence au motif que celle-ci compromettrait la réalisation des objectifs du service universel du pays. Y a-t-il moyen de promouvoir ce service universel sans sacrifier la concurrence ?

Ces deux objectifs sont conciliables grâce notamment à une source de financement clairement définie en vue de fournir des services de boucle locale à un prix inférieur au coût. Ces fonds pourraient être collectés, par exemple, au moyen d'une taxe prélevée sur certains services de télécommunication – éventuellement sur les services longue distance et internationaux (comme c'est le cas actuellement) mais elle serait perçue de manière plus efficiente sur les services locaux pour les consommateurs (lorsqu'ils peuvent être identifiés) dont la demande en services téléphoniques est inélastique. Une utilisation efficiente des fonds pourrait être assurée en ciblant soigneusement les subventions et par le recours à des appels d'offres concurrentiels pour la fourniture du service dans les zones où il est facturé à un prix inférieur à son coût.

Une fois établi ce type de mécanisme de financement du service universel, la concurrence et le service universel sont conciliables – et, de fait, on pourrait s'attendre à ce que la concurrence favorise l'objectif de pénétration par un renforcement des incitations à l'efficience productive et à la création de produits et services innovants et attrayants.

4. Promotion de la concurrence sur les marchés où il pourrait exister un « dysfonctionnement du marché »

14. Sur certains marchés, il n'est pas possible de s'en remettre exclusivement à la concurrence, dans le respect des lois-cadres, en vue de réaliser les objectifs énoncés dans la section 1. Sur ces marchés, une forme d'intervention réglementaire supplémentaire est nécessaire.

15. L'intervention la plus appropriée différera d'un cas à l'autre, selon le marché et le problème spécifique auquel on fait face. Toutefois, en règle générale, cette intervention réglementaire supplémentaire devrait, dans la mesure du possible, être conçue de manière à faciliter et non à restreindre la concurrence. Dans certains cas, il pourrait être nécessaire de limiter la concurrence d'une certaine manière. Toutefois, la limitation de la concurrence ne devrait pas être plus forte que nécessaire en vue de réaliser l'objectif donné et devrait être soumise à un examen périodique pour qu'il soit possible de la supprimer lorsque les conditions du marché changent.

16. Par exemple, dans le cas de nombreux types de services professionnels, certains clients ne sont pas en mesure d'apprécier à l'avance la qualité des services qu'ils recevront. Aussi, en l'absence d'une intervention réglementaire, la concurrence entre fournisseurs risque-t-elle de faire baisser la qualité en dessous du seuil d'efficience. Cet argument est invoqué, par exemple, pour justifier la nécessité de limiter l'accession à de nombreuses professions.

17. Dans certains cas, toutefois, il peut être possible d'intervenir sans limiter la concurrence. Par exemple, les pouvoirs publics peuvent chercher à agir en communiquant directement aux consommateurs des informations sur la qualité des services fournis. À l'inverse, des mécanismes pourraient être établis qui permettraient de dédommager les consommateurs lésés par la fourniture de services de piètre qualité (par l'intermédiaire, par exemple, de garanties ou d'assurances).

18. Lorsque ces mécanismes ne sont pas matériellement possibles ou efficients, il pourrait être nécessaire d'introduire des normes de qualité minimales. L'application de ces normes se traduit inévitablement par une limitation de la prestation des services dans la mesure où seuls les professionnels satisfaisant à certaines normes seraient alors autorisés à fournir leurs services. Toutefois, cette limitation de l'offre devrait être directement liée à la nécessité d'assurer un niveau minimal de qualité des services et ne devrait pas être supérieure à ce qui est nécessaire. Dans certains cas, lorsque les critères d'entrée ont été plus stricts que nécessaire en vue de fournir certains services, de nouvelles professions ont été créées avec des critères d'entrée moins stricts afin de stimuler la concurrence. Nous pouvons citer par exemple les

« licensed conveyors », assurant des services liés aux mutations immobilières, dans les professions juridiques et les « infirmiers praticiens » dans les professions médicales.

19. Des principes similaires s'appliquent, par exemple, à la réglementation de la sécurité ou à la lutte contre la pollution. Dans chaque cas, le mécanisme de réglementation visant à contrôler les effets nuisibles devrait, dans la mesure du possible, être compatible avec les mécanismes du marché. Il devrait autoriser et inciter les entreprises à allouer les ressources et à chercher de nouveaux moyens pour satisfaire les normes voulues de la manière la plus efficiente possible.

20. Les exemples ci-dessous illustrent ces principes de manière plus approfondie. Le premier exemple illustre une situation où il pourrait être nécessaire de restreindre un tant soit peu la concurrence en vue d'atteindre un objectif donné. Le deuxième exemple illustre comment des interventions réglementaires supplémentaires peuvent puissamment influer sur le degré de concurrence dans un marché donné.

Exemple #5 : Réglementation des taxis[13]

Une ville ne dispose actuellement d'aucune réglementation de l'activité des taxis. D'où une pléthore de taxis en activité – motorisés et à pédale. Il est toutefois préoccupant de constater que ces taxis font payer les touristes trop cher (lesquels ne connaissent pas les itinéraires, les distances ou les tarifs appropriés), que les chauffeurs peuvent se disputer violemment d'éventuels clients et que les véhicules eux-mêmes sont mal entretenus, avec un taux d'accidents inacceptable. Les pouvoirs publics ont proposé de mettre en place un régime de licences qui limitera sensiblement le nombre de taxis autorisés à être en service. L'autorité de réglementation est priée de se prononcer sur cette proposition. Vous y opposerez-vous au motif qu'elle constitue une restriction manifeste à la concurrence ?

Il est vrai que l'application de cette proposition limitera la concurrence. Toutefois, nous risquons également d'avoir affaire ici à un « dysfonctionnement du marché » dans la mesure où les utilisateurs de taxis (en particulier ceux qui ne sont pas originaires de la ville) ne sont pas au courant des tarifs appropriés ni même capables d'évaluer les coûts d'entretien de leur taxi avant de se lancer. Comment conviendrait-il de s'attaquer à ce dysfonctionnement du marché ? Une approche possible consisterait à sensibiliser les utilisateurs de taxis à la nécessité de faire jouer la concurrence avant d'accepter une course. Toutefois, cette approche risquerait d'être inapplicable, notamment dans les emplacements (comme à la sortie des grands aéroports) où faire la queue n'est efficace que si les clients montent dans le taxi situé en tête de file. Il pourrait alors être nécessaire de subordonner l'activité des taxis à l'octroi d'une licence, d'imposer des compteurs normalisés et de veiller à la stricte application du règlement qui veut que les taxis empruntent l'itinéraire le plus court. Même dans ce cas, toutefois, le nombre de licences accordées ne doit pas être limité. La possibilité pour les chauffeurs d'entrer et de sortir librement du marché éliminera les phénomènes de rente de situation et déterminera le nombre de taxis disponibles à toute heure de la journée. Les tarifs pratiqués par les chauffeurs devraient être soigneusement fixés pour assurer que le nombre de taxis en activité n'est ni excessif ni insuffisant durant les heures creuses aussi bien que durant les heures de pointe.

Cela étant toutefois, les habitants de la ville qui connaissent bien les itinéraires, les distances et les tarifs et qui sont capables de faire jouer la concurrence peuvent ne pas avoir besoin de cette protection. Il pourrait être par conséquent fondé de mettre en place un système régissant l'activité des taxis à deux niveaux avec un niveau fortement réglementé où les taxis seraient autorisés à desservir les lieux surtout fréquentés par les nouveaux arrivés dans la ville (les aéroports et les grands hôtels, par exemple) et un deuxième niveau, pour une grande part non réglementé, où les taxis seraient à la disposition de tous les autres clients sur demande. Un système à deux niveaux de ce type fonctionne à Londres.

Exemple #6 : Réglementation du secteur bancaire[14]

Un pays n'a jamais ouvert son secteur bancaire à la concurrence. Au lieu de quoi, une banque d'État en situation de monopole y opère dans le cadre de limites strictes soumettant à un plancher le taux d'intérêt qu'elle peut verser sur les comptes de dépôt et plafonnant le taux qu'elle peut percevoir sur les prêts qu'elle accorde. Estimant qu'il s'agit d'un secteur potentiellement concurrentiel, les pouvoirs publics décident de libéraliser l'accès au secteur bancaire tout en supprimant la réglementation à laquelle la Banque d'État était jusqu'alors soumise. L'autorité de réglementation doit-elle appuyer cette proposition ?

La libéralisation de l'entrée sur le marché bancaire et la suppression des restrictions sont louables mais elles ne suffisent pas en soi à assurer une concurrence efficace. En l'absence de toute autre intervention, les consommateurs sont susceptibles en effet de se retrouver dans une situation moins favorable qu'auparavant. La raison en est que les consommateurs ont souvent du mal à évaluer le risque prudentiel pris par une banque. Le cas échéant, la concurrence entre les banques les poussera à augmenter le risque qu'elles courent jusqu'à un niveau de risque de faillite beaucoup trop élevé. Afin de ne pas être exposés à une telle situation, les consommateurs peuvent estimer qu'ils sont mieux lotis en demeurant clients de la banque d'État dans la mesure où elle bénéficie d'une garantie explicite ou implicite de la part des pouvoirs publics. Il est alors à l'évidence peu probable que cette situation favorise l'émergence d'une concurrence efficace entre les banques. Avec la suppression de la réglementation sur le taux d'intérêt créditeur, les consommateurs sont susceptibles d'être moins bien lotis qu'auparavant en étant moins bien rémunérés sur leurs comptes de dépôts et en payant des intérêts plus élevés pour leurs emprunts.

Il peut être possible de sensibiliser les consommateurs à la nécessité d'évaluer les risques assumés par la banque qu'ils choisissent. Une législation obligeant les banques à révéler leur risque de crédit faciliterait un examen comparatif. Toutefois, la banque d'État détiendra un avantage concurrentiel aussi longtemps qu'elle bénéficiera d'une garantie implicite des pouvoirs publics. La privatisation éliminerait cet avantage mais, lorsqu'elle n'est pas politiquement possible, la seule solution consisterait à créer un régime d'assurance des dépôts qui élimine le risque de perte de dépôts encouru par toutes les banques concurrentes. Ce régime devrait naturellement s'appuyer sur un système de réglementation prudentielle et de surveillance des banques concurrentes. Dans ce cas, l'infrastructure réglementaire (sous la formes d'une réglementation prudentielle des banques) est nécessaire pour maintenir la concurrence entre les banques.

5. Appel d'offres concurrentielles ou concurrence pour le marché

21. Il a été signalé ci-dessus qu'il n'est pas possible de s'en remettre à la concurrence pour atteindre les objectifs des pouvoirs publics sur les marchés où la seule issue viable sur le long terme est la présence d'une seule entreprise. C'est le cas, par exemple, lorsque la demande totale du marché peut être satisfaite par une seule entreprise à un prix moindre que lorsqu'il y a deux entreprises ou plus. On appelle ces marchés « monopoles naturels ». Presque tous les secteurs des services aux collectivités comportent des éléments importants de monopole naturel.

22. Dans la plupart des pays, les services aux collectivités comme l'électricité, les télécommunications et les services relatifs à l'eau sont depuis de nombreuses années fournis par une seule entreprise en situation de monopole dans chaque région. Cette entreprise était parfois explicitement réglementée par une autorité indépendante mais elle était souvent une entreprise publique et soumise à une réglementation implicite. La prochaine section examinera comment la concurrence a été au cours des dernières années favorisée au sein des composantes concurrentielles de ces secteurs. Dans la présente section, nous examinerons les exemples où la concurrence pour le marché a été mise à profit comme une solution de remplacement à la réglementation d'une entreprise intégrée.

23. Supposons donc que les pouvoirs publics aient décidé que certains services seront fournis par une entreprise intégrée en situation de monopole naturel. Dans ce cas, les pouvoirs publics ne peuvent pas compter sur une concurrence classique dans le marché en vue de réaliser les objectifs de la section 1. Au lieu de cela, les pouvoirs publics ont alors le choix entre, d'une part, le recours à la réglementation et, d'autre part, un type de concurrence pour le marché sous la forme d'appels d'offres concurrentiels.

24. En cas d'appels d'offres concurrentiels, les pouvoirs publics spécifient les services qu'ils souhaiteraient voir fournis (notamment leur qualité, leur variété, etc.), ainsi que toute autre obligation (comme les obligations d'investissement) et invitent les entreprises intéressées à faire des offres – soit sous la forme d'un montant que le soumissionnaire est disposé à payer (ou à accepter) en vue d'assurer les services en question au prix spécifié soit, à l'inverse, sous la forme du prix que le soumissionnaire ferait payer en échange de la fourniture du service étant donné le montant de la subvention accordée par les pouvoirs publics.

25. Les appels d'offres concurrentiels sont une pratique généralisée dans de nombreux pays, en particulier pour les services incombant traditionnellement aux pouvoirs publics locaux – comme les services de traitement des déchets solides, les services ambulanciers, les services de protection contre les incendies ou les trains de banlieue. Dans certains pays, la délégation de certains services des collectivités locales doit obligatoirement faire l'objet d'un appel d'offres concurrentiel.

26. L'efficacité des appels d'offres concurrentiels pour la réalisation des objectifs décrits ci-dessus dépend en partie, bien entendu, de la place que le processus d'appel d'offres donne à la concurrence. De nombreux pouvoirs publics prévoient des règlements explicites régissant les passations de marchés afin d'optimiser le degré de concurrence du processus d'appel d'offres pour les services.

27. Il est possible de favoriser le degré de concurrence pour le marché en accordant une minutieuse attention aux facteurs analysés ci-dessus à la section 3 – comme la réduction la plus forte possible des barrières à l'entrée, ainsi que la garantie d'une structure sectorielle concurrentielle et d'une neutralité du point de vue de la concurrence entre les entreprises d'État et les entreprises privées. Les barrières à l'entrée peuvent être réduites notamment en assurant une durée suffisamment longue de la concession pour recouvrer le coût de tout investissement non récupérable devant être effectué par le soumissionnaire retenu. À l'inverse, les pouvoirs publics pourraient conserver la propriété de tous les biens à longue durée de vie requis et les donner à bail au soumissionnaire retenu selon des conditions financières prédéterminées.

28. Les appels d'offres concurrentiels peuvent poser des problèmes lorsque l'adjudicataire en place acquiert un avantage concurrentiel sur les autres concurrents au moment où la concession doit être renouvelée. Cet avantage peut résulter notamment d'informations d'initié, par exemple, sur la qualité de tous les facteurs de production impliqués, ainsi que sur les besoins probables de maintenance future et leur coût. L'adjudicataire a pu également s'assurer par contrat la disponibilité d'intrants difficiles à se procurer comme par exemple le personnel ayant acquis des compétences nécessaires à la prestation du service en question. L'existence d'un avantage concurrentiel détenu par l'adjudicataire peut dissuader les autres concurrents de proposer une offre. Les pouvoirs publics peuvent alors promouvoir la concurrence en avisant au moyen par exemple d'assurer qu'une partie de la main d'œuvre existante est reprise par le nouvel adjudicataire et en conservant un groupe d'entreprises fournissant des services similaires dans le cadre des concessions voisines.

29. Les appels d'offres concurrentiels n'éliminent pas le besoin de réglementation. De fait, ils incitent très fortement l'adjudicataire à réduire les dépenses au minimum. Cette incitation doit être contrebalancée par une forte incitation réglementaire au maintien de la qualité des services et de toute infrastructure dont la durée de vie dépasse la durée de la concession.

30. Les appels d'offres concurrentiels posent des problèmes très difficiles lorsque la décision prise par l'adjudicataire de cesser de fournir les services impose des coûts élevés aux pouvoirs publics ou aux consommateurs. Ces coûts peuvent être occasionnés par l'interruption du service ou par la nécessité de relancer la procédure d'appel d'offres. Lorsque les coûts sont élevés, les pouvoirs publics sont confrontés à un problème d'« extorsion » ex post, l'adjudicataire pouvant chercher à renégocier après coup les termes et les conditions de la concession. Les soumissionnaires, qui prévoiront cette éventualité, pourront faire preuve d'un excès d'optimisme. Dans le cas des appels d'offres concurrentiels pour les services ferroviaires britanniques, nombre des adjudicataires sont par la suite devenus insolvables. Les pouvoirs publics se sont finalement résignés à accroître sensiblement les subventions qu'ils leur versaient.

31. Plus la durée de la concession est longue, plus il est difficile de prévoir l'évolution du coût de la prestation des services par le concessionnaire. Si celui-ci est tenu de pratiquer un prix fixe, le risque qu'il encourra sera proportionnel à la durée de la concession. Pour les concessions plus longues, il est possible de réduire le risque en autorisant des procédures automatiques de révision du prix de la concession. Pour les concessions de très longues durées, les techniques d'ajustement du prix peuvent elles-mêmes devoir être modifiées par une instance d'arbitrage neutre. De fait, plus la période de la concession est longue, plus l'appel d'offres ressemble à une réglementation classique.

32. En résumé, à l'instar des autres formes de réglementation, la réussite des appels d'offres concurrentiels dépend de l'existence d'institutions réglementaires efficaces qui peuvent mettre en œuvre les incitations nécessaires pour promouvoir la concurrence lors du processus de la concession, afin d'assurer que les obligations auxquelles le concessionnaire doit satisfaire font l'objet d'un suivi ex post et de garantir une transition réussie au moment du renouvellement de la concession.

Exemple #7 : Services ferroviaires non-commerciaux[15]

Un pays souhaite réduire les subventions accordées pour financer la fourniture de certains services non-commerciaux de transport de passagers dans une région reculée. Ces services sont actuellement fournis par la compagnie ferroviaire intégrée en place, qui est en situation de monopole et est fortement subventionnée. L'écartement des voies dans cette zone reculée ne correspond pas à la norme. Les pouvoirs publics proposent d'organiser une procédure d'appel d'offres concurrentiel pour les services ferroviaires de cette région. Ils invitent les soumissionnaires à faire des offres en vue de l'aide requise à la fourniture de services de transport ferroviaire d'un certain niveau dans cette région pendant un an. Durant la première année, la seule offre reçue est celle de la société ferroviaire en place. L'année suivante, l'autorité de la concurrence est invitée à donner son avis sur la façon d'améliorer le degré de la concurrence lors du processus de soumission.

La décision de mettre à profit la concurrence pour le marché afin de réduire le coût le plus possible et d'améliorer la productivité de ces services est louable. Toutefois, avec une telle approche des pouvoirs publics, le degré de concurrence risquera de ne pas être approprié lors du processus de soumission. Celui-ci comporte plusieurs caractéristiques susceptibles de dissuader les soumissionnaires potentiels de se mettre sur les rangs :

Premièrement, la société en place, qui fournit déjà ces services, possède un gros avantage comparatif par rapport aux autres entreprises du fait des informations qu'elle détient concernant les coûts réels de la prestation de ces services. Cela peut dissuader les autres entreprises de soumissionner contre la société en place. Deuxièmement, rien dans le processus de soumission n'interdit la société en place de profiter de subventions croisées de la part de ses autres services en situation de monopole. Troisièmement, la largeur des voies dans cette région ne correspondant pas à la norme, tous les investissements effectués par un nouveau venu en matériel roulant ou locomotives seraient en partie irrécupérables. La courte durée de la concession exclut toute chance de les recouvrer.

Il existe différentes manières d'améliorer le processus d'appel d'offres. Premièrement, et avant tout, le cercle des soumissionnaires potentiels pourrait s'étendre aux sociétés de transport non ferroviaires. Les

compagnies d'autocars notamment pourraient être en mesure d'assurer un service conforme aux objectifs des pouvoirs publics. Deuxièmement, on pourrait remédier à la nécessité d'effectuer des investissements irrécupérables en donnant à bail le matériel roulant et les locomotives nécessaires au soumissionnaire retenu. De même, la période de concession devrait probablement être étendue pour permettre au concessionnaire de recouvrer tout autre coût irrécupérable. Enfin, il pourrait être envisagé d'empêcher la société en place de participer au processus de soumission afin d'éliminer tout risque de subvention croisée.

Exemple #8 : Concurrence dans les services d'autocars locaux[16]

Des pouvoirs publics envisagent une refonte des services d'autocars locaux. Ceux-ci sont actuellement assurés par une entreprise d'État mais les pouvoirs publics estiment que la fourniture de services d'autocars offre peu d'économies d'échelle, voire aucune, et décident alors d'ouvrir le marché à la concurrence. Les pouvoirs publics ont d'abord envisagé la concurrence pour le marché sous la forme d'appels d'offres concurrentiels mais ont toutefois reconnu que cette approche les obligeait à assumer un rôle de réglementation continue pour déterminer les services qui seront fournis, ainsi que leur niveau de qualité. Aussi ont-ils préféré proposer la concurrence classique sur le marché. Les pouvoirs publics font valoir que cette concurrence assurera la fourniture des services attendus par les utilisateurs avec un degré élevé d'efficience et d'innovation. L'autorité de la concurrence devrait-elle soutenir l'approche proposée ici ?

Malheureusement, la réponse est probablement négative. Dans le cas des services d'autocars locaux (contrairement, par exemple, aux services d'autocars de longue distance), les passagers n'achètent pas leurs billets à l'avance ce qui les obligerait à voyager avec une compagnie donnée à une date et une heure précises. Au lieu de quoi, ils attendent simplement le premier autocar qui passe. Ainsi, chaque fois qu'elle investit dans un service à horaires fixes (par exemple en annonçant les horaires à l'avance et en les affichant aux arrêts), une compagnie d'autocar locale court le risque de voir une société concurrente « s'emparer » de ses passagers qui attendent en faisant simplement arrêter ses autocars juste avant les horaires annoncés. La société qui aura investi dans des horaires de desserte fixes est alors désavantagée. En outre, les autocars appartenant à des sociétés concurrentes sont incités à « faire la course » jusqu'au prochain arrêt afin d'être les premiers à ramasser les passagers qui attendent. Toutefois, les clients sont moins susceptibles de voyager par autocar en l'absence d'horaires fixes.

Il est possible d'éliminer ces problèmes par l'organisation d'appels d'offres lors de l'attribution du droit d'exploitation de certains itinéraires. Il est vrai que les pouvoirs publics doivent spécifier les itinéraires, les tarifs et les normes de qualité minimales et devront veiller au respect de ces spécifications. Toutefois, les coûts correspondants l'emportent, en définitive, sur les inconvénients découlant de la concurrence classique sur le marché. En outre, plusieurs autres conditions pourraient être imposées lors du processus de soumission en vue de favoriser l'interopérabilité de l'ensemble du réseau desservi par les autocars (par exemple, assurer l'offre de billets de correspondance, garantir certaines connexions, etc.).

6. Accès aux infrastructures essentielles

33. Dans la section précédente, nous avons examiné comment il est possible d'introduire dans certains secteurs une forme de concurrence lors de l'attribution du droit de fournir un certain service tout en maintenant une entreprise intégrée en situation de monopole. Toutefois, cette approche est tout simplement impraticable pour la plupart des nombreux services publics traditionnels. Dans la majorité des pays, les pouvoirs publics ont toujours préféré s'en remettre d'abord à la réglementation d'une entreprise intégrée (entreprise d'État en général) en vue de réaliser les objectifs énoncés ci-dessus.

34. Toutefois, un examen plus attentif de la question révèle que, dans presque tous les secteurs traditionnels de services aux collectivités, certaines composantes sont en mesure de faire face à la concurrence alors que d'autres sont en situation de monopole naturel. Le plus important progrès accompli en matière de réglementation au cours des vingt dernières années a peut-être été la prise de conscience que la promotion de la concurrence au sein des composantes concurrentielles d'un secteur donné améliorerait de manière générale la réalisation des objectifs énoncés ci-dessus.

35. La promotion de la concurrence au sein des composantes concurrentielles des services aux collectivités nécessite notamment que la réglementation donne plus d'importance aux prix et à la qualité des intrants essentiels (également appelés « services d'accès ») qu'aux prix et à la qualité au niveau des utilisateurs finaux. L'intervention des pouvoirs publics dans les segments concurrentiels de ces services peut alors se limiter aux types d'intervention énoncés ci-dessus à la section 3 (à savoir, la réduction des barrières à l'entrée, la promotion d'une structure concurrentielle, la garantie de la neutralité du point de vue de la concurrence, la réduction au minimum des coûts de transfert, etc.).

36. Comme signalé ci-dessus, la réglementation de l'accès aux infrastructures essentielles a pour premier avantage de permettre aux pouvoirs publics de recourir d'abord à la concurrence en vue de réaliser les objectifs énoncés ci-dessus et de réduire ainsi le champ de la réglementation. Elle offre en outre un autre avantage, à savoir la possibilité aux entreprises en place de proposer une gamme étendue de services sans discontinuité.[17]

37. Donner accès aux infrastructures essentielles comporte plusieurs inconvénients majeurs : (a) l'autorité de la concurrence chargée de garantir l'efficience des prix et la qualité de l'accès peut avoir à plusieurs égards une mission plus difficile à assurer que celle incombant au régulateur chargé de garantir l'efficience des prix et la qualité des services intégrés au niveau des utilisateurs finaux ; et (b) la fourniture conjointe de l'intrant essentiel et du service concurrentiel par la même entreprise risque de réduire certaines économies de gamme.

38. Cette section examine le cas où le propriétaire de l'infrastructure essentielle est également autorisé à fournir les services concurrentiels. (Le cas de la séparation verticale est analysé dans la section suivante). L'entreprise en place est alors en mesure de restreindre l'augmentation de la concurrence dans le segment concurrentiel en augmentant le prix ou en abaissant la qualité de l'accès aux intrants essentiels. L'entreprise en place peut également être incitée à profiter de sa position pour restreindre le développement de la concurrence selon la nature de la réglementation à laquelle elle est soumise. Ainsi, les pouvoirs publics doivent établir un mécanisme assurant un accès efficient et non discriminatoire aux infrastructures essentielles fournies par l'entreprise en place pour que la concurrence se développe au sein des composantes concurrentielles des secteurs concernés.

39. La question de l'accès aux infrastructures essentielles est en grande partie un problème de réglementation – autrement dit, il s'agit d'abord de garantir que les services requis sont assurés, à un prix et à un degré de qualité efficients, parallèlement à des innovations et investissements continus au niveau de l'infrastructure. Toutefois, l'angle d'approche de la réglementation de l'accès influe également de différentes manières sur le degré de concurrence dans les segments concurrentiels. Nous examinerons ces aspects du problème de la réglementation de l'accès.

40. En premier lieu, le montant et la structure des droits d'accès devraient être les mêmes pour toutes les entreprises rivales dans les segments concurrentiels si l'on souhaite que se développe une concurrence efficiente. Lorsque le propriétaire des infrastructures essentielles est également en situation de concurrence dans le segment concurrentiel, il conviendrait notamment que les droits d'accès versés par les entreprises concurrentes soient les mêmes que ceux que « se verse » le propriétaire de l'infrastructure essentielle. Il est possible de calculer le montant que se verse le propriétaire de l'infrastructure essentielle : c'est le prix en

aval, ou prix à l'utilisation finale, moins le coût marginal du segment concurrentiel. De nombreux pays utilisent différents types de tests par imputations ou « effets de ciseau » dont l'objectif, de fait, est d'assurer que les droits d'accès ne dépassent pas le prix pour l'utilisateur final moins le coût marginal du segment concurrentiel. Ce prix est également nommé « principe de tarification efficace des composants ».

41. La question de la structure des droits d'accès est tout aussi importante que leurs montants. Lorsque les utilisateurs finaux sont différenciés, l'entreprise en place peut être en mesure de pratiquer une discrimination par les prix de manière à répartir les utilisateurs finaux en différents groupes dont chacun paie un prix distinct. Cette différentiation peut être efficiente et nécessaire si l'on souhaite recouvrer pleinement les coûts fixes de l'infrastructure essentielle. Cette discrimination par les prix devrait également être prise en compte dans les prix d'accès – autrement, si l'on fixe les frais d'accès à un niveau moyen, la concurrence aura pour effet de faire baisser les prix acquittés par les utilisateurs finaux qui payaient plus que la moyenne et ainsi d'empêcher la société en place de pratiquer une discrimination par les prix efficiente.[18]

42. Pour déterminer le degré de concurrence, la qualité et la ponctualité relatives du service sont tout aussi importantes que le prix (relatif) demandé aux entreprises concurrentes. L'entreprise en place pourrait en effet diminuer la qualité ou la ponctualité du service qu'elle fournit de manière à maintenir l'avantage comparatif détenu par sa propre entreprise en aval.

43. Si sa capacité est limitée, l'infrastructure essentielle peut être dans l'impossibilité technique d'assurer plus longtemps les services à partir d'un certain niveau. L'efficacité économique exige alors que les entreprises en aval soient soumises à un rationnement efficient de cette capacité limitée. Comme d'habitude, le moyen le plus efficace de rationner cette capacité est d'agir sur les prix du marché. Cette approche peut toutefois soulever un problème. Si l'autorité de la concurrence ne connaît pas précisément la capacité de l'infrastructure essentielle, l'entreprise en place peut chercher à la limiter afin de restreindre la quantité de services à la disposition de ses concurrents et/ou élever le prix du marché.

44. En résumé, lorsqu'il fournit également des services dans le segment concurrentiel (et lorsque certaines conditions sont réunies), le propriétaire de l'infrastructure essentielle a la capacité de restreindre le développement de la concurrence et y a intérêt. Dans ce cas, le développement de la concurrence dépend fortement des incitations et de l'efficacité de l'autorité de la concurrence à fixer des prix efficients, à garantir la qualité, ainsi qu'à veiller au respect d'un accès non discriminatoire à l'infrastructure essentielle.

45. Dans la plupart des pays, les restrictions prévues par le droit de la concurrence à l'abus de position dominante devraient garantir une forme d'accès aux infrastructures essentielles (dans la mesure où l'incapacité à assurer l'accès à un intrant essentiel à des conditions acceptables apparaîtrait normalement comme un abus de position dominante). Dans la pratique, il n'est pas courant de s'en remettre aux seules dispositions du droit de la concurrence pour assurer un accès efficace et en temps voulu aux infrastructures essentielles car la majeure partie des dispositions du droit de la concurrence ne peuvent en effet être appliquées qu'en cas de non-respect et les procédures destinées à faire respecter la loi sont en général trop lentes et contraignantes pour assurer l'accès en temps voulu. Aussi est-ce souvent la législation du secteur concerné qui rend obligatoire la possibilité d'accès aux services en question. L'Australie a un régime de droit général à l'accès, prévu dans sa législation (dans le cadre du droit de la concurrence) assurant un accès efficient et en temps voulu à toutes les infrastructures spécifiquement concernées par ce régime. Toutefois, des intrants essentiels peuvent ne pas être spécifiquement mentionnés dans la législation sectorielle et les entreprises nouvellement entrées sur le marché doivent alors s'en remettre à l'application du droit de la concurrence pour y accéder. Il incombe en général à l'autorité de la concurrence de garantir l'accès à ces intrants.

Exemple #9 : Rendre obligatoire l'accès à l'itinérance[19]

Un pays a garanti un accès libre au secteur de la téléphonie mobile durant de nombreuses années. Toutefois, un très petit nombre de réseaux se sont constitués. De fait, seuls deux réseaux couvrent l'ensemble du territoire national. Il existe également un troisième réseau desservant les grandes villes (où vivent 90 pour cent de la population du pays) qui n'apparaît pas comme une option viable aux yeux de nombreux consommateurs qui donnent, semble-t-il, une nette préférence aux réseaux dont la couverture est très étendue. Durant de nombreuses années, les parts de marché de ces sociétés n'ont pas vraiment évolué, le plus grand réseau oscillant autour des 60 pour cent du marché, le deuxième comptant pour 32 pour cent et le plus petit 8 pour cent. Intense par le passé, la concurrence par les prix dans le secteur de la téléphonie mobile s'est à présent calmée et les prix se sont à peu près stabilisés, voire ont même légèrement augmenté en termes réels. Les pouvoirs publics du pays craignent une absence de concurrence réelle dans le secteur de la téléphonie mobile et consultent l'autorité de la concurrence sur l'action qui pourrait être menée. Que devrait-elle recommander ?

Le modèle économique des réseaux de téléphonie mobile est tel que plusieurs réseaux financièrement viables peuvent probablement se partager le marché dans les régions très peuplées. Le problème est qu'une société de téléphonie mobile devra, pour être concurrentielle en zones urbaines, également étendre son réseau aux zones reculées tant que les consommateurs donneront la préférence aux sociétés proposant une vaste couverture géographique. Autrement dit, les coûts d'extension du réseau aux zones reculées du pays réduisent le degré de concurrence en zones urbaines. Ainsi, la réglementation des autorisations d'accès de nouveaux opérateurs aux réseaux existants en zones rurales peut augmenter sensiblement la concurrence en zones urbaines. Une manière d'accroître la concurrence dans ce secteur consisterait à obliger les réseaux existants à fournir des services d'itinérance aux nouveaux réseaux dans les zones reculées du pays moyennant la perception d'un tarif d'accès.

Exemple #10 : Accès aux services Internet [20]

Une compagnie de télécommunication en place a une filiale qui fournit des services d'accès à Internet en concurrence avec d'autres fournisseurs indépendants. L'autorité de la concurrence est appelée à définir les conditions de l'accès des fournisseurs de service Internet au réseau de télécommunications en place. Elle chiffre les coûts de prestation du service d'accès à quelque 10 millions de dollars, avec une demande approximative prévue de 10 millions d'heures d'accès, et fixe alors un tarif horaire d'un dollar. Toutefois, le fournisseur d'accès en place décide alors d'introduire un nouveau tarif facturé à ses abonnés pour ses services d'accès à Internet : 50 dollars par mois pour un accès illimité. Cette offre s'avère rapidement être un très grand succès notamment auprès des plus gros utilisateurs. Les fournisseurs d'accès concurrents se plaignent auprès de l'autorité de la concurrence que cette tarification les empêche d'être concurrentiels. La compagnie en place signale que l'utilisation moyenne par internaute est de 50 heures par mois et que ses rivales devraient alors être en mesure de faire face à la concurrence avec ce tarif.

L'utilisation moyenne par internaute est certes de 50 heures par mois, mais les différents clients rechercheront différents niveaux d'utilisation d'Internet et ne privilégieront pas le même type de tarification. Un prix forfaitaire est plus attrayant pour les gros utilisateurs alors qu'une tarification à la durée conviendra davantage aux petits utilisateurs. Avec une tarification forfaitaire, l'entreprise en place peut attirer les gros utilisateurs (qui peuvent également être les plus rentables) et laisser ainsi ses concurrents se contenter des utilisateurs qui consomment le moins.

Pour résoudre ce problème, il faut garantir que toute différentiation dans le tarif facturé à l'abonné soit également prise en compte dans les redevances d'accès facturées aux concurrents. Si elle offre un tarif forfaitaire à ses abonnés, la compagnie en place doit proposer une redevance forfaitaire correspondante à ses concurrents pour leur permettre de proposer un tarif compétitif à leurs propres abonnés avec la même structure.

7. Séparation verticale

46. La précédente section a analysé comment le propriétaire d'une infrastructure essentielle fournissant par ailleurs des services concurrentiels est incité à contrôler le prix et la qualité de l'accès à cette infrastructure pour contenir le développement de la concurrence en aval. L'autorité de la concurrence s'efforcera bien entendu de limiter cette pratique mais l'entreprise en place aura toujours intérêt à trouver de nouveaux moyens pour restreindre la qualité, réduire la ponctualité et élever les prix des services d'accès. L'autorité de la concurrence doit s'acquitter d'une mission difficile, à savoir assurer une surveillance constante des actions de l'entreprise réglementée, et il est peu probable qu'elle soit en mesure de juguler parfaitement ce genre de pratiques.[21]

47. Plutôt que d'essayer de surveiller les activités de l'entreprise réglementée, l'autorité de la concurrence pourrait accroître le degré de concurrence en limitant toute incitation de l'entreprise réglementée à restreindre la concurrence, et ce, par une réforme du régime de propriété de l'infrastructure essentielle.

48. Par exemple, toutes les entreprises concurrentes en aval pourraient conclure des accords de détention conjointe de l'infrastructure essentielle. Il est fréquent par exemple que plusieurs compagnies aériennes soient les copropriétaires d'un aéroport (ou, du moins, qu'elles y possèdent en commun les services de coordination des créneaux horaires). De même, un groupe de grands consommateurs de gaz peut décider de se partager la propriété d'un gazoduc, etc. Dans ce contexte concurrentiel, la première mesure à prendre est d'assurer que cette propriété commune ne devienne pas un mécanisme de collusion en aval et que tout nouveau membre puisse être admis au « club » à sa demande.

49. Une autre possibilité, parfois plus simple, consiste à empêcher le propriétaire de l'infrastructure essentielle de proposer ses services dans le segment concurrentiel. En Australie, par exemple, les compagnies aériennes ne peuvent posséder plus de 5 pour cent d'un aéroport. De même, dans de nombreux pays, le secteur de la production électrique a été totalement séparé des réseaux de transport et de distribution de l'électricité.

50. Ce type de séparation a pour principal avantage d'ôter tout intérêt pour le propriétaire de l'infrastructure essentielle d'en refuser l'accès à ses concurrents. Elle facilite alors la réglementation et devrait conduire à un plus haut degré de concurrence en aval.

51. Son principal inconvénient est qu'elle entraîne la perte d'économies de gamme procurées par la fourniture conjointe des infrastructures essentielles et des segments concurrentiels. Ces coûts comprennent, par exemple, les coûts de coordination des investissements entre l'infrastructure essentielle et le segment concurrentiel, les coûts de surveillance des entreprises en aval pour assurer qu'elles ne détérioreront pas l'infrastructure essentielle, les coûts de maintien de la qualité et des investissements voulus dans les infrastructures essentielles (par opposition aux coûts de maintien de la qualité et des investissements voulus au niveau des utilisateurs finaux profitant de l'infrastructure), et les coûts résultant d'une tarification inefficiente de l'accès.

52. Il ne sera pas toujours efficient d'empêcher le propriétaire de l'infrastructure de fournir ses propres services concurrentiels. Le caractère approprié ou non de la séparation verticale (ainsi que sa forme la plus adéquate) dépendra d'un examen au cas par cas. Toutefois, la séparation verticale dans un certain nombre de secteurs aboutit, semble-t-il, à une hausse sensible de la concurrence, laquelle hausse fait plus que compenser les éventuelles pertes d'économies de gamme. En particulier, la séparation verticale est courante dans le secteur de l'aviation et du transport maritime, et est de plus en plus fréquente dans le secteur de l'électricité et l'industrie gazière. Rien ne permet toutefois encore d'affirmer qu'elle constitue

ou non l'option la plus efficiente dans le secteur ferroviaire. Dans tous les cas, l'approche optimale différera presque toujours selon le pays et le secteur.

Exemple #11 : Intégration de la production et du transport de l'électricité [22]

Le marché libéralisé de l'électricité d'un pays fonctionne bien depuis plusieurs années. Lors de la mise en place du marché, le secteur de la production électrique a été séparé des réseaux de transport et de distribution. Toutefois, le propriétaire d'un réseau de transport électrique réglementé a récemment déposé une demande en vue d'acheter des actifs majeurs de production électrique. Dans leur demande, les postulants s'engagent à considérer l'ensemble de la production sans discrimination. Cette demande devrait-elle être acceptée ?

Cette question revient à se demander si cette intégration donnera au propriétaire du réseau de transport en place la possibilité d'opérer de manière discriminatoire vis-à-vis des producteurs concurrents d'une manière qu'il sera difficile de contrôler efficacement ex post. Les facteurs que le propriétaire du réseau de transport contrôle dépendront de la manière dont est conçu le marché de gros. Par exemple, le volume produit par chaque générateur peut être déterminé par un « gestionnaire de réseau » indépendant du propriétaire du réseau de transport. Néanmoins, il resterait vraisemblablement au propriétaire du réseau de transport un très vaste éventail de possibilités lui permettant de limiter la production de concurrents – par exemple, en faisant des opérations de maintenance des lignes électriques des concurrents pendant les heures de pointe ou en négligeant d'entretenir ces lignes en vue d'accroître leur taux de défaillance, ou bien en évitant d'améliorer les infrastructures reliées aux producteurs concurrents au moment voulu. Le propriétaire du réseau de transport électrique peut même influer sur le débit des lignes reliées aux producteurs concurrents et décider de le diminuer en invoquant des raisons de sécurité.

Il serait très difficile de détecter nombre de ces pratiques et plus encore d'en démontrer le caractère discriminatoire. En définitive, il serait, semble-t-il, peu recommandé de permettre aux producteurs électriques de réintégrer d'un réseau de transport électrique.

Exemple #12 : Réforme structurelle dans le secteur ferroviaire[23]

Un pays en transition (appartenant à l'ex-Union soviétique) possède un réseau ferroviaire dense avec d'importants flux de transport de marchandises en particulier sur les itinéraires à destination/en provenance de la capitale et correspondant au commerce est-ouest avec d'autres pays. Les services ferroviaires sont actuellement assurés par une entreprise publique en situation de monopole qui souffre d'une faible productivité. Ce monopole des chemins de fer est dans l'ensemble déficitaire. Toutefois, les pouvoirs publics estiment que certains services (en particulier le fret lourd) sont rentables mais ils ne peuvent pour l'heure les distinguer des autres. Les pouvoirs publics sont peu désireux de voir baisser l'activité de transport des passagers (sous certaines conditions météorologiques, les routes sont impraticables dans certaines régions). Le pays n'a que peu d'expérience en matière de réglementation indépendante et peu de connaissances concernant les mécanismes réglementaires. L'autorité de la concurrence est invitée à formuler une proposition en matière de réforme orientée vers la concurrence.

Comme souligné par le présent document, il existe différents moyens de concevoir l'ouverture du transport ferroviaire à la concurrence. En particulier, il est possible d'envisager la concurrence entre sociétés ferroviaires intégrées verticalement (soit la concurrence pour le marché soit la concurrence sur le marché) ou la concurrence entre sociétés ferroviaires d'exploitation. Choisir entre ces deux approches consistera, au moins en partie, à confronter les arguments pour et contre.

Le droit d'accès aux infrastructures permet une concurrence efficace dans les services ferroviaires. Toutefois, l'introduction d'une concurrence efficace entre sociétés ferroviaires d'exploitation nécessite une réglementation rigoureuse et efficiente de l'accès aux infrastructures au niveau des voies. La chose est éventuellement possible mais le manque d'expérience et de pratique du pays en matière de réglementation laisse à penser que l'opération sera difficile et peut-être inefficiente.

Étant donné la densité du réseau ferroviaire, il pourrait être possible de diviser le réseau de manière à instaurer la concurrence entre plusieurs sociétés ferroviaires, du moins sur les principaux itinéraires commerciaux. Cette concurrence sera certes inévitablement imparfaite mais elle ne nécessitera pas, pour l'accès aux infrastructures au niveau des voies, une réglementation complexe et grande consommatrice de ressources. En outre, il serait peut-être possible de recourir à des appels d'offres pour choisir un prestataire de services sur certaines composantes de l'infrastructure (comme les lignes secondaires ou les réseaux de train de banlieue actuellement non rentables). La société ferroviaire pourrait être invitée à signaler les composantes du réseau non rentables pouvant alors faire l'objet d'un appel d'offres.

8. Institutions réglementaires, mécanismes et gestion de la transition

53. Une réglementation efficiente des prix et services des entreprises en situation de monopole naturel suppose l'existence d'autorités de réglementation qualifiées. Ces autorités sont habituellement tenues d'être indépendantes des pouvoirs publics et transparentes dans leurs processus décisionnels en vue de protéger les investissements faits par les entreprises qu'elles réglementent.[24] Si l'entrée dans les secteurs concurrentiels suppose l'accès à un intrant essentiel, il importe que l'autorité chargée de la réglementation de l'accès soit également indépendante du propriétaire de l'infrastructure essentielle. (Il faudrait pour ce faire, par exemple, limiter la possibilité pour le régulateur de travailler, à l'issue de son mandat, pour le propriétaire de l'infrastructure essentielle).

54. On a beaucoup débattu de la question de savoir s'il est préférable que les autorités de la concurrence couvrent un seul ou bien plusieurs secteurs et s'il est intéressant de combiner les fonctions de réglementation et de surveillance de l'application de la concurrence (comme en Australie et, dans une certaine mesure, aux Pays-Bas).[25] Il n'est pas encore possible de déterminer quelle est la structure la plus appropriée. On avance que les autorités de la concurrence couvrant un seul secteur peuvent à la longue identifier étroitement leurs intérêts et arguments avec ceux des secteurs qu'elles réglementent et, dans certains cas, finir par s'opposer à la suppression de la réglementation et/ou à l'introduction de la concurrence. Cette tendance est susceptible d'être moins fréquente lorsque les autorités de la réglementation sont à vocation multisectorielle. L'association de la surveillance de l'application du droit de la concurrence et de la fonction de réglementation se justifie dans la mesure où elle assure une approche intégrée des questions de la définition du marché et des évaluations du degré de la concurrence. Certains commentateurs font valoir qu'une culture et une mentalité tournées vers la concurrence imprégneraient alors les fonctions de réglementation. Dans tous les cas, les mesures prises par les autorités de réglementation, d'une part, et les autorités de la concurrence, d'autre part, devraient être compatibles et coordonnées, par exemple, par l'établissement d'accords et d'organismes de coordination officiels (comme la tenue de réunions périodiques).

55. Dans de nombreux cas, l'instauration de la concurrence dans les secteurs concurrentiels a entraîné la mise en place d'organismes quasi-réglementaires à but non lucratif chargés d'assurer un accès non discriminatoire aux infrastructures essentielles. Par exemple, dans le secteur de l'aviation, de nombreux aéroports ont mis en place une autorité chargée d'allouer les créneaux horaires de décollage et d'atterrissage. De même, dans le secteur de l'électricité, il incombe souvent à un gestionnaire de réseau indépendant à but non lucratif d'assurer le fonctionnement du marché de l'électricité au comptant et la répartition de l'approvisionnement en cas de saturation du réseau de transport électrique. Dans le secteur des télécommunications, les ressources limitées comme les attributions de numérotation ou les adresses électroniques (notamment les noms de domaine de l'Internet) sont souvent gérées par des organismes quasi-réglementaires indépendants. La gouvernance de ces organismes peut également grandement

contribuer à accroître la concurrence – en particulier, ces organismes ne devraient pas être autorisés à agir de manière discriminatoire vis-à-vis des entreprises existantes ou d'éventuels nouveaux entrants.

56. L'introduction de la concurrence dans un segment auparavant monopolisé peut fortement perturber l'activité des entreprises en place et être à l'origine d'un grand nombre d'institutions et mécanismes nouveaux qui mettront du temps avant d'être pleinement opérationnels. Une nouvelle institution réglementaire peut également mettre du temps avant de se forger une réputation d'indépendance et de crédibilité. Il est pour ces raisons parfois approprié d'envisager une introduction de la concurrence par étape ou progressive. De nombreux pays européens, par exemple, s'emploient actuellement à ouvrir progressivement leur marché de l'électricité en abaissant le seuil au-delà duquel les consommateurs sont autorisés à choisir leur fournisseur d'électricité. Il faut, en premier lieu, veiller à ce que la période transitoire d'ouverture à la concurrence ne dépende pas des agissements des entreprises en place (par exemple, du fait qu'un niveau donné de concurrence a été atteint à un certain stade). Sinon, les entreprises en place auront un intérêt de plus à prendre des mesures visant à retarder ou reporter indéfiniment l'introduction de la concurrence.

57. Certains arguments d'ordre économique de même que l'expérience donnent à penser qu'un train de réformes orientées vers la concurrence est plus susceptible de réussir lorsqu'il couvre de nombreux secteurs simultanément que lorsqu'il porte sur un seul secteur à la fois. Les entreprises résisteront peut-être moins à l'introduction de la concurrence sur leurs marchés de produits s'il est également prévu de l'introduire sur les marchés de leurs intrants où la concurrence entraînera une baisse des coûts et une amélioration de la qualité des intrants qu'ils utilisent. C'est la raison principale pour laquelle les négociations sur la libéralisation des échanges concernent simultanément de nombreux secteurs et pays. Les réformes de la politique nationale de la concurrence (National Competition Policy) en Australie au milieu des années 90 sont un bon exemple d'une tentative globale d'amélioration du niveau de la concurrence d'un bout à l'autre du pays. Pour de nombreux autres pays, une réforme globale orientée vers la concurrence résulte d'un « principe de concurrence » inscrit dans la législation ou une constitution (comme le Traité de l'UE).[26]

58. La libéralisation simultanée est particulièrement importante dans un cas. Dans certains secteurs, il existe des restrictions à la concurrence à deux niveaux de la chaîne d'approvisionnement – par exemple, une entreprise peut avoir le monopole de la production et du transport du gaz et une autre le monopole de la distribution et de la vente au détail du gaz (qui représente la majeure partie de la consommation de gaz). Dans ce cas, la libéralisation du secteur devrait intervenir simultanément aux deux niveaux. La libéralisation du secteur en aval seulement risque de renforcer le pouvoir de marché du monopole en amont. La libéralisation du secteur en amont risque de créer un monopsone en aval. Ce type d'arguments a été invoqué pour justifier le report de la libéralisation de l'industrie gazière dans les pays où le premier fournisseur de gaz est un producteur étranger.

59. La théorie aussi bien que la pratique donnent à penser qu'un programme de réformes orientées vers la concurrence embrassant l'ensemble de l'économie est plus susceptible de réussir lorsqu'il n'est pas tributaire d'une volonté politique suivie et qu'il habilite une institution soit à sensibiliser aux réformes soit à les appliquer directement elle-même. Par exemple, en Australie, les réformes de la politique nationale de la concurrence ont exigé de l'État et des collectivités locales qu'ils conduisent un examen de la législation existante pour évaluer son impact sur la concurrence. Une nouvelle autorité, le National Competition Council, s'est vue chargée d'assurer la conduite de ces évaluations.

60. Dans de nombreux pays, l'autorité de la concurrence a un rôle essentiel à jouer dans la promotion ou, du moins, dans l'orientation des réformes axées sur la concurrence. Dans d'autres pays, l'autorité de la concurrence doit au moins être consultée sur les projets de loi ou de règlements susceptibles d'influer sur la concurrence. Dans certains pays, l'autorité de la concurrence peut même être admise à participer à la prise

de décision des pouvoirs publics, par exemple, sur la privatisation ou la libéralisation des échanges.[27] Dans plusieurs pays, l'autorité de la concurrence a le droit de conduire des enquêtes indépendantes et de formuler des recommandations publiques sur la nécessité de conduire des réformes orientées vers la concurrence. Dans certains cas (la Communauté européenne et la Corée, par exemple), le responsable de l'autorité de la concurrence siège au côté des ministres gouvernementaux et participe à la formulation de l'ensemble des grandes orientations économiques des pouvoirs publics.

61. Dans tous les cas abordés ci-dessus, lorsqu'une institution a pour mission d'assurer la promotion de la concurrence, les réformes correspondantes couvrent la plus large part possible de l'économie et soustraient ces réformes des conséquences des aléas de l'action des pouvoirs publics en la matière.

9. Conclusion

62. Le présent document a brièvement examiné le vaste domaine de « la politique de la concurrence » en mettant l'accent sur la politique de la concurrence dans les secteurs réglementés. La concurrence contribue grandement à promouvoir l'efficience et à garantir que le fonctionnement des marchés profite en dernier ressort aux utilisateurs et consommateurs. Une concurrence efficace et saine n'est pas fortuite mais nécessite une intervention prudente et réfléchie du type de celles indiquées dans le présent document. Les autorités de la concurrence ont un rôle essentiel à jouer dans la sensibilisation à un recours accru à la concurrence, ainsi qu'à la mise en œuvre des mesures qui la rendront réalisable, efficace et durable dans tous les secteurs de l'économie.

Annexe

Etudes empiriques des effets du développement de la concurrence sur les indicateurs d'efficacité microeconomiques et macroéconomiques

Un certain nombre d'études ont tenté d'établir un lien entre les mesures de la concurrence ou les mesures de réglementation publique, d'une part, et les résultats microeconomiques et macroéconomiques, d'autre part. Plusieurs de ces études sont résumées ci-dessous : [28]

Concernant le lien entre la réglementation restreignant la concurrence et la croissance de la productivité, Nicoletti et Scarpetta (2003) estiment que les réformes en faveur de la gouvernance privée (c'est-à-dire, de la privatisation) et de la concurrence tendent à stimuler la productivité. Dans le secteur manufacturier, les gains attendus d'une baisse des barrières à l'entrée sont d'autant plus importants que le pays en question est en retard par rapport au pays de tête dans le domaine de la technologie. Ainsi, la réglementation limitant l'entrée peut compromettre l'adoption de technologies existantes, éventuellement en réduisant les pressions concurrentielles, les retombées technologiques, ou l'entrée de nouvelles entreprises à forte intensité technologique. Parallèlement, la privatisation aussi bien que la libéralisation de l'entrée, estime-t-on, ont un impact positif sur la productivité de l'ensemble des secteurs. Ces conclusions montrent quels sont les bienfaits possibles des réformes réglementaires et de la privatisation, en particulier dans les pays ayant de grands retards technologiques et des cadres réglementaires rigides qui affectent toute incitation à l'adoption de nouvelles technologies.

Concernant le lien entre la réglementation restreignant la concurrence et l'investissement, Alesina, Ardagna, Nicoletti et Schiantarelli (2003) constatent qu'une réglementation stricte régissant les marchés de produits a un gros effet négatif sur l'investissement. D'après les données concernant les secteurs ayant subi d'importantes réformes réglementaires, la déréglementation suscite une hausse de l'investissement à long terme. Les conclusions sont claires : les réformes réglementaires, de libéralisation de l'entrée notamment, sont très susceptibles de stimuler l'investissement.

Concernant le lien entre la réglementation restreignant la concurrence et les niveaux d'emploi, Nicoletti et Scarpetta (2001) signalent que, même si les écarts entre les législations sur la protection de l'emploi, les politiques de prestations sociales et la fiscalité rendent compte de l'essentiel des différences existant d'un pays à l'autre en matière de taux d'emploi, la réglementation des marchés de produits a également un impact. Ils estiment que la promotion de la concurrence en Nouvelle-Zélande et au Royaume-Uni a permis une hausse du taux d'emploi de 2.5 points de pourcentage environ sur la période 1978-1998. Dans les pays comme la Grèce, l'Italie, et l'Espagne, qui ont mené des réformes plus modestes, celles-ci n'ont entraîné qu'une augmentation oscillant entre 0.5 et 1 pour cent des taux d'emploi. (Cette information est résumée dans l'addendum à la Note du Secrétariat rédigé en vue de la deuxième réunion du Forum mondial sur la concurrence qui s'est tenue le 2 février 2002, CCNM/GF/COMP(2002)8).

Concernant le lien entre la concurrence et les incitations à innover, Carlin, Fries, Schaffer et Seabright (2001) de même que Carlin, Schaffer et Seabright (2004) constatent que le passage d'une situation de monopole à un certain degré de concurrence (avec quelques entreprises concurrentes) accélère la croissance des chiffres d'affaires et la productivité de la main d'œuvre, de même que l'incitation à innover. Toutefois, cet effet n'est pas constant – une hausse prolongée de la concurrence (mesurée en nombre d'entreprises concurrentes) finit par infléchir la hausse des chiffres d'affaires.

Concernant le lien entre les mesures veillant au respect de la concurrence et des politiques antitrust et la croissance économique, Dutz et Hayri (1999) constatent que l'efficacité de l'application des politiques antitrust et des mesures en faveur de la concurrence est corrélée positivement avec la croissance à long terme.

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NOTES

1. Ce document a été rédigé par Darryl Biggar, consultant auprès de l'OCDE (13 janvier 2005). Courriel : darryl.biggar@stanfordalumni.org

2. L'annexe au présent document résume brièvement quelques études empiriques concernant les retombées positives des réformes orientées vers la concurrence sur différentes mesures microéconomiques et macroéconomiques.

3. Fels (1999), page 13. Chadwick Teo du Ministère du commerce et de l'industrie à Singapour a résumé la chose en une formule brève : « l'efficience est l'objectif, la concurrence le processus ».

4.. Les économistes parlent de «dysfonctionnement du marché » pour désigner les circonstances où les marchés concurrentiels ne parviennent pas à réaliser les objectifs ci-dessus. Les causes reconnues de dysfonctionnement du marché sont (a) le monopole naturel et/ou le pouvoir de marché ; (b) les services collectifs fournis par les administrations publiques ; (c) les externalités ; et (d) l'asymétrie de l'information.

5. Voir par exemple l'étude du Centre de développement de l'OCDE. Selon celui-ci, ces dernières années ont vu une prise de conscience croissante de l'effet paralysant de la corruption sur le développement économique. La corruption accroît l'inégalité, fausse le rôle de redistribution de l'État, gaspille les ressources humaines et financières, et détériore les services publics. Plusieurs études empiriques ont montré qu'elle baisse sensiblement les niveaux de l'investissement, ainsi que la productivité du capital. Ces effets sont particulièrement nuisibles dans les pays en développement qui, avec peu de ressources, connaissent des niveaux de corruption plus élevés que les pays industrialisés. OCDE (2001a)

6. Même lorsqu'elle ne favorise pas directement la concurrence, la séparation structurelle peut améliorer la qualité de la réglementation. Par exemple, la division d'un monopole régional en plusieurs monopoles régionaux plus petits peut faciliter les comparaisons entre entreprises lors du processus de réglementation (également appelé concurrence en fonction des critères de référence ou « concurrence par comparaison »).

7. Cette étude de cas décrit approximativement ce qui s'est passé en Australie. De plus amples informations sur la restructuration du secteur de la production électrique sont disponibles dans OCDE (2003).

8. De même, les entreprises publiques doivent parfois faire face à des désavantages dont leurs concurrents sont exempts, comme le plafonnement des montants qu'elles peuvent emprunter, les règles régissant les conditions auxquelles elles peuvent embaucher de la main œuvre, ou, parfois, les contrats conclus par le passé au-dessus des prix du marché et qui doivent être honorés (également appelées « coûts échoués »).

9. Cette étude de cas s'inspire plus ou moins de la réforme introduite dans le secteur ferroviaire en Nouvelle-Zélande. De plus amples informations sur la concurrence dans le transport ferroviaire sont disponibles dans OCDE (1998).

10. Les prix plafond peuvent également dans certaines circonstances restreindre la concurrence. Cela peut être dû au fait qu'ils limitent la rentabilité et ainsi réduisent les incitations à l'entrée. Le plafonnement peut également agir comme un point de cristallisation des phénomènes de collusion des entreprises sur le marché.

11. Cette étude de cas s'inspire plus ou moins de l'expérience du Royaume-Uni. Pour de plus amples informations, se reporter à OCDE (2000a).

12. De nombreux pays ont établi des mécanismes de financement de services universels comme celui décrit ici. Cette question a été analysée dans OCDE (1995).

13. Cette étude de cas est tirée de OCDE (2001b)

14. Cette étude de cas est tirée d'OCDE (1998b).

15. La question de la promotion de la concurrence lors de la passation des marchés publics est analysée dans OCDE (1999) et OCDE (2000b).

16. Cette étude de cas s'appuie sur l'expérience du Royaume-Uni. De plus amples informations sont disponibles dans OCDE (2001b).

17. Permettre l'accès d'une société ferroviaire aux voies d'une autre société ferroviaire permet à la première d'offrir une gamme plus étendue de services de bout en bout sans que les passagers ou le fret qu'elle transporte n'aient à changer de trains. De même, permettre l'accès d'une entreprise postale au système de distribution d'une autre entreprise postale permet aux clients de la première d'envoyer leurs lettres vers un plus grand nombre de destinations. Remarquons que, dans ces deux exemples, l'accès mutuel ou réciproque sera probablement décidé sans même l'intervention des pouvoirs publics.

18. Pour de plus amples détails à ce sujet, se reporter à OCDE (2004).

19. Cette étude de cas correspond à un problème qui s'est posé en Australie. Pour de plus amples informations, se reporter à OCDE (2002) et OCDE (2004).

20. Cette étude de cas renvoie à un problème décrit en plus amples détails dans OCDE (2002).

21. Pour de plus amples détails, se reporter à OCDE (2001d).

22. Cette étude de cas s'appuie sur ce qui s'est passé en Australie et au États-Unis. De plus amples informations sur la concurrence dans le secteur de la production électrique sont disponibles dans OCDE (2003a).

23. Cette étude de cas s'appuie sur les expériences de la Chine et de la Russie en matière de réformes dans le transport ferroviaire. Voir les publications OCDE (2001c) et OCDE (2003b) et la prochaine table ronde sur la réforme structurelle dans le transport ferroviaire.

24. Pour de plus amples informations à ce sujet voir Joskow (1998), page 26.

25. Voir, par exemple, le rapport de l'OCDE dans OCDE (1999b)

26. Cette question est analysée plus en détail dans Heimler (1999).

27. Le Conseil de la concurrence roumain participe aux réunions mensuelles du « Groupe interministériel sur la concurrence » composé de représentants du Ministère de l'économie et du commerce, du Ministère de la justice, du Ministère des finances publiques, du Ministère des communications et des technologies de l'information, du Ministère de l'environnement et de l'administration des eaux, du Ministère de la santé et du Ministère de l'éducation et de la recherche.

28. Se reporter également aux documents, présentés au deuxième Forum mondial sur la concurrence, concernant le lien entre la politique de la concurrence et le développement économique.

OCDE

ROUNDTABLE ON BRINGING COMPETITION INTO REGULATED SECTORS

-- AIDE MEMOIRE --

Organisation for Economic Co-operation and Development
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BRINGING COMPETITION INTO REGULATED SECTORS

Aide memoire of the GFC discussion of February 2005

In opening the roundtable, the **Chairman** for this session (Mr. Helcio Tokeshi from Brazil) observed that competitive markets are wonderful coordination devices. But markets vary widely from each other - each different market requires different sets of rules and regulations. This roundtable is about determining the appropriate form and structure of regulation for different markets. He invited the author of the background paper to summarise the issues involved in bringing competition into regulated sectors.

Dr. Darryl Biggar noted that this topic – bringing competition into regulated sectors – is very broad. Indeed, it is, at one level, the entire field known as "competition policy". In the limited time available in this roundtable it is hoped to provide an overview of the set of policies, or frameworks, for bringing competition into regulated sectors.

To talk about bringing competition into regulated sector, we need to understand what we might mean by regulated sectors. The set of regulated sectors will include, of course, the traditional public utilities, such as telecommunications, electricity and so on. There are also a number of other industries which are currently regulated (or have been heavily regulated in the past), such as road transport, professional services, banking. Even more broadly there are a very large number of laws which of course directly affect competition – even if not in an individual sector - such as company laws, bankruptcy laws, laws on investments, intellectual property rights and so on. We can imagine, then, that there are "layers" of regulation – with different layers of regulation applying in different sectors.

Starting first from the "outermost" layer, most sectors in members' economies don't need special sector-specific regulations. These are usually those sectors which can sustain effective competition. But there are, of course, a number of other sectors which are subject to additional sector-specific rules. These are sectors which almost always have an element of what economists call a "market failure" – that is, there is something about these markets which means that reliance on the broad framework of laws alone will not deliver the outcomes that we want. It is often in these sectors that we have the most interesting conflicts between competition and regulation. Thirdly, within the set of sectors which need sector specific regulations, we have those sectors which can't sustain competition – also known as the "natural monopoly" sectors. In these "natural monopoly" sectors there often remain sub-sectors which can sustain competition. In this case, promoting competition is a matter of identifying the sub-sectors which can sustain competition and then promoting that competition.

Turning first to the sectors subject to the broad framework laws in our economies, what can we do to promote competition in these markets? There are a large number of policies which may enhance competition. These policies are also relevant in those sub-sectors of natural monopoly sectors (such as telecommunications) which can sustain competition. These policies can be grouped into 8 headings:

(1) Policies promoting investment, entrepreneurship, innovation; policies facilitating the raising of capital, contracting and the enforcement of contracts; and so on. These are part of what we might call the "framework laws" for members' economies.

(2) Policies related to lifting restrictions on entry, barriers to trade, barriers to foreign ownership and so on.

(3) Structural reform – especially breaking up sectors which are concentrated.

(4) Competitive neutrality - ensuring that businesses (both government and privately owned) compete on an equal footing in the market place, including the elimination or control of government subsidies.

(5) Removal of controls on prices (such as price ceilings or price floors) or controls on the services that can be offered.

(6) Ensuring demand side responsiveness to prices – ensuring that consumers have the incentive and the ability to seek out and accept the best offer (perhaps by reducing switching costs).

(7) Tariff re-balancing and elimination of cross-subsidies – including the provision of wider policy objectives, such as universal service, in a way which is not threatened by competition.

(8) Active enforcement of competition law.

There are a number of sectors for which sector specific regulation is required. As mentioned above, these are sectors subject to what economists call "market failures". The policies for promoting competition in these sectors will vary from sector to sector. It's quite difficult to make a general prescription. But we can say that, as far as possible, the regulatory solution to the market failure in these sectors - whether taxis, banking or professional services - should be done in a way which is consistent with competition. Furthermore, any restriction to competition should be no greater than is necessary to achieve the objectives of correcting the market failure.

In regard to the natural monopoly sectors, it is obviously not possible to sustain conventional competition in-the-market in these sectors. In some cases competition for-the-market may be feasible. Competitive tendering for urban rail transport services is one such example. Competitive tendering raises a lot of issues, but is worth mentioning.

More importantly, even if we can't get competition within the natural monopoly component, there are often other components of the same sector which can sustain competition. In these components, promoting competition is primarily about regulation of access to essential facilities.

Regulation of access to essential facilities is not an easy problem. It is, first and foremost, a regulation problem. It raises all the conventional issues of regulation, such as ensuring incentives for efficient pricing, efficient quality, and incentives for investment. It also raises issues about the independence of the regulators from the regulated industry on the one hand, and from the government on the other.

In addition, the policies listed above for promoting competition also apply in the competitive segments of these industries: structural separation, competitive neutrality, eliminating barriers to entry, eliminating controls on pricing, and so on. In addition, promoting competition in these sectors is likely to remain difficult as long as the incumbent monopoly continues to remain vertically integrated. Vertical separation of the natural monopoly component from the competitive sector is therefore another tool for promoting competition.

What is the role of the competition authority in bringing competition to regulated sectors? Competition authorities, of course, are not the only agencies involved in promoting competition. Many countries have other agencies which are specifically tasked with promoting competition. But in some countries the competition authority is the sole agency with a competition-promoting mandate. How can the competition authority promote competition? In most cases, the competition authority is at least consulted on competition promoting reforms. In other cases, the competition authority has a formal role in developing those reforms. In some countries, the competition authority is allowed to advocate either privately or publicly for specific reforms. In any case, all competition authorities have a role in actively enforcing competition law, particularly in those sectors which have been recently been opened to competition.

The **Chairman** proposed that the discussion be structured into three parts. The first part will focus on policies for bringing competition into sectors that can sustain effective competition without sector-specific regulations. The second part will focus on bringing competition to sectors which are subject to sector specific regulations but are not natural monopolies. The third part of the discussion will be devoted to natural monopoly sectors – particularly telecommunications and electricity. This will be followed by a general discussion.

The Chairman then turned to the first part of the discussion – focusing on sectors which do not require any sector-specific regulation. The policies for promoting competition in these sectors include a number of policies which establish the basic rules for a market economy – such as rules on entrepreneurship, on raising capital, on investment, on basic health regulations, the rules for opening a business, and so on. For example, Brazil has recently put in place a new bankruptcy law. This forms part of the overall framework for effective competition because if bankrupt companies are sustained artificially, they are competing on unfair terms with other companies in that industry. Competition is much healthier when companies that are in difficulty can exit the market quickly.

The Chairman also highlighted the submission from **Lebanon** where it appears that the lack of effective framework legislation has contributed to a lack of competition. About half of the Lebanese domestic markets are considered oligopolistic or monopolistic and one third have a firm with a market share above 40 percent. The reason for this seems to be due to "outdated commercial law, long delays in commercial dispute settlements, business unfriendly administrative regulations, corruption and the existence of exclusive agencies as important artificial barriers to entry". The submission goes on to note that the consequences of this lack of an effective commercial legal framework include the lack of export competitiveness, high cost of imports, rigid labour markets, non tariff barriers to trade and lack of access to capital for the private sector, especially small and medium size enterprises. This is a good illustration of how important the overall framework of commercial rules and regulations are to promoting competition in the economy.

Lebanon pointed out that there is currently a draft law being considered which will establish the basic components of a competition law regime. The new law will replace a number of outdated laws and decrees which exist at the moment. These disparate laws and decrees date back to the 1970s and deal with mergers and anticompetitive practices amongst other things. It is hoped that, following a process of consultation with the private sector and other parts of government, this new competition law will be in place by mid-2005. At that time a new competition authority will be established which will need to build credibility in the face of concentrated markets and an elite which controls large parts of the economy.

The **Chairman** agreed that one of the consequences of industry concentration is that it can lead to a concentration of industrial power in a powerful elite which can oppose reform.

Pakistan also mentioned a number of policies to facilitate competition – such as eliminating the need for licenses, facilitating the process of raising capital, and privatisation of a large number of firms. The Chairman noted that historically there arose a number of dominant private enterprises that were not closely regulated. This led to a period of nationalisation. We are now seeing the pendulum move back towards privatisation and deregulation. The Chairman asked Pakistan about the link between privatisation and deregulation. Could the level of competition that we now observe have been achieved without privatisation?

Pakistan explained that in the late fifties and early sixties there were concerns about the significant concentration of wealth in Pakistan. A Commission was set up to look into the concentration of wealth. It revealed that 22 families were holding virtually all of the investment in Pakistan. This led to the creation of a new law on monopolies and restrictive trade practices in 1969, and the creation of an authority called the Monopoly Control Authority of Pakistan. The primary emphasis of this law was on curtailing the concentration of economic power in few hands. In particular, the law required that no individual or family should have more than 50% of the shares of a firm in any form. The law also prevented the holding of capital by a single family but, instead, required dispersed public ownership.

However, after the establishment of the Monopoly Control Authority there was a large scale nationalisation. The most important sectors of the economy were nationalised to the extent that there was hardly any room for the private sector. Even where the private sector existed, licences or permits were required for new investment, for new business locations, or for the issuance of new capital.

Starting in the 1980s, these restrictions were progressively removed. In 1992, the rules restricting capital issues were removed and the office for capital issues was abolished. Restrictions on business locations were removed, as were restrictions on foreign shareholding or on the percentage of equity that could be held by any one person.

However the anti-monopoly law has remained quite outdated. More recently an effort has been made to update this law. The first draft was given to the government in 1998. The delegate expressed optimism that a new competition law will be implemented in the short term.

The **Chairman** noted his concern that there is a risk of privatisation or deregulation not working, leading to a new movement in favour of nationalisation.

The Chairman then moved to the second part of the roundtable, which dealt with sectors which require sector-specific regulation but are not natural monopolies. These sectors often create some of the biggest problems for competition policy makers and include sectors such as banking, insurance, taxis, many of the professions, broadcasting, and so on.

The Chairman invited the US to discuss some of the issues surrounding promoting competition in the legal professions, and how they have tried to promote competition in one particular form of legal services (services associated with the purchase and sale of real estate). How can we weigh the social benefit from consumer protection against the benefits of competition policy in the form of lower prices and better access or better quality of services?

The **United States** acknowledged that, as set out in the background paper, there will be different roles for competition versus regulation in each sector. Some sectors may have natural monopoly features that call for continuing strong regulatory role even after privatisation or liberalisation. On the other hand in some sectors there maybe little or no need for sector-specific regulation – and reliance on general competition law may be sufficient (trucking and airlines might fall into this category).

However, professional services fall between these two paradigms. The legal profession in the US is regulated by the states. The states define the activities that are reserved to lawyers through what are called "unauthorised practice of law" statutes. These statutes prevent lawyers from competing with non-lawyers in a variety of services. These regulations can and do serve an important consumer protection objective, but they can also go too far and prohibit non-lawyers from offering professional services that are not legal in nature.

The US antitrust agencies have been concerned about the tendency of state legislators to adopt overly-broad statutes and regulations that prevent non-lawyers from competing in such services as real estate conveyancing. In many cases, non-lawyers have been successfully providing such services for decades. Competition with non-lawyers has resulted in significantly lower prices to consumers. So the US Justice Department and the FTC have engaged in a number of advocacy efforts – through letters to associations and state legislators, and even legal challenges – to limit the scope of these statutes in such a fashion that the regulation is proportional to the harm caused by the market failure.

The US antitrust agencies urge policy makers to consider whether the restrictions that are proposed serve the public interest. This involves not only assessing the harm that consumers may suffer from allowing non-lawyers to perform certain tasks, but importantly also the harm they suffer from decreased choice and higher prices when they are deprived of competitive alternatives. Their efforts have been successful in a number of states – where the state legislators have refused to adopt overly broad definitions or where the Justice Department has obtained judgments in court that strike down provisions in existing statutes. The US submission describes specific cases in which the agencies have participated and the results. The US expressed hope that the submission is illustrative in showing not only how a competition agency can use advocacy to advance consumer interests in this particular sector, but also more broadly how competition policy can co-exist with and complement regulations to maximize economic welfare.

Following up on the comments of Pakistan, the delegate from **UNCTAD**[1] noted that we can observe a significant evolution in the approach of developing countries towards competition policy. Previously the emphasis in competition policy (as in Pakistan before 1989) was the avoidance of undue concentration of market power in a few hands or a few families. These regulations were very restrictive and, in fact, they prevented new entry into the market. UNCTAD has been working since at least 1980 to convince developing countries to understand the need to change and to work in the direction of favouring competition and opening and deregulating markets, rather than restricting them. In Pakistan, as well as most developing countries, there is a now a significant movement in the direction of opening markets and moving towards freer competition. UNCTAD has a role to play in helping developing countries with training, and technical assistance, as they seek to re-orientate their competition authorities from closing markets to investment to aiming at opening markets to more competition. UNCTAD is pleased to see that the majority of developing countries are now adopting a modern national competition legislation aimed at opening markets and not restricting them.

At the end of 2004 **COMESA**[2] adopted a regional law which covers anti-competitive business practices, mergers and acquisitions, abuse of dominance, and consumer protection. This law will complement national competition laws. COMESA will now move to the next stage of assisting member states in enforcing both the national competition law and this regional law.

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1. UN Conference on Trade and Development
2. The Common Market for Eastern and Southern Africa.

COMESA has been working on a regional agreement for the air transport sector. A regional law is being drafted, not just for the 19 member states of COMESA, but also for the East African Community (which covers Kenya, Uganda and Tanzania) and the Southern African Development Community. These three regions have agreed that they need to regulate how flights are conducted, rights to landing and so on.

The delegate expressed appreciation for the support of UNCTAD, DFID and the EU over the last 2 years and the expectation that they will continue to work with these agencies over the next phase of implementation of the regional law.

BIAC[3] explained the structure and role of BIAC highlighting, in particular, the work of BIAC's Competition Committee (which parallels the work of the OECD Competition Committee). Turning to the topic of the roundtable, **Mr. Goldman** of BIAC explained that the topic of bringing competition to regulated sectors is an area where the broad business community and competition enforcement agencies have largely the same views.

BIAC's submission discusses a number of the challenges faced in the process of deregulation. In particular, BIAC highlighted the need for a transition period in order to accomplish deregulation effectively. Many firms in the business community have been the victims of dominant incumbent firms which are reluctant to relinquish their dominant position. As a result, BIAC suggested that there needs to be a defined transition period during which it may be necessary to mandate access for new entrants, or even to go so far as to control the prices of dominant firms, to prevent market power by certain entrenched entities being used to increase prices to supra-competitive levels. The process of liberalisation should be a staged process. Specifically, BIAC proposed that the competition authority may need some additional complementary parallel powers (either in its own right or, in the transition phase, through an agreement with the former regulatory agency) to ensure that this kind of market power is not continued. Only when the transition phase is successfully completed will the competition authority be in a position to engage in the usual range of enforcement activities to ensure a level playing field. These points are discussed more fully in the BIAC submission.

Tunisia said that the roundtable has discussed a number of regulated sectors which go beyond the classic notion of "regulated sectors" to include, for example, the professions. The delegate was concerned that if the definition of regulated sectors is expanded to include these other sectors, we will be led to accept (or forced to accept) undue restrictions on competition. The delegate proposed restricting the definition of regulated sectors to those in which there are technical constraints which prevent competition, such as natural monopoly.

The delegate asked if the professions should be considered a "regulated sector"? Would that create obstacles for the work of the competition authority? The professions don't want any involvement of the competition authority in their sectors. Lawyers, doctors, even insurance companies and banks want the competition authority to stay out of their sectors. They want these sectors to be closed to competition.

The delegate asked: once a concession has been given, what is the role for competition and the role for the competition authority? Tunisia expressed great concern about the events in the California electricity market. The concern is that the resulting blackouts were due to the granting of private concessions and the introduction of competition. It is important to develop arguments to respond to those people who emphasise risks from the introduction of competition in electricity.

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3. The Business and Industry Advisory Committee to the OECD.

India began its economic reforms in 1991. Since then many monopolies have been dismantled, and entry and exit barriers eliminated. A number of independent sector regulators have been set up, mostly in the utility sectors. For example, the capital market is regulated by the Securities Exchange Board of India (SEBI), the insurance market (both life and general insurance, including pensions) is regulated by the Insurance Regulatory and Development Authority, the telecommunications sector by the Telecom Regulatory Authority of India, and the electricity sector by the Central Electricity Regulatory Commission. In addition, there is also a proposal to set up a separate regulator in the petrol and natural gas sectors. The government has also established various statutory authorities for sectors such as the media, the professions, air transport, financial services, food and beverage commodities, and so on.

At the time these sector regulators were set up, promoting competition was not a key focus. It is now widely accepted that regulation should as far as possible be compatible with competition, in order to promote efficiency, technological innovation and the quality of services. It is desirable to embody the promotion of competition as an objective in the sectoral acts themselves. For example, in the Electricity Act of 2003, promoting competition has been recognized as a responsibility. Significantly, this forced the Central Electricity Regulator to commission an expert study into the state of competition in this sector. That study has revealed a very unsatisfactory picture.

India also pointed to the role of government-owned companies. In most of these sectors there are government-owned companies enjoying a dominant status which they seek to guard and protect very jealously. This creates immense pressure against reform. This has been a problem in the telecom, insurance and electricity sectors. These government-owned companies also exploit the "national champion" argument to further entrench their hold on the market.

The delegate from India also raised concerns about regulators being set up in sectors where there is no justification for having one. Such sectors need to be left to be governed by market forces subject to the broader competition law. Pressures to introduce new unnecessary regulations should be strongly opposed. Even in traditional regulated sectors there are often areas that can be left to competitive forces, such as generation in the electricity sector. Regulatory restraint is difficult, but necessary if competition is not to be stifled.

The **Chairman** agreed that competition authorities often face a situation where their actions can cause short-term pain to specific, identifiable, companies or individuals. The task is to argue that this is for the benefit of a diffuse majority of the country and longer term prosperity.

Chinese Taipei noted that many regulatory regimes are intended to pursue other policy goals or objectives in addition to the objective of promoting competition. The challenge is to ensure that the competition objective is given due weight prior to opening the market, and is maintained and reviewed from time to time after competition has been introduced by both the competition authority and the sector regulators.

The Fair Trade Commission has succeeded in facilitating the liberalization of the telecommunications market, in part because the policy goal of increasing the penetration rate and decreasing the digital divide is compatible with and facilitated by competition. Issues such as fair access to infrastructure or universal service obligations can also be taken care of through a well designed regulatory structure, without sacrificing competition. Chinese Taipei also has valuable and successful experience in restructuring the electricity market to introduce competition. The government's view was that the stability of power supply was a higher goal than competition. It considered that this goal could not be achieved without a state-owned vertical integrated power company.

Taiwan noted that to liberalise a regulated sector effectively, competition policy must operate in concert with other policies and the competition authority should act in co-operation with sector regulators. To this end, it made three points:

- Introducing competition to a regulated sector means not only de-regulating but also re-regulating that sector. The new rules should be designed to be compatible with competition, should set clear rules for the incumbent, and should minimize the risk to other desirable objectives.

- The competition authority should establish workable relationships with sector regulators and should repeatedly review all existing regulations and should work with the sector regulator in developing more competition-oriented regulations.

- Finally, Taiwan noted that bringing competition to regulated sectors is never an easy task, and sometimes a very frustrating one. Taiwan therefore counselled patience.

Croatia highlighted some very anticompetitive behaviour occurring in specific regulated industries. Often the sector-specific regulation is used as a justification for this behaviour.

The delegate described the situation with taxi services in Croatia. At present, there is a professional association of taxi drivers who is in charge of issuing taxi licenses. In effect this gives the industry association the absolute right to decide who may enter this profession. The result is very expensive services. This situation is very unfavourable for consumers. Not only is it damaging consumers due to the overcharging of taxi services in Croatia, but it also is damaging to potential taxi drivers who cannot enter the market to provide taxi services.

At the most recent session of the Competition Commission in Croatia it was decided to issue an advocacy letter to the city municipality and to the cab associations. The Competition Commission proposed letting much more competition in this sector by abolishing the restrictive rules for entering the market. The Commission established that there are much lower prices in other capitals of Europe, even in richer countries. In countries that have the same standard of living it was found that taxi services are much more economical. There has been an angry response from the taxi driver association who argues that because there are 1500 taxi drivers in the city of Zagreb that alone means that there is enough competition.

The **Chairman** then moved to the third part of the discussion, focusing on bringing competition to natural monopoly sectors. In these sectors, the challenge is finding a way to separate that part of the service chain which is indeed a national monopoly from those parts in which you can have more competition. This, in turn, raises the issue of regulating access to the essential facilities. This usually involves some form of regulated prices for the natural monopoly component and/or some mechanism to resolve the access disputes that will inevitably arise. This usually is coupled with the establishment of regulatory authorities, usually responsible for setting the access charges, resolving the disputes and defining the many technical regulations that are required to make this kind of separation feasible and possible. There is also a need for active control of abuse of a dominant position and/or steps to improve competition by having very clear rules about the structural separation or action to reduce switching costs so that the users of the service have a chance to effectively change companies or providers. Finally, in many cases there is a need to set up some mechanism to preserve any non-commercial services and/or achieve the universal coverage.

The telecom sector in **Kenya** was until very recently a government monopoly. The first step was the division of Kenya Post and Telecommunications into three parts - Telecom Kenya Ltd, the Postal Corporation of Kenya, and the Communication Commission of Kenya. However because of deep-rooted relationships between former colleagues, the Communication Commission granted Telecom Kenya a 5 year monopoly over Nairobi (which is the most profitable part of this sector). Because of the 5-year monopoly, services from Telecom Kenya in the Nairobi area have been very bad. However, the mobile sector has been very competitive and it has helped provide an alternative for consumers and to control the dominance of Telecom Kenya.

As in other developing countries, Ministries that have control of regulated industries tend to see competition authorities as an irritant. This has been a very big problem for Kenya. The competition law is being amended and by the end of this year, the competition authority in Kenya will likely be able to look into uncompetitive practices in all areas of the economy. This will help solve this problem of capture of the regulator by the industry and special-interest groups.

Indonesia described the Indonesian experience in introducing competition in the telecommunication sector. Previously there was a monopoly in each of the parts of the telecommunications sector in Indonesia. In the fixed-line business there was only one local operator, one national operator and one international operator. As a result of this state-owned monopoly market structure, the price was high, the quality of services offered was very poor, technology developments were slow, and telephone density was very low.

In 1999, the government enacted a new telecommunications law which significantly enhances the scope for competition. The new law allows a range of operators to enter the market including state-owned companies, regional-owned government companies, private companies and even co-operative associations. The new law prohibits conduct that could result in monopolistic practices and mentions the necessity to implement fair business practices.

Before the deregulation, the tariff for telecommunications was fixed by the government. The tariff is now determined by operators based on a government formula. The regulator, which was previously part of the government, is now an independent body. The number of operators has increased from 4 to 7 operators in the mobile business and from 3 to 7 operators in fixed-line services. As a result of the new law, the price is lower, there are better services, invoicing is improved and consumers of telecommunications have a lot of choices.

The Indonesian Competition Commission can recommend to the government the termination of a monopoly. It can also advocate for competition in the process of implementing technical regulations such as interconnection and setting tariffs. It also promotes public awareness through seminars, workshops and other public events to encourage the introduction of competition in a regulated sector.

The **Chairman** noted Chile's submission raises the issue of the problems caused by a requirement to maintain geographically average prices. If the incumbent is required to maintain an average price across a certain geographical area, this induces new entrants to enter the market in the lowest-cost areas to cherry-pick the most profitable customers away from the incumbent. On the other hand, if the incumbent is allowed to respond by differentiating its own prices, on a customer-by-customer basis, the new entrants may be deterred from entering the market at all (because the incumbent knows who are the most profitable customers and will lower the prices just enough for those customers he wants to keep). Should the regulator allow price flexibility or should he risk deterring entry into the market?

Chile replied that the fixed local company claimed that it had its hands tied to compete. In many segments it faced competition from firms which could set any tariff or tariff structure they wanted, while the incumbent was stuck with a very rigid tariff structure.

The tariff structure usually consisted of a fixed cost and a variable cost. This fixed cost was important in lower income segments. The mobile phone, although a more expensive technology, was a very important source of competition in this lower income segment because it didn't have this fixed cost. In addition, cable TV (which also offered phone services) was an important source of competition in residential areas. In dense, mainly business, areas the extent of the natural monopoly is not that clear – other operators can enter in these areas.

These competing local loop companies were cherry-picking customers. But there was a legal problem. When the government went to the Monopoly Commission the response was that the law states that prices are free unless there is not enough competition in which case they will be fixed. But rather than these black or white possibilities, transition is a question of shades of grey. If we just liberalise the market, the incumbent will sweep out all the competition by charging different prices in different parts of the city, so as to deter entry. On the other hand, we cannot keep this giant tied and unable to compete against inefficient competitors.

In the end, a decision was made for pricing flexibility, with conditions to prevent predatory pricing by the incumbent. One of the conditions is that it cannot discriminate in different geographical areas that are predetermined in the tariff process. If the incumbent offers a plan to one customer in a geographical area it has to offer it to every customer in the same area. If they invent a new plan, it has to remain available in the market for at least one year.

This flexibility has worked to the benefit of the lower income sector which now has been offered fixed line service without the fixed cost but with a higher variable cost.

The **Chairman** observed that sometimes the process by which competition is introduced can be as important as the policies themselves. What role do competition authorities have in these processes? The Chairman then turned the discussion to the process by which competition is introduced in these natural monopoly sectors and the institutions that are responsible for the promotion of the reform.

Russia explained that the Federal Antimonopoly Service of Russia is involved in all stages of the development of federal policies concerning natural monopoly regulation, in close co-operation with other regulators. In addition one person of the FAS is a member of the Directorate of the Federal Service for Tariffs. The Directorate is a collegial body established for decision-making regarding prices/tariff in natural monopoly areas.

The **Chairman** also highlighted a second submission from Chile that discusses the evolution of long distance telephone services. In that case, there was consultation between the telecom regulator and the competition commission. The competition commission then issued a ruling, spelling out some of the requirements for allowing a local service company to enter the long distance market. This was challenged in court. Eventually the Supreme Court upheld the right of the competition commission to define those rules in general requirements that applied to the sector. BIAC, in its submission, also reminded us that one of the landmark events in competition in the past century - the break up of AT&T - was the result of a competition law prosecution undertaken by the US Department of Justice. Even though the competition authority may not have direct and formal oversight of regulated sectors, that does not mean that it cannot have some kind of influence over the regulations in those sectors through litigation or through its relationship with regulatory authorities.

Activity related to bringing competition to regulated sectors in **Poland** can be roughly divided into two areas; First, competition policy enforcement. Poland has had numerous cases in which the competition authority tried to promote competition through legal proceedings. Second, it is extremely important to advocate competition policy to other government ministries which are involved in the process of liberalising regulated sectors.

The President of the Office for Competition and Consumer Protection has a right to issue opinions on privatisation transactions carried out by government ministries. Between 1990 and 1995, when the liberalisation process was the most intense, around 1500 opinions were issued on privatisation transactions. These opinions were not binding but, in the majority of cases, they were followed by the Ministries or agencies involved in the process of liberalisation. This led to the introduction of competition in sectors which, at the beginning of the liberalisation process, were deemed to be structurally uncompetitive. Both advocacy and competition policy enforcement has brought about changes in those sectors.

Consumers International raised an issue in the Cable TV sector. In India there are a large number of operators but there is a lack of competition because each provider has a geographical monopoly. As a result consumers don't have a choice over their cable operator. Recently, the telecom regulatory committee of India has made efforts to introduce competition in the cable TV sector by promoting the use of alternative delivery platforms such as IPTV. Although there is now competition in the telecommunication sector in India, still the public sector enterprise in the telecom sector still engages in several anti-competitive practices. There is a contradiction in the role of government as owner of this firm and the role of government as regulator.

Another delegate from Consumers International replied to the comments by Tunisia and problems with concession contracts. He pointed out that there is a currently a crisis in the use of concession contracts for the provision of water services. Between 1985 and 2000, 75% of the concession contracts in the water sector in Latin America were renegotiated. At present, according the World Bank, 45% of the concession contracts in the field of water and sanitation are in distress (that is, financially insolvent or involved in litigation). There is something which is not working in this sector.

The delegate expressed concern that reliance on competitive tendering processes is sometimes leading to perverse results. For example, in Manilla, the concession contract was granted to the firm which offered the lowest price. The price dropped by 47% in the west of Manilla. But now this contract has been cancelled. It simply was not feasible to have such dramatic price reductions. One possible reform would be to have all the tender offers published, for public discussion. At present these contracts too often remain secret. Even in Europe, in Berlin or Bucharest, these contracts remain entirely confidential. This is an unacceptable situation. There is a strong need for reform of the management of the system of concessions.

The **WTO** emphasised that the issues under consideration at this roundtable - the relationship between competition and sector regulation – also have a very important interaction and relationship with trade policy. This is a two-way relationship. Clearly competitive markets with minimal sector specific regulation and maximal coverage of horizontal competition law are advantageous and preferable from the standpoint of trade liberalisation and trade policy. But equally, trade instruments can and already do have a bearing on the implementation of appropriate pro-competitive regulatory regimes. For example, the WTO reference paper on basic telecommunications services which was agreed in the late 1990's. This reference paper was one of the factors underlying the adoption of some of the regulatory legislation in the telecom sector which has been referred to in this roundtable. The core values which are promoted by the reference paper on basic telecommunications services are the values of competition, non discrimination and

transparency. These are indeed the same core values of competition law and policy. Indeed, the reference paper refers specifically to concepts such as the prevention of anticompetitive acts and access to essential facilities.

The WTO emphasised that not only are these concepts increasingly used in trade in addition to competition instruments, but their broader application by the trade world and by regulatory authorities needs to be infused by the thinking and experience of competition agencies.

For example, consider the concept of essential facilities. It is very important that the concept of essential facilities neither be under-utilised nor over-utilised. Clearly if the concept of essential facilities is under-utilised, the degree of competition which will prevail in downstream markets will be less than is technically feasible and desirable. But if the concept of essential facilities is over-utilised, this will actually reduce the incentive for facilities-based competition and for innovation and the development of competing facilities.

It is important that we share access to the insights of competition policy, because these concepts, though they are now incorporated in WTO instruments, have been most subtly and effectively defined in the antitrust jurisprudence of the US and some other jurisdictions. We need continuing dialogue between competition agencies and with the trade community to continue to ensure that these concepts are effectively applied.

France wanted to give three messages to government colleagues and agencies in the process of developing or modernising their competition laws, relating to the relationship between competition and regulated sectors:

First it is necessary to hold firmly to the principle that when we create a competition law it should apply to all sectors, including regulated sectors. There are strong pressures from certain sectors – banks, telecoms, radio and television, for example – which argue that they do not function like other sectors and therefore should not be subject to a general law. It is important to resist these pressures.

Second, it is important to put in place arrangements between different agencies which involve – somewhat paradoxically – both co-operation and a degree of competition. Co-operation, because the competition authority needs the technical expertise and the intimate knowledge of the sector which resides with the specialist regulator. Conversely, the specialist regulator must have its narrow sectoral view challenged with the broader economy-wide perspective of the competition authority.

At the same time it is important to have a degree of competition. We should not give each institution a monopoly in its area. There should be a degree of competition in resolving disputes because, at the end of the day, the same disputes can usually be treated either through sector-specific regulation or under the heading of abuse of dominance. If the competition authority wants to be successful in competing against the sectoral regulator in this way, it is necessary to work towards creating a jurisprudence which is clear and understandable, and, above all, which is timely (competition authorities often take too long in prosecuting cases). In dynamic industries such as telecommunications, cases of abuse of a dominant position should be remedied in a matter of months.

Third, the relationship between the competition authority and the sectoral regulator must be dynamic, because regulation is often a process of transition – that is, a movement towards sole reliance on general competition law. It is necessary to arrange this transition so as to ensure the progressive movement of power to the competition authority. It is important to distinguish three steps: The first step is the regulation of entry (ensuring entry into an industry which at present is a monopoly). This involves primarily legal and technical matters,

which are essentially the domain of the specialist regulator. The second step is the regulation of dominance, where the ex-monopoly has competitors but still has a large share of the market. In this phase the competition authority must play an increasingly important role. The third step is primary reliance on competition law, when all the firms have balanced market shares. The primary role for regulation is to verify that each firm's behaviour complies with the competition law. At this point the regulator's power should be transferred to the competition authority. But it is true that organisations do not like spontaneously giving up their power, so it is not always easy to arrange a simple transition between these three steps.

Gabon has had a competition law since 1998. Gabon has opted for a "split" system of competition law agencies. On the one hand, there is an institution responsible for investigations and prosecutions. This institution was formerly known as the Direction Générale des Prix[4]. This institution has been restructured and is now called the Direction Générale de la Concurrence et de la Consommation[5]. In addition, there will also be an agency responsible for making competition law decisions.

In regard to the topic of competition in regulated sectors, Gabon suffers from the problems of other small economies – the narrowness of its markets. In many markets there are a strictly limited number of operators – and these are often subsidiaries of international groups. Gabon is currently interested in introducing competition in ports. Studies have shown that it is often more expensive to transport goods from Libreville to Port-Gentil to the warehouse of the importer, than it costs to transport goods from Europe to Gabon. There is no competition in the port sector at the moment. But in other sectors there have been some successes – notably in mobile telephony where there are three private competitors to the state operator (Celltel, Telecell and Liberty).

Korea noted that a provision in the Korean competition law obliges the regulator to consult with the Korea Fair Trade Commission when drafting laws that may restrict competition. The KFTC can also ask the regulator to amend the regulations when necessary. The KFTC is also a member of the Korean Government Regulatory Committee and the Chairman of KFTC participates in cabinet meetings to advocate competition. In Korea the KFTC and regulators sign an agreement (an MOU) which sets out the relative spheres of responsibility – the KFTC is in charge of overall competition and the sectoral regulators are responsible for sector-specific technological matters.

The **Chairman** concluded by thanking all of the participants and the Secretariat for an interesting and lively discussion.

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4. Directorate General for Prices
5. Directorate General for Competition and Consumers

Organisation de Coopération et de Développement Economiques
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Global Forum on Competition

ROUNDTABLE ON BRINGING COMPETITION INTO REGULATED SECTORS

Contribution from Chile

-- Session I -

This contribution is submitted by Chile under Session I of the Global Forum on Competition to be held on 17 and 18 February 2005.

JT00176833

English text only

ROUNDTABLE ON BRINGING COMPETITION INTO REGULATED SECTORS

1. The evolution of the long-distance telephone service in the Telecommunications Market

1. Prior to privatisation, Chile's telephone system was dominated by two state-owned companies: Compañía de Teléfonos de Chile ("CTC"), which provided local telephony services, and Empresa Nacional de Telecomunicaciones de Chile ("ENTEL"), which provided domestic and international long-distance services. By 1989, many other companies were interested in providing long distance services; several firms, including CTC, applied to the telecommunications regulatory agency ("SUBTEL"), for operating licenses in long-distance service. Although a consensus had been reached on the need to end monopolies in long-distance services, doubts emerged about whether local telephone companies should be allowed to participate in the long-distance business. It was feared that the local telephone companies, a natural monopoly, would tend to favor their own business in long-distance services, for example, by giving its competitors poor interconnections. It was generally thought that it would be too difficult to put a regulatory scheme in place capable of preventing discrimination entirely. Three factors contributed to this belief: 1) it would be too difficult to enforce technical standards, 2) the regulatory system was not sophisticated enough, and 3) the legal system did not facilitate conflict resolution.

2. The regulators, on the other hand, were aware that vertical integration has its advantages. For example, it makes it possible for telecommunications companies to utilize existing economies of scope in providing services and for consumers to sign up with a single company for all services. Although it would be ideal for integrated companies to compete in offering a wide array of services, the nature of a natural monopoly in basic telephone services, coupled with a highly concentrated market share of these services in a single company (nearly 95 percent of Chile's subscribers were with CTC at the time) made this option difficult to achieve.

3. In June 1989, SUBTEL consulted the antitrust authorities to inquire whether entry of local telephone companies into the long-distance business would clash with the provisions of the Competition Law, especially in the case of CTC. In November of that year, the Antitrust Commission, decided that, by adopting measures and precautions set forth in the ruling, local telephone companies could provide long-distance services. These measures limited local telephone companies' long-distance participation to a multi-carrier dialing system that enabled users to select a long-distance carrier for individual calls by dialing a certain number of digits.

4. The Antitrust Commission also directed local telephone companies to provide all long-distance operators equal opportunity to interconnect with the local network, with fees access approved by SUBTEL. Moreover, the companies that became vertically integrated were required to undergo this process by means of subsidiaries chartered as publicly traded stock corporations that forced transactions between the parent company and subsidiary to emulate market conditions. Also the Antitrust Commission made it mandatory for local telephone companies to provide carriers all information related to long-distance traffic (for example, subscriber number, type of traffic, billing amount, and carrier used) and to offer the long-distance companies metering, appraisal, and billing and collection services, abiding by non discriminatory rates pre-approved by SUBTEL.

5. In response, ENTEL filed an appeal known as "petition in error"[1] with the Supreme Court, which, in May 1990, nullified the earlier resolution and sent the case back to the Antitrust Commission. In formulating its ruling, the Court said that the Antitrust Commission failed to include in its argument all relevant technical information needed to establish that, with currently available technology, it would be

possible to ensure compliance with essential conditions to establishing a competitive long-distance market. In addition, the Court ordered the Commission to carefully decide which technical conditions would guarantee fair-market conditions, including supervision of interconnection quality. Consequently, this was the central focus of the rehearing before the Antitrust Commission.

6. The rest of the telecommunications companies claimed that CTC's integration into long-distance services would make it possible for that company to extend its monopoly from local to long-distance service, despite installation of a multi-carrier dialing system. From these companies' perspective, CTC could provide different levels of quality in the interconnection, thereby adversely affecting service quality of potential long-distance competitors, since the technical, financial, and legal means to implement all required monitoring or oversight to guarantee non discrimination were not in place.[2] Furthermore, CTC would have incentive to transfer profits from the regulated market to the competitive market. Being the only company in direct contact with users, CTC would have a commercial advantage. Finally, having prior access to information related to long-distance service would make it possible for CTC to offer different service plans.

7. CTC argued that the Antitrust Commission did not have the legal authority to prohibit market access in the absence of an unlawful act or event to justify its intervention, since the function of the Antitrust Commission was to sanction unlawful acts classified in the Competition Law, not to decide about a market structure. It also asserted that installation of a multi-carrier dialing system would prevent non-tariff discrimination. Furthermore, it claimed that operating its long-distance service through a subsidiary subject to supervision Chilean Securities and Insurance Supervisor would be sufficient guarantee that no cross subsidies between CTC and its long-distance affiliate would occur. Lastly, CTC offered to set aside a minimum of 10 percent of the capital shares of its long-distance subsidiary for another telecommunications company, also giving it the right to appoint at least one member to the subsidiary's board of directors.

8. The Antitrust Commission issued its new ruling in April 1993.[3] As a preliminary matter, the Commission addressed the issue of the scope of its authority. It maintained that, contrary to the CTC's claim, the Commission had the discretionary power to rule on the matter submitted by SUBTEL, even though the case did not involve an offence or crime as such. Thus, it rejected allegations regarding its lack of jurisdiction to establish regulations. Regarding the merit of the case, the Commission held that it was improper to divide up the telecommunications market into segments, citing that technological advancements in this sector made it difficult to differentiate between services. Nevertheless, it warned that vertical integration posed a risk to fair competition, which made it necessary to establish an efficient, strictly controlled, regulatory framework with drastic sanctions for offenders. In its ruling, the Commission reiterated the measures that must be adopted before deregulating the long-distance market, giving the government 18 months in which to implement them[4]. In addition, SUBTEL was ordered to regulate direct connection of users to long-distance companies.[5]

9. Law 19,302, which establish the way for deregulating long-distance services, was approved in March 1994. This law encompassed all of the requirements imposed by the Antitrust Commission and included a constraint on participation of all companies in the long-distance market over the subsequent five years. These constraints were most stringent for carriers affiliated with local phone companies. The multi-carrier system became operational in October 1994. Deregulation of the long-distance market met expectations. New firms, including CTC-Mundo - CTC's subsidiary - entered into the long-distance service market. The volume of international calls handled by ENTEL, which had held a monopoly position until 1994, dropped to less than 41 percent of total volume by 1995, and its market share in this sector continued to decrease (Table 1). ENTEL's market share drop was even more dramatic in domestic long-distance calls where it fall to 37.4% by the end of 1994.[6]

Table 1: Companies' Participation in the Long-distance Service Market
(by minute transferred)

	Domestic Traffic (%)		International Traffic (%)	
Company	2003	1994	2003	1995
ENTEL	35.5	37.4	34.0	40.5
CTC-Mundo	38.2	28.9	19.6	20.7
Chilesat[7]	19.1	21.9	18.5	19.4
Others	7.2	11.8	27.9	19.4

Source: SUBTEL

10. Long-distance rates dropped dramatically, as evidenced by the change in the cost of a one-minute phone call from Chile to the U.S., a route that represents 42 percent of total international traffic. During peak hours, the regulated rate had been US$2.40 per minute, while today, the same call costs less than US$0.3 per minute.[8] The rates' drop causes a strong increase in traffic, indeed between 1994 and 1996, the international long-distance traffic grew a 116% and the domestic one and 165%.

11. Giving subscribers the ability to select a particular carrier by simply dialing two digits for each call made it easier for competition to thrive in this sector. In countries with less competition than Chile, multi-carrier systems require that users call through the company with which they have a service contract. This explains why the Antitrust Commission prohibited cutting off multi-dialing service to subscribers under a service contract. In 1996, CTC-Mundo offered appealing discounts to any users who requested that CTC, the parent company, disconnect the multi-carrier dialing, leaving active-service contract dialing through that company. The Antitrust Commission admonished CTC-Mundo to discontinue the offer. Today, there are 26 carriers operating using the multi-carrier dialing system.

NOTES

1. The parties affected by the decisions of the Antitrust Commission usually file with the Supreme Court a special appeal, known as a "petition in error," which relates to the procedural, rather than meritorious, aspects of the original Commission proceedings. If the appeal is accepted, the Court requires the Commission to amend the "mistake or abuse" committed when the Commission issued the decision being challenged. Thus, using petition in error, the substance of a decision can be modified, even though, in principle, this was not permitted.

2. These companies argued that quality discrimination does not have to be ongoing to be effective.

3. Some companies filed an appeal against the decision of the Antitrust Commission with the Supreme Court, alleging that the Commission was not empowered to regulate situations that are properly governed by law. In its 1994 decision, the Court denied the appeal, declaring that the Antitrust Commission has the power to issue resolutions of a general nature to which private parties must adhere.

4. Perhaps the only difference between Resolutions of 1989 and 1993 is that the latter allowed service contracts and multi-dial service to coexist, while the former only accepted the dialing multi-carrier.

5. Direct connections are those that bypass the network of local companies, which, prior to that time, had not been permitted.

6. However, long-distance service is still concentrated, largely because only three companies (CTC-Mundo, ENTEL, and Telex Chile) had fiber optic networks that covered the entire country, making it necessary for other carriers to lease use of this network from these companies.

7. Former Telex-Chile

8. This dramatic price decrease can be attributed, in part, to technological changes and elimination of cross subsidies.

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Global Forum on Competition

ROUNDTABLE ON BRINGING COMPETITION INTO REGULATED SECTORS

Contribution by Mrs. Andrea Butelmann (TDLC, Chile)

-- Session I --

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English - Or. English

LETTING THE MONOPOLY COMPETE: THE CASE OF CHILEAN FIXED LINE TELECOMMUNICATION

Contribution by Mrs. Andrea Butelmann
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1. Chilean "efficient firm model" is a scheme, with similarities to the benchmark model. The regulator has to "design" the most efficient company to serve the demand for a period of 5 years. Price structure is set in order to make present value of this hypothetical project equal to cero. The hypothetical firm becomes the benchmark for the real firm. Only the dominant firm in the market has faced regulation for consumer prices, while smaller firms have only their access charges set by the authority.

2. Even though in the telecommunication industry we observe a dynamic technological development that is bringing an important degree of competition, traditional fixed line technology is still the cheapest alternative and has enough sunk costs to preempt entry if allowed to.

3. During the last few years the mobile network has increased its market penetration more than fixed line telecommunication did in the last 30 years. Cable TV has developed technologies to serve voice communication on its network, and WLL technology (wireless last mile) has become a serious threat for traditional fixed line systems for some segment of customers.

4. In this presentation we discuss the implications of incipient competition on the incumbent competitive position, the alternative solutions, and their strengths and weaknesses.

1 Theory and history of the telecom economy

1.1 Network economy and crossed subsidies

5. Telecommunication is a network based industry. The decreasing average costs are mainly explained by this feature. The higher the density of customers and/or intensity of use, the lower the cost of service.

6. The regulator set prices for telephone services for each "cost areas" (CA). An CA is a group of geographic areas with the same price structure will prevail. The bigger the CA the more likely is to impose cross-subsidies within it.

7. Moreover, in most countries there is mandatory universal access, which forces the telecommunication firms to serve all the demand in their areas of service, even if new clients generate losses to the company. In absence of competition universal access obligation does not impose financial stress to the incumbent, high costs of new low demand clients are distributed proportionately among all the consumers. Generally, this obligation binds only the incumbent, who covers all areas of service; newcomers are able to target only the area of service of their interest.

8. Going back to the pure monopoly case, the problem with cross subsidies is that they distort the consumption decisions. High demand consumers face a marginal price above the marginal cost they impose to the firm and low demand consumers face a marginal price below the marginal cost they impose to the firm.

9. Cross subsidies inefficiencies are usually ignored by governments while distribution implication are overvalued because of political reasons.

10. On the other hand, when the incumbent faces some competition, large CAs and universal access obligation impose financial stress for the incumbent.

1.2 Situation in Chile

11. Chile was divided in 5 CA's during the 1999-2004 tariff period. For the 2004-2009 periods the number of CA's increased to 9. Authority has decided as well that each city should be assigned only one CA. This decision poses a difficult situation for the incumbent since most cities have heterogeneous consumer densities.

12. The most relevant case is Santiago with over six million inhabitants. In Santiago coexists high populated areas, low populated areas, high demand consumers and low demand consumers.

13. For the 1999-2004 periods Telefónica CTC Chile, was to charge one price scheme to every consumer in Santiago, dealing with a high level of cross subsidies.

1.3 Alternative technologies and the end of the hegemony

14. The market share of fixed line monopolies is decreasing, the reasons are mainly technological. The optimal scale of some elements of traditional technology has been reduced. At the same time, competitive technology, namely "broad band" has allowed the transmission of TV, Internet and voice by the cable TV network at a competitive price. A duplication of fixed line networks is becoming common in populated areas.

15. Competition of fixed lines first arises in high density areas, but cable TV allows competition to expand to not as dense residential areas as well.

16. In the voice communication industry the market share reduction is even sharper. The wireless technology has become a widely used technology, increasing more than 3 times its market share in the last 5 years.

1.4 Situation in Chile

17. TV cable companies had become a serious threat for the incumbent. The main cable company, VTR is offering phone service by its broad band. Since VTR may choose where to offer phone service, choosing only densely populated areas, plus a low marginal cost of offering broad band for consumers already connected to the TV cable net has resulted in an important client loss from CTC to VTR in residential areas.

18. A second threat is net duplicators. It is important to note that in general net duplicators would face higher costs than the incumbent, but the later has to price all the consumers the same price while the former may discriminate among clients. The most relevant net duplicators in Chile are: Entel, Manquehue, Cmet, GTD in business areas.

1.5 Cross subsidies and non discrimination rule: a sweet for new entrants

19. A relevant question is if competition in the fixed line sector is socially efficient. We will leave this question to the reader and will answer a simpler question: Can a newcomer, with higher cost than the incumbent, make profits under the CAs regulatory scheme? The answer is yes.

20. As CAs become smaller the tariff scheme becomes more complex, this imposes a limit in the CAs size. No matter how small CAs are constructed, there will be enough heterogeneity so to find consumers, lets call them "good consumers" for whom the price of the incumbent is higher than the marginal cost they impose to the firm.

21. Suppose a firm A with the same cost structure than the incumbent. This firm can serve the "good consumers" at their marginal cost plus an "extra normal rent", equal to the difference between the marginal cost of good consumers and the average cost charged by the incumbent. Remember that the marginal cost of good consumers is lower than the average cost charged by the incumbent. Now suppose a firm B, with the same cost structure of the incumbent plus an extra cost ε. If ε is small enough, this firm can serve the good consumers at a price equal to its cost plus an extra normal rent, ε lower that extra-normal rents of firm A.

22. The incumbent could respond to a follower by lowering the tariff of the good consumers, but the non discrimination rule forces it to offer the lower tariff also to bad consumers in that CA.

2. Possible solutions

23. In Chile, the telecommunication law admits that competition will ultimately prevail in telecom market. For that reason it does not impose price regulation automatically but designates the antimonopoly authority to judge if price regulation is needed given the degree of competition observed in the market. The law simply says that if there is not enough competition, prices should be set by the regulatory authority, otherwise prices will be set by market forces. This binary solution, fixing prices or letting the market work, does not guide the transition from a regulated absolute monopoly to a real free market and that is the reason why the process for finding a solution was so lengthy.

2.1 Free pricing and regulated alternative

24. If followers' survival is based on cross subsidies, under free pricing competition will disappear. If followers disappear the incumbent faces no more competition, forcing the government to resume regulation. In that case there are two inefficient alternatives:

- Regulation with inefficient competition.
- Free market and monopoly prices.

25. It is possible to improve the social surplus combining the two alternatives. Allowing the incumbent to charge free prices and forcing it to maintain a regulated tariff for consumers who prefer it, prevents inefficient competition and danger of monopoly pricing.

2.2 Situation in Chile

26. It is not easy to determine whether followers in Chile survive due to competitive price structures or by taking advantage of implicit crossed subsidies in the tariff structure of the incumbent. Probably both situations coexist.

27. In the most populated areas net duplication should be efficient if the incumbent network is overused, that's the case of Entel's offer of comunication downtown; i.e.; the business area. High demand residential consumers should be a fine business to TV cable network with or without cross subsidies.

28. The inefficiencies are most likely to be present in middle demand and/or middle density areas, where there is not enough traffic to justify two networks and where marginal users of phone by TV cable network impose a high cost.

2.3 Predation risk

29. In the last chapter we argued that if the followers have a competitive structure free pricing is the social optimum. But if the incumbent uses predatory practices the last condition does not hold.

30. The predatory practice risk increases if the incumbent has the possibility to reduce the prices only to consumers that are willing to move to the competition. It also increases if the price reduction can be given for a short period of time to make competition leave the market.

31. If the regulator can restrict the use of selective price reductions and short term price reductions, it would be too costly for the incumbent to perform predatory practices.

3. Statistics in Chile

32. In Chile, there are 9 fixed line companies with 3,5 million lines; i.e., a penetration of 20% approximately. The market share of the incumbent (CTC) is close to 90% and in great extensions of the territory is the only service provider. On average, the incumbent is followed by 3 small providers taking a share between 1% a 10 % in each CA. Nevertheless, the degree of competition within the CA is concentrated in smaller areas where the challengers have captured, in some cases, a quarter of the demand.

33. On the mobile phone market, there are 4 firms with a total 6 million clients. Being a more expensive technology, average traffic for mobile phone client is only 70 minutes a month compared to 600 minutes for a fixed line subscriber. Thus, total traffic through fixed lines is five times that of the mobile network.

34. Then market power of the incumbent has been seriously challenged by other fixed line companies for heavy users and by mobile network in the case of low traffic consumers.

4. Solution adopted in Chile

35. In 2003, price *flexibility* for CTC was decreed in Chile. The authority asked the Antitrust Commission in several occasions to allow CTC to offer alternative plans that would adjust to different consumer's needs. The authority should continue setting prices in each CA and the incumbent has to offer the plan with the regulated tariff to all consumers in the CA. Consent was granted after three years of analysis and discussions.

36. The decree considers two classes of consumers: that which traffic does not exceed 15,000 (lowered to 1200 in 2004) minutes a month and bigger consumers. For the small consumer category, each alternative plan should be available for every consumer in the CA. Furthermore, the plans should comply with the following requirements:

- each plan must be available to be contracted for at least one year;
- contracts are indefinite in time;
- there is no permanence requirement for consumers, who may unilaterally change to any plan being offered;

- plans may be designed by the incumbent and need no previous approval, but they should be reported to the authority and be widely published both in written media and the company's website.

37. For the larger consumer segment, the incumbent is free to negotiate with the consumer a plan, without the obligation to extend, or inform, the offer to every consumer in the CA.

38. Conclusion: Ways should be found to move from a regulated market to a competitive market, when technological progress allows competition. These solutions should prevent the incumbent from re-monopolizing the market through predation; otherwise, the pendulum will keep moving from regulation to deregulation and back.

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ROUNDTABLE ON BRINGING COMPETITION INTO REGULATED SECTORS

Contribution from India

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ROUNDTABLE ON BRINGING COMPETITION INTO REGULATED SECTORS

1. The Government of India has recently enacted a modern competition law in the form of the Competition Act, 2002 (12 of 2003). The Central Government has also established the Competition Commission of India w.e.f. 14.10.2003 to carry out the objectives of the Act. The Monopolies & Restrictive Trade Practices Act, enacted in 1969, dealt with some competition issues. The MRTP Act was too narrow in its sweep to deal with competition issues especially in the era of liberalisation and globalisation. The MRTP Commission had taken up complaints against anticompetitive practices but was handicapped on account of certain limitations in the law. These limitations have been adequately covered in the new law. A couple of illustrations are given below relating to the limitations of the MRTP Act as well as those provisions of the new law that get these infirmities.

2. The All India Float Glass Manufacturers' Association (the Association) filed a complaint and also an application for grant of temporary injunction before the Monopolies and Restrictive Trade Practices Commission (the MRTPC) against three Indonesian companies alleging that they were manufacturing float glass and were selling the same at predatory prices in India, and were hence resorting to restrictive and unfair trade practices in terms of the MRTP Act, 1969. In the complaint, it was stated that the float glass of Indonesian origin was being exported into India at the CIF price of US$155 to 180 PMT. At this price, some float glass had been shipped into India during the period December, 1997 to June, 1998. It was alleged that these sale prices were predatory prices as they were less than not only the cost of production for the product in Indonesia but also the variable cost of production of the product. The complainant also furnished figures indicating the estimated cost of float glass internationally as well as the cost of production of float glass in India with a view to demonstrate that the Indian manufacturers of float glass would not be able to compete with the price at which the Indonesian manufacturers were presently selling or intending to sell to India consumers. On this basis, it was contended that the sale of float glass by the Indonesian manufacturers at the said price of US$155 to 180 PMT will restrict, distort and prevent competition by pricing out Indian producers from the market. The MRTP Commission instituted an enquiry on the complaint and granted interim injunction restraining the Indonesian companies from exporting their float glass to India at predatory price.

3. The Alkali Manufacturers' Association of India (AMAI) filed a complaint as well as an application for grant of temporary injunction before the MRTP Commission alleging that American Natural Soda Ash Corporation (ANSAC), consisting of six producers of natural soda ash, have joined hands together to form an export cartel by virtue of a membership agreement amongst them entered into in America on 8th December 1983. By this agreement, the six producers had agreed that all export sales by them or by any of their subsidiaries will be made through ANSAC which was set up as a Corporation in accordance with the provisions of United States Export Trade Act, 1918. It was further alleged in the complaint that the ANSAC is an attempt to invade the Indian market and undercut the Indian producers, as it sold American soda ash to Indian consumers at an unrealistically low price of US$132 PMT – CIF. With a view to circumvent the prohibition of Indian law against Monopolistic Restrictive and Unfair Trade Practices a strategy was adopted by ANSAC by selling American soda ash to Indian consumers through M/s. G. Premjee of Singapore in whose favour the Indian producers had opened letters of credit. According to the complaint there was a bulk soda ash by ANSAC to Indian consumers through the conduit of M/s. G. Premjee of Singapore. According to the complainant, ANSAC was a cartel of American Ash Soda producers and was likely to affect maintenance of prices at reasonable and realistic levels in India and with a view to adversely affect the local production and availability of soda ash. The MRTP Commission instituted an enquiry and passed an ad interim injunction which was subsequently confirmed by it, directing ANSAC not to indulge in the practice of cartelisation by exporting soda ash to India in the form of cartel directly or indirectly.

4. Aggrieved with the orders passed by the MRTP Commission, the appellants namely, M/s. Haridas Exports on behalf of Indonesian companies and the ANSAC filed an appeal in the Supreme Court of India which *inter alia* passed the following orders:

- the MRTP Commission can *inter alia* take action when a restrictive trade practice is carried out in India in respect of imported goods. In both the cases, 'goods' have not been imported into India and hence the matters are beyond the jurisdiction of the MRTP Commission;

- Under the MRTP Act, there is no power to stop import;

- the MRTP Act does not confer extra territorial jurisdiction on the MRTP Commission;

- if a cartel is selling goods to India and still making profit then it is not in the interest of the general body of consumers in India to prevent the import of such goods.

5. The Competition Act, 2002 *inter alia* provides for the following:

- the term "cartel" has been explicitly and unambiguously and defined in Section 2(c) of the Act as "cartel includes an association of producers, sellers, distributors, traders or service provides who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services";

- the term "predatory price" has been explained in clause (b) in Explanation below Section 3(2) of the Act: "predatory price means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors";

- the Commission is vested with the power to restrain temporarily any party from importing such goods until the conclusion of such enquiry or until further orders;

- the Commission has been conferred u/s 32 of the Act power to enquire into Acts taking place outside but having adverse effect on competition in India.

6. The newly enacted Competition Act has removed deficiencies noticed in the MRTP Act.

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Global Forum on Competition

ROUNDTABLE ON BRINGING COMPETITION INTO REGULATED SECTORS

Contribution from Indonesia

-- Session I --

This contribution is submitted by Indonesia under Session I of the Global Forum on Competition to be held on 17 and 18 February 2005.

JT00178759

English text only

BRINGING COMPETITION INTO REGULATED SECTORS: INDONESIAN EXPERIENCE IN THE TELECOMMUNICATION SECTOR

I. Telecommunication Sector before Deregulation

1. Indonesian telecommunication sector was regulated by Law No. 3 of 1989 on Telecommunication. The law stipulates that the telecommunication is performed by the government. The government then assigned its state-owned companies to run the telecommunication networks and services. At that time, PT Telkom held the monopoly for domestic telecommunication, whereas PT Indosat for the international.

2. The monopoly arrangement was regulated in Article 12 of the law that mentioned:

   1. Telecommunication is run by the government, and for the telecommunication services can be handed over to other operators.

   2. Other operator beside the one mentioned in paragraph (1) can operate basic telecommunication services based on cooperation with the other operator. Other operator may provide non basic telecommunication services with other operator without cooperation.

3. Government recognized and considered the importance of telecommunication for the realization of national goals, and wanted to establish a reliable telecommunication performance. Therefore it was deemed necessary to rely on the government as the operator in the telecommunication sector, allowing it to appoint the state-owned companies to provide telecommunication service. Consequently, the domestic telecommunication network and services were at that time monopolized by PT. Telkom, while PT. Indosat monopolized networks and services for international.

The structure of the telecommunication sector before deregulation

	MOBILE	**FIXED LINE**		
Operator	Telkomsel	**Local**	**Domestic**	**International**
	Excelcomindo	Telkom	Telkom	Indosat
	Satelindo			
	Mobisel			

4. The impacts of monopoly, controlled by the two state-owned companies could be described as follows:

- The Price was high
- The growth of consumer-oriented telecommunication services was stagnant
- The Telecommunication services were inferior and the quality of voice was poor
- Despite the poor quality, consumer could not shift to other operator since there were no alternatives
- The Technology was stagnant
- The teledensity was low

II. Telecommunication after Deregulation

5. In 1999 government enacted a new law on telecommunication, namely Law No. 36 of 1999 which replaced the Law No. 3 of 1989. The new law has adopted competition in the telecommunication sector. The law stresses the importance of telecommunication reform to increase the performance of telecommunication operators in order to face globalization and to prepare national telecommunication industry to enter business competition era. Transparent regulations that provide more business opportunity for small and medium enterprises are essential to support the realization of fair and professional competition.

6. The provision of telecommunication is regulated in Article 8 of the law, that stipulates:

7. Telecommunication network and/or service can be provided by legal entities established for that purpose based on the existing law and regulation, which include:

- State-owned company
- Regional government-owned company
- Private company
- Cooperative

8. The law also covers competition provision in Article 10 stating that:

1. It is prohibited to conduct any activity that could result in monopolistic practices and unfair business competition in the provision of telecommunication.

2. Prohibition mentioned in paragraph (1) based on the existing law and regulation.

9. This article aims to ensure fair competition between telecommunication operators in doing their business activities. The law and regulation referred to by this article is the Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition.

10. The distinctions between the two laws are as follows:

No.	Subject matter	Law No. 3 of 1989	Law No. 36 of 1999
1.	Operator	Government through its state-owned company	State-owned companies, regional government-owned companies, private company and cooperatives
2.	Operation Category	Basic, non basic and special telecommunication service	Network, service and special telecommunication
3.	Cooperation Framework	Joint Venture, Joint Cooperation, Management Contract	Cooperation with State Owned-Company is not necessary, business driven
4.	Exclusivity	Monopoly for basic service	Competition
5.	Tariff	Fixed by government	Determined by operator based on government formula
6.	Interconnection Agreement	Determined by government through PT. Telkom	Determined by operator and negotiable
7.	Regulator	Government	Government and it can be hand over to regulatory body

The structure of the telecommunication sector after deregulation

	MOBILE	**FIXED LINE**		
Operator	Telkomsel	**Local**	**Domestic**	**International**
	Excelcomindo	Telkom	Telkom	Indosat
	Indosat	Indosat	Indosat	Telkom
	Mobile 8	Esia (West Jawa and Jakarta)		
	Lippo			
	Telecom			
	Mandara			

11. The new telecommunication law has brought some benefits to customers such as:

- Lower price
- The growth of consumer-oriented telecommunication services
- The Telecommunication services are much better
- The consumers now have many choices
- Technology is developing faster
- The teledensity increases

III. Challenges in the deregulation process

12. Indonesia experiences some challenges in the transition process from monopoly to competition, such as:

1. Inconsistency of political policy towards competition.
2. Insufficiency of competitive safeguard. The existing regulation can not cope with the fast-paced technology development in the telecommunication sector.
3. The existing regulation has not been implemented consistently, such as the issuance of license is still not transparent and discriminative, so it can create barriers for operators in their attempts to enter the market.

4. The established independent body does not posses the authority to run its duties independently. Everything is still under supervision of General Director of Department of Pos and Telecommunication as the chair of the independent body.

IV. Contribution of Commission for the Supervision of Business Competition (KPPU)

13. KPPU keeps supporting competition process in the telecommunication sector so that competition can be applied in various telecommunication services. Some efforts done by KPPU, include:

1. Recommendation to the government to terminate monopoly.
2. Advocacy in implementing competition that includes technical regulations such as interconnection, tariff and license.
3. Promoting competition in the telecommunication sector through various activities, involving stakeholders, such as holding seminars and workshops to increase public awareness on competition in telecommunication sector.

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Global Forum on Competition

ROUNDATBLE ON BRINGING COMPETITION INTO REGULATED SECTORS

Contribution from Kenya

-- Session I --

This contribution is submitted by Kenya under Session I of the Global Forum on Competition to be held on 17 and 18 February 2005.

English - Or. English

JT00177256

BRINGING COMPETITION INTO REGULATED SECTORS: FOCUS ON KENYA

1. Introduction

1. In Kenya, the drive to deregulate and liberalise the market has led to attempts at more precise economic definitions of what constitutes a natural monopoly: taking cost as exogenous. This has led to the opening of these markets, which previously were thought to be natural monopolies, to competition. Major ways of introducing competition into regulated utilities with different competitive potential, at each stage, was to separate the monopolistic and competitive components as different units. This approach has overcome, but not very effectively, the problem of a monopolist extending his monopoly power in the whole industry. However, this approach hinders realisation of economies of scope and that of density (in telephony industry) that might be available for a firm undertaking several connected activities

2. Kenya's process of introducing competition in these sectors is seemingly premised on several analyses[1] done on the competitive potential, world-wide, in Electricity, Railway, Telecommunications, Water and Gas. These analyses have concluded that: (a) In electricity, generation and supply is competitive but high-voltage transmission and regional distribution cannot accommodate competition; (b) In telecommunication, potential for intense competition exist in long-distance, international networks and services (VANS) but moderate in local network and (c) for competition to thrive, proper access to essential related networks need to be availed.

2. Electricity industry

3. Just like any electricity supply industry (ESI), Kenya's industry, is a vertically related market with the following stages: (1) generation; (2) transmission; (3) distribution and (4) supply.

2.1 Energy inputs

4. A greater percentage of power consumed in the country is hydro generated. Although it avoids pollution, it imposes cost in terms of visual amenity and ecological damage. Geothermal stations, located in the Great Rift Valley, do also supply to the national grid. The overdependence in hydro power means that Kenya's electricity is highly susceptible to weather conditions[2]. To lessen the risk, plans have been underway to explore more geothermal sources but this has been hampered by the enormous costs of these investments. Secondly, plans are underway to connect the country's national grid with the one from South Africa (under ESKOM).

2.2 Generation

5. In all ESIs, theoretically, vertical separation taunts for competition between generators. This is because it allows entry, therefore putting pressure for downward trend in prices, and contract terms. This means that it enhances contestability in the market. Generators compete to supply the transmission grid under long-term contracts. This offers insurance for both generators and the grid against risk. However, they have some risk in the sense that the contract holders are not the most efficient. Contracts are also complex due to their nature – specification and enforcement.

1. Baldwin and Cave (1999); Armstrong et all (1994).

2. Kenya suffered a major power rationing programme in 2000 due to drought.

6. Kenya separated its generation from transmission in 2000. As indicated earlier, this was after the drought which affected the predominant hydro-power supply. Prior to this, Kenya Power and Lighting Company (KPLC) generated, transmitted, distributed and supplied electricity. This was hydro and geo inputted electricity. To lessen the effects of the power rationing, several (4 in number) Independent Power Producers (IPPS) were commissioned to feed the national grid. All these IPPS were generating using diesel as an input as opposed to water. Further restructuring of the industry saw KPLC being vertically separated. The role of generation was left to Kenya Generating Company (KENGEN) and the IPPs while KPLC remained with all the other roles (transmission, distribution and retailing). It is worthy noting the KPLC and KENGEN are public companies.

7. The generating companies (gencos) supply to KPLC under long-term contracts. Although these may minimise the risks associated with spot/pool markets (i.e. spot price volatility and its complexity) the process of negotiating for these contracts has never faded away from the lime-light. The writer's position is that these contracts were negotiated at a time when the country was facing a crisis and therefore, the issue of competitive contract prices was not exhausted. Furthermore, the IPPS were aware of this and therefore they exercised their dominance; wouldn't you? This means that the procurement process was not competitive and that therefore, this inefficiency has continued to be passed to the consumer to date. Nevertheless, these contracts are about to end and there are plans to review the contract prices downwards[3].

8. Failure to have gencos reviewing these contracts, the best for the Kenya's ESI is vertical integration. This is because the system is small and secondly, social gains can be accrued since it eliminates double marginalisation (gencos and KPLC). Interestingly, the Sector's regulator (Electricity Regulatory Board: ERB) accrues its budget directly from levies collected by KPLC. This arrangement places the regulator under the risk of capture.

2.3 Transmission

9. As stated earlier, KPLC was left with the role of transmitting, distributing and supplying. The aim of this separation was to increase transparency in charges and hindering risk of investment in capacity being passed on to consumers as it is the case in vertically integrated system. Therefore, this arrangement was meant to encourage prudent investment: by allowing all generators access to the national grid.

10. In some Developed countries, competition has also been introduced in the supply function of ESIs. This means creating retail markets. This leads to inefficiency being reduced in generation because customers are free to choose the most efficient supplier. Therefore, it is difficult for distributors to pass on any uncompetitive contracts. However, the Kenyan case is a story of separating gencos and KPLC only. Gencos are not supplying KPLC competitively and therefore, it is very difficult to transfer any benefits to consumers.

11. To conclude on Kenya's ESI, vertical separation should have been based on potential market competition, which in turn should have depended on the size of the market, the nature of scale economies (taking into account our energy source: hydro) and the institutional design (KPLC and gencos). Lastly, vertical separation of the industry would have been deemed to be successful if it enables ESI adapt to new circumstances (changes in technology, fuel prices and so on) with minimal costs, prices or profits. Since Kenya's ESI was restructured there is no evidence of net cost savings or efficiency gains hence no improvement in the consumers' welfare. However, further restructuring in the industry is going on: the Government has already recruited experts to re-organise KPLC.

3. Ministry of Energy, G.O.K (2004).

3. Telecommunications

12. The question of whether a telephone utility is a natural monopoly has been studied empirically since the 1970's but it has never been resolved[4]. Nevertheless, pressure for reforms in telecoms come form the extraordinary rapid technical progress in equipment (digital switches, cellular phones, satellites, and fibre-optic sales), software (for programming switches, compressing and routing data, encryption, and billings and billings and so on) and the other services that these technologies ease. Donor conditionalities in Kenya have also been a driving force in carrying out reforms in this sector. However, reforms and competition cannot be introduced in the whole telephony industry. The most effective place to introduce competition is for the services provided over the network. However, network and service providers are interdependent and efficient Service delivery requires an efficient network. Also, investments in one may reduce the cost of the other[5].

3.1 Development of competition

13. There is no clear boundary for the natural monopoly in telecoms. It must be drawn, pragmatically, at the place where the efficiency gains of increased competition outweigh the benefits of integration. This varies with the size, sophistication, range of services (broadband vs. voice), and the rate of expansion of the system, as well as on regulatory constraints on the range of services that may be provided, degree of cross-subsidisation required and so on. Therefore, network operation and construction may be naturally monopolistic to a degree. That is, it would be waste of resources if different companies lay telephone wires in the same exchange area.

14. The supply or manufacture of apparatus or the supply of services over a network cannot be said to have this characteristic. Prior to liberalisation, Kenya Postal and Telecommunications Corporation (KP&TC) was the only provider of telecommunications, postal services and courier services in Kenya. Mobile telephone services were a preserve of the political elite: there is a story that mobile lines used to be issued in State House (the President's official residence)! And internet connectivity was never there. KP&TC used to manufacture its own and consumers apparatus in their plant in Gilgil, Kenya.

15. After liberalisation, KP&TC was unbundled into Telkom Kenya Limited (TKL) to deal with telecommunications, Postal Corporation of Kenya (PCK) to deal with mail services and the regulator was created: Communications Commission of Kenya (CCK). Gilgil manufacturing plant was also de-linked. All these firms were opened to competition. Nevertheless, TKL was given a five year monopoly in the provision of land lines in Nairobi and for provision of internet services (the so-called Jambonet). This arrangement was meant to accord TKL a grace period for re-organising itself before it is opened to competition. This was also due to the Universal service Obligation (USO). The period ended June, 2004 and two market players have already been licensed to provide Internet connectivity.

16. For provision of mobile telephony, there are two active service providers with a subscription of around three million compared to less than half a million land line operators. Another third mobile provider has been licensed but yet to operationalise. This has been the fastest growing industry in Kenya and a major source of government revenue currently. However, there has been a main regulatory problem in this service: the problem of setting efficient and agreeable access price (interconnectivity or otherwise termination charges) so that service providers can compete with undistorted cost-related prices. The problem of switching costs is also very prevalent and therefore competition does not put downward pressure on prices. To avoid this problem, CCK is already addressing the problem of switching costs by introducing number portability.

4. Shin and Ying (1992).

5. Newberry (1999).

17. Generally, privatisation and competition in telecommunication has resulted to enormous growth of entry and expansion of capacity. There is enormous competition in long-distance calls through internet. This has resulted to big rates reductions in the last three years. The above benefits have been coupled with more innovation and more development in new services which much international standards.

18. When we juxtaposition pre and post- liberalisation eras in Kenya, we can reasonably conclude that competition is crucial for providing telecoms benefits in terms of productivity growth, real cost and rates reductions. However, there is a problem of sustaining effective competition due to entry barriers caused by huge investment requirements, economies of scale, scope and density (critical mass). The country is also faced with a dilemma of trying to create competition, particularly in fixed lines, while at the same time expecting TKL to carry the USO. Fortunately, USO is effectively being provided by mobile via 'pay as you go' service. As stated, already there are more mobile phones than fixed lines in Kenya. Another concern, which also is expected to generate political heat, is the structure of TKL post liberalisation: do we try and sustain a national, locally owned TKL or allow ownership (controlling or significant shares) by major international partner.

19. Lastly, the writer opines that regulation in this sector has proved less necessary than for electricity, although CCK is more vibrant than ERB. This is for the reason that (a) there is rapid growth in demand from consumers with willingness and ability to pay; (b) there are lesser 'sunk' costs and switching options are available (for mobile telephony); and (c) there is much less strong USO that is, absence of concept of "right of all households" to have a telephone connection. For example, households can access phone via call box.

4. Railways

20. Although there is not much to write about, it is important to indicate that the process of concessioning Kenya Railways (KR) has already started. KR is more of a freight dominated rail system rather than passenger. The KR system is relatively small and it is a small component of transport services and compete (with difficulty) with road. Although the details of Concessioning are not yet finalised, there are indications that the process will involve (a) unbundling of tracks business, their maintenance and locomotives; (b) Build Own Operate and Transfer (BOOT) arrangement for the railway line to Southern Sudan and (c) for the areas where lines exist, its expected that they will be concessioned on Operate and Transfer (after 25 years) arrangement.

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Global Forum on Competition

ROUNDTABLE ON BRINGING COMPETITION INTO REGULATED SECTORS

Contribution by Joey Ghaleb (Lebanon)

-- Session I --

This contribution is submitted by Mr. Joey Ghaleb (Lebanon) under Session I of the Global Forum on Competition to be held on 17 and 18 February 2005.

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ROUNDTABLE ON BRINGING COMPETITION INTO REGULATED SECTORS

by Joey R. Ghaleb, Chief Economist
Ministry of Economy and Trade, LEBANON

1. Bringing competition into regulated sectors: the case of banks, insurance, telecommunications & electricity

1. Awaiting the new law and authority in charge of enforcing it, the few existing regulators are assuming both the technical and the competition control oversight role. Syndicates, orders, and even professional organisations are also regulating their practices and in many instances engaging or promoting anticompetitive practices. The role and mandate of the Ministry of Economy and Trade is limited given the constraints imposed by existing laws and the overall policy of support private sector initiatives without assessing fully the impact on the economy as a whole or considering consumer welfare. Just a couple weeks ago, the Lebanese Parliament ratified a new and modern consumer protection law which revamps the old archaic law and creates a new authority to protect consumers. This authority, also linked to the Ministry of Economy and Trade, will complement and enforce the upcoming competition authority.

1.1 Banks

2. Lebanon has a vibrant banking sector with over 60 banks (4mn population) regulated by a strong Central Bank and a Banking Control Commission. Mergers, pricing, and other regulatory measures are overseen, and for decades now, by the sectoral regulator. Moreover, the Association of Banks is a powerful lobby, led by 5 or 6 top banks, and an authority which influences interest rates and policy of commercial banks.

3. Introducing competition and "imposing" a new authority on this sector is proving to be a challenge especially that a law regulating bank mergers is operational giving the regulator and the council of ministers the right to approve mergers. A dialogue has been launched with the regular and the banking sector to agree on a mechanism that will serve both the interest of the sector but also the consumer and the potential entrant.

1.2 Insurance

4. The Insurance sector, relatively small compared to banks or to the region, is regulated by a young control commission linked directly to the Minister of Economy. And since the upcoming competition authority will be linked directly or indirectly to the same minister, we do not and we are not observing any major resistance from the regulator. A dialogue has also been launched with the Insurance Control Commission who has been operational for a few years only. Hence, carving a role for the competition authority in the sector is proving to be easier. Note as well that the sector is small in terms of volume of activity and thus less powerful as a lobby group.

1.3 Telecommunications

5. The sector includes a landline network owned and operated by the state, two mobile networks (previously private, established through a 12-year BOT license in 1992, turned into management contracts with state ownership), and a number of privately-owned internet and data providers.

6. A telecommunications law was passed in July 2002 which calls for an independent regulatory authority entrusted, among other things, to ensure a competitive environment and to regulate the sector as a

whole. The law calls for the establishment of "Liban Telecom," an entity which will own the landline network and has the right to get the third mobile license. Liban Telecom would be fully owned by the state at the start, later to be privatised through an Initial Public Offering and/or partially selling shares to an international strategic partner.

7. The designation of the members of the telecom regulator and the creation of Liban Telecom has been put on hold until now. The Government expects to set up the regulator in the first quarter of 2005 and formally establish Liban Telecom and hence offer a third mobile license.

8. Once in place, the regulator is expected to oversee competition within the sector but the language of the law is general and the relationship with a future competition authority remains unknown. Discussions with officials from the ministry of telecommunications have advanced and a memorandum might be signed to divide the tasks between the two authorities. The situation in this sector is not clear given that there is a regulator "on paper" and a ministry interested in strengthening its role however this regulator has not been tested yet as the one in the banking sector. Moreover telecommunications is a cash-cow for state treasuries and thus clearly defining the relationship between the regulator and the authority remains a challenge.

1.4 Electricity (power sector)

9. Utilities in Lebanon such as electricity and water are by and large quasi-private, and/or are moving in the direction of privatisation. The Electricité du Liban (EDL) is a public institution under the tutelage of the Ministry of Energy; however it is not the only body in-charge of generating power as concessions have long been awarded to private enterprises. An electricity law was passed in September 2002 and once EDL is restructured and the operational losses curbed, the privatisation process will be launched and an independent regulatory body set up. The timeframe of power sector is less advanced than the telecom sector with a regulatory body still not formed and hence no clear mandate is envisioned for it.

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Global Forum on Competition

ROUNDTABLE ON BRINGING COMPETITION INTO REGULATED SECTORS

Contribution from Pakistan

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BRINGING COMPETITION INTO REGULATED SECTORS

1. In the era of the sixties, Pakistan was pursuing the policy of economic development through the private enterprises system. As a result, industrialisation got a boost by the initiative of the private sector. Major industries were set up in the textile and engineering sectors. Several big industrial groups were in a position to abuse their economic power. It was, therefore, strongly felt that absolutely unregulated private sector businesses tend to result in concentration of wealth, creation of monopolies and formation of cartels which are detrimental to the consumers interest and social well being.

2. The Government constituted in 1963 an Anti-Cartel Laws Study Group to carry out a detailed and in-depth study into trade, commerce and industry of the country and their market behaviour. The group formulated a comprehensive report, based upon which a draft anti-monopoly and anti-cartel law was published for public opinion in 1968-69. Consequently, the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 (MRTPO), was promulgated on February 26, 1970 and enforced with effect from August 17, 1971. Simultaneously, an independent body, the Monopoly Control Authority (MCA), was constituted to administer this law.

3. The Economic Reform Order of 1972 resulted in the nationalisation of thirty-two large scale manufacturing units including chemicals, automobiles, iron and steel, petrochemicals, heavy and light engineering, oil refining, cement and fertilisers. All heavy industry was placed under the public sector. The Board of Industrial Management (BIM) was created with ten corporations and thirty-two nationalised industries under its control. Subsequently, life insurance, banking, vegetable oil processing, cotton ginning, grain milling, and oil distribution companies in the private sector were also taken under state control. The private sector industry was further placed under pressure through introduction the Price Control and Prevention of Profiteering and Hoarding Act 1977.

4. In the equity market the main policy impediment was the entry barrier put up by the Controller of Capital Issues, who had to approve every issue, and in addition, set the issue price. A company could only approach the financial markets to raise funds when the Government had approved its project. In addition, public sector financial institutions, the insurance companies and the Development Financial Institutions (DFIs) were all major players in the equity market giving the government effective control. This dominance was compounded by the fact that there was no competition from foreign institutional investors.

5. All the nationalised enterprises enjoyed exemption from the application of competition law under the provisions of Section 25 of MRTPO. This retarded competition.

6. In 1976, the Government promulgated the Foreign Private Investment (Promotion and Protection) Act to ‘promote’ and ‘protect’ foreign private investments in the country. The Law provided protection to foreign investors with respect to their ‘industrial undertakings’ established in Pakistan in or after September 1954.

7. In 1981, the Monopoly Control Authority and the Securities and Exchange Authority were combined and placed under the umbrella of a newly created organisation – the Corporate Law Authority (CLA). The Chairman and Members of the Authority were concurrently notified as Chairman and Members of Monopoly Control Authority for performing functions under MRTPO. Under this arrangement, the other corporate laws, viz Company Law, Securities and Exchange law, Modaraba Law, enjoyed first priority.

8. Another feature of industrial policy was that permission was required from the government before the establishment of large-scale industries. These included various kinds of restrictions and many other steps such as investment licensing, import restrictions on capital and intermediate inputs, location clearances, and the pace of industrial investment. In 1984, the number of industries requiring these licenses was reduced and by the year of 1992, all these restrictions were removed.

9. De-regulation and privatisation policy was started in 1988. The financial sector was deregulated and leading banks and financial institutions have been sold to employees and private parties. With the economic liberalisation, new banks, financial institutions, leasing companies, housing finance, investment companies and foreign banks, have come up, which has created a competitive milieu.

10. The Capital Issues (Control and Continuance Act, 1947), was repealed in 1992 leading to freer pricing issues. The foreign investors as well as domestic private sector mutual funds have been attracted to trade in the equities, increasing competition on the buyer side of the equity market.

11. In the 90's, public enterprises in manufacturing, banking, telecommunication, and electricity generation were divested. Ninety industrial units, two banks, twelve percent of the shares in telecommunication, ten percent of the shares in PIA, and one thermal power station were divested.

12. A high powered Privatisation Commission and later a Ministry of Privatisation was set up and the Privatisation Commission Ordinance, 2000, was promulgated to accelerate the process of privatisation. Assets amounting to Rupees 60.9 billions have been sold to the private sector till 2000-2001. The sick units were reviewed for the purpose of rehabilitation and/or closure.

13. Sectoral Regulatory authorities were established during 1996 onwards. These include Pakistan Telecommunication Authority, National Electric Power Regulatory Authority (NEPRA), Oil & Gas Regulatory Authority (OGRA), etc.

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Global Forum on Competition

ROUNDTABLE ON BRINGING COMPETITION INTO REGULATED SECTORS

Contribution from Poland

-- Session I --

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JT00178517

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ROUNDTABLE ON BRINGING COMPETITION INTO REGULATED SECTORS

1. Introduction

1. Due to the dynamics of the transformation process in Poland the reform of the sectors which we call regulated were undertaken after macroeconomic stabilisation of the whole economy. That is why the liberalisation of the network monopolies started up in the mid–90–ties and the essential elements of the reform such as privatisation or deregulation are still being continued. There is a wide-spread awareness in Poland as to the necessity of the farther liberalisation and its significance for the development of competition in these sectors. One should also mention that liberalisation of the markets that were state monopolies in the past is one of the main objectives of the Lisbon Agenda and Poland being a member of the EU takes part in the its realisation.

2. Network monopolies in Poland are regulated by sectoral acts but in parallel they come under the antimonopoly legislation. Due to the market power of the former monopolists which is still significant and anticompetitive practices they adapt the antimonopoly office often intervenes in these sectors. Creation of the separate sector regulators for telecommunication, energy and rail transport has not changed the fact that the Office for Competition and Consumer Protection (OCCP) is the only administrative body responsible for realisation of antimonopoly legislation (which means it counteracts the abusing of dominant position and anticompetitive agreements as well as possible anticompetitive mergers).

3. Procompetitive changes in regulated sectors are necessary – despite the reforms incumbent companies in telecom, energy or rail transport sectors are still dominant and own most of the infrastructure due to which their market power and potential anticompetitive behaviour are threat to the development of the competition on the market.

4. Engagement of the OCCP in bringing competition into regulated sectors takes place through:

a) counteracting anticompetitive practices on the markets,
b) giving opinions on the drafts of legal acts concerning the regulated sectors with the aim of including solutions fostering competition,
c) strengthening cooperation between the OCCP and sector regulators.

2. Cooperation between OCCP and regulators

5. There are a few institutions in Poland now that act as regulators. Scope of their powers is restricted to one or several sectors of the economy that used to be state monopolies. The abovementioned institutions are: The Energy Regulatory Office, Office of Telecommunications and Post Regulation, The Civil Aviation Office and the Office of Rail Transport Regulation. The OCCP standing is that strengthening cooperation with regulators will favour effective fighting infringements of competition on the markets concerned.

6. Regulators have substantial impact on creating competition on the markets they regulate. That is why it is so important for competition policy to better coordinate activities of the OCCP and regulators.

Having that in mind Office for Competition and Consumer Protection is going to make agreements precising the details and rules of that cooperation. The subjects of the agreements would be first of all:

- organisational aspects of concurrence in situations envisaged in the sectoral acts,
- procedures of cooperation in concrete cases,
- principles of exchange of information and using of data collected.

3. Examples of cases dealt by the OCCP

3.1 Abuse of dominant position, energy sector

7. The proceedings concerned a local monopoly supplier of electric energy – ZE Kraków. It has been determined that in relations with its customers it used a contract form containing provisions imposing onerous conditions on individual customers. The rights and obligations of the parties concerning the mode and terms of settlement were regulated by a tariff, which was not provided to the customers, and whose change did not require any amendments to the energy supply contract. Moreover, ZE Kraków did not comply with requirements pertaining to quality, reliability and continuity of supplying and receiving energy, as well as responsibility of the parties for breaching a contract. Those requirements are unequivocally set out in legal provisions regulating activities of electric energy providers.

8. Conduct of ZE Kraków was considered anti-competitive and a prohibition decision was issued by the President of the Office. It is noteworthy, that the undertaking amended contested provisions of the contract and put them into practice even before the decision.

3.2 Abuse of dominant position, telecommunication sector

9. The proceedings concerned Telekomunikacja Polska SA (TP SA), a national incumbent, holding a dominant position on a number of telecommunication services markets. Following numerous complaints by TP SA's customers, explanatory proceedings concerning unilateral introduction of changes to conditions regulating provision of ISDN services by TP SA were initiated by the Office.

10. The aforementioned changes included withdrawing some tariff plans and moving their users to other, less favourable ones. The company also misinformed its customers, as in a document announcing changes to conditions of contract, it mentioned neither legal basis for its action, nor possibility of terminating the contract, creating thus an impression, that its actions cannot be lawfully contested, as they are in accordance with the provisions of the contract.

11. The proceedings showed a clear dominance of TP SA on the Polish ISDN services market, mainly being a result of the fact, that the undertakings enjoys monopoly over direct access do customers, being the only last mile operator in Poland. Its competitors are thus unable to provide ISDN services directly to their customers.

12. President of the Office decided that TP SA, inserting into a contract provisions stating that a change to services' prices does not constitute a change to the contract and does not require the consent of the other party, imposed unfair and unlawful condition on its customers, abusing thus its dominant position on the Polish ISDN services market. In consequence, a prohibition decision with a 7 million PLN (ca. 1,7 EUR) fine was issued.

3.3 Abuse of dominant position, rail transport.

13. On 30th June 2003 the President of the OCCP launched an investigation against the PKP Cargo S.A. ('PKP Cargo') – the dominant undertaking on the Polish market of rail freight transport. The case has been initiated upon the complaint from Sped Pro S.A. ('Sped Pro') –forwarding company operating on the market of rail freight transport. In its complaint Sped Pro claimed that the PKP Cargo abused the dominant position it has on the aforementioned market, by applying a system of discriminatory rebates, in its relations with forwarders.

14. The relevant market in the aforementioned investigation has been identified as the market for the services of freight transport by rail in Poland. Other means of transport has been excluded from the scope of the relevant market definition as no substitution has been observed between them and the rail transport. The PKP Cargo possessed a 70% of the relevant market, therefore it was considered as an entrepreneur with a dominant position.

15. In due course of the investigation the charges brought up by the Sped Pro have been confirmed.

16. In the long term contracts it signed with the forwarders, PKP Cargo applied different rates of rebates to *similar* undertakings (turnover and the amount of freight transported were analysed in order to determine the degree of *similarity* between the undertakings). In addition, PKP Cargo differentiated the conditions under which it was possible for the forwarders to change the declared[1] amount of freight to be transported via PKP Cargo in a given quarter or year. Finally, in its contracts with the forwarders the PKP Cargo, excluded certain railway stations and certain receivers from the list of destinations available to the forwarders.

17. On 31st December 2004 the President of the OCCP issued a decision in which he has found all above mentioned practices to be in breach with act of 15th December 2000 on competition and consumer protection. The President issued a cease and desist order and imposed a fine of EUR 5.000.000 on the PKP Cargo.

NOTE

1. In their contracts with PKP Cargo the forwarders obliged themselves to provide the PKP Cargo with a defined volume of freight to be transported during a given period (usually a quarter or the year) The change in the declared quota was possible only after fulfillment by the forwarder of some conditions. Those conditions were set differently by PKP Cargo in case of similar undertakings

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Global Forum on Competition

ROUNDTABLE ON BRINGING COMPETITION INTO REGULATED SECTORS

Contribution from Russian Federation

-- Session I --

This contribution is submitted by Russian Federation under Session I of the Global Forum on Competition to be held on 17 and 18 February 2005.

JT00176834

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ROUNDATBLE ON BRINGING COMPETITION INTO REGULATED SECTORS

1. In Russian Federation spheres of Natural Monopolies activity relate to regulating economic spheres. Its activity, besides sector legal acts, is regulating by the Law "On Natural Monopolies", which determines the basis of the federal policy concerning natural monopolies subjects independently of its sector specificity.

2. The Law "On Natural Monopolies" determines spheres of natural monopolies subjects' activity. Development of competition in the following spheres is impossible or economically inexpedient in up-to-date conditions:

- transportation of electricity power by network, as well as oil and gas by pipeline;
- services of ports and airports;
- basic telecommunication services at local level;
- railway transportation services;
- post and telegraph services.

3. The Law settles allowable methods of state regulating, which should be applied regarding the pointed economic subjects.

4. These methods are the following:

- price regulating, realizing by price (tariff) determining (fixing) or determining of its maximum level;
- determining of consumers to be obligatory served,
- and (or) determining of the minimum ensuring in case of impossibility to completely providing with goods, producing (realizing) by subjects of natural monopolies.

5. The Law also stipulates the possibility of application of the antimonopoly legislation with respect to the subjects of natural monopolies in cases when its activities brings or can bring to infringement of counteragents' interests, as well as during control over economic concentration, which is realized with participation of the subjects of natural monopolies.

6. Besides the Law determines functions and authorities of the bodies for natural monopolies' regulation, and defines the procedures of taking decisions and appealing of decisions taken by the body decisions.

7. At present time three federal bodies of executive powers are realizing provisions of the Law "On natural Monopolies". These bodies are independent from regulating economic operators on issues of organisation structure, finance, legal structure and decision-making. These bodies are directly submitted to the Chairman of the Government of the Russian Federation. They are:

- Ministry for economic development and trade of the Russian Federation, responsible for elaboration of state policy in the sphere of natural monopolies;

- Federal Service for Tariffs, realizing functions of price (tariffs) determining (fixing) in the spheres of natural monopoly subjects activity and realizing control regarding prices (tariffs) determining (fixing) and its' application in pointed spheres. This Service has the right to set the price by means of direct indication of the concrete price or determining of the upper limits, extra charge or maximum coefficient of price changes;

- Federal Antimonopoly Service (FAS Russia), realizing functions of control and supervision over:

  – Activities, which realizing with participation or with regard to natural monopolies subjects, which can infringe goods consumers' interests, taking in mind that these goods are regulating, or activities, which restrain economically sound transition of the appropriate commodity market from condition of natural monopoly to condition of competition market;

  – Observance of natural monopolies subjects' requirements on indiscrimination;

  – Observance of requirements on obligatory concluding of the treaties by natural monopolies subjects, Est.

8. Thus, activities of natural monopolies subjects, based of provisions of the Law "On Natural monopolies", do not removed from the sphere of application of the Law "On Competition and Restriction of Monopolistic Activity at Commodity Markets" (the Law on competition) and realisation of the FAS Russia' functions in the sphere of regulation of their activity realizing in the frameworks of the Law on competition.

9. The accent of provisions application of the Law on competition with amendments of 2002 regarding the natural monopolies subjects, was removed from reacting upon being made infringements to preventing the establishment of discriminative conditions by requiring the fulfillment of economic, technical, informative and other requirements.

10. Furthermore federal antimonopoly body realizes control over activity of the bodies of state power and municipal bodies with the view to bar restriction of competition and infringement of interests of economic subjects when passing acts or realizing activities. It also concerns the bodies for regulating of activity of natural monopolies subjects.

11. Institutional structure of the Russian federal antimonopoly body allows to realize its' authorities at all levels (federal, regional, local), because at present time within the system of Russian antimonopoly bodies, Central body, as well as Regional offices, is controlling the situation at markets of fuel-energy complex, transport and communication.

12. Experience of application of the antimonopoly legislation in the spheres of natural monopolies shown, that the most frequent violation by natural monopolies subjects is abusing of dominant position.

13. Thus, in 2003, 3269 applications concerning abuse of dominant position by economic entities at commodity markets were received. More than 70 % of the applications were on abusing of dominant position at markets of base fields of economy such as markets of electricity power and heat, gas, oil and oil products, communicative services, railway transport, sea and river transport, activity of seaports and river

ports, motor transport and air transport, as well as airports activity. 59% of applications concern abusing of dominant position by natural monopolies in the electricity power and heat sphere.

14. Treaties made with participation of natural monopolies subjects have significant place in antimonopoly body' activity on control over economic concentration.

15. At the same time about 10% of the treaties are agreed by federal antimonopoly body only on conditions those requirements on providing of competition is observed. These requirements have as behavioral, so structural nature. Such requirements for example were put forward by public corporation "Svyazinvest" during its reorganizing and establishing of seven interregional communicative companies. These requirements were aimed at creation of equal conditions for telecommunicate operators that are the members of the group of persons of public corporation "Svyazinvest", as well as non members. Establishment of the public corporation "Russian Railways" was agreed under terms of creation of equal conditions for companies, those are included into group of persons of Russian public corporation "Russian Railways" and are not included. Moreover, removing of the enterprises, those are not connected with transportation process, out of the public corporation "Russian Railways" during the fixed period, stipulated for the agreement.

16. At the same time FAS Russia activity in the sphere of natural monopoly regulation is not only realizing of the mentioned functions. Existing system of the federal state power and FAS Russia' authorities provide participation of the Russian antimonopoly body in all stages of forming and realisation of federal policy concerning regulation in the spheres of natural monopolies in close collaboration with another regulator.

17. FAS Russia has the right of "legislative initiative" on issues of natural monopolies regulation. This right allows to FAS Russia to participate in the process of elaborating the reforming programs for natural monopolies' fields of economy and legislative providing to realize these programs in order to provide pro-competitive nature of such reforms, as well as in improving of regulating methods with the view to minimize its limiting influence on competition development.

18. Besides FAS Russia also participates in process of price regulation of natural monopolies subjects' activity. One person of FAS Russia authority is the member of Directorate of the Federal Service for Tariffs. Directorate is collegial body, established for decision-making on price (tariffs) definition (fixing) and to control in the spheres of natural monopolies subjects' activity.

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Global Forum on Competition

ROUNDTABLE ON BRINGING COMPETITION INTO REGULATED SECTORS

Contribution from Thailand

-- Session I --

This contribution is submitted by Thailand under Session I of the Global Forum on Competition to be held on 17 and 18 February 2005.

JT00178071

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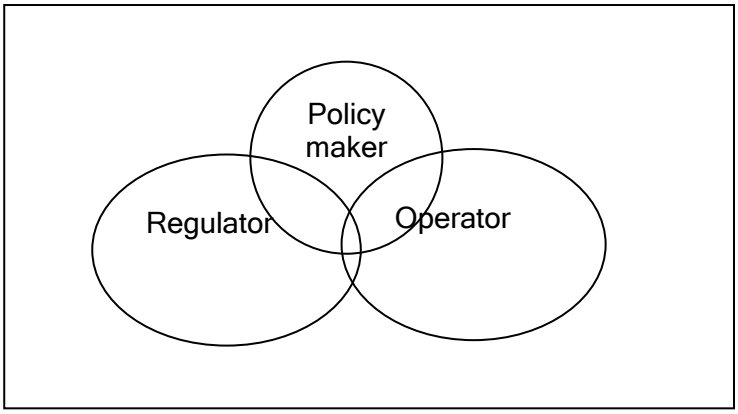
BRINGING COMPETITION INTO REGULATED SECTORS: FACT FROM THAILAND

1. Introduction

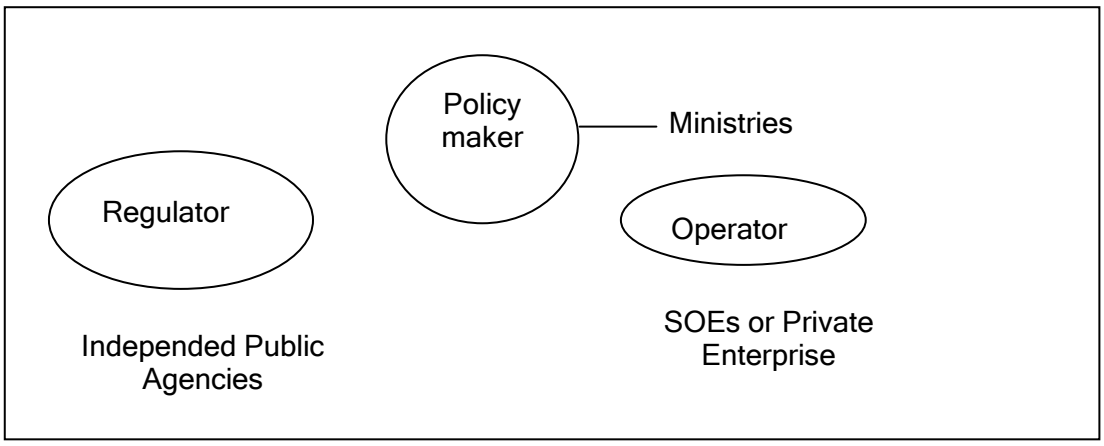
1. It has been recognised that Thailand just introduced the Competition Act in 1999. The Competition Act of 1999 is the legislation which provided Thailand with its first explicit competition policy. The main key of competition provision is to supervise conduct control of business practices for example abuse of dominant position, Mergers, Concerted Practices, and Unfair Trade Practices. During this early stage, Thai government has been bringing competition into regulated sector through the privatisation policy.

1.1 The first Step: Reformation of the roles & structures of the regulators

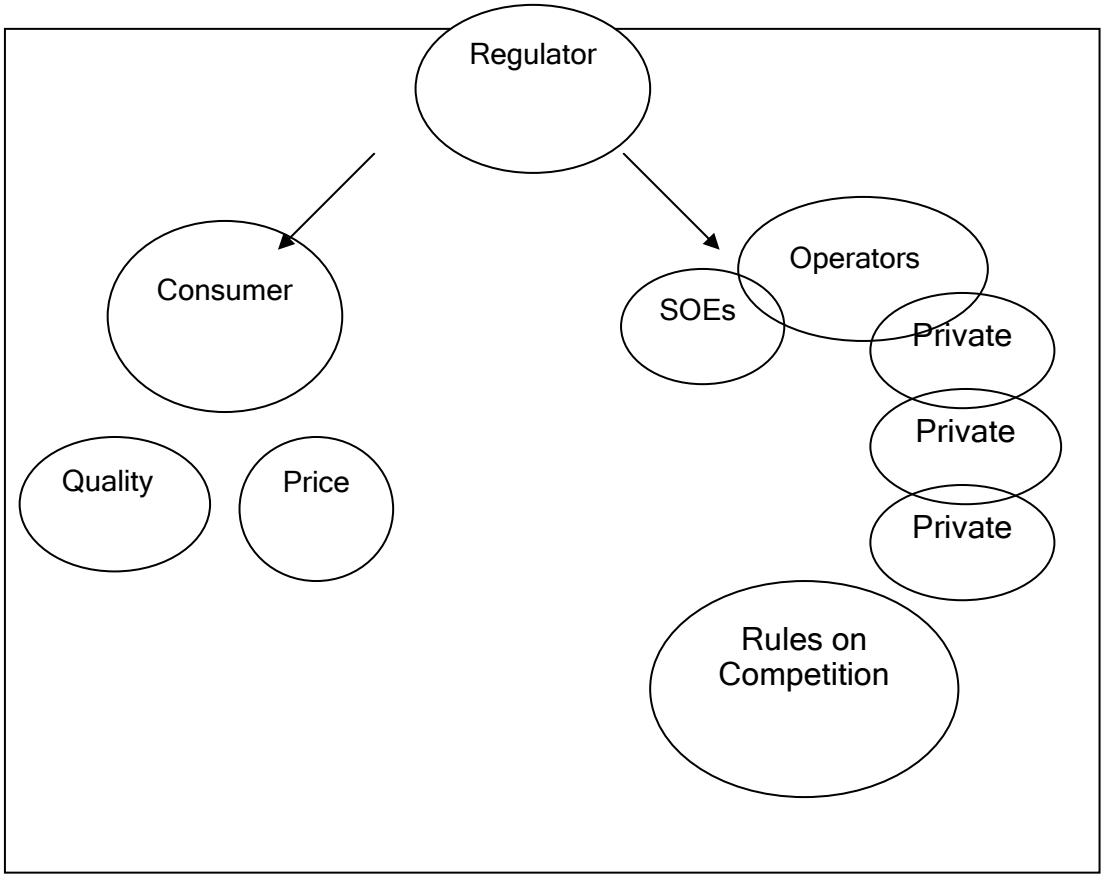
2. Before reformation, the regulators are responsible for policy making, regulation and operation. It means that the government acts as the policy maker, the regulator and the operator through SOEs. The figure I shows the unified roles of the government.



3. At present, the government clearly separates all the roles from each others. The ministries take the responsibilities of policy making. The independent public agencies take the responsibilities of regulation and the state owned enterprise take the responsibilities of business operation in competition with private enterprises. The figure II shows the separation of policy making, regulation and operation.



4. Independent Sector Regulator have a mechanism for the systematic control of monopoly power with a view to preventing corporatised entities from abusing monopoly power to the detriment of the consumer and other operator. The figure III shows the of mechanism Independent Sectors Regulator.



1.2 The second Step: The Industry-Specific Act prescribe the fair competition

5. The provisions of the Industry-Specific Act stipulates that the industry is subject to the Trade Competition Act. For example, The Telecommunications Business Act 2001 Section 21 prescribes that. *"Telecommunications business, in addition to being under the law on trade Competition,* The NCT shall determine specific measures in accordance with the nature of the telecommunications *business in order to prohibit the licensee to carry out any action that is a monopoly or that decreases or limits competition in the telecommunications business service* in the following makers : (1) Subsidy of services (2) Taking over of business in the same arrive (3) Unfair usage of market power (4) Protection of small operators" or sections 36 of the *Draft Bill on Broadcasting Business prescribes that. "Sound and television broadcast businesses in addition to being under the law on trade competition,* in the case where the NBC deems appropriate to determine specific measures in accordance with the business, the *NBC has the power to issue announcement prohibiting the licensee to carry out any action that is a monopoly or that decreases or limits competition in the sound and television broadcast business.*

6. Or the Draft Bill on Electricity and Natural Gas Business which state in Section 11 "The Electricity and Natural Gas Business Commission shall have duties and powers as follows: …….. (4) *Determine measures for the promotion of competition and prevention of abuse of monopoly power*……." And Section 57 "The Controlled Energy Business Licensee *shall not carry out any action*

that is an abuse of monopoly power or that reduces competition or limits competition in controlled energy business service as provided in the Trade Competition Act 1999 except where the Commission has granted approval.

2. Conclusion

7. This information shows the efforts of Thai government to carry out positive and meaningful actions of bringing competition to regulator sectors in order to promote greater competition with in the regulated industries and fair competition in the market place.

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Global Forum on Competition

ROUNDTABLE ON BRINGING COMPETITION INTO REGULATED SECTORS

Contribution from the United States

-- Session I --

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JT00178380

English text only

BRINGING COMPETITION INTO REGULATED SECTORS: THE LEGAL PROFESSION SUBMISSION OF THE UNITED STATES

1. Introduction

1. Professions in the United States are often subject to laws and regulations specifying who may enter the profession and what types of minimal competency requirements must be satisfied before the individual can receive a license. The legal profession, as noted in the section on professions in OECD's Background Note by the Secretariat for this session, is no exception. The Federal Trade Commission ("FTC") and the Antitrust Division of the Department of Justice ("Justice Department") (collectively, the "agencies") have a longstanding interest in assessing the impact of such restrictions on competition.

2. In the United States, the fifty states, rather than the federal government, regulate the legal profession. One aspect of their regulation is to define through "unauthorized practice of law" ("UPL") statutes those activities that are reserved for lawyers. While almost all states (with the exception of Arizona) have statutes that purport to define the practice of law, these UPL statutes tend to be vague in scope and contain broad qualifiers. For example, the Texas UPL statute states that "the definition in this section is not exclusive and does not deprive the judicial branch of the power and authority under both this chapter and adjudicated cases to determine whether other services and acts not enumerated may constitute the practice of law."[1] These types of open-ended statutory definitions give courts and bar associations scant guidance when they attempt to apply UPL statutes to specific facts.

3. There are four primary actors involved in such regulation: state bar associations (private organizations of lawyers, not state agencies); state bar agencies (which formulate rules for court approval), state legislatures (which pass laws defining the profession of law); and state courts (often the supreme, or highest, courts of each state). Generally, the highest court in a state has the power to regulate the practice of law within the state, often through authority to promulgate legal practice rules or interpreting state statutes that define the practice of law. Often the highest court in a state oversees the rules of professional conduct, including the definition of the practice of law. The definition of the practice of law determines the acts that are considered legal practice as well as the individuals who can perform them, i.e., only state certified attorneys.

4. UPL statutes prevent non-lawyers from competing with lawyers in a variety of services. UPL statutes and regulations may be justified when excluding non-lawyers from offering a particular service when there is a clear showing that it advances an important consumer protection objective and the benefits to consumers outweigh the harms created by the reduction in competition. The general justification for excluding persons not admitted to the bar from the practice of law is the protection of the public, not protection of lawyers from competition. However, at times, state UPL provisions have also been used to prohibit non-lawyers from offering professional services that are not legal in nature, such as performing real estate closings without rendering legal advice, or from providing certain types of services that may nominally be legal services, but that some non-lawyer professionals are equally qualified to provide, such as tax advice.[2]

2. FTC and Justice Department Efforts to Promote Competition

5. The agencies have become increasingly concerned about efforts to prevent non-lawyers from competing with attorneys in the provision of certain services through the adoption of overly broad UPL opinions and laws by state bar associations, courts, and legislatures. Since 1996, the agencies have worked to address these concerns principally through advocacy efforts. The antitrust agencies jointly authored a series of advocacy letters opposing laws, regulations, and other proposals that would broaden the definition of "unauthorized practice of law" in ways that would foreclose competition from other professionals in rendering particular services.

6. The agencies have been concerned particularly about attempts to restrict non-lawyer competition in real estate closings.[3] In the majority of states, non-lawyers compete with lawyers to provide real estate closing services. However, in the last few years, several state bar associations and legislatures have sought to adopt opinions that declare real estate closing services to be the practice of law, and thus prevent non-lawyers from closing real estate transactions. The agencies use three primary tools to convey their arguments in this area, depending on the audience. The two primary advocacy instruments are letters addressed to the bar association or legislature and legal briefs before the state court. Both are often announced by a press release that summarizes the facts and arguments to the public, at times attracting news media attention in the local jurisdiction. While the letters and briefs contain similar arguments, briefs are more formally structured to match the rules of the court, containing relevant cites to past cases in the jurisdiction. For the purposes of this paper, the aspects described below are similar for both the advocacy letters and briefs.

7. In addressing these concerns to state legislatures or bar associations, the agencies encourage competition through advocacy letters and *amicus curiae* briefs filed with state supreme courts. Through these filings, the agencies have urged the American Bar Association and the Indiana State Bar Association, as well as the states of Virginia, Rhode Island, Kentucky, North Carolina, Georgia, West Virginia, Ohio, and Massachusetts to reject such restrictions on competition between lawyers and non-lawyers.[4] In addition, the Justice Department has challenged in court attempts by bar associations to restrain competition from non-lawyers,[5] and the FTC has challenged anticompetitive restrictions on certain business practices of lawyers.[6]

8. Although the agencies' advocacy efforts usually focus on policy-makers, the agencies have also responded to requests for comment from private bodies that propose model UPL statutes and regulations. In December 2002, for example, agencies sent a joint letter to the American Bar Association's Task Force on the Model Definition of Unauthorized Practice of Law, which had drafted a definition of unauthorized practice of law for consideration by state legislators and regulators. The letter suggested that the proposed definition is unnecessarily broad, citing FTC and Justice Department experience with uses of UPL to foreclose competition in real estate closings and other arenas. The letter also noted than an overly broad definition of UPL could prevent consumers from using popular software programs for writing wills and preparing other legal documents, since these programs could be considered rendering legal advice if they provide suggestions in response to information input by the customer.[7] The letter also explained that an overly broad definition of UPL could prevent a wide variety of non-lawyer advocates from competing with lawyers to give legal information and resolve problems for consumers.

2.1 Determining When Competition Benefits Consumers

9. The Justice Department and the FTC urge policy-makers to consider whether lawyer/non-lawyer competition is in the public interest. The antitrust agencies recognize that there are circumstances requiring the knowledge and skill of a person trained in the law, but nonetheless believe that consumers generally benefit from competition between lawyers and non-lawyers in the provision of many services. The agencies argue that prohibitions on the unauthorized practice of law should serve the public interest. An inquiry into the public interest, however, involves not only assessing harm that consumers may suffer from allowing non-lawyers to perform certain tasks, but also consideration of the benefits that accrue to consumers when lawyers and non-lawyers compete.[8] If the antitrust agencies determine that the proposed UPL statutes will harm competition, they engage in efforts to educate decision-makers about possible anticompetitive effects.

2.2 The Content of the Advocacy Letters

2.2.1 Overall Purpose

10. The joint competition advocacy letters or briefs submitted to courts, begin with a clear articulation of the antitrust agencies' interest and experience in promoting competition in all sectors of the American economy. The antitrust agencies also emphasize their foremost concern in evaluating regulation – consumer welfare. Overall, the letters or briefs provide a clear, single-minded consumer-focused message. Restrictions on competition generally are considered harmful to consumers. Accordingly, such restrictions are justified only by a clear showing that they are necessary to prevent significant consumer harm and are narrowly drawn to minimize its anticompetitive impact. Without a showing that a practice harms consumers, a restraint on competition is likely to hurt consumers by raising prices and eliminating consumers' ability to choose among competing providers, without providing any countervailing benefits.

11. After the initial statement of interest, the letters or briefs then address the specific proposed change to the definition of the practice of law that they are responding to and set out the appropriate standard under which to evaluate the change – that prohibitions on the unauthorized practice of law should serve the public interest. The inquiry into the public interest involves not only assessing harm that consumers may suffer from allowing non-lawyers to perform certain tasks, but also consideration of the benefits that accrue to consumers when lawyers and non-lawyers compete. The antitrust agencies advocate that decision makers should balance the harm that would be caused by banning non-lawyer services against the harm that might be caused by continuing to allow them. The advocacy letters seek both to demonstrate the harm to consumers when competition is reduced and expose the weaknesses of the argument that UPL restrictions are needed to protect consumers at real estate closings.

2.2.2 Applying the Standard – Touting Benefits of Competition

12. After setting out the public interest standard, and explaining that the balance should focus on harm and benefits to consumers, the letters then address how the new provision will affect consumers. Here, the procompetitive message is that consumers generally benefit from lawyer/non-lawyer competition in the provision of real estate closing services. Restrictions on such competition are not in the public interest because, when they unnecessarily limit competition between lawyers and non-lawyers, they likely cause more harm to consumers. Specifically, the letters outline the likely consequences of the UPL restrictions. First, such restrictions force consumers who would not otherwise hire a lawyer to do so.

Businesses and individuals that rely on non-lawyers for advice and information related to real estate closing services and other types of services would be required to hire attorneys instead. Since the cost of retaining an attorney for those same services is often higher, this is a demonstrable harm to consumers in the form of higher costs. The letters cite evidence from studies in other jurisdictions that suggest that the use of non-lawyers in various states provides a lower cost alternative for consumers.[9] Second, by eliminating competition from non-lawyers, UPL restrictions likely increase the price of lawyers' services because the availability of alternative, lower-cost non-lawyer service providers will no longer be a threat. Consequently, even consumers who would otherwise choose a lawyer over a non-lawyer would likely pay higher prices if the proposed rule were adopted. For example, in several letters, the agencies have cited findings by the New Jersey Supreme Court that real estate closing fees were much lower in southern New Jersey whether or not the transaction included a lawyer, where non-lawyer settlements were commonplace, than in the northern part of the state where lawyers conducted almost all settlements.[10]

2.2.3 Applying the Standard – Addressing the Offered Justifications

13. Next, the letters turn to the offered justifications for the UPL restriction. The lawyer proponents of UPL restrictions often argue that regulation is necessary to protect consumers from inferior non-lawyer services. To this argument, the agencies answer that 1) the marketplace is likely to limit the ability of non-attorneys to provide shoddy service or otherwise take advantage of consumers, 2) there is no evidence from other jurisdictions of widespread harm due to non-lawyers performing non-legal real estate closing services, and 3) there are less competitively restrictive means to protect consumers than an outright ban on non-lawyer services. The letters directly address the justification put forth by the state bar association, state bar agency, or legislature that has proposed the restriction. Often, the advocates for the restriction have not provided any factual evidence demonstrating that consumers are actually hurt by the availability of non-lawyer real estate services. Indeed, the failure to cite any instances of actual consumer injury from non-lawyer real estate closings undercuts the professed consumer protection arguments in favour of the UPL restriction. The antitrust agency letters argue that other states and academics who have examined the issue have routinely failed to find evidence that allowing non-attorneys to perform real estate settlement functions results in consumer harm.[11]

14. The antitrust agencies argue that sweeping restrictions on competition be justified by a credible showing of need for the restriction and require that the restriction be narrowly drawn to minimize its anti-competitive impact. Part of the advocacy effort against the adoption of anticompetitive UPL restrictions related to real estate closing is that consumers can be protected by measures that restrain competition less than a complete ban on non-lawyer settlements. In response to advocacy efforts from the antitrust agencies and others, Virginia, confronted with similar issues in 1997, adopted a statute that permits consumers to choose lay settlement providers, which are now regulated by the state. Hence, Virginia consumers continue to have the benefits of competition, including lower-cost settlements. In another example, the New Jersey Supreme Court has required written notice to consumers of the risks involved in proceeding with a real estate transaction without an attorney. This measure permits consumers to make an informed choice about whether to use non-lawyer closing services.

3. Conclusion

15. The agencies' efforts against unnecessary competitive restrictions on the unauthorized practice of law related to real estate services and other kinds of services emphasize consumer choice and the benefits that lead to reduced prices and better services. Indeed, the letters and briefs acknowledge that the

assistance of a licensed lawyer at closing may be desirable, and consumers may decide they need a lawyer in certain situations. The letters do not express a preference for either lawyer or non-lawyer services, but rather focus on the benefits of competition between the two choices. The overall theme of the UPL efforts matches the overall message of any antitrust advocacy that seeks to bring competition into regulated sectors: consumers benefit immensely from competition among different types of service providers. Accordingly, the UPL efforts seek to prevent unnecessary competitive restrictions that would deprive consumers of the ability to choose to use a non-lawyer and are likely to impose higher closing costs on consumers, who would no longer be able to reap the benefits of competition from non-lawyers.

ANNEX A

1. Examples of Joint Justice Department-FTC Advocacy Efforts to Prevent UPL Regulations that Restrict Competition

1.1 Kentucky

In 1981, the Kentucky Bar Association, the state bar agency, approved an opinion that held that non-lawyers conducting a real estate closing did not engage in the unauthorized practice of law. This allowed Kentucky consumers to choose to use a non-lawyer closing agent. However, in 1997, the KBA's Unauthorized Practice of Law Committee drafted an opinion that would have prevented non-lawyers from competing with attorneys in providing real estate closing services. The Justice Department and others submitted comments opposing adoption of the rule on grounds that it was anticompetitive and also unnecessary to protect the public. In November 1997, the Board of Governors of the KBA declined to adopt the opinion. But again, in the spring of 1999, a revised version of the restriction was presented to the Board of Governors. The opinion was approved in 1999, even though there was no evidence that Kentucky consumers were substantially harmed over the 18 years when non-lawyer real estate closings were allowed. In Kentucky, after the Board of Governors approves a UPL opinion, an aggrieved party may file a motion with the Kentucky Supreme Court seeking review of the opinion. In 2000, the Justice Department asked the Supreme Court of Kentucky to reject a KBA advisory opinion that declared real estate closings performed by non-lawyers the unauthorized practice of law. The Court ruled against the KBA and rejected the proposed change to the definition of the unauthorized practice of law.

1.2 Rhode Island

In 2002 a bill was introduced into the Rhode Island House of Representatives that would prevent non-lawyers from competing with lawyers to perform real estate closings. The proposed bill prohibited lay closing services in both residential and commercial deals and purchases, refinancing, second mortgages, and other transactions. The agencies submitted a letter to the legislators, urging them to reject the proposed bill. The agencies expressed concern that the bill likely would cause Rhode Island consumers and businesses to pay more for real estate closings and could also prevent them from benefiting from competition from out-of-state and Internet lenders that could provide more convenient closing services. According to the letter, one industry source estimated that Rhode Islanders could pay $200-$500 more, if buyers must pay for their own attorneys, as well as the lender’s closing lawyer. The Rhode Island House of Representatives did not enact the bill into a law. The following year, however, a similar bill was introduced into Rhode Island House of Representatives. The agencies again sent a letter in 2003 to the legislators, citing the same concerns they had with the 2002 bill. The bill went to the state Senate and the Justice Department objected again. The bill died and did not become law.

ANNEX B

- **American Bar Association**: Letter from the Justice Department and the FTC to Task Force on the Model Definition of the Practice of Law, American Bar Association (Dec. 20, 2002), available at: http://www.ftc.gov/opa/2002/12/lettertoaba.htm, and http://www.usdoj.gov/atr/public/comments/200604.htm.

- **Georgia**: Brief *Amicus Curiae* of the United States of America and the FTC in On Review of ULP Advisory Opinion 2003-2 (filed July 28, 2003), available at http://www.ftc.gov/os/2003/07/georgiabrief.pdf and http://www.usdoj.gov/atr/cases/f201100/201197.htm; and letter from the Justice Department and the FTC to Standing Committee on the Unlicensed Practice of Law, State Bar of Georgia (Mar. 20, 2003), available at: http://www.ftc.gov/be/v030007.htm.

- **Indiana**: Letter from the Justice Department and the FTC to Unauthorized Practice of Law Committee, Indiana State Bar Ass'n (October 1, 2003), available at: http://www.usdoj.gov/atr/public/comments/205733.htm.

- **Kentucky**: Brief *Amicus Curiae* of the United States of America in Support of Movants Kentucky Land Title Ass'n *et al.* in *Kentucky Land Title Ass'n v. Kentucky Bar Ass'n*, No. 2000-SC-000207-KB (Ky., filed Feb. 29, 2000), available at http://www.usdoj.gov/atr/cases/f4400/4491.htm; and letter from the Justice Department to Board of Governors of the Kentucky Bar Association (June 10, 1999 and Sept. 10, 1997), available at http://www.usdoj.gov/atr/public/comments/comments.htm.

- **Massachusetts**: Letters from the Justice Department and the FTC the Massachusetts Bar Association and to Representative Paul Kujawski of the Massachusetts House of Representatives (Dec. 16, 2004 and Oct. 6, 2004), available at: http://www.ftc.gov/os/2004/12/041216massuplltr.pdf and http://www.ftc.gov/os/2004/10/041008kujawskicomment.pdf.

- **North Carolina**: Letter from the Justice Department and the FTC to President of the North Carolina State Bar (July 11, 2002), available at: http://www.usdoj.gov/atr/public/comments/11438.htm; and letter from the Justice Department and the FTC to Ethics Committee of the North Carolina State Bar (Dec. 14, 2001), available at: http://www.usdoj.gov/atr/public/comments/9709.htm.

- **Ohio**: Brief *Amicus Curiae* of the FTC in *Cleveland Bar Association v. CompManagement, Inc.*, No. 04-0817 (filed Aug. 3, 2004), available at http://www.ftc.gov/os/2004/08/040803amicusbriefclevbar.pdf.

- **Rhode Island**: Letters from the Justice Department to Speaker of the Rhode Island House of Representatives and to the President of the Rhode Island Senate, *et al*. (June 30, 2003 and Mar. 28, 2003), available at: http://www.usdoj.gov/atr/public/press_releases/2003/201130.htm#63003 and http://www.usdoj.gov/atr/public/press_releases/2003/200899.htm#1; and letter from the Justice Department and the FTC to Speaker of the Rhode Island House of Representatives, *et al*. (Mar. 29, 2003), available at: http://www.ftc.gov/be/v020013.pdf.

- **Virginia**: Letter from the Justice Department and the FTC to Supreme Court of Virginia (Jan. 3, 1997), available at: http://www.usdoj.gov/atr/public/comments/3967.htm; and letter from the Justice Department and the FTC to Virginia State Bar (Sept. 20, 1996), available at: http://www.usdoj.gov/atr/public/comments/vauplltr.htm.

- **West Virginia**: Brief *Amicus Curiae* of the United States of America and the FTC in *Lorrie McMahon v. Advanced Title Services Company of West Virginia*, No. 31706 (filed May 25, 2004), available at http://www.usdoj.gov/atr/cases/f203700/203790.htm and http://www.ftc.gov/be/V040017.pdf.

NOTES

1. Tex. Gov't Code Ann. §§ 81.101 (b).

2. Other examples include advice to tenants by tenants associations and to home buyers by realtors about what the state's laws require, estate planning, the provision of legal information but not advice by trained lay people, the negotiation of agreements that could have a legal effect, the completion of purchase and sale agreements by real estate agents, and various forms of compliance training for corporate employees.

3. Real estate closing services can include the preparation and execution of a deed, including the examination and clearing of title, answering non-legal questions during the closing process, witnessing signatures at closing, and disbursing of funds. A number of states either require or are considering requiring the presence of attorney at all residential real estate closings - sometimes even including refinancing of existing mortgages, where no real estate changes hands.

4. For a complete list of citations, please see Annex B.

5. In *United States v. Allen County Indiana Bar Ass'n*, the Justice Department sued and obtained a judgment against a bar association that had restrained title insurance companies from competing in the business of certifying title. The bar association had adopted a resolution requiring lawyers' examinations of title abstracts and had induced banks and others to require the lawyers' examinations of their real estate transactions. Civ. No. F-79-0042 (N.D. Ind. 1980). *See also United States v. New York County Lawyers' Ass'n*, No. 80 Civ. 6129 (S.D.N.Y. 1981) (Justice Department obtained court order prohibiting another county bar association from restricting the trust and estate services that corporate fiduciaries could provide in competition with other attorneys).

6. *Federal Trade Commission v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1990). In addition, the FTC staff has conducted studies of the effects of occupational regulation and submitted comments about these issues to state legislatures, administrative agencies, and others. *See, e.g.*, Carolyn Cox and Susan Foster, *The Costs and Benefits of Occupational Regulation*, Bureau of Economics, The Federal Trade Commission, October 1990.

7. The FTC-Justice Department letter to the ABA is available at: http://www.ftc.gov/opa/2002/12/lettertoaba.htm,and http://www.usdoj.gov/atr/public/comments/200604.htm.

8. The Supreme Court of New Jersey has explained, "The question of what constitutes the unauthorized practice of law involves more than an academic analysis of the function of lawyers, more than a determination of what they are uniquely qualified to do. It also involves a determination of whether non-lawyers should be allowed, in the public interest, to engage in activities that may constitute the practice of law. . . . We determine the ultimate touchstone -- the public interest -- through the balancing of the factors involved in the case, namely, the risks and benefits to the public of allowing or disallowing such activities." *In re Opinion No. 26 of the Comm. on Unauthorized Practice of Law*, 654 A.2d 1344, 1345-46 (N.J. 1995).

9. Cited in several of the joint Justice Department/FTC letters and briefs, a 1996 Media General study conducted in Virginia found that non-lawyer real estate closings were substantially less expensive than attorney closings. The average closing costs including title examination were $451 for lawyers versus $272 when non-lawyers were used. The study, and joint Justice Department/FTC advocacy efforts, helped persuade the Virginia legislature to reject a proposed law that would have barred non-lawyer closers, but instead pass a statute that allows consumers to choose non-lawyers who are regulated through licensure and other means.

10. South New Jersey buyers unrepresented by counsel paid no closing costs, while unrepresented sellers paid about $90; buyers unrepresented by counsel throughout the entire transaction, including closing, paid on average $650, while sellers paid $350. North New Jersey buyers represented by counsel paid on average $1,000, and sellers $750. In Re Opinion No. 26, 654 A.2d at 1349.

11. One study cited in the letters compared five states where non-lawyers provide non-legal real estate services with five states that prohibit non-lawyer provision of such services. The study's goal was to determine "whether members of the public suffer actual harm from lay provision of real estate settlement services." The author found "that the evidence does not substantiate the claim that the public bears a sufficient risk from lay provision of real estate settlement services to warrant blanket prohibition of those services under the auspices of preventing the unauthorized practice of law." Joyce Palomar, *The War Between Attorneys & Lay Conveyancers Empirical Evidence Says "Cease Fire!,"* 31 Conn. L. Rev. 423, at 477 and 520 (1999), cited in the agencies' letter to Representative Paul Kujawski of the Massachusetts House of Representatives, October 6, 2004, at http://www.usdoj.gov/atr/public/comments/205772.htm.

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Global Forum on Competition

ROUNDTABLE ON BRINGING COMPETITION INTO REGULATED SECTORS

Contribution from Vietnam

-- Session I --

This contribution is submitted by Vietnam under Session I of the Global Forum on Competition to be held on 17 and 18 February 2005.

JT00176832

English text only

BRINGING COMPETITION INTO REGULATED SECTORS IN VIETNAM

1. Introduction

1. Vietnam economy for so many years has been best described as having highly concentrated industries dominated by large state-owned enterprises which supported inefficient firms, operating in markets insulated by various types of barriers and distorted by numerous regulations. Various forms of inadequate government policies have led to market distortion. The business opportunities created did not enable all the society to participate in the development of various economic sectors. The development of the private sectors has in fact been mainly the result of unfair business competition conditions. The emergence of conglomerates and a group of strong businessmen that were not supported by the spirit of true entrepreneurship has one of the factors, which cause economic resilience to become extremely vulnerable and uncompetitiveness.

2. The above mentioned situations and conditions have forced Vietnam to renovate (doi moi) and rearrange its business activities so that the business activities can grow and develop in a fair, rational and appropriate way. So it can create and maintain a healthy business competition climate and avoid concentration of economic power on one certain person or group, which are contradictory to the ideals of social justice.

3. Competition policy and law is directly relevant to the main elements of market-oriented economic reforms undertaken in Vietnam during 10 years. Domestic reforms (e.g. trade and price liberalisation; deregulation, including state-controlled monopolies such as utilities and "network industries"; privatisation of previously state-owned enterprises; and reforms of foreign direct investment legislation) need to be accompanied by the introduction and implementation of effective competition law and policy.

4. The network monopolies, such as: electricity grids, railway, basic telecommunications operators) need to be guided by competition principles to ensure that they do not abuse their dominant power with respect to end users. In Vietnam, sectoral regulators are created to supervise the operations of the network operators and are given competition responsibilities that they may share with the competition Authority.

5. Despite significant progress being made by Vietnam Government in adopting competition regulations, there is a relative knowledge gap in these sectoral regulators regarding the specific impact of competition policy on development. Key concerns have been raised by Government of Vietnam as to whether competition will damage international competitiveness, raise unemployment, or hamper social policies.

2. The regulations system related to competition law

6. The decision to adopt a competition law, or promote the adoption of a competition law, as an element of economic development raises a number of issues about the approach to law reform in transition environments and the possible contributions of competition policy to economic progress.

7. The ten-year Socio-economic development Strategy for 2001-2010 (SEDS) endorsed by the 9th Party Congress and by the National Assembly - includes a commitment to creating a level playing field for all enterprises regardless of ownership, and to completely opening the economy to global competition over the coming decade. The Government's Comprehensive Poverty Reduction and growth Strategy (CPRGS, May 2002) forcus on: (i) creating a legal environment that support fair and competitive business; (ii)

maintaining macroeconomic stability, and; (iii) creating a social environment that provides social environment that provides social equality, enhanced grassroots democracy and legal support for the poor.

8. The Socio-Economic Development Strategy (2001-2010) has identified the task to:

- "To renew and complete the legal framework work, dismantle all obstacles in terms of mechanism, policy and administrative procedure with a view to maximizing all resources, generating a new impetus for the development of production and business by all economic sectors with different forms of ownership. All enterprises and citizens are entitled to invest in businesses in the forms stipulated by laws and to be protected by the law. All business organisations in different or mixed forms of ownership are encouraged to develop on a long-term basis, cooperate and compete equally, and constitute an important integral part of the socialist-oriented market economy. To develop vigorously small and medium enterprises; step by step set up a number of powerful economic groups".

- "To establish in a synchronised manner and continue developing and completing different kinds of market in parallel with the formation of a legal and institutional framework, for the market to operate dynamically, efficiently and orderly in a healthy, open and transparent environment restrictive to and controlling over business monopoly. To adopt effective measures to fight smuggling and trade fraud".

2.1 Telecommunications sector

9. On May 25, 2002, the Standing Committee of the National Assembly approved the introduction of *Ordinance 43*[1] (the "Post and Telecommunications Ordinance") to replace the outdated Decree No.109.[2] This milestone Ordinance provides a more transparent regulatory regime for private and public networks, dealing with issues such as interconnection[3], fees, charges and licensing, and introducing a Universal Service Fund.

10. The Ordinance is a detailed legislative instrument governing telecommunications. It sets out provisions concerning:

- consumer rights (including confidentiality and privacy);
- providers;
- licensing;
- network/services reservations;
- competition (such as through the application of dominant operator obligations);
- interconnection;
- pricing (retail and wholesale);
- access to land and structures;
- standards of quality;
- universal service;

- dispute resolution and compensation;
- radio frequency planning and licensing;
- telecom numbering and Internet resource planning.

11. According to the Industry Development Strategy to 2010 and Orientation to 2020, the development target is to reach a minimum teledensity of 25 telephones per 100 people (on average every household then has a telephone). The national telephone network could cover all areas of the country with high capacity, high speed, high quality, modern and diversified services at fair prices.

12. Key policy priorities are stated as follows:

- develop and improve the legal framework to move from a monopoly to a competitive environment;
- develop and issue a market liberalisation roadmap for particular services with certain timing in order to create conditions for enterprises to enter the market;
- market expansion through encouraging licensed operators to enter the market to stimulate competition;
- develop tariff regulations toward a cost-based approach and ensure universality;
- develop an open resale market;
- capital mobilisation initiatives include identifying domestic sources, reserve funds of operators; from staff of enterprises; from different governmental levels; and from different citizens. International sources of capital could be through ODA, BCC, JV, BOT, issuing of international bonds; lending from banks, financial institutions and foreign companies;
- encourage equitisation in the state-owned telecommunication enterprises, except the national backbone network;
- develop policies and regulations related to interconnection, USO, and investment in remote and rural areas;
- develop and issue a transparent licensing policy with simple procedures to create favourable conditions for new entrants;
- issue licenses to other operators in different service areas: ISP, IAP, long distance and international.

2.2 Competition and Monopoly Pricing

13. *Ordinance 40-2002-PL-UBTVQH10 of the National Assembly dated 26 April 2002* codifies and consolidates a number of items of legislation on prices and price controls, effective as of 1 July 2002. Detailed regulations on pricing were issued under *Decree 170-2003-ND-CP of the Government dated 25 December 2003* and became effective as of 14 January 2004. Applicable to all foreign and domestic organisations and individuals engaged in production or business activities in Vietnam ("businesses"). *Ordinance 40* provides for:

- state management of the stability of market prices of important and essential goods and services (prescribed in *Decree 170* as including petrol, oil, liquefied gas, cement, iron, steel, rice, coffee, cotton, sugar cane, salt, and certain kinds of medication);

- determination by the State of prices of land, water surfaces and important natural resources, State owned assets to be sold or leased out, goods or services subject to monopoly (including electricity, transportation and post and telecom services), and goods and services important for national welfare and people's livelihood (including petrol, treated water, basic medicines, bus transportation and subsidized commodities);

- evaluation of prices of State owned assets;

- control of monopoly prices (defined as the price of goods or services fixed by any one seller or purchaser organisation or individual in the market, or the price of goods or services of multiple organisations and individuals co-operating in a monopoly, holding a major share of the market and having the power to dominate market prices);

- control of price monopoly co-operation (price-fixing);

- Prohibition on dumping;

- other prohibitions on businesses with respect to pricing.

14. *Decree 170* limits the definition of "price monopoly co-operation" to price-fixing agreements between businesses aimed at dominating the market *exceeding the market share stipulated by law* (italicised words do not appear in *Ordinance 40*). But the new regulations do not stipulate the relevant market share. Of note, the price-fixing provisions of the current draft of the Law on Competition prescribe a market share threshold of 30%. *Decree 170* expressly prohibits the following conduct deemed to be price monopoly co-operation:

- agreement between businesses to fix prices, control prices, change prices for sale of goods and services aimed at restraining competition, infringing the legal interests of other businesses or of consumers;

- sudden sale of one (identical or similar) type of goods or services at one uniform price by several businesses at one particular point of time;

- agreement between businesses to create scarcity of goods by way of limiting production, distribution, transportation, sale of goods or supply of services; destructing or damaging goods; or taking advantage to speculate and increase prices;

- agreement between businesses to apply conditions of sale or purchase of goods and supply of after-sale services which affect prices of goods and services;

- agreement between businesses to change prices of sale and purchase of goods and services in order to eliminate or force other enterprises to co-operate with them or become their affiliates.

15. Implementing *Decree 170, Circular 15-2004-TT-BTC of the Ministry of Finance dated 9 March 2004* provides detailed guidelines on regulation of petrol, oil, liquefied gas, cement, iron, steel, rice, coffee, cotton, sugarcane, salt and some medications (effective as of 6 April 2004). Of note, *Circular 15* prescribes

the circumstances in which prices will be deemed to have "abnormally fluctuated", for the purposes of State management of stability of market prices.

16. Under the *Decree 169-2004-ND-CP of the Government dated 22 September 2004 on Dealing with Administrative Offences in Pricing Sector,* any domestic or foreign organisation or individual engaged in production or business activities in Vietnam and breaching the provisions on price stabilisation will be subject to a VND5-10 million fine.

17. The price-fixing provisions of *Ordinance 40* and *Decree 170* lay foundations for the *Law on Competition.*

- A law on Competition has been passed by the National Assembly of Vietnam in November 9, 2004 and come into enforced by July 1, 2005.

2.3 Electricity sector

- A law on Electricity has also passed the National Assembly of Vietnam in November 9, 2004 and come into enforced by July 1, 2005, at the same time of Competition law.

18. The Electricity law is a detailed legislative instrument governing electricity sector. It sets out provisions concerning:

2.3.1 Scope of application

19. This Law provides regulations on the electric power sector planning and investment; electricity savings; power market; the rights and obligations of organisations and individuals participating in electricity activities and usage; protection of electrical equipment, electricity works and power safety.

2.3.2 Objects of application

20. This Law shall apply to organisations and individuals who engage in electricity activities and usage or other activities related to electricity in Viet Nam. In case of otherwise stipulated by an Intenational treaty, to which the Socialist Republic of Viet Nam has signed or acceded, the regulations specified in the treaty would prevail.

2.3.3 Principle of activities of an electric power market

- ensure the transparency, equality, healthy competition and non-discrimination between (electric) power market's participants;

- respect right of freedom to select partners and forms of transactions of the market's participants, in conformity with levels of development of the power market;

- the Government that regulates the power market activities to ensure sustainable power system development, satisfying the requirements to supply electricity in a secure, stable and effective fashion.

2.3.4 Formation and development of power market

Power market is formed and developed under the sequent levels as follows:

- Competitive power generation market;

- Competitive power bulk market;
- Competitive power retail market.

21. The Prime Minister shall define the road map, pre-conditions to form and develop levels of the power market.

2.3.5 State management of electricity activities and usage

22. The Ministry of Industry shall be responsible to the Government for conducting functions of state management of electricity activities and usage.

2.3.6 Contents of electricity regulation

1. develop regulations on operation of a competitive power market and directions for implementation;
2. research and recommend measures to regulate power supply-demand relationship and manage the realisation of power supply-demand balance;
3. issue, modify, amend, and revoke electricity activity license as prescribed in Article 38 of this Law;
4. specify conditions and procedures for interruption or deduction of electricity consumption; conditions and procedures for connection to the national power grid;
5. research and develop retail electricity tariffs and implement electricity tariff regimes and policies;
6. conduct consultations with relevant organisations and agencies on the retail electricity tariff;
7. approve and adjust bulk power sale tariffs; approve transmission charges, distribution charge and others according to Government's regulation.

3. Conclusion

23. As the regulatory reform are being implemented on the spirit of “doi moi” process, the industry regulating authorities should consistently follow the principles of creating a fair competition environment, non-discrimination among different economic classes during the process of making policy and reform in their own industry.

24. The Government's role should be focused on rule of laws ensuring a level playing field, macroeconomic coordination, environmental protection, fair competition and controlling monopolies or oligopolies, etc and not on favouritism and protection of state-owned corporation. The investment and business environment should be improved; costs to make business in terms of time and money should be reduced to the regional level. The Primer Minister of Vietnam has emphasized on many occasions over the past five years that strengthening the economy's competitiveness is a top priority for the nation, and the Competition Law, backed by an independent authority, will contribute to Vietnam’s ability to participate in the global economy.

25. The legal framework has provided some general guidance on competition, which needs to be concretised and implemented on several aspects. The rights of the consumers have to be clearly identified and an agency has to look after these rights. Duties and responsibilities of the monopoly have to be clearly and concretely elaborated. Sanctions for abusing of its monopolistic position must be formulated and endorsed. A powerful anti-monopoly agency must act in order to avoid abusing of the predominant position. Transparency on the decision process must be provided.

26. Independent Auditing must be implemented annually. Transparence and Openness must be observed in all regulations.

NOTES

1. Ordinance 43/2002/PL-UBTVQH10 on Post and Telecommunications.

2. Decree No. 109/1997/ND-CP on Posts and Telecommunications.

3. Note however that the provisions of the Ordinance do not provide a mechanism for guaranteeing interconnection.

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Global Forum on Competition

ROUNDTABLE ON BRINGING COMPETITION INTO REGULATED SECTORS

Contribution from BIAC

-- Session I --

This contribution is submitted by BIAC under Session I of the Global Forum on Competition to be held on 17 and 18 February 2005.

JT00177357

English - Or. English

SUBMISSION OF THE BUSINESS AND INDUSTRY ADVISORY COMMITTEE (BIAC) TO THE OECD GLOBAL FORUM ON COMPETITION

SESSION 1: BRINGING COMPETITION INTO REGULATED SECTORS[*]

1. Introduction

1. This paper has been drafted and submitted without the benefit of reading the Secretariat's paper, which was not available prior to the date of submission of this paper.

2. In principle, the goal of regulatory reform is to foster greater economic competition by allowing marketplace forces (rather than government) to govern activity in the industry, the rationale being that economic regulation should be reformed to stimulate competition and eliminate competition-distorting impacts except where clear evidence demonstrates that regulation is the best way to serve broad public interests. Where such evidence exists, the impacts should be minimized in the pursuit of other public interest goals.[1]

3. Whether or how well the goal of pro-competitive regulatory reform is achieved, both from the government and the business community perspectives, is a function of various factors including the motivations and goals of regulatory reform, and the objectives to be achieved in the administration of the regulatory reform process and post-reform environment.

4. This submission sets forth BIAC's views concerning the challenges in bringing competition to a formerly regulated market. It should be considered in conjunction with BIAC's submission to Session 2 regarding the relationship between competition authorities and sectoral regulators.[2]

2. Motivation for regulatory reform

5. The goal of achieving greater competition through regulatory reform may be motivated by a number of economic factors, including protection of competition as an end in itself, promotion of economic efficiency, prevention of wealth transfers from consumers to producers, protection of free markets, advancement of the public interest or special interests, a desire to improve the average standard of living, a desire to stimulate productivity and a desire to increase international competitiveness.[3] The actual impetus for regulatory reform of a given industry, however, may vary.

6. Regulatory reform is in many ways a product of globalization and the resulting need to shed protectionist principles in order to adapt to innovation, change and larger trading environments. Regulatory reform may also flow from different jurisdictions' attempts to pull back from policies akin to state aid that were designed to support particular sectors or from government control, as was the case in the former Soviet Union.[4]

7. Another catalyst for regulatory reform is litigation by competition authorities. In the 1980s, the U.S. Department of Justice commenced an antitrust suit against AT&T based on AT&T's anticompetitive activities in the market for long distance telephone services. This suit was settled by way of a Modified Final Judgment, which became the instrument of regulatory reform and paved the way for the *Telecommunications Act of 1996*. [5]

8. Perhaps the most common driver of regulatory reform, however, is the shifting of political and economic tides and pressures. In the U.S. for example, lobbying efforts by those denied entry to the airline industry led to the dismantling of the Civil Aeronautics Board, which before that time had controlled air traffic, routes, rates and gate access. As studies have shown, airline fares have dropped substantially, the number of departures has risen and air safety has improved as a result.[6]

3. Challenges of regulatory reform

9. Whatever the motivations and catalysts for regulatory reform, some degree of government involvement is required to implement it and to ensure that competition in fact takes place.[7] Governmental oversight is necessary to ensure that consumer and efficiency gains are not jeopardized and that private anticompetitive restraints do not replace regulation.[8] It is also necessary to ensure that dominant market positions are not inappropriately entrenched during the transition phase.

10. There are also a number of threshold issues that must be addressed before beginning the transition:

- Governments must fully understand the different social policy outcome of regulated environments as opposed to competitive markets. This entails an examination of the goals sought to be achieved and motivations and catalysts for regulatory reform, but also the potential adverse consequences such as higher prices for higher cost consumers.[9]

- The transition phase must have a predictable and disclosed end, or at the very least, milestones that should be reached before the transition period can be considered complete. Although some impediments to free competition can be removed fairly quickly, others involve a longer-term plan. A delicate balance must be struck to ensure that conditions conducive to competition are not undermined, while ensuring that the process does not continue indefinitely. For example, regulatory reform in the telecommunications industry in Canada is currently in its third decade.[10]

- When considering these and other issues related to the transition process, governments must also be attuned to the fact that errors can have a significant long-term detrimental impact on competitive markets. Examples of potential costly missteps include: failure to deregulate upstream or downstream (a problem that plagued regulatory reform of the California electricity sector), failing to consider implications for collaterally affected industries and creating an environment with too much duplication and overlap of regulatory functions.[11]

11. Although the degree of government involvement is informed by whether the regulatory reform is to be complete or partial, there are unique challenges associated with regulatory reform that are present in both circumstances.

12. These challenges can be divided into four basic categories: (i) fostering a competitive marketplace; (ii) determining the amount of government involvement; (iii) determining the government institutions involved in the regulatory reform process; and (iv) determining the role of competition authorities vis-à-vis sectoral regulators and in the regulatory reform process generally.

3.1 Fostering a competitive marketplace

13. The power and influence of vested domestic business interests often operates as an obstacle to regulatory reform. As can be expected, these industry participants may attempt to preserve their protection from the full forces of competition, [12] including by:

- Endeavouring to forestall regulatory reform through intense political lobbying efforts;
- Engaging in monopolistic or cartel behaviour to exclude new entrants who would otherwise have been excluded as a result of some regulatory process;
- Attempting to exercise horizontal market power by raising prices above competitive levels;
- Attempting to exercise vertical market power by engaging in discriminatory access practices; and
- Exploiting their ability to learn about rivals' upstream, downstream or adjacent markets.

14. Vigorous competition law enforcement should be encouraged to prevent anti-competitive practices, particularly during the transition process. Other transitional safeguards may be required. For example, price controls may be appropriate as a discipline to keep prices down while competition takes root. It may also be necessary to mandate access to markets for new entrants through legislative means. It must be recognized that competition law authorities are not likely to have the jurisdiction, experience or skills to implement and/or supervise certain aspects of these transition measures. In any event, these regulatory requirements should be phased out once competition has indeed taken root.

15. Accordingly, regulatory reform should not be undertaken unless there are basic competition laws and resources and institutions in place to facilitate its enforcement. Ensuring these protections exist improves the prospects for successful deregulation and promotes transparency and predictability for the business community.

3.2 Determining the right amount of government involvement

16. As government seeks to remedy potential abuses and facilitate a transition, the question then arises: what level of involvement is required? As some commentators have observed, withdrawal of traditional regulation may in fact require more activism on the part of government to ensure that competition on equal terms can develop, both to ensure competitive access and to protect consumer interests.[13]

17. Although the objective (i.e. partial or complete regulatory reform) somewhat dictates the level of government involvement from a regulatory perspective, common approaches typically require agency-specific oversight of the deregulated industry combined with generalized competition law enforcement during and after regulatory reform.

18. Where the government role involves a distinct regulatory presence in the market, issues related to promoting competition, controlling the prices for natural monopoly products which are not yet subject to competitive supply and establishing competitive terms of access take precedence.

19. Where the government role is competition law enforcement, issues related to fostering competitive environments which provide consumers with a variety of products at efficient prices are paramount.

20. The ICN has noted that the main areas where competition rules interact with industry-specific rules are interconnection, access, monopoly/incumbent-pricing, anti-competitive agreements and merger control.[14]

21. As discussed in BIAC's submission to Session 2, the post-regulatory reform environment can at times reflect uncertainty, inconsistency and lack of transparency for the business community as competition authorities and sectoral agencies pursue their sometimes conflicting mandates.

22. As the ICN's work reflects, jurisdictions employ different means of managing conflicts between sectoral regulators and competition authorities, ranging from informal co-operation to legally required referrals.[15]

3.3 Determining the right government institutions involved in the regulatory reform process

23. The challenges of regulatory reform are complicated further by the potential number of government institutions.

- In the U.S. for example, the electricity industry is governed by the Federal Energy Regulatory Commission (which regulates the interstate transmission of electricity), state public utility commissions (which have the power to set retail prices) and by the FTC or the DOJ (which enforce the *Clayton Act*).

- In Canada, the airline industry is governed by the Canadian Transportation Agency, and is also subject to special provisions in the *Competition Act* relating to predatory pricing in the airline industry.[16]

- Further, in some countries, such as Canada, there may be a form of regulated conduction exemption or defence which exempts certain business conduct from the purview of competition law enforcement. Defining the scope of the exemption can be problematic; the objective must be certainty for the regulates.

24. The higher the number of regulatory authorities involved, the higher the likelihood of varying degrees of monitoring, differing compliance requirements and unique competition and non-competition policy goals, and the lower the likelihood of predictability and fairness for the business community.[17]

25. Even when one regulator assumes primary responsibility for the industry subject to regulatory reform, other substantive issues can arise:

- Instincts of self-preservation can motivate sectoral regulators to entrench their supervision and monitoring role.[18]

- The potential for "regulatory capture" (i.e., the development of a regulatory orientation that is more reflective of the objectives of the regulated entities than it is of the initial regulatory objectives) is generally recognized to be greater when a single sector regulator has been given a mandate to implement a transition to competition.[19]

3.4 Determining the role of competition authorities

26. Unlike industry-specific regulators who have a much narrower interest to serve, competition authorities have a broader mandate of promoting competition generally. Implementing this mandate can take the form of advocacy, rendering of advice, active participation in the regulatory reform process and facilitating/maintaining competition through merger review or enforcement of abuse of dominance laws.[20] The following are some examples of the approach taken by competition authorities in the regulatory reform process.

- In the U.S., the antitrust authorities have acted as commentators in the regulatory reform process, beginning in the early stages of the U.S. regulatory reform wave. A former FTC Chairman has remarked that the Commission's aggressive competition advocacy through speeches and formal submissions to regulatory agencies and legislative committees helped create a policy climate ripe for regulatory reform in various sectors.[21] Such submissions could advocate that during transition periods, regulators should ease the burdens on incumbents rather than imposing burdens on new entrants.[22]

- When the *Telecommunications Act of 1996* led to deregulation of radio mergers and expanded U.S. DOJ oversight of these transactions, the DOJ found that many of the Joint Sales Agreements that had been initiated under the Federal Communications Commission's watch were problematic under the antitrust laws. Rather than seek enforcement against a large segment of the industry, or selectively enforce in a discriminatory fashion, the DOJ effectively decided to grandfather the pre-existing agreements and use its advocacy role in counselling the radio broadcasting industry toward future compliance.[23]

- In Canada, the Competition Bureau promotes competition in deregulated industries through competition policy and legislative advocacy,[24] regulatory interventions under authority of sections 125 and 126 of the *Competition Act*,[25] enforcement of the *Competition Act* and through education of businesses as to the benefits of competition. [26] The Canadian Competition Bureau has indicated that it views its policy advice and analysis role as key to achieving the objectives of the *Competition Act*. [27] Recognizing the inherent conflict where there is competition law regulation as well as industry-specific regulation, the Competition Bureau has articulated a set of core principles governing the joint regulation. These range from developing mechanisms for inter-agency cooperation and coordination, to expressing its preference for relying on competition law to prevent anticompetitive business practices unless regulation is demonstrably better.[28]

- The Canadian Competition Bureau's involvement in the regulatory reform of electricity markets involved several measures, including (i) intervening in electricity market structure reviews and hearings; (ii) supporting structural separation between transmission and distribution systems and regulatory oversight of access and pricing; and (iii) supporting separate electricity market surveillance.[29]

NOTES

∗ This paper has been prepared principally by Crystal L. Witterick and Kikelomo O. Lawal, Blake, Cassels & Graydon LLP, with the input of members of the BIAC Competition Committee. A. Paul Victor, Weil, Gotshal & Manges LLP provided significant input, particularly from a U.S. perspective, for the framework and substance of this discussion. We also draw upon the extensive work of the Organisation for Economic Co-operation and Development (OECD) and the International Competition Network (ICN) in the area of regulatory reform. *See* OECD Regulatory Reform Programme page at: http://www.oecd.org/topic/0,2686,en_2649_37421_1_1_1_1_37421,00.html and the ICN's Antitrust Enforcement in Regulated Sector's Working Group's Report to the ICN's Third Annual Conference, Seoul, Korea, April 2004, available at http://www.internationalcompetitionnetwork.org/seoul/aers_ch3_seoul.pdf.

1. *See* OECD Report on Regulatory Reform, Paris, 1997, available at http://www.oecd.org/dataoecd/17/25/2391768.pdf; *see also* "Restructuring Public Utilities for Competition", OECD Policy Brief, February 2002, available at http://www.oecd.org/dataoecd/0/0/2066164.pdf.

2. As discussed more fully in BIAC's submission to Session 2, there are four alternative approaches for managing real and potential conflicts between antitrust and sectoral interests:

   a. vesting competition policy and enforcement authority solely in the federal competition agency;

   b. allowing sectoral agencies to submit their views to the antitrust agency, which retains ultimate competition authority;

   c. allowing concurrent jurisdiction where either the sectoral agency or the competition agency may block a transaction; or

   d. vesting ultimate authority in the sectoral agency, which receives structural input from the competition agency.

3. *See* Crampton, Paul and Facey, Brian, "Revisiting Regulation and Deregulation through the Lens of Competition Policy: Getting the Balance Right", 25 *World Competition* (2002) at 25-53. *See also* Crampton, Paul, "Competition and Efficiency as Organizing Principles For All Economic and Regulatory Policymaking", prepared for the First Meeting of the Latin American Competition Forum, Paris, April 7-8, 2003, available at http://www.oecd.org/dataoecd/43/26/2490195.pdf

4. *See* Proceedings of the Sixth Workshop of the APEC-OECD Co-Operative Initiative on Regulatory Reform, Pucón, Chile, May 24-25, 2004 (which contains discussions of various jurisdictions' attempts to introduce regulatory reform), available at http://www.oecd.org/dataoecd/44/24/33818980.pdf.

5. *See* McLaughlin, Duane, "FCC Jurisdiction Over Local Telephone Under the 1996 Act: Fenced Off?", 97 *Columbia L. Rev.* 2210 (1997).

6. *See* "Air Safety Improved but Delays Remain a Problem Because More People Flying, Says FTC Study on Deregulation", FTC Press Release dated February 8, 1988, available at http://www.ftc.gov/opa/predawn/F88/dereg.txt. *See also*, John M. Nannes, Testimony Before The Committee On Transportation & Infrastructure U.S. House Of Representatives Concerning Antitrust Analysis Of Airline Mergers (June 13, 2000), *available at* http://www.usdoj.gov/atr/public/testimony/4955.htm ("The deregulation of the airline industry illustrates both the dividends that freeing regulated markets can have for American businesses and consumers and the role of sound antitrust enforcement. The deregulation of the nation's airlines in 1978 resulted in vigorous price competition and an astounding expansion of capacity. Today, more people are flying to more places than ever before."); Anne K. Bingaman, Address Before The Commonwealth Club of California (July 29, 1994), *available at* http://www.usdoj.gov/atr/public/speeches/innovate.htm ("The salutary effect of competition on innovation has been demonstrated repeatedly in this country when a variety of previously regulated industries have been deregulated, either in whole or in part. . . . For example, the entry and subsequent growth of Southwest Airlines stimulated price competition that has benefited air travellers."); and Adam M. Golodner, "Antitrust, Innovation, Entrepreneurship And Small Business," Address Before the SBA Conference

On Industrial Organization (Jan. 21, 2000), *available at* http://www.usdoj.gov/atr/public/speeches/4200.pdf ("In airlines, .our faith in competition has led to more open markets, new competitors and opportunities for entrepreneurship, better and cheaper products, and a better economy within which all businesses, including small businesses, can compete, innovate, and thrive.")

7. *See generally* APEC/OECD Integrated checklist on Regulatory Reform, (a checklist prepared to assist member economics evaluating their regulatory reform efforts and determining the process of development and implementation, available at http://www.oecd.org/dataoecd/43/26/2490195.pdf. *See also* "Integration and Infrastructure in the Americas", remarks made by A. Paul Victor at the 2nd Latin American Regional Conference, Rio de Janeiro, May 10 – 13, 1998, at 3.

8. *See generally* Prepared Statement of the Federal Trade Commission, presented by Chairman Robert Pitofsky before the House of Representatives Committee on the Judiciary, June 4, 1997.

9. *See* Crampton *supra* note 3 at 10-11.

10. *See* Crampton and Facey, *supra* note 3 at 38; Crampton *supra* note 3 at 13.

11. *See* Crampton *supra* note 3 at 13-15.

12. *Id. See also* Prepared Statement of the Federal Trade Commission, presented by Commissioner Mozelle Thompson at the House Judiciary Committee Hearing on July 28, 1999; Crampton, *supra* note 3 at 12.

13. *See* Meyer, John R. and Tye, William B., "Toward Achieving Workable Competition in Industries Undergoing a Transition to Deregulation: A Contract Equilibrium Approach", 5 *Yale J. on Reg.* 273 (1988).

14. See ICN Antitrust Enforcement in Regulated Sectors Working Group's Report to the ICN's Third Annual Conference, Seoul, April 2004, available at http://www.internationalcompetitionnetwork.org/seoul/aers_ch3_seoul.pdf at 5.

15. *Id.* at 6.

16. *See* e.g. sections 78 (1)(j) and (k), which prohibit anticompetitive acts in the operation of a domestic service, and section 79 (3.1), which provides for administrative monetary penalties for abuse of dominant position by an airline. There is currently a set of amendments to the *Competition Act* under consideration that would eliminate these and other airline-specific provisions. The text of this Bill C-19 is available at: http://www.parl.gc.ca/common/Bills_ls.asp?Parl=38&Ses=1&ls=C19.

17. *See generally* "Relationship between Regulators and Competition Authorities", OECD Directorate for Financial, Fiscal and Enterprise Affairs, Committee on Competition Law and Policy (1999), available at http://www.oecd.org/dataoecd/35/37/1920556.pdf.

18. *Id.*

19. *See generally*, "Relationship between Competition Authorities", published by the OECD Directorate For Financial, Fiscal And Enterprise Affairs Committee on Competition Law and Policy, June 29, 1999, available at http://www.oecd.org/dataoecd/35/37/1920556.pdf.

20. For example, in May 1998 the U.S. DOJ challenged Primestar's acquisition of the Digital Broadcast Satellite (DBS) assets of News Corp. on the basis that it would have allowed five of the largest cable companies (which controlled Primestar) to prevent new entry. *See United States v. Primestar Inc.*, Civ. No. 1:98CV01193 (D.D.C. filed May 12, 1998).

21. See Muris, Timothy, "Creating a Culture of Competition: The Essential Role of Competition Advocacy", prepared remarks for the International Competition Network Panel on Competition Advocacy and Antitrust Authorities, September 28, 2002, available at: http://www.ftc.gov/speeches/muris/020928naples.htm.

22. *See* Debra A. Valentine, General Counsel Federal Trade Commission, "Antitrust in a Global High-Tech Economy", 8th National Forum for Women Corporate Counsel, Washington D.C. (April 30, 1999).

23. *See*, Joel I. Klein, "DOJ Analysis of Radio Mergers." Address Before the ANA Hotel (Feb. 19, 1997), *available at* http://www.usdoj.gov/atr/public/speeches/jik97219.htm; and Lawrence Fullerton, "Current Issues in Radio Station Merger Analysis," Address Before the Business Development Associates Antitrust 1997 Conference (Oct. 21, 1996), *available at* http://www.usdoj.gov/atr/public/speeches/8210.pdf

24. In 2004, the Competition Bureau appeared before the House Standing Committees on Canadian Heritage, on Industry, Science and Technology and Banking, Trade and Commerce to provide its views on the future of broadcasting, foreign investment restrictions and Bill C-249 (an act to amend the Competition Act with respect to consideration of efficiencies), respectively. *See* relevant portion of the Bureau's Annual Report 2004, available at http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct03010e.html.

25. Sections 125 of the Act authorizes the Commissioner to make representations to and call evidence before federal boards, commissions or other tribunals where such submissions are relevant to the tribunal and the matters before the tribunal, and to assume a similar role with respect to provincial boards, commissions and other tribunals where she has been invited to do so.

26. "The Complementary Role of Regulations and Competition Law in Deregulating Industries", speech given by Andre Lafond, Deputy Commissioner of Competition of the Canadian Competition Bureau, at the Canadian Bar Association Annual Fall Conference on Competition Law, October 3-4, 2002.

27. *Id.*

28. *Id*.

29. *See* Ronayne, Mark "Canadian Competition Law Roles, Responsibilities and Relations in Emerging Electricity Markets", paper prepared for the Canadian Bar Association Annual Fall Conference on Competition Law, Ottawa, Ontario, September 20 – 21, 2001.

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Global Forum on Competition

THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS

Issues Paper

-- Session II --

This Issues Paper by the Secretariat is submitted FOR DISCUSSION under Session II of the Global Forum on Competition to be held on 17 and 18 February 2005.

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THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS

1. Introduction

1. In the past, relationships between competition authorities and sector regulators have at times involved disagreements over regulatory approaches, with relatively poor mechanisms for ensuring that both regulators' and competition authorities' views are taken into account. On the one hand, regulators have sometimes been felt to act more in the interests of the firm(s) they regulate than in the interests of consumers or promoting competition. On the other hand, competition authorities have sometimes been felt to ignore broader social objectives apart from increasing competition and to lack adequate technical knowledge about highly complex sectors.

2. Fractious relationships are not inevitable. Competition authorities and sector regulators should be on the same side because:

- Economic growth is enhanced by pro-competitive regulation, as suggested by recent research by the OECD and others.

- Many of the objectives of competition authorities and regulators are in fact very similar. For example, regulators often focus on preventing "excessive pricing", ensuring access to essential facilities and ensuring that barriers to entry are reduced. These objectives are shared by competition authorities in most OECD jurisdictions.

3. The ideal relationship between competition authorities and regulators is driven by a central government that promotes broad review of existing regulations with a pro-competitive lens, ensuring that a "competition culture" encompasses both sector regulators and competition authorities.

4. In practice, not many countries have yet achieved this ideal. To the extent the ideal has not reached, there are nonetheless a number of practical measures that governments can take to enhance pro-competitive regulation and improve the relationship between competition authorities and sector regulators. (OECD(1999, 2003a))[1]. This note outlines a number of these approaches.

5. Key elements for increasing the pro-competitive regulation include:

- The central government actively supports pro-competitive regulation;

- Instruments for co-operation are implemented by both competition authorities and regulators; and

- Overall principles of competition law enforcement are common across different sectors.

1. The relationships have been examined in many previous competition law and policy peer reviews, such as OECD(2004b), including through the OECD Regulatory Reform Review program, as well as in recent reviews of Norway (OECD(2003b) and Mexico (OECD(2004a).

2. Broad government efforts to promote competition benefit the economy

6. The development of pro-competitive regulation and the lowering of regulatory barriers are of vital economic importance both for ensuring that the benefits of competition will accrue to domestic consumers and for ensuring that domestic companies will have cost structures that enable them to succeed in international trade. Sector regulation affects the cost and quality of many key inputs of production, such as telecommunications, energy and transport. Pro-competitive regulation enhances the ability of firms within a regulated sector to adapt to changed technology, choose low-cost means of production, adapt to consumer preferences and set prices that more closely reflect the variable costs of production. As a result, governments can benefit their economies by encouraging pro-competitive regulation.

7. Australia provides a good example of what can happen when a government as a whole seeks to promote competition and make regulations more pro-competitive. Nearly two decades of economic stagnation and decline relative to other OECD economies led Australia to embark on an ambitious reform program, including reform of financial and labour markets and of competition policy. The implementation of the competition component, Australia's ambitious and comprehensive National Competition Policy, has made since the mid 1990s a substantial contribution to the recent improvement in Australian labor and multifactor productivity and economic growth. Australia's Productivity Commission estimates that Australian households' annual incomes are on average around A$7,000 higher as a result of competition policy. The most recent OECD review of Australia shows that the Australian economy is still benefiting from the program of widespread and deep reforms that started in the 1980s and was especially intensive in the 1990s. These made it easier to set macro policies in a stability-oriented medium-term framework. The combination resulted in a thirteen year long economic expansion period accompanied by low inflation, high resilience to external and domestic shocks, and very healthy public finances.

8. Pro-competitive regulation has been shown to enhance employment, increase productivity growth and promote investment.

- **Employment**. Nicoletti and Scarpetta (2001) find that product-market regulation has an impact on employment. They estimate that pro-competition policy developments in New Zealand and the UK have added around 2.5 percentage points to their employment rate over the period the period 1978-1998. Countries with more modest reforms, such as Greece, Italy and Spain have only added between 0.5 and 1 per cent to the employment rates through such reforms.

- **Productivity growth**. Nicoletti and Scarpetta (2003) find that "reforms promoting private governance [i.e., privatisation] and competition … tend to boost productivity. In manufacturing the gains to be expected from lower entry barriers are greater the further a given country is from the technology leader. Thus, regulation limiting entry may hinder the adoption of existing technologies, possibly by reducing competitive pressures, technology spillovers, or the entry of new high-tech firms. At the same time, both privatisation and entry liberalisation are estimated to have a positive impact on productivity in all sectors…. These results … point to the potential benefits of regulatory reforms and privatisation, especially in those countries with large technology gaps and strict regulatory settings that curb incentives to adopt new technologies."

- **Investment**. Alesina, Ardagna, Nicoletti and Schiantarelli (2003) find that "tight regulation of the product markets has had a large negative effect on investment. The data for sectors that have experienced significant changes in the regulatory environment suggest that deregulation leads to greater investment in the long-run". "The implications … are clear: regulatory reforms, especially those that liberalise entry, are very likely to spur investment".

3. Primary government tasks in regulated sectors

9. The primary potential government tasks faced in regulated sectors are among those below:[2]

- **Technical regulation:** setting and monitoring standards, managing license, and implementing sanctions so as to assure compatibility and to address privacy, safety, reliability, financial stability and environmental protection concerns;

- **Wholesale regulation:** ensuring non-discriminatory access to necessary core facilities, especially network infrastructures. By regulating the way in which natural monopolists provide access to their facilities, it is possible for governments to improve economic welfare by promoting lower access prices and greater supply;

- **Retail regulation:** measures to mitigate monopoly pricing or behaviour at the retail level;

- **Public service regulation**: measures to ensure that all consumers, regardless of social status, income or geographical location, have access to goods that are deemed of special social value, as with universal service obligations;

- **Resolution of disputes**: quasi-judicial powers may result in faster resolution of disputes than could be provided by a non-specialized court; and

- **Competition oversight:** controlling anticompetitive conduct and mergers. Competition regulation has a number of goals, one of the most important being efficient operation of markets. It seeks to prevent abuses of market power that result in unduly high prices, less innovation, lower choice and lower quality.

10. Increasingly, policy makers recognize that regulations should be designed to minimize their harmful effects on competition. For example, public service regulations designed to ensure universal access to services have frequently overstepped their original purpose and have served as a basis for preventing competition by protecting incumbents from entry. These entry prohibitions ensured that the incumbent would be able to cross subsidize from high profit products to low profit or money losing products. In fact, such restrictions on competition are often not necessary because universal service obligations can be met in the presence of competition. (OECD(2004c))

4. Competition authorities and regulators have different core competencies

11. Competition authorities and sector regulators have different core competencies. These core competencies influence the types of tasks best accomplished by each.

4.1 Sector regulators

12. Sectoral regulation is frequently overseen by sector regulators. Sector regulators typically have extensive, ongoing knowledge of the technical aspects of the products and services that are regulated. Sector regulators are likely better suited to technical regulation than competition authorities.

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2. This note does not discuss the issue of broader structural changes in governance, such as structural separation between competitive and non-competitive businesses or privatisation, as these changes often involve more parts of government than competition authorities and sector regulators. Such changes are discussed in the note for session I, "Bringing competition into regulated sectors," DAF/COMP/GF(2005)1, 25 January 2005. (OECD(2005b)

13. For example, in telecommunications, when adjacent spectrum is operated by two entities, there is a technical possibility that signals of one entity may interfere with those of the other. While some would suggest that a common law system could resolve any disputes related to interference (see, for example, Coase (1959)), policy makers have generally preferred to create an administrative body with oversight of interference issues. Sector regulators are well-suited to setting rules that will reduce interference or for overseeing parties' claims of undue interference from neighbouring spectrum. At times, though, even technical regulations can affect the conditions of competition, so competition policy issues can arise even with technical regulation. For example, rules on interference limit the number of potential competitors within a spectrum band. When technical regulations impact conditions of competition, there may be reason to involve competition authorities in design and oversight of such regulations.

14. Historically, regulators have often been closely related to ministries that manage or managed incumbent firm(s). Perhaps as a result, regulatory agencies are sometimes perceived as taking actions that appear to serve the interests of the firm(s) being regulated. Greater independence both from political power and the regulated sector are crucial for avoiding these perceptions. In many countries, regulatory institutions have indeed increased their levels of independence.[3]

15. Enforcement by sector regulators may be better suited when:

- Fast, definitive resolutions are needed;
- Ex post enforcement creates excessive uncertainty;
- Scientific and technical expertise is required to assess merits of arguments;
- The standards of proof required for competition law cases would not be met for achieving the socially desired regulatory outcomes; and
- Structurally similar situations are repeated and consistent basic rules are desired.

4.2 Competition authorities

16. Competition laws are frequently broadly overseen by competition authorities. The skills necessary for delineating relevant markets, assessing likelihood of harm to competition, assessing entry conditions and assessing significant market power are particularly well-suited to the expertise of competition authorities. While regulators may have skills in these areas, it is usually the case that competition authorities have a greater breadth of experience in competition law oversight and are adept at applying the competition law to different products and services. Competition authorities are best suited to competition law oversight.

17. In the process of applying competition laws in regulated sectors, competition authorities can often benefit from the technical expertise of sector regulators and should seek to co-operate with sector regulators to benefit from this expertise.

18. Competition laws frequently include abuse of dominance provisions that apply to "excessive" prices. In jurisdictions with such laws, abuse of dominance may be construed to limit monopoly pricing, a topic also of concern to regulators. (See the note for session III on "Abuse of Dominance in Regulated Sectors" (OECD(2005a).)

3. See, for example, OECD(2003a, 2004d).

- Enforcement by competition authorities may be better suited when:
- Defining markets for regulatory purposes is necessary;
- Ex ante regulatory enforcement risks distorting market outcomes, stifling new products and more generally creating costly errors;
- Markets will not require ongoing oversight; and
- Products of interest are subject to strategic manipulation that cannot be foreseen through regulation.

19. As for wholesale regulation, retail regulation, public service regulation and dispute resolution, the ideal role of competition authorities and regulators is less clear. In certain countries, such as Australia and the Netherlands, competition authorities have more direct roles in some of these areas of regulation. In absence of sector regulators, especially in non-OECD countries, competition laws are often invoked to govern unregulated sectors.

4.3 Competition authorities can provide valuable input for those tasks for which they are not primary enforcers

20. Even when competition authorities are not the best qualified institution to make determinations related to topics such as ongoing price, revenue, technical or other regulation, competition authorities do nonetheless have skills that are useful for some parts of regulation and that should be used as part of the regulatory process in key economic sectors. For example, many economic regulations are predicated on the idea that one or more firms in a product market have the ability to profitably raise prices. Regulators have not always made reasoned determinations of market power, while competition authorities are skilled in the reasoning related to product market definition. In the European Union, a recent electronic communications package was adopted in February 2002, including Directive 2002/21/EC. (European Parliament and the Council (2002)) This package identifies a three-step approach of:

- Identification of relevant markets;
- Determination of operators considered to hold significant market power; and
- The possibility of imposing ex ante obligations on specific operators considered to be dominant within the pre-defined markets.

21. Recommendation C(2003)497 on relevant product and service markets susceptible to ex ante regulation identifies 18 potentially regulated markets. (European Commission (2003)) The national regulatory authorities are responsible for determining the geographic scope of these markets. The national regulatory authorities are then responsible for making determination of operators considered to hold significant market power or "dominance." Findings of significant market power will then be a pre-condition for ex ante obligations, as defined in the Access Directive (2002/19/EC). The package would help focus regulation on products and services that are not fully competitive. It is expected that unnecessary regulations will be reduced. The national regulatory authority determinations are subject to review and comment by the European Commission; both in the development of the package and in reviewing determinations, DG Competition play a significant role.

5. Instruments of co-operation that merit consideration

22. While broad government programs are not always possible, improved co-operation between competition authorities and sector regulators is more easily implemented than broad government programs and is valuable for ensuring both that regulatory agencies take appropriate account of competition concerns and that competition authorities take appropriate account of technical and other regulatory concerns. At times, co-operation may occur naturally without any institutional support. Even so, co-operation can usually be enhanced, to the benefit of regulatory decision making. A variety of instruments exist for encouraging co-operation between competition authorities and sector regulators. No OECD country has in place all the options listed below. However, adopting a mixture of some of these instruments can be valuable for improving the process and outcomes of co-operation. These include:

5.1 Giving statutory powers to the competition agency for some aspects of sector regulation

23. At times, regulations may continue to apply to products and companies even after the need for regulation has passed. However, for reasons of institutional inertia and survival, regulatory agencies may not relinquish outdated regulatory powers or institute new powers in response to changed market conditions. A number of laws and regulations therefore predicate the applicability of regulation on the existence of substantial market power.

24. An example of this can be found in the laws and regulations of Mexico. Determinations of substantial market power are made by the Competition Commission, not the sector regulator, for sectors stated by the Seaport Law of 1993, the Law on Roads, Bridges and Road Transport of 1993, the Navigation Law of 1994, the Railroad Services Law of 1995, the Federal communications Law of 1995, the Civil Aviation Law of 1995 and the Airport Law of 1995, and the regulations of natural gas of 1995 and of pension funds of 1996. The Mexican Competition Commission is responsible for assessing whether entities, such as incumbent telecom operator Telmex, have substantial market power over a product or service. Such a finding is needed prior to regulation of the company's product or service. The telecom regulator then has the ability to regulate operators declared to hold market power. However, should the competition authority in the future alter its ruling in response to changed market conditions and assess that a firm that formerly had substantial market power for a product no longer does, the regulator then has no further right to regulate the firm in that product. Besides assessments of market power, a second area in which the Competition Commission plays a role is in making determinations to authorize economic agents to participate in privatisations or in public auctions for concessions, licenses and permits. (OECD(1999), p. 182, OECD(2004a), pp. 16-17)

5.2 Competition authorities and regulators can be given concurrent powers of enforcement of the national competition law

25. One way to ensure that both technical expertise and competition law expertise can express their views is to provide concurrent jurisdiction, in which both sector regulators and a competition authority have the right to bring cases under the national competition law. The UK's Competition Act of 1998, for example, provides concurrent powers for sector regulators in electricity, gas, telecommunications, water and railways, among other areas. The UK's implementing regulation Statutory Instrument 2000 No. 260 does not permit the exercise of functions by an authority while the same functions are being carried out by another authority, avoiding double jeopardy. It requires that when one authority has or may have concurrent jurisdiction, that authority shall notify other authorities with jurisdiction in advance of taking action. The relevant authorities are then to decide among themselves who shall exercise powers in relation to a given case. In case agreement is not reached, the Director General of Fair Trading shall inform the Secretary of State in writing. Authorities may make representations to the Secretary of State and the Secretary of State determines which authority shall exercise powers in relation to a given case. The

Statutory Instrument also permits the transfer of functions to another authority from the one who initially exercises functions and permits the staff of one authority to act as staff of the authority with decision power for a given case. (HMSO(2000))

5.3 Placing senior official of competition agency on oversight board for sector regulator and vice versa

26. Placing senior officials from regulators in board positions for a competition authority or senior competition authority officials in board positions can be an effective tool for ensuring that institutions take account of each other's interests. The Australian Competition and Consumer Commission (ACCC) has associate commissioners in addition to the five permanent commissioners. Associate commissioners can include appointees from Commonwealth and State regulatory agencies. For example, association commissioners have come from institutions such as the Australian Broadcasting Authority, the New South Wales Independent Pricing and Regulatory Tribunal and the Victorian Office of the Regulator General. At the same time, certain members of the ACCC have been appointed as associate members of the Australian Communications Authority. (OECD(1999), p. 107)

5.4 Providing competition authorities with the standing to submit public comments on the application of regulations that require written response by the regulator prior to final decisions

27. Ensuring that competition authorities have an opportunity to air their views and that regulatory agencies must respond to these views can provide an important avenue for promoting competition. In Italy, most sectors are subject to the national competition law (law No. 286 of October 10, 1990) as enforced by the Antitrust Authority (Autorità garante della concerrenza e del mercato). The exception is that in the banking sector, the sector regulator, the Bank of Italy, has the responsibility for the enforcement of the national competition law for agreements, abuses of dominant position and mergers. The competition authority nonetheless has the ability to submit its views on bank regulatory matters. After such a submission, the bank regulator must respond and cannot permit anticompetitive actions unless there are special circumstances (notably, system stability is at risk) and the competition authority agrees. (OECD(1999), p. 165)

5.5 Establishing a written framework that governs co-operation between sector regulators and competition authorities

28. One way to enhance co-operation over the long-term is to establish formal co-operation agreements. The Competition Authority of Ireland has instituted such formal agreements in accordance with the Competition Act of 2002, section 34(1). According to the Act, the purpose of enabling such agreements is to facilitate co-operation, avoid duplication of activities, and ensure consistency between decisions related to competition issues. The act requires that agreements contain:

- "a provision enabling each party to furnish to another party information in its possession if the information is required by that other party for the purpose of the performance by it of any of its functions",

- "a provision enabling each party to forbear to perform any of its functions in relation to a matter in circumstances where it is satisfied that another party is performing the functions in relation to that matter" and

- "a provision requiring each party to consult with any other party before performing any functions in circumstances where the respective exercise by each party of the functions

concerned involves the determination of issues of competition between undertakings….". (Competition Act 2002, Section 34(3))

29. A number of co-operation agreements have been established in Ireland. The Competition Authority has agreements with the Broadcasting Commission of Ireland (TCA(2002a)), the Commission for Aviation Regulation(TCA(2002b)), the Commission for Communications Regulation(TCA(2002c)), the Commission for Energy Regulation(TCA(2002d)) and the Office of the Director of Consumer Affairs(TCA(2003)). These co-operation agreements to ensure that the protections of confidentiality provided by one body are assured when that information is shared with another body and that information cannot be used for any purpose besides that for which it has been shared.

30. Even when an explicit, bilateral written agreement does not exist, co-operation can be enabled by legislation. In France, the telecommunications law and the energy law enable cooperation between the regulators and competition authority. The telecommunications law enables consultation between the Autorité de Régulation de Télécommunications and the Conseil de la Concurrence. Similarly, the energy law suggests that conduct related to abuse of dominance or restrictive agreements will be referred by the energy regulator, the Commission de Régulation de l'Energie (CRE) to the Conseil de la Concurrence. The law also promotes consultation between the CRE and the Conseil de la Concurrence. (OECD(2004e))

5.6 Encouraging personnel transfers or exchanges between sector regulator and competition authority

31. Staff transfers between a competition authority and a regulator, whether unilateral or bilateral, can significantly improve the process of communication between a regulator and competition authorities. Staff transfers have occurred both at senior management levels and at normal staff level. For example, in the U.S., the Chief of Staff of the Antitrust Division of the U.S. Department of Justice was appointed to be a commissioner in the telecommunications regulator, the Federal Communications Commission (FCC), and then proceeded to become the chairman of the FCC. In Finland, staff from the competition authority have found positions in regulators, such as the telecommunications authority. The transfers described above have occurred at senior levels. But transfers or exchanges can also happen at the staff level and can encourage improved communications at the staff level. Transfers or exchanges tend to work better when staff who are well known within an institution transfer to the other. In the U.S., an exchange of economics staff between the U.S. Department of Justice's Antitrust Division and the FCC enhanced knowledge, communication and understanding between economic staff of the institutions.

5.7 Exchanging information informally between sector regulator and competition authority

32. When a competition agency seeks to comment on the activities of a regulator, it can often be valuable to contact the regulator before making any official comments, in order to find the right people to whom comments should be addressed and to better understand reasons for regulations or proposed regulatory actions. At times, informal comments may be more effective than formal comments.

5.8 Head of competition authority can be given a cabinet level standing

33. Giving the chairperson of a competition authority a high-level status within top government hierarchy can be beneficial when independent regulators do not exist or when ministries retain many regulatory functions and maintain final decision powers. For example, in Korea, the Chairman of the Korean Fair Trade Commission has cabinet level standing within the government. Such standing can help to ensure that the competition authority is able to appeal directly to high level government for internal government dispute resolution and that competition authorities are not outranked by sector regulators.

5.9 Regulator and competition authority can be unified, ensuring internal consistency with respect to competition decisions

34. One way to ensure consistency in the approach towards competition law enforcement of a sector regulator and a competition authority is to merge the regulator with the competition authority. One example of merging a regulator with a competition authority occurs in the Netherlands, where the government has created chambers within the NMa for sector regulation. The energy regulator in the Netherlands, the Office of Energy Regulation (DTe) is placed under the oversight of the competition authority, the NMa. DTe is responsible for the implementation and supervision of the Electricity Act of 1998 and the Gas Act of 2000. In 2004, the Office of Transport Regulation was set up as another chamber in the NMa. The chamber model allows highly specialized knowledge related to sectors to exist within the structure of a competition authority focused on broad issues of improving competition.

6. Ensuring consistency in application of competition laws

35. Ensuring consistency in application of competition law across different sectors is an important goal. When competition authorities are responsible for competition law application in some areas and sector regulators are responsible in others, ensuring such consistency can be difficult. Consistency at a national level can help to ensure that international convergence of antitrust standards can occur, which is particularly important for ensuring that complex international transactions do not face a tangle of different rules that can weigh down transactions with excessive remedies. The UK has been one of the leading OECD jurisdictions in ensuring consistency.

6.1 Appeals route for competition decisions should converge

36. One practical and highly desirable method for ensuring such consistency is setting up a common appeals path, so that there is one court that has ultimate oversight of competition law cases, whatever their origin. This is particularly important in the UK, with concurrent jurisdiction between many sector regulators and the Office of Fair Trading (OFT), but is also important where sector specific laws may have competition impacts. In the UK, the Competition Appeals Tribunal is the common appellate body for decisions by the Competition Commission and by regulators with respect to application of competition law. In Poland, the Antimonopoly Court has jurisdiction both over competition authority cases and over appeals of regulation. “The broader jurisdiction promises to ensure that policies are applied consistently in competition cases and in sectoral regulation. Originally, the Court only reviewed AMO decision. In 1997, it was given the power to hear appeals from the new Energy Regulatory Authority. The telecoms regulator was added in 2000, and the railway regulator in 2001.” (OECD(2002), p. 26) In France, the path of appellate review of decision by the Conseil de la Concurrence and both the telecom and energy regulators is through a common court, the cour d’appel de Paris.

6.2 Regulatory impact assessment should take into account competition objectives, among other goals

37. Increasingly, central governments engage in regulatory impact assessments in order to ensure that new regulations are necessary and that their benefits exceed their costs, and that other alternative regulations would not succeed equally well. One portion of these assessments should include the impact on competition. The UK has developed this approach with a significant role held by the OFT. According to the Cabinet Office’s Regulatory Impact Unit, all Regulatory Impact Assessments “must include a Competition Assessment, except where the proposal solely affects the public services. The Cabinet Office describes a Competition assessment as one to “Provide an assessment of the competition impacts for each option (talk to OFT).” (UK Cabinet Office (2005b)) The OFT has published its own “Guidelines for Competition Assessment (OFT(2002)). Alternatively, the Cabinet Office releases a quick summary of key

features of a competition assessment. The test proceeds in two stages: first assessing whether there are potentially significant competitive effects from a regulation and second, if there are, performing an in depth analysis. With respect to a detailed analysis, the Cabinet Office states that "Carrying out this assessment can be complex and requires an understanding of competition issues. You will need the help of your departmental economists and should also consult the Regulatory Review Team at the OFT who will provide help with the competition analysis, as well as with drafting the assessment." (UK Cabinet Office (2005a)

6.3 Competition authorities should be given the right to intervene with respect to existing and proposed regulations that are potentially harmful to competition

38. At the stage of preparing new regulations or reviewing existing regulations, giving the competition authority the right to intervene helps to promote pro-competitive regulation. In the UK, the OFT can study both proposed and existing regulations. It can then issue a public report stating its views about what problems may exist in the regulation(s). Once this report has been issued, the government has undertaken to respond publicly within 90 days. Note that this right to intervene is not the same as a requirement that the competition authority submit opinions on all new regulations. Most competition authorities do not have the resources to review all new regulations.

7. Conclusion

39. One of the most powerful mechanisms for achieving pro-competitive regulation is to improve the co-operation and co-ordination between sector regulators and competition authorities. Central government support for pro-competitive regulation is justified in order to enhance growth and develop an economy that is better able to resist economic shocks.

- Central government should encourage pro-competitive regulation, by taking actions such as:
  - Appointing regulators with a proven interest in competition;
  - Including pro-competitive regulation as part of a sector regulator's mandate; and
  - Giving competition oversight functions to the competition agency, with technical backup from the sector regulator.
- Instruments of co-operation between sector regulators and competition authorities should be adopted, such as:
  - Giving statutory powers to the competition agency for some aspects of regulatory reviews;
  - Placing senior official of competition agency on oversight board for sector regulator and vice versa; and
  - Providing competition authorities with the standing to submit public comments that require written response by the regulator prior to final decisions.

- Mechanisms for ensuring domestic consistency in competition rules should be applied

  - To the extent that multiple agencies have competition oversight functions, a common appeal route should be created so that competition cases are governed by a common standard;

  - Regulatory impact assessment should take into account competition objectives, among other goals; and

  - Competition authorities should be given the right to intervene with respect to existing and proposed regulations that are potentially harmful to competition.

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Organisation de Coopération et de Développement Economiques
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Français - Or. Anglais

DIRECTION DES AFFAIRES FINANCIÈRES ET DES ENTREPRISES
COMITÉ DE LA CONCURRENCE

DAF/COMP/GF(2005)2
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Forum mondial sur la concurrence

LES RELATIONS ENTRE AUTORITES DE LA CONCURRENCE ET AUTORITES RESPONSABLES DE LA REGLEMENTATION SECTORIELLE

Note de discussion

-- Session II --

Cette note de discussion du Secrétariat est soumise POUR EXAMEN lors de la Session II du Forum mondial sur la concurrence qui se tiendra les 17 et 18 février 2005.

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Français - Or. Anglais

LES RAPPORTS DES AUTORITÉS DE LA CONCURRENCE ET DES RÉGULATEURS SECTORIELS

1. Introduction

1. Les rapports des autorités chargées de la concurrence et des régulateurs sectoriels ont parfois donné lieu à des désaccords sur la stratégie de régulation, assez peu de mécanismes permettant d'assurer à la fois la prise en considération du point de vue des autorités chargées de la concurrence et de celui des régulateurs. D'un côté, on a parfois eu l'impression que les régulateurs agissaient plus dans l'intérêt de la (des) société(s) qu'ils sont chargés de réguler que dans l'intérêt des consommateurs ou de la concurrence. D'un autre côté, on a pu parfois penser que les autorités chargées de la concurrence négligeaient les objectifs intéressant l'ensemble de la collectivité, au-delà du renforcement de la concurrence, et ne possédaient pas les connaissances techniques nécessaires sur des secteurs très complexes.

2. Ces tensions ne sont pas une fatalité. Les autorités chargées de la concurrence et les régulateurs sectoriels devraient œuvrer côte à côte, parce que :

- Une régulation qui favorise la concurrence stimule la croissance économique, comme permettent de le penser de récents travaux de l'OCDE et d'autres sources.
- Nombre des objectifs des autorités chargées de la concurrence et des régulateurs sont en fait très similaires. Ainsi, de nombreux régulateurs s'attachent principalement à empêcher une « tarification excessive », à garantir l'accès aux services de base et à s'assurer de la réduction des obstacles à l'entrée. Ces objectifs sont aussi ceux des autorités chargées de la concurrence dans la plupart des pays de l'OCDE.

3. L'idéal serait que les rapports des régulateurs et des autorités chargées de la concurrence soient conduits par les autorités centrales qui prennent l'initiative d'un examen général de la réglementation en vigueur dans une optique axée sur la concurrence, veillant à ce qu'une « culture de la concurrence » inspire à la fois les régulateurs sectoriels et les autorités chargées de la concurrence.

4. Dans la pratique, rares sont les pays qui ont réalisé cet idéal. Dans la mesure où l'idéal n'est pas atteint, les autorités peuvent néanmoins prendre un certain nombre de mesures pratiques pour promouvoir une régulation qui favorise la concurrence et améliorer les rapports des autorités chargées de la concurrence et des régulateurs sectoriels (OCDE 1999, 2003a).[1] Cette note expose les grandes lignes de quelques-unes de ces stratégies.

5. Quelques-uns des grands principes visant à promouvoir une régulation axée sur la concurrence pourraient s'énoncer comme suit :

- Les autorités centrales se mobilisent pour une régulation qui favorise la concurrence ;
- Les instruments de coopération sont mis en œuvre à la fois par les autorités chargées de la concurrence et par les régulateurs ; et
- Les principes généraux d'application du droit de la concurrence sont intersectoriels.

1. Ces rapports ont déjà été étudiés lors de nombreux examens par les pairs du droit et de la politique de la concurrence, par exemple OCDE (2004b), notamment dans le cadre du programme de l'OCDE sur la réforme de la réglementation, ainsi que lors du récent examen de la Norvège (OCDE 2003b) et du Mexique (OCDE 2004a).

2. L'effort général des autorités publiques en faveur de la concurrence profite à l'économie

6. La mise au point d'une régulation qui favorise la concurrence et la réduction des obstacles réglementaires sont d'une importance économique capitale, tant pour veiller à ce que les consommateurs nationaux bénéficient de la concurrence que pour s'assurer que les structures de coût des entreprises intérieures leur permettront de rester compétitives au niveau international. La régulation sectorielle influe sur le coût et la qualité de nombreux moyens de production essentiels, par exemple les télécommunications, l'énergie et les transports. Soumises à une régulation favorisant la concurrence, les entreprises du secteur visé sont mieux armées pour s'adapter à l'évolution technologique, pour choisir les moyens de production bon marché, pour répondre aux préférences des consommateurs et pour fixer des prix qui reflètent plus fidèlement les coûts variables de la production. De ce fait, les autorités publiques peuvent stimuler leur économie en encourageant une régulation qui favorise la concurrence.

7. L'Australie fournit un bon exemple de ce qui peut arriver lorsque les autorités publiques dans leur ensemble s'attachent à favoriser la concurrence et à mieux axer la régulation sur la concurrence. Près de deux décennies de stagnation et de déclin économiques par rapport aux autres économies de l'OCDE ont conduit l'Australie à engager un ambitieux programme de réforme, notamment la réforme des marchés financiers et du travail, ainsi que de la politique de la concurrence. La mise en œuvre du volet concernant la concurrence, la générale et ambitieuse *National Competition Policy* a, depuis le milieu des années 90, largement contribué aux gains récents de la productivité du travail et d'autres facteurs, ainsi qu'à la croissance économique de l'Australie. Selon les estimations de la *Productivity Commission* nationale, les revenus annuels des ménages ont en moyenne augmenté d'environ 7 000 dollars australiens du fait de la politique de la concurrence. La dernière étude de l'OCDE sur l'Australie montre que l'économie nationale bénéficie encore du programme de réformes, vastes et profondes, qui a commencé dans les années 80 et s'est intensifié surtout durant les années 90. Ces réformes ont facilité la définition de politiques macroéconomiques dans un cadre à moyen terme axé sur la stabilité. Sous l'effet conjugué de ces mesures s'est ouverte une période d'expansion économique de treize ans où l'inflation est restée faible, la résistance aux chocs intérieurs et extérieurs, élevée, et les finances publiques, très saines.

8. Une régulation axée sur la concurrence s'est avérée favorable à l'emploi, à la croissance de la productivité et à l'investissement.

- **L'emploi**. Nicoletti et Scarpetta (2001) observent que la régulation des marchés de produits influe sur l'emploi. Ils estiment que l'orientation des politiques dans un sens qui favorise la concurrence en Nouvelle-Zélande et au Royaume-Uni a ajouté environ 2.5 points de pourcentage à leur taux d'emploi sur la période 1978-1998. Dans les pays où les réformes n'ont pas pris cette ampleur, par exemple la Grèce, l'Italie et l'Espagne, le taux d'emploi n'a progressé que de 0.5 à 1 point de pourcentage.
- **La croissance de la productivité**. Nicoletti et Scarpetta (2003) constatent que les réformes qui favorisent la gouvernance privée [c'est-à-dire la privatisation] et la concurrence … stimulent généralement la productivité. Dans l'industrie de transformation, les gains que l'on peut attendre de la réduction des obstacles à l'entrée sont d'autant plus grands que le pays considéré est loin de celui qui mène la course technologique. Aussi une régulation qui limite l'entrée peut-elle freiner l'adoption de technologies existantes, par exemple en réduisant la pression de la concurrence, les retombées technologiques ou l'arrivée de nouvelles entreprises de pointe. En même temps, la privatisation comme la libéralisation à l'entrée passent pour exercer une influence bénéfique sur la productivité dans tous les secteurs … Ces conclusions … mettent en évidence les bienfaits que peuvent apporter les réformes de la réglementation et la privatisation, surtout dans les pays qui souffrent d'un gros retard technologique et d'un régime réglementaire restrictif freinant l'incitation à adopter les technologies nouvelles.

- **L'investissement**. Alesina, Ardagna, Nicoletti et Schiantarelli (2003) observent que la régulation étroite des marchés de produits a gravement nui à l'investissement. Les données relatives aux secteurs où l'environnement réglementaire a beaucoup changé permettent de penser que la déréglementation stimule l'investissement à long terme. Les conséquences sont claires : il y a tout lieu de s'attendre à ce que les réformes de la réglementation, surtout celles qui libéralisent l'entrée, stimulent l'investissement.

3. Principales tâches des autorités publiques dans les secteurs régulés

9. Parmi les principales tâches auxquelles les autorités publiques peuvent se trouver confrontées dans les secteurs régulés, il faut citer les suivantes[2] :

- **La régulation technique** : fixer des normes et en surveiller l'application, gérer les licences et appliquer des sanctions pour assurer la compatibilité et répondre aux préoccupations touchant au respect de la vie privée, à la sécurité, à la fiabilité, à la stabilité financière et à la protection de l'environnement ;
- **La régulation au stade du gros** : assurer un accès non discriminatoire aux services de base, notamment ceux que portent les réseaux d'infrastructure. En régulant l'accès que les monopoles naturels donnent de leurs services, notamment en encourageant la baisse des prix d'accès et l'augmentation de l'offre, les autorités publiques peuvent contribuer à la prospérité économique de la collectivité ;
- **La régulation au stade du détail** : mesures visant à modérer la tarification ou le comportement des monopoles au niveau du détail ;
- **La réglementation des services publics** : mesures visant à s'assurer que tous les consommateurs, quels que soient leur situation sociale, leur revenu ou leur lieu de résidence, ont accès aux biens tutélaires, par exemple ceux qui sont assortis d'obligations de service universel ;
- **Le règlement des différends** : des pouvoirs quasi juridictionnels peuvent se traduire par un règlement des différends plus rapide que ne le permettraient un tribunal non spécialisé ; et
- **La surveillance de la concurrence** : réprimer les pratiques anticoncurrentielles et contrôler les fusions. Parmi les objectifs de la régulation de la concurrence, l'un des plus importants est le fonctionnement efficient des marchés. Elle vise à empêcher les abus de position dominante qui se traduisent par des prix excessifs, le recul de l'innovation, la réduction du choix et la baisse de la qualité.

10. Les responsables de l'action publique prennent conscience que la régulation doit être conçue pour réduire le plus possible les atteintes qu'elle porte à la concurrence. Ainsi, une réglementation visant à assurer l'accès universel aux services publics a souvent dépassé son objectif initial pour servir à empêcher la concurrence en protégeant des entrants les prestataires en place. Ce barrage à l'entrée permettait au titulaire de compenser les pertes subies sur certains produits par les profits réalisés sur d'autres. En réalité, ces restrictions à la concurrence sont souvent superflues du fait que les obligations de service universel peuvent être respectées en situation de concurrence. (OCDE (2004c)

2. Cette note ne traite pas la question des changements structurels généraux dans la gouvernance, par exemple la séparation structurelle des activités concurrentielles et non concurrentielles ou la privatisation, car ces changements font souvent intervenir d'autres organes des pouvoirs publics que les autorités chargées de la concurrence et les régulateurs sectoriels. Ces changements sont étudiés dans la note destinée à la séance I, « Bringing competition into regulated sectors », DAF/COMP/GF(2005)1, 25 janvier 2005. (OCDE 2005b)

4. Les missions respectives des autorités de la concurrence et des régulateurs

11. Les autorités chargées de la concurrence et les régulateurs sectoriels ont des missions différentes. Ces missions essentielles influent sur la nature des tâches respectives qu'ils sont les mieux à même d'accomplir.

4.1 Les régulateurs sectoriels

12. La régulation sectorielle est souvent confiée à des organismes sectoriels. Ceux-ci possèdent généralement une connaissance détaillée et suivie des aspects techniques des produits et des services qui font l'objet de la régulation. Selon toute vraisemblance, les régulateurs sectoriels sont mieux armés pour la régulation technique que les autorités chargées de la concurrence.

13. Ainsi, dans le secteur des télécommunications, lorsque deux sociétés exploitent des fréquences adjacentes, il est techniquement possible que les signaux émis par l'une interfèrent avec ceux qu'émet l'autre. Certains diront qu'un système de *common law* pourrait régler tout différend né d'interférences (voir, par exemple, Coase 1959), mais les responsables ont généralement préféré créer un organe administratif chargé des problèmes d'interférence. Les régulateurs sectoriels sont bien placés pour fixer des règles qui réduiront les interférences ou pour instruire les plaintes d'interférence avec des fréquences voisines. Il arrive toutefois que la seule régulation technique affecte les conditions de la concurrence, de telle sorte qu'elle pose elle-même aux autorités des problèmes de concurrence. Par exemple, les règles visant les interférences limitent le nombre de concurrents qui peuvent exploiter une bande de fréquence donnée. Lorsque la régulation technique affecte les conditions de la concurrence, il peut y avoir lieu de faire intervenir les autorités chargées de la concurrence dans la conception et le suivi de cette régulation.

14. De tout temps, les régulateurs ont souvent été en liaison étroite avec les ministères qui ont ou avaient la tutelle des prestataires en place. C'est peut-être pourquoi les autorités de régulation semblent parfois prendre des mesures qui servent les intérêts des sociétés visées. Pour éviter cette image, il est essentiel de mieux assurer leur indépendance, tant du pouvoir politique que du secteur qu'elles régulent. Et de fait, dans de nombreux pays, les organes de régulation jouissent d'une plus grande indépendance.[3]

15. Les régulateurs sectoriels sont les mieux placés pour faire appliquer les règles lorsque :

- Il faut une décision rapide et définitive ;
- L'application *ex post* engendre trop d'incertitude ;
- Des compétences scientifiques et techniques sont nécessaires pour juger du poids des arguments ;
- Les normes de preuve qu'impose le droit de la concurrence ne seraient pas respectées si l'on voulait atteindre les résultats attendus de la régulation pour l'ensemble de la collectivité ; et
- Des situations structurellement similaires se répètent et l'on veut pouvoir s'appuyer sur des principes constants.

4.2 Les autorités de la concurrence

16. Les autorités chargées de la concurrence exercent souvent une surveillance générale des textes relatifs à la concurrence. Les compétences requises pour définir les marchés à prendre en considération et pour évaluer le risque d'atteintes à la concurrence, l'accessibilité des marchés et les pouvoirs de marché

3. Voir, par exemple, OCDE (2003a, 2004d).

significatifs correspondent particulièrement bien au savoir-faire des autorités chargées de la concurrence. Les régulateurs peuvent être qualifiés dans ces domaines mais, le plus souvent, les autorités chargées de la concurrence ont acquis une plus vaste expérience de la surveillance du droit applicable et maîtrisent l'application du droit de la concurrence aux différents produits et services. Les autorités chargées de la concurrence sont mieux armées pour veiller à l'application du droit en la matière.

17. Lorsqu'elles assurent l'application du droit aux secteurs régulés, les autorités chargées de la concurrence sont souvent en mesure de bénéficier des compétences techniques des régulateurs sectoriels et elles doivent à cet effet rechercher leur coopération.

18. Le droit de la concurrence comprend souvent des dispositions contre l'abus de position dominante qui s'appliquent aux prix « excessifs ». Dans les pays où existent de telles dispositions, l'abus de position dominante peut être interprété comme une limite à la tarification de monopole, question qui intéresse aussi les régulateurs. (Voir la note destinée à la Séance III sur l'abus de position dominante dans les secteurs régulés (OCDE 2005a).

Les autorités chargées de la concurrence sont les mieux placées pour faire appliquer les règles lorsque :

- Il est nécessaire de définir les marchés aux fins de la régulation ;
- L'application *ex ante* de la régulation risque de fausser le libre jeu des mécanismes du marché, étouffant les nouveaux produits et, plus généralement, entraînant des erreurs coûteuses ;
- Les marchés n'appelleront pas une surveillance permanente ; et
- Les produits prometteurs sont sujets à une manipulation stratégique que les régulateurs ne peuvent prévoir.

19. Pour ce qui est de la régulation au stade du gros, de la régulation au stade du détail, de la réglementation des services publics et du règlement des différends, le partage idéal des tâches entre les autorités chargées de la concurrence et les régulateurs est moins évident. Dans certains pays, par exemple l'Australie et les Pays-Bas, les autorités chargées de la concurrence interviennent plus directement dans certains de ces domaines de la régulation. En l'absence de régulateurs sectoriels, surtout dans les pays non membres de l'OCDE, le droit de la concurrence est souvent invoqué dans la conduite des secteurs non régulés.

4.3 Les autorités de la concurrence peuvent contribuer utilement à l'exécution de certaines tâches alors qu'elles n'ont pas le pouvoir de police

20. Même lorsque les autorités chargées de la concurrence ne sont pas l'institution la plus qualifiée pour prendre une décision sur certains sujets, par exemple la régulation permanente des prix, des recettes, des questions techniques, elles conservent néanmoins des compétences qui sont utiles à certains aspects de la régulation et doivent être utilisées dans le cadre de la régulation de secteurs économiques essentiels. Ainsi, la régulation économique part souvent du principe que, sur un marché de produits, une ou plusieurs entreprises sont en mesure d'augmenter les prix à leur profit. Les régulateurs n'ont pas toujours donné une définition argumentée du pouvoir de marché, alors que les autorités chargées de la concurrence sont qualifiées pour définir rationnellement les marchés de produits. Dans l'Union européenne, un cadre réglementaire commun pour les réseaux et services de communications électroniques été adopté en février 2002, notamment la Directive 2002/21/CE. (Parlement européen et Conseil 2002). Ce cadre définit une méthode en trois temps :

- La définition des marchés à prendre en considération ;
- La définition des opérateurs qui détiennent un pouvoir de marché significatif ; et
- La possibilité d'imposer des obligations *ex ante* à certains opérateurs bien précis jugés dominants sur les marchés prédéfinis.

21. La recommandation C(2003)497 de la Commission concernant les marchés pertinents de produits et de services susceptibles d'une régulation *ex ante* recense dans le secteur des communications électroniques 18 marchés qui pourraient être régulés. (Commission européenne 2003). Les autorités régulatrices nationales sont chargées de définir l'étendue géographique de ces marchés, puis les opérateurs qu'elle juge détenir un pouvoir de marché significatif ou exercer une « domination ». La constatation d'un pouvoir de marché significatif est alors une condition préalable à l'imposition d'obligations *ex ante*, comme prévu dans la Directive sur l'accès (2002/19/CE). Ce cadre aiderait à cibler la régulation sur les produits et services qui ne sont pas pleinement soumis à la concurrence. La réglementation superflue devrait s'en trouver réduite. Les définitions des autorités régulatrices nationales sont susceptibles de révision et de commentaires de la Commission européenne ; la Direction générale Concurrence joue un rôle important, tant dans l'élaboration du cadre que dans la révision des définitions.

5. Les instruments de coopération qui méritent considération

22. S'il n'est pas toujours possible de mettre en œuvre une politique d'ensemble, resserrer la coopération des autorités chargées de la concurrence et des régulateurs sectoriels est plus aisé et contribue utilement à garantir tout à la fois que les organismes de régulation prennent dûment en considération les préoccupations relatives à la concurrence et que les autorités chargées de la concurrence tiennent pleinement compte des préoccupations, techniques et autres, relatives à la régulation. La coopération s'instaure parfois naturellement, sans aucun appui institutionnel. Même dans ces conditions, on peut généralement la renforcer au bénéfice de la prise de décision des régulateurs. De multiples instruments existent pour encourager la coopération des autorités chargées de la concurrence et des régulateurs sectoriels. Aucun pays de l'OCDE n'a mis en place toutes les options énumérées ci-après. Cependant, conjuguer quelques-uns de ces instruments peut contribuer utilement aux mécanismes et aux résultats de la coopération. Au nombre des mesures envisageables figurent les suivantes :

5.1 Confier à l'organisme chargé de la concurrence certaines compétences en matière de régulation sectorielle

23. La régulation continue parfois de s'appliquer à certains produits et à certaines entreprises alors que la nécessité ne s'en fait plus sentir. Par inertie institutionnelle et instinct de survie, les organismes de régulation peuvent conserver des compétences dépassées ou en instituer de nouvelles en réponse à l'évolution des marchés. Un certain nombre de lois et règlements fondent ainsi la régulation sur l'existence d'un pouvoir de marché significatif.

24. On en trouve une illustration dans les lois et règlements du Mexique. Le constat d'un pouvoir de marché significatif est fait par la Commission de la concurrence, et non pas le régulateur sectoriel, pour les secteurs mentionnés dans la loi sur les ports maritimes de 1993, la loi sur les routes, les ponts et les transports routiers de 1993, la loi sur la navigation de 1994, la loi sur les services ferroviaires de 1995, la loi sur les communications fédérales de 1995, la loi sur l'aviation civile de 1995 et la loi sur les aéroports de 1995, ainsi que la régulation du gaz naturel de 1995 et celle des fonds de pension de 1996. La Commission de la concurrence est chargée d'évaluer si une société, par exemple l'opérateur titulaire des télécommunication *Telmex*, dispose d'un pouvoir de marché significatif sur un produit ou un service. Ce constat est une condition préalable à la régulation du produit ou service de la société. Le régulateur des télécommunications peut alors réguler les opérateurs réputés détenteur d'un pouvoir de marché. Toutefois, si l'autorité chargée de la concurrence devait à l'avenir modifier sa décision en réponse à l'évolution du

marché et juger qu'une entreprise qui jouissait auparavant d'un pouvoir de marché significatif pour un produit donné ne l'a plus, le régulateur n'a plus alors le droit de réguler l'entreprise sur ce produit. Outre les évaluations du pouvoir de marché, il est un deuxième domaine où la Commission de la concurrence joue un rôle : la décision d'autoriser les agents économiques à participer aux privatisations ou aux adjudications de concessions, licences et permis. (OCDE 1999, p. 182 ; OCDE 2004a, pp. 16-17)

5.2 Les autorités de la concurrence et les régulateurs peuvent se voir confier concurremment des compétences d'application du droit national de la concurrence

25. Instituer des compétences concurrentes est un moyen de s'assurer que puissent s'exprimer les connaissances, tant techniques que relatives au droit de la concurrence : les régulateurs sectoriels comme l'autorité chargée de la concurrence peuvent soumettre des affaires au droit national de la concurrence. Le *Competition Act* de 1998 au Royaume-Uni, par exemple, confie des compétences concurrentes aux régulateurs sectoriels de l'électricité, du gaz, des télécommunications, de l'eau et des chemins de fer, entre autres domaines. Les textes réglementaires d'application *Statutory Instrument* 2000 n° 260 interdisent à une autorité d'exercer des fonctions si celles-ci sont déjà remplies par une autre autorité, évitant ainsi le risque de dualité de poursuite. Ces textes exigent que, si une autorité exerce ou peut exercer une juridiction concurrente, elle le notifie, avant toute action, aux autres autorités exerçant cette juridiction. Les autorités compétentes doivent alors convenir de celle d'entre elles qui aura juridiction pour une affaire donnée. Si l'accord ne peut se faire, le *Director General of Fair Trading* en informe le Secrétaire d'État par écrit. Les autorités peuvent faire des démarches auprès du Secrétaire d'État, qui décide quelle autorité aura juridiction pour une affaire donnée. Le *Statutory Instrument* permet aussi, pour l'affaire considérée, le transfert de compétences d'une autorité à une autre et le détachement du personnel correspondant. (HMSO 2000)

5.3 Nommer de hauts responsables des organismes chargés de la concurrence au conseil de surveillance des régulateurs sectoriels et inversement

26. Nommer de hauts responsables de la régulation sectorielle au conseil d'une autorité chargée de la concurrence et vice versa peut être un moyen efficace de s'assurer que chaque institution tienne compte des intérêts des autres. À l'*Australian Competition and Consumer Commission* (ACCC) des commissaires associés siègent aux côtés des cinq commissaires permanents. Les commissaires associés peuvent être nommés par les organismes de régulation du Commonwealth et des États. Les commissaires associés émanent par exemple de l'*Australian Broadcasting Authority*, du *New South Wales Independent Pricing and Regulatory Tribunal* et du *Victorian Office of the Regulator General*. Parallèlement, certains membres de l'ACCC ont été nommés membres associés de l'*Australian Communications Authority*. (OCDE 1999, p. 107)

5.4 Habiliter les autorités de la concurrence à formuler publiquement sur l'application de la régulation des avis qui requièrent une réponse écrite du régulateur avant la décision définitive

27. Veiller à ce que les autorités chargées de la concurrence puissent donner leur avis et à ce que les organismes de régulation soient tenus de répondre est une piste à étudier pour développer la concurrence. En Italie, la plupart des secteurs sont soumis au droit national de la concurrence (loi n° 286 du 10 octobre 1990) que fait respecter l'Autorité antitrust *(Autorità garante della concerrenza e del mercato).* Une exception toutefois : dans le secteur bancaire, c'est le régulateur sectoriel, la Banque d'Italie, qui est chargé d'assurer le respect du droit national de la concurrence dans les accords, les abus de position dominante et les fusions. L'autorité chargée de la concurrence conserve néanmoins la capacité de donner son avis en matière de régulation bancaire. Le régulateur bancaire doit répondre à cet avis et ne peut autoriser des pratiques anticoncurrentielles, sauf circonstances exceptionnelles (notamment si la stabilité du système est menacée) et avec l'accord de l'autorité chargée de la concurrence. (OCDE 1999, p. 165)

5.5 Instituer un cadre écrit qui régit la coopération des régulateurs sectoriels et des autorités de la concurrence

28. Passer des accords de coopération officiels est un moyen de resserrer la coopération à long terme. La *Competition Authority* d'Irlande a institué des accords de ce type conformément au *Competition Act* de 2002, section 34(1). Selon cette loi, permettre ces accords a pour objet de faciliter la coopération, d'éviter la répétition des activités et d'assurer la cohérence des décisions relatives aux problèmes de concurrence. La loi prescrit que ces accords comprennent :

- une disposition habilitant chaque partie à communiquer les informations en sa possession à une autre partie si celle-ci en a besoin pour remplir ses fonctions ;
- une disposition permettant à chaque partie de s'abstenir d'exercer l'une ou l'autre de ses fonctions dans une affaire si elle constate qu'une autre partie remplit ces fonctions dans cette affaire ; et
- une disposition qui veut que chaque partie consulte les autres avant d'exercer des fonctions lorsque l'exercice de ces fonctions par chaque partie en ce qui les concerne suppose la définition de problèmes de concurrence entre sociétés. (Competition Act 2002, Section 34(3)).

29. Un certain nombre d'accords de coopération ont été institués en Irlande. La *Competition Authority* a passé des accords avec la *Broadcasting Commission of Ireland* (TCA (2002a), la *Commission for Aviation Regulation* (TCA(2002b)), la *Commission for Communications Regulation* (TCA(2002c)), la *Commission for Energy Regulation* (TCA(2002d)) et l'*Office of the Director of Consumer Affairs* (TCA(2003)). Ces accords de coopération ont pour objet de garantir que la confidentialité assurée par un organisme l'est aussi lorsque des informations sont communiquées à un autre organisme et que ces informations ne peuvent pas servir un autre but que celui pour lequel elles ont été communiquées.

30. Même en l'absence d'accord bilatéral écrit, la coopération peut être autorisée par la législation. En France, la loi sur les télécommunications et la loi sur l'énergie permettent la coopération entre les régulateurs et l'autorité chargée de la concurrence. La loi sur les télécommunications permet à l'Autorité de régulation des télécommunications et au Conseil de la concurrence de se consulter. De même, la loi sur l'énergie propose que, pour décider de la conduite à tenir face à un abus de position dominante ou des ententes restrictives, le régulateur de l'énergie, la Commission de régulation de l'énergie (CRE) en réfère au Conseil de la concurrence. La loi encourage aussi la CRE et le Conseil de la concurrence à se consulter. (OCDE (2004e)

5.6 Encourager les transferts ou les échanges de personnel entre le régulateur sectoriel et l'autorité de la concurrence

31. Les transferts de personnel entre une autorité chargée de la concurrence et un régulateur, qu'ils soient unilatéraux ou bilatéraux, peuvent améliorer sensiblement la communication entre les deux catégories d'organes. Des transferts de personnel interviennent aussi bien au niveau des hauts responsables qu'à celui de leurs subordonnés. Ainsi, aux États-Unis, le *Chief of Staff* de l'*Antitrust Division* du *Department of Justice*, nommé commissaire du régulateur des télécommunications, la *Federal Communications Commission* (FCC), en a pris ensuite la présidence. En Finlande, des agents de l'autorité chargée de la concurrence ont trouvé un poste dans les organismes régulateurs, par exemple l'autorité des télécommunications. Ces transferts sont intervenus dans la haute hiérarchie. Or, des transferts ou des échanges sont possibles à d'autres niveaux aussi et peuvent favoriser la communication à ces niveaux. Les transferts ou échanges sont généralement plus efficaces lorsqu'ils portent sur des agents reconnus dans leur institution d'origine. Aux États-Unis, un échange d'économistes entre l'*Antitrust Division* du *Department*

of Justice et la FCC a fait progresser les connaissances, la communication et les analyses des agents économistes des deux institutions.

5.7 Échanger des informations sans formalité entre les régulateurs sectoriels et l'autorité de la concurrence

32. Lorsqu'un organisme chargé de la concurrence désire formuler des commentaires sur les activités d'un régulateur, il est souvent utile qu'il prenne contact avec le régulateur avant de donner un avis officiel afin de trouver le destinataire précis de ces commentaires et de mieux comprendre les raisons de la régulation ou des projets de régulation. Des commentaires informels sont parfois plus efficaces que des avis officiels.

5.8 Le chef de l'autorité de la concurrence peut avoir rang de ministre

33. Il peut être utile de donner au président d'une autorité chargée de la concurrence un rang élevé dans la haute hiérarchie nationale en l'absence de régulateurs indépendants ou lorsque les ministères détiennent de nombreuses fonctions de régulation et conservent le pouvoir de décision en dernier ressort. Ainsi, en Corée, le Président de la Commission de la concurrence a rang de ministre. Ce rang peut contribuer à garantir que l'autorité chargée de la concurrence peut s'adresser directement au niveau gouvernemental pour le règlement interne d'un différend et que l'autorité chargée de la concurrence n'est pas supplantée par les régulateurs sectoriels.

5.9 Un régulateur et l'autorité de la concurrence peuvent être unifiés pour assurer la cohérence interne des décisions relatives à la concurrence

34. Fusionner un régulateur avec l'autorité chargée de la concurrence est un moyen d'assurer la cohérence de la stratégie d'application du droit de la concurrence par ce régulateur sectoriel et l'autorité chargée de la concurrence. On en trouve une illustration aux Pays-Bas, où le gouvernement a institué au sein de la *Nederlandse Mededingingsautoriteit* (NMa, Autorité de la concurrence) des chambres de régulation sectorielle. Le régulateur de l'énergie aux Pays-Bas, le *Dienst uitvoering en toezicht Energie* (DTe, Service de régulation de l'énergie) est placé sous la tutelle de l'autorité chargée de la concurrence, la NMa. Le DTe est chargé de la mise en œuvre et du suivi d'application de la loi sur l'électricité de 1998 et de la loi sur le gaz de 2000. En 2004, la *Vervoerkamer* (chargée de la régulation des transports) a été instituée sous la forme d'une autre chambre de la NMa. Cette organisation en chambres permet une connaissance technique pointue des secteurs au sein même de l'autorité chargée de la concurrence qui s'attache principalement aux problèmes généraux du développement de la concurrence.

6. Assurer une application cohérente du droit de la concurrence

35. Assurer une application cohérente du droit de la concurrence à l'ensemble des secteurs est un objectif essentiel. Lorsque l'autorité chargée de la concurrence est responsable de l'application du droit de la concurrence à certains domaines et les régulateurs sectoriels à d'autres, assurer cette cohérence est parfois difficile. La cohérence au niveau national peut favoriser la convergence internationale des normes antitrust, ce qui est particulièrement important pour que les transactions internationales complexes ne se heurtent pas à une jungle de règles qui peuvent grever ces transactions par le poids des mesures correctives. Le Royaume-Uni est l'un des pays pilotes de l'OCDE dans la recherche de la cohérence.

6.1 Les voies de recours contre les décisions relatives à la concurrence devraient converger

36. Une méthode pratique et très souhaitable pour assurer cette cohérence consiste à instituer une voie de recours commune, pour que la surveillance en dernier ressort des affaires relevant du droit de la concurrence appartienne à une seule cour, quelle que soit leur origine. C'est particulièrement important au

Royaume-Uni, où de nombreux régulateurs sectoriels et l'*Office of Fair Trading* (OFT) exercent des juridictions concurrentes, mais c'est important aussi lorsque des droits sectoriels peuvent avoir des conséquences pour la concurrence. Au Royaume-Uni, le *Competition Appeals Tribunal* est l'organe commun d'appel contre les décisions de la *Competition Commission* et des régulateurs en matière d'application du droit de la concurrence. En Pologne, la Cour antimonopole est compétente à la fois pour les affaires jugées par l'autorité chargée de la concurrence et pour les appels en matière de régulation. Cette compétence élargie doit garantir que les politiques sont appliquées en toute cohérence, qu'il s'agisse d'affaires de concurrence ou de régulation sectorielle. À l'origine, la Cour n'examinait que les décisions de l'Office antimonopole. En 1997, elle a été chargée de recevoir les appels émanant de la nouvelle Autorité de régulation de l'énergie. S'y sont ajoutés en 2000 le régulateur des télécommunications et, en 2001, le régulateur du secteur ferroviaire. (OCDE (2002), p. 26). En France, la voie de recours contre les décisions du Conseil de la concurrence, ainsi que celles des régulateurs des télécommunications et de l'énergie est une cour commune, la Cour d'appel de Paris.

6.2 L'analyse d'impact de la réglementation doit tenir compte des objectifs de concurrence, entre autres buts

37. De plus en plus souvent les administrations centrales se livrent à l'analyse d'impact de la réglementation pour s'assurer que la nouvelle régulation est nécessaire et que ses bienfaits l'emportent sur leur coût, et que d'autres régulations ne seraient pas aussi efficaces. Une partie de l'analyse devrait porter sur les conséquences pour la concurrence. Le Royaume-Uni a mis au point cette démarche en donnant un rôle important à l'OFT. Selon la *Regulatory Impact Unit* du *Cabinet Office*, toutes les analyses d'impact de la réglementation doivent comprendre une analyse de la concurrence, sauf lorsque le projet touche uniquement les services publics. Le *Cabinet Office* définit l'analyse de la concurrence en disant qu'elle doit donner une analyse des effets de chaque option sur la concurrence (exposé à l'OFT du *Cabinet Office* du Royaume-Uni (2005b)). L'OFT a publié ses propres « Guidelines for Competition Assessment » (lignes directrices pour l'analyse de la concurrence, OFT (2002). Autre source, le *Cabinet Office* donne un bref résumé des principales caractéristiques d'une analyse de la concurrence. L'examen se déroule en deux étapes : premièrement, déterminer si un instrument de régulation peut exercer des effets notables sur la concurrence ; deuxièmement, dans l'affirmative, procéder à une analyse approfondie. Pour ce qui est de l'analyse approfondie, le *Cabinet Office* précise qu'effectuer cette analyse peut s'avérer complexe et suppose la connaissance des questions de concurrence. Il faut faire appel aux économistes du ministère et consulter aussi la *Regulatory Review Team* (équipe d'examen de la réglementation) à L'OFT qui apportera son aide lors de l'analyse de la concurrence et de la rédaction de l'analyse. (*Cabinet Office*, Royaume-Uni (2005a)

6.3 Les autorités de la concurrence doivent être habilitées à influer sur la régulation en vigueur ou en projet qui peuvent nuire à la concurrence

38. Au stade de l'élaboration d'un nouvel instrument de régulation ou de la révision d'un instrument en vigueur, habiliter l'autorité chargée de la concurrence à intervenir favorise l'instauration d'une régulation qui favorise la concurrence. Au Royaume-Uni, l'OFT peut étudier aussi bien les instruments en vigueur que ceux qui sont en projet. Il peut alors publier un rapport sur les problèmes que peut, à son avis, poser la régulation. À compter de la publication de ce rapport, le gouvernement s'est engagé à répondre publiquement dans les 90 jours. On notera que ce droit d'intervention n'équivaut pas à l'obligation qui serait faite à l'autorité chargée de la concurrence de donner son avis sur tout instrument nouveau. La plupart des autorités chargées de la concurrence n'ont pas les moyens d'examiner l'ensemble des instruments nouveaux de régulation.

7. Conclusion

39. L'un des mécanismes les plus puissants pour parvenir à une régulation qui favorise la concurrence consiste à resserrer la coopération et la coordination des régulateurs sectoriels et des autorités chargées de la concurrence. L'appui des autorités centrales à une régulation qui favorise la concurrence se justifie dans le but de renforcer la croissance et de mettre en place une économie qui résiste mieux aux chocs économiques.

- Les autorités centrales doivent encourager une régulation qui favorise la concurrence en prenant certaines mesures, par exemple :
  - Nommer des régulateurs qui ont fait la preuve de leur intérêt pour la concurrence ;
  - Inscrire la recherche d'une régulation favorable à la concurrence dans le mandat des régulateurs sectoriels ; et
  - Confier la surveillance de la concurrence à l'organisme public compétent, avec l'assistance technique des régulateurs sectoriels.
- Il faut adopter des instruments de coopération des régulateurs sectoriels et des autorités chargées de la concurrence, par exemple :
  - Donner compétence à l'organisme chargé de la concurrence pour certains aspects des examens de la régulation ;
  - Nommer de hauts responsables des organismes chargés de la concurrence au conseil de surveillance des régulateurs sectoriels et inversement ; et
  - Habiliter les autorités chargées de la concurrence à formuler publiquement des avis qui requièrent une réponse écrite du régulateur avant la décision définitive.
- Il faut mettre en œuvre des mécanismes qui assurent la cohérence nationale des règles de concurrence
  - Dans la mesure où de multiples organismes exercent des fonctions de surveillance de la concurrence, il faut instituer une voie de recours commune pour que les affaires de concurrence soient régies par une norme commune ;
  - L'analyse d'impact de la réglementation doit tenir compte des objectifs de concurrence, entre autres buts ; et
  - Les autorités chargées de la concurrence doivent être habilitées à influer sur la régulation en vigueur ou en projet qui peuvent nuire à la concurrence.

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Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

28-Jan-2005

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/GF/WD(2005)13
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Global Forum on Competition

THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS

Contribution from Algeria

-- Session II --

This contribution is submitted by Algeria under Session II of the Global Forum on Competition to be held on 17 and 18 February 2005.

JT00177690

English - Or. English

THE RELATIONSHIP BETWEEN THE COMPETITION AUTHORITIES AND SECTORAL REGULATORS

1. Introduction

1. The meet the needs that globalisation has generated, Algeria has introduced a new economic policy involves a redefining of the Government's role and means of intervention, primarily in the form of private-sector participation in the management of certain public services and in economic decision-making.

2. Reducing the weight of the influence and power wielded by the Government in accordance with this policy required a number of legal and organisational measures aimed at eliminating monopolies, freeing up initiatives and encouraging entrepreneurship.

3. Consequently, over the past ten years, the government has steadfastly pursued a process of institutional and economic reform aimed at increasing investment and private shareholdings in public enterprises through partnerships, privatisations, competition and the award of franchises. As part of this process, an action programme has been put in place to allow the Government to gradually disengage itself from the funding, performance, operation and management of certain public services with a view to ensuring greater market liberalisation.

2. Reform of public services and creation of regulatory authorities

4. The reorganisation of public services in Algeria has made it imperative to update and revise the legal and institutional framework governing public service activities in order to improve the services supplied, facilitate the supply of new services and establish healthy, fair and transparent conditions of competition.

5. The use of independent regulatory authorities, set up specifically for this purpose, marks a decisive step forward in the process of good economic governance. These new instruments will be called upon to make a significant contribution to the shift from protectionism to a market economy based on free enterprise and competition.

6. These regulatory authorities will be a major instrument for the process of structural reform on which the public authorities have embarked. They will be the institutions to which the task of supervising and managing the technical, economic and administrative aspects of franchise contracts will be conferred and will act as the interface between the administration and franchise holders.

7. In addition, these bodies will provide the public authorities with a powerful tool for preventing situations likely to disturb the smooth functioning of the public service covered by the franchise or upset the balance of franchise contracts.

8. The independence of these regulatory authorities will ensure that the public interest and consumers' rights are properly safeguarded and that all actors are treated fairly and will allow them to provide objective rulings on conflicts and disputes, thereby making it possible to impose healthy and fair competition.

9. The Government's disengagement from economic management therefore consists in raising the market to the status of regulator in markets for public utilities whose regulation and oversight have been entrusted to such authorities, whose main task is to organise and support the dismantling of public utility monopolies while at the same time safeguarding the quality of public service and respect for users' rights.

10. As part of its continuing efforts to implement economic reforms, Algeria has started to put in place a number of sectoral regulatory institutions relating to such areas as electricity, gas, transport, water and post and telecommunications.

11. Until now, however, only the regulatory authority for post and telecommunications has been set up and started to fulfil its role in regulating the market in accordance with the new rules of competition that have been put in place. Its impact can clearly be seen in the mobile telephony segment where market conditions are highly competitive (several operators, rapid development of technology, volume of demand, lowering of costs and tariffs, etc.).

12. That the other regulatory authorities mentioned above have not yet been set up is due to the fact that the public authorities have adopted an incremental and flexible approach in this area to ensure that the right conditions are place to create viable markets with regard to the sectors concerned.

3. Reform of the post and telecommunications sector and establishment of the Algerian Post and Telecommunications Authority (ARPT)

13. Until 2000, the post and telecommunications sector was governed by provisions under which the sector enjoyed a monopoly for both postal and telecommunications services. This situation generated numerous constraints such as relatively complex management procedures, lack of competition and inadequate self-financing capacity due primarily to low rates of debt coverage. Indeed, this state of affairs led to a major delay in the introduction of Internet services, data transmission and other value added services.

14. At the regional level, this situation resulted in slower network development compared with the countries of the Middle East and North Africa.

15. These constraints and shortcomings prompted the government to undertake a far-reaching reform of the sector from both a legal and an institutional standpoint by through the creation of an efficient legislative and regulatory framework for the sector and by promoting competition in order to encourage the development of networks and services, provide a high-quality public service at reasonable cost throughout the territory and open up the sector to the global economy. The reform of this strategic sector should take the form of development and promotion of postal services and information and communication technologies (ICTs). Noteworthy benefits of this reform include the creation of jobs relating to the sector, the encouragement of scientific research and the emergence of technology poles and technical skills that will generate new ICT-related jobs.

16. To achieve these objectives, the legislative and regulatory framework for postal services and information and communication technologies had to be completely revamped and a separation established between regulatory and control functions and those of operation and development.

17. Responsibility for sectoral policy and regulatory activities now lies with the Ministry of Postal Services and ICTs, while regulation of the post and telecommunications sector, as well as operation and development, have been entrusted to two separate operators:

- Algérie-Poste, a public establishment of an industrial and commercial nature responsible for the supply of postal services;

- Algérie-Télécom, an economic public enterprise (limited share company) for telecommunications.

18. The new legal system, enshrined in Law No. 2000-03 of 5 August 2000 which ended the years of monopoly, lays down the new rules governing the supply of postal and telecommunications services.

19. This Law reasserts the main prerogatives of the Government with regard to oversight and regulation of the post and telecommunications sector, while at the same time providing for operations in this sector to be opened up to competition. In addition, to allow the State to effectively exercise regulatory control over this market, the Law provides for creation of a regulatory authority.

20. The liberalisation of the markets for postal and telecommunications services led to their progressive opening-up to competition and to the promotion of private shareholdings and investment. This process was designed to maintain and develop the universal service over the entire territory to the greater benefit of all citizens.

21. This reform of the sector was also accompanied by the restructuring of the capital of the historical operator "Algérie-Télécom", which was subsequently divided into two historical operators (Algérie-Télécom and Algérie-Poste) which currently operate in a commercial environment subject to the new market requirements.

22. In addition, three new private operators have arrived in the market (Djezzy, Mobilis and Nedjma).

23. At the institutional level, this reform took the form of:

- Establishment, in May 2001, of the Algerian Post and Telecommunications Authority (ARPT) as the regulatory body for the sector responsible for ensuring that the market and competition function properly and for safeguarding the general interests of users.

  The main tasks of the Authority are to:

  - verify that effective and fair competition exists in the post and telecommunications markets and to take any action required to promote or re-establish competition in those markets;

  - gain access to information held by operators in order to carry out its assigned oversight and regulatory duties;

  - arbitrate in disputes between operators

  - co-ordinate, at the national level, number assignment and lay down the conditions under which requests from operators for number assignments must be met;

  - lay down the conditions for the use of broadcasting frequencies by operators;

  - punish infringements of the legislation and regulations in force.

- the creation of Algérie-Poste as a public establishment of an industrial and commercial nature in January 2002;

- the opening-up to competition of the GSM mobile telephony segment in July 2001. As part of this process, the operator ORASCOM has been selected under the terms of the licensing procedure;

- the creation of the National Frequency Agency (ANF) as a public establishment of an industrial and commercial nature in March 2002, the Algerian Space Agency (ASAL) in May 2002 and the National Radio-navigation Agency in July 2003.

4. Impact of competition rules in the mobile telephony sector

24. Over three years after the mobile telephony sector was opened to competition, the initial results have been genuinely encouraging in that Algeria currently has around 4 000 000 GSM subscribers.

25. The three mobile telephony operators, Djezzy, Mobilis and Nedjma, have respective totals of 2 718 000, 640 000 and 105 000 subscribers. In terms of market share, Djezzy has 78% of the market, Mobilis 19% and Nedjma 3%.

26. These figures far exceed the forecasts by both the sector and the regulatory authority which expected the market to grow to 3 million subscribers by the end of 2004 (i.e. a mobile telephone penetration rate of 9.37%).

27. Algeria, which has a population of 32 million inhabitants, currently has a mobile telephone penetration rate of 11%. It is also well within the bounds of possibility that forecasts of 5 million mobile telephone subscribers (11% penetration) by the end of 2000 will be significantly exceeded. By 2007, the number of subscribers should rise to 10 million.

28. Furthermore, it is worth noting that the number of subscribers in the domestic market (all operators combined) has risen by 54 000 at the end of 2000 to the current level of almost 4 million, which reflects the stiff competition between the three operators mentioned above.

29. The statistics for the division of market share and strength of competition between the three operators (Djezzy, Mobilis and Nedjma) demonstrate the fast-changing nature of this market and its vigour.

30. This process is continuing through the downwards trend in prices observed in particular withy regard to the cost of chips which are currently offered at zero dinars by Mobilis compared with the 2000 price of almost 26 000 Algerian dinars (DZD).

31. In addition, the operators are constantly improving the quality of their services, notably by offering incentives to buyers and premiums.

32. This positive market development benefits consumers, whose needs are therefore fully satisfied in terms of value for money.

5. Relationship between the Competition Council and the regulatory authorities

33. Ordinance No. 03-03 of 19 July 2003 on competition vests the Competition Council with general powers to issue opinions and take decisions likely to safeguard and maintain the free play of competition in the market and to sanction practices that restrict competition, in conjunction with the various institutions concerned.

34. Consequently, in accordance with the provisions of Article 39 of the Ordinance on competition, the Competition Council is called upon to develop a relationship of close co-operation and co-ordination with the regulatory authorities responsible for networked public services.

35. Moreover, this legislative system provides for co-operation and decision-making within a framework agreed and organised by the Competition Council and the regulatory authorities whenever the latter are concerned by the cases examined.

36. Furthermore, the provisions of Article 13 of Law No. 2000-03 of 5 August 2000 setting forth the general rules relating to postal and telecommunications services charge the post and telecommunications regulatory authority (ARPT) with the task of co-operating with other national and foreign authorities or organisations with the same remit. They can therefore collaborate with the Competition Council whenever a practice that restricts competitions affects the regulated sector and requires recourse to the authority of the Competition Council to deal with the conflict.

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DIRECTION DES AFFAIRES FINANCIÈRES ET DES ENTREPRISES
COMITÉ DE LA CONCURRENCE

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Forum mondial sur la concurrence

LA RELATION ENTRE LES AUTORITES DE LA CONCURRENCE ET LES AUTORITES REGLEMENTAIRES SECTORIELLES

Contribution de l'Algérie

-- Session II -

Cette contribution a été soumise par l'Algérie au titre de la Session II du Forum Mondial sur la Concurrence qui doit se tenir les 17 et 18 Février 2005.

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Français - Or. Français

LES SECTEURS REGULES : RELATIONS ENTRE LE CONSEIL DE LA CONCURRENCE ET LES AUTORITES DE REGULATION

1. Introduction

1. Par référence aux exigences induites par la mondialisation, l'Algérie a arrêté une nouvelle politique économique qui implique une redéfinition du rôle et des moyens d'intervention de l'Etat, à travers notamment la participation du secteur privé dans la gestion de certains services publics et la prise de décisions économiques.

2. A cet effet, la réduction du poids et du pouvoir exercés par l'Etat, a nécessité un certain nombre de mesures juridiques et organisationnelles visant à éliminer les situations de monopole, à libérer les initiatives et à encourager l'esprit d'entreprise.

3. C'est ainsi qu'au cours de la dernière décennie, les pouvoirs publics se sont résolument investis dans un processus de réformes institutionnelles et économiques axées sur l'accroissement de l'investissement et de l'ouverture du capital des entreprises publiques, par le biais de partenariats, de privatisations, de la concurrence et de mise en concession. A ce titre, un programme d'actions a été mis en place, en vue de permettre le désengagement progressif de l'Etat du financement, de la réalisation, de l'exploitation et de la gestion de certains services publics, dans la perspective d'une libéralisation plus grande des marchés.

2. Réforme des services publics et mise en place des autorités de régulation

4. La restructuration des services publics algériens a rendu impérative, la modernisation et l'adaptation du cadre légal et institutionnel régissant les activités de service public afin d'améliorer les services offerts, de favoriser l'offre de nouveaux services et d'instaurer une concurrence saine, loyale et transparente.

5. Le recours à des autorités de régulation indépendantes, créées dans ce contexte, marque un tournant décisif de la bonne gouvernance économique. Ces nouveaux instruments sont appelés à contribuer de façon significative au passage d'un régime protectionniste à une situation de marché basée sur la libre entreprise et la compétitivité.

6. Ces autorités de régulation constitueront un instrument privilégié dans la mise en œuvre des réformes structurelles engagées par les pouvoirs publics. Elles agiront comme des institutions chargées de superviser et de gérer les aspects techniques, économiques et administratifs des contrats de concessions et constitueront l'interface entre l'administration et les concessionnaires.

7. Ces entités seront, par ailleurs, un outil économique puissant au service des pouvoirs publics pour la prévention des situations a même de perturber la bonne exploitation du service public, objet de la concession et l'équilibre des contrats de concession.

8. L'indépendance de ces autorités de régulation assurera la conciliation entre l'intérêt public, la protection des consommateurs et le traitement équitable des intervenants à travers notamment, l'arbitrage

des litiges et différends de manière objective et permettra de faire appliquer une concurrence saine et loyale.

9. C'est ainsi que le désengagement de l'Etat de la gestion économique consiste à élever le marché au rang de régulateur, dans les marchés des utilités publiques dont la régulation et la surveillance sont confiées à ces autorités dont la mission principale réside dans l'organisation et le renforcement du mouvement de démonopolisation des utilités publiques, tout en sauvegardant la qualité de service public et le respect des droits de l'usager.

10. Dans le cadre de la poursuite de la mise en œuvre des réformes économiques, l'Algérie a engagé un processus de création de différentes institutions sectorielles de régulation, dont celles de l'électricité et du gaz, des transports, de l'eau et de la poste et des télécommunications.

11. Cependant, jusqu'à présent, seule l'autorité de régulation de la poste et des télécommunications a été mise en place et a commencé à jouer son rôle de régulation du marché dans le cadre des nouvelles règles de concurrence mises en place. Ceci est palpable en matière de téléphonie mobile grâce au taux élevé de compétitivité qui caractérise ce segment de marché (multiplicité des opérateurs, évolution rapide de la technologie, volume de la demande, baisse des coûts et des tarifs, ...).

12. La mise en place des autres autorités de régulation précitées n'est pas encore intervenue du fait que les pouvoirs publics ont adopté en la matière une démarche progressive et flexible afin de pouvoir réunir au préalable les conditions pouvant rendre viables les marchés ayant trait aux secteurs concernés.

3. Réforme du secteur des postes et télécommunications et introduction de l'autorité de régulation (ARPT)

13. Le secteur de la poste et des télécommunications était régi jusqu'en 2000 par des dispositions aux termes desquelles il jouissait d'un monopole aussi bien pour les services de la poste que pour les télécommunications. Cette situation a engendré de nombreuses contraintes, à savoir notamment un mode de gestion des procédures assez lourd, l'absence de concurrence, des capacités d'autofinancement insuffisantes dues essentiellement au faible taux de recouvrement des créances. Cet état de fait a par ailleurs entraîné un retard important dans la diffusion des services Internet, la transmission des données et autres services à valeur ajoutée.

14. Sur le plan régional, cette situation a généré un développement des réseaux en retrait par rapport aux pays du Moyen-Orient et de l'Afrique du Nord.

15. Ces contraintes et insuffisances ont conduit l'Etat à entreprendre une vaste réforme du secteur tant au plan juridique qu'institutionnel, en dotant ces secteurs d'un cadre législatif et réglementaire efficient et transparent, favorisant la concurrence afin de promouvoir le développement des réseaux et services, de fournir un service public de qualité à un coût raisonnable sur tout le territoire et d'ouvrir ce secteur sur l'économie mondiale. La réforme de ce secteur stratégique devrait se concrétiser à travers le développement et la promotion de la poste et des technologies de l'information et de la communication (T.I.C). A l'actif de cette réforme, il y a lieu de citer la création d'emplois liés au secteur, la stimulation de la recherche scientifique et l'émergence de pôles et de compétences créateurs de nouveaux métiers liés aux TIC.

16. Pour atteindre ces objectifs, il a fallu procéder à la refonte du cadre législatif et réglementaire de la poste et des technologies de l'information et de la communication, la séparation des fonctions de réglementation et de régulation de celles d'exploitation et de développement.

17. La politique sectorielle et la fonction de réglementation relèvent désormais du Ministère de la Poste et des TIC alors que les fonctions de régulation de la poste et des télécommunications et d'exploitation et de développement sont confiées à deux opérateurs distincts :

- Algérie-poste, établissement public à caractère industriel et commercial pour les activités postales ;

- Algérie-télécom, entreprise publique économique (société par actions) pour les télécommunications.

18. Le nouveau dispositif juridique, consacré par la loi n° 2000-03 du 05 août 2000 qui a mis fin à des années de monopole, fixe les nouvelles règles qui régissent les activités de la poste et des télécommunications.

19. Cette loi réaffirme, par ailleurs, les principales prérogatives de l'Etat en matière de contrôle et de régulation du secteur de la poste et des télécommunications tout en consacrant l'ouverture de l'exploitation de ce secteur à la concurrence. En outre, pour permettre l'exercice effectif de la fonction de réglementation et de contrôle de ce marché par l'Etat, cette loi prévoit la création d'une autorité de régulation.

20. La libéralisation des marchés des services des télécommunications et de la poste a conduit leur ouverture à une concurrence croissante et à la promotion de la participation et de l'investissement privés. Celle-ci s'est faite dans la préservation et le développement du service universel sur l'ensemble du territoire et en faveur de tous les citoyens.

21. Cette réforme du secteur s'est traduite également par la restructuration du capital de l'opérateur historique « Algérie-Télécom », qui s'est scindé ensuite en deux opérateurs historiques (Algérie-Télécom et Algérie-Poste) qui opèrent aujourd'hui dans un environnement commercial régi par les nouvelles exigences du marché.

22. En outre, trois nouveaux opérateurs privés sont arrivés sur le marché (Djezzy, Mobilis et Nedjma).

23. Au niveau institutionnel, cette réforme s'est traduite par :

- La mise en place, en mai 2001, de l'autorité de régulation de la poste et des télécommunications (ARPT) en tant qu'organe de régulation du secteur qui veille au bon fonctionnement du marché et de la concurrence et à la préservation de l'intérêt général des usagers.

  Elle a pour missions essentielles :

  – le contrôle de l'existence d'une concurrence effective et loyale sur les marchés de la poste et des télécommunications et la prise de mesures nécessaires afin de promouvoir ou de rétablir la concurrence sur ces marchés ;

  – l'accès aux informations et renseignements auprès des opérateurs, en vue de l'accomplissement des missions de contrôle et de régulation qui lui sont assignées ;

  – l'arbitrage des litiges opposant les opérateurs ;

- la coordination du plan national de numérotation et la fixation des conditions de satisfaction des demandes de numéros formulées par les opérateurs ;

- la fixation des conditions d'utilisation des fréquences radioélectriques par les différents opérateurs ;

- la sanction des infractions à la législation et à la réglementation en vigueur ;

- la création d'Algérie Poste en tant qu'établissement public à caractère industriel et commercial en janvier 2002 ;

- l'ouverture à la concurrence du segment de la téléphonie mobile GSM en juillet 2001. Dans ce cadre, l'opérateur ORASCOM a été retenu aux termes du processus d'adjudication de la licence ;

- la création de l'Agence Nationale des Fréquences (ANF) en tant qu'établissement public à caractère industriel et commercial en mars 2002, de l'Agence Spatiale Algérienne (ASAL) en mai 2002 et de l'Agence Nationale de Radionavigation en juillet 2003.

4. Impact des règles de la concurrence dans le secteur de la téléphonie mobile

24. Plus de trois années après l'ouverture de la téléphonie mobile, les premiers résultats obtenus sont réellement encourageants. En effet, l'Algérie a atteint le nombre de 4.000.000 d'abonnés GSM environ.

25. Les trois opérateurs de téléphonie mobile Djezzy, Mobilis et Nedjma ont atteint respectivement 2. 718. 000, 640. 000 et 105. 000 abonnés. En termes de parts de marché, Djezzy détient 78 %, Mobilis 19% et Nedjma 3%.

26. Ces chiffres dépassent de loin les prévisions du secteur et de l'autorité de régulation qui prévoyaient 3 millions d'abonnés à la fin de l'année 2004 (soit une télédensité mobile de 9,37%).

27. Or, l'Algérie qui compte 32 millions d'habitants atteint actuellement 11% de télédensité mobile. Il est, aussi, tout à fait probable que les prévisions visant à atteindre les 5 millions d'abonnés mobiles (11 % de télédensité) à fin 2005 seront largement dépassées. A l'horizon 2007, le nombre d'abonnés atteindrait les 10 millions.

28. Par ailleurs, il y a lieu de relever que le nombre d'abonnés sur le marché national (tous opérateurs confondus) est passé de 54.000 abonnés à la fin de l'année 2000 à près de quatre millions d'abonnés actuellement, ce qui dénote le fort degré de concurrence entre les trois opérateurs précités.

29. Les indicateurs chiffrés sur les parts de marché et la dynamique de concurrence constatés entre les trois opérateurs (Dezzy, Mobilis et Nedjma) démontrent le caractère très évolutif de ce marché et sa vitalité.

30. Ce processus se poursuit à travers l'évolution à la baisse des prix constatée notamment en ce qui concerne les coûts de la puce qui est actuellement cédée à zéro dinar par Mobilis alors qu'en 2000 la puce coûtait presque 26.000 DA.

31. En outre, les opérateurs améliorent constamment la qualité de leurs prestations à travers notamment les incitations et les bonus à l'achat.

32. Ce développement positif du marché est profitable aux consommateurs dont les besoins sont ainsi globalement satisfaits sur le plan du rapport qualité/prix.

5. Relations entre le Conseil de la Concurrence et les autorités de régulation

33. L'ordonnance n° 03-03 du 19 juillet 2003 relative à la concurrence accorde au Conseil de la Concurrence une compétence générale d'avis et de décisions de nature à protéger et à préserver le libre jeu de la concurrence sur le marché et à contrecarrer les pratiques restrictives de concurrence, en liaison avec les différentes institutions concernées.

34. C'est ainsi, que conformément aux dispositions de l'article 39 de l'ordonnance relative à la concurrence, le Conseil de la Concurrence est appelé à développer une coopération et une coordination étroites avec les autorités de régulation chargées des services publics en réseau.

35. Ce dispositif législatif organise par ailleurs la coopération et la prise de décision dans un cadre concerté et organisé entre le Conseil de la Concurrence et les autorités de régulation, chaque fois que ces dernières sont concernées par les affaires examinées.

36. Par ailleurs, les dispositions de l'article 13 de la loi n° 2000-03 du 5 août 2000 fixant les règles générales relatives à la poste et aux télécommunications, confèrent à l'autorité de régulation de la poste et des télécommunications (ARPT) la mission de coopération avec d'autres autorités ou organismes nationaux et étrangers ayant le même objet. Ainsi, elles peuvent collaborer avec le Conseil de la Concurrence lorsqu'une pratique restrictive de concurrence affecte le secteur régulé et nécessite le recours à la compétence du Conseil de la Concurrence pour traiter le contentieux.

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English text only

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

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Global Forum on Competition

THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS

Contribution from Brazil

-- Session II --

This contribution is submitted by Brazil under Session II of The Global Forum on Competition to be held on 17 and 18 February 2005.

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English text only

THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS

1. The actions of regulatory agencies are centralised in specific sectors that have great social interest. Rules are developed by the agencies within the limits required by Brazilian Legislative Power and with public policy character. Furthermore, these agencies are responsible for monitoring the fulfillment of their rules. On the other hand, Brazilian antitrust authority (CADE) does not have the prerogative of couching rules but of applying those that have already been established. Besides, CADE prospect is general to Brazilian economy, which means that it is not limited to one or another sector. Its main objective is to make sure that the rules established in the Brazilian antitrust legislation come being fulfilled.

2. The application of Law 8.884/94 in all sectors of the Brazilian economy is defined in its article 15: "This Law applies to individuals, public or private companies, as well as to any individual or corporate associations, established *de facto* and *de jure* – even on a provisional basis – irrespective of separate legal nature, and notwithstanding the exercise of activities regarded as a legal monopoly."

3. Admitting both activities need to be executed by different organisms, it does not mean that these organisms will work in an isolated way. Actually, they must be integrated enough to enhance cooperation and convergence in more effective antitrust enforcement, taking advantage of each other's expertise[1].

1. Brazilian System of Competition Defence

4. The authorities responsible for the defence of competition in Brazil are the Administrative Council of Economic Defence (CADE), the Secretariat for Economic Law (SDE), within the Ministry of Justice and the Secretariat for Economic Monitoring (SEAE), within the Ministry of Finance.

5. CADE is an adjudicating authority that decides whether or not the defendants committed an infraction against competition. CADE also judges the legitimacy of legal acts – mergers, incorporation or any kind of horizontal integration – that might restrain or eliminate competition. The SDE is responsible for the initiation and instruction of administrative proceedings. SDE is also responsible for issuing opinions about the competition aspects of mergers to be judged by CADE. SEAE has the task of emitting technical opinions regarding the economic aspects of mergers and, also, at its discretion, issuing opinions on administrative proceedings that investigate behaviours against the economic order. These organisations compose the Brazilian System of Competition Defence – SBDC.

2. Brazilian Regulatory Agencies and CADE

6. The attributions relative to the execution of the antitrust rules belong to the competition authorities. The regulatory agencies give technical opinions when requested and should notify the existence of infractions, although they don't have decision attributions.

7. Most of regulatory agencies legislation includes provisions that establish the necessity of the promotion of competition in the regulated sector. In spite of being general, these clauses show that the regulatory agencies are aware of the importance of the willingness to reach a competitive environment in

[1] As the OECD has already concluded in the document entitled "Relations between Regulators and Competition Authorities", antitrust attributions must be done by the antitrust agencies. Whenever necessary, on those regulated sectors, regulatory agencies activities must be driven by the technical, economic and market accessibility objectives. The document also appoints cooperation and coordination as an important way to avoid waste of resources and to make sure that competition will not be restricted by the regulation rules

the sector. Having this in mind, the cooperation with CADE becomes a great instrument to face this challenge as the Brazilian antitrust agency is used to dealing with it in all sectors of the economy. At the same time, CADE can take advantage of getting access to the expertise and market knowledge of the regulatory agencies.

8. As the majority of regulatory agencies legislation does not define specific procedures for promoting competition and interaction with CADE, agreements have been celebrated between these organisms in order to institutionalise cooperation in the actions involving antitrust analyses. In addition to that, practical actions have been adopted to reach the objective of interaction. So, these Agreements establish the continuous exchange of publications, deliberations and all kind of instruments about the antitrust subject between these organisms as well as exchange between technical bodies. They establish also the promotion of services like consulting, training, researches as well as courses and workshops about competition protection. Are also included in the Agreements the uniformity of concepts and procedures of applying Brazilian Antitrust Law and the specific regulatory law.

9. The tendency is the evolution of the agreements in order to provide specifics procedures to reach the maximum cooperation between regulatory agencies and CADE. The idea is to include in these agreements different and special programs to interact with merger control and anticompetitive conducts analyses.

10. In merger control, the formulation of technical opinion by the regulatory agencies will be settled obligatorily or not. It will depend on each agreement, establishing a stated period to the delivery of the document. Once done, the agency technical opinion will be sent to SDE as the same way that SEAE technical opinion is. After that, the habitual procedures will be continued.

11. In anticompetitive conducts analyses, SDE and SEAE will be able to request information to agencies as well as logistic support for investigations. When regulatory agencies perceive indications of competitive infractions, they must warn SBDC about it. The obligation to the agencies opinion will depend on each agreement.

12. CADE is not obligated to follow the agencies technical opinions. Besides, these opinions have confidential character when necessary. The agreements will include also the body responsible for the promotion of cooperation.

13. Some of regulatory agencies have already established on their legislation more specific clauses. One of them is National Petroleum Agency - ANP legislation (Law nº 9.478/97):

> "Article 10. When, in its attributions, ANP becomes aware of a fact that can be an indication of competitive infraction, must communicate it immediately to CADE and SDE - linked to the Ministry of Justice - in order for them to take the proper steps, in accordance to the pertinent legislation scope.
>
> Sole Paragraph. "Independently of the communication established in the *caput* of this article, CADE will notify ANP of the content of its decision whenever it applies a sanction against economic infractions committed by firms or any individuals in the exercise of any activity related with the national oil supply, within the maximum stated period of 24 (twenty four) hours after the publication of the respective decision, in order to the regulatory agency adopt the legal steps under its attribution."

14. The intention is to extend clauses like the one described above to all agencies using the agreements, while proper regulatory agencies legislation has not been enacted.

15. Nowadays, a Law Project (nº 3.337/2004) to reform all the regulatory agencies is in National Congress. In this legislative bill, there is a whole chapter concerning the interaction between the regulatory agencies and the SBDC in order to reduce institutional conflicts between them.

16. The law project establishes the duty of collaboration in its articles 15 and 16 and removes attributions linked to the antitrust subject from the regulatory agencies:

> "Article 15. Following the promotion of competitiveness and the effective implementation of antitrust legislation in the regulated markets, antitrust authorities and regulatory agencies should act in cooperation, privileging the exchange of experiences."
>
> "Article 16. In their attributions, the regulatory agencies should monitor and follow the market acts of the regulated sector agents, in order to assist the antitrust organisms in their fulfillment of the antitrust legislation, in accordance to Law 8.884/94, June 11th 1994.
>
> Paragraph 1. The antitrust organisms are responsible for the application of antitrust legislation, charging them, in accordance to Law 8.884/94, the analyse of mergers and the instauration of preliminary investigations and administrative proceedings in order to select economic infractions, under the charge of CADE, as judicial organism, to emit final decision about the mergers and anticompetitive conducts.
>
> Paragraph 2. In the analyse and instruction of mergers and administrative proceedings, the antitrust organisms will be able to request technical opinions to the regulatory agencies that will be used in these analyses and instructions.
>
> Paragraph 3. The regulatory agencies will request opinions from the antitrust organism linked with Ministry of Finance about rule drafts, before they become available to public consultation, concerning the eventual impacts on the competitive conditions of the regulated sector within the stated period of 10 days."

17. Concerning about economic infractions, the project establish:

> "Article 17. The regulatory agencies, when, in their attributions, become aware of a fact that can be an indication of competitive infraction, must communicate it to the antitrust organisms to they take the proper steps.
>
> Sole Paragraph. Will be restored administrative proceedings by the organism responsible for the instruction in the Brazilian System of Economic Defence whether the analyse of preliminary investigations concluded by the regulatory agency or by that Secretariat show enough indications of anticompetitive practice."

18. The project law also includes that CADE will notify the agencies about the content of its decisions about conducts adopted by firms or any individual in the regulated activities, as well as mergers that have been judged.

3. National Agency of Telecommunication (ANATEL) and CADE

19. As any other regulatory agency legislation, there are general clauses in ANATEL legislation objecting the promotion of competition in the sector:

> "Article 5. In the economic relationships within the telecommunications industry, the following constitutional principles shall be observed: national sovereignty, social role of property, free initiative, free competition, consumer protection, reduction of regional and social disparities, restraint of economic power abuse, and continuity of service rendered under the public system."
>
> "Article 6. The telecommunication services shall be organized based on the principle of free, ample and fair competition among all providers, having the Government to act towards promoting them, as well as to correct the effects of imperfect competition and to repress violations against economic order."

20. The ANATEL legislation and its relation with CADE are exceptions within the cooperation between regulatory and antitrust subjects. While the rest of the agencies do not have the prerogative of imposing decisions to CADE, ANATEL legislation establishes attributions to instruct the cases:

> "Article 7. General protection rules to the economic order are applicable to the telecommunications sector, when same do not conflict with this law.
>
> Paragraph 1. The acts involving a telecommunications service provider, under public or private system, aiming at any form of economic concentration, either through merger or incorporation of companies, establishment of holding companies to control enterprises or any form of partnership conglomerate, shall be subject to controls, procedures and conditions provided in the general protection regulations to the economic order.
>
> Paragraph 2. The acts provided in the preceding paragraph shall be submitted to the appraisal of CADE - Administrative Council of Economic Defence, by means of the regulatory organ."

21. And continues:

> "Article 19. The Agency shall take the necessary measures to satisfy the public interest and for the development of telecommunications in Brazil, acting independently, impartially, legally, impersonally and publicly, and especially:
>
> XIX - to exercise legal authority in connection with telecommunications, in the control, prevention, and repression of violations against the economic order, except for the authority belonging to the Economic Defense Administrative Council – CADE."

22. The actual jurisprudence of CADE shows that ANATEL has the same attributions of SDE, implementing the instruction of proceedings of mergers as well as anticompetitive conducts analyses.

4. Brazil's Central Bank and CADE

23. Brazilian Central Bank (BACEN) has claimed the authority to approve mergers and to investigate conducts. The point of view of Brazilian Antitrust Authorities, however, is that it is very possible to conciliate both laws, meaning that BACEN would remain, with exclusivity, with the regulation duties and CADE would take care of the antitrust defense. In other words, the analysis of the mergers will be made effective by BACEN, that will take into account regulatory and social aspects, and by CADE, that will observe a most generic perspective of competition defense.

24. Presently, there is a Law Project being analyzed by the Congress, which will settle some of the controversial points concerning attribution problems between CADE and BACEN. The principal points of the legislative bill are those establishing that the merger control involving financial institutions is about to

be reviewed by SBDC only in cases not involving systemic risks. When mergers in the bank sector can affect the good function of the financial system, the jurisdiction in these cases will belong only to BACEN. The Law Project also establishes that only CADE will sanction the anticompetitive conducts.

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THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS

Contribution from Chile

-- Session II --

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THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS

1. The Competition Authorities

1. The Competition law has an institutional framework composed by two bodies – an enforcement agency (the Prosecutor's Office) and an independent Competition Tribunal.

2. The National Economic Prosecutor heads the agency that investigates and brings enforcement cases. The Prosecutor, who must be a lawyer, is appointed by President of Chile and may be removed by him at any time. For budget purpose, The Prosecutor's Office ("Office") is part of the Ministry of the Economy, but the Prosecutor is independent of the Ministry. By law, he is subject to the supervision of the President through the Ministry of Economy, and is directed by law to "discharge its duties independently," to "defend the interests entrusted to him…based on his own discretion", and to represent "the general economic interests of the community". In Chile, there have been a tradition of independence by the Prosecutors.

3. The Prosecutor's Office must investigate all legally valid complaints and may open investigations *ex officio*. Upon notice to the Chair of the Competition Tribunal, the Prosecutor may declare investigations confidential and may obtain police assistance. The Prosecutor must ordinarily provide notice to the target of an investigation, but the Competition Tribunal may waive this requirement when notice would interfere the investigation. The Prosecutor has the power to compel the production of documents and the co-operation of public agencies, state-owned entities, private firms, and individuals. Public officials must keep confidential all information they obtain by reason of their duties, except that such information may be used in enforcement activities and in proceedings before the Competition Tribunal or courts. Interference with an investigation by the Prosecutor's Office is punishable by imprisonment for up to 15 days, independent if the person belongs to a private or state-owned company or if he is a public servant.

4. The result's of investigations by the Prosecutor's Office are usually set forth in a "report"- essentially an administrative decision – that is delivered to the Competition Tribunal. If the Office decides that an official proceeding should be begun, the report is accompanied by a "*requerimiento*"- a formal charge seeking a fine or other remedy. The report is a matter of public record.

5. The rulings in competition cases are performed by the Competition Tribunal. This Tribunal is an independent entity that has judicial powers but is not formally part of the judiciary. It has five members. The President of the Tribunal, who must be a lawyer, is appointed by the President of the Republic from a list of five nominees established by the Supreme Court though a public competition. The other members (two lawyers and two economists) are chosen as follows. One lawyer and one economist are chosen by the President from a list of three nominees established by the Central Bank (Council of Governors), also through a public competition. The other lawyer and economist will be appointed directly by the Central Bank from candidates selected by this same public contest. The Tribunal will also have four subrogate members, selected by the President of the Republic and the Central Bank from the same lists of nominees. All candidates are requested to have expertise in competition issues.

6. The members of the Tribunal have terms of six years, and may serve more than one term. During their terms, they can only be removed for cause. Neither public servants nor officers or employees of publicly held corporations (or their affiliates) are eligible. Members of the Tribunal will receive fixed remuneration. The Tribunal also has its own staff.

7. The decisions of the Competition Tribunal are solved by majority. The parties affected by the decisions of the Competition Tribunal usually file with the Supreme Court a special appeal, known as a "petition in error," which relates to the procedural, rather than meritorious, aspects of the original Tribunal proceedings. If the appeal is accepted, the Court requires the Tribunal to amend the "mistake or abuse" made when the Tribunal issued the decision being challenged. Thus, using petition in error, the substance of a decision can be modified.

2. Competition law and policy in regulated sectors

8. For many competition authorities, activity relating to regulated sectors of the economy is largely a matter of competition advocacy because the sectoral regulator has the exclusive power to make many of the key decisions relating to competition. In Chile, the balance of power is different because the competition law can sometimes be applied even to a sectoral regulator of other part of the government.

9. In fact, Article 1's of the Competition Law applies to all individuals, to all enterprises (regardless of state ownership), and in some circumstances to government ministries or other agencies. An unusual feature of Chile's law, is that it applies to some extent to decisions by government ministries or agencies even when they are acting in a regulatory capacity, and not just when they are acting in a proprietary capacity. It has been applied to discriminatory government action that creates an "unlevel playing field". The law is not interpreted as covering governmental "output restrictions" in the form of non-discriminatory quality standards or other limitations on who may enter a market. On the national level, the law has been applied to the Ministry of Transportation, the Telecommunication Office, the Electricity and Fuels Superintendence, the General Waters Directorate, and the State Procurement Directorate. It also applies to municipalities.

10. Virtually all competition laws have an express or implied exclusion for conduct that is required by law, including private action that is authorised by government regulations of official decisions. In general, the basis for this exclusion is a concern that applying competition law could or would interfere too much with other government regulation. In Chile, there are no express exclusions in the competition law. As in other countries, statutory monopolies do exist and there are instances when laws grant exclusive rights. Since possession of a monopoly is not a violation, these laws do not actually create exclusions, as long as abuse of the monopoly or exclusive right is subject to the law.

11. With respect to competition actions against government entities acting in their regulatory capacity, the Competition Authorities has attempted to avoid interfering with legitimate government regulation by limiting the law's coverage to discriminatory regulations or conduct.

12. In any case, a usual practice has been that when a government entity will decide something that can have competition problems it asks for a consultation of the Competition Authorities – Prosecutor's Office or Competition Tribunal - to inquire whether go ahead or not.

3. An example

13. As an example of the application of the competition law to sectoral regulators, let us study a case of the telecommunication market. Two firms operating at 800 megahertz petitioned for additional spectrum at 1900 megahertz in order to compete more effectively against two firms that already had some spectrum at that band. The telecoms regulator agreed. One of the incumbents complained, and the Prosecutor's Office initiated a proceeding. Eventually, the Tribunal – former Antitrust Commission - order that the regulator use an auction to decide which firms should obtain rights to the spectrum. Another order in this proceeding directed the regulator not to give the first two firms preference because they had applied first for the megahertz. The entire process took about two years, and the two firms initially approved by the

telecoms regulators were the successful bidders at the auction, but the process had to be competitive and transparent and finally the decision was taken by who paid more for the spectrum. Relying in part on this fact, some telecoms officials regard the case as one in which the competition institutions were used to delay the allocation of new spectrum. Some telecoms officials also believe that in some occasions the competition institutions become too involved in technical matters, but the final result of the competition process is the important one and in most part the competition and the telecoms agencies work well together.

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THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS

Contribution by Mr. Wang (SAIC, China)

-- Session II --

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THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS

By Mr. Wang (SAIC, China)

1 Legislative insights into relations between competition and industry regulatory authorities in China

1. Under the People's Republic of China Anti-unfair Competition Law enacted in 1993, the industry and commerce administrative authorities are established as the authorities to regulate competition. Sub-clause 3.2 of the Law stipulates that "The industry and commerce administrative authorities subordinated to the People's governments above county-level shall perform monitoring and inspections on acts of unfair competition. In case such monitoring or inspection function is assigned to other authorities under other laws or regulations, the stipulations of such other laws or regulations shall apply." Since the Anti-unfair Competition Law is the first in China dedicated for the inhibition of unfair competition, there had been no other laws or regulations establishing alternative authorities for such function when the Anti-unfair Competition Law was enacted. Therefore, for years after enactment of the Law, the industry and commerce administrative authorities had been the sole governing body in China in relation to unfair competition, responsible for implementing the Anti-unfair Competition Law in all industries, including but not limited to power, telecommunications and finance.

2. The authority of industry and commerce authorities as the competition regulatory body has been challenged in recent years, such challenges are mainly from the power, telecommunications, finance, civil aviation and pharmaceutical industries.

3. The People's Republic of China Tendering & Bidding Law stipulates under Article 32 that "Bidders shall not collude in respect of the bid price, repulse the fair competition of other bidders, nor shall they cause detriment to the interests of the Tenderee or other bidders. Bidders and the Tenderee shall not collaborate to impair the national interests, social public interests or the legitimate interests of others." These stipulations are largely identical with those under Article 15 of the Anti-unfair Competition Law, "Bidders shall not collude in the bidding to drive the bid price up or down. Any bidder shall not collaborate with the Tenderee to repel the fair competition of rivals." To avoid doubt in respect of the implementer of the stipulation, the Tendering & Bidding Law further stipulates under Article 7 Item 2, "The administrative monitoring and inspection and division of responsibilities among departments shall be subject to the determination of the State Council". In response to this article, the State Council stipulates that the construction authorities shall monitor and inspect unfair competition in tendering and bidding.

4. The People's Republic of China Telecommunication Regulations (enacted in 2000) makes stipulations under Articles 41 and 42 in relation to the unfair competition in telecommunication sector as more detailed elaboration of the stipulations under the Anti-unfair Competition Law. Meanwhile, the Telecommunication Regulation stipulate that the information industry authorities of the State Council or telecommunication authorities of provinces, autonomous regions or municipalities shall perform monitoring and inspection on unfair competition in this sector, thus completely excluding the industry & commerce authorities from the telecommunications sector.

5. In a document of the State Council in 1998 in relation to the responsibilities of China Insurance Supervisory Commission, the monitoring and inspection duty was assigned to the Commission and its affiliate organisations.

6. Despite the absence of dedicated stipulations under laws or stipulations in respect of the governing body of unfair competition in such sectors as power, civil aviation and pharmacies, certain evidences demonstrate that the industry & commerce authorities are being excluded. For example, the Stipulations in Relation to Prohibition of Unfair Competition on Civil Aviation Transportation Market enacted by CAAC in 1996 designated CAAC to monitor and inspect the unfair competition on nationwide civil aviation transportation market. The Power Market Supervision Methods enacted by China State Power Supervisory Commission in 2003 designated the power supervisory authorities to monitor and inspect the unfair competition of power generation enterprises. Strictly speaking, the above designations could not absolutely exclude the industry & commerce authorities from this regard. However, such designations have never been challenged.

7. In general, in respect of the monitoring and inspection on unfair competition, the industry & commerce authorities still prevail. Nevertheless, in certain sectors such as power, telecommunications and insurance, the industry regulatory authorities have superseded the industry & commerce authorities.

2. Concerns resulted from the exclusion of industry and commerce authorities

8. At least two concerns have arisen from the fact that the unfair competition is under jurisdiction of industry regulatory authorities. Firstly, the industry regulatory authorities usually have interest connections with the enterprises under their regulation. Such interest connection is highly possible to impair the effectiveness of regulatory actions. Prior to the reform and openness, a system without separation of administration and enterprises was in place in China, when the industry regulatory authorities controlled the operation of enterprises within the industry and even, the industry regulatory authorities are also operating organisations. Further to the reform that has lasted 20 years, the regulatory authorities of most industries have ceased to be involved in direct operation. However, such historical connection could not cease in a short period of time. Meanwhile, enormous amount of state-owned enterprises operating in the regulated industries would have closer connections with the regulatory authorities. In addition, since the regulatory authorities are responsible for the policy making, they have enormous communication with the regulated enterprises. Therefore, in comparison with the competition regulatory body, the industry regulatory authorities are more apt for the influence by the enterprises under their jurisdiction and are therefore more tendentious. In particular, in case of interest conflicts between the regulated enterprises and the consumers, the regulatory authorities are likely to take aside the regulated enterprises, thus impairing the protection of consumer interests and rights.

9. Secondly, as the regulatory authorities perform the monitoring and inspection on the unfair competition in the regulated industry, the fairness of such actions may deviate from the should-be level. On one hand, the stipulations differ under different laws and regulations, causing that different authorities may take different punishing actions on the same case of violation. For example, for the administrative penalty of unfair competition of utilities, the Anti-unfair Competition Law requires “termination of the violation action and fine ranging from Rmb 50,000 to Rmb 200,000 based on the severity”, while the Telecommunications Regulations stipulate, in terms of unfair competition of telecommunication enterprises, that “The violating enterprise be charged to take corrective actions, apologize to the customers and compensate any loss to the telecommunication customers. In case of refusal to take corrective actions, apologize to the customer or compensate the loss to the customer, the violating shall be subjected to reprimand and fine of Rmb 10,000 to Rmb 100,000. In case of serious violation, the violating enterprises shall be ordered to terminate its operation for correction”. Obviously, the lower and upper limits of fine under the Telecommunications Regulations are significantly below those under the Anti-unfair Competition Law. On the other hand, the unfair competition in the regulated industries does not differ materially from that in the non-regulated industries. The monitoring and inspection by different authorities will inevitably result in the application of different enforcement yardsticks.

10. Based on the above considerations, we believe the unfair competition regulatory system in regulated industries is unsatisfactory.

3. Shared jurisdiction, a possible solution

11. In order to ensure the enforcement effectiveness and fairness, we believe the industries and commerce administrative authorities shall return to the regulated industries. However, such return shall not be on exclusive basis. As a matter of fact, the industries and commerce administrative authorities may face shortage of technical knowledge while handling violating cases in the regulated industries such as power, telecommunications and insurance and such shortage of technical knowledge may in turn affect the enforcement results. Therefore, we believe it might be a practical approach for the competition regulatory authorities and industries regulatory authorities to share the jurisdiction over unfair competition activities. Such approach combines the administrative proficiency of industries and commerce authorities and technical knowledge of industry regulatory authorities in a mutually supplementary arrangement. In practice, the approach may be implemented in two steps. As the first step, the current laws and regulations shall be amended to stipulate that the industries and commerce authorities and the industry regulatory authorities share the monitoring and inspection on unfair competition. As the second step, a communication mechanism shall be established between the industries and commerce authorities for sharing of information and technologies. We will make further study as to how such mechanism could be established.

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THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS

Contribution from Estonia

-- Session II --

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CO-OPERATION BETWEEN THE ESTONIAN COMPETITION BOARD AND NATIONAL REGULATORY BODIES

1. Background

1. There are several regulatory bodies in Estonia, exercising regulatory and supervisory function over different fields of action, such as telecommunications, energy, railway transport, aviation etc. Their competence and the scope of supervision is different, arising from a special act and other legal acts adopted on the basis of a special act. In addition to that, ministries (for instance Ministry of Social Affairs concerning medicines) and local governments (district heating, water and sewerage) exercise some regulatory functions.

2. Regulatory bodies in their traditional meaning have been established mainly for the ex ante regulation and supervision of such fields of action, where there is no effective competition and application of the principles of the competition law and the ex post supervision exercised by the competition authority are not enough for functioning of normal market relations. Establishing an objectively justified ex ante regulation from the one hand and exercising ex post competition supervision from the other hand complement each other and should guarantee the normal functioning of market relations in a relevant market.

3. Most of the regulatory bodies are in the subordination of the Ministry of Economic Affairs and Communications, the Communications Board and the Energy Market Inspectorate exercise the most comprehensive regulatory functions.

4. In general, the co-operation requirement has been laid down in the statute of a regulatory body. Typical wording is as follows: in order to perform its main functions, the board co-operates with other government bodies, local governments, foundations, non-profit organisations, entrepreneurship and consumer organisations and respective bodies of other states and international organisations in a way laid down in legal acts. Such a provision can be found also in the statute of the Competition Board.

2. The need for co-operation and exchange of information

5. By now there is a clear understanding that co-operation between regulatory bodies is objectively justified and necessary. It should be mentioned that competition authorities are also sometimes considered as regulatory bodies. This is to a certain extent justified because the competition law has imposed some ex ante restrictions and prohibitions that undertakings have to take into account.

6. It is inevitable that the competence of the regulatory bodies and the Competition Board partially overlap. In such a situation it is very important to guarantee the legal certainty to undertakings and avoid making contradictory decisions by different government bodies. In addition to that, during proceedings of a matter sector-specific knowledge may become necessary, for example in the fields of telecommunications, where the Communications Board is more competent. The regulatory bodies also have systematically gathered information concerning a specific field of economy. Unlike the regulatory bodies and due to the specific characteristic of the competition supervision, the competition authorities do not continuously and systematically gather information on different fields of business activity. Therefore the exchange of information becomes important. The regulatory bodies should be interested in issues concerning fields under their supervision because it is the competency of the regulatory bodies to elaborate and apply remedies fostering competition. Concerning the mentioned function, the knowledge and experience on

competition issues of the Competition Board could be useful. Hence the mutual consulting and exchange of information is useful both to the regulatory bodies and the Competition Board, enabling better usage of resources of a government body and achieve better results of the proceedings.

7. Until now the special acts did not contain a requirement of co-operation between a regulatory body and the Competition Board, but in EU regulations concerning the electronic communications service (known as New Regulatory Framework for Electronic communications services) it has been laid down a requirement for such a co-operation, i.e. exchange of information, which has been taken into account in elaboration of a draft Electronic Communications Act.

3. Practical experience of the Estonian Competition Board

8. In its daily work the Competition Board has mainly co-operated with the Communications Board, the Energy Market Inspectorate, the Civil Aviation Administration, the Railway Board, Financial Supervision Authority etc. So far the co-operation with the Communications Board and the Energy Market Inspectorate has been closer and more effective. The co-operation between the Competition Board and the regulatory bodies is not based on formal agreements, but the principles of general need for co-operation.

9. As there have been quite many applications and enquiries concerning the telecommunications, the co-operation with the regulatory body of that field, the Communications Board, has been close. According to Article 8 (9) of the Telecommunications Act, if the market share of a public telecommunications network operator or public telecommunications service provider is at least 40 per cent of the turnover of the specific public telecommunications service market, the activities of the operator or service provider as the undertaking with significant market power shall be governed by the Competition Act, in addition to the Telecommunications Act. In this case the legislator has provided for the parallel application of two legal acts. In case of violation of the Telecommunications Act may for example the price of a service be unfair and therefore also the Competition Act may be violated. If the norms of those two acts split, the Telecommunications Act as a special act is applied. In case of issues not regulated by the Telecommunications Act, the Competition Act is applied. Such was the opinion of the Supreme Court in a case concerning complaint of AS Eesti Telefon on the annulment of a decision of the Competition Board and the Competition Board follows the principles of the opinion of the Supreme Court.

10. In several cases, when making decisions, the Competition Board has relied on the opinion (for example concerning the interpretation or application of the provisions of the Telecommunications Act) or formal decision of the Communications Board and arising from that assessed, whether there was a violation of the Competition Act. Such a practice has also been used with other regulatory bodies.

11. In order to avoid inexpedient duplication of the supervisory actions, it has been proved to be useful to reach an agreement between different regulatory bodies before the commencement of the proceedings, agreeing on the scope of the proceedings carried out by each regulator, so that in the end all necessary proceedings would have been carried out. It is also discussed what kind of information the regulators can exchange, taking into account the obligation to maintain business secrets.

12. As a more recent example, the Competition Board proceeded a matter, where a law office representing an undertaking providing cable distribution and data communications services, submitted an application to the Competition Board. The law office alleged that there was a rental agreement between the dominant telecommunications undertaking and a cable operator concerning the communications network and the provisions of the agreement were at variance with the Competition Act. According to the complainant, the terms of the agreement might be unreasonably favourable because the cable operator had agreed not to provide Internet services in that area. During the proceeding of the matter, there was a meeting between the officials of the Competition Board and the Communications Board, in order to

determine the issues each board would be dealing with. In this case, the issue of the rightness and validity of the rental charges was regulated by a special act – the Telecommunications Act, and therefore fell into the competence of the Communications Board and the Competition Board did not have to assess the validity of the rental charge under the Competition Act. The Competition Board held the proceeding of the matter in abeyance until the Communications Board had made a decision on the conformity of the rental charge to the requirement of the Telecommunications Act and that the rental charge was not too low. The Competition Board analyzed the conformity of other provisions of the rental agreement to the Competition Act and came to the conclusion that there were no characteristics of an abuse of a dominant position or agreements that restricted competition.

13. Using this case as an example, one can say that both the Competition Board and the Communications Board were very much interested in co-operation and there were no obstacles during this co-operation.

4. Legal bases for co-operation and exchange of information

14. In the Estonian legal framework, one of the legal bases for co-operation and exchange of information (concerning administrative procedure) would be Administrative Co-operation Act. This act determines the conditions and procedure for the grant of authority to natural and legal persons to perform public administration duties of the state and of local governments independently and the bases and procedure for the provision of professional assistance between administrative authorities. The act establishes basis for application for and provision of professional assistance, requirements to the information contained in the application for professional assistance and compensation for expenses of professional assistance. However, professional assistance is different from the common co-operation between government bodies. The co-operation principle means communicating with other bodies as equal partners, not spending resources in order to achieve goals of other bodies.

15. The co-operation and information issues are to a certain extent regulated by legal acts regulating different fields of economy.

16. According to Article 93(2) of the Electricity Market Act, if necessary, the Energy Market Inspectorate shall involve independent experts and co-operate with other Estonian and foreign supervisory authorities in order to exercise supervision.

17. At the same time the exchange of information has in different special acts been regulated in different ways and generally there is no possibility to exchange information containing business secrets or confidential information. According to Article 99(4) of the Telecommunications Act, officials of the Estonian National Communications Board are required to maintain state or business secrets which has become known to them in the course of performing their duties and have the right to use such information only to perform their duties.

18. According to Article 97(1) of the Electricity Market Act, the Energy Market Inspectorate shall maintain the confidentiality of information communicated thereto if the person communicating the information has indicated that it contains business secrets. According to Article 97 (3), the communication of information in the case where such communication is prescribed by law or where the person who provided the information or the person to whom the information pertains has given consent to the communication of the information shall not be deemed to be a breach of the obligation specified in Article 97(1). According to Article 97(4), the Energy Market Inspectorate shall use any information at its disposal only to perform the functions arising from the act.

19. According to Article 28(2) of the District Heating Act, supervisory authorities (the Energy Market Inspectorate and rural municipality and city governments) shall use the information at their disposal solely for the performance of duties arising from law.

20. According to Article 144 of the draft Electronic Communications Act, the Communications Board co-operates with the Competition Board and when necessary, exchanges information on the competition on the communications markets. The mentioned bodies may specify the conditions and organisation of the co-operation in a co-operation protocol. The extent of the information forwarded by the Communications Board to the Competition Board, including the possibility to forward confidential information and requirement to the Competition Board to maintain such confidential information have also been provided.. At the same time the draft act does not provide for an obligation to the Competition Board to exchange information. Also the Competition Act does not provide for such an obligation. Article 56 of the Competition Act regulates co-operation between the European Commission and the Competition Board. It is provided in Article 12 of the Council Regulation (EC) 1/2003, which competition authorities and on which occasion information, including confidential information is exchanged with.

21. As it can be seen, the legal regulation in force does not enable to exchange all the necessary information between the Competition Board and national regulatory bodies. In such a situation, one possibility is to ask the person that submitted the information, whether the Competition Board or regulatory body can forward the information to another government body. In case the person does not agree, the other government body has to independently request the information necessary to perform its main functions. But acting this way is an ineffective usage of administrative resources, which does not depend on the effectiveness of work arrangements of a regulatory body.

5. Conclusions

22. At present nobody doubts that co-operation between national regulatory bodies and competition authorities is necessary and even inevitable. That enables to use better their rather limited administrative and financial resources. In addition to that, exchange of the knowledge and experience on competition issues and sector-specific knowledge between officials of different government bodies, enriches them intellectually and enables them better perform their main functions. The possibility to exchange information also reduces the burden to undertakings to submit similar information to different supervisory bodies.

23. Clearly the legal bases regulating the exchange of information should be improved. But in this part the supervisory bodies themselves must be active enough and initiate the process of amending the legislation on this issue.

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Global Forum on Competition

THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS

Contribution from Indonesia

-- Session II --

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THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS IN INDONESIA

1. Background

1. Competition has been introduced in various sectors industries in Indonesia. Telecommunication sector, as an example, has adopted competition value in Law No. 36 of 1999 on Telecommunication. Article 10 of the Law states that telecommunication operators are prohibited to conduct activities that could result in the occurrence of monopolistic practices and for unfair business competition. In line with competition policy in telecommunication sector, government has issued supporting regulations to ensure fair competition in the market place. One of those supporting regulations is Ministerial Decree No. 33 of 2004 on Fair Competition Supervision in Fixed Network Operation.

2. The Ministerial Decree No. 33 of 2004 covers specific competition issues and unfair conducts in telecommunication sectors that include:

1. The obligations for dominating operators to provide good services in accordance with standard service
2. The criteria of dominant position, which is market control in terms of business activities, coverage area and revenue that control the majority of market
3. The prohibition of abuse of dominant position, such as selling below cost, selling above the price formulated by regulation, cross subsidy, directly or indirectly coerce other network providers or customer to use their network or basic telephony service only, refuse to provide interconnection and discrimination
4. The usage of access code and interconnection, such as prohibition for fixed network operator to block access code of other network operators
5. Limited services. All telecommunication operators may request all services and facilities they need to the fixed network operators and the fixed network operators are obliged to give all possible services and facilities they can provide.

3. In the closing provision, the General Director of Post and Telecommunication is assigned to implement and supervise the decree.

2. BRTI as Sectoral Regulator

4. In line with the competiton policy of the telecommunications market, it is necessary to establish a regulatory body which is transparent, independent and impartial to all operators to give healthy competition.

2.1 Stated in the Law No. 36/1999, article 4 (explanation)

5. The Telecommunications Minister could delegate regulation function to a Regulatory Body.

Ministerial decree no 31 year of 2003 :

- establishment of Badan Regulasi Telekomunikasi Indonesia (BRTI) – Indonesian Telecommunications Regulatory Body;

- to secure *transparency, independecy and fairness* in telecommunication Network and Service operations;

- effective from 5 January 2004;

- as the transitional Body toward full Independent Regulatory Body.

6. BRTI consists of Telecommunications Regulatory Committee Members (of five) and Directorate General Posts and Telecommunications.

7. The Committee members consists of a chairman which is Director General of Posts and Telecommunications and 4 experts in technical (telecommunications & IT), legal, economics and social.

8. The 4 experts members were selected through independent selection team.

9. The Committee Members are elected for two years term, which can be extended one more term if necessary

10. The decision of BRTI is implemented by the Committee members collegially. In case no consensus is reached, voting is taken by the Committee members with equal voting right

11. In carrying out its task, Committee members is independent from power/influence of other interest.

12. Each Committee decision has to:

- go through process considering input in the form of opinion and thought which developed within the community;

- to secure transparancy, independency and fairness.

13. The BRTI's decisions are in the form of Ministerial or DG decree.

14. BRTI reports to Minister of Transportations and Telecommunications.

Supervision of:

- operational performance;

- competition safeguard;

- utilisation of telecommunications tools and equipment.

Control of operation of network and service operators:

- settlement of dispute between operators;

- utilisation of telecommunications tools and equipment;

- utilisation of tools and equipment.

3. KPPU as Competition Authority

15. Article 35 and 36 of the competition law provides KPPU with duties and authorities.

16. As stated in Article 35 of the competition law, KPPU is assigned to perform the following duties:

- evaluate agreements that may result in monopolistic practices and or unfair business competition;
- evaluate business activities and or conduct of business actors which may result in monopolistic practices and or unfair business competition;
- evaluate the existence or non existence of misuse of dominant position which may result in monopolistic practices and or unfair business competition;
- undertake actions in accordance with the authority of the Commission;
- provide advice and opinion concerning government policies related to monopolistic practices and or unfair business competition;
- prepare guidelines and or publications related to the law;
- submit periodic reports on the results of the Commissions' work to the President and the People's Legislative Assembly.

17. In order to be able to carry out its duties effectively, KPPU is provided with the following authorities:

- receive reports from public and or business actors regarding allegations of the existence of monopolistic practices and or unfair business competition;
- conduct research concerning the possibility of the existence of business activities and or actions of business actors which may result in monopolistic practices and or unfair business competition;
- conduct investigations and or hearings on allegations of cases of monopolistic practices and or unfair business competition reported by the public or by business actors or discovered by the Commission as a result of its research;
- make conclusions regarding the results of its investigations and or hearings as to whether or not there are any monopolistic practices and or unfair business competition;
- summon business actors suspected of having violated the provisions of this law;
- summon and invite witnesses, experts and any person deemed to have knowledge of violations of the provisions of this law;
- seek assistance of investigators to invite business actors, witness, experts or any persons as intended in sub-articles e and f who are not prepared to appear upon the commission invitation;

- request the statements of government institutions related to the investigations and or hearings about business actors who violate the provisions of this law;

- obtain, examine and or evaluate letters, documents or other instruments of evidence for investigations and or hearings;

- determine and stipulate the existence or non existence of losses on the parts of business actors or society;

- announce the commission's decision to business actors suspected of having engaged in monopoly practices and or unfair business competition;

- impose administrative sanctions on business actors violating the provisions of the law.

18. In principle, the responsibility of KPPU is to react to anticompetitive behavior in the market. As the telecommunications market shifts from monopoly to competition, the role of KPPU has grown in this sector. KPPU takes regulatory action *ex post* based on the competition law, after determining that there has been anticompetitive behavior in the market. KPPU is assigned by law also to provide advice and opinion concerning government policies related to monopolistic practices and/or unfair business competition

4. The Relationship between Competition Authorities and sectoral regulators in Indonesia: Ways to make the relationship work effectively

19. As mentioned in Article 35 of Competition Law, the main role of KPPU as a competition authority is to protect competition from anticompetitive behavior and mergers, while the BRTI as a sectoral agency is responsible for economic, competition (to some extend) and technical regulation. Since the BRTI is assigned also to supervise the competition in their sector, there will be potential problems of overlapping tasks between KPPU and BRTI in the future. Any problems arise from those unclearly defined competition responsibility between the two agencies would lead to policies which are incompatible or not in line with competition values. By remembering that telecommunication sector is one of public utilities, the disharmonic and incompatible policies would have effect on public welfare and national resources allocation (efficiency).

20. Based on its duties given by law, KPPU has to give recommendation to government, including sector regulator regarding competition issue. By disseminating competition values to the executive and legislative institution, KPPU could speed up the process of internalisation competition values and culture in each institution. The internalisation of competition values in related institution or sector regulators is significant and vital so that policies coming out from these institutions can be in line or compatible with the competition values (policies). Through what so called "Policy Harmonistion Mechanism" KPPU would identify related industrial policies which are believed to effect competition in each sector.

21. Under policy harmonisation mechanism, KPPU has initiated discussions, workshops and seminars for technical department or ministerial institution. Some of the policies and regulation which has been evaluated by KPPU has been reformed and the remaining is still under consideration.

22. The relationship between KPPU and BRTI regarded and defined as evolving, continuous and simultaneous process of coordination and cooperation. At the earlier stages, the process of coordination and cooperation would include intensive communication to achieve a common understanding of each responsibility. The process of communicating and understanding between sector regulators and competition authority regarding each responsibility is very important especially at the beginning stages like today. An understanding between KPPU and BRTI on common perspective (maximum welfare and

efficiency) and clearly defined responsibilities would minimize the probability of conflict of tasks between the two agencies.

23. Telecommunication is in the earlier stages of restructuring, the delegating responsibilities and function from the related department to the BRTI is still in the initial process. Some say that this process would take time longer than the expected. Under those conditions, the most effective way in harmonising policies is by coordinating with the related department or ministerial institution directly.

24. As competition authority, KPPU would still need coordination with Ministry and BRTI. KPPU would be responsible for maintaining competition in telecommunication while the BRTI would be responsible more for the technical issues and economic (include non discriminatory access to input and pricing policy). Those classifications would follow the area of expertise of the agencies. Also, the coordination process would make sure that the agencies will function accordingly and create a synergy between them.

25. In establishing cooperation, several possible problems may arise though. For example, the independency of BRTI is still questioned, since it has to report to the executive body (Department or Ministerial). Another problem is that there is no clear separation of functions of BRTI and government.

5. Conclusion

26. Adoption of competition policy now becomes a must in order to survive from economic problems and the global competition. Competition policy will ensure that the economic efficiency will be achieved in sector industries. Therefore, it is important that competition policy is effectively enforced to prevent unfair competition of public and private sectors.

27. To create business climate which is conducive for all business actors, it is important to be open, transparent and competitive. These three factors are essential to create healthy economic growth and sustained employment in the long term. Competition is a relatively new issue in Indonesia, lasting results will take years to achieve. Several steps are identified to create better competition in sector industries:

- there is a clear need for KPPU to develop frameworks for cooperation with sector regulators in order to integrate a strong network of competition law and enforcement within the sector regulations;

- KPPU can establish a regular information exchange with all sector regulators so that KPPU could be more effective in identifying anticompetitive practices and optimally used its capability to play the role of monitoring in sector industries.

28. Rapid liberalisation without putting safety nets first, including the implementation of competition policy in place will lead Indonesia into problems. On the other hand, with the right type of regulation, Indonesia has a remarkable chance to establish markets as engines for economic progress.

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Global Forum on Competition

THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS

Contribution from Kenya

-- Session II --

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RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTOR REGULATORS: A CASE FOR KENYA

1. Monopolies and Prices Commission: An overview

1. Monopolies and Prices Commission (MPC) is the Kenya's competition Authority. It deals with economic regulation: regulation of the structure (mergers and takeovers); regulation of conduct (controlling restraints in trade and or dealing with exemptions) and also performance. Another function of the MPC is to advise the government of Kenya in regard to issues germane to competition: domestic, regional and international. MPC, institutionally, is rationalised in such a way that it is a department in the ministry of Finance. This means that it is the Minister who regulates with recommendations from a Department. The basis of this was for MPC to act as a transitory institution that is, from a heavily controlled market economy to a liberalised one. The disadvantage with this regime is that it denies the MPC a chance to establish its reputation. This has arisen when incumbents have ignored or rejected recommendation.

2. As indicated earlier, this institutional arrangement was meant to be a transitional step towards an independent regulator. However, political capture occurred. In order to distort regulatory goals to pursue political ends the previous government did not pursue the goal of setting an independent regime. Economic regulation became a tool of self-interest within government and the ruling elite. It is reasonable to state that MPC suffered a *political risk:* the political leaders failed to support and secure cooperation for policy of economic growth.

3. Nevertheless, this regime has an advantage: it has economised on regulatory resources. This due to the fact that the officers are remunerated as Civil servants and budget allocation is based on Treasury allocation only. However, with the change of Government, there has been a policy shift. Under a document titled *The Economic Recovery strategy* the new Government has committed itself to:

- enacting and enforcing laws supportive of competition;
- harmonising competition law with sectoral regulatory laws;
- according the Commission requisite autonomy in order to separate policy, management and regulatory functions. This will enhance credibility and predictability of the Commission's decisions. This, also, has already been incorporated in the Ministry's of Finance Strategic Plan;
- according the Commission adequate budgetary provision to build the human resource capacity and to enable it to regulate competition in all sectors of the economy.

2. Sector Regulators

4. Whereas MPC's jurisdiction cuts across the whole economy, there exist other sector regulators in the economy who operate independently. Communications Commission of Kenya (CCK), regulates the Communications sector under The Communications Act (No.2 of 1998); Electricity Regulatory Board (ERB), operates under the Electric Power Act, Number 11 of 1997; Capital Markets Authority, promotes, regulates and facilitates the development of an orderly, fair and efficient capital markets under the Capital

Markets Act, Cap.485A. The Central Bank of Kenya, regulates the banking and financial institutions under the Central Bank of Kenya (Amendment) Act, 1996. It is of interest to note that this Act empowers the Minister for Finance to approve mergers and takeovers in the banking sector.

5. There is other legislation with the aim of promoting, regulating and controlling industries. These include laws relating to tariff protection and related matters; Customs and Excise Act, Cap. 472, regulation by taxation; Income Tax Act, Cap.470; Value Added Tax Act, No.7 of 1989 and other laws relating to restrictions on establishment and expansion of Industrial undertakings and Businesses.

6. Sector Regulators in Kenya are created by separate pieces of legislation. Although all of them are not excellent pieces of legislation, the writer can reasonably state that most of them have adopted OECD countries' and US mode of regulation. They are relatively independent regulatory agencies compared to MPC. This regime is quite evident in the telecommunications sector. These agencies are premised on (a) distinguishing formal accountability that is, design of legal framework and legal structures and (b) Informal Accountability that is, regulatory processes and practices; (c) having responsibilities, which are defined and not shared. This arrangement avoids duplication of responsibilities hence minimising regulatory competition and or collusion.

7. They have been accorded autonomy through legislation. This can be manifested by secure source of funds although they have not secured security of tenure for their Executives nor have they set objective appointments procedure for them. These agencies have explicit legal accountability; this is manifested by effective and timely review and appeals procedures they conduct. Transparency has been enhanced through clear and published regulatory processes. Decisions and reasons for such decisions are made public through the media and therefore they establish a benchmark and consistency in future decisions. This has established predictability, which is important, in the market.

3. Cooperation between MPC and Sector Regulators

8. There is neither harmonisation nor synchronisation of the responsibilities of the sector regulators viz those of MPC. Although this arrangement may be an optimal organisational response to the threat of capture, because it reduces the non-benevolent regulator's discretion, there is plausible concern that some regulators have developed a culture of arrogant independence, bordering on vexatious indulgence. This leads to regulatory competition. A recent example is where the Association of Kenya Insurers (AKI) recommended insurance premium rates to Insurance brokers. The indulgence of the MPC in trying to resolve this matter was taken as an infringement of the powers bestowed upon the Insurance industry regulator.

9. Nevertheless, MPC and other sector regulators, in an effort to circumvent the problem created by information asymmetry have continued to share information instead of relying on information provided for by the industry. This has helped to reduce informational rent enjoyed by the industry. Secondly, it has helped reduce the economic costs of regulation: - (1) the costs of directly administering the regulatory system and; (2) the compliance costs of regulation

10. In Kenya, quite often, the laws creating sector regulators contain a portion dealing with competition in the sector with no deliberate harmonisation of the role of MPC and the sector regulators. However, there are some indications that sector regulators, although not obliged, are increasingly consulting with the MPC. For example, in the area of mergers and takeovers, the Central Bank of Kenya liaises with the MPC. The Civil Aviation Board has been liaising with MPC in the area of restrictive trade practices. The Communication Commission of Kenya has also been cooperating with the MPC in the investigation of restrictive trade practices and in the area of mergers and takeovers. The Capital Markets Authority cooperates with the MPC in matters concerning listed companies.

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THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS

Contribution by Mr. Joey Ghaleb (Lebanon)

-- Session II --

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THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS

by Joey R. Ghaleb, Chief Economist
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1. Current state of competition in Lebanon

1. From the time when the civil war drew to a close, Lebanon has been actively working on repositioning itself as a trade hub linking the Arab East with the European West by signing a free trade agreement with the EU, implementing the tariff dismantlement with Arab countries, and keenly pursuing WTO membership (expected end 2005). Domestically, a number of fiscal measures were also introduced in this regard, including the unilateral reduction in tariff rates in 2000. Concurrently, however, cumulated fiscal deficits related to post war reconstruction needs (infrastructure, institutions, political stability) have resulted in large debt-GDP ratio approaching 170% by end-2004.[1]

2. A recent study conducted by the Ministry of Economy and Trade in 2003, empirically assessed what was perceived for decades by observers of the Lebanese economy, namely that many sectors are shielded from competition. According to the study, about half of Lebanon's domestic markets are considered oligopolistic to monopolistic; and a third of them have a dominant firm with market share above 40 percent. The reasons for such high concentration indexes (and hence, little internal competition) are of different natures, but always relate in one way or another to the existence of barriers to entry and exit. Some of them are natural, in the presence of economies of scale for instance. Others are artificial, and stem from rules, regulations and norms that practically restrict entry at least to some enterprises. The study lists in this regard outdated commercial laws, long delays in commercial disputes settlements, business-unfriendly administrative regulations, corruption, and the existence of exclusive agencies as important artificial barriers to entry.

3. The lack of domestic competition is ultimately negatively affecting Lebanon's export competitiveness. But in addition to the imperfect market structures and the ensuing rent-seeking behaviour, there are other factors contributing to the reduced level of competitiveness namely the high cost of inputs (e.g., power & power outages, telecommunications), rigid labour markets, high lending rates due to crowding out, non-tariff barriers including technical barriers to trade imposed by EU, and lack of access to capital for a private sector mainly composed of Micro and Small and Medium Enterprises.

4. The competition legislative infrastructure is outdated and "dispersed" across several laws and decrees, most of which uncorrelated and enacted at different time periods. No modern competition law exists and competition culture *per se* does not exist. A number of sectors (e.g., banks, insurance) are regulated by their respective authorities and the government still provides protection to exclusive agents (vertical agreements).

5. As a final note, Lebanon has no history of an authority promoting and safeguarding competition, however, the economy of Lebanon is driven by market forces and is by and large liberal. The economy has always been characterised by having low taxation and little or no restrictions on investment, foreign ownership, or movement of factors of productions and capital. The increasing role of the government has been witnessed following the end of the conflict in 1990 where massive state intervention was required to reconnect segmented markets.

1. Debt dynamics have, and for the first time since 1975 (start of Lebanese War) been reversed in 2004 and is expected to decrease in 2005 pending additional reforms

2. Relationship between the competition authority and sectoral regulators

6. The competition draft law[2] as it stands calls for an independent competition authority linked administratively to the Minister of Economy and Trade. The relationship between this authority and sectoral regulators and who "has the final say" depends on whether the case is about a concentration or an anticompetitive practice. If there is an anticompetitive practice, the draft law gives the regulator the powers of a "rapporteur" who is in charge of investigating the situation and submitting its opinion before the Competition Authority which is obliged to hear all arguments before giving its ruling. Mergers, on the other hand, will be reviewed by the regulator but a non-binding opinion of the Authority must be requested prior to any ruling by the regulator.

7. This proposed mechanism to govern the relationship between the authority and the regulator will be better defined in memorandums of understanding called for by the law. Such approach allows flexibility and takes into account the specificity of each sector.

8. *Awaiting the new law* and authority in charge of enforcing it, the few existing regulators are assuming both the technical and the competition control oversight role. Syndicates, orders, and even professional organisations are also regulating their practices and in many instances engaging or promoting competitive practices. The role and mandate of the Ministry of Economy and Trade is limited given the constraints imposed by existing laws and the overall policy of support private sector initiatives without assessing fully the impact on the economy as a whole or considering consumer welfare.

9. Below we will briefly expose the cases of two regulators:

- Banks: Lebanon has a vibrant banking sector with over 60 banks (4mn population) regulated by a strong Central Bank and a Banking Control Commission. Mergers, pricing, and other regulatory measures are overseen, and for decades now, by the sectoral regulator. Moreover, the Association of Banks is a powerful lobby, led by top 5 or 6 banks, and acts as an authority which influences interest rates and overall policy of commercial banks.

- Insurance*:* The insurance sector, relatively small compared to banks or to the region, is regulated by a young control commission linked directly to the Minister of Economy. And since the upcoming competition authority will be linked directly or indirectly to the same minister, we do not and we are not expecting an issue of cooperation between the two bodies.

3. Cooperation within regional agreements and among national authorities

10. The Association Agreement with the EU and soon the Wider Europe Initiative will govern Lebanon's competition policy at the regional level. Lebanon is not yet a member of the WTO but assuming it will adhere in 2005, the country will thus play a role in the future round negotiation dealing with the Singapore Issues notably competition. It is envisaged that in the short to medium term, Lebanon will sign bilateral memorandums with other competition authorities and will work closely under the umbrella of the Association Agreement.

11. Lebanon stands to learn from joint intra-national authority cooperation and welcomes a greater dissemination of the best practices and closer collaboration between competition authorities either under the umbrella of regional agreements (e.g., Euro-med Process) or through a sponsorship/apprentice program whereby experienced authorities take on the responsibility of training new authorities leading to joint memorandum of understandings.

2. expected to be sent to Parliament by June 2005

4. Implementation of the competition law: technical assistance

12. Lebanon is in the process of finalizing a draft law to be submitted to Parliament within the first half of 2005. Assuming the competition authority is designated in 2005 and the law ratified, the implementation and enforcement of the law remains a major challenge. Not only does Lebanon need to extensively train the authority staff and inspectors but technical assistance however is needed to a much larger audience and it is expected to encompass:

- capacity building of inspectors and authority staff;
- training and workshops for judicial authorities, lawyers, stakeholders;
- medium term twining programs with other authorities;
- awareness raising to a variety of audiences.

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Global Forum on Competition

THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS

Contribution from Pakistan

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RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS

1. Pakistan's macro-economic policy considers that on-going monitoring of newly privatised state monopolies was necessary to safeguard the consumer interest but at the same time over-regulation of the state owned firms offered to the private sector was avoided, to encourage the private ownership. Therefore, the national competition authority, i.e. MCA, was stopped to take cognizance of the emerging competition issues in the sectors regulated by sector regulators through an amendment in 2002, to further enlarge the scope of exemptions. A sector-wise review is provided in the paragraphs to follow.

1. Pakistan Telecommunication Authority (PTA)

2. PTA regulates the operation and maintenance of the telecommunication system and telecommunication services in accordance with the 'Pakistan Telecommunication (Re-Organization) Act, 1996'. It grants licenses and whenever the Authority has preferred an applicant to another in the award of a license, it records reasons for doing so.

3. Until recently, the Pakistan Telecommunication Company Limited (PTCL), having majority shares and pre-dominantly being controlled by Government, enjoyed monopoly in fixed telephony services. The Government of Pakistan has already issued a telecom deregulation policy. A number of mobile telephone companies have entered the market and are competing with each other as well as with PTCL.

2 National Electric Power Regulatory Authority (NEPRA)

4. NEPRA, established to regulate the power sector under the Regulation of Generation, Transmission and Distribution of Electronic Power Act, 1997, has the following functions to perform:

5. The NEPRA Act states that the Authority shall be exclusively empowered to determine rates, charges and other terms and conditions for electric power services. Nothing in this Act shall affect the jurisdiction, power or determination of the Corporate Law Authority or the Monopoly Control Authority. However, the sector lies outside the purview of the monopolies law to the extent of activities covered in the NEPRA Ordinance.

6. The electric power sector, earlier dominated by government owned power generation and distribution organisations like Water and Power Development Authority (WAPDA), Karachi Electric Supply Corporation (KESC), Karachi Nuclear Power Plant (KANUPP), now has a number of Independent Power Plants (IPPs) and Small Power Plants (SPPs). Similarly on the distribution end, a number of distribution companies are operating in the power distribution sector. Also, KESC's privatisation is going on.

3. Oil &Gas Regulatory Authority (OGRA)

7. OGRA was established to foster competition, increase private investment and ownership in the mid-stream and down-stream petroleum industry and to protect the public interest in accordance with the 'Oil & Gas Regulatory Authority Ordinance, 2002'.

8. OGRA is responsible for protection of users of regulated activities and consumers against monopolistic or oligopolistic pricing. Yet there are no controls over the formation of monopolies and

evading any prohibitory clauses as specified under MRTPO. The OGRA Ordinance does not give OGRA any specific mandate to act in a manner so as to check such an eventuality. Also, the Government has opened the oil and gas sector to private entrepreneurs for exploration, drilling, refining and distribution of petroleum products.

9. Oil Companies Advisory Committee (OCAC) was formed in the mid sixties as a forum of the oil companies to interact with each other and the Government in matters relating to the management of the oil business, etc. The members of OCAC comprise refineries, oil marketing companies and gas distribution companies. The consumer prices of petrol and diesel are reviewed and adjusted on fortnightly basis by Oil Companies Advisory Committee (OCAC) on variations in the international market prices. Any increase/decrease in the international market prices is passed on to the consumer with the approval of Ministry of Petroleum & Natural Resources.

4. Pakistan Electronic Media Regulatory Authority (PEMRA)

10. PEMRA was established under the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 for regulating establishment and operation of all broadcast and Cable Television (CTV) stations in Pakistan.

11. The Authority deals not only with tariff rates but also specifies that a licensee shall not merge or amalgamate with any other person without the prior approval of the Authority, and a person who is the shareholder of, or owns an interest in, a company which is a licensee, shall not transfer or dispose of his shares or the interest, without the prior approval of the Authority. Provided that in the case of a listed company, the shares, representing not more than two percent of the issued and paid up share capital, is transferred without such approval. Also the PEMRA (Media Ownership and Control) Regulations, 2002 prohibits the undue concentration of media ownership and states that there shall be no undue concentration of media ownership, cross media ownership, monopoly power or restrictive trade practices by a person or associated persons or associated undertakings.

5. Role of the competition authority

12. It is noted at the outset that the definition of ‘service’ in the monopoly law is quite limited and only covers provision of board, lodging, transport, entertainment or amusement, facilities in connection with the supply of electrical or other energy, purveying of news, banking, insurance and investment. Also the Law does not apply to following undertakings:

- Federal/ Provincial Government owned undertakings;

- The activity or functions of an undertaking or undertakings that are regulated, prescribed, determined or required to be approved by a Regulatory Authority. The “Regulatory Authority” means the NEPRA, PTA, OGRA and any other regulatory authority as the Federal Government may, by a notification in the official Gazette, specify.

13. Therefore, the limitations of the Law include a limited definition of services, major areas of services are outside the definition and some of the services are covered under the sector regulators. Hence, MCA’s role in the sectors regulated by sector regulators has been marginalised. MCA can only make recommendations to the Federal Government for suitable governmental actions to prevent or eliminate undue concentration of economic power, unreasonable monopoly power or unreasonably restrictive trade practices, which, in its opinion exists in case of any undertaking or group of undertakings engaged in business activities in a sector regulated by a sector regulator. However, in practice this function of ‘advice/recommendation’ is hampered by the fact that the undertakings lying outside the purview of the

Law are not bound to provide any information to the MCA, thus making it difficult to conduct any probing into the sector.

5. Dual jurisdiction of competition authority and sector regulators

14. To control quality and prices of drugs, the applicable law is Drugs Act, 1976 that regulates the import, export and manufacture, distribution and sale of drugs. Maximum prices for drugs are also set under the Drugs Act, 1976. Under section 12 of Drugs Act 1976 the Federal Government may, by notification in the official Gazette, fix the maximum price at which any drug is to be sold and specify a certain percentage of the profits of manufacturers of drugs to be utilised, in accordance with the rules for purposes of research in drugs.

15. Like pharmaceuticals, there are a few other sectors that are regulated by sector regulators such as the banking sector being regulated by State Bank of Pakistan under the Banking Companies Ordinance, 1962, the insurance sector by the Securities and Exchange Commission of Pakistan (SECP) under Insurance Ordinance, 2000, the air transport by Civil Aviation Authority (CAA), road transport by District Transport Authorities (DTA), postal service by Postal Authority (PA), but simultaneously competition issues are left for the competition authority to regulate. Therefore, matters relating to undue concentration of economic power, unreasonable monopoly power or unreasonably restrictive trade practices in the aforementioned sectors are dealt with by MCA.

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Global Forum on Competition

THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS

Contribution from Romania

-- Session II --

This contribution is submitted by Romania under Session II of the Global Forum on Competition to be held on 17 and 18 February 2005.

JT00176830

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THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS

1. In order to successfully cope with the economic globalisation and integration within the Single European Market, for meeting the exigencies imposed by the quality of future Member State of European Union, it is required a thorough knowledge of the competition rules, knowledge that can be achieved by an active competition advocacy. In achieving this goal, the national authority in the field - the Competition Council - has an important role.

2. Romania's integration objective is conditioned by European rules and practices in the competition field that must function even before the accession itself as an essential support for a viable and functional market economy.

3. The competition advocacy defines the capacity of authority involved and authorised in providing assistance, in influencing and participating at drafting and enforcing the Governmental economic policies, designated to a better promotion of structures and competition behaviour of companies, and to increase their performances and competitiveness on the market.

4. The objectives of the competition advocacy are of complex nature and have an essential importance for developing in Romania a functional market economy. The Competition Council approaches mainly activities focused on competition advocacy, respectively:

1. The activity of competition advocacy in relation with regulatory authorities of different sectors

5. Within the process of strengthening the functional market economy, the Competition Council plays an active role in favour of liberalising the markets of public interest services. Therefore it is extremely necessary and useful for all the concerned factors to know the policy and the rules on competition, the legal framework and to promote them in a coherent and consequent way.

6. The competition promotion in public utilities sector, the way in which is established the coordination between the competition authority's actions and regulatory institutions on different sectors represents a real challenge of the present. The competition legislation and policy aim at limiting the anticompetitive behaviours of companies, and de-regulating is oriented to minimize the distortion of market functioning through governmental interventions.

7. In principle, both the competition authority and the regulatory institutions are focused on protecting the public interest against the monopolistic power, but the used instruments are different. The Competition Council has in view to guarantee for all companies the increase of efficiency as a result of competition, price reduction, in order to provide competitiveness and job creation. To these, there are added the consumer's benefits, obtained by reducing costs of concerned benefits services.

8. The competition authority has an important role within the reform process of regulated sectors, as part of the privatisation process, by its vocation to impose measures of breaking the existing monopolies, of controlling or prohibiting economic concentrations that threaten the market structure. The close cooperation with regulatory institutions is motivated in these cases by the requirement to ensure the reforms efficiency.

9. Therewith, ensuring the performance of public interest services, in terms of quality and price, in order to meet the end users needs represents a common responsibility of competition authorities, of

regulatory authorities and of service suppliers. Far to be incompatible, the services of general interest and the principles of competition policy are complementary in reaching this objective.

10. Romanian Competition Council participates in a regulated framework at the Consultative Commissions of the regulatory authorities; in the context of the actions that regards the competition advocacy, Competition Council intensified its periodical meetings with the regulatory authorities.

11. The conclusion on July 14 of a Protocol with the National Authority of Regulation in Communications and on July 21, 2004 of two Protocols with the National Authority in the Field of Natural Gas and with the National Authority in the Field of Energy, aimed at strengthening the co-working and cooperation based on an active partnership, for the promotion and achievement of the objectives, of the implementation of the strategy and policy in the field of competition.

12. The main economic regulated sectors in Romania are: electrical energy, natural gases, electronic communications, and postal services, services of local interest and mineral resources and oil. The regulations of network industries take aim, especially: assuring transparency, assuring services in non-discriminatory conditions, accountancy delimitation, accessibility of third parties to network and price control.

1.1 Electrical Energy - development and expectations

13. Romania has the largest power sector of South Eastern Europe. There are over 22.2 gigawatts (GW) of installed electric-generating capacity. On July 2004, Italian company ENEL bought two out of eight distribution societies: SC Electrica Banat SA and SC Electrica Dobrogea SA. A similar sell-off strategy was approved for SC Electrica Oltenia SA and SC Electrica Moldova SA.

14. *National Authority in the Field of Energy* is called to harmonise the conflicting interests in the sector. Its mission is to create and implement a system of regulations with a view to ensuring the proper functioning of the electricity sector and market in terms of efficiency, competition, and transparency and consumer protection.

15. Course of the opening degree of electrical energy domestic market: 2004 - 40%, 2005 -55%, 2006 - 80%, Jan. 2007 - 100% for industrial consumers and July 2007 - 100% for all consumers.

1.2 Natural Gas - development and expectations

16. On October 2004, there have been privatised the two big distributors of natural gas SC Distrigaz Sud si SC Distrigaz Nord SA. The price of natural gas produced by domestic undertakings is going to grow gradually, reaching import price in 2007.

17. In 2000, Romania set up the *National Authority in the Field of Natural Gas*. Its main responsibilities include tariff setting, authorising and licensing companies, and protecting consumers, controlling natural gas sector companies, issuing technical norms and regulating access to the transmission and distribution grids.

18. Course of the opening degree of natural gas domestic market: 2003 - 30%, 2004 - 40%, 2005 - 50%, 2006 - 75%, 2007 - 100%.

1.3 Electronic Communications

1.3.1 Fixed telephony

19. The market was fully liberalised on January, the 1st, 2003.

20. Romtelecom, the national telephony operator, was privatised in 1998 (OTE Greece) and still holds a dominant position on fixed telephony market. Also, over 2000 companies have required a license for fixed telephony.

21. Romtelecom must permit access to network to the new entrants in non-discriminatory and equitable terms.

22. Romanian Competition Council has adopted Guidelines on the application of the competition rules to access agreements in the telecommunications sector - framework, relevant markets and principles.

23. *Mobile telephony* - there are 4 operators: Mobifon, Orange, Telemobil and Romtelecom (Cosmorom).

24. *Internet* - there are about 40 providers operating at national level and about 362 providers at local level.

25. *Cable TV* - there are 3 main operators: RCS, Astral Telecom and UPC.

26. The reform process ongoing in Romania is aimed at creating a competitive environment in the electronic communications sector. A close collaboration between the Competition Council and National Regulatory Authority in Communications (hereinafter referred as NRA) is a *sine qua non* condition of success.

27. The Competition Council participates, on regular basis, at the NRA's Consultative Committee meetings. This Consultative Committee has the role to support the harmonization of the different parties' interests, and to asses the NRA's regulations impact on the market. Also, the Consultative Committee makes proposals for improving the quality of the adopted regulations.

28. Furthermore, the Competition Council gives mandatory opinion on the draft normative acts to be adopted by the NRA's that may have anticompetitive impact, and proposes amendments to the legislation having such effects.

29. In this respect, the Competition Council gave its opinion on the following normative acts adopted by NRA:

- regulation on identifying the relevant markets from electronic communications sector;
- regulation on carrying out the market analysis and on determining the significant market power.

30. On the other hand, Romanian Competition Council has adopted *Guidelines on the application of the competition rules to access agreements in the telecommunications sector - framework, relevant markets and principles*.

31. In this respect, the Competition Council asked for the NRA's opinion on these guidelines.

32. The purpose of these guidelines is threefold:

- to set out access principles stemming from competition law, in order to create greater market certainty and more stable conditions for investment and commercial initiative in the telecoms and multimedia sectors;

- to define and clarify the relationship between competition law and sector specific legislation (in particular this relates to the relationship between competition rules and open network provision legislation);

- to explain how competition rules will be applied in a consistent way across the sectors involved in the provision of new services, and in particular to access issues and gateways in this context.

33. The Competition Council recognises that NRA has different tasks, and operates in a different legal framework from the Competition Council when the latter is applying the competition rules. The sector specific law, based as it is on considerations of telecommunications policy, may have objectives different to, but consistent with, the objectives of competition policy. The Competition Council will cooperate as far as possible with the NRA.

34. National Regulatory Authority regulates *ex ante* the conduct of the companies acting on the market, trying to prevent any anti-competitive agreements or abusive behaviours. Whenever the Competition Council investigates an alleged infringement of the Competition law by companies acting on a regulated market, the NRA is asked to participate in the procedure. Also, whenever the behaviour of the companies acting on these markets has the characteristics of an anti-competitive practice prohibited by the Competition law, the Romanian Competition Council can intervene and impose the sanctions provided for by the Competition law.

35. In conclusion, the cooperation between Competition Council and Regulatory Authorities is oriented to:

- preventing and discouraging anticompetitive practices on these markets;

- Market monitoring activities;

- disseminating and informing undertakings about measures taken in case of infringement of Competition Law no. 21/1996;

- mutual consultation about sensible competition problems.

2. The activity of competition advocacy in relation with the Government

36. This activity is based on coherent actions, as follows:

2.1 Establishing and institutionalising a system of ex ante consultations and ensuring its functionality on a permanent base

37. The sooner the consultancy process is engaged in elaborating the legislation, the more efficient the competition rules will be highlighted within those normative acts.

2.2 Participation at the elaboration by the Government of the legislation concerning economic integration and reform

38. The competition authority must be involved, even when elaborating proposals of legislative drafts, especially when promoting those normative acts with potentially negative impact on competition.

2.3 Participation to actions concerning privatisation and its economic effects

39. The intervention and the practical role of the Competition Council in this field are necessary to ensure the implementation of competition rules by actions in the previous stage as well as in post-privatisation stage.

2.4 The Competition Council's involvement in the governmental activity, as habilitated observer, through its concerned representatives, especially entrusted in this scope

40. Competition Council must be directly involved in the Governmental decisional activity, by issuing and sustaining its own point of view, on executive initiatives with direct or indirect impact on the competition field.

2.5 Participation of Competition Council's representatives to international meetings and using efficiently the results within inter-ministerial group on competition issues

41. Market globalisation and integration require an active presence at meetings with international and regional character and submitting proposals regarding harmonization and synchronisation of Competition Council's activity with international trends.

42. As an action method in this matter, was create an Inter-ministerial working Group on competition issues, with monthly reunions. The first meeting of the Inter-ministerial Group on competition was aimed at initiating the materialisation of the initiative of preventing the potential anti-competitive practices on the market in order to reach the goal represented by the well functioning of the mechanisms of a functional market. At this meeting the representatives of the Ministry of Economy and Trade, Ministry of Justice, Public Finance Ministry, Ministry of Communications and Information Technology, Ministry of Environment and Water Administration, Ministry of Health and Ministry of Education and Research have participated.

43. The competition advocacy is not necessarily an original, Romanian action, but represents an activity on which all competition authorities were focused. The international experience demonstrated in time that, by promoting the competition culture, the financial efforts are lower, unless the authorities are focused strictly on sanctioning the infringements of the law in this field.

44. Romania considers that a deeper, more intensive bilateral and multilateral cooperation among competition authorities can prove to be a very good response that is needed in terms of globalisation. In order to solve competition problems with regional dimension, the competition authorities of neighboring countries have to strengthen cooperation between them. That is why the Romanian Competition Council is confident in the establishment of the fruitful relationships with the competition authorities from the South East Europe.

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Global Forum on Competition

THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS

Contribution from Russian Federation

-- Session II --

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THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS

1. The most important object of structure reorganization in Russia is reforming of the sectors of natural monopolies, aimed at increasing of effectiveness of their activities by developing competition processes at corresponding commodity markets.

2. The Russian strategy of reforming and comprehensive approach are based at the following basic principles:

- improvement of instruments of regulation aimed at cutting down efficiency losses by creating appropriate system if incentives for regulated market participants;
- separation of competition segment apart of naturally monopolistic and factual introduction of competition into this segment;
- incorporation of state owned companies in sectors of natural monopolies.

3. Increasing of effectiveness of regulation presumes a step by step transition in potentially competition sectors from direct regulation (including by setting tariffs) to market methods of regulation (including the methods of antimonopoly regulation and control) and subsequent reduction of natural monopolistic sectors.

4. Decision on preserving or phasing down of direct regulation is carried out from the market analysis, and the necessary condition for preserving regulation is the natural monopolistic state of the market.

5. Significant importance when regulating the activities of subjects of natural monopolies is paid to applying flexible tariff schemes and setting tariffs on economically reasonable level.

6. Division into natural monopolistic and (potentially) competition spheres of activity, as well as methods and scales of such division (from separate accounting to property separation) also depend on the situation at the market. Determination of potentially competitive sector is performed so that upon its allocation the competition is provided at this segment of the market.

7. In this regard, in the process of reforming the weak points are determined towards to which the demands of non-discrimination are the basic factor of decreasing market access barriers and are of key significance for competition development. Such spheres include infrastructure activities built on special capacities, which are hardly to be established due to economic and technological reasons as for market participants and for their associations, and whose services influence on competition development outlook at complemented markets.

8. So it is necessary to improve the present antimonopoly and sector legislation in the part of market access, as well as standard contracts for services rendered by the subjects of natural monopolies.

9. The established pro competitive monopoly sectors reforming vector presumes active participation of the Russian antimonopoly body in working out and realization of reformation programmes.

10. Antimonopoly body of the Russian Federation is the developer and responsible executor of a range of key documents concerning the build-up of competition market in natural monopolistic sectors, issues of non-discrimination access, etc.

11. Lately the process of electric energy sector reforming aimed to liberalization of electricity market and creation of conditions for competition development is going on rapidly.

12. For the present moment the criteria of attribution of electricity mail lines and objects of electricity networks economy to the Unified National Electricity Network are being determined.

13. The new basis of pricing and rules of state regulation of tariffs for electric and heat energy in the Russian Federation are being accepted.

14. The principles of pricing envisage stipulating a separate value of payments for services rendered in conditions of natural monopolies, including for transmission of electricity along the common national and regional networks, for transmission of heat energy, for connecting consumers to electricity networks, for granting system services at electricity wholesale market. These components should be excluded from the license fee while the respective institutions are being established, which grant such services (Federal Network Company, regional network companies, system operator). Calculation of tariffs will be based upon the validity of laid down capital profit rate. The basis of pricing also creates conditions for inciting costs reduction when granting services.

15. Besides, the rules of regulation are aimed for initiating the process of electricity prices liberalization at the wholesale market (the bottom limit of prices is being fixed, under which the market price will be determined as the result of demand and supply at this very segment of the market).

16. Basic tasks of electricity market technological and commercial infrastructure build up were fulfilled. So, Federal Network Company and System Operator were established as 100% branches. RAO UES and these affiliated branches signed agreements for granting system services and energy transmission services. The process of creating branches of backbone electricity networks of FSK UES is going on.

17. The procedure of signing agreements on system services granting was carried out, Administrator of Trade System (ATS) of electricity wholesale market was established. As ATS is an institution of competition market build up and functioning, according to the Government's decision Federal Antimonopoly Body was appointed as an authorized executive power body performing the control of ATS activity.

18. In addition to the functions specified in the Law on Competition, Federal Antimonopoly Body has a right to veto all decisions of ATS, which contradict the demands of competition market build up and operation. ATS Charter and in the immediate Federal Law No 35-FL of 26.03.03 "On electricity" say that federal antimonopoly body participates in preparation of the electricity market operation rules.

19. A package of "reforming" laws developed with direct participation of federal antimonopoly body is adopted.

20. The basic document is Federal Law "On electricity". It legally regulates the institutional model of the sector operation, its organization and technological infrastructure, the subject structure of the sector, mechanism of their interaction, the order of arguments settling, as well as measures of responsibility for non-performance of obligations.

21. Some amendments were introduced into the Federal Law "On electricity ": into the spheres of activity of subjects of natural monopolies instead of granting services on energy supply only services on electricity transmission are included, services on operation control management and services on heat energy transmission. Thus, generation and distribution of electric energy are removed from under the power of the rules of Federal Law "On natural monopolies".

22. The Rules of the wholesale market of electric energy have been established, on the basis of which on November 1, 2003 a sector of free trade was launched. The volume of the sector is limited by 15% of electric energy produced in Russia.

23. The list of generating companies of the wholesale market of electricity is already approved. Unification of all electric power stations owned by RAO UES Russia and its branches into 10 generating companies follows the aim of providing equal starting conditions for generating companies and non admission of dominance of some of them at the wholesale market of electric energy.

24. Obvious efforts on reforming are undertaken in the sector of railway transport. In the framework of de-monopolization of the market of railway transportation a transition from the subjects of natural monopolies activity regulation to the regulation of activity in the sphere of railway transport infrastructure of common use is implemented.

25. Under the initiative of federal antimonopoly body a separation of the functions of state management and functions of an economic entity is legally allocated.

26. In sector legislation a principle of provision of non discrimination access to infrastructure services is envisaged, contractual regime of relationship between carrier and infrastructure owner is established.

27. In the process of federal railway transport property privatization a vertically integrated company is established – an open joint stock company "Russian railways", 100% of shares of the company are in the state property.

28. By present moment services on transportation are provided by more than 70 companies-operators, possessing their own rolling stock park.

29. Russian Federation has achieved the most success in competition development at the telecommunication markets. Tariff reform was realized in the sphere of regulation, which was aimed at decision-making on regulation application only when conditions for effective competition are absent, taking in mind market condition, combining flexibility of tariff regulation and antimonopoly control. The level of regulated tariffs provides compensating of the current expenses, modernization and development. Competition market of the mobile communication is actively developing. (there are more than 100 license holders).

30. Also liberalization processes taking place in gas fields. Gasprom was incorporated, separate business accounting was bring in for different persons in the frames of group Gasprom, also division into business (extraction, transport, distribution, realization by separate legal persons). The share of independent market participants in gas fields has increased from 1% to 5% from the beginning of reforming. Rules of non-discrimination access to gas transportation and gas distributing nets were taken.

31. At the same time, in spite of positive experience of natural monopolies reforming, reorganizing entails conflicts and contradictions. It was caused by the fact that products and services, providing by

natural monopolies subjects are the main resources of the number of industry fields, and tariffs for the services essentially influence on real incomes of the inhabitants.

31. As the result, the process of reforming should be followed by measures on competition advocacy, aimed not only at state power bodies and business community but also at the population of the Russian Federation.

32. Thus, Russia has substantially approximated to OECD standards on regulation principles and deregulation of natural monopoly subjects. The principles of free competition and following the rules of antimonopoly legislation become an integral part of business conduct and taking decisions by state power bodies when building and implementing reforming programmes in these sectors.

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THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS

Contribution from Singapore

-- Session II --

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JT00177060

English - Or. English

SINGAPORE'S COMPETITION ACT 2004

1. Background

1. Singapore enacted its Competition Act 2004 which came into effect on 1 January 2005. The law was passed in the Singapore Parliament on 19 October 2004. It was drafted taking into account feedback received from two rounds of public consultation. The consultation documents and submissions received can be found at the website of the Competition Commission of Singapore (www.ccs.gov.sg).

2. Key Features of the Competition Act

2. In the formulation of the law, Singapore was conscious to incorporate international best practices but to take into account that the Singapore economy is small and open.

3. The law establishes a new statutory body, the Competition Commission of Singapore ("CCS"), under the purview of the Ministry of Trade & Industry, to administer and enforce the competition law. The main provisions of the law cover the following areas:

- prohibited activities;
- scope of application;
- enforcement;
- appeals; and
- offences.

4. Prohibited activities: The law prohibits the following:

- Anticompetitive practices and agreements – Section 34 of the law prohibits practices and agreements which prevent, restrict or distort competition in Singapore. The section contains an illustrative list of such agreements, including agreements between competing firms to fix prices, reduce the quantity of the goods and services sold, or share markets. The CCS, in enforcing section 34, will focus principally on agreements that have an appreciable adverse effect on competition in Singapore.

- Abuse of dominance – The law does not prohibit firms from being dominant, including monopolies. The law, however, prohibits dominant firms from abusing their dominance in ways that are anticompetitive and which work against long-term economic efficiency (section 47).

- Mergers and acquisitions (M&As) – Not all M&As have anticompetitive effects. Being a small open economy, highly-concentrated markets are at times inevitable. Thus, only M&As which substantially lessen competition and have no offsetting efficiencies are prohibited (section 54). There is no requirement for prior notification of M&As.

5. Scope of application: The law does not apply to the Singapore Government or its statutory boards or any other entity acting on their behalf. The intent of competition law is to regulate the conduct of market players, and not fetter the discretion of Government in its policy-making and performance of public functions. Thus, the law will only apply to commercial and economic activities carried out by private sector entities in all sectors, regardless whether the entity is foreign-owned, Singapore-owned or Government-owned.

6. There are however several exclusions from the law, as set out in the Third and Fourth Schedules of the law:

- services of general economic interest;
- compliance with legal requirements;
- avoidance of conflict with international obligations;
- on grounds of public policy;
- vertical agreements;
- goods and services regulated by other competition law; and
- mergers approved under any other law relating to competition.

7. Specifically, the following activities are excluded: supply of piped potable water; supply of wastewater management services; supply of scheduled bus services; supply of rail services; cargo terminal operations; provision of armed security services; media sector; clearing house activities; provision of gas and electricity services; provision of telecommunications services; and supply of ordinary letter and postcard services.

8. Some of these exclusions are based on public interest considerations such as national security and defence interests. The other exclusions are for sectors or activities which already have sectoral competition frameworks. Many of these sectors have only been recently liberalised and in transition to a more competitive market environment. The regulation of these sectors – which involve technical matters and require industry knowledge and expertise – is better done by the respective sectoral regulators at this point of time. Cross-sectoral competition issues will however be dealt with by the CCS, in consultation with the sectoral regulators.

9. The scope of the sectoral exclusions will be reviewed, taking into account market developments, after the law has come into force for some time years.

10. Enforcement: The CCS will have the following powers:

- Power to investigate – The CCS may conduct an investigation if there are reasonable grounds to suspect an infringement of the law. The CCS will have the necessary powers to gather evidence.
- Power to adjudicate – Upon completing its investigation, the CCS may make a decision as to whether the law has been infringed. The CCS will notify the parties affected by its decision and provide opportunity for the parties to make representations.

- Power to sanction – The law provides for sanctions ranging from financial penalties to structural remedies. Financial penalties up to a maximum amount of 10% of the turnover of the Singapore business of the party that infringed the law can be set. This is necessary so as to act as a strong deterrent.

11. Rights of private action: Besides financial penalties, parties who infringed the law are liable to be sued by parties who suffered loss or damage directly as a result of the infringement. They can only do so after the CCS has made its determination and the appeal process exhausted. This serves as an additional deterrent. Normal court practices would apply, and the onus would be on the parties seeking damages to show that actual losses had resulted from the prohibited activities.

12. Appeal process: The law provides for an independent appeal process. A separate body, the Competition Appeal Board (CAB) will be established to hear appeals against the decisions of the CCS. The CAB will be an independent body comprising members appointed by the Minister for Trade & Industry. Parties may make further appeals against decisions of the CAB to the High Court, and thereafter to the Court of Appeal, but only on points of law and the amount of the financial penalty.

13. Offences: The law also provides for criminal sanctions for parties failing to comply with a requirement of the CCS in an investigation, or to destroy documents, or to provide false information.

2.1 Phased Implementation

14. The law is implemented in a phased approach:

- Phase I: On 1 January 2005, only the provisions establishing the CCS came into force.

- Phase II: On 1 January 2006, the provisions on anticompetitive practices and agreements, abuse of dominance, enforcement, appeal process and other miscellaneous areas will come into force.

- Phase III: The remaining provisions, i.e. those relating to M&As, will be gazetted to come into force at a later date (likely 2007).

15. This will allow the CCS time to build up its resources and capabilities.

2.2 Press release on launch of the CCS

16. The press release issued by the Ministry of Trade & Industry on the launch of the CCS is attached for information.

ANNEX

PRESS RELEASE

MINISTRY OF TRADE AND INDUSTRY LAUNCHES COMPETITION COMMISSION

1. A new statutory board, the Competition Commission of Singapore (CCS), will be set up on 1 January 2005, under the Ministry of Trade and Industry, to administer and enforce the Competition Act 2004.

2. The functions and duties of the CCS shall be to:

(a) remove or limit practices that have adverse effect on competition in Singapore;

(b) maintain and enhance efficient market conduct and promote competition in markets in Singapore;

(c) act internationally as the national body representative of Singapore in respect of competition matters; and

(d) advise the Government or other public authority on national needs and policies in respect of competition matters generally.

The CCS will have powers to investigate and adjudicate anticompetitive activities. It will also have the powers to impose sanctions.

3. The prohibition provisions in the Competition Act 2004 will come into effect in phases, starting from 1 Jan 2006. This is to allow time for the CCS to build up its resources and capabilities to perform its enforcement duties when the prohibition provisions come into effect.

4. The board members of the CCS are in the enclosed list. Mr Lam Chuan Leong, who is the Second Permanent Secretary (Special Projects), Ministry of Finance, will be the Chairman of the CCS. Mr Ng Wai Choong, Deputy Secretary (Industry), Ministry of Trade and Industry, will concurrently hold the position of Chief Executive Officer of the CCS.

5. For more information, please visit CCS' website at http://www.ccs.gov.sg.

Ministry of Trade and Industry
30 December 2004

APPOINTED MEMBERS OF THE COMPETITION COMMISSION OF SINGAPORE

a. Mr Lam Chuan Leong - Chairman
Second Permanent Secretary (Special Projects)
Ministry of Finance

b. Mr Ng Wai Choong - Chief Executive Officer
Deputy Secretary (Industry)
Ministry of Trade & Industry

c. Mr Lee Seiu Kin
Second Solicitor-General
Attorney-General's Chambers

d. Assoc Prof Tan Cheng Han
Dean, Faculty of Law
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e. Mr Edward Robinson
Principal Economist, Monetary Policy Division
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f. Dr Phang Sock Yong
Associate Dean, School of Economics and Social Sciences
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g. Mr Bobby Chin Yoke Choong
Managing Partner - KPMG Singapore
Member of KPMG Asia Pacific Board and KPMG International Council

LAM CHUAN LEONG
CHAIRMAN, COMPETITION COMMISSION OF SINGAPORE

Lam Chuan Leong, 56, is also the Second Permanent Secretary (Special Projects) at the Ministry of Finance, a post he assumed on 1 January 2004. He began his career in the Administrative Service in 1970.

He has held several senior appointments in the civil service, including as Permanent Secretary in the then Ministry of Communications and Information, Ministry of Trade and Industry, Ministry of National Development, and the then Ministry of the Environment.

He was awarded the Public Administration Medal (Gold) in 1990.

A President's Scholar, Mr Lam has a Masters in Business Administration/Studies from Harvard University, USA.

NG WAI CHOONG
CHIEF EXECUTIVE OFFICER, COMPETITION COMMISSION OF SINGAPORE

Ng Wai Choong, 39, is currently the Deputy Secretary (Industry), Ministry of Trade and Industry, having held this appointment since 2002. He began his career in the civil service in 1991.

Mr Ng first worked in the Ministry of Finance and subsequently in the Ministry of National Development before being posted to the Ministry of Trade and Industry. Presently, he is a member of the Board of the Health Sciences Authority and the Singapore-MIT Alliance Governing Board. He also holds directorships in several other organisations.

In 1990, he graduated with a Bachelor of Economics from the University of Tokyo, Japan.

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

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Global Forum on Competition

THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS

Contribution from the United States

-- Session II --

This contribution is submitted by the United States under Session II of the Global Forum on Competition to be held on 17 and 18 February 2005.

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RELATIONS BETWEEN ANTITRUST AND REGULATORY AUTHORITIES[1] SUBMISSION OF THE UNITED STATES

1. Introduction

1. In the United States, the various industry-specific regulatory agencies, such as the Federal Communications Commission (FCC), and the non-industry specific federal antitrust authorities, the Antitrust Division of the Department of Justice ("Justice Department") and the Federal Trade Commission (FTC), were created at different times with different authorizing statutes. Generally, regulatory programs were established with objectives beyond just protecting competition, such as universal access and media ownership diversity. In contrast, in modern times the U.S. antitrust agencies have focused solely on competition with an emphasis on consumer welfare, although the authors of some of the antitrust laws also had populist or business-protection goals in mind. However, the movement toward deregulation of many industry sectors over the past several decades has led the regulatory agencies increasingly to emphasize competition analysis and respect for free market forces. This shift has changed the dynamic between the industry-specific regulators and the antitrust agencies.

2. In general, U.S. federal law addresses the competitive effects of business conduct in one of three ways. First, in a few limited instances, conduct is statutorily exempt from the antitrust laws. An example is the "business of insurance," which is exempt under the McCarran-Ferguson Act, but which is regulated to various degrees by the states.[2] In such cases, the regulated company is expressly exempt or immune from the federal antitrust laws.[3] Antitrust immunity may also be implied when there is a "clear repugnancy between the antitrust laws and the regulatory system."[4] A discussion of express and/or implied antitrust immunities is outside the scope of this paper.[5]

3. Second, certain types of conduct are evaluated only under the antitrust laws with respect to their possible effect on competition. For example, an industry-specific regulator may have jurisdiction to set prices, but not have jurisdiction to criminally prosecute price fixing.

4. Third, there are categories of conduct over which the antitrust agencies and the industry- specific regulator have concurrent or shared jurisdiction, most frequently in the area of merger enforcement but also in some non-merger situations. Congress has decided whether to grant an industry regulator exclusive jurisdiction over competition matters within an industry or to establish concurrent jurisdiction between the industry regulator and the antitrust agencies on a sector-by-sector basis. This paper will focus on relations between the antitrust agencies and industry-specific regulators in the banking, electricity and telecommunications industries.

2. Antitrust Framework

5. There are three major federal[6] antitrust laws: the Sherman Antitrust Act,[7] the Clayton Act,[8] and the Federal Trade Commission Act.[9] The Sherman Act, enacted in 1890, prohibits all contracts, combinations and conspiracies that unreasonably restrain interstate and foreign commerce, and prohibits monopolization of or attempts to monopolize any part of interstate or certain foreign commerce. A Sherman Act violation may be subject to both civil and criminal penalties; however, only the Justice Department is empowered to bring criminal prosecutions. The Clayton Act is a civil statute, enacted in 1914 and substantially amended in 1950. The Clayton Act, *inter alia*, prohibits all mergers and acquisitions that are likely to substantially lessen competition in any relevant line of commerce. Under the Clayton Act, all transactions above a certain financial threshold must be notified to both the Justice Department and the FTC. The Federal Trade Commission Act, which created the FTC, also was enacted in

1914. The FTC Act is a civil statute enforced only by the FTC that prohibits unfair methods of competition affecting interstate commerce.

6. Although the Sherman Act took effect in 1890, it was not until 1903 that the United States Congress first appropriated funds for antitrust enforcement and authorized the appointment of an assistant within the Department of Justice to advise the Attorney General on antitrust matters.[10] Congress established the FTC in 1914. Both the Justice Department and the FTC have jurisdiction to investigate and bring cases under the Sherman and Clayton Acts. The Clayton and FTC Acts limit the FTC=s jurisdiction over certain industries (e.g., telecommunications common carriers, banking, aviation).

3. Relations Concerning Mergers

3.1 Banking

7. There are four industry-specific regulators with authority to approve or deny bank and bank holding company mergers: the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision.[11] In 1963, the Supreme Court upheld the Justice Department=s authority to challenge a banking merger under the antitrust laws.[12] Prior to that, it was believed that the antitrust laws largely did not cover bank mergers.[13] To resolve industry and Congressional concern over potential harm to the safety and soundness of the banking system from inconsistent outcomes, the Bank Merger Act and the Bank Holding Company Act were amended in 1966 to include a provision for concurrent independent review of competitive effects by the Justice Department and the bank regulatory agency.

8. Under the Bank Merger Act of 1966, the regulator must request and the Justice Department must provide to the relevant banking agency a competitive factors advisory report that the agency *must* consider in its decision.[14] The Act prohibits the relevant banking agency from approving any transaction that "would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or attempt to monopolize the business of banking in any part of the United States,"[15] or "whose effect in any section of the country may be substantially to lessen competition," unless the anticompetitive effects of the proposed transaction are clearly outweighed by the public interest.[16] The regulatory agency must notify Justice Department of its approval of a proposed transaction.[17] Absent exigent circumstances (e.g., imminent failure of one of the banks or bank holding companies), the companies may not consummate the merger for thirty days following approval by the regulatory authority, to give Justice Department an opportunity to review and, if appropriate, challenge the merger.[18] The regulatory authority may, with Justice Department's concurrence, reduce the post-approval waiting period to 15 days, but this period must last at least 15 calendar days after the date of regulatory approval.[19]

9. To ensure that the regulatory agencies and the Justice Department apply similar standards, in1994 the Justice Department, the Federal Reserve Board, and the Office of the Comptroller of the Currency jointly published the "Bank Merger Competitive Review," which outlines the bank merger antitrust review process. As highlighted in this joint statement, the bank regulatory agencies and the Justice Department in practice do not necessarily use the same product market definition and, as a result, may disagree on the geographic market definition. For example, in the merger of BayBanks and Bank of Boston Corp., the Federal Reserve Board, using their "cluster of banking services" product market, would have cleared the transaction without any divestiture in the Boston market.[20] The Justice Department, however, required a divestiture in the Boston market after its investigation determined possible anticompetitive effects for small and lower middle market business banking services.[21]

10. As in other industries, the requirement that the bank regulatory agencies apply some of the same antitrust standards as the Justice Department has not hindered the banking agencies= efforts to carry out

the other facets of their regulatory policy. Competition analysis is only one of several criteria that the banking regulators must consider in their approval process, and the regulator can override competitive concerns if the public=s "convenience and needs" so warrant.[22] Indeed, in cases where Justice Department has ultimately sued following agency approval, the relevant agency has intervened in the case on behalf of the bank to defend the agency=s approval in court.[23]

3. 2Electricity

11. Electric utilities in the United States are regulated by both the states and the Federal Energy Regulatory Commission (FERC), a successor to the Federal Power Commission. The FPC was created by the Federal Power Act of 1920 and became an independent commission in 1930.[24] In its declaration of policy explaining the need to regulate electric utility companies, the Act states "that the business of selling electric energy for ultimate distribution to the public is affected with a public interest."[25] Historically, the FERC has focused on wholesale electricity sales and associated transmission services. Under the Act, the rates that the FERC establishes for wholesale electricity sales and transmission must be "just and reasonable."[26] The states, on the other hand, traditionally have focused on retail electricity rates and transmission. States also retain control over the sitting of generation and transmission lines within their borders.

12. In 1992 Congress enacted the Energy Policy Act which facilitated competition in the wholesaling of electricity by increasing the FERC=s authority to order third parties access to transmission lines even if the utility was not involved in a merger.[27] Both the FTC and the Justice Department filed extensive comments on how this objective could be best achieved, although the FERC did not accept all of the agencies' proposals. In the case of vertical unbundling, the FERC later accepted the agencies' proposals to move from behavioural rules to a structural approach (independent regional transmission organizations).

13. In addition to advising on competition-related rules and regulations, the antitrust agencies share jurisdiction with the FERC over electric utility mergers involving assists subject to its jurisdiction. Historically, Justice Department has taken responsibility for reviewing mergers between electric utilities, in part because of provisions in the Nuclear Regulatory Commission statute that specifies that Justice Department is to conduct an analysis of mergers involving nuclear power plants. Consistent with the objectives of the Federal Power Act, the FERC is charged with ensuring that a merger is in the public interest.[28] This "public interest" standard differs from the standard the Justice Department and the FTC apply in reviewing mergers pursuant to Clayton Act §7, which prohibits mergers that are likely to substantially lessen competition in any relevant market.[29] Another key difference between the agencies= reviews is that applicants in a FERC proceeding bear the burden of proving that their transaction is consistent with the public interest whereas to block a merger, the Justice Department must prove to a federal court, and the FTC must prove to an administrative law judge or to a court in an injunctive proceeding, that a transaction is likely to substantially lessen competition. These differing standards and burdens could, but rarely do, lead to situations where the antitrust agencies take no action regarding a particular merger, but the FERC conditions clearance of it on compliance with certain remedies.[30] Concurrent jurisdiction with different standards can, in some instances, provide important benefits. For example, FERC's merger notification thresholds are substantially lower than the antitrust agencies' thresholds. FERC may be able to identify significant, but localized, competitive problems in a transaction that was not reportable to the antitrust agencies and address the problems before approving the merger.

14. In 1996, in furtherance of the federal government=s deregulatory approach to wholesale electricity markets, the FERC adopted the Open Access Rule. This rule requires each public utility that owns, operates or controls interstate transmission facilities to file an open access transmission tariff. Thereafter, the FERC issued a new merger policy statement[31] that declared competitive effects to be one of three key inquiries under the FERC=s public interest analysis. Consequently, the competitive effects of

mergers are now analyzed by the FERC under its own standard. The FERC formally adopted the *Justice Department/FTC Horizontal Merger Guidelines* prior to its revised merger standard, but the FERC's merger standard departs from the Guidelines in potentially significant ways. In addition, the information sources used by the FERC to analyze proposed mergers are substantially different than those of the antitrust agencies. Hence there is potential for a FERC merger evaluation to yield different results than an antitrust agency evaluation of the same merger. The Justice Department and FTC staff has recently comments on information sources used in merger and market power evaluations and the differences between the FERC approach and information sources and those of the antitrust agencies. The FERC policy statement also makes clear that "there may be unusual circumstances in which, for example, a merger that raises competitive concerns may nevertheless be in the public interest because customer benefits (such as the need to ensure reliable electricity service from a utility in severe financial distress) may clearly compel approval."[32]

3.3 Telecommunications

15. The industry-specific regulator for telecommunications is the Federal Communications Commission (FCC) which was established by the Communications Act of 1934.[33] The purpose of the Communications Act is "to make available, so far as possible, to all people of the United States, . . . a rapid, efficient, Nationwide, and worldwide wire and radio communication service with adequate facilities at a reasonable price . . . ." Pursuant to sections 214(a) and 310(d) of the Act, the FCC must determine whether a proposed transfer of telecommunications licenses and authorizations (such as those involved in a merger of two telecommunications companies) will serve the public interest, convenience and necessity.[34] In conducting its public interest analysis, the FCC must consider the goal of the Communications Act, "which includes among other things, preserving and enhancing competition in relevant markets, ensuring that a diversity of voices is made available to the public, and accelerating the private sector deployment of advanced services."[35] Consequently, the FCC=s merger review analysis is broader than the Justice Department=s analysis under section 7 of the Clayton Act.[36] In some cases (e.g., AT&T/Comcast), this has resulted in the Justice Department deciding not to challenge a merger, while the FCC conditions clearance of the merger on compliance with certain remedies.

16. In addition to the differing standards of review, the FCC and the Justice Department also use different processes and timetables to review mergers. For example, while both agencies may compel additional information from the merging parties, the FCC is required to publish any information on which it relies in reaching its decision (absent a protective order allowing such information to be placed under seal).[37] In contrast, the Justice Department has an affirmative obligation not to disclose to the public any party or third party information obtained pursuant to compliance with the mandatory reporting requirements of merger notification or the compulsory process.[38] Similarly, the FCC, by its own internal rules, aims to rule on merger applications within 180 days of filing[39] whereas the Justice Department is statutorily obligated to make a decision within 30 days of receiving the merging parties= completed application or, if the Justice Department request additional information or documents (referred to as a "Second Request"), within 30 days of certification of compliance with the Second Request.[40] Finally, the applicants in an FCC proceeding bear the burden of proving that a particular license transfer is in the public interest whereas under the Clayton Act, the antitrust authorities must convince a federal court of a likelihood that the transaction will substantially lessen competition in order to block the transaction.

17. Despite differences in standards, burdens of proof, and timing, the FCC and the Justice Department can and do cooperate on and coordinate their respective merger investigations. There are no rules governing which agency may initiate the contact or when they should do that. Typically, such cooperation begins once the parties have filed with one of the agencies, although in major cases contact may occur sooner. As noted above, although FCC rules generally require it to disclose *ex parte* meetings, the rules contain an exception for meetings with the antitrust authorities.[41] While the FCC and the Justice

Department are thus free to meet and discuss theories of competitive harm, proposed remedies, and timing, the Justice Department may not disclose any information it has obtained from the parties or third parties under the Hart-Scott-Rodino merger review process absent a waiver of confidentiality protections. Such waivers are useful in order to streamline the review process and avoid inconsistent results, and are granted in most relevant investigations.

4. Relations Concerning Non-Merger Matters

18. As noted above, the antitrust agencies often advise industry-specific regulators on non-merger matters that impact competition. This advice may take several forms. For example, both the FTC and the Justice Department participate in a number of inter-agency task forces or committees that formulate an Administration=s policies on various economic issues. Additionally, the antitrust agencies, like any private person, may file comments in regulatory proceedings before independent agencies. For example, both the Justice Department and the FTC submitted comments to FERC regarding its 1996 merger policy statement. In the electricity area, staff from Justice Department, FTC, Department of Energy, and FERC meet informally to discuss perspectives on regulatory reforms and competition enforcement matters. Finally, some statutes authorize the antitrust agencies to participate in certain regulatory proceedings and/or require the regulator to seek advice from the competition agencies in particular types of proceedings. An example of such a statute is the Telecommunications Act of 1996,[42] the purpose of which is to open all telecommunications markets in the United States, including local services, to competition. Section 271 of the 1996 Act conditioned Regional Bell Operating Company (RBOC) entry into the long distance market on a showing that the RBOC=s local market was open to competition. In making this determination, the Act required the FCC to consult with the Justice Department and accord "substantial weight" to the Justice Department=s analysis. As part of this consultative process, the Justice Department generally provided the FCC with a written evaluation within thirty days of the RBOC=s application. By statute, the FCC had ninety days to rule on an RBOC's application. Both before and after the Justice Department=s evaluation was filed, Justice Department and FCC staff consulted with respect to issues that the Justice Department believed may impede competition in the local market. These consultations fall within the exception to the FCC=s *ex parte* rules and, thus, are not required to be put on the public record. While the FCC was required to accord "substantial weight" to the Justice Department=s evaluation, the FCC was not bound to follow the Justice Department=s advice. As of today, the RBOC's have received long-distance authority in all fifty states.

19. In addition to seeking the antitrust agencies' advice on competition matters, a regulatory agency also may notify the antitrust agencies of conduct that falls within the regulatory agency's jurisdiction that may violate the antitrust laws. One example of such a referral involved allegations against three wireless communications firms that agreed not to bid against each other in license auctions conducted by the FCC. In numerous auctions conducted over a six month period, each company refrained from bidding on licenses that another wanted in exchange for the other=s agreement not to bid against them in markets that they wanted. As a result, the FCC received less money than it would have for licenses in markets that were the subject of the agreement. After receiving information about the alleged bid rigging from the FCC, the Justice Department launched an investigation that ultimately led to the filing of complaints and consent decrees against the three firms.[43]

5. Conclusion

20. There are advantages and disadvantages associated with concurrent or shared jurisdiction. One of the advantages is that it allows each agency to avail itself of the other agency=s expertise. For example, the antitrust agencies are experts in antitrust law whereas the regulatory agencies have broad knowledge of their respective industries. Interaction between the two agencies may be particularly helpful in defining markets, obtaining industry statistics, and articulating theories of competitive harm. Moreover, the

antitrust agencies generally have greater investigative powers (e.g., power to subpoena documents and depositions) than the regulatory agencies. In addition, consumers and competitors are more likely to complain to the antitrust agencies because of the strong confidentiality provisions that the antitrust laws provide.

21. An additional advantage for competition may come from the different standards applied by the antitrust agency and regulatory agency. As noted above, the antitrust laws are designed to protect against anticompetitive harm from certain activities (e.g., price fixing, monopolization), and with that narrow focus, the antitrust agencies are limited to redressing only anticompetitive harm. On the other hand, the regulatory agencies not only can redress anticompetitive harm in certain circumstances, but through their "public interest" standard they can also alter the competitive situation. A particularly important application of this difference is that the antitrust laws do not generally address concerns about existing market power that may have accumulated prior to liberalization of these sectors. Once liberalization has taken place, firms may have an increased ability to exercise this latent market power. State and federal sector regulators may be better positioned to address existing market power concerns of this type because their statutes are less narrowly focused than the antitrust laws on preventing increases in market power through mergers or anticompetitive activities.

22. In contrast, concurrent or shared jurisdiction imposes costs on the antitrust and regulatory agencies and the parties, especially in the merger context. In addition to increased transaction costs from duplication of effort within the agencies and by the parties in dealing with multiple agencies, one of the disadvantages is that shared jurisdiction can lead to inconsistent outcomes. For example, the antitrust agency may decide not to challenge a merger, but the sector regulator may impose competition related conditions to its approval. When an antitrust agency and sector regulator enforce the same competition laws, differences in enforcement approaches may emerge and can increase the difficulty of achieving consistent antitrust policies in a jurisdiction. Since regulatory outcomes can vary according to how individual regulators exercise their discretion, firms may expend additional resources to learn and monitor the preferences of both an antitrust agency and sector regulators. As regulatory agencies make competitive effects a more significant part of their analysis, the risk of inconsistent outcomes and greater duplication are increased. But these costs can be mitigated by early and regular contact between the agencies, which can reduce duplication of effort and limit the risk of inconsistent outcomes.

NOTES

1. This submission is adapted from a Department of Justice contribution to a report prepared by the Antitrust Enforcement in Regulated Sectors Working Group (AERS) of the International Competition Network (ICN). The original is available at: http://www.internationalcompetitionnetwork.org/seoul/aers_ch3_seoul.pdf, pages 100-108.

2 *See* 15 U.S.C. §1012(b).

3. Similar restrictions pertain to antitrust investigations of agricultural cooperatives, although it is less clear in this instance that an alternative regulatory regime is in place.

4. *United States v. Nat'l Ass'n of Securities Dealers, Inc.*, 422 U.S. 694, 719 (1975).

5. For a discussion of express and implied immunities, see "Accommodating Regulatory Approaches in an Antitrust Universe: The U.S. Experience in Harmonizing Antitrust with Laws that Restrain Competition" in the Antitrust Enforcement in Regulated Sectors Working Group's *Report to the Third ICN Annual Conference*, at page 15. The report is available at: http://www.internationalcompetitionnetwork.org/seoul/aers_ch1_seoul.pdf.

6. In addition to the federal laws, most states have antitrust laws that closely parallel the federal statutes. These laws are enforced through the offices of state attorneys general. This paper does not cover the relations between federal and state antitrust authorities.

7. 15 U.S.C. "1 and 2.

8. 15 U.S.C. '12 *et seq.*

9. 15 U.S.C. '41 *et seq.*

10. The term "Antitrust Division" was not used within an official Department of Justice document until 1919. The first Assistant Attorney General for Antitrust was confirmed by the U.S. Senate in 1933.

11. *See* 12 U.S.C. §1828©) and 12 U.S.C. §1842.

12. *See United States v. Philadelphia National Bank*, 374 U.S. 321 (1963).

13. *See* Bank Merger Act of 1960, H.R. 1416 (March 23, 1960).

14. 12 U.S.C. §1828©)(4). By statute, the FTC does not have jurisdiction over banking. *See* 15 U.S.C. §45(2).

15. 12 U.S.C. §1828(c)(5)(A).

16. *Id.* at §1828(c)(5)(B).

17. *Id.* at §1828©)(6).

18. *Id.*

19. *Id.*

20. 82 Federal Reserve Bulletin No. 9 at 856. The Federal Reserve Board order includes the Justice Department required divestiture.

21. Letter from J. Robert Kramer, II, Chief, Litigation II Section, Antitrust Division, Department of Justice, July 2, 1996, to the Honorable Alan Greenspan, Chairman of the Board of Governors of the Federal Reserve System.

22. 12 U.S.C. §1828 (c)(5)(B).

23. *See e.g., United States v. National Bank and Trust of Norwich*, 1984 WL 21972 (N.D.N.Y. June 12, 1984).

24. 16 U.S.C. §791a.

16 U.S.C. §824(a).

26. 16 U.S.C. §824(d).

27. 16 U.S.C. §824(k). Before this, the FERC sought to increase wholesale electricity competition in the 1980s by making its merger approvals contingent upon pledges by merging utilities to implement transmission open access policies.

28. 16 U.S.C. §824b.

29. 15 U.S.C. §18.

30. The lack of conflicting outcomes may be attributable to the growing convergence of the public interest standard and the antitrust standard in recent years.

31. FERC Order No. 592, 18 C.F.R. Part 2 (Dec. 19, 1996) (hereinafter *Policy Statement).*

32. *Policy Statement* at 7.

33. 47 U.S.C. §151.

34. 47 U.S.C. §§214(a), 310(b).

35. *In re Applications for Consent to the Transfer of Control of Licenses from Comcast Corp. and AT&T Corp., Transferors, to AT&T Comcast Corp., Transferee*, 17 F.C.C.R. 23,246, at 23,255 (citing 47 U.S.C. §157; Telecommunications Act of 1996, Pub. L. No. 104-104, Preamble, 110 Stat. 56).

36. By statute, the FTC does not have jurisdiction over telecommunications common carriers (e.g., wireline or wireless carriers). 15 U.S.C. §§21(a) and 45(a)(2). The FTC can review telecommunications matters involving non-common carrier issues such as cable distribution and programming.

37. *See* 47 C.F.R. §0.459.

38. 15 U.S.C. §18a(h).

39. *See* FCC Press Release, *FCC Implements Predictable, Transparent And Streamlined Merger Review Process* (Jan. 12, 2000).

40. 15 U.S.C. §§18a(b) and (e). The Hart-Scott-Rodino (HSR) reporting requirements (and the time limitations contained therein) apply to all mergers, including telecommunications mergers, above a certain financial threshold. 15 U.S.C. §18a(a)(2). Because the parties cannot consummate their merger until they receive all necessary regulatory clearances, as a practical matter the Justice Department may continue its investigation until the FCC issues its decision, if after the HSR deadline.

41. 47 C.F.R. §1.1204(a)(6).

42. 47 U.S.C. §151 *et seq.*

43. *See United States v. Mercury PCS II, L.L.C.*,1999-2 Trade Cas. P72,707 (D.D.C. 1999); *United States v. Omnipoint Corp.*, 1999-1 Trade Cas. P72,472 (D.D.C. 1999); *United States v. 21st Century Bidding Corp.*, 1999-1 Trade Cas. P72, 473 (D.D.C. 1999).

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Global Forum on Competition

THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS

Contribution from Vietnam

-- Session II --

This contribution is submitted by Vietnam under Session II of the Global Forum on Competition to be held on 17 and 18 February 2005.

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THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS IN VIETNAM

1. Vietnam Competition Authority: VCAD

1.1 Brief history

1. Going parallel with renovation process initiated in 1986, which transformed Vietnam's economy from a centrally-planned economy to a multi-sector, competition is gradually accepted to be the best vehicle to enhance social welfare and protect consumers' interest. The reason is fairly simple: when choices are available to consumers, firms would be put under pressure to reduce prices, to improve their product and service quality and to be responsive to customers' needs in order to gain an advantage over rivals and win more business. The acknowledgement urges an urgent need to build and enforce competition law and policy in Vietnam.

2. In February 2003, a Board for Competition Management was established under the Ministry of Trade. The main tasks of the Board is to participate in drafting Competition Law. Other tasks involve the handling of cases on trade remedies initiated by foreign trade agencies against Vietnamese exports since these issues remains new to Vietnamese businesses.

3. In March 2004, Vietnam Competition Administration Department (VCAD) is established as a statutory body directly under Ministry of Trade of Vietnam, pursuant to the Decree No. 29/2004/ND-CP of the Government on defining the functions, tasks, powers and organisational structure of the Ministry of Trade.

1.2 Major roles

4. VCAD is a statutory body directly under Ministry of Trade of Vietnam. Its function is to assist the Minister of Trade in state management of competition in order to promote an equitable and non-discriminative competition environment, and to protect and encourage fair competition:

- making regulations and providing guidelines on compliance with the Competition Act, particularly in respect of what constitutes restraint of competition, abuse of dominant position, prohibited mergers or acquisitions, etc.;
- dealing with breaches of competition regulations;
- determining whether conduct or a particular transaction falls within one of the allowed exceptions; and
- co-ordinating with sectoral regulators to carry out competition policy and determine compliance

5. The Competition Administration Authority has the following duties and powers:

- Control the process of economic concentration in accordance with this Law.

- Process dossiers for seeking for a grant of exemption; make proposals to the Minister of Trade for his decision of further submission to the Prime Minister for his decision.

- Investigate into competition cases relating to acts of restriction of competition and unfair competition.

- Deal with and impose penalties upon acts of unfair competition.

- Carry out other duties as provided for by law.

6. In addition, VCAD is expected to be in charge of implementing other four Ordinances on: Antidumping (2004), Safeguard (2002), Subsidies and Countervailing measures and Consumer Protection.

2. Major sector regulators in Vietnam

7. Some regulators to name are Ministry of Trade, Ministry of Planning and Investment, Ministry of Finance, Ministry of Industry, Ministry of Posts and Telematics, and Ministry of Transport. Hereafter, I will brief major functions of these institutions in turn.

2.1 Ministry of Trade

8. The Government Decree No. 29/2004/ND-CP on determining the functions, tasks, powers and organisational structure of the Ministry of Trade re-defined the Ministry of Trade is official body of the Government in charge of state management over trade, public services, and is presented as representative of state ownership in state-owned enterprises under the Ministry's management in accordance with laws. This applies to both foreign trade and domestic trade.

2.2 Ministry of Planning and Investment

9. The Ministry of Planning and Investment is a government agency which is charged with the role of state management over the domain of planning and investment, that consists of: providing comprehensive advice on the country-level socio-economic development strategies, programs and plans, on economic management mechanisms and policies for the national economy and for specific sectors, on domestic and foreign investments, industrial and export-processing zones, on management of official development assistance (in short ODA) sources, national-wide control of procurement, enterprises, business registration. The Ministry is also entrusted with exerting the role of state management over public services provided in sectors belonging to the Ministry's mandate under valid legislation *(Government Decree No. 61/2003/ND-CP)*. In terms of competition, it administers the entry into and exit from market of enterprises.

2.3 Ministry of Finance

10. The Ministry of Finance is a Government agency which has the function of implementing the State management in finance, State budget, tax, fees and other revenues of the State budget, national reserve, State financial funds, financial investment, corporate finance and financial services (generally called as financial-budgetary fields), customs, accounting, independent auditing, prices nation-wide and public services in the fields; conducting the ownership rights to the State’s investment capital in enterprises according to regulations of the Law.

2.4 Ministry of Industry

11. The Ministry of Industry is established by the Government and responsible to the Government for state management of the industrial sector namely mechanical engineering, metallurgy, new energy, renewable energy, oil and gas, minerals mining, chemicals (including pharmaceutical industry), industrial explosion materials, consumer-goods industry, foodstuff industry and other processing industries throughout the country; implements state management of public services and represents the state ownership in state shared enterprises in the industries managed by the Ministry under the law.

2.5 Ministry of Posts & Telematics

12. Government Decree No.90/2002/ND-CP dated November 11, 2002 promulgating the functions, duties, range of competence and organisational structure of the Ministry of Posts and Telematics assigned the ministry as a Government agency performing the functions of State management over the fields of posts, telecommunications, IT, electronics, the Internet, radio wave emission and transmission, radio frequency and national information infrastructure in the entire country; performing State management functions regarding public utilities services and will be the reprehensive of the State as the owner of State capital in enterprises in which the State deposits a share specializing in posts, telecommunications and IT as regulated by law.

2.6 Ministry of Transports

13. The Ministry of Transports is a government agency in charge of state management of land transport (highways, railways), inland waterway transport and maritime transport nation-wide.

14. In each sector, since competition law has not been promulgated, there are a number of sector regulations that apply within the sector. Together with the nature of natural monopolist in some sectors, it leads to a situation of complexity and difficulty in the enforcement of competition law. We will come back to the issue in the next part.

3. Interaction between VCAD and sector regulators

3.1 Competition regulatory reform in Vietnam at a glance

15. In parallel with the process of renovation, legal competition is step by step considered to be momentum for economic development, effectiveness improvement and social progress. Since 1986, the State has gradually loosened competition restrictions and shown respect to the objective operating principles, mechanism and laws of the market. By the 1992 Amended Constitution adopted by the National Assembly in December 2001, the State recognized the right to freely do business, to compete and to be treated fairly under the light of law.

16. Over the last decade, a number of regulatory reforms aiming at creating a smoother and more open business environment have been made, remarkably, the deregulation of accession to the market. The recently adopted Enterprise Law of 2000, replacing the Company Law and the Law on Private Enterprises, has loosened regulations on market access. In some areas, individuals who want to found enterprise can even register via computer network. As a result, there were 26,000 new enterprises registering from the beginning of 2000 to the August of 2001, equivalent to 58% of total registration in the 1991-1999 period. Certain areas, which used to be state monopoly e.g. electricity, telecommunication services are now being step-by-step deregulated and open up to all economic sectors. This is clearly reflected in a number of new and; or amended legal documents such as the Ordinance on Post and Telecommunication (2002) and pending Law on Electricity.

17. In short, both the State and enterprises have been fully aware of the role of competition in the market economy as well as in the integration into regional and global economy. Competition has brought about admitted advantages concerning speeding up renovation, effectively allocating resources, eliminating backward factors, and rationally redistributing incomes. The entire economy in general and enterprises in particular have step by step accepted competition as a fundamental principle and also nature of market-based economy. The introduction of Competition Law following the Government's Program for Building Laws & Ordinances, once again re-assure the Government's commitment to reform its legal system so as to promote socio-economic development based on market forces. Nevertheless, as Vietnam's legal system is in the process of reforming, there inevitably remain conflicts, overlaps and probably inconsistencies in and among legal texts.

3.2 Interface of Competition Law and some sector regulations

18. The Competition Law of Vietnam governing four areas of anticompetitive conducts such as Agreement in Restraint of Competition, the Abuse of Dominant Market Position and Monopoly Position, and Economic Concentration and Unfair Competition. This law is to be applicable to all individuals and organisations conducting business in the territory of Vietnam. The overall goal of the law is to protect interests of the State, and of enterprises and consumers; and to promote socio-economic development.

19. As mentioned above, Vietnam has both competition law and a complicated sector regulations. Clearly, some sector regulations are complement to competition law however some other may contradict. Take the Vietnam's Civil Code as an example. Pursuant to article 7 of the Civil Code, individuals and organisations have the right to freely and voluntarily make commitments and agreements. This means the involving parties could establish an anticompetitive agreement e.g. agreements to share consumer markets or sources of supply of goods and services, agreements either directly or indirectly fixing the prices of goods and services, including agreements to fix resale price among parties operating in different levels of a manufacture or distribution chain, etc. Indeed, it appears there is no articles or provisions throughout the Civil Code that inhibits this sort of agreements. In this regard, it contradicts to the Competition Law as these agreements are to be prohibited by articles 7, 8 of the Competition Law.

20. Ordinance on price 2002 is an example of the potential overlap among competition law and other regulations. By law, this ordinance codifies and consolidates a number of items of legislation on competition and monopoly pricing. Detailed regulations on pricing were issued under Decree 170-2003-ND-CP of the Government dated 25 December 2003 and became effective as of 14 January 2004. By this Decree, agreement between businesses to fix prices, control prices, change prices for sale of goods and services aimed at restraining competition, infringing the legal interests of other businesses or of consumers; agreement between businesses to change prices of sale and purchase of goods and services in order to eliminate or force other enterprises to co-operate with them or become their affiliates, etc are expressly prohibited. These are consistent with the Competition Law. However it is unclear that when such conducts exist, the Ministry of Trade (VCAD) or the Ministry of Finance would be the one in charge to perform the state management task the case and whether to take the Competition Law or the Ordinance on Price into consideration as handling the case. The ambiguity predicts up-coming difficulty in enforcement of Vietnam and earnestly urges the need for interaction between competition policy authority and sector regulators.

3.3 The interaction between VCAD and sector specific regulators

3.3.1 Division of task between VCAD and sector specific segulators

21. The division of task between VCAD and Sector Specific Regulators is somewhat similar to recommended regime referred to before. Obviously *competition protection* is to be in charge of VCAD.

Other tasks of *technical regulation* and *economic regulation* are those of sector regulators. For instance, regarding Telecommunication standards and quality, State's authority of post, telecommunication, which is the Ministry of Posts and Telematics announce types of equipments, telecommunication networks, telecommunication construction and services required to apply standard (Ordinance on Post and Telecom, 2002). The remaining task of *access regulation* however is unclear. To be efficient, a close connection between of VCAD and Sector Specific Regulators is necessarily required.

3.3.2 Interaction between VCAD and sector specific regulators in the formulation of competition law and policy

22. In formulating competition law and policy, between VCAD and Sector Specific Regulators there exists a certain degree of interaction. Take the drafting of Competition Law as an illustrating example. In April 2000, the Minister of Trade issued a decision for establishing Competition Law Drafting Board. Members of the board include those from Ministry of Trade, Vietnam Center of International Arbitration, Vietnam Lawyer Association, Vietnam Chamber of Commerce and Industry, Foreign Trade University, Office of National Assembly, Office of the Government, Ministry of Justice, Ministry of Planning and Investment, and the Economy and Budget Committee of National Assembly. The idea of inviting several members from various sectors is to set ground for co-ordination and to ensure transparence and consistency in between competition law and other regulations.

23. The relationship between *VCAD* and sectors regulators is regarded and defined as involving, continuous and simultaneous process of closely co-ordination and co-operation. At the earlier stages, the process of co-ordination and co-operation would include intensive communication to achieve a common understanding of each responsibility. Under the mechanism of policy harmonisation and competition advocacy, *VCAD* has already initiated discussions, public workshops and seminars, which involved sectoral regulators, including Ministry of Ministry of Posts & Telematics (telecommunication sector); Ministry of Industry (electricity sector); Ministry of Planning and Investment (procurement and tendering sector); Ministry of Finance (Control of price monopoly co-operation sector); Ministry of Health (Medicine sector); Ministry of Construction and Ministry of Transportation.

24. In addition, before submitting the Competition Law to the National Assembly for promulgation, the draft has been sent to relevant Ministries/ Industries for suggestions. The Competition Law submitted is the 10^{th} draft, which means there were at minimum 10 times of taking relevant sector regulators' suggestions into law. Nevertheless, there still remains obstructing issues of overlap and conflicts as previously mentioned. Perhaps, this interaction between those respective institutions was not close enough. In order to disseminate and implement competition law and policy in regulated sectors, VCAD need to develop and enhance co-ordination and cooperation closely and tightly with sectoral regulation through harmonisation mechanism and competition advocacy programs.

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Global Forum on Competition

THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS

Contribution from BIAC

-- Session II --

This contribution is submitted by BIAC under Session II of the Global Forum on Competition to be held on 17 and 18 February 2005.

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SUMMARY OF DISCUSSION POINTS

Presented by the BUSINESS AND INDUSTRY ADVISORY COMMITTEE (BIAC)
TO THE OECD GLOBAL FORUM ON COMPETITION

SESSION 2: RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS[1]

1. BIAC welcomes the opportunity to provide its views to the fifth meeting of the Global Forum on Competition concerning the relationship between competition authorities and sectoral regulators. BIAC commends the Secretariat for addressing this increasingly important issue.

1. Introduction

2. Evolving historically from concerns with firm size and perceived dominance as a threat to markets and to the political system, legislation was enacted to regulate conduct in particular industries; *e.g.*, railroads in the United States. The legislation afforded specialised agencies authority to regulate competition, often overlapping responsibilities vested in the traditional antitrust agencies.[2] Part of the concern with "bigness" derived from fear of "excessive" ("predatory") competition, leading to statutory and regulatory restrictions on low-level pricing and limitations on market entry.

3. Specialised agencies were also created to deal with the competitive functioning of industries in markets which were believed to embrace public assets and/or "natural monopolies," for example, airspace and airlines and, initially, spectrum and broadcast communications.

4. The allocation of responsibilities among the governmental bodies is often imperfect, placing responsibilities in the hands of regulators who were not by training or orientation adept at assessing the likely competitive impact of a proposed transaction or particular conduct. Competitive markets require efficient and effective allocation of enforcement responsibility between competition agencies and sectoral regulators, with careful consideration going to the relative advantage that each brings to the enforcement arena.[3]

5. Certain sectoral government agencies have been allocated specialised authority for competition assessment and enforcement in designated regulated or semi-regulated industries.

> For example, in the U.S. the role of the sectoral government agency varies from concurrent jurisdiction between the Department of Justice (DOJ) and the Federal Communications Commission (FCC) to pre-emptive jurisdiction over mergers in a specific industry, for example, railroad mergers and international airline alliances. This is by no means a phenomenon unique to the United States; the allocation of competition enforcement jurisdiction to sectoral regulators is evident in national legal structures the world over.[4]

6. The decisions made by these specialised agencies are sometimes at odds with the recommendations and decisions of the antitrust enforcement agencies. Overlapping jurisdiction and different standards of review can, at times, result in different outcomes for the same transactions, or at least additional requirements being imposed by one or the other agency.[5]

- The standard of review mandated for use by sectoral agencies is often a "public interest standard" as opposed to the "substantial lessening of competition" standard or the "abuse of dominance" standard used by most antitrust authorities.

- Multiple review by both antitrust and sectoral agency can also result in an unnecessary delay of the closing of a transaction.[6]

7. The issue of antitrust authorities and sectoral regulators was directly addressed to the DOJ by the International Competition Policy Advisory Committee (ICPAC) in its study and recommendations on the future of international antitrust policy.[7]

- A majority of the ICPAC members recommended removal of the oversight authority for the competition aspects of merger review from the sectoral agencies.[8]

- In offering this recommendation, the ICPAC majority explained that overlapping sectoral and generalised agency authority threatens:

  – efficient review;

  – substantive international convergence;

  – case-by-case cooperation; and

  – consistency and transparency.[9]

8. The increasingly global nature of transactions militates in favour of consolidation of authority for competition aspects of merger review solely with the antitrust agencies.

2. Global significance of multiple enforcement review

9. The overlapping of sectoral and generalised antitrust review has global significance. The costs of enforcement multiplicity are apparent not only in countries with established antitrust regimes but with increasing importance in newly established market economies and in countries implementing the transition from comprehensive public utility regulation to competition.

> For example, the frictions and complexities presented by the possibility of merger inquiries in sixty to seventy jurisdictions presents in itself an extraordinarily daunting challenge to expeditious and consistent enforcement.

10. Consistency in antitrust enforcement is an important component of cooperation efforts.

- It is necessary to allow national governments to establish common policies and procedures with foreign counterparts and to work together on assessing individual transactions.

- There is no formal mechanism by which foreign competition authorities can share information with sectoral regulators as they can with their competition authority counterparts.[10]

- It is difficult for one country to encourage foreign governments to cure imperfections in their competition policies and procedures when their system is more decentralised with different substantive standards implemented by different government bodies.

3. Problems associated with multiple enforcement review

11. Significant costs arise in the allocation of competition enforcement responsibility to regulators whose primary governmental role and analytical expertise lies outside established competition policy objectives and analytical norms. Inconsistent and contradictory enforcement creates a climate of business uncertainty, the cost of which is borne not only by business,[11] but also by national economies and the competitive markets of which they are a part.[12]

- Multiple review by both antitrust and sectoral agency can give rise to uncertainty and demonstrable adverse effects, including not only easily recognised impacts, such as unnecessary delay of the closing of a transaction, but also effects with more far-reaching consequences for national economies, such as negative effects on the attraction of private risk capital, the promotion of new entry, trade liberalisation, and the overall cultivation of a culture of competition.

- Government's allocation of competition enforcement responsibility authority to competition agencies ensures that competition enforcement is conducted under a framework of sound, established economic analysis and policy objectives.

- In those instances where additional industry expertise is required, antitrust agencies can and do cooperate with sectoral regulators but base their decisions, ultimately, on economic results, as proper antitrust analysis dictates.

- In areas of pre-emptive or concurrent competition enforcement jurisdiction, it should be incumbent upon sectoral regulators to assess decisional factors such as market definition, market share, entry, and costs, based on established competition principles and standards.

12. Multiple review of the same transaction may make the grounds for individual decisions less transparent.

- Because of the "public interest standard," sectoral regulators often have authority to give effect to social welfare or industrial policy considerations that extend beyond the traditional focus of antitrust analysis.

- It may be difficult to determine whether traditional antitrust concerns or social welfare objectives motivated the sectoral regulator's decisions.

  - Removal of competition analysis from the sectoral agencies' purview would make their policy and political motivations more transparent.

  - Transparent decision-making is an important constraint on the exercise of discretion by public officials.

13. Efficient use of government resources also counsels toward consolidation of responsibilities within the competition agency. Competition specialists with expertise in a particular industry can be utilised in matters that do not require such expertise. For instance, an industrial organisation economist with a specialisation in telecommunications law that resides in the competition authority can be assigned to assist on generalised competition matters during periods when telecommunications matters do not demand his or her time. Exclusive or duplicative human resources in the regulatory authority do not permit the most efficient use of these human resources.

4. Alternative approaches to multiple enforcement review

14. There are several different approaches which can be considered regarding the division of duties between antitrust and sectoral agencies.

- The oversight duty for competition policy can be removed from sectoral regulators and vested solely with the federal antitrust agencies. For example, the role of sectoral regulators in merger review, if any, would be limited to industry specific, non-competition-based analysis.[13]

  - Antitrust agencies could be assigned with the responsibility of reviewing competitive effects and conceiving possible remedies, the sectoral regulator could be given the responsibility of monitoring the remedy.

  - This approach would align the antitrust review standards of previously regulated firms with competition standards in other market sectors.

  - In transitional sectors, such as those undergoing deregulation, price and access regulation may continue as a prominent feature of a regulatory scheme designed to help make the transition to a fully competitive market. In those instances, sectoral regulators have an important and appropriate role, but one that, if conducted properly, will eventually yield to competition enforcement. In many such instances, regulatory oversight functions will exist relative to the stage of transition to a fully competitive market, during which the responsibilities of competition enforcement agencies and regulators will shift accordingly. [14]

  - There may be an apparent inconsistency in allocating regulatory review between two agencies and expeditious treatment. If the assignment of responsibility is clear, however, between the antitrust agency (competition issues) and the sectoral agency (other issues), the review can take place simultaneously with minimal delay.

- The antitrust agency can retain ultimate antitrust authority; however, the sectoral agency can prepare and promulgate its own views on the competition aspects of a transaction.

- Jurisdiction can be coordinated between the antitrust and sectoral agency regarding competition issues and either agency can block a transaction.[15]

  - This approach raises the problem of delay and piling on, since the responsibility for competition issues overlaps.

  - If there is coordinate jurisdiction, there should be fixed timetables.

- The sectoral agency can be assigned the ultimate authority with structural input from the antitrust agency.

  - However, as history has shown, input from the antitrust agency is not always honoured or respected.[16]

  - An improvement would require the sectoral agency to specify reasons for a departure from the antitrust agency's recommendation and any such findings would be subject to independent review.

15. At a minimum, the unifying principles applicable to all of the above alternatives should be:

- Fixed timetables should be established to avoid delay from duplicate review.
- There should be transparency in the results, *i.e.*, a sectoral agency must provide an explanation for any departure from an antitrust agency's recommendation.
- There should be transparency in the process, including a public statement of position by an antitrust agency.
- There should be clarity of jurisdiction and authority as between sectoral regulators and competition authorities.

NOTES

1. Paper prepared by James Rill, BIAC Committee Vice Chair, Jane Comer, and Brenda Carleton, with substantial contribution from BIAC Committee members.

2. S*ee, e.g.*, in the U.S., Packers and Stockyards Act, 1921, 7 U.S.C. §§ 181-229 (2000); and Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79-79z-6 (2000).

3. *See*, e.g., *Relationship between Regulators and Competition Authorities*, OECD Directorate for Financial Fiscal and Enterprise Affairs, Committee on Competition Law and Policy (DAFFE/CLP(99)8) *available at* www.oecd.org/dataoecd/35/37/1920556.pdf; and Paul Crampton, *Competition and Efficiency as Organizing Principles For All Economic and Regulatory Policymaking*, Address Before the First Meeting of the Latin American Competition Forum, (Apr. 7-8, 2003) *at* http://www.oecd.org/dataoecd/43/26/2490195.pdf .

4. A compendium of the experiences of various countries with respect to pre-emptive or concurrent competition enforcement jurisdiction is annexed to the Initial Report of the ICN's Antitrust Enforcement in Regulated Sectors Working Group. The information, prepared for presentation at the ICN's Seoul conference, is available for downloading from the ICN's website at www.internationalcompetitionnetwork.org.

5. *See, e.g.*, in the U.S., the FCC service requirements as a form of competitive concern in *Bell Atlantic/NYNEX*. *See also* the experience with sectoral regulation in Canada in the case of *Canada Pacific Ltd. /Cast North America, Inc*. and the opposing conclusions by the Competition Bureau and the (former) National Transportation Agency.

6. *E.g.*, in the U.S. case of *Univision/Hispanic Broadcasting Co.*, the DOJ reached its decision six months before the FCC, even though both agencies began reviewing the transaction at the same time.

7. The Committee was co-chaired by James F. Rill and Paula Stern. Committee members included the following leading representatives from the worlds of business, law, and academia: Zoe Baird, Thomas E. Donilon, John T. Dunlop, Eleanor M. Fox, Raymond V. Gilmartin, Vernon E. Jordan, Jr., Steven Rattner, Richard P. Simmons, G. Richard Thoman, and David B. Yoffie.

8. See Final Report, Department of Justice's International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust (hereinafter "ICPAC Report") at 154. The Advisory Committee was assisted in large part by a paper prepared for the Committee by William E. Kovacic, "The Impact of Domestic Institutional Complexity on the Development of International Competition Policy Standards," March 15, 1999. Note that in the U.S., entrusting competition policy exclusively to the federal agencies requires Congressional action.

9. ICPAC Report at 145-147.

10. The antitrust cooperation agreements between countries typically relate to notice and information sharing among antitrust authorities but not expressly to information exchange between antitrust authorities and sectoral regulatory agencies.

11. Companies must spend additional resources to inform themselves about the decision-making tendencies of two institutions rather than one, and when agencies apply dissimilar analytical techniques, businesses incur the expense to evaluate commercial plans and strategies under both enforcement approaches.

12. Concurrent or subsequent sectoral antitrust determinations elevate further the spectre of delay, cost and inconsistent results impeding the progress of what may well be pro-competitive, efficient transactions or, conversely, in the case of sectoral preemption authorise transactions which would merit antitrust challenge.

13. *E.g.*, in the U.S., Congress assigned antitrust authority over domestic airline mergers to DOJ.

14. *See, e.g.*, in the U.S., *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) and *Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir., 1990).

15. *E.g.*, the U.S. DOJ and FCC.

16. *E.g.*, compare authority over: 1) U.S. airline mergers before Congress vested authority with the antitrust agency; 2) railroad mergers, for example *Union Pacific/Southern Pacific*; and 3) international airline alliances.

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Global Forum on Competition

THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS

Contribution from Allan Fels

-- Session II --

This contribution is submitted by Mr. Allan Fels (Dean, Australia and New Zealand School of Government) under Session II of the Global Forum on Competition to be held on 17 and 18 February 2005.

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English text only

1. The issues are important

1. Competition authorities generally believe that they face large challenges in their relationships with sectoral regulators.

2. This is why the issue is at the top of the Global Forum on Competition (GFC) agenda as well as being a major topic for the International Competition Network (ICN); it is why, whenever competition regulators or policy makers are invited to nominate topics for OECD or ICN conferences, they always vote for the topic ahead of others; it is why there have been so many previous discussions, and why there will be many more.

3. The reasons why the issue is seen as important will emerge today but, for a start on this discussion, I suggest three reasons:

- Some of the most important competition policy challenges arise in regulated sectors. Typically these are the sectors which more than any other require large injections of additional competition.

- There are considerable constraints on the ability of competition policy makers and regulators to take the necessary steps to achieve the best possible competitive outcomes. Many of the constraints arise from the existence of regulation and associated regulatory bodies.

- There is a close interrelationship between the work of competition bodies and regulatory bodies. Their work often overlaps. There is a need for cooperation but it can be difficult to achieve in practice. There may also be conflict. There may be competition for turf. Inevitably there are considerable tensions which exercise the minds of regulators.

4. The issue of the relationship between different arms of government is far from unique to competition and sectoral regulators. Modern discussions of government in nearly every country are dominated by such terms as “joined-up government”, “interagency collaboration”, “coproduction of public value”, “networked governance”, “connected government”, and “whole of government management”. The need for proper coordination between agencies arises in nearly all fields of government, at nearly all levels, and often between levels of government, whether relating to security threats, or intractable social issues such as drug dependence, or environmental issues, or rising community expectations for easier access to government by integrating service delivery. Not only are the policy challenges of integrating the work of regulatory bodies no more difficult than exist for other parts of government – indeed they look easier – but also they encounter a common attitude – the public does not lightly tolerate non-cooperation, conflict or turf battles between overlapping parts of government.

2. Today's Forum

5. Today’s Forum provides an opportunity to advance discussions of the topic in two respects. First, the GFC provides the opportunity of considering how the issues play out in non OECD countries as well as OECD countries. The verdict is likely to be that the problems in non OECD countries are even greater than in OECD countries. Second, a great deal of previous discussion has related to what competition regulators and policy makers regard as the perfect outcome. It is useful to discuss ideal outcomes and so their nature needs to be debated, and proclaimed to policy makers. One reason is that many countries are gradually moving closer to ideal outcomes. However, equally important is to take the customary discussions a step further than in the past by acknowledging that the ideal outcomes desired by

the competition community are rarely achieved. We need to consider what the actual real world, non ideal relationships are; what problems they give rise to; how to live with them, how to make the most of an imperfect situation, as well as how to work towards getting it changed. The solutions to the problems of collaboration with other regulators cannot be fully analysed today, let alone be implemented but it will be valuable for the problems with the present arrangements – as well as the satisfactory features – to be laid out by as many competition regulators as possible, so that understanding can be advanced and some progress at the analytical level at least can start to be made.

3. Ideal Outcomes

6. The competition community tends to see something like the following as ideal:

- there should be no regulatory laws that restrict competition. But if they are absolutely necessary and there is no alternative, the restrictions on competition should be minimal;
- the competition body should have paramount decision making power in relation to any matters affecting competition.

7. A philosophy along these lines is reflected, for example, in today's BIAC paper.

8. The OECD Secretariat paper notes that competition authorities and sectoral regulators should be on the same side because:

- economic growth is enhanced by pro-competition regulation, and
- the objectives of competition authorities and sectoral regulators are very similar.

4. Competition Culture

9. It emphasizes the important point that "the ideal relationship between competition authorities and regulators is driven by a central government that promotes broad review of existing regulations with a pro-competitive lens, ensuring that a "competition culture" encompasses both sector regulators and competition authorities" (para 3).

5. Australia

10. This comment is undoubtedly influenced by Australian experience on which I will now briefly digress. The latest OECD EDRC review of Australia attributes a large part of its recent excellent economic results to the adoption of exactly this approach. The Governments of Australia – the Commonwealth (or national) Government and the State and Territory (or regional or provincial) Governments reached a general agreement in the 1990s to promote competition policy in all sectors, including regulated ones, to the maximum extent that it was in the public interest to do so – and competition WAS assumed to be in the public interest, unless the contrary was demonstrated publicly and transparently at an independent review. All laws and regulations that were anticompetitive were reviewed from this perspective with independent, public, transparent processes; exemptions from competition law were largely abolished and a culture of rigorous enforcement of competition law across all sectors was encouraged; monopolistic structures of public utilities, such as in energy, telecommunications faced rigorous reviews of their monopoly positions and some disaggregation followed. There was also a strong push for the competition regulator to take over economic regulation in telecommunications and energy, and this has largely happened, spreading a culture of competition to regulatory discussions. A key point in Australia's drive was strong pro-competitive pressure from the central, most powerful parts of government.

6. Arrangements between regulators are usually less than ideal

11. In practice, however, many countries have not achieved the optimum outcomes desired by competition advocates. It is necessary to know why. It may be that, in part, competition advocates seek more than is reasonable, given the fact that governments pursue a variety of objectives other than competition ones. Also, as the secretariat paper points out, competition agencies and regulators may have different core competencies and should each separately do the tasks for which they are most suited. However, it is also the case that less than ideal outcomes reflect other factors – interest groups lobbying; a weak competition culture; failure of top policy makers to recognise the value of competition and the desirability of strong, effective competition agencies; a general lack of institutional capability in the public sector especially in developing countries; a slow emergence or non acceptance of truly independent regulatory agencies and so on.

12. Another factor, as noted in the Secretariat paper, is that governments see a number of regulatory tasks as being necessary in regulated sectors, including technical, wholesale, retail, and public service regulation, as well as dispute regulation and competition oversight itself. This mixture of activities with their many varying goals tends to obscure the need to adhere to competition principles as much as possible. It also creates complex institutional arrangements. Competition agencies and their goals are only a part of the brew.

13. How well the compatibility of competition and sectoral regulation bodies works out in different countries varies. In the United States, for example, there appears to be relatively strong public support for competition policy, and this can spill over into making it more likely that regulatory arrangements will be relatively more attuned than in many other countries to competition sensitivities. At the other end of the spectrum the difficulties seem large in developing countries.

14. In the end it is important that discussions of the relationship of competition agencies and national regulation acknowledge that in many cases arrangements fall short of ideal. It then becomes important to discuss practical ways of dealing with these situations rather than just complaining and advocating ideal arrangements that are not achievable.

7. Tasks for competition authorities who are not primary enforcers

15. The OECD secretariat paper seeks to do that by emphasizing the fact that competition authorities can provide valuable input for the tasks for which they are not primary enforcers. Instruments of cooperation that merit consideration include:

- giving statutory powers to the competition agency for some aspects of sector regulation e.g. determining whether there is substantial market power as a precondition for the applicability of regulation;

- giving competition authorities and regulators concurrent powers of enforcement of the national competition law;

- placing senior officials of competition agencies on oversight boards for sectoral regulation and vice versa;

- providing competition authorities with the standing to submit public comments on the application of regulations that require written responses by the regulator prior to final decisions;

- establishing a written framework which governs cooperation between sector regulators and competition authorities;

- encouraging personal transfers or exchanges between the sector regulator and competition authority;

- exchanging information informally between sector regulator and competition authority;

- head of competition authority can be given a cabinet level standing;

- regulator and competition authority can be unified, ensuring internal consistency with respect to competition decisions.

8. Consistency in Application of the Law

16. In addition, steps can be taken to ensure consistency in the application of competition laws. This would include:

- the appeals route for competition decisions should converge;

- regulatory impact assessment should take into account competition objectives, among other goals;

- competition authorities should be given the right to intervene with respect to existing and proposed regulations that are potentially harmful to competition.

- an absence of legislative obstacles to cooperation.

17. These conditions are often hard to realise. They need further study if there are to be good results when regulatory power spreads across more than one agency.

9. Productive Interagency Collaboration

18. Having identified these steps as desirable in an imperfect situation, we need to note some of the conditions under which interagency collaboration is conducive to productive relationships. They are:

- Shared culture and values - for example, a general culture of competition in the community that leads non competition agencies to see the value of competition. Likewise, competition agencies need to recognise the values and objectives which drive sectoral regulators. This is likely to lead to greater interagency agreement on objectives, and a willingness to cooperate.

- Strong direction from the most powerful parts of government that the agencies should collaborate effectively.

- Legislative recognition of the desirability of cooperation.

- A recognition and acceptance by agencies that they need to work together -on an ongoing basis – to achieve their goals.

- Agreement on the allocation of roles and responsibilities.
- A willingness to commit resources.
- A willingness to commit authority to problem-solving.
- Ongoing arrangements rather than ad hoc problem solving.
- Careful management of the political environment (which involves a wider number of forces than each agency is used to dealing with).

9. Conclusion

19. What is the important is to collect an inventory of problems in relationships of competition authorities and sectoral regulators; to acknowledge that in most cases the legislative allocation of powers and responsibilities of the competition authorities and sectoral regulators will be less than ideal; to identify the problems; and to analyse and implement solutions that maximise the public value of interagency collaboration.

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ABUSE OF DOMINANCE IN REGULATED SECTORS

(Background Note by the Secretariat)

-- Session III --

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ABUSE OF DOMINANCE IN REGULATED SECTORS

Background Note

by the Secretariat

1. Introduction

1. The phrase, "abuse of dominance in regulated sectors," is both obvious and contradictory. Some might say that abuse can only be expected in sectors that have been singled out to be regulated. Others might say that if a sector were effectively regulated, then abuse cannot occur. But legal and institutional frameworks are not so tightly built, allowing at least the questions to be raised whether there is an overlap so that some conduct can be dealt with both as a regulatory matter and an antitrust matter, as well as whether there may be gaps between the implementation of the two approaches. Institutional structures may create a gap in which competition authorities find themselves deciding whether and how to address exploitative or exclusionary conduct by enterprises in dominant positions and, more rarely, by other parts of government. Where these gaps are in regulated sectors that are economically or politically important, such as telecommunications, electricity, and transport, competition authorities can be under intense pressure to solve market problems.

2. Governments impose economic regulation for a variety of reasons. These include economic reasons, such as reducing the effect of market failures, and political reasons, i.e., redistribution or hindering redistribution of wealth. Competition law usually contains prohibitions of abuse of dominance, that is, exploitative and/or exclusionary conduct by enterprises in dominant positions. Some market failures result in enterprises having dominant positions. Many environments with market failures are also environments in which exploitation or exclusion is feasible. Thus, it is not surprising that economic regulation and antitrust law are applied in close proximity in an economy.

3. Other sessions in the 2005 OECD Global Forum on Competition address two related issues, bringing competition into regulated sectors and the relationships between economic regulators and competition authorities. When sectors that had had a state operator or been subject to pervasive regulation are liberalised, in the sense that other enterprises can enter and begin competing in some markets, and that regulated enterprises gain freedom to make significant economic decisions, then there is wider scope for enterprises to engage in anticompetitive conduct. However, newly established or revived competition authorities may find their room for manoeuvre constrained by pre-existing sectoral regulators. This note fits between these two related issues—after competition has been introduced into a regulated sector and focusing on one aspect of the relationship between competition and regulation. That is, this note focuses on where there is economic regulation but dominance abuse prohibition can be a *substitute* in addressing a market failure (e.g., access to an essential facility can be mandated by regulation or by abuse prohibition), or can *reinforce* regulation (e.g., failure to comply with regulation can be treated as an abuse) or can *maintain the effectiveness* of regulation (e.g., prohibiting tying of unregulated to regulated services to evade regulation or prohibiting a price squeeze when the access price is regulated).

4. The rest of the note is organised as follows. First is a description of how competition and regulatory laws relate to each other. Second is a brief discussion of abuse of dominance, both in general and in specific, as a legal concept to address an economic concern.

2. How do the competition and regulatory laws relate?

5. Abuse of dominance prohibition and economic regulation may relate in a number of ways. They may be contained in the same or different laws. They may be enforced by the same or different institutions. (This is part of the topic of another Forum session.) They may be of interest to different levels of government, such as federal versus state. They may push enterprises' conduct in the same or in different directions. This section mentions some of the legal issues that arise in considering the relationship between these two policies.

6. The substance of the dominance abuse prohibition and of the economic regulation may be contained in the same law, such as a telecommunications act prohibiting dominance abuse as well as setting out the regulatory regime. Or the substance can be in different laws, such as a competition law and sector-specific regulatory laws. Then the principles by which conflicts of laws are resolved (such as specific laws overriding general laws unless this is explicitly not intended) can be called into play. Explicit exemptions or, in the other direction, "savings clauses" which say that the current law does not affect the application of the other explicitly identified law, may be contained in the laws themselves.

7. It is unusual for a sector to be exempt from the competition law because the sector is also subject to economic regulation. But legislators do not always see the implications of broad exemptions. An example is provided by South Africa. "[T]he 1998 Competition Act excluded 'acts subject to or authorised by other legislation.' Courts began to interpret this phrase so that firms in regulated sectors escaped Competition Act oversight whether or not the other regulatory process also controlled anticompetitive conduct. [Bank mergers were exempted; an agricultural co-operative was exempted.]....[T]he legislation was amended to avoid the problem in the future." (OECD, *Competition Law and Policy in South Africa*, 2003, p. 51)

8. A more difficult issue is the relationship between abuse of dominance and regulation when they might apply to the same conduct or to very closely related conduct. A 2003 European Commission decision on *Deutsche Telekom* is interesting in this respect. The incumbent telecom company was found guilty of an abusive margin squeeze, that is, of charging too low a price to consumers given the price it charged its rivals for access to some of its facilities. The access price was partly regulated by regulatory authorities, but the retail price was not regulated. It was chosen by Deutsche Telekom. It appears to be the rule that where enterprises have economic freedom under the regulation then the competition law, with its abuse of dominance prohibition, applies. This decision is also interesting as an example of the relationship between European Union competition law and a Member State's regulatory law, a topic taken up below.

9. Consider now the relationship between abuse of dominance and regulation when the laws might apply to the same conduct. There could be an explicit exemption. The more interesting question is, what if there is not? One interpretation of the 2004 US Supreme Court's decision, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, is that if a regulatory regime is effective in performing the same functions as the antitrust (competition) regime, at least with respect to denial of access, then antitrust law does not apply.[1] The traditional default position is for the antitrust law to apply: "Repeal of the antitrust law by implication from a regulatory statute are strongly disfavoured, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." (*United States v. Philadelphia National Bank*, 374 U.S. 321, 350-51 (1961) cited in *Antitrust Law Developments (Fifth)*, p. 1239.) The traditional rule is being tested by decisions such as *Trinko*.

10. Both the specific versus general distinction and the sovereignty of constituent parts are significant in the "state[2] action doctrine" in the US. This doctrine effectively insulates state government and private parties from the application of the competition laws when the anticompetitive conduct is

undertaken within a "clearly articulated" and "actively supervised" state policy. State regulation that is "clearly articulated" and "actively supervised" is the usual example.

11. The "state action doctrine" in the US contrasts with the analogous relationships within the European Union and in the Russian Federation. The European Union has been the inspiration and even impetus for much regulation by Member States, although the regulation of such sectors as telecommunications and energy is performed by the Member States. National regulation must comply with applicable EU law, including EU competition law.

12. The Russian Federation provides yet another way to resolve conflicts between competition law at the federal level and regulation at the level of constituent parts. In Russia, actions or decisions by federal bodies of the executive power, state bodies of the subjects of the Federation (i.e., its constituent parts) and bodies of local government are prohibited if they restrict the independence of economic actors or create discriminatory conditions, and if those actions or decisions have or may have as a result the prevention, restriction or elimination of competition, and they infringe the interests of economic actors. Some of the items in the non-exhaustive list of prohibited actions or decisions have their anticompetitive effect through exclusion of competitors, and thus arguably are an analogue of abuse of dominance. Officials are subject to civil, administrative, or criminal liability for violations. (Federal Law on Competition and Restriction of Monopolistic Activity on Product Markets, articles 7 and 21, respectively.)

13. This section has touched on some of the legal issues that arise in considering the relationship between abuse of dominance prohibition and economic regulation. Where these policies conflict, managers of enterprises need to know the rules by which the conflict will be resolved. In much of its past work, the OECD has strongly endorsed a policy that competition law have the greater weight and regulation be designed to have the least anticompetitive effect. Where these policies point in the same direction, one way to choose which policy takes the lead is on the basis of which would be the least costly. Other bases for decision-making—likelihood of capture, institutional characteristics, and so on—are discussed in another session of this Forum. However, in some instances, the constitutional division of power determines how the abuse of dominance prohibition relates to economic regulation. In sum, competition authorities face different constraints in their ability to use abuse of dominance prohibitions in regulated sectors.

3. What is abuse of dominance?

14. Jurisdictions differ in their definition of the legal term, "abuse of dominance." They have two tests, but they differ in how they apply the two tests. The first test is that the enterprise[3] (or enterprises, see below) must have a dominant position in a relevant market. The second test is that the conduct must be "abusive." The remainder of this section mentions the more important issues related to these two tests.

3.1. What is a dominant position in a relevant market?

15. A dominant position is a legal term that expresses the economic concept of an enterprise having substantial, durable market power in a market. Put plainly, it means that an enterprise can keep prices substantially above competitive levels for some significant length of time. Buyers cannot switch to some other supplier or some other product easily and quickly. Rivals cannot enter or expand their capacity quickly.

16. The legal term "dominant position" also varies by jurisdiction from relatively formal to more analytic. At the formal end of the scale, some competition laws specify a market share and label enterprises with larger market shares dominant. At the more analytic end, the competitive constraints on the enterprise are considered more explicitly, with references to entry by new competitors, competitors' changing their products to compete more directly or of expanding their capacities, buyers' ability and practice of

switching suppliers, and so on. If entry at large scale is either unlikely or slow, or if rivals cannot expand capacity substantially or quickly, or if buyers cannot easily switch suppliers, then the enterprise may have a dominant position. Where the data exist, residual demand analysis (describing the demand that individual enterprises face) measures market power directly. In particular, this analysis allows the calculation of the effect on demand faced by a specific enterprise when prices change. If demand does not shrink by much when price increases, then the enterprise has market power and, if it is substantial and durable, a dominant position.

17. Another dimension in which jurisdictions differ in the definition of dominant position is the number of enterprises. In some jurisdictions, only conduct by a single economic entity could be identified as "abuse of dominance" whereas in other jurisdictions, conduct by more than one economic entity could be identified as an abuse. It's worthwhile to note that, in the most prominent of these jurisdictions, the European Union, the concept of joint dominance is used much more in evaluating proposed mergers in oligopolistic markets than in abuse cases. With this in mind, this note does not further address joint dominance.

18. A "dominant position" is a "dominant position" in a relevant market, not an abstract dominance. Market definition in circumstances of possible dominance raises well-known problems. One is the need to avoid the "Cellophane fallacy," i.e., the need to adjust the market-defining test often used in merger analysis (the SSNIP test or hypothetical monopolist test) to take account of the possible existence of market power.[4] The second is the need to ensure that all competitive constraints are under consideration. For example, if several seaports are substitutes from the shippers' point of view, then the exclusion of a ferry from one port might be calamitous for the ferry—it cannot provide the service it wishes to—but not really have an effect on the shippers.

19. In sum, for conduct by an enterprise to qualify as an "abuse of dominance," the enterprise must be found to be dominant in a relevant market. In other words, "dominance" is a one-sided test; it screens out non-dominant enterprises. If the enterprise is caught by the screen, then the conduct must be examined for whether it is abusive. This is the subject of the next part.

3.2. What is abuse?

20. Circumscribing abusive from non-abusive conduct by a dominant enterprise is difficult. More than in most other areas of substantive competition law, jurisdictions differ. This part of the law presents two other difficulties. The first is that the economic effect of specific conduct depends greatly on the context in ways that we cannot yet generalise. Therefore, this part of the law appears to be more *ad hoc* even though the decisions follow underlying principles. The second difficulty is institutional. Unlike merger review or cartel enforcement, dominance abuse typically comes to the attention of the authorities on the basis of complaints, and the economic interests of those complaining do not systematically align with the economic interests of society more generally. This means that authorities must distinguish the specific from the general, and in particular whether the specific harm to one or two rivals is the harbinger of general harm to the process of competition or just some sour grapes.

21. Exploitative conduct is one of the two general categories of abusive conduct. From the outset, an important observation is that jurisdictions differ in whether a dominant enterprise's conduct that is directly and immediately exploitative is prohibited and, if prohibited, how assiduously they prosecute it. The principal example of this sort of conduct is a monopoly charging monopoly prices.

- In some jurisdictions, this is not illegal. The thinking is that markets are flexible enough that rivals will appear soon enough and, besides, monopoly profits are the incentives that drive innovation and the development of business acumen.

- In other jurisdictions, a monopoly charging monopoly prices is illegal, but the authorities pick and choose when they think markets are sufficiently open that rivals will lower prices soon. One example of this approach is provided by the Office of Fair Trading with respect to scientific publishing. The OFT found indications of high prices and profits, but decided not to intervene "for now" since "it remains to be seen whether market forces…will remedy the problems that may exist," but it kept the position under review. ("The market for scientific, technical and medical journals," a statement by the OFT, September 2002)

- Other jurisdictions prosecute exploitative conduct such as a monopoly charging monopoly prices.

22. Exclusionary conduct is the other general category of abusive conduct. This term means that a dominant enterprise engages in some sort of conduct that forces another enterprise from a market, or keeps it out in the first place. Some typical examples are provided in the cases submitted for this session: the operator of a port denies access to rival stevedores, or the owner electricity transmission denies access to rival electricity generators-marketers, or the incumbent telecoms enterprise charges prices that prevent unintegrated rivals from competing in markets that the regulatory regime intends to be competitive. As for exploitative conduct, jurisdictions differ in how they treat exclusionary conduct.

3.2.1 Some generalisations

23. Some generalisations may help provide some order to the list of potentially abusive conduct. First, market failure can help to focus attention on the economic effect of conduct. Second, an awareness of the complaint-driven nature of abuse of dominance investigations can help focus investigations on harm to the competitive process. Third, limiting the topic to regulated sectors has some implications on the effect of the conduct, evidence, and remedies.

24. The economic effect of specific conduct depends greatly on the context in ways that we cannot yet generalise. We can, however, generalise in some ways, in particular about market failures. Market failure is an economic concept meant to convey the idea that some market outcomes could be improved for both buyers and sellers if there were different prices, varieties, or patterns of innovation.[5] Natural monopoly, entry barriers, externalities and asymmetric information are examples of market failures. Sometimes economic regulation is imposed to try to correct market failure, so the regulated sectors that are the topic of this note are likely to have market failures. Furthermore, some abuses are simply the manifestation of market failure. E.g., charging monopoly price is what one expects in a natural monopoly, a market failure. Some abuses are a reaction to market failure. E.g., rebates when certain retail sales targets are met may be the efficient way for manufacturers to overcome their inability to monitor retailers' sales efforts. Hence, evaluating market failures are a key part of analysing the context of conduct, and thus its economic effect.

25. Second, complaints about exclusion present an inherent difficulty which can result in over- or under-enforcement. As noted above, authorities typically learn about dominance abuse from complaints. The economic interests of those complaining do not systematically align with the economic interests of society more generally. However, harm to the competitive process begins with harm to individuals who may complain to the competition authorities. The problem of when to act is a bit like the problem in distinguishing between competitive prices and predatory prices. If we have an efficiency objective, we would like inefficient competitors to exit a market but we do not want all competitors to exit a market, except in particular circumstances. If we have other objectives, like preserving a right to be in business or preventing the concentration of economic power within an economy, then we may be willing to have somewhat inefficient enterprises in markets. Wherever the line is ultimately drawn, there remains the

problem of distinguishing harm to competitors from harm to competition, a distinction that might be difficult to draw during the process of harm or the investigation of the harm.

3.2.2 What is the significance of "in regulated sectors"?

26. Regulation can affect whether specific conduct is found to be abusive. In addition, it can affect whether certain facts constitute evidence for dominance, the size of punishment, and the decision about what remedies would be feasible.

27. Whether conduct violates regulation may affect whether it is abusive. For example, in the United States, a monopolist's conduct that contributes to establishing or maintaining monopoly power *and* is improper for reasons outside the antitrust laws is considered to be abusive. False advertising, product disparagement, filing baseless legal proceedings and violation of regulatory requirements have been found to qualify. (ALD5, pp. 246 and following)[6]

28. Further, regulation and abuse prohibition may be substitutes, the choice depending on the feasibility of deciding in advance whether particular conduct is harmful. Conduct that can be judged *ex ante* as generally abusive is probably more cheaply dealt with by a prohibition *per se*, as in regulation. But for that conduct for which *ex ante* judgement has many errors (prohibited conduct is not harmful, permitted conduct is harmful), then it is probably cheaper—taking into account both the direct costs and the costs of erroneous judgements—to apply competition law's usual case-by-case approach. It is these difficult cases, in which many facts and circumstances are considered, that remain as "abuse of dominance" cases.

29. Effective regulation affects the significance of evidence commonly taken to indicate dominance. Market shares are often used as evidence of dominance. As noted above, they are sometimes even included in the definition of dominance in competition laws. But where regulation prohibits an enterprise from raising price or from refusing to supply its rivals, then market shares have little indicative value. The absence of entry barriers may be taken as evidence pointing toward an absence of dominance. But regulatory barriers to entry (or exit) have the same effect as "natural" entry barriers. More generally, the significance of indicators of dominance changes when enterprises are subject to regulation. What matters, of course, is the actual regulation applied and not the rule book as such.

30. Regulation reduces the punishment for abuse, at least in certain circumstances. In particular, the "filed rate doctrine" in the US says that a person who is injured by high prices cannot recover treble damages (as the antitrust laws normally allow) if the prices (rates) had been filed with the relevant regulator. (ALD5, pp. 1240-2)

31. Regulation can make behavioural remedies cheaper than if a regulator were not already in place. But the overall cost of a behavioural remedy may still be higher than the cost of suffering the abuse or imposing a structural remedy.

32. In sum, regulation can affect the analysis of abuse of dominance cases in a number of ways. Understanding the regulation applied in a sector is crucial in evaluating the evidence for dominance, to understanding the effect of specific conduct, and feasible remedies.

33. The next section lists some conduct which, when engaged in by a dominant enterprise, has been found to be abusive in some circumstances. The list is by no means exhaustive and has been trimmed to correspond to some of the cases submitted for this session.

3.2.3 Specific abuses

34. As noted above, generalisation of how to distinguish abusive conduct from non-abusive conduct is difficult. One analysis of underlying principles has been made by Vickers. He identifies three tests that have been put forward to distinguish abuse from non-abuse: (1) the sacrifice test (whether the conduct would be profitable if it did not tend to eliminate or lessen competition), (2) the as-efficient competitor test (whether rivals who are as efficient as the dominant enterprise would be excluded by the conduct), and (3) the consumer harm test (whether consumer surplus or total surplus would fall as a result of rivals being excluded by the conduct). However, he notes conceptual difficulties with each test. (John Vickers, "Abuse of market power," Speech to the 31st conference of the European Association for Research in Industrial Economics, Berlin, 3 September 2004.) These tests do, however, have the merit of focusing on the economic effect of the conduct, specific types of which are mentioned next.

35. **Refusals to deal.** The concern here is often a refusal by an enterprise controlling an essential facility to grant access to it, or the imposition of unreasonable changes in services provided or the rates charged. The focus for abuse of dominance cases in these situations is whether the facility is essential to competitive viability, whether the facility could be duplicated practically and reasonably, and whether granting access is feasible. There can be legitimate business reasons for denying access to an essential facility, beyond the issue of feasibility of sharing.[7] Given that an essential facility is a natural monopoly[8] with high entry barriers, both of which cause market failure, access is often regulated when such a facility has a significant economic or political impact.

36. Beyond outright refusal, the dominant enterprise may engage in a variety of conduct to harm its rivals. It may charge a "high" access fee, or provide only a degraded quality of access (not timely, or unreliable, or inconvenient). It may use information which is necessary to provide the access in order to target solicitation to the rivals' customers. An enterprise may engage in similar conduct when another network must interconnect with its own network. In sum, even though some aspects of access to an essential facility may be regulated, there may be dimensions of denial discovered or invented only as the dominant enterprise seeks to keep its rivals wrong-footed. This conduct may need to be dealt with as abuse of dominance, rather than as regulatory evasion.

37. **Price squeeze.** The concern here is that an enterprise, dominant in an upstream market but facing rivals—whom it supplies—in a downstream market, could choose a combination of up- and downstream prices that eliminate rivals. Such elimination undoes the effect of a regulatory regime designed to foster such rivalry. Price squeeze is defined differently in different jurisdictions. Fundamentally, a price squeeze occurs when the difference between the downstream price and the upstream price is "too small." Jurisdictions differ in how small "too small" is.[9] The larger the required margin, the more inefficient surviving competitors can be. This means there are more competitors downstream, potentially offering greater product variety and scope for innovation, but can mean that consumers pay higher prices.

38. **Vertical agreements and other pricing that foreclose competition**. A concern in regulated sectors is tying unregulated services to regulated services as a way to evade regulation. (The enterprise makes monopoly profits on the tied product but complies with maximum price regulation on the tying product.) In both regulated and unregulated sectors, a concern is often provisions that raise the cost of consumers' switching to another supplier, such as unreasonably long license periods, royalties based on a measure independent of quantity (e.g., the total number of personal computers rather than on the number of PCs using the intellectual property), bundled rebates, pricing dependent on exclusivity, and others. Raising switching cost, of course, raises barriers to rivals' entry and hampers rivals' expansion. Some, but not all, of these practices are reactions to the particular market failure known as "asymmetric information:" Contracts between producers and distributors, for example, can reduce some of the inefficiencies caused by asymmetric information such as by inducing the provision of difficult-to-observe retail services. Offering

various pricing schemes (bundling, rebates, two-part tariffs, etc.) can be an efficient way to discover various consumers' willingness to pay.

39. **New product introduction and promotion**. This concern arises when products are used in networks in which the various products need to be compatible. The concern is that a dominant firm introducing new products may harm smaller enterprises' ability to compete. However, innovation is an aspect of competition and a way to improve consumer well-being. This means that caution is required when considering whether an innovation is anticompetitive. The balance is reflected in the pattern of US court decisions in which the integration or modification of a computer system's components, when the changes improve performance or cut costs, have been consistently found to be legal even when the changes resulted in incompatibility. (ALD5 p. 291) While the language of this paragraph suggests high-tech products, the same issues of innovation and compatibility can arise in other contexts.

40. **Anticompetitive litigation**. Abuses of government process, such as filing lawsuits or administrative complaints in order to hinder competitors, can be an abuse. Standards for finding this to be an abuse are high, however. In the US, for example, the complaining party "must show (1) that the claim was objectively baseless, in that no reasonable litigant could have anticipated success on the merits; and (2) if and only if the "objectively baseless" test is met, that the party asserting the meritless claim had a subjective intent to interfere directly with a competitor's business relationships by means of the litigation process, regardless of the outcome of the case." (ALD5, pp. 295-6, citing *Professional Real Estate Investors v. Columbia Pictures Industries,* 508 U.S. 49 (1993))

41. **Monopoly leveraging.** The concern is that an enterprise could use its dominance in one market to extend that dominance to another market, usually by tying or pricing with the same effect as a tie. Specific economic conditions are necessary for this strategy to be profitable and anticompetitive. The seminal example for when leveraging may be profitable is if the "tied" market is subject to economies of scale and thus is imperfectly competitive, and leveraging successfully induces exit of rivals from that market. (Michael D. Whinston, "Tying, Foreclosure and Exclusion," *American Economic Review*, vol. 80, pp. 837, 1990)

42. **Predatory pricing.** The concern is that an enterprise may charge a low price until its rivals exit the market, then subsequently exploit the resulting market power. The related concept of price squeezes was addressed above. In regulated sectors the concern centres on enterprises supplying two or more products, where entry into one market is constrained and the other market is potentially competitive. The concern is that the enterprise will apply profits generated in the "protected" market to fund predation in the potentially competitive market. Debate focuses on what cost measures are relevant (marginal cost, average incremental cost, another measure of cost that includes some of the common costs, whether or not to include foregone profits as an opportunity cost), whether or not assessing the ability to recoup the costs of the predatory strategy is a separate necessary analytical step, and how to assess the effect of predation in establishing a reputation as a formidable competitor and thus deterring future entry in other markets where the enterprise is active. Since none of the cases submitted deal with predation, this note does not further address this topic.

43. **Other conduct** which has been found to be abusive is:

- A regulated enterprise charges a price above the regulated price. A variant is, a regulated enterprise sells a given quantity at the regulated price and charges a much higher price for any amount above that quantity.

- A regulated enterprise ties the provision of the regulated product to the purchase of an unregulated product.

- An enterprise, subject to economic regulation only in part and enjoying substantial market power, introduces a contractual obligation or a pricing scheme which raises buyers' costs of switching to a different supplier. For example, it may require that all of a consumer's estimated use of the product, such as natural gas, be prepaid.

- A government office accepts only services provided by one of several potential providers. For example, the passport agency's local office accepts only photographs provided by a specific photographer, even though other photographers' photographs comply with regulation.

44. To summarise this section on abuse of dominance, jurisdictions differ in how they define the legal term, "abuse of dominance." Dominance must be defined in a relevant market, and is a one-sided test, i.e., enterprises not meeting the test cannot be found to be abusing their dominance. The second test is whether the conduct is abusive. The determination is based on economic effects, i.e., an analysis of the facts and context. Specific conduct can be abusive or not abusive, depending on the facts and context. Conduct taking place in a regulated sector can affect whether the conduct is abusive, the evidence for the dominance or otherwise of the enterprise, and whether behavioural remedies for abusive conduct are feasible. Refusal to provide access to an essential facility or price squeezes eliminate the competitors that regulation is designed to foster. Tying unregulated services undermines the effectiveness of maximum price regulation. Thus, some abuse of dominance has the effect of undermining the very objectives regulation was designed to achieve.

4. Observations

45. Abuse of dominance is not uncommon in regulated sectors.

46. Markets subject to failure may potentially receive the attention of the state through a combination of several instruments: state operation, regulation of corporate entities or private enterprises, and the competition law. The choice of instrument can reflect differing costs of application in the given circumstances. Among the potential costs would be the development of a concept of abuse of dominance that is not appropriate in markets not subject to economic regulation. For example, exploitative pricing might be better dealt with by regulation, then subsequently as regulatory evasion, than as dominance abuse.

47. The market failures that induced the regulation can make conduct abusive. For example, while normally an enterprise refusing to supply incurs no antitrust penalty, if that enterprise controls an essential facility, carefully defined, then its refusal to grant access to its rivals is an abuse.

48. The economic regulation put in place to address the market failure may do so incompletely. Economic regulation controls only a handful of an enterprise's economic decisions. Such an enterprise may find profitable conduct, not explicitly prohibited by regulation, but which is exploitative of its market power or exclusionary of rivals. Thus, a regulated enterprise can abuse a dominant position. Further, it may abuse its dominance through violation of regulation or through conduct that does not violate regulation.

NOTES

1. In that decision, the Court said that "One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm." It found that "[t]he regime was an effective steward of the antitrust function." The "slight benefit" of antitrust intervention in the case did not outweigh a "realistic assessment of its costs." [*Trinko* at 412, 413, 414] It is important to note that, in this case, the regulatory structure dealt with the precise dominance abuse claimed.

2. Here "state" refers to the fifty states. The treatment of states is distinct from the treatment of states' political subdivisions. The subdivisions may have immunity only if the state has authorised the anticompetitive conduct. However, *inter alia* local governments, local government officials, and private persons acting per their direction are not subject to antitrust damage claims according to the Local Government Antitrust Act of 1984.

3. No attempt is made in this note to discuss the nature of "that which can be the subject of competition law application," e.g., how to define "enterprise" as used in this note.

4. Applying the SSNIP test when prevailing prices reflect the exercise of market power—asking whether an unregulated profit-maximising enterprise would impose a small but significant and non-transitory increase in price on a candidate market—would define too broad a market because it would indicate some products as substitutes that are not, in fact, substitutes at competitive prices.

5. A market failure is technically defined as a departure of the market equilibrium from the set of Pareto optimal allocations of goods and services. A Pareto optimal allocation is an allocation in which no economic agent can be made better off without making another worse off. We would not expect failure in a market that is perfectly competitive, in which there is complete information and costless transactions.

6. A more careful statement is: Once an enterprise has been found to be a monopoly, then a finding of monopolisation requires the conduct to be either (1) economically irrational but for the conduct's adverse effect on competition, or (2) contributing to establishing or maintaining monopoly power *and* improper for reasons outside the antitrust laws. Conduct which has been found to qualify under item 2 has included false advertising, product disparagement, filing baseless legal proceedings and violation of regulatory requirements.

7. "While the requirement that the monopolist have a 'legitimate business reason' cannot be satisfied by the motive of preventing erosion of its monopolistic position, (citation omitted), the courts have found a monopolist's goals of discouraging free riding, enhancing its image, or ensuring low cost of r its customers to be legitimate business motivations." *City of College Station v. City of Bryan*, 932 F. Supp. 877 (S.D. Tex. 1996 cited in ALD5 p. 284)

8. Indeed, the definition of essential facility is much more restrictive than the definition of natural monopoly. Not all natural monopolies are essential facilities.

9. A price squeeze, in US jurisprudence, is said to occur when an enterprise has monopoly power over one product, its price for that product is "higher than a 'fair price,'" that product is necessary in order to compete in a second market where the monopolist also competes, and the difference between the enterprise's upstream price and its downstream price is so small that competitors cannot match the downstream price and still earn a "living profit." (United States v. Aluminum Co. of America, 148 F.2d 416, 437-38 (2d Cir. 1945) cited in ALD5, p. 269.) US courts have applied three tests to determine whether the price of the monopolised good is unfair: 1) if the wholesale price is lower than the retail price then a price squeeze is presumed; 2) if the vertically integrated enterprise could have made a profit by selling at its own retail price if it had purchased at its own wholesale prices, then there is no price squeeze; 3) if the wholesale profit margin is significantly greater than the retail profit margin, then an illegal price squeeze probably occurred.

A subtly different definition of price squeeze is provided by the European Commission in the Access Directive as occurring when, "the difference between [the retail prices charged by operators with significant market power] and the interconnection prices charged to competitors who provide similar retail services is not adequate to ensure sustainable competition." (Directive 2002/19/EC of 7 March 2002 On access to, and interconnection of, electronic communications networks and associated facilities, point 20). In the Commission's decision in *Napier Brown/British Sugar*, the test was whether the margin of prices charged by a firm, dominant in both the upstream and downstream markets, exceeded its own costs in the downstream activity and restricted competition. ("The maintaining by a dominant company, which is dominant in the markets for both a raw material and a corresponding derived product, of a margin between the price it charges for a raw material to the companies which compete with the dominant company in the production of the derived product and the price which it charges for the derived product, which is insufficient to reflect that dominant company's own costs of transformation (in this case the margin maintained by Napier Brown between its industrial and retail sugar prices compared to its own repackaging costs) with the result that competition in the derived product is restricted, is an abuse of a dominant position." [European Commission Decision 88/518/EEC OJ [1998] L-284/41, para. 66].) The *Napier Brown/British Sugar* test is more similar to the second US test.

The differences between the two jurisdictions' approaches become apparent when the vertically-integrated enterprise is not dominant downstream (this is not relevant in the US test) or when the vertically integrated enterprise is more efficient than its non-integrated rivals (the survival of the rivals is relevant in the EU test), perhaps by reason of economies of scope between the two activities.

The UK's Ofcom has considered allegations of price squeezes several times. It uses various versions of the *Napier Brown/British Sugar* test, but highlights the importance of cost allocation with its note that it "will give close consideration to the method of cost allocation where [Ofcom's Director General] believes that it may be being used to aid anticompetitive behaviour." Paragraph 7.26 of "The Application of the Competition Act in the Telecommunications Sector", OFT 417 ('Oftel's Competition Act Guidelines').

Cost allocation enters the price squeeze discussion when costs are used to regulate the upstream price. It is helpful to recall that fixed costs can be allocated among activities in a wide variety of ways, depending on the policy objectives. Often, the upstream price is regulated to ensure a "reasonable" payment toward fixed or common costs. This leaves scope for an enterprise to charge a downstream price that constitutes a "squeeze" but not predation, if marginal cost is considered to be the relevant test. If the upstream price is regulated as a maximum price, then presumably the enterprise could charge a lower upstream price—getting less payment toward fixed or common costs—in order to avoid a "squeeze."

It can be noted here that the price one part of an enterprise charges another part of the same enterprise is irrelevant to a price squeeze test. However, the level of internal transfers affects, depending on the regulatory environment, taxes and allowed revenues, which do affect profits.

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ABUS DE POSITION DOMINANTE DANS LES SECTEURS REGLEMENTES

(Note de Référence par le Secrétariat)

-- Session III --

La présente note du Secrétariat est soumise POUR EXAMEN au cours de la Session III du Forum mondial sur la Concurrence qui se tiendra les 17 et 18 février 2005.

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L'ABUS DE POSITION DOMINANTE DANS LES SECTEURS RÉGLEMENTÉS

Note de référence du Secrétariat

1. Introduction

1. L'expression, « abus de position dominante dans les secteurs réglementés » est à la fois évidente et contradictoire. Certains argumenteront que cet abus ne peut se produire que dans les secteurs choisis pour être réglementés. D'autres diront qu'il ne peut se produire dans un secteur réglementé de manière efficiente. Toutefois, les cadres juridiques et institutionnels ne sont pas à ce point précis. Aussi peut-on au moins se demander si, d'une part, le champ de la réglementation et celui du droit de la concurrence ne se chevauchent pas de sorte que certaines pratiques puissent être assujetties aussi bien à la réglementation qu'au droit de la concurrence, et si, d'autre part, il arrive que certains domaines ne sont couverts par aucune des deux approches. Les structures institutionnelles peuvent laisser un vide dans lequel les autorités de la concurrence seront amenées à décider s'il convient de s'attaquer aux pratiques d'exploitation abusive et d'exclusion de certaines entreprises occupant des positions dominantes et, moins fréquemment, par des administrations publiques, et selon quelles modalités. Les autorités de la concurrence peuvent être soumises à d'intenses pressions pour résoudre les problèmes de marché que posent ces vides dans les secteurs réglementés revêtant une importance économique et politique comme les télécommunications, l'électricité et les transports.

2. Les pouvoirs publics imposent une réglementation économique pour une série de raisons. Ces raisons sont notamment économiques, en vue par exemple de réduire l'effet des dysfonctionnements du marché, et politiques, à savoir, assurer ou entraver la redistribution des richesses. Le droit de la concurrence interdit en général l'abus de position dominante, c'est-à-dire les pratiques d'exploitation abusive et/ou d'exclusion adoptées par des entreprises occupant des positions dominantes. Certains dysfonctionnements du marché entraînent des prises de position dominantes par des entreprises. De nombreux environnements pâtissant de dysfonctionnements du marché sont également le théâtre de pratiques d'exploitation abusive ou d'exclusion. Aussi n'est-il pas surprenant que la réglementation économique et le droit de la concurrence aient des applications très voisines dans une économie.

3. D'autres sessions du Forum mondial de l'OCDE sur la concurrence de 2005 abordent deux questions liées : introduire la concurrence dans les secteurs réglementés et relations entre les autorités de tutelle sectorielles et les autorités de la concurrence. Dans les secteurs, soumis par le passé à un opérateur public ou à une réglementation omniprésente, et qui se libéralisent - en ce que d'autres entreprises peuvent entrer et commencer et être en situation de concurrence sur certains marchés, et que les entreprises réglementées ont une plus grande liberté dans la prise de décisions économiques importantes - les entreprises sont alors plus à même de se livrer à des pratiques anticoncurrentielles. Toutefois, les autorités de la concurrence nouvellement mises en place ou rétablies peuvent voir leur marge de manœuvre limitée par les autorités de tutelle sectorielles préexistantes. Le thème de la présente note s'inscrit entre ces deux questions liées – après l'ouverture à la concurrence d'un secteur réglementé, en se concentrant sur un aspect de la relation entre concurrence et réglementation. En somme, la présente note examine les cas où il existe une réglementation économique mais où l'interdiction de l'abus de position dominante peut constituer un *substitut* en vue de résoudre un dysfonctionnement du marché (ex. : l'accès à une infrastructure essentielle peut être rendu obligatoire par la réglementation ou l'interdiction d'abus de position dominante), ou peut *renforcer* la réglementation (par exemple, la non-observation de la réglementation peut être considérée comme un abus) ou peut *maintenir l'efficience* de la réglementation (par exemple, en interdisant l'association de service non réglementés et de services réglementés en vue d'échapper à la réglementation, ainsi que les effets de ciseau en cas de réglementation du prix d'accès).

4. Le reste de la présente note s'organise de la manière suivante. Elle offre d'abord une description des liens existant entre droit de la concurrence et réglementation, puis une analyse succincte de l'abus de position dominante, de manière générale et en particulier, comme concept juridique en vue de résoudre un problème économique.

2. Comment le droit de la concurrence et le droit réglementaire sont-ils liés ?

5. L'interdiction de l'abus de position dominante et la réglementation économique peuvent être associées de différentes manières. Elles peuvent faire l'objet d'une même loi ou de lois distinctes. Elles peuvent être mises en œuvre par la même institution ou par des institutions distinctes. (Cette question est l'un des aspects du thème d'une autre session du Forum.) Elles peuvent offrir un intérêt pour les administrations de différents échelons, dans un État fédéral, le niveau fédéral par opposition à celui des États. Elles peuvent inciter les entreprises à agir de manière identique ou différente. La présente section aborde certains problèmes juridiques soulevés par l'étude du lien entre ces deux approches.

6. Les contenus respectifs de l'interdiction de l'abus de domination et de la réglementation économique peuvent être mentionnés dans la même loi, comme une loi sur les télécommunications interdisant l'abus de position dominante tout en fixant le cadre réglementaire du secteur. Ou bien chaque approche peut figurer dans des lois distinctes, comme un droit de la concurrence et une réglementation propre à chaque secteur. Il est ensuite possible d'invoquer les principes des conflits de loi (comme l'existence de lois particulières l'emportant sur les lois de portée générale, à moins qu'il soit explicitement dit que telle n'est pas l'intention). Les lois elles-mêmes peuvent prévoir des exemptions explicites, ou à l'inverse, des « clauses de sauvegarde » stipulant que la loi en vigueur n'affecte pas l'application de l'autre loi explicitement mentionnée.

7. Il est rare qu'un secteur ne relève pas du droit de la concurrence pour la raison que ce secteur est également soumis à la réglementation économique. Toutefois, les législateurs ne s'avisent pas toujours des conséquences des larges exemptions. L'Afrique du Sud en offre un exemple : la Loi sur la concurrence de 1998 excluait « les actes relevant d'une autre loi ou autorisés par une autre loi ». Les tribunaux ont commencé à interpréter ces termes dans le sens où les entreprises des secteurs réglementés n'étaient pas soumises à la loi sur la concurrence, que l'autre dispositif réglementaire contrôle ou non également les comportements anticoncurrentiels. [L]a loi sur la concurrence ne s'appliquait pas aux fusions bancaires, puis on a également écarté son application à une coopérative agricole. La loi a été ensuite modifiée pour éviter ce problème à l'avenir. (OCDE, *Competition Law and Policy in South Africa*, 2003, p. 51)

8. Une question plus délicate concerne le lien existant entre l'interdiction de l'abus de position dominante et la réglementation lorsqu'elles peuvent s'appliquer aux mêmes agissements ou à une pratique qui s'y rapporte de très près. Une décision de la Commission européenne de 2003 portant sur *Deutsche Telekom* est intéressante à cet égard. La société de télécommunications en place a été reconnue coupable de baisse de marge abusive, autrement dit, d'offrir des prix trop bas aux consommateurs au regard du prix d'accès à certaines de ses infrastructures qu'elle faisait payer à ses concurrents. Le prix d'accès était en partie réglementé par des autorités de réglementation alors que le prix facturé au consommateur ne l'était pas. Ce fut la stratégie adoptée par Deutsche Telekom. La règle semble-t-il est que le droit de la concurrence, assorti de l'interdiction d'abus de position dominante qu'il prévoit, s'applique lorsque la réglementation laisse toute liberté économique aux entreprises. Cette décision est également intéressante dans la mesure où elle offre un exemple du lien existant entre le droit de la concurrence de l'Union européenne et la réglementation d'un pays membre, un thème développé ci-dessus.

9. Considérons à présent le lien entre l'interdiction d'abus de position dominante et la réglementation lorsque les deux approches peuvent s'appliquer aux mêmes agissements. Une exemption explicite pourrait alors être prévue. Toutefois, la question la plus intéressante est de savoir ce qui se

passerait sans cette exemption ? Une interprétation donnée à la décision de la Cour suprême des États-Unis de 2004, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, est que si un cadre réglementaire peut assurer efficacement les mêmes fonctions qu'un régime (concurrentiel) antitrust, du moins relativement au refus d'accès, le droit de la concurrence n'est alors plus applicable.[1] Par défaut, c'est traditionnellement le droit de la concurrence qui est appliquée : l'abrogation implicite du droit de la concurrence du fait d'un texte réglementaire est fortement désapprouvée, et ne s'est produite que dans les cas de pure incompatibilité entre les dispositions antitrust et les dispositions réglementaires. (*United States v. Philadelphia National Bank*, 374 U.S. 321, 350-51 (1961) citez dans *Antitrust Law Developments (Fifth)*, p. 1239). La règle traditionnelle est mise à l'épreuve par des décisions de justice comme *Trinko*.

10. La distinction entre le particulier et le général aussi bien que la souveraineté des parties constituantes de l'État fédéral sont importantes dans la doctrine du domaine d'intervention des États[2] aux États-Unis. Cette doctrine préserve efficacement les États et les particuliers de toute application du droit de la concurrence lorsque la pratique anticoncurrentielle s'inscrit dans le cadre d'une politique des États clairement formulée et activement surveillée. La réglementation des États « clairement formulée » et « activement surveillée » est l'exemple habituel.

11. La « doctrine du domaine d'intervention des États » aux États-Unis contraste avec les liens analogues existant dans l'Union européenne et la Fédération de Russie. L'Union européenne a été une source d'inspiration, voire un élément moteur, de la majeure partie de la réglementation édictée par les pays membres, même si ceux-ci édictent la réglementation des secteurs comme les télécommunications et l'énergie. La réglementation nationale doit être conforme à la législation correspondante de l'Union européenne, notamment le droit communautaire de la concurrence.

12. La Fédération de Russie prévoit encore une autre manière de résoudre les conflits entre droit de la concurrence au niveau fédéral et réglementation au niveau des parties constituantes. En Russie, toute action ou décision des entités fédérales du pouvoir exécutif, des États sujets de la Fédération (c'est-à-dire, de ses parties constituantes) et des pouvoirs publics locaux est interdite si elle limite l'indépendance des acteurs économiques ou crée des conditions discriminatoires, et si elle entraîne ou risque d'empêcher, de limiter ou d'éliminer la concurrence, et porte atteinte aux intérêts des acteurs économiques. Plusieurs agissements de la liste non exhaustive des actions ou décisions prohibées ont des effets anticoncurrentiels par l'exclusion des concurrents, et peuvent alors être d'une certaine manière assimilables à l'abus de position dominante. Les responsables engagent leur responsabilité civile, administrative ou pénale en cas de non respect. (Loi fédérale sur la concurrence et les restrictions de l'activité monopolistique sur les marchés de produits, articles 7 et 21 respectivement.)

13. La présente section a abordé certaines des questions juridiques soulevées par l'examen du lien entre l'interdiction de l'abus de position dominante et la réglementation économique. Les responsables d'entreprises doivent connaître les règles qui résolvent les cas de conflit entre ces deux approches. Dans une bonne partie de ses travaux, l'OCDE a fortement appuyé une approche où le droit de la concurrence pèse plus et où la réglementation est conçue de manière à être la moins anticoncurrentielle possible. Lorsque ces deux politiques tendent vers la même direction, une manière de choisir celle qui prévaudra consiste à retenir celle qui sera la moins coûteuse. Une autre session du Forum analyse d'autres critères régissant la prise de décision – probabilité d'influence, caractéristiques institutionnelles, etc. Toutefois, dans certains cas, le partage constitutionnel du pouvoir détermine comment l'interdiction d'abus de position dominante s'articule avec la réglementation économique. En résumé, les autorités de la concurrence se heurtent à différents obstacles lorsqu'elles cherchent à appliquer les interdictions d'abus de position dominante aux secteurs réglementés.

3. Qu'est-ce que l'abus de position dominante ?

14. Les pays n'ont pas la même définition de l'expression juridique « abus de position dominante ». Ils prévoient deux critères de détermination mais ils diffèrent quant à leurs modalités d'application. Le premier critère de détermination est que l'entreprise[3] (ou les entreprises, voir ci-dessous) doit/doivent avoir une position dominante dans un marché pertinent. Le deuxième critère est le caractère « abusif » des agissements en question. Le reste de la présente section aborde les questions les plus importantes en rapport avec ces deux critères.

3.1. Qu'est-ce qu'une position dominante dans un marché pertinent ?

15. « Position dominante » est une expression juridique correspondant au concept économique d'une entreprise dotée d'un pouvoir de marché important et durable. En clair, il s'agit de la situation d'une entreprise en mesure de maintenir ses prix sensiblement au-dessus des niveaux concurrentiels pendant une longue période de temps. Les acheteurs ne peuvent se tourner vers un autre fournisseur ou produit aisément et rapidement. Les concurrents ne peuvent entrer sur le marché ou développer leurs capacités rapidement.

16. Selon le pays, l'expression juridique « position dominante » varie également entre un point de vue relativement formel et une approche plus analytique. Pour les points de vue les plus formels, certaines dispositions du droit de la concurrence fixent une part de marché au-delà de laquelle une entreprise est considérée comme ayant une position dominante. L'approche la plus analytique, quant à elle, considère de manière plus explicite les contraintes concurrentielles auxquelles une entreprise donnée fait face en prenant en compte l'entrée de nouveaux concurrents, les concurrents qui changent de produits pour affronter la concurrence plus directement ou qui développent leurs capacités, l'aptitude des acheteurs à changer de fournisseurs et les pratiques qu'ils adoptent à cette fin, etc. Si l'entrée de concurrents à grande échelle est soit improbable soit lente, ou si les concurrents ne peuvent accroître leurs capacités sensiblement ou rapidement, ou bien si les acheteurs ne peuvent changer aisément de fournisseurs, l'entreprise peut alors avoir une position dominante. Lorsque les données sont disponibles, l'examen de la demande résiduelle (qui décrit la demande à laquelle chaque entreprise est confrontée) mesure le pouvoir de marché directement. Cette analyse permet en particulier de calculer l'effet de l'évolution des prix sur la demande à laquelle doit répondre une entreprise donnée. Si la demande ne se contracte pas beaucoup lorsque les prix augmentent, l'entreprise est alors dotée d'un pouvoir de marché et, si ce pouvoir est important et durable, d'une position dominante.

17. Le nombre d'entreprises concernées constitue un autre aspect sur lequel les pays diffèrent dans la définition qu'ils donnent du concept de « position dominante ». Pour certains, seuls les agissements d'une entité économique pourraient être qualifiés d'« abus de position dominante » tandis que, pour d'autres, les pratiques de plusieurs entités économiques pourraient également correspondre à une « position dominante ». Il convient de signaler que, pour le plus éminent de ces groupes de pays, l'Union européenne, le concept de position dominante conjointe est employé beaucoup plus pour évaluer les projets de fusions dans les marchés oligopolistiques que les cas d'abus. Compte tenu de cela, la présente note n'abordera pas plus avant le cas de la position dominante conjointe.

18. Une « position dominante » est une « position dominante » dans un marché pertinent et non une position dominante théorique. La définition du marché dans le cas d'une éventuelle position dominante pose des problèmes bien connus. Le premier consiste à éviter « la cellophane fallacy», (d'après une décision de justice américaine) autrement dit, à ajuster le test de la définition du marché souvent utilisé dans l'analyse des fusions (le test SSNIP ou le test du monopoliste hypothétique) afin de tenir compte de l'éventualité d'un pouvoir de marché.[4] Le deuxième problème consiste à s'assurer que toutes les contraintes concurrentielles sont prises en considération. Par exemple, si plusieurs ports maritimes constituent des substituts du point de vue des affrêteurs, alors exclure un ferry d'un port donné pourrait être

désastreux pour le ferry, dans la mesure où il ne peut pas offrir le service qu'il souhaite, mais n'aurait pas véritablement d'effet sur les affrêteurs.

19. En résumé, pour qualifier les agissements d'une entreprise d' « abus de position dominante », il faut établir que l'entreprise est dominante dans un marché pertinent. En d'autres termes, la « position dominante » correspond à un test qui n'opère que dans un sens puisqu'il élimine les entreprises n'occupant pas de position dominante. Si l'entreprise est retenue à l'issue du test, il faut examiner si ses agissements sont abusifs ou non. C'est le thème de la prochaine partie.

3.2. Qu'est-ce qu'un abus ?

20. Il est difficile de distinguer les pratiques abusives d'une entreprise ayant une position dominante de celles qui ne le sont pas. Sur ce point, l'approche des pays diffère plus l'un de l'autre que pour la majeure partie des autres domaines du droit positif de la concurrence. Cette partie du droit présente deux autres difficultés. La première vient de ce que l'effet économique d'un agissement particulier dépend largement du contexte selon des modalités qui ne peuvent à ce jour pas être généralisées. Ainsi, cet aspect du droit semble être plus *ad hoc* même si les décisions correspondantes suivent des principes fondamentaux. La deuxième difficulté est d'ordre institutionnel. À la différence du contrôle des fusions ou des cartels, ce sont en général des plaintes qui portent les abus de position dominante à la connaissance des autorités, et les intérêts économiques des plaignants ne correspondent pas systématiquement aux intérêts économiques de l'ensemble de la société. Aussi les autorités doivent-elles faire la distinction entre le particulier et le général et savoir notamment si le préjudice spécifique occasionné à un ou deux concurrents annonce un dommage général dont pâtit le processus de la concurrence ou bien s'il nuit seulement à quelques opérateurs mécontents.

21. Les pratiques d'exploitation abusive constituent l'une des deux catégories générales d'agissements abusifs. Une première remarque importante est que les pays diffèrent quant à l'interdiction ou non des pratiques d'exploitation abusive directe et immédiate d'une entreprise en position dominante et, s'ils l'interdisent, ils ne la poursuivront pas avec la même assiduité. Le premier exemple de ce type de pratiques est celui d'une entreprise en situation de monopole facturant des prix monopolistiques.

- Pour certains pays, de tels agissements ne sont pas illégaux. Ils pensent que les marchés sont assez souples pour qu'apparaissent des concurrents suffisamment tôt, et par ailleurs que les profits de l'entreprise en situation de monopole incitent à innover et à aiguiser le sens des affaires.

- Pour d'autres pays, une entreprise en position de monopole facturant des prix monopolistiques est en situation illégale mais les autorités n'interviennent que lorsqu'elles estiment que les marchés sont suffisamment ouverts pour que les concurrents soient en mesure de baisser leurs prix à brève échéance. L'Office britannique de la concurrence (OFT) offre un exemple d'une telle approche dans le domaine de l'édition scientifique. Certains indices relevés par l'OFT portaient à croire que les prix et les profits y étaient élevés mais l'OFT a décidé de ne pas intervenir « pour le moment » dans la mesure où il restait à savoir si les forces du marché seraient en mesure de remédier aux éventuels problèmes. (« The market for scientific, technical and medical journals », communiqué de l'OFT, septembre 2002)

- D'autres autorités poursuivent les pratiques d'exploitation abusive comme la tarification monopolistique d'une entreprise en situation de monopole.

22. Les pratiques d'exclusion forment l'autre grande catégorie des pratiques abusives. Cette expression désigne les agissements d'une entreprise en situation de position dominante qui contraint, d'une manière ou d'une autre, une deuxième entreprise à se retirer d'un marché, ou bien qui l'empêche d'y entrer d'emblée. Les cas soumis à la présente session offrent plusieurs exemples caractéristiques : l'opérateur d'un port empêche les dockers concurrents d'y accéder, ou le propriétaire d'un réseau de transport d'électricité en refuse l'accès aux sociétés concurrentes productrices-vendeuses d'électricité, ou bien une entreprise de télécommunications en place pratique une tarification qui empêche les concurrents non intégrés d'être présents sur les marchés dont le cadre réglementaire vise à assurer le caractère concurrentiel. À l'instar des pratiques d'exploitation abusive, les pays ne traitent pas les pratiques d'exclusion de la même manière.

3.2.1 Quelques généralisations

23. Quelques généralisations peuvent aider à ordonner la liste des pratiques potentiellement abusives. En premier lieu, le dysfonctionnement du marché peut aider à centrer l'attention sur les retombées économiques des agissements d'une entreprise. En deuxième lieu, en constatant que les plaintes sont généralement à l'origine des enquêtes sur les abus de position dominante, cela peut aider à centrer ces enquêtes sur les dommages causés au mécanisme de la concurrence. Troisièmement, limiter la question aux secteurs réglementés influe sur l'effet des pratiques, des preuves et des voies de recours.

24. Les retombées économiques de telle ou telle pratique dépendent largement du contexte selon des modalités impossibles à généraliser à ce jour. Il est toutefois possible de dégager quelques généralités, en particulier pour ce qui concerne les dysfonctionnements du marché. Le dysfonctionnement du marché est un concept économique exprimant l'idée que le fonctionnement du marché pourrait donner des résultats meilleurs, tant du point de vue des acheteurs que de celui des vendeurs, si les tarifications, les produits ou les schémas d'innovation étaient différents.[5] Le monopole naturel, les barrières à l'entrée, les externalités et l'asymétrie de l'information sont des exemples de dysfonctionnement du marché. Parfois, la réglementation économique est imposée pour essayer de corriger un dysfonctionnement, de sorte que les secteurs réglementés qui constituent le thème de la présente note sont susceptibles de présenter des dysfonctionnements du marché. En outre, certains abus sont tout bonnement le fait du dysfonctionnement du marché. Par exemple, on s'attend à ce qu'une entreprise en situation de monopole naturel pratique une tarification monopolistique, mais cela constitue un dysfonctionnement du marché. Certains abus constituent une réaction au dysfonctionnement du marché. Par exemple, lorsque certains objectifs de vente au détail sont atteints, des remises peuvent être un moyen efficace pour les fabricants de pallier leur incapacité à suivre les efforts commerciaux des détaillants. Aussi l'évaluation des dysfonctionnements du marché est-elle une composante essentielle de l'analyse du contexte dans lequel les entreprises agissent et, ainsi, des retombées économiques de ces agissements.

25. Deuxièmement, les plaintes déposées pour pratiques d'exclusion posent une difficulté qui leur est propre pouvant conduire à un défaut ou à un excès de mise en œuvre. Comme signalé plus haut, ce sont les dépôts de plaintes qui portent généralement les abus de position dominante à la connaissance des autorités. Les intérêts économiques des plaignants ne correspondent pas forcément aux intérêts économiques de l'ensemble de la société. Toutefois, l'atteinte au mécanisme de la concurrence commence avec le préjudice subi par des particuliers qui peuvent porter plainte devant les autorités de la concurrence. Savoir quand intervenir revient un peu à savoir distinguer les prix concurrentiels des prix prédateurs. Si nous visons un objectif d'efficience, nous souhaiterons que les concurrents inefficients sortent d'un marché à condition toutefois que tous les concurrents ne sortent pas à l'exception de certains cas particuliers. Si nous visons d'autres objectifs, tels que la préservation du droit pour toute entreprise d'être en activité ou la prévention de toute concentration de pouvoir économique dans une économie donnée, la présence sur les marchés d'entreprises quelque peu inefficientes pourrait être souhaitable. Où que soit tracée la ligne de partage en définitive, il s'agit toujours ici de distinguer le préjudice fait aux concurrents de celui causé à la

concurrence, une distinction qui pourrait être difficile à établir au niveau du tort causé ou de l'enquête correspondante.

3.2.2 Quelle est la pertinence de la précision « dans les secteurs réglementés » ?

26. La réglementation peut influer sur la possibilité ou non de qualifier telle pratique d'abusive et même de considérer certains faits comme éléments de preuve de position dominante, de même que sur la lourdeur de la condamnation et sur la décision portant sur les mesures correctrices envisageables.

27. Savoir si telle ou telle pratique constitue une atteinte à la réglementation peut déterminer son caractère abusif. Par exemple, aux États-Unis, une pratique monopolistique contribuant à la mise en place et au maintien d'un pouvoir de monopole *et* répréhensible pour des raisons ne relevant pas du droit de la concurrence est tenue pour abusive. Il en a été ainsi de la publicité mensongère, du dénigrement de produits, de l'introduction d'instances judiciaires infondées et de la violation de dispositions réglementaires. (ALD5, p. 246 et suite)[6].

28. En outre, la réglementation et l'interdiction d'abus de position dominante peuvent être des substituts l'un de l'autre, le choix entre ces deux approches dépendant de la possibilité de se prononcer à l'avance sur le caractère nuisible ou non de la pratique en cause. Il est probablement plus avantageux de traiter les pratiques dont on peut dire à l'avance qu'elles sont généralement abusives en tant qu'interdites en soi, comme peut le prévoir la réglementation. Toutefois, concernant les agissements pour lesquels l'appréciation *ex ante* comporte de nombreuses erreurs (certains agissements interdits ne sont pas préjudiciables alors que certains agissements licites le sont), il est probablement plus pratique – compte tenu des coûts directs et des coûts occasionnés par les jugements erronés – d'appliquer l'approche au cas par cas traditionnelle du droit de la concurrence. Ce sont ces cas difficiles, où de nombreux faits et circonstances sont examinés, qui restent des cas d'« abus de position dominante ».

29. Une réglementation efficiente influe sur la pertinence des preuves couramment invoquées pour signaler qu'une position est dominante. Les parts de marchés sont souvent invoquées comme la preuve d'une position dominante. Comme on l'a vu, les parts de marché sont même parfois mentionnées par le droit de la concurrence dans la définition de la position dominante prévue. Toutefois, lorsque la réglementation interdit à une entreprise d'élever ses prix ou de refuser d'approvisionner ses concurrents, alors les parts de marché n'ont aucune réelle valeur indicative. L'absence de barrières à l'entrée peut être invoquée comme l'indice d'une absence de position dominante. Néanmoins, les barrières réglementaires à l'entrée (ou à la sortie) ont le même effet que les barrières « naturelles » à l'entrée. De façon plus générale, la pertinence des indices de position dominante change lorsque les entreprises sont soumises à la réglementation. Ce qui importe, bien entendu, c'est la réglementation véritablement appliquée et non la réglementation théorique.

30. La réglementation allège la condamnation prévue pour abus, du moins dans certaines circonstances. En particulier, la « filed rate doctrine » (doctrine des prix déposés) aux États-Unis dispose qu'une personne lésée par une tarification élevée ne peut recouvrer des dommages et intérêts au triple (ainsi que le droit de la concurrence le prévoit normalement) si les prix (tarifs) ont été préalablement déposés auprès de l'autorité de tutelle compétente. (ALD5, p. 1240-2)

31. La réglementation peut prévoir la possibilité d'agissements remédiant à l'abus de position dominante et moins coûteux que si une autorité de tutelle n'était pas déjà en place. Toutefois, le coût global de ce type de mesure correctrice risque d'être toujours plus élevé que le coût occasionné par l'abus ou l'imposition d'une telle mesure à caractère structurel.

32. En résumé, la réglementation peut influer sur l'analyse des cas d'abus de position dominante de différentes manières. Comprendre la réglementation appliquée à un secteur est essentiel pour évaluer les éléments de preuve attestant la position dominante, en vue de comprendre l'effet de telle ou telle pratique, et les remèdes envisageables.

33. La prochaine section énumère certains agissements qui, pratiqués par l'entreprise en position dominante, ont été tenus pour abusifs dans certaines circonstances. Cette liste n'est en aucune manière exhaustive et a été réduite afin de correspondre à plusieurs des exemples présentés au cours de la présente session.

3.2.3 Abus spécifiques de position dominante

34. Comme nous l'avons noté plus haut, il est difficile de généraliser quant à la distinction entre pratique abusive et non-abusive. Vickers a analysé les principes sous-jacents à cette question. Il recense trois tests qui ont été proposés pour distinguer les cas d'abus et de non-abus : (1) le test du sacrifice (l'abus de position dominante en question serait-il rentable pour son auteur si cette pratique n'avait pas pour effet d'éliminer ou de limiter la concurrence ?), (2) le test du concurrent aussi efficient (des concurrents aussi efficients que l'entreprise dominante seraient-ils éliminés en raison de l'abus de position dominante ?), et (3) le test du dommage subi par le consommateur (la « rente » du consommateur ou la « rente » totale baisserait du fait que les concurrents sont exclus en raison de l'abus de position dominante). Toutefois, Vickers fait remarquer les difficultés conceptuelles que présente chacun des tests. (John Vickers, « Abus de pouvoir de marché », allocution prononcée lors de la 31e conférence de l'Association européenne de la recherche en économie industrielle, Berlin, 3 septembre 2004). Ces tests ont toutefois le mérite de mettre en lumière les effets économiques de la pratique des entreprises, dont certains types sont décrits ci-après.

35. **Refus de contracter.** Ce qui pose problème ici, c'est souvent le refus par une entreprise ayant la maîtrise d'une infrastructure d'en autoriser l'accès, ou encore l'imposition de modifications déraisonnables dans les services fournis ou dans les prix pratiqués. Dans ce genre de situation, l'abus de position dominante tourne autour de la question de savoir si cette infrastructure est essentielle pour que la concurrence soit assurée, si une autre infrastructure identique pourrait être raisonnablement créée et si il est envisageable d'en autoriser l'accès. Il peut y avoir des raisons commerciales légitimes de refuser l'accès à une infrastructure essentielle, outre la question de la possibilité matérielle d'en partager l'usage.[7] Étant donné qu'une infrastructure essentielle constitue un monopole naturel[8] avec des barrières à l'entrée élevées, ces deux caractéristiques entraînant un dysfonctionnement du marché, l'accès à ce type d'infrastructure est souvent réglementé lorsque cette infrastructure a un rôle économique ou politique important.

36. Outre un refus pur et simple, l'entreprise dominante peut se livrer à diverses pratiques ayant pour but de nuire à ses concurrents. Elle peut pratiquer un prix d'accès élevé ou encore ne fournir qu'un accès de médiocre qualité (pas en temps utile, peu fiable ou inapproprié). Elle peut profiter des informations que ses concurrents doivent fournir afin de bénéficier de l'accès, pour solliciter des clients de ces concurrents. L'entreprise peut se livrer à des agissements de ce type dans les cas où un autre réseau doit se connecter à son propre réseau. En résumé, même si certains aspects de l'accès à une infrastructure essentielle peuvent être réglementés, on peut se trouver face à des situations où l'on constate finalement que l'entreprise dominante refuse l'accès ou invente des moyens pour ce faire, afin de prendre ses concurrents au dépourvu. Ce genre de pratique devrait peut-être être considéré comme un abus de position dominante plutôt que comme un contournement de la réglementation.

37. **Effet de ciseau.** Le problème ici est celui d'une entreprise, dominante sur un marché d'amont mais aux prises avec des concurrents sur un marché d'aval et dont elle est le fournisseur, qui peut décider d'un ensemble de prix d'amont et de prix d'aval tels qu'ils évincent ses concurrents. Cette éviction réduit à

néant les effets d'un régime réglementaire dont l'objectif est de promouvoir cette concurrence. L'effet de ciseau est défini différemment selon les pays. À la base, il y a effet de ciseau lorsque la différence entre le prix d'aval et le prix d'amont est trop peu importante. La notion de « trop peu importante » diffère d'un pays à l'autre.[9] Plus la marge requise entre les deux prix est importante, moins les concurrents en place sont efficients puisqu'il y a alors plus de concurrents en aval dont l'offre est potentiellement plus riche en termes de variété de produits et d'innovation, mais cela peut vouloir dire que les consommateurs paieront des prix plus élevés.

38. **Accords verticaux et autres pratiques de prix empêchant la concurrence**. Dans les secteurs réglementés, l'un des problèmes est la pratique qui consiste à lier des services non réglementés à des services réglementés pour échapper à la réglementation. (L'entreprise dégage des profits de monopole sur le service réglementé mais pratique le prix maximum réglementé sur le service non réglementé lié). Dans les secteurs réglementés et non réglementés, les dispositions qui augmentent le coût pour le client d'un changement de fournisseur posent souvent problème. Il peut s'agir de licences d'une durée déraisonnablement longue, de redevances fondées sur un critère autre que quantitatif (par exemple, le nombre total d'ordinateurs personnels du client plutôt que le nombre précis d'ordinateurs qui utilisent les droits de propriété intellectuelle achetés), les ristournes groupées, les prix fixés en fonction de l'exclusivité, et autres dispositions. Par exemple, si l'on augmente le coût pour un client du changement de fournisseur, cela relève bien entendu les barrières à l'entrée des concurrents et freine le développement de ces concurrents. Certaines de ces pratiques, mais pas toutes, sont des réactions au dysfonctionnement du marché que l'on appelle « information asymétrique ». Les contrats entre producteurs et distributeurs, par exemple, peuvent diminuer certaines des inefficiences provoquées par l'information asymétrique, dans le cas notamment de prestations de services concrètement difficiles à quantifier. L'offre de diverses grilles tarifaires (forfaits, rabais, tarifs en deux parties, etc.) peut être un moyen efficace donnant un ordre d'idée du prix que les consommateurs sont prêts à payer pour un service ou un bien.

39. **Introduction et promotion de nouveaux produits**. Cette question se pose pour des produits utilisés dans des réseaux où il faut que les divers produits soient compatibles. Le problème ici est qu'une entreprise dominante qui introduit de nouveaux produits peut affecter la capacité concurrentielle des entreprises plus petites. Néanmoins, l'innovation est l'un des aspects de la concurrence et c'est un moyen d'améliorer le bien-être du consommateur. Il faut donc être prudent lorsque l'on cherche à déterminer si une innovation est anti-concurrentielle ou non. La voie moyenne est illustrée par la tendance générale des décisions des tribunaux américains. Selon une jurisprudence constante de ces tribunaux, l'intégration de composants dans le système d'un ordinateur ou la modification de ces composants, lorsque cette intégration ou cette modification améliore la performance de l'ordinateur ou réduit les coûts, est tout à fait légale, même si ces changements entraînent des problèmes d'incompatibilité (ALD5 p. 291). Le contexte du présent paragraphe se réfère à des produits de haute technologie, mais les mêmes questions d'innovation et de compatibilité peuvent se poser dans d'autres situations.

40. **Recours abusif et anticoncurrentiel aux procédures judiciaires ou administratives**. Les recours abusifs à la procédure, tels l'introduction d'instances judiciaires ou de réclamations administratives afin d'entraver l'activité de concurrents, peuvent constituer des abus répréhensibles. Toutefois, les critères pour que de tels recours abusifs soient considérés comme répréhensibles sont très élevés. Aux États-Unis par exemple, la partie qui se plaint d'un abus doit « prouver (1) que le recours est objectivement sans fondement, en ce sens qu'aucun plaideur raisonnable ne pourrait tabler sur un succès de son action en justice sur le fond, (2) et que, à condition nécessairement que le test de l'absence de fondement objectif soit préalablement satisfait, la partie introduisant l'instance qui ne peut être accueillie sur le fond, ait eu l'intention subjective de nuire directement aux relations professionnelles d'un concurrent en engageant la procédure, sans considération de l'issue du différend. » (ALD5, p. 295-6, citant la décision de justice *Professional Real Estate Investors v. Columbia Pictures Industries*, 508 U.S. 49 (1993))

41. **Effet de levier monopolistique.** Le problème ici est celui d'une entreprise susceptible de se servir de sa position dominante sur un marché pour l'étendre à un autre marché, généralement un marché lié, ou par une politique de prix ayant le même effet qu'un marché lié. Pour que cette stratégie soit rentable du point de vue de l'entreprise concernée et revête un caractère anticoncurrentiel, il faut des conditions économiques particulières. L'exemple type d'un effet de levier monopolistique susceptible d'être rentable est celui où le marché « lié » fait l'objet d'économies d'échelle et est donc imparfaitement concurrentiel, et où l'effet de levier réussit à provoquer l'éviction des concurrents de ce marché (voir Michael D. Whinston, « Tying, Foreclosure and Exclusion, » *American Economic Review*, vol. 80, p. 837, 1990).

42. **Prix d'éviction.** Le problème ici est celui d'une entreprise pratiquant des prix bas jusqu'à ce que ses concurrents se trouvent évincés du marché, après quoi l'entreprise peut donc profiter du pouvoir de marché qu'elle a ainsi acquis. Le concept voisin de l'effet de ciseau a été étudié plus haut. Dans les secteurs réglementés, le problème tourne autour des entreprises qui fournissent deux produits ou plus, lorsque l'entrée sur un marché est limitée et que l'autre marché est potentiellement concurrentiel. Le risque est que l'entreprise se serve des bénéfices dégagés sur le marché « protégé » pour financer sa politique de prix d'éviction sur le marché potentiellement concurrentiel. Le débat tourne autour des critères à prendre en compte pour mesurer les coûts (coût marginal, coût incrémental moyen, autre mesure de coût incluant certains coûts communs, inclusion ou non en tant que coût d'opportunité des bénéfices auxquels l'entreprise renonce par la pratique de prix bas), savoir s'il faut, en tant qu'étape analytique nécessaire, procéder à une estimation de la capacité de l'entreprise à récupérer les coûts de sa politique de prix d'éviction, et comment estimer l'effet de la politique de prix d'éviction au niveau de la réputation de l'entreprise en tant que concurrent très puissant, ce qui dissuade la concurrence d'entrer dans les autres marchés où l'entreprise est active. Étant donné qu'aucun des exemples donnés ne concerne les prix d'éviction, la présente note ne traite pas le sujet plus avant.

43. **D'autres pratiques** ont été estimées constitutives d'un abus de position dominante :

- Une entreprise réglementée pratique un prix supérieur au prix réglementé, ou encore, une entreprise réglementée vend une certaine quantité de biens ou de services au prix réglementé et pratique un prix très supérieur pour toute quantité supplémentaire.

- Une entreprise réglementée lie la fourniture du produit réglementé à l'achat d'un produit non réglementé.

- Une entreprise, qui n'est que partiellement assujettie à une réglementation économique et qui jouit d'un pouvoir de marché significatif, introduit une obligation contractuelle ou des tarifs qui renchérissent le coût pour l'acheteur d'un changement de fournisseur. L'entreprise peut, par exemple, exiger que son client paie à l'avance toute la consommation estimée du produit, comme par exemple le gaz naturel.

- Une administration n'accepte uniquement que les services fournis par l'un de plusieurs prestataires potentiels. Par exemple, un service de délivrance des passeports n'accepte que les photographies faites chez un photographe particulier, même si les photographies faites par d'autres photographes sont conformes à la réglementation.

44. Pour résumer cette partie de l'étude sur l'abus de position dominante, les pays diffèrent dans leur définition juridique de l'expression « abus de position dominante ». Cette position dominante doit être définie par rapport à un marché correspondant aux activités de l'entreprise et le test n'opère que dans un sens, à savoir que les entreprises qui ne remplissent pas les critères du test ne peuvent pas être considérées comme abusant de leur position dominante. Le deuxième test concerne le caractère abusif de la pratique de l'entreprise. Le critère est celui des conséquences économiques de cette pratique, ce qui suppose une

analyse des faits et du contexte. En effet, une même pratique peut être abusive ou non, en fonction des faits et du contexte. Concernant l'analyse du caractère abusif, les faits constitutifs de la position dominante ou autre de l'entreprise, et les possibilités de remédier à l'abus de position dominante, s'il s'agit d'un secteur réglementé, les solutions peuvent être différentes de celles d'un secteur non réglementé. Le refus de laisser l'accès à une infrastructure essentielle ou l'effet de ciseau au niveau des prix élimine la concurrence que la réglementation a pour but de susciter. Le fait de lier des services non réglementés à des services réglementés sape l'efficacité de la réglementation imposant des prix maximum. Un certain abus de position dominante a pour effet de contrecarrer les objectifs de la réglementation elle-même.

4. Observations

45. Les abus de position dominante ne sont pas rares dans les secteurs réglementés.

46. Les pouvoirs publics peuvent intervenir sur les marchés exposés à des dysfonctionnements par plusieurs moyens : domaine d'intervention de l'État, réglementation des sociétés ou entreprises privées, et droit de la concurrence. Le choix du moyen peut dépendre des différences de coût de mise en œuvre de ces moyens selon les circonstances. L'adoption d'un concept d'abus de position dominante inadapté aux marchés non assujettis à une réglementation économique figure parmi les coûts possibles. Par exemple, il vaut peut-être mieux traiter les pratiques de prix excessifs par la réglementation, puis éventuellement les attaquer au titre du contournement de la réglementation, que de les considérer comme un abus de position dominante.

47. Les dysfonctionnements du marché qui ont conduit à l'adoption d'une réglementation peuvent rendre abusive la pratique d'une entreprise. Par exemple, alors que, normalement, une entreprise qui refuse de vendre un bien ou un service n'encourt aucune amende au titre de la réglementation de la concurrence, si cette entreprise contrôle une infrastructure essentielle soigneusement définie, le refus par cette entreprise de permettre à d'autres l'accès à cette infrastructure est un abus de position dominante.

48. La réglementation économique adoptée pour remédier à des dysfonctionnements du marché peut le faire de façon incomplète. La réglementation économique ne contrôle qu'un tout petit nombre des décisions économiques d'une entreprise. L'entreprise peut avoir des agissements qui lui sont profitables et qui ne sont pas explicitement interdits par la réglementation, mais qui constituent néanmoins des abus de son pouvoir de marché ou qui excluent ses concurrents. Ainsi, une entreprise réglementée peut abuser d'une position dominante, aussi bien en violant la réglementation que par des agissements qui ne contreviennent pourtant pas à la réglementation.

NOTES

1. Dans cette décision, le tribunal a déclaré que « l'un des facteurs importants est l'existence d'une structure réglementaire ayant pour objectif de dissuader les comportements anticoncurrentiels et d'y remédier lorsqu'ils existent ». Le tribunal a estimé que « la réglementation dont il s'agit est un agent efficace de la lutte contre les pratiques anticoncurrentielles ». En l'espèce, le « léger avantage » de l'application de réglementation anti-trust ne compensait pas « ses coûts estimés de façon réaliste » [*Trinko*, pages 412, 413, 414]. Il faut préciser que, dans le cas soumis au tribunal, la réglementation traitait précisément de l'abus de position dominante allégué par le plaignant.

2. Le mot « État » se réfère ici aux cinquante États des États-Unis. Il faut distinguer les États de leurs subdivisions administratives. Ces subdivisions ne bénéficient de l'immunité que si l'État a autorisé le comportement anticoncurrentiel. Cependant, entre autres choses et en vertu du Local Government Antitrust Act de 1984, les collectivités locales et leurs dirigeants, ainsi que les personnes physiques qui agissent selon les instructions de ces derniers, ne peuvent pas être poursuivies pour préjudice au titre d'un comportement anticoncurrentiel.

3. Nous n'abordons pas dans la présente note la discussion sur « ce qui peut être l'objet d'une application de la loi sur la concurrence », par exemple, comment définir le mot « entreprise » tel que nous l'utilisons dans la note.

4. Le test SSNIP, ou test du monopoliste hypothétique, appliqué aux situations où les prix en vigueur résultent de l'exercice par l'entreprise de son pouvoir de marché (ce test consiste à se demander si une entreprise non réglementée, cherchant à maximiser ses profits, imposerait une augmentation des prix peu élevée mais nette et non transitoire sur un marché candidat), délimiterait un marché trop vaste car il indiquerait que certains produits sont des substituts alors que ce ne sont pas, de fait, des substituts à des prix concurrentiels.

5. Un dysfonctionnement du marché se définit techniquement comme une situation où le marché s'écarte de son équilibre tel qu'il devrait résulter des allocations optimales de biens et services selon Pareto. Une allocation optimale de Pareto est une allocation dans laquelle aucun agent économique ne peut améliorer sa position sans que cela se fasse au détriment d'un autre agent économique. Normalement, il ne faut pas s'attendre à un dysfonctionnement dans un marché parfaitement concurrentiel, parfaitement informé et où les transactions n'ont aucun coût.

6. De manière plus nuancée, on peut dire que lorsqu'une entreprise s'avère en position de monopole, pour que ce monopole soit répréhensible, il faut en outre que les agissements de l'entreprise soient (1) irrationnels du point de vue économique, nonobstant le fait que lesdits agissements ont des effets négatifs sur les concurrents, (2) ou que ces agissements contribuent à créer ou perpétuer un pouvoir de monopole et soient répréhensibles pour des raisons autres que celles visées par les lois anti-trust. Parmi les agissements qui entrent dans la définition (2), on peut citer la publicité mensongère, le dénigrement d'un produit, l'introduction d'instances judiciaires sans fondement, et la violation d'obligations réglementaires.

7. « L'exigence que le monopoliste ait une « raison commerciale légitime » ne peut pas être satisfaite par le motif qu'il s'agit d'empêcher une érosion de la situation de monopole (citation omise), mais les tribunaux ont cependant jugé que les objectifs d'une entreprise en situation de monopole visant à décourager les situations où certains peuvent bénéficier gratuitement des activités des autres, ou visant à améliorer son image, ou encore à faire bénéficier ses clients de coûts réduits, sont des raisons commerciales légitimes ». *City of College Station v. City of Bryan*, 932 F. Supp. 877 (S.D. Tex. 1996 cité dans ALD5 p. 284)

8. La définition d'une infrastructure essentielle est bien plus restrictive que la définition du monopole naturel. Les monopoles naturels ne sont pas tous des infrastructures essentielles.

9. Pour les tribunaux américains, il y a effet de ciseau lorsqu'une entreprise a un pouvoir de monopole sur un produit, que le prix de ce produit est « supérieur au juste prix », que ce produit est nécessaire pour participer à la concurrence sur un second marché où le monopoliste est également présent, et qu'il y a si peu de différence entre le prix d'amont et le prix d'aval fixé par l'entreprise en situation de monopole que les concurrents ne peuvent pas pratiquer les niveaux de prix d'aval et dégager des profits raisonnables (United States v. Aluminum Co. of America, 148 F.2d 416, 437-38 (2d Cir. 1945) cité dans ALD5, p. 269). Les tribunaux américains ont utilisé trois tests pour déterminer si le prix du bien objet de monopole est juste ou non : 1) si le prix de gros est inférieur au prix de détail, il y a alors présomption d'effet de ciseau ; 2) si l'entreprise intégrée verticalement aurait pu dégager un bénéfice en vendant à son propre prix de détail après avoir acheté à son propre prix de gros, il n'y a alors pas d'effet de ciseau; 3) si la marge bénéficiaire au niveau du prix de gros est nettement plus importante qu'au niveau du prix de détail, il y a alors probablement effet de ciseau illégal.

La Commission européenne, dans la Directive européenne relative à l'accès aux réseaux de communications, donne une définition subtilement différente de l'effet de ciseau qui, selon elle, intervient lorsque « la différence entre (les) prix de détail (pratiqués par les opérateurs puissants sur le marché) et les redevances d'interconnexion facturées à leurs concurrents fournissant des services de détail similaires ne permettrait pas de garantir une concurrence durable ». (Directive 2002/19/CE du 7 mars 2002 relative à l'accès aux réseaux de communications électroniques et aux ressources associées, ainsi qu'à leur interconnexion (directive "accès"), point 20). Dans la décision de la Commission *Napier Brown/British Sugar*, le test était de savoir si la marge sur les prix facturés par une entreprise ayant une position dominante sur le marché amont comme sur le marché aval, était supérieure à ses propres coûts dans l'activité aval et constituait une entrave à la concurrence. « Le maintien, par une entreprise dominante, qui est dominante aussi bien sur le marché de la matière première que sur celui d'un produit dérivé, d'une marge entre le prix qu'elle facture pour la matière première aux entreprises qui la concurrencent sur le marché du produit dérivé et le prix qu'elle facture pour le produit dérivé trop étroite pour refléter le coût de transformation de l'entreprise dominante elle-même (en l'espèce, la marge maintenue par BS entre le prix de son sucre industriel et le prix du sucre au détail par rapport à ses propres coûts de reconditionnement), avec pour effet de restreindre la concurrence sur le produit dérivé, constitue un abus de position dominante » [Décision de la Commission européenne 88/518/EEC OJ [1998] L-284/41, para. 66]). Le test *Napier Brown/British Sugar* est davantage similaire au deuxième test américain.

Les différences entre les approches américaine et européenne deviennent apparentes lorsque l'entreprise intégrée verticalement n'est pas dominante sur le marché d'aval (cela ne s'applique pas au test américain) ou lorsque l'entreprise intégrée verticalement est plus efficiente que ses concurrents non intégrés (la survie des concurrents est un facteur pertinent dans le test de l'UE), en raison peut-être des économies de gamme entre les deux activités.

L'Ofcom britannique (autorité de réglementation des communications) a eu à traiter plusieurs fois de plaintes pour effet de ciseau. L'Ofcom a eu recours à plusieurs variantes du test *Napier Brown/British Sugar*, mais elle souligne l'importance de l'allocation des coûts dans sa note où elle précise qu'elle « envisagera de près la méthode de l'allocation des coûts lorsque [le Directeur général de l'Ofcom] estime que cette méthode peut être utilisée pour contribuer à des agissements anti-concurrentiels ». Paragraphe 7.26 de « The Application of the Competition Act in the Telecommunications Sector », OFT 417 (Guide de l'Oftel sur la loi relative à la concurrence).

L'allocation des coûts intervient dans la question de l'effet de ciseau lorsque les coûts servent à réguler les prix d'amont. Il est utile de rappeler que les coûts fixes peuvent être alloués entre les activités de nombreuses manières différentes, en fonction des objectifs. Le prix d'amont est souvent réglementé pour assurer un financement « suffisant » des coûts fixes ou des coûts communs. Cela laisse une certaine latitude pour une entreprise de facturer un prix d'aval qui provoque un « effet de ciseau », mais pas un effet

d'éviction de la concurrence, si l'on considère que le coût marginal est le test à appliquer. Si le prix d'amont est réglementairement plafonné, on peut penser que l'entreprise peut facturer un prix d'aval moins élevé, avec un moindre financement des coûts fixes ou communs afin d'éviter un « effet de ciseau ».

On notera ici que le prix facturé par une partie de l'entreprise à une autre partie de la même entreprise n'entre pas en considération dans le test de l'effet de ciseau. Toutefois, en fonction de l'environnement réglementaire, le niveau des prix de transfert affecte la fiscalité et le chiffre d'affaires, et donc les bénéfices de l'entreprise.

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

04-Feb-2005

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/GF(2005)3/ANN1
Unclassified

Global Forum on Competition

ABUSE OF DOMINANCE IN REGULATED SECTORS

(Key issues for discussion in Sub-Sessions)

-- Session III --

This note includes the Key issues suggested FOR DISCUSSION of the case studies under review in the 3 Sub-Sessions (of Session III) of the Global Forum on Competition. The discussion of case studies will be held on Friday18 February 2005 and start in small rooms at 9.30 am sharp.

English - Or. English

JT00177983

KEY ISSUES FOR DISCUSSION IN SUB-SESSIONS

1. Issues for discussion in case studies

1. Most the cases to be discussed in Session III involve a dominant enterprise hindering rivals who must purchase an input from the dominant enterprise. The terms of the rivals' purchase influence their ability to supply the downstream market. The dominant enterprises use a variety of methods in these cases, broadly characterised as refusal to deal (Russia, Jamaica) or to interconnect (Peru), degrading the quality of service (Zambia), and pricing with an effect similar to tying (Latvia). In another case, the dominant enterprise introduces a new service and both ties it to services in which it is dominant and charges prices that are too low (Chinese Taipei). Two other cases might be better characterised as "abuse of economic dependency" (Senegal) and "exploitative abuse" combined with asymmetric information preventing buyers from taking countermeasures (China).

1.1 General issues

2. Where there is a choice between using regulation or antitrust, what are the criteria for choosing which instrument to use?

3. Where there is no regulatory option (e.g., the conduct is not prohibited by regulation, the regulator is not capable of acting), how do competition authorities constrain themselves not to become *de facto* regulators over the longer term and over larger spheres of the economy?

1.3 Issues for specific cases

Zambia

4. This case study deals with a long-term concessionaire in a unique port degrading the quality of access it grants rivals who must use the port. The concessionaire also intimidates its rivals' customers and uses information available to it in its role as port operator to its advantage.

- What are the criteria for deciding whether the Mpulungu Harbour and Port are an essential facility to which access should be mandated? Do the criteria include whether a facility's owner is the state? Whether the unintegrated rivals have already made relationship-specific investments?

- Long-term concessions for vital infrastructure are increasingly common, but cannot exhaustively describe the concessionaire's obligations toward unintegrated rivals. What are effective ways to ensure that concessionaires grant appropriate access to their rivals on appropriate terms?

- What is the purpose and effect of Section 3(f) of the Zambian Competition and Fair Trading Act, which exempts all matters to which the government is a party?

Chinese Taipei

5. This case deals with the introduction of a new service by the historical telecommunications monopolist, who also provides regulated access to network facilities to its rivals in the mobile telephony market.

- What are the criteria for deciding whether rivals should be given access to the new service?

- Given that different services incur different costs, but also that accounting for different costs is itself costly, what degree of de-averaging is reasonable?

South Africa

6. This case study deals with a request for interim relief by pharmaceutical distributors, who objected to pharmaceutical manufacturers and importers establishing a jointly owned distributor—subsequently sold to a third party—to be the unique distributor of their products.

- What evidence establishes or refutes "joint dominance" in an abuse of dominance case?

- When does exclusion from a market (not subject to regulation) constitute an offence, and when does it not?

Senegal

7. This case study deals with abuse of economic dependence. Some persons claim abuse of economic dependence to be a "buyers' side" analogue to abuse of dominance. Prohibitions of abuse of economic dependence are needed, in this view, when buyers' have too much bargaining power vis-à-vis sellers. An alternative view is that accusations of abuse of economic dependence are simply part of a private argument between parties over how to share monopoly profits jointly generated by complements, as in this case air transport and travel agent services.

- How are consumers affected by changes in the level of travel agent commissions?

- If Air France had no market power, would there be any concern about the terms it offers travel agents in Senegal?

- What market impact screens that insure that a competition authority's economic dependency cases promote competition as well?

Russian Federation

8. This case study deals with the denial of access to electricity transmission by RAO UES, which is also a dominant electricity generator.

- Deciding whether to mandate access to a facility involves balancing incentives to future investments in infrastructure against the current value of greater competition, product variety and the like. Does this balance shift when the owner of a facility is the state?

- Given the externalities of electricity transmission (one transaction can raise or lower the cost of completing another transaction), there is a legitimate requirement for generators to provide information to transmission operators. How does one determine what information must be supplied? How can commercially sensitive information be credibly protected?

Peru

9. This case deals with a telecom company, who is the unique mobile telephony licensee in Peru outside Lima, refusing to allow its rival's customers to "roam" using its facilities.

- Contrary to the conclusions in the case study, was this a question of network interconnection in an economic sense (even if it may not be in an engineering sense)?

- Under what conditions should network interconnection be mandated? Was this one of them?

Latvia

10. This case deals with the historical telecommunications monopolist pricing a bundle of services in such a way that providers of a single service—BTC rental—could not compete with the historical monopolist.

- What are the criteria for determining whether BTC rental is a relevant market?

- How does the nature of the regulation of voice telephony over public fixed-line and ISDN line lease affect the analysis of Lattelekom's pricing?

- What pricing of a bundle including BTC rental would *not* constitute an abuse?

Jamaica

11. This case deals with the owner of Kingston wharves denying access to the wharves by independent stevedoring companies.

- What are the criteria for deciding whether the Kingston wharves are an essential facility to which access should be mandated?

- Who are the consumers in this case? What do consumers lose when independent stevedoring companies are denied access to the Kingston wharves?

- If integrating stevedoring reduced costs, and Kingston wharves charged a lower price to customers who used the integrated service, would this constitute an abuse?

China

12. This case deals with school management rolling fees for monopoly-supplied, compulsory insurance into school fees, while school management receives fees from the insurance company.

- Did the insurance company have a dominant position?

- If so, what is the offence: Is it that the school management bundled unregulated insurance with regulated school fees? Is it that the insurance company and school management agreed that management would receive a payment for the bundling of insurance and school? Is it that the school management did not disclose the insurance fees so that parents did not have the information to take counteractions, such as seeking alternative insurance cover?

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

16-Feb-2005

Français - Or. Anglais

DIRECTION DES AFFAIRES FINANCIÈRES ET DES ENTREPRISES
COMITÉ DE LA CONCURRENCE

DAF/COMP/GF(2005)3/ANN1
Non classifié

Forum mondial sur la concurrence

ABUS DE POSITION DOMINANTE DANS LES SECTEURS REGLEMENTES
(Principales questions à examiner dans les sous-sessions)

-- Session III --

Cette note renferme les principales questions proposées POUR L'EXAMEN des études de cas traitées dans les trois sous-sessions (de la session III) du Forum mondial sur la concurrence. L'examen des études de cas aura lieu le vendredi 18 février 2005 et commencera dans les petites salles à 9 h 30 précises.

JT00178710
Ta 26502

Français - Or. Anglais

PRINCIPALES QUESTIONS À EXAMINER LORS DES SOUS-SESSIONS

1. Questions à examiner dans les études de cas

1. La plupart des études de cas à examiner au cours de la session III concernent une entreprise dominante qui gêne des concurrents contraints de lui acheter un intrant. Les conditions de l'achat par les entreprises concurrentes influencent leur capacité d'approvisionner le marché en aval. Dans ces cas, les entreprises dominantes recourent à diverses méthodes, que l'on peut définir d'une manière générale comme le refus de vente (Russie, Jamaïque) ou d'interconnexion (Pérou), la dégradation du service (Zambie) et la tarification avec effet similaire à l'achat lié (Lettonie). Dans un autre cas, l'entreprise dominante crée un nouveau service et le lie à des services pour lesquels elle occupe une position dominante tout en pratiquant des tarifs trop bas (Taipei chinois). Deux autres affaires pourraient être caractérisées plus justement comme un « abus de dépendance économique » (Sénégal) et un « abus d'exploitation » conjugué à une asymétrie de l'information qui empêche les acheteurs de prendre des contre-mesures (Chine).

1.1 Questions générales

2. Lorsque le choix existe entre la réglementation et la législation antitrust, quels sont les critères permettant d'opter pour l'un de ces deux instruments ?

3. Lorsqu'il n'y a pas d'option réglementaire (exemple : le comportement n'est pas interdit par la réglementation, l'autorité de tutelle n'est pas en mesure d'agir), comment les autorités de la concurrence s'emploient-elles à ne pas devenir des autorités de réglementation de facto dans le long terme et à ne pas élargir leur champ d'action?

1.3. Questions relatives à des cas spécifiques

Zambie

4. Cette étude de cas traite d'un concessionnaire à long terme dans un port unique qui dégrade la qualité de l'accès qu'il accorde aux entreprises rivales contraintes d'utiliser ce port. En outre, le concessionnaire exerce des pressions sur les clients de ses concurrents et utilise à son profit les informations dont il dispose en tant qu'opérateur portuaire.

- Quels sont les critères applicables pour déterminer si le port de Mpulungu constitue une infrastructure essentielle qui implique une obligation d'offrir l'accès ? Ces critères indiquent-ils si le propriétaire de l'infrastructure est l'Etat, et si les entreprises concurrentes non intégrées ont déjà réalisé des investissements spécifiques en vue de l'opération?

- Les concessions de longue durée pour des infrastructures vitales sont de plus en plus répandues, mais elles ne peuvent pas décrire de façon exhaustive les obligations du concessionnaire à l'égard de concurrents non intégrés. Quels sont les moyens efficaces de faire en sorte que les concessionnaires accordent un accès approprié à leurs concurrents dans des conditions correctes ?

- Quelle est la finalité de l'article 3(f) de la Loi zambienne sur la concurrence, qui exempte toutes les affaires où l'Etat est partie ?

Taipei chinois

5. Cette affaire traite de la mise en place d'un nouveau service par le monopole historique des télécommunications, qui fournit aussi un accès réglementé aux installations de réseau à ses concurrents sur le marché de la téléphonie mobile.

- Quels sont les critères applicables pour déterminer si les concurrents doivent se voir accorder l'accès au nouveau service ?

- Etant donné que différents services impliquent des coûts différents, mais aussi que la comptabilisation de divers coûts est elle-même onéreuse, dans quelle mesure une modulation des tarifs est-elle raisonnable ?

Afrique du Sud

6. Cette étude de cas traite d'une demande de mesures de redressement provisoires formulée par des distributeurs de produits pharmaceutiques, qui s'opposaient à ce que des fabricants et des importateurs de médicaments mettent en place une co-entreprise de distribution – revendue ultérieurement à un tiers – destinée à être le seul distributeur de leurs produits.

- Quels éléments de preuve établissent ou réfutent la « dominance conjointe » dans une affaire d'abus de position dominante ?

- Dans quel cas l'exclusion d'un marché (non soumis à réglementation) est-elle constitutive d'une infraction, et dans quel cas ne l'est-elle pas ?

Sénégal

7. Cette étude de cas traite de l'abus de dépendance économique. D'aucuns affirment que l'abus de dépendance économique représente l'équivalent, côté acheteur, de l'abus de position dominante. Dans cette optique, des interdictions de l'abus de dépendance économique sont nécessaires lorsque les acheteurs détiennent un pouvoir de négociation excessif vis-à-vis des vendeurs. Selon un autre point de vue, les accusations d'abus de dépendance économique font simplement partie d'un différend privé entre les parties sur le partage de profits monopolistiques générés par des activités complémentaires, en l'occurrence le transport aérien et les services d'agents de voyages.

- Dans quelle mesure les consommateurs sont-ils affectés par les variations du niveau des commissions des agents de voyages ?

- Si Air France n'avait pas d'emprise sur le marché, se préoccuperait-on des conditions qu'elle offre aux agents de voyages au Sénégal ?

- Quels sont les critères d'évaluation de l'impact sur le marché permettant de s'assurer que les cas de dépendance économique soumis à l'autorité de la concurrence impliquent aussi un effet stimulant sur la concurrence ?

Fédération de Russie

8. Cette étude de cas expose le refus d'accès au réseau de transport d'électricité par RAO UES, qui est également un producteur dominant d'électricité.

- Avant de décider s'il faut rendre obligatoire l'offre d'accès à une infrastructure, il convient de mettre en balance les incitations en faveur d'investissements futurs dans l'infrastructure et la valeur actuelle d'une intensification de la concurrence, d'une diversification des produits, etc. La balance penche-t-elle autrement quand le propriétaire d'une infrastructure est l'Etat ?

- Etant donné les externalités du transport de l'électricité (une transaction peut alourdir ou alléger le coût de réalisation d'une autre transaction), il est légitime que les producteurs soient tenus de fournir des informations aux opérateurs du réseau de transport. Comment déterminer les informations qui doivent être fournies ? Comment les informations commercialement sensibles peuvent-elles être protégées de façon crédible ?

Pérou

9. Cette étude de cas traite d'une compagnie téléphonique qui est la seule à détenir une licence de téléphonie mobile au Pérou en dehors de Lima, et qui ne permet pas aux clients de ses concurrents de pratiquer l'« itinérance » en utilisant ses installations.

- Contrairement aux conclusions de l'étude de cas, s'agissait-il d'une question d'interconnexion au réseau au sens économique (même si elle ne se pose peut-être pas au sens technique) ?

- Dans quelles conditions l'offre d'interconnexion au réseau devrait-elle être rendue obligatoire ? Etait-ce le cas ici ?

Lettonie

10. Cette étude de cas indique que le monopole historique des télécommunications a tarifé un groupe de services de telle sorte que les fournisseurs d'un seul service – location d'une ligne BTC – n'étaient pas en mesure de concurrencer le monopoleur historique.

- Quels sont les critères applicables pour déterminer si la location d'une ligne BTC constitue un marché pertinent ?

- Dans quelle mesure la nature de la réglementation de la téléphonie vocale sur ligne fixe publique et sur ligne RNIS louée affecte-t-elle l'analyse de la tarification de Lattelekom ?

- Quel type de tarification d'un groupe de services incluant la location d'une ligne BTC *ne constituerait pas* une pratique abusive ?

Jamaïque

11. Cette affaire traite du refus du propriétaire des quais de Kingston d'accorder l'accès aux compagnies d'acconage indépendantes.

- Quels sont les critères applicables pour déterminer si les quais de Kingston sont une infrastructure essentielle pour laquelle l'offre d'accès devrait être obligatoire ?

- Qui sont les consommateurs dans ce cas ? Que perdent les consommateurs lorsque des compagnies d'acconage indépendantes se voient refuser l'accès aux quais de Kingston ?

- Si l'intégration de l'acconage entraînait une baisse des coûts, et si les quais de Kingston appliquaient un tarif réduit aux clients utilisant le service intégré, cela constituerait-il une pratique abusive ?

Chine

12. Cette étude de cas décrit les pratiques de la direction d'un établissement scolaire qui intègre dans les frais scolaires des frais pour une assurance obligatoire fournie par le monopole, tandis que la direction de l'école est rétribuée par la compagnie d'assurances.

- La compagnie d'assurances exerçait-elle une position dominante ?

- Dans l'affirmative, en quoi consiste l'infraction : la direction de l'établissement a-t-elle regroupé une assurance non réglementée avec des frais scolaires réglementés ? La compagnie d'assurances et la direction de l'établissement scolaire ont-elles convenu que la direction recevrait une rémunération pour le groupage des frais d'assurance et des frais de scolarité ? La direction de l'établissement a-t-elle omis d'indiquer le montant des frais d'assurance, de sorte que les parents n'ont pas disposé des informations nécessaires pour réagir, et notamment pour chercher une autre couverture d'assurance ?

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

14-Jan-2005

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/GF/WD(2005)17
Unclassified

Global Forum on Competition

ABUSE OF DOMINANCE IN REGULATED SECTORS

Case submitted by Latvia

-- Session III --

This case is submitted by Latvia in view of its discussion in Sub-Session 1 on Friday 18 February 2005 (from 9.30 am).

JT00176939

English - Or. English

ABUSE OF DOMINANT POSITION IN ACTIVITIES OF UNDERTAKING "LATTELEKOM SIA"

By Mr. Ilze Lasmane
(Latvia)

1. The Competition Council of Latvia received a complaint in year 2003 that indications of abuse of dominant position have been noticed in the activities of the undertaking "Lattelekom SIA" (henceforth called "Lattelekom") – historical monopoly of fixed telecommunications. In November 2002, "Lattelekom" started to provide a combined service "Komforta ISDN" (henceforth called K-ISDN), which is based on the lease of ISDN telephone lines and the rental of a digital bureau telephone exchange (henceforth called BTC). A discount is applied to the subscription price for K-ISDN. The amount of this discount depends on the quantity of conversations over the public fixed-line telecommunications network. Besides, in the framework of the above-mentioned combined service, the lease payment for connection to an ISDN line is fixed at half the level of the lease payment for connection to a separate ISDN line, without any BTC rental. A plaintiff considers that in such a way "Lattelekom" uses its dominant position in a market of telecommunication services and thus forecloses the market of the rental of BTC, in which other market players would like to participate. These market players now only sell and install BTC and provide service for BTC. The market for the rental of BTC in Latvia seems to be profitable, because clients prefer to rent BTC, not to obtain them in their property.

2. According to the Law on Telecommunications (which was in force at that time) the sector is regulated by the Public Utilities Commission (PUC). It regulates the following activities:

- local, national and international voice telephony services over public fixed-line telecommunications network;
- public taxophone services;
- leased line services;
- data transmission and internet services.

3. Article 8 of the Law provides that PUC protects the interests of telecommunications service users and telecommunications companies and settle disputes between telecommunications companies, when the dispute is related to interconnection, special access and leased lines, as well as between telecommunications companies and telecommunications service users, when the dispute is related to the complaints by service users.

4. Providers of BTC selling and installing services in this case are neither telecommunications companies nor users of telecommunications services. Therefore the Law on Telecommunications cannot be applied and the Competition Council initiated proceedings under the Article 13 of the Competition Law which prohibits abuse of dominant position.

5. Until 1st January 2003, "Lattelekom" had legal, determined by law, monopoly rights to provide services of voice telephony over the public fixed-line telecommunications network, services of lease of lines and taxophone services. During year 2003, "Lattelekom" lost only approximately 3 per cent of its market share in providing voice telephony services and preserved its monopoly position in the market of leased lines. Thus, "Lattelekom" has a dominant position in two regulated markets – in the market for

voice telephony over the public fixed-line electronic communications network and the market for leased line service. Already one month before losing its monopoly position "Lattelekom" begun to provide a combined service K-ISDN, which included such services, which "Lattelekom" provides or could provide separately:

- lease of connection to two ISDN lines;
- rental service for BTC;
- allocation service of rights to use numbers of public telephony network from the national numeration plan;
- local, national, and international voice telephony services over public fixed-line telecommunications market.

6. In the frameworks of the combined service K-ISDN, discounts are offered, i.e. if the quantity of telephone conversations over the public fixed-line telecommunications network reaches a certain threshold, a discount for rental of BTC is applied. The analysis of information obtained by the Competition Council allowed the conclusion to be drawn that "Lattelekom", by gaining income from services of public fixed-line voice telephony, possibly subsides the provision of the service K-ISDN because, under certain circumstances, the monthly subscription price for the service K-ISDN becomes lower than the cost of providing this service for one month.

7. Other companies who want to enter the market of rental services of BTC, but who are not providers of voice telephony services over public fixed-line telecommunications network and are not providers of leased ISDN telephone lines, do not have the possibility to offer discounts to their clients, to be able to compete successfully with "Lattelekom". Thus, unequal competition conditions are created. By combining three services in one package (two of them provided by "Lattelekom" as the dominant undertaking) and by applying discounts which cannot be offered by other market participants, "Lattelekom" practically closes the market of BTC rental services, not allowing new market participants to enter this market. For clients the offer by "Lattelekom" is favourable, and in such a way "Lattelekom" keeps its existing clients and attracts new clients. The present consequences of such activities of "Lattelekom" are the foreclosing of the market, which has negative effects for competition in this market, and a possible consequence of this is a possible rising of prices for clients. Taking into account the above-mentioned considerations, the Competition Council made a decision that "Lattelekom" abuses its dominant position in the market for voice telephony services over public fixed-line telecommunications network and in the market of leasing ISDN telephone lines, and thus "Lattelekom" violates the prohibition provided by a general clause included in Article 13 of the Competition Law of Latvia.

8. With its decision, the Competition Council established the violation of the prohibition of abuse of a dominant position provided by Section 13 of the Competition Law, imposed on "Lattelekom" a legal obligation to cease such a practice and imposed a fine on "Lattelekom" in the amount of 500 000 lats (750 000 Euro).

9. "Lattelekom" appealed this decision. The court overturned the part of the Competition Council decision's imposing a legal obligation to cease the practice and the part imposing the fine but the court accepted the validity of the part of the decision establishing the violation. The reason for overturning the legal obligation was a procedural mistake made by the Competition Council. The reason for overturning the fine was the fact that the amount of the fine was calculated on the basis of "Lattelekom's" overall turnover in the previous financial year but not on the basis of its turnover in the relevant market, which is

less than 10 % of the overall turnover. “Lattelekom” could not indicate this turnover to the Competition Council until the start of court proceedings.

10. At the present moment,“Lattelekom” has appealed this court decision to a higher court.

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Global Forum on Competition

ABUSE OF DOMINANCE IN REGULATED SECTORS

Case submitted by Russian Federation

-- Session III --

This case is submitted by Russian Federation in view of its discussion in Sub-Session 1 on Friday 18 February 2005 (from 9.30 am).

English - Or. English

JT00176955

RUSSIAN FEDERATION
"ROSENERGOATOM" AGAINST RAO "UES RUSSIA"

1. In September 2001, MAP Russia received an application from the concern "Rosenergoatom" complaining about wrongful acts by RAO "UES Russia", which had refused to sign a contract with "Rosenergoatom" to render the services of electric power transmission.

2. In accordance with the Order of the President of the Russian Federation (of 10.04.00 No Pr- 705) "On elaboration of measures to increase the volume of exports of electric power produced by nuclear power plants", in April–May 2001 "Rosenergoatom" signed two contracts to deliver electric power. One was a contract with a German firm acting on the electric power market of the Republic of Georgia, "PBE Trading GMBx," to supply electric power to Georgia until 2006. The second contract was with an association of Ukrainian enterprises "Electro technical corporation "Elkor" (Kharkov) to deliver electric power to Ukraine. For realisation of these contracts, in accordance with Art. 435 of the Civil Code, "Rosenergoatom" had sent a formal request to RAO "UES Russia".

3. In response to the request by "Rosenergoatom", RAO "UES Russia" replied that it was impossible to sign a contract on transmission of electric power with "Rosenergoatom" before RAO "UES Russia" is given copies of the contract that was concluded between "Rosenergoatom" and "PBE Trading GMBx" and the contract between "Rosenergoatom" and "Elkor" (Kharkov).

4. "Rosenergoatom" refused to give the requested copies of the contracts, pointing out that all necessary technical information for signing and further realisation of the contracts was contained in the request, and the other information contained in the contracts between "Rosenergoatom" and the contracting parties is its commercial classified information and is not necessary for the consideration of the request for transmission of electric power. At the same time, "Rosenergoatom" showed its readiness to render additional technical information if it is necessary.

5. In reply to the mentioned letter, "Rosenergoatom" offered to eliminate from the contract text references to contracts, and after that send the new one for consideration by RAO "UES Russia" or to render the copies of the contracts.

6. As a basis of the legal position, the applicant provided the letter from RAO "UES Russia", which points out the groundlessness of "Rosenergoatom's" activity in signing the contracts with "PBE Trading GMBx" and "Elkor" because:

- in accordance with the Decree of the Government of the Russian Federation (of 12.07.96 No793) "On Federal wholesale electric power market" (further, "Decree on federal wholesale electricity market") such contracts should be previously agreed by RAO "UES Russia";

- "Rosenergoatom" offers electric power to foreign partners at dumping price, and it causes damage not only to RAO "UES Russia" but to Russian producers too.

7. The Commission [the decision-making body within the MAP] tested the proofs provided and listened to explanations by persons participating in this case, and decided:

8. RAO "UES Russia" occupies a dominant position on the market of electric power generation in the Russian Federation (share more than 65%), as well as on the services market of high voltage transmission (330kV and higher) of electric power (share more than 65%). It is inscribed in the Federal

section of the Register of Economic Entities which have market shares of more than 35%. Besides, RAO "UES Russia" is a natural monopoly subject according to Article 4 of the Federal Law "On Natural Monopolies" and is inscribed in the Register of Natural Monopolies.

9. In cases when, in accordance with the Code or other laws, the Party which has received the offer (draft contract) has to sign the contract, then according to paragraph 1 of the Article 445 of the Civil Code of the Russian Federation (further, "Civil Code"), this Party has to inform the other Party on acceptance, or to refuse the acceptance, or to inform on acceptance of the offer under other conditions (protocol of differences and draft contract) within thirty days after receiving the offer. Signing the contract on electric power transmission is obligatory for RAO "UES Russia" according to Article 10 of the Civil Code and Article 5 of the Federal Law "On Competition and Restriction of Monopolistic Activity at Commodity Markets" (further, "Competition Law") and Article 8 of the Federal Law "On Natural Monopolies".

10. RAO "UES Russia" infringed Article 445 of the Civil Code. The following actions, provided by the indicated Article, were not taken in response to the offer by "Rosenergoatom": refusal of the offer, acceptance of the offer, sending the protocol of differences.

11. At the same time RAO "UES Russia" has sent to "Rosenergoatom" a proposition to provide it with copies of the contracts between "Rosenergoatom" and "PBE Trading GMBx", and between "Rosenergoatom" and "Elkor". It is RAO "UES Russia's" opinion that, in accordance with the Decree on Federal Wholesale Electricity Market, these contracts should be preliminarily agreed by RAO "UES Russia" and RAO "UES Russia" has the authority to agree any contracts regarding electric power export. Therefore, the requirement to render the indicated contracts before concluding them is lawful. But the Decree on Federal Wholesale Electricity Market does not grant to RAO "UES Russia" the indicated authority. Besides, in accordance with Article 55 of the Constitution of the Russian Federation and Article 1 of the Civil Code, civil rights could be limited on the basis of Federal Law only as much as necessary in order to protect the grounds of the constitutional system, morality, health, rights and valid interests of other persons, providing defence and security of the country.

12. Representatives of RAO "UES Russia" could not explain to the Commission what RAO "UES Russia" meant by "dumping prices" and have not given any proof to support its own position. Moreover RAO "UES Russia" has no authority to control prices agreed by Parties when they sign either domestic or export contracts.

13. RAO "UES Russia" insists that it is necessary to know the conditions of the contracts on selling electric power signed by the applicants. This statement is not grounded on real conditions and legal rules, because all essential conditions of the contract on electric power transmission are contained in the request made by "Rosenergoatom" to RAO "UES Russia". Besides, contracts could not contain any additional obligations, because these contracts are bilateral agreements, and RAO "UES Russia" is not a Party to the agreement. The establishment of rights and duties for third persons in bilateral agreements without approval by the third person contradicts Article 421 of the Civil Code, and regulations containing such rights and duties are invalid and do not involve any legal consequences for third persons.

14. Therefore RAO "UES Russia's" requirement that "Rosenergoatom" render contracts on the sale of electric power as the reason not to conclude the contract on electric power transmission is invalid and infringes Article 445 of the Civil Code.

15. Nuclear plants belonging to "Rosenergoatom" produce electric power with the aim of delivering it to the market. But it is necessary to transmit electric power from producer to consumer via power lines in order to deliver produced electric power to the market, and RAO "UES Russia" is a monopolist and the owner of these power lines. Due to the fact that RAO "UES Russia" does not render the services of electric

power transmission to producers, especially to “Rosenergoatom”, the generating company has no access to the market of electric power.

16. The fact that RAO “UES Russia” does not sign the contract on electric power transmission in the established order and in established dates creates insuperable barriers for “Rosenergoatom” to enter the electric power market.

17. The Competition Law qualifies as abuse of a dominant position the creation, by an economic entity in a dominant position, of barriers to market entry by other economic entities.

18. According to Article 5 of the Competition Law and Article 10 of the Civil Code, abusing a dominant position is prohibited.

19. Taking into consideration the above-mentioned facts, the Commission made a decision to declare that the actions of RAO “UES Russia” that created barriers for “Rosenergoatom” to enter the electric power market violate paragraph 6 point 1 of Article 5 of the Law of the Russian Federation “On Competition and Restriction of Monopolistic Activity at Commodity Markets.” The Commission gave instructions to RAO “UES Russia” to eliminate the violation of the antimonopoly legislation.

20. All court authorities agreed on the legality of this decision of the federal antimonopoly body.

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ABUSE OF DOMINANCE IN REGULATED SECTORS

Case submitted by Zambia

-- Session III --

This case is submitted by Zambia in view of its discussion in Sub-Session 1 on Friday 18 February 2005 (from 9.30 am).

JT00176940

English - Or. English

MPULUNGU HARBOUR AND PORT: A SUMMARY OF COMPETITION ISSUES

1. Zambia is a landlocked country and therefore does not have an elaborate port system. The only significant port is Mpulungu Port, which is located on Lake Tanganyika (northern Zambia). Mpulungu Port offers easy and ready access by water to the western part of Tanzania, eastern part of Congo DR as well as Burundi and Rwanda (all these, including Uganda and Kenya are collectively referred to as the "Great Lakes Region.") The Port is regulated through the Ministry of Communication and Transport, while the Zambia Competition Commission retains responsibility for applying the competition law.

2. The Mpulungu Harbour and Port provides the easiest and cheapest route to those countries exporting goods into the markets in the Great Lakes Region. Also, given the type and nature of the terrain between these exporting countries and the market in the Great Lakes Region, it would be very costly to most, if not all, of the exporting countries to construct roads or a railway system into the market. Mpulungu is therefore a strategic and principal exit for Zambia's exports to the Great Lakes Region for products such as cement, maize and other agricultural produce. Zambia is part of the Common Market for Eastern and Southern Africa as well as of the Southern African Development Community, both of which promote *inter alia* trade in this region.

1. The Port

3. The average cargo through the Port per year is about 60 000 metric tonnes per year. However, it has the potential to handle up to 80 000 or even 120 000 metric tonnes per year.

4. The Port has two quays and an oil jetty. A quay is used for loading and off-loading vessels; one quay can only accommodate one vessel at a time. Currently, the oil jetty is also used for loading and off-loading cargo. Therefore, the Port can handle only three vessels at any one time.

5. The Port has three cranes, two forklifts and assorted other equipment to move loads around the port. However, the Port Operator has decided that all loading of vessels is to be done manually using labour, and off-loading is to be done by cranes. The Port Operator's justification is maintenance cost reduction.

6. The Port has four storage facilities, each with a capacity of 1000 metric tonnes. This storage could be expanded. However, according to the Concession Agreement, the Government and Port Operator must jointly fund any rehabilitation or upgrading at the Harbour and Port. The Government does not have the funds; indeed, in the past, it has used European Union funding for such projects.

2. Competitors, i.e., Port users

7. Currently, seven competitors use the Mpulungu Harbour and Port:

	Port User	Cargo (MT)	Approximate Market Share
1.	Agro-Fuel Investments	29, 535.82	50.1%
2	Cacitex (Z) Limited	21, 256.65	36.1%
3	Tanganyika C. Service	5, 335.80	9.1%
4	SDV (Z) Limited	1, 305.09	2.2%
5	Kaimbi C. Masters	1, 336.48	2.2%
6.	Powermack Freight	110.00	0.2%
7	Fedrol C. Masters	62.00	0.1%
	Total	**58, 941.84**	**100.00%**

3. The Concession

8. In line with the privatisation programme in Zambia, the Government decided to concession the Mpulungu Harbour and Port for the purpose of increasing the productivity and efficiency of the harbour, port, freight, transportation and associated services. The port had been managed by the Government through Mpulungu Harbour Corporation Limited (MHCL).

9. Mpulungu Harbour Corporation Limited is a Government parastatal that was managing Mpulungu Harbour Estate, Harbour and Port Operations and Assets prior to the Harbour and Port and the Assets being concessioned to Mpulungu Harbour Management Limited (MHML). Today, Mpulungu Harbour Corporation Limited's role is not that of Port Regulator but represents Government shareholding and interest and serves as the link between the Port Operator and the Government. In the year 2000, Mpulungu Harbour Estate, Harbour and Port Operations and Assets were concessioned to Mpulungu Harbour Management Limited by the Zambia Privatisation Agency (ZPA) after a competitive bidding process. That is, Mpulungu Harbour Management Limited became the Port Operator, responsible for operating and maintaining Mpulungu Harbour Estate and Assets and for providing harbour and port operations and harbour services.

10. The Concession Agreement provides that, "*The Concessionaire shall have the freedom to set and revise, in its contracts with customers, the conditions of cargo handling and the rates charged to customers for the handling of such cargo and passengers.*" (Article 19.3)

11. The Agreement makes provision for fair access: "*The Concessionaire warrants and undertakes to GRZ that it shall procure the Harbour and Port Services are available to the public and other commercial users on Arms Length Terms, provided however, that such use shall not unduly prejudice or interfere with the Concessionaire's operations hereunder, in doing so the Concessionaire shall procure that the public or other commercial users are not prejudiced*". (Article 62.1)

12. The Term *"Arms Length"* is defined in the preamble of the Concession Agreement as follows:

"Arms Length Terms shall mean: a transaction where

- The parties in negotiating the transaction have sought to promote their own best interests in accordance with fair and honest business methods;

- The consideration expressed in the agreement for the transaction entered into is the only consideration for the transaction;

- The price and other terms of the transaction have not been affected by, nor determined as a consequence of, any other agreement or any direct or indirect relationship (other than the relationship created by the transaction agreement) between the selling party or MHCL of the selling party, or a company in which the selling party is MHCL, and the buying party or MHCL of the buying party, or a company in which the buying party is MHCL; and

- Neither the selling party, nor any person or company connected with it through shareholding or otherwise, has any direct or indirect interest in the subsequent disposal, if applicable, by the buying party of any of the products or services obtained pursuant to the transaction agreement".

13. The concession period is 25 years, and subject to review every five years. The review focuses on operational matters. The Government may terminate the concession only if the Concessionaire defaults on its material obligations or ceases activity for 120 days. In particular, there is no specific competition provision in the Concession Agreement beyond that of Article 62.1.

4. Abuse of dominant position by Mpulungu Harbour Management Ltd

14. The Zambian Competition Commission believes that, whilst the concession agreement recognises the need for competition, Mpulungu Harbour Management Limited has violated the 'Arms Length' requirement specified in Article 62.1 by continuing to carry out anticompetitive practices to the detriment of the other competitors. Through its subsidiary, Agro-Fuel Investments Limited (Agro-Fuel), Mpulungu Harbour Management Ltd has played the role of Port Operator, Port User and Manager, contrary to the desired competition and concession principles.

15. Furthermore, the "Arms Length" provision, requiring fairness in dealing with other port users, implies that Mpulungu Harbour and Port is an "Essential Facility". It is an essential facility because:

- The position of the Harbour and Port cannot be replicated or acquired by other competitors (The geography of the Lake is not favourable to putting up several ports and none of the competitors has the financial capacity to put up a different port.)

- The Operator's competitors need access to the Harbour and Port in order to offer competitive service. Denial of access to this facility will mean failure on the part of the Port Operator's competitors to provide effective competition.

- The Port has the potential and capacity to handle both the Port Operator's (i.e. MHML's), services and the competitors' services without affecting the Port Operators' business (Current capacity utilisation is low due to problems ranging from security risks arising from the civil wars in the Democratic Republic of Congo and the Great Lakes Region to inadequate and inefficient operating facilities i.e. loading and off-loading equipment. Furthermore, the port is

in fact shared: Since the implementation of the Concession Agreement in July 2000, the Port Operator has on average been exporting 20 000 to 30 000 metric tonnes per year, with the immediate market challenger transporting 15 000 to 25 000 metric tonnes, leaving the rest to the smaller competitors.)

- It is controlled by a dominant player i.e. the Port Operator, which is vertically integrated. He is both a Port Operator and Port User. (The Port Operator's market share in the relevant market is above 50%. According to the Competition and Fair Trading Act, the threshold for a monopoly undertaking is 50% market share.)

5. Instances of abuse by Mpulungu Harbour Management Limited

16. Investigations carried out by the Zambia Competition Commission revealed that Mpulungu Harbour Management Limited was abusing his position as Port Operator and Port User by availing himself more usage of all the Port facilities and access to business opportunities. This is a contravention of competition rules and the spirit of the Concession Agreement. Investigations revealed the following:

5.1 Allocation of shipping space

17. The allocation of shipping space is totally unfair and is generally aimed at giving Agro-Fuel an unfair advantage over other Port Users. Shipping space is limited to the three vessels and three barges that transport cargo between the Port and the Great Lakes Region. The vessels are owned by the Batralac Shipping Company, travel as a group, and make a roundtrip once per month. The barges, also, travel as a group and make one trip per month. The Port Operator holds information on the departure of the ships (i.e. vessels and barges) for the Mpulungu Port and this information is not made available either to all Port Users or to the general public. The Port Operator then uses this information to privately and secretly allocate shipping space, with more space to himself and the remainder to the other Port Users. The existing "First In First Out" (FIFO) rule is not strictly followed and is manipulated by the Port Operator to his advantage.

5.2 The chartering of vessels

18. The frequency of chartering is higher for the Port Operator than the other Port Users. For instance, from December 2001 to August 2002, there were a total of 12 incidents of chartering vessels, out of which Agro-Fuel Investments Limited had 7 and 5 were for the rest of the competitors. In principle, the Port Users are required to discuss with the Port Operator prior to going into chartering arrangements with the shipping company. The Port Operator reserves the right to accept or refuse. The Port Operator may refuse on grounds that there is a shortage of vessels or barges and yet when it suits him, he can charter a vessel or a barge.

5.3 Choice of cargo to be loaded

19. Mpulungu Harbour Management Limited dictates the type of cargo to be loaded by the other Port Users so that he can load cargo that is marketable. In principle, the Port Operator must leave the choice of cargo to be loaded to be the prerogative of each port user since he or she knows the demands of his or her customers better. By dictating the type of cargo to be loaded, the Port Operator is abusing his position as Port Operator. This discrimination affects competition in that it actually aims at eliminating competition in the lucrative markets dealing with products in high demand. What has actually happened is that this has made some competitors run into liquidity problems and others subsequently collapsed.

5.4 Port storage

20. The Port Operator has kept this for his exclusive use. In response to repeated complaints, the Port Operator has made provisions to accommodate the competitors' cargo. This is entirely dependent on his discretion and there is no fixed system in place. Sometimes, other Port Users are forced to keep their cargo on trucks until it can be loaded onto the vessels. This incurs demurrage charges. In some cases, they have to consult the Port Operator before bringing cargo into the Port. This disadvantages them in that they cannot meet their customer demands and hence the risk of losing business is very high.

5.5 Back-loads

21 Agro-Fuel Investments Limited through Mpulungu Harbour Management Limited has monopolised this business. In principle, cargo owners are supposed to decide and chose the transporter or haulier they want. Unfortunately, this is not the case because the Port Operator threatens the cargo owners with denying them access to port facilities like loading and off-loading using cranes and storage facilities, etc. There are mainly two parties to this transaction, the shipping companies and the truckers or hauliers. It is important to appreciate that the Port Operator is also a transporter with his trucks bringing cargo into the port. Therefore, by forcing cargo owners to clear and transport their cargo exclusively through Agro-Fuel Investments, the Port Operator is disadvantaging other hauliers and restricting the economic benefits from this traffic to Agro-Fuel Investments alone.

5.6 Tariff increase

22. Two weeks after taking over the Port, Mpulungu Harbour Management Limited increased the tariffs by 46% without consultations and without notice. If this continues, it can render the other Port Users uncompetitive. The Concession Agreement grants the Port Operator complete freedom to set rates and conditions.

6. Attempts at dispute resolution

23. On 28th November, 2001, Zambia Privatisation Agency wrote to the Port Operator regarding: "Operations at Mpulungu Harbour". Zambia Privatisation Agency informed the operator about the complaints raised by the Port Users regarding the way the port was being managed and persistent complaints regarding the issue of space allocation. The Port Operator did not address and resolve these problems and hence their recurrence. Unfortunately, again the Port Operator has refused to cooperate with the various wings of Government. The Concession Agreement cannot be nullified because the conditions under which it can be nullified have not been met. Further, the Concession Agreement empowered the Port Operator to set the operating procedures. However, the Port Operator did not put in place operating procedures. This resulted in the various complaints from the other Port users.

7. Determination of the case

24. The Zambia Competition Commission constituted a Port Review Committee in January 2003, composed of the Ministry of Commerce, Trade and Industry, Ministry of Finance and National Planning, Ministry of Communication and Transport, Zambia Privatisation Agency and Mpulungu Harbour Corporation Limited to come up with a proposal for a "Standard Operating Procedures" to create transparency in the utilisation of the Harbour and Port by both the Port Operator and the other users. To this effect, a Memorandum of Understanding was drafted to cover the procedure for bringing about transparency in the utilisation of the harbour and port. This was done on the realisation that the harbour and port was an 'essential facility' and for effective competition to take place all competitors needed to access and use the harbour and port on a fair and non-discriminatory basis. If the terms of the Memorandum of Understanding are complied with, the Port Operator would comply with Sections 7(1) of the Zambian

Competition Act, which is meant to stop business entities, persons or groups of persons from preventing, restricting or distorting competition to an appreciable extent in relevant markets in Zambia and 6(1), which gives the Commission powers to monitor, control and prohibit acts or behaviour that are likely to adversely affect Competition and Fair Trading in Zambia.

25. The issues requiring transparency in the proposed "Standard Operating Procedure" were:

- Allocation of shipping space;
- Chartering of vessels:
- Choice of cargo to be loaded;
- Port Storage;
- Back-loads; and
- Tariff increase.

26. Given the situation that the Mpulungu Harbour and Port is a monopoly asset and taking into account the various violations arising from failure by the Port Operator to operationalise the Concession Agreement, the Port Regulatory Review Committee decided to put in place a "Standard Operating Procedures document", which would cover all the operating activities (indicated as issues requiring transparency), such that this would be a document governing the operations of the Port and would therefore be made available to all Port Users and stakeholders. In order to make it binding, all parties i.e. the Port Operator and the Port Users, were required to append their signatures to it. This was intended to be a self-checking mechanism that would eliminate secret decisions and actions. Consequently, it was expected that in this way, there would be free, fair and effective competition

27. The Port Users accepted the Memorandum of Understanding but the Port Operator refused on grounds that the Commission and the Port Regulatory Review had no powers under the Concession Agreement to direct him what to do and further that such actions were intended to take authority to run the Port from the Port Operator. The Port Operator further argued that the Commission was precluded from determining the matter by virtue of section 3(f) of the Competition and Fair Trading Act which exempts all matters of which the government is a party from the application of the law. In this case the government was party to the concession.

28. In this case, the Commission decided to implore on Government to attend to the anticompetitive practices. Consequently, the Commission recommended to the Ministry of Finance (a party representing Government in the Concession Agreement) to nullify and/or to review the provisions in the Concession Agreement that do and/or are likely to substantially lessen competition. The Government should remedy all the instances of abuse of dominant position by putting in place and implementing the said "Standard Operating Procedures Document." Further, the Commission identified all the anticompetitive provisions in the Concession Agreement and recommended the desired amendments.

29. The Government, before it could consider the Commission's recommendations, was stopped by the court proceedings against the Port Operator, the Commission and Government commenced in the High Court by the Port Users. However, it would appear the Government may consider the Commission's recommendation when the concession comes for review in September 2005. In the meantime, the Commission has used the press to create a public awareness about the matter. The Government can no longer ignore the anticompetitive practices being perpetuated by the Port Operator.

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ABUSE OF DOMINANCE IN REGULATED SECTORS

Case submitted by Jamaica

-- Session III --

This case is submitted by Jamaica in view of its discussion in Sub-Session 2 on Friday 18 February 2005 (from 9.30 am).

JT00176941

English - Or. English

JAMAICA'S CASE STUDY
REFUSAL OF ACCESS TO PORT FACILITIES
NOVEMBER, 2004

1. Introduction

1. In February 2002, the FTC received a complaint from a stevedoring company, Shipping Services Stevedoring Limited (SSL Limited) who sought the Commission's assistance in resolving the following issue: Kingston Wharves Limited (KWL), who owns berths 1-9 Port Kingston/Bustamante (hereafter referred to as Kingston Wharves) and who also operates a stevedoring company, issued a notice on December 11, 2001 which effectively denied independent stevedoring companies access to the port facilities which the latter deemed to be necessary to carrying out their commercial interest.

2. The Staff of the FTC was concerned that the refusal to grant access to the required facilities would allow KWL to extend its dominant position from one market to a neighbouring but separate market. Due to a 2001 Court ruling however, which prevents the FTC from holding hearings and thus from issuing directives, the Staff advised SSS Limited to take the matter directly to the Court under Section 48 of the Fair Competition Act (FCA). Under Section 48, any person who engages in conduct which is in contravention of the FCA is liable in damages for any loss caused to any other person by such conduct. The Staff also offered to provide an expert witness for the Court hearing; and committed to providing the parties to the dispute with a market delineation report.

2. Legal and factual context

2.1 Legal Context

3. The Staff examined the matter under Sections 19 and 20 of the FCA. Section 19 of the FCA defines the existence of dominant position:

> "For the purposes of the Act an enterprise holds a dominant position in a market if by itself or together with an interconnected company, it occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors".

4. Section 20(1) of the FCA states that "an enterprise abuses a dominant position if it impedes the maintenance or development of effective competition in a market." Under Section 20(2)(a), "an enterprise shall not be treated as abusing a dominant position if it is shown, *[inter alia*], that (i) its behaviour was exclusively directed to improving the production or distribution of goods or to promoting technical or economic progress; and (ii) consumers were allowed a fair share of the resulting benefit."

5. Therefore, once dominance is established, the conduct in question should be assessed to determine if it is anticompetitive. Where it is deemed to be anticompetitive, the Staff has to assess whether or not the conduct contributes to, or was exclusively directed to improving the production or distribution of goods, or to promoting technical or economic progress and consumers were allowed a fair share of the resulting benefit. If the conduct is found to be indispensable to the attainment of the above objectives, then KWL would not be treated as having abused its dominant position.

2.2 Factual context

6. There are two public multi-purpose ports in Jamaica: the Port of Kingston/Bustamante and the Port of Montego Bay (by road, there is a distance of 170km between the two ports). The Port of Kingston/Bustamante is divided into two separate facilities: Kingston Container Terminal (KCT), a dedicated container terminal; and Kingston Wharves (KW), a multi-purpose facility. The former is owned by the Government and operated by a private firm on a management contract, while the latter is owned by a public liability company which is listed on the Jamaican Stock Exchange.

7. There are several commercial activities taking place at any one port: infrastructure provision (the provision of the physical infrastructure necessary for port operations); stevedoring (the loading and unloading of cargoes from ship to the wharf); receiving, delivery and unloading (the receiving, assembly and storage of export cargoes in warehouses or holding yards, and the unpacking of imported containers; towage; and pilotage.

8. Each of the above activities represents different functional levels in the interlocking chain of activities which are required to run a port. While the strong complementarities which exist between the activities suggest that they can be supplied as a bundle, this does not mean that each of the functional levels cannot exist as a separate product market. Given the existence of single product suppliers of the different port activities in Jamaica the Staff took the view that each port activity is a separate functional level in the vertical supply chain.

9. Based on the complaint it was necessary to define two related markets. The first would be the market for the supply of access to whatever is in question, in this case, cargo freight infrastructure. The second would be the market for the good or service for the production of which access is needed, in this case stevedoring services. In defining the first market, the question was whether the relevant market included all types of cargo freight infrastructure (air and sea), or all ports, or whether it was confined to only those facilities provided by KWL. The relevant market therefore depended on the demand and supply substitutability between the different types of cargo freight infrastructure. The Staff found that given factors such as specialized cargo needs, topography and prohibitive transportation costs the market could be defined as the provision of public port facilities for non-containerized cargo in the Port of Kingston/Bustamante. With respect to the second market, the Staff held the view that stevedoring was a distinct product market which was geographically confined to or near the KWL infrastructure.

10. Given that KW handled all the non-containerized cargo in the Port of Kingston/Bustamante, the existence of high entry barriers (lack of suitable port locations in the metropolis area, etc.) and the absence of countervailing buyer power, KWL was considered to be a dominant player in the first market under Section 20 of the FCA. As a dominant port operator, KWL has the ability to engage in anticompetitive practices aimed at driving out its existing or potential competitors in ancillary markets such as the stevedoring and towage markets. KWL's notice, which if allowed would bar independent stevedores from its port facility, is an example of its ability to abuse its dominant position. If it is not prevented from barring independent service providers from using its facility, KWL, in the absence of regulation, will be in a position to charge the port users such as shipping operators, exporters and importers excessive prices for all port-related services.

11. While the Staff holds the view that a dominant undertaking has the right to advance its own commercial interest, such behaviour is not acceptable under Section 20 of the FCA if its actual purpose is to strengthen its dominant position and abuse said position. Further, the Staff did not accept the arguments advanced by KWL in justification of its action. According to KWL, its action was geared towards improving the efficiency of port operations and ensuring KW's financial viability. For KWL's conduct to qualify for an exemption under Section 20(2) of the FCA, it should impose only such restrictions that are

indispensable to the attainment of the named objective(s). It was the view of the Staff that the objectives of increased efficiency and financial viability could be attained via less restrictive means. The Staff therefore opined that KWL's conduct would not qualify for exemption and would therefore be in breach of the FCA.

3. Action taken

12. In 2002, the Supreme Court having heard agruments from both parties in the case, issued an interim injunction in which it ordered KWL not to implement the notice issued in 2001 or take "any steps calulated to prevent, hinder or deter the Plaintiff from engaging in stevedoring business, shipping agency business and/or ancillary operations in or with repect to berths 1-9 …..". The interim injunction which allowed for the maintenance of competition in the market for the provision of stevedoring services, is still in effect as the judge has yet to issue a final decision.

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

04-Feb-2005

English text only

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/GF/WD(2005)23
Unclassified

Global Forum on Competition

ABUSE OF DOMINANCE IN REGULATED SECTORS

Case submitted by South Africa

-- Session III --

This case is submitted by South Africa in view of its discussion in Sub-Session 2 on Friday 18 February 2005 (from 9.30 am).

JT00178045

English text only

NATIONAL ASSOCIATION OF PHARMACEUTICAL WHOLESALERS AND 8 OTHERS ('THE COMPLAINANTS') V. GLAXO WELLCOME (PTY) LTD AND 6 OTHERS ('THE RESPONDENTS') (68/IR/JUN 00)

1. Introduction

1. This is an application for interim relief by nine wholesale distributors of pharmaceutical products. Five of the respondents are pharmaceutical manufacturers and importers ("the manufacturers") who have established a joint exclusive distribution agency ("EDA") for their products. It is alleged that the manufacturers are in contravention of provisions of the Competition Act that proscribe restrictive horizontal practices (Section 4), restrictive vertical practices (Section 5) and abuse of dominance (Section 8).

2. What follows is essentially an edited excerpt of the Tribunal's decision in this matter. Given the subject matter of this discussion we have only dealt with the allegations concerning restrictive vertical practices and abuse of dominance. The full decision is available on the OECD and the Tribunal web site.

3. The Tribunal's decision to dismiss the application is presently on appeal to the Competition Appeal court. Note that it is an application for *interim* relief and hence it is decided on the basis of the filed papers alone and without the benefit of oral evidence. In the event of a factual dispute, the respondent's version is generally preferred in an application for interim relief.

2. The distribution of pharmaceutical products

4. In South Africa the pharmaceutical wholesalers have traditionally effected the distribution of pharmaceutical products from the manufacturers to the retail pharmacies. That is to say, specialist pharmaceutical wholesalers purchased pharmaceutical products from the manufacturers and then on-sold these to retail pharmacies and other small purchasers. The wholesalers generally received a standard rate of discount of 17,5% off the manufacturers' list price. The wholesalers retained a portion of this discount, the difference between their purchasing price and their selling price constituting their trading margin. The standard range of this trading margin appears to have been approximately 5%-7%. Note that the wholesalers generally trade in all products traditionally available from retail pharmacists including ethical pharmaceutical products, over-the-counter pharmaceutical products and a range of fast moving consumer goods.

5. In March 2000, a number of manufacturers who are the respondents in this matter jointly acquired one of the existing wholesale distributors which they then proceeded to transform into an EDA. The transformation essentially meant that the erstwhile distributor went from being a wholesaler, owning its stock and trading on its own account, to an agency distributor which distributed its principals' stock at an agreed fee. The name of the distributor was changed to Kinesis.

6. The terms of the EDA provided that the respondents would henceforth distribute all of their products through Kinesis alone. This applied to distribution to all of their customers including retail pharmacists, dispensing doctors, hospital groups and the State. Wholesalers, too, would have to acquire their product through the EDA on the same terms and conditions available to the retail trade. In other words, insisted the manufacturers, they were not refusing to supply the wholesalers, but were simply insisting that they receive the product from the EDA, Kinesis, on the same terms and conditions available to the retailers. The wholesalers insisted that the withdrawal of their discount would effectively eliminate

them from the market and accordingly they asked the Tribunal to find a number of anticompetitive practices covering restrictive horizontal and vertical practices and abuse of dominance. They requested an order which would effectively restore the *status quo ante*, in particular that would restore the discounts that distinguished their trading terms from those of their customers, the retailers

7. Note that the wholesalers had never been active in distributing pharmaceutical products to the large hospital groups and the State – these were serviced directly by the manufacturers. After its conversion from a wholesaler into a distribution agent, ownership of the products sold through Kinesis remained with the manufacturer until the sale to the customer. This, we emphasise, contrasts with the wholesale mode of distribution where the wholesaler, a trader, takes ownership of the product from the manufacturer. The wholesaler then on-sells these products to the retailer, in this way effecting the distribution of pharmaceutical products. In addition to the task of physical distribution, Kinesis performs a range of other distribution related services including the taking of orders and collection of payment on behalf of the manufacturers. Kinesis undertakes these services on behalf of each principal in exchange for a fee agreed between each principal and the distribution agent.

8. When this matter was first heard by the Tribunal, the panel upheld the wholesalers on the ground that the *joint* ownership by the manufacturers of the distribution agency contravened the prohibition on restrictive *horizontal* agreements. This finding was taken on review to the Competition Appeal Court which sent the matter back for a further hearing because of substantive and procedural shortcomings associated with the relief imposed by the Tribunal.

9. However by the time the matter came back to the Tribunal the manufacturers – cognisant of the Tribunals' attitude to their joint ownership of the distribution agent – had sold Kinesis to Tibbett and Britten ("T&B"), a UK logistics services provider. The manufacturers maintain that their relationships with their distribution agent are now governed by separate service level agreements concluded between the respective principals and T&B/Kinesis.

10. In the pharmaceutical industry – as with many consumer goods – there are a relatively small number of manufacturers whose products are purchased by the final consumer through a relatively large number of retail outlets. In the case of 'ethical' or patented pharmaceutical products these retail outlets are a myriad of pharmacists or 'chemists'. The manufacturer is thus confronted with the formidable task of ensuring that its product is available in the required quantity and form at the ultimate point of sale. In a word, the manufacturer is confronted with the task of *distributing* its product to the retailers.

11. There are a number of alternative mechanisms for effecting distribution. The manufacturer may simply be approached by the ultimate interface with the final end consumer, that is, the retailer, take orders for the product and arrange for its transportation to these points of retail distribution. Indeed, in the case of very large retailers of pharmaceutical products – these being the large hospital groups, most particularly, although not exclusively, the state hospital services – this is precisely how distribution is effected to this day. In other words, there is, in this important latter segment of the pharmaceutical manufacturing and distribution chain, a direct interface between the manufacturer, on the one hand, and, on the other, the vehicle through which the final end consumer acquires pharmaceutical products. There has been no need, presumably either on the part of the seller or the buyer, for an intermediary between these two ends of the chain and so the wholesale trade, precisely the intermediary between manufacturer and retailer, has largely been absent from this segment.

12. However, there are a large number of consumers of pharmaceutical products who do not procure their medicines by attending a hospital. Instead, they approach, in a manner not fundamentally different to a purchaser of, for example, clothing or grocery products, a high street retailer in order to satisfy their needs. However, unlike in the case of grocery or mass clothing products, and this largely because of

regulatory intervention, the retail pharmaceutical sector is not, at this stage, dominated by increasingly large outlets that are household names as in the area of grocery or clothing retail. Note that the rise of the large retail grocery supermarket chains has all but eliminated the grocery wholesale trade.

13. For a manufacturer, skilled in and focused on the innovation and production process, interfacing with a large number of retailer customers is highly undesirable. It is indeed, albeit for different reasons, no less taxing for a large number of retailers to deal with a small number of producers, particularly in an industry whose peculiar features demand that the retailer stock the product of all or most manufacturers. In other words, the high costs associated with transacting between a small number of manufacturers, on the one hand, and, on the other hand, a large number of retailers – costs borne in various ways by both parties to the transaction - have created an opportunity for a set of traders, the wholesalers, to simultaneously meet the requirements of both the manufacturers and retailers. Naturally, as in any trade, the rise of these intermediaries is accompanied by rules, associations, legislation, venerable firms and the like, by all the trappings of permanency. However, it is essential to understand that the rise of this intermediary trading function, however ordered and permanent it may subsequently appear to be, is rooted in a spontaneous, admirably opportunistic response to a particular set of market conditions and a changed set of market conditions may call forth a different response from the key participants.

14. The wholesaling function is, of course, by no means costless. It requires considerable investment and the investors naturally seek a reward – their decision to direct their resources to pharmaceutical wholesaling is not, after all, driven by commercial considerations, by the reward that the entrepreneurs and investors expect to receive in exchange for meeting a demand generated by market conditions. But they are traders – they seek their reward neither from those from whom they purchase product nor from those to whom they sell product. They garner their reward by buying cheap and selling dear. If market conditions change so as to cause a deterioration in the wholesalers' terms of trade then they will either re-position themselves, usually by identifying value-added services that they introduce into the market thus allowing them to maintain or increase their overall trading margins, or they will face the risk of decline and, ultimately, outright elimination from the market.

15. It is clear that the writing has long been on the wall both in this particular sector of the economy and in the business of distribution more generally. In the pharmaceutical sector it is common cause that there is a hitherto unprecedented effort by the purchasers of pharmaceutical products and by those who finance the purchase of these products to secure a decrease in their prices. The buyers have, in short, sought to counter-balance the power of pharmaceutical manufacturers. For instance, the formation of large pharmacy chains such as Pharmacare, Hyperpharm, Dischem and Galleria are, in large part, inspired by an effort to constrain the prices of pharmaceutical products. In addition, increased monitoring of prices by managed health care organisations and medical aids as well as efforts through the formulary system, are all driven by the desire to constrain the pricing of pharmaceutical products. But this has also meant the entry of the large buyer into an area traditionally characterised by small retail pharmacies. These large purchasers are, like the state, perfectly capable of interfacing directly with the manufacturer. They do not, in other words, require the intermediation of the wholesaler.

16. This pressure to constrain their pricing behaviour has also caused the pharmaceutical manufacturers to focus on costs incurred in the chain of manufacturing and distribution and this, too, explains their increased attention to the mode of distributing their products. In other words, there is no doubt that the manufacturers, pressured to constrain their own pricing, will look to decrease costs and to appropriate pockets of profit in the value chain. They have clearly decided that there are costs that can be squeezed out of the distribution chain and/or that there are profits to be appropriated in undertaking this function differently to the traditional wholesaler model. There is, however, nothing necessarily sinister about this albeit that it may reverberate to the detriment of established pharmaceutical wholesalers – it is simply part of the competitive process, a process that we are charged with promoting rather than reifying.

3. Assessment of alleged restrictive practices

17. As noted the wholesalers alleged contraventions of Section 4 (restrictive horizontal practices), Section 5 (restrictive vertical practices) as well as certain subsections of Section 8 (abuse of a dominant position). This summary will only deal with the allegations in terms of Sections 5 and 8.

3.1 The relevant markets

18. There are, in our view, two relevant markets implicated in this matter. The first is, strictly speaking, not a single market but a set of distinct markets. Given that a pharmaceutical product intended for one therapeutic use cannot be substituted by a product intended for another therapeutic use, anti-trust investigations of the pharmaceutical industry tend to use the ATC3 therapeutic categories as the bases for identifying the relevant pharmaceutical product markets. The important point to underline is that there can be no aggregation of pharmaceutical products into a single pharmaceutical product market.

19. It is argued that the second market is that for the distribution of pharmaceutical products. This is the market in which Kinesis is said to compete with the applicants, although, as we elaborate below, the wholesalers also argue that the manufacturers and wholesalers are competing in the distribution market.

20. A number of caveats are in order. In particular we are not persuaded that there is a separate market for the distribution of *pharmaceutical* products. On the face of it, it is arguable that the market is that for the provision of distribution services, rather than *pharmaceutical* distribution services. As we elaborate below, this has a major, even dispositive, impact on the applicants' allegations relating to foreclosure.

21. Moreover, the applicants contend that the manufacturers and wholesalers compete in this distribution market, or, at any rate, in what the applicants identify in their heads of argument as 'the relevant markets for the sale of products to retail pharmacies and to medical practitioners'. The gist of this argument seems to be that whereas previously only the wholesalers enjoyed direct access to the manufacturers, this has now been extended to retailers and medical practitioners as well. Because, under this new regime, both manufacturers and wholesalers interact directly with retailers, they are somehow divined to be competitors in the same market 'for the sale of products to retail pharmacies and medical practitioners.'

22. We understand that the manufacturers have decided to interface directly, through their agent, Kinesis, with the retailers of their, that is, the manufacturers', own products. We are prepared to concede, with some residue of doubt, that this places both wholesalers and distribution agent in the same distribution market - notwithstanding that the former trades in pharmaceutical products and the latter trades in distribution and logistical services we concede that both do, in effect, distribute pharmaceutical products. However, we cannot agree that this places the manufacturers and distributors in the same market. Even if the manufacturers had elected to perform all the distribution functions in-house, that is, through a fully vertically integrated distribution division, this would not make them competitors in the distribution market any more than performing security functions in-house would make them participants in the security services market. There is no iron law that says that the manufacturing process begins and ends at pre-ordained points, much less that it is illegitimate from a competition perspective for the manufacturer to engage in any activity beyond those points. The products belong to the manufacturers and our starting point is that they are entitled to distribute it to their various customers as they see fit, just as they are entitled to secure their premises as they see fit. Indeed, if the wholesalers were to permit the general public to purchase products directly from their premises, the retailers would have no recourse under competition law.

23. In fact, in this case, the manufacturers have not taken distribution services in-house – they have simply elected to determine price in a direct interface with the retailers and, in certain, but not all, instances they have decided that they will offer a uniform price regardless of the purchasers designation as 'wholesaler' or 'retailer'. Most of the physical acts associated with the task of ensuring that their products arrive at the purchasers' premises have been contracted out to a specialist provider of distribution services. If the wholesalers compete with anybody in this scheme then it is with the distribution agent and certainly not with the manufacturer. In short, further argument and evidence may well reveal that the wholesalers participate in the pharmaceutical wholesale market which, like the erstwhile market for typewriters, is in terminal decline, not because of a restrictive practice perpetrated by a customer or a competitor but because a wholly new product, a wholly new mode of distribution, has displaced it.

24. In summary, then, we conclude that there is a range of separate pharmaceutical product markets based on ATC3 categories. The distribution market is more difficult to identify with confidence on the basis of the evidence before us. Conventional wisdom appears to concede the existence of a market for the distribution of pharmaceutical products. However, as noted, we are not persuaded that a broader definition of this market is not appropriate.

3.2 Restrictive vertical agreements

3.2.1 Section 5(1) of the Act provides:

- An agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive gain resulting from that agreement outweighs that effect."

25. In this matter it is alleged that the respondents, by entering into contracts to establish an exclusive distribution agency, have fatally compromised intra-brand competition, competition between alternative sellers of the same brand. This, argue the applicants, should be of particular concern to the competition authorities because, it is alleged, it takes place in the context of an industry noted for the absence of inter-brand competition, competition between producers of alternative brands.

26. It is also alleged that the EDA effectively constitutes a barrier to new entry at the manufacturing level. Full-line wholesalers will, it is alleged, not be able to continue in business if they are not able to trade in the full range of pharmaceutical products. This means that pharmaceutical distribution will be dominated by agencies all in the exclusive service of active participants in the industry. Any would-be new entrant would then either have to persuade its competitors to undertake distribution on its behalf or, alternatively, face the formidable hurdle of entering at the distribution and manufacturing levels simultaneously.

27. In general, in order to sustain this allegation of likely foreclosure we would have to be persuaded that Kinesis is dominant in the pharmaceutical distribution market – which is manifestly not the case – or that it has entered into a conspiracy with the other EDAs. There is no evidence of such a conspiracy. But even this would not suffice to persuade us. There are other pharmaceutical distribution mechanisms in place, other, that is, than the various EDAs, to be found not least of all in the ranks of the present applicants. Moreover, as we have already indicated in our discussion of the relevant market, we have no reason to believe that other distributors, that is, providers of distribution and other logistic services in other sectors of the economy, would not be able to effect the distribution of pharmaceutical products. There are, we acknowledge, particular unique features that attach to the distribution of pharmaceutical products, but this applies to a range of products – fresh and frozen food products with their cold chain requirements is a pertinent example - and these have not precluded specialist logistic providers from meeting the

requirements of manufacturers of these products. For this reason we are yet to be persuaded that the relevant market for the purposes of our present examination is correctly identified as that for the provision of distribution services to the *pharmaceutical* industry.

28. The applicants counter that, whatever the theoretical prospects for new entry may be, this has not occurred for many years and that the allegedly low returns earned by the wholesalers are an effective deterrent to new entrants. Again, we are skeptical. Low returns may be endemic and permanent in the pharmaceutical wholesale trade. But this may be a signal that the wholesale mode of distribution has, like the typewriter, finally run into the sand. Wholesalers unwilling to grasp this nettle and reconsider their business model may well find themselves subject to endemically low returns. However, it is not for the competition authorities to protect them from their commercial folly. Certainly, as the present case exemplifies, there has been new entry by providers of logistic and distribution services. In other words, low returns may well be the outcome of a comfortable oligopoly whose participants are content with the easy life, with passing on pharmaceutical products and the associated margins to their long-standing and, it frequently appears, captive customers. Low returns are not necessarily indicative of robust competition.

29. We should note a feature of the exclusivity that attaches to this particular EDA. Certainly, Kinesis is exclusively contracted to perform a range of distribution and logistical services on behalf of its principals. But this does not preclude wholesalers from procuring product through the agency of Kinesis for on-sale to the retailers. Nor, naturally, are the retailers precluded from sourcing the principals' product through the wholesale channel. The wholesalers argue that by establishing an identical price for retailers and wholesalers any possible incentive for retailers to purchase their requirements from the wholesalers has been eliminated – the wholesalers would either have to charge the retailers a higher price than that available through the EDA or they would have to forego all margin. But this seemingly self-evident contention requires considerably closer scrutiny. Certainly, it is common cause that certain of the respondents still maintain an explicit price differential between its wholesale customers and its retail customers and that others continue to incentivise high volume purchases.

30. However even if we assumed that wholesalers and retailers were in fact charged an identical price, does this serve to eliminate the possibility of other pro-competitive offerings from the wholesalers? For example, the wholesalers insist that the full-line service that they offer is a convenient alternative for small retailers who, in the absence of such an offering, would have to place orders with a number of different EDAs. If this is indeed so, then why are wholesalers not able to charge for the convenience of one-stop purchasing? The greater frequency of the deliveries from the wholesalers is also presented as one of their competitive strengths. In other words, the EDA does not preclude the wholesalers from inserting themselves between the principals and their retail customers. However the test for a successful and sustainable pro-competitive insertion is that the wholesalers provide a pro-competitive rationale for their existence. If these additional offerings cannot be charged out, then it is clear that they are not valued by the market. It is not then for the competition authorities to foist these upon the market by providing that the wholesalers' position be secured through the provision of a price advantage.

31. Secondly, we have to examine the contention that the EDA has eliminated vigorous intra-brand competition, that is, competition between wholesale distributors of the identical pharmaceutical brand. Exclusive distribution arrangements do, per definition, eliminate intra-brand competition. However, there is insufficient evidence of vigorous competition between wholesalers (that is, intra-brand competition) in the pre-EDA era to sustain the allegation that this amounts to a substantial lessening of competition. We are asked to infer high levels of competition between the various wholesalers from the allegedly low returns earned by the latter. However, as already noted, this may well be indicative of a monopolist or a group of co-operating oligopolists who value the quiet life over and above high returns.

32. This latter interpretation is supported by other prima facie evidence of co-operation, rather than vigorous competition, between the wholesalers, the uniform discount demanded from the manufactures not the least of these indicators.

33. In the face of these prima facie indicators of co-operation as well as evidence submitted by the respondents we are not able to accept, without further evidence, the complainants' bald assertion of strong intra-brand competition for pharmaceutical products in the pre-EDA era.

34. We should also note the argument, widely supported in contemporary competition analysis, that holds that insofar as a diminution of intra-brand competition occurs as a result of an exclusive distribution arrangement, that this will be likely compensated for by more intensive inter-brand competition, that is, by competition between competing brands – in other words, that the distributor's focus on procuring competitive advantage for its clients brands will intensify competition with brands that do not enjoy the services of the distribution agent.

35. In opposition to this argument, the applicants contend that the pharmaceutical industry is characterised by unusually low levels of inter-brand competition. This contention appears to derive from two features associated with the market for pharmaceutical products. These are, first, the widespread use of intellectual property protection of pharmaceutical products. And, second, the 'must-have' nature of the product, the fact that product and brand selection of pharmaceutical products is made by the prescribing doctor thus eliminating the ability of the actual purchaser of the product to exercise any competitive choice.

36. We, of course, acknowledge ubiquitous use of patents in this sector. We note, however, the respondents' observation that even many patent protected products face competition from products applicable for the same broad therapeutic purpose. Moreover, we are constrained to observe that on closer appraisal of the evidence, the market for ethical pharmaceutical products may well be an innovation market, that is, that competition occurs in the innovation stage of the product life-cycle. This latter form of competition is not diminished by patent protection – indeed, it is competition in order to achieve patent protection in respect of a new innovation. The evidence before us does not justify a far-reaching judgment on the state of competition in the market for pharmaceutical products. We stress that further evidence and argument may well establish low levels of inter-brand competition in the pharmaceutical products market – certainly the exceptional returns posted by the pharmaceutical majors suggest low levels of competition. However, this conclusion cannot be justified on the papers submitted in this application for interim relief.

37. Even the 'must-have' nature of pharmaceutical product consumption has been called into question by relatively recent developments that have been highlighted by the respondents. We refer, of course, to increasing evidence of demand side buying power supported by legislative intervention that requires the use, under a range of circumstances, of cheaper products than those frequently prescribed by the consumer's doctor, as well as increasing pressure from medical aid schemes to contain costs.

38. In summary then, based on general pharmaceutical product characteristics – the widespread use of patent protection and the 'must-have' nature of the product – the applicants argue that inter-brand competition is already considerably muted and that the formation of an EDA will eliminate intra-brand competition. However, contrary evidence submitted by the respondents suggests that intra-brand competition has never been particularly strong and that inter-brand competition may well be a great deal more robust than suggested by the applicants.

39. In the absence of further evidence, we accordingly cannot find that the vertical agreement between the respective principals and the distribution agencies as represented by three EDAs in question

has resulted in a substantial preventing or lessening of competition in any of the relevant markets implicated in this matter.

3.3 Abuse of Dominance

40. The applicants also allege contravention of Sections 8 (a), (b) (c) and (d) (i). These contraventions would all constitute an abuse of a dominant provision.

3.3.1 Dominance

41. The threshold necessary to sustain an allegation of abuse of dominance is that dominance in a market should be established. It is here that the complainants' difficulties begin.

3.3.2 Section 7 of the Act provides that:

42. A firm is dominant in a market if:

- it has at least 45% of that market;
- it has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or
- it has less than 35% of that market, but has market power.

43. Market power' is defined in the Act as:

> 'the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers.'

44. Recall that we have identified two relevant markets. The first refers to a set of pharmaceutical products markets each defined by the ATC3 therapeutic categories. The second refers to the market for the distribution of pharmaceutical products, although as we have noted above, there is prima facie evidence suggesting that the market may be cast more broadly as a market for the distribution of consumer products.

45. We can find no coherent allegation regarding dominance in the second of these markets, the distribution market. Accordingly our discussion of the abuse of dominance allegations is focused on the pharmaceutical product markets.

46. With respect to the pharmaceutical product markets, the applicants have produced therapeutic class analysis tables to establish that the principals collectively hold market shares in excess of 45% in 31 ATC 3 classes and market shares exceeding 35% in 3 other ATC 3 classes. On this basis they conclude that *"the principals are jointly dominant or presumed to be dominant (i.e. have more than a 35% share) in 31 ATC 3 classes."*

47. With respect to this allegation of 'joint dominance', the respondents counter that

> "It is not sufficient to assert collective dominance (and we do not concede that the concept is recognised in our legislation) merely because the sum of the sales of the companies that use the same distributor is at least 35%. There can be no economic justification for aggregating sales in this way. Where GSK, Pfizer and Pharmacare products have similar therapeutic qualities they are competing products in a particular product market, properly defined, whether or not they use the same distribution agent."

48. We cannot but concur with the respondents. Even if we understand why a competition authority may elect to exercise particular vigilance towards a group of competing manufacturers using the same distribution agency - distribution being a particularly 'close to market' activity - the mere fact that they are doing so cannot be used to infer an agreement between the manufacturers and therefore cannot, of itself, infer 'joint' or 'collective' dominance for the purposes of sustaining a Section 8 allegation. Were we to permit this inference to be drawn we would expose every logistic or distribution service provider that had more than one client in the same market (as well as the clients themselves) to prosecution under Section 4 and, assuming that our Act does actually recognize the concept of abuse of *collective* dominance, Sections 8 and 9. In essence we would, by requiring that each provider of distribution services restrict itself to one client in each market, be severely inhibiting specialisation in the provision of these services. Indeed, the entire tenor of the applicants' arguments suggests that this is precisely the conclusion that they would have us draw.

49. In addition to 'joint dominance' the wholesalers allege that the manufacturers are individually dominant in a number of ATC3 categories.

50. The respondents, for their part, deny that dominance is proven in respect of the ATC 3 classes. They argue that in respect of certain products the manufacturer's patent may have expired, or other new innovative treatments may provide vigorous competition, or generic alternatives may be available. On this basis their expert report by Europe Economics, analyses the various markets and concludes that the degree of substitutability in the ATC 3 categories is such that the number of ATC 3 categories in which the respondents are dominant is relatively few.

51. The applicants, in addition to the evidence submitted on market share in the various therapeutic categories, allege, relying upon Section 7(c), that the respondents have market power.

52. In support of this allegation, the applicants insist, firstly, that the respondents' have the power to control price. This, they argue, is a consequence of patent protection and of the "must-have" nature of pharmaceutical products.

53. Clearly, patent protection confers a degree of monopoly power – this is its manifest intention. And while we have referred above to the submissions of the manufacturers in which they argue, inter alia, that even patented drugs are not immune from competition from other treatments in the same therapeutic category, there can be little denying the power conferred by a patent and the controversies surrounding the alleged willingness of the pharmaceutical manufactures to milk this power for all that it is worth. However, this having been said, it is indeed difficult to understand how the EDA confers 'additional' monopoly power on the patent holder. The source of the market power is the patent and this is not influenced by the distribution arrangement employed by the patent holder.

54. Secondly, the applicants argue that the principals have the power to behave independently of their customers and assert that this is evidenced by their unilateral alteration of the distribution pricing system and by the imposition of new trading terms and conditions via the EDA's. We will restate our response to this argument, which, although fundamentally flawed, constantly re-appears, in one guise or another, throughout the applicants' submissions.

55. The view supported by the applicants – and accepted for the purposes of this decision – is that the wholesalers and the logistic and distribution services specialists like Tibbet and Britten perform a distribution service for the pharmaceutical manufacturers. This is the basis of the applicants' insistence that they be rewarded for rendering this distribution service. The respondents, for their part, have decided to utilize the services of Kinesis, Tibbet and Britten's subsidiary. They have entered into a contract with Kinesis that appoints them their exclusive distribution agent. This is no different to appointing, on an

exclusive basis, a firm of auditors or attorneys or an advertising agent or a security company. During the contract period alternative firms of, for example, auditors will not expect to perform an auditing function for the entity in question and they will naturally not expect to be rewarded. Indeed the only basis for the applicants' insistence that, in the face of the EDA, they continue to perform distribution services and that they be 'rewarded' for so doing is that, in fact, they are, in reality, not providers of distribution services at all, but they are rather traders in, inter alia, pharmaceutical products. What has changed is not the 'reward' offered to them for performing the distribution service, but rather their terms of trade, terms that now include the cost of the distribution and other related logistical services, costs which have been internalised by the respondents in the form of an exclusive agency agreement with Kinesis.

56. The applicants are, of course, perfectly at liberty to continue as traders of pharmaceutical products. To do this may well pre-suppose that they improve their terms of trade that they bargain down the price charged by the manufacturers and/or bargain up the price they receive from the retailers. In order to improve their bargaining position they may, in turn, have to incorporate new services into their trading activities. But why should their inability to achieve more favourable terms of trade be construed as a manifestation of market power on the part of the manufacturers?

57. The mere selection by the manufacturers of a distribution agent does obviously not, in itself, reflect market power. Monopolistic market power would be manifest if a purchaser of distribution services were able to extract a sub-competitive price for the provision of these services. But there is no evidence for this, nor could there be. If the respondents insisted upon Kinesis delivering a competitive service at a sub-competitive price, then Kinesis would be at liberty to refuse the business and to compete for the distribution business of other pharmaceutical manufacturers, or, indeed, of manufacturers of any number of other products if the distribution market was defined broadly. The custom of the pharmaceutical manufacturers is undoubtedly incentive for the distribution service providers to bargain hard, to attempt to reduce costs in order to maintain a viable return and to introduce new and better services. But if, in the end, they are unable to agree on an acceptable rate and/or level of service, then the manufacturer would seek out another service provider and the distributor would seek out another purchaser of its services.

58. The wholesalers appear to contend that it is the exclusive element that manifests market power. But this too is untenable. There is an element of 'exclusivity' in every transaction – once I elect to purchase a motorcar, or, for that matter, the week's groceries, from a particular vendor, and then other vendors are 'excluded'. I will have been induced to support the chosen vendor by the superiority of her offering. This is why it has been recognised, from the earliest days of US anti-trust jurisprudence, that every contract contains an implicit 'restraint of trade' and this is precisely why the sweeping language of the Sherman Act has been moderated by a rule of reason. It was recognised that a literal interpretation of the Sherman Act's prohibition of every contract in restraint of trade would have the perverse consequence of restraining the operation of the market itself, rather than the anticompetitive conduct at which it was directed.

59. The principle outlined above is not affected by the fact that the commodity in question here is a service which is provided over a period of time, rather than a product supplied at a particular point in time. Exclusivity in the provision of the service, in particular the length of time for which it is granted, is simply part of the bargain. It takes no great insight to imagine the service provider conceding a lower price or a higher level of service in exchange for greater certainty in the form, on this occasion, of a time bound exclusive arrangement. In the normal conduct of trade these bargains are entered into every minute of every day. Certainly, as soon as the bargain is struck others are 'excluded', are 'restrained' from trading to a greater or lesser extent.

3.3.3 Abuse

60. Even if we proceed on the basis that one or other of the respondents 'individually' dominate 27 (founding affidavit) or 37 (replying affidavit) pharmaceutical product markets, the applicants would still have to establish that this dominance had been abused.

3.3.4 Section 8 of the Act provides:

61. It is prohibited for a dominant firm to:

(a) charge an excessive price to the detriment of consumers;

(b) refuse to give a competitor access to an essential facility when it is economically feasible to do so;

(c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anticompetitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or

(d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anticompetitive effects of its act -

(i) requiring or inducing a supplier or customer to not deal with a competitor;…"

62. The applicants Heads of Argument indicate that they are only pursuing abuse of dominance allegations under sections 8(d)(i) and 8(c).

3.3.5 Section 8(d)(i)

63. The wholesalers allege that the respondents are inducing each other, alternatively retail pharmacists and doctors, not to deal with the wholesalers, but with Kinesis.

64. In their Heads of Argument they state that:

> "The Principals have perpetrated an abuse of dominance by compelling or at least inducing the Complainant's customers to buy directly from them by offering them prices and/or discounts that the Applicants cannot match"

65. The respondents point out that the applicants have not established that they are competitors of the respondents, as envisaged by this section. They argue that pharmacists will choose to source product either from the manufacturers or the wholesalers on the basis of the distribution services offered, therefore, they compete in respect of the distribution service – not in respect of pharmaceutical products supplied. In this sense, the wholesalers and manufacturers compete at different levels of the supply chain, the wholesalers exerting no constraining force on the manufacturers at the product level, that is, in setting prices. They furthermore argue that "induce" cannot be interpreted broadly to include any manner of offering discounts based on volume of products purchased. We agree with this argument. More is required in terms of this section. It is the very essence of competition for competitors to compete for custom on the basis of superior offerings.

3.3.6 Section 8(c)

66. It is not clear from their papers whether the applicants are relying on the general species of exclusionary conduct in section 8(c).

67. In their Heads of Argument they state that:

> "The Respondents, with effect from 29 May 2000, effectively refused to supply their products to the Applicants at the customary discounted rate, or at any price which would compensate the wholesalers for the services they render or to enable them to compete effectively with the Principals in the sale of their products. As their products are no longer offered to wholesalers on terms and conditions that make it viable for wholesalers to trade in such products. This is tantamount to a refusal to deal because the concept of a refusal to deal covers not only pure refusal, but also where a dominant company is only willing to deal on an unreasonable basis…"

68. From their assertions in their Heads, it seems the applicants are seeking to encapsulate under this section their allegations that the manufacturers are denying them competitive access to their products; raising the barriers to entry into the distribution market; and ensuring that their accounts are paid for in preference to other creditors.

69. The respondents argue once again, that the applicants have not established, even on a prima facie basis, the markets in respect of which the respondents are dominant. They also insist that the evidence before us shows there are a number of efficiency and pro-competitive gains which arise from the use of the EDA.

70. It is not clear to us that the respondents' conduct is exclusionary. The applicants are clearly able to continue trading profitably in the respondents' products and the effluxion of time has demonstrated that they have not been ousted from the market. This point is elaborated on later in the decision. We refer to our decision in York Timbers Limited and Safcol Limited:

> "As already elaborated, we are not persuaded that the practice complained of, the reduction in the guaranteed supply from Witklip, is 'exclusionary' within the meaning of the Act - that is, it does not impede or prevent the applicant from expanding in the market but merely requires that it competes for its supply of raw material on terms similar to those available to its competitors. Moreover, even if the practice complained of were to be established as an impediment to the applicant's expansion in the market, it still remains for the applicant to establish the 'anticompetitive effect' of the practice, to show, in other words, that market power has been created or extended in consequence of the alleged act. This has not been done."

71. Our reasoning in the York case is applicable here.

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Global Forum on Competition

ABUSE OF DOMINANCE IN REGULATED SECTORS

Case submitted by Chinese Taipei

-- Session III --

This case is submitted by Chinese Taipei in view of its discussion in Sub-Session 2 on Friday 18 February 2005 (from 9.30 am).

JT00176938

English - Or. English

ABUSE OF MONOPOLISTIC POWER IN THE TELECOMMUNICATIONS SECTOR CHINESE TAIPEI

1. The practice concerned

1. Chinese Taipei's state-owned telecommunications company Chunghwa Telecom Co. (hereafter "Chunghwa") introduced the "099 Follow-me code" service ("099" service) on 7 September 1999. This service uses telecommunications and computer technologies on the telephone network to provide so-called intelligent services. Users are able to use these services to make collect calls, manage information, and check voice mail, as well as to benefit from answering and transferring programs. Information sent via the telephone to a user may be transferred to any designated terminal equipment (e.g. telephone, mobile telephone, or fax machine) in accordance with the transferring program set by that user.

2. Originally, Chunghwa set the rate of local calls at NT$1.7 for five minutes and the rate of local calls to mobile phones at NT$6 per minute. All of the other existing mobile phone operators set their mobile communications services at similar rates. Through its "099 Follow-me code" service, Chunghwa established a uniform rate of NT$0.06 per second (*i.e.* NT$3.6 per minute) for both local-099-local calls and local-099-mobile phone calls. In providing such a uniform rate, Chunghwa increased the rate of local calls an overwhelming 900%, whereas it decreased the rate of local calls to mobile phones 40%.

3. The price structure of the "099" service was extremely low (NT$3.6 per minute), compared with other mobile phone rates at that time (around NT$6.0 per minute), and therefore, it was extremely attractive to users. By the end of the first week after the introduction of the "099" service, more than 21,000 people had already subscribed to that service.

2. The factual context and the competition problem

4. Prior to significant amendments that were made to the Telecommunications Act on 5 February 1996, Chinese Taipei's telecommunications services were monopolized by the Directorate General of Telecommunications (the DGT) under the Ministry of Transportation and Communications (the MOTC). The amendments established a legal basis for opening up the relevant markets and split the DGT into two entities, with the new DGT acting as the sector regulator, and the state-owned Chunghwa serving as the incumbent operator to run the telecommunications businesses, ranging from data communications and mobile communications to the fixed networks.

5. The monopolized telecommunications services were liberalized in sequence: from paging, mobile phones, satellite phones and mobile data communications in 1997, and four years later, to the fixed communications networks in 2001. At the time the "099" service was introduced in 1999, Chunghwa was still the only telecommunications company operating in the fixed line telecommunications market. The liberalisation of the mobile phone market brought in five private companies to compete with Chunghwa in related businesses. All the private mobile phone companies, however, still needed to have access to Chunghwa's network facilities to provide their services.

6. According to the Telecommunications Act, the MOTC shall set administrative rules to govern and examine the tariffs of Type I telecommunications enterprises (i.e. facility-based carriers). The MOTC shall also prevent the setting of tariffs on the part of Type I telecommunications enterprises engaging in cross-subsidisation, thereby preventing them from hindering fair competition. This rule shall be applicable

to Type I telecommunications enterprises that also operate Type II telecommunications enterprises (i.e. non-facility-based carriers) or other non-telecommunications businesses.

7. To comply with the Telecommunications Act, Chunghwa submitted a rate proposal to the MOTC for approval before it was granted the right to provide the "099" service. Initially, the MOTC granted permission for that rate. However, later on, the MOTC realized there were some points that needed to be clarified, and thus, changed its permission to an interim one, with a two-month testing period. The issues considered by the MOTC included who should have the right to set rates, whether there should be two phases in the collection of fees, whether there should be cross-subsidisation, and whether Chunghwa should negotiate with competitors when its rate-setting affects competitors, and so on.

8. On 10 September 1999, soon after the "099" service was introduced, private mobile phone operators jointly filed a complaint with the competition authority, the Fair Trade Commission (the FTC). The complaint alleged that Chunghwa had structured the pricing of its "099" service in such a way that it may have been giving rise to undue pricing, cross-subsidisation, unfair competition, violation of private mobile phone operators' rate-setting rights and legitimate revenue.

9. In the complaint filed with the FTC, the private mobile phone operators claimed that Chunghwa's "099" service may have been obstructing fair competition in the following aspects:

- "Average pricing" constituted cross-subsidisation. For Chunghwa's "099" service, NT$0.06 was charged per second (NT$3.6 per minute) to transfer local calls to local telephones or mobile phones. The local calling rate at that time was NT$1.7 per five minutes, while the local calling rate to a mobile phone was NT$6 per minute. As the fixed line business had not yet been liberalized, Chunghwa was allegedly enjoying a monopoly in the local call market. As a result, with its "099" service, Chunghwa may well have been collecting a premium on local calls and using this premium to subsidize its shortfalls from calls to mobile phones, thus causing unfair competition in the mobile communications market.

- Chunghwa was in violation of competitors' rate-setting rights and the principles of the allocation of telecommunications fees. *The Regulations Governing Mobile Telecommunications Network Interconnection*, issued by the DGT, provides that the "Allocation of telecommunications fees for telecommunications between mobile networks and fixed line networks, but not international telecommunications, shall be processed in accordance with the following principles: ... the carrier on the calling end shall collect the telecommunications fee from the caller; the telecommunications fee revenue belongs to the mobile network carrier." However, in regard to the "099" service, Chunghwa decreased the local calling rate to a mobile phone from NT$6 per minute to NT$3.6 per minute and informed the private mobile phone operators that Chunghwa would take 76% of the telecommunications fee revenue. Chunghwa's practices were obviously violating the private mobile phone operators' rate-setting rights and the principles of the allocation of telecommunications fees.

- Clearly there was an issue of unequal access to the "099" service. Chunghwa's "099" service could only be connected to Chunghwa's local and mobile phone networks. Contrast this with non-Chunghwa mobile subscribers who could not transfer incoming local calls to their mobile phone through "099". This may have, indeed, caused subscribers to switch from private carriers to Chunghwa in order to use the "099" service.

10. The FTC, after completing its investigations, determined that Chunghwa had been using the revenues generated from its monopolistic position in the fixed networks to subsidize its mobile phone business that had only recently been opened up to competition. The alleged practice may have been having the effect of excluding competitors from the market, and hence, harming consumers' benefits in the long term.

3. Actions taken to solve the problem

11. The FTC is the sole competent authority of the Fair Trade Act which is the general competition law and which can be applied to all sectors in Chinese Taipei. However, considering that the price structure of the "099" service had been granted by the MOTC on an interim basis, to avoid legal uncertainty caused by any duplication of jurisdictions, the FTC decided not to take formal action against Chunghwa. Instead, it made a formal recommendation to the MOTC on 10 October 1999, as presented in the following:

- Chunghwa's "099" service may have had the effect of obstructing fair competition by collecting telecommunications fees for local calls and local calls to mobile telephones on an average-pricing basis. Thus, the FTC recommended "de-averaging": Chunghwa should only collect fees on the basis of its actual costs;

- When Chunghwa connects "099" calls to the mobile telecommunications networks, mobile phone carriers should have the rights to set and collect the telecommunications fees in accordance with the relevant laws and regulations so as to maintain competition in the mobile phone business; and

- Chunghwa should provide equal access to its "099" service to subscribers to other private mobile telephone carriers and avoid obstructing fair competition by means of unequal treatment without legitimate cause.

4. Final outcome of the case

12. On 24 November 1999, the MOTC formally replied to the FTC, stating its decisions to respect the FTC's recommendation and to reformulate the rate proposal of Chunghwa's "099" service as follows:

- To make the price structure transparent, telephone fees shall be separated into two parts: the first part to be paid by the calling party, and the second part, from 099 to local, long distance or mobile phones, to be charged to "099" users;

- To ease the concerns over cross-subsidisation, the rate of the first part shall be decreased to NT$0.02 per second, the rate of the second part, in the case of local-099-mobile, shall be decided by the individual mobile phone companies, in accordance with the actual costs and the principles of the allocation of the telecommunications fees;

- The current users of the "099" service could still enjoy the old rate until 6 March 2000; and

- The MOTC will consider fair competition as an important factor when examining telecommunications rate proposals in the future.

13. Chunghwa then reset its price structure of the "099" service so that it was in full compliance with the MOTC's instructions, and this solved the FTC's competition concerns. Nonetheless, unexpectedly, the FTC received numerous complaints from the "099" service users for raising the rate of that service. The FTC then had to make public statements, explaining that it was fully aware that innovations may produce

and enhance consumers' welfare and that it had always been positive to the telecommunications enterprises' introduction of new technologies and new services. However, anticompetitive practices, such as cross-subsidisation, deployed by the incumbent with a monopolistic position that could harm or even eliminate competitors in other competitive markets shall be prohibited or corrected.

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ABUSE OF DOMINANCE IN REGULATED SECTORS

Case submitted by China

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JT00176942

A CASE OF COMPULSORY INSURANCE VIA SCHOOL MANAGEMENT BY SOME INSURANCE COMPANIES IN PARTIAL LEAGUES OF INNER MONGOLIA

1. Outlines of the case

1. In the first half of 2001, during the process of carrying out supervision and inspection of the competition acts of the public utilities and any other business operators occupying monopoly status, the Industrial and Commercial Administration of Inner Mongolia Autonomous Region found that some insurance companies of partial leagues forced the students (pupils) to purchase personal insurance with the help of school management by using the special position of the school without the consent of the pupils and their parents and paying the school management certain insurance commission fees. For example, the Yi League Life Insurance (Branch) Company, by sponsoring a meeting on Dongsheng life insurance coordination issues, attended by the competent educational authority and some other organisations, put forward, in the form of minutes of the meeting, requirements that all the pupils and children in schools and kindergartens have to purchase insurance. In light of the requirements of the insurance company, the school management collected insurance premium from the pupils at the start the new school term at a time when collecting enrollment fees, without the consent of the pupils and their parents.

2. Because it was difficult to determine the nature of the acts conducted by the insurance company and school management, the Industrial and Commercial Administration of Inner Mongolia, on May 18th, 2000, made an application to the State Industrial and Commercial Administration for an interpretation on the legal issues resulted from this case.

2. Legal issues resulted from the case

3. Issues resulted from this case are the following three aspects:

- In accordance with the provisions as stated in Article 6 of the "Law of the People's Republic of China against Unfair Competition" that "A public utility enterprise or any other business operator occupying monopoly status according to law shall not restrict people to purchase commodities from the business operator designated by him, thereby precluding other business operators from fair competition", it is important to clarify whether the insurance company falls within the scope of "any other business operators occupying monopoly status according to law" or not. The answer to this question will directly relate to whether the provisions in the said article are applicable to the insurance company or not.

- In accordance with the provisions as stated in Article 2 (Sub-clause 3) of the "Law of the People's Republic of China against Unfair Competition" that a business operator as mentioned in this Law refers to "a legal person or any other economic organisation or individual engaged in commodities marketing or profit-marking services", it is also important to clarify whether or not the school (management) falls under "business operator" in this sense. The answer to this question will directly relate to whether or not the unfair competition acts conducted by the school management shall be punished according to the specific provision as stated in the "Law of the People's Republic of China against Unfair Competition".

- It is essential to clarify whether or not the insurance company's compulsory sales promotion of insurance by using the advantageous status of the school management falls within the prohibition of abuse of advantageous status.

3. Case Analysis

- Scope of restricting competition acts stated in Article 6 of the "Law of the People's Republic of China against Unfair Competition".

  In accordance with the provisions as stated in Article 6 of this Law, the transaction or competition restricting acts of the business operators from a monopoly industry such as public utility enterprises include not only the competition restricting acts conducted by the business operators from a monopoly industry such as public utility enterprises by abusing their advantageous status, but also collusion between business operators from a monopoly industry such as public utility enterprises and those from administrative organisations or other monopoly industry or other business operators occupying special advantageous status, as well as competition restricting acts conducted by means of other's advantageous status, which commonly exists in the insurance industry. In the practice of sales promotion of insurance, the insurance companies frequently provide their compulsory insurance by means of the business operators in a monopoly industry occupying monopoly status according to law, such as some administrative organisations such as security, traffic policeman and family-planning departments, or by means of the public utility enterprises such as railway, highway, fuel gas and electricity etc., or by means of some business operators of a the monopoly industry occupying monopoly status according to law such as commercial banks etc., or by means of the advantageous status of particular organisations such as hospitals, schools, parks etc.

- The compulsory insurance conducted by the insurance company with the help of school management is deemed to be an act restricting competition as stated in Article 6 of the "Law of the People's Republic of China against Unfair Competition".

  Most of the people from the State Industrial and Commercial Administration considered that the Insurance Companies shall fall under the "other business operators occupying monopoly status according to law" as specified in the "Law of the PRC against Unfair Competition". Firstly, the insurance company has specific rights assigned by the law on one hand, and it is subjected to control by the law on the other hand, thus it has a special status and is a business operator in a monopoly industry. Secondly, the monopoly status of the insurance company may be affirmed according to the specific provisions stated in the "Insurance Law of the People's Republic of China". According to relevant provisions in the Insurance Law, the setup of the insurance company shall apply special admission system and be subjected to special procedures for approval, and the insurance company shall engage in its business activities in line with specific rules without appropriate freedom of competition; additionally, the Insurer possesses monopoly status in the determination of insurance claims settlement, who can make decision on selection freedom of the insured or the assured. From what is mentioned above it can be affirmed that the insurance company is a business operator occupying monopoly status according to law.

  The information offered by the Industrial and Commercial Administration of Inner Mongolia shows that the school management performs sales promotion of insurance at school on behalf of/for the insurance company based on its entrustment and on the instruction of the insurance company, as a matter of fact school management provides its compulsory insurance. It can be

seen from the above that the insurance company and school management have precolluded and preconspired and agreed with respect to the joint implementation of compulsory insurance. As far as the subjective desire is concerned the compulsory sales promotion of insurance conducted by the insurance company and school management forms their joint intentional acts, while from the objective point of view the insurance company conducted compulsory sales promotion of insurance by using the advantageous status of the school. Based on the theory of joint violation of law, the acts of the insurance company and school management constitute an act of compulsory sales promotion of insurance, who shall bear administrative and legal liabilities accordingly.

What shall be noted is that during compulsory insurance by the insurance company, using the school management or other business operators occupying specific advantageous status, in case of neither having desire nor performing compulsory insurance to the opposite side but the opposite side conducted compulsory insurance unilaterally for the purpose of obtaining "insurance commission fee" agreed to be paid by the insurance company, in this case the insurance company will not bear liability for compulsory insurance. The liability for the above act of compulsory insurance unilaterally shall be borne by the school management. Therefore the relevant evidence for certifying whether or not the insurance company acts on compulsory insurance becomes essential.

- While offering profit-making services the school management falls under the business operator as stated in the "Law of PRC against Unfair Competition".

3.1 Different understanding to the business operator

4. It is specified in Article 2 (Sub clause 3) of the "Law of PRC against Unfair Competition" that "'A business operator' as mentioned in this Law refers to a legal person or any other economic organisation or individual engaged in commodities marketing or profit-making services". How to understand the definition of business operator as stated in the "Law of PRC against Unfair Competition" will directly relate to the application scope of this Law, which will not only be of great importance theoretically, but also have a significant influence upon the practice of law enforcement.

5. Currently there exists two different opinions regarding the definition of business operator in theoretical circle and based on the administrative management and law enforcement practice: one opinion concludes that a business operator must be a person who possesses the corresponding legal principal qualification, otherwise even though he/she engages in commodities marketing or profit-making services without corresponding the legal principal qualification, he/she will not fall within the scope of the term "business operator." The other opinion concludes that so long as one engages in commodities marketing or profit-making services and whether or not he/she possesses the said legal principal qualification for engaging in such activities, he/she will exceptionally fall within the scope of the term "business operators."

3.2 Evaluation and analysis on the above two opinions

6. In the first opinion, where the definition of a business operator is given from the viewpoint of legal principal qualification, there exists defects and deficiencies based on the provisions in the "Law of PRC against Unfair Competition" and realistic economic life. For example, the staff of the business operator does not possess business qualification but he/she may become an executor in respect of infringement of commercial confidence. For additional example, an administrative organ does not possess business qualification but it becomes the restricted principal as stated in Article 7 of the "Law of PRC against Unfair Competition". In our realistic life there exist lots of unhealthy phenomena where persons

without business qualification participate in unfair competition and perform actions restricting competition. These acts have always had a bad and harmful influence upon fair competition.

7. In the second opinion, there exists some merit from both the viewpoint of legal principle and actual rationality. That equal acts are subjected to equal legal evaluation reflects an important principle of equal and fair modern legality. The "Law of the People's Republic of China against Unfair Competition" protects the order of fair market competition. Anyone who violates the provisions as stated in this Law will exceptionally be investigated and punished whether or not he/she has a business qualification.

3.3 When engaging in profit-making services school management falls within the scope of the term "business operator"

8. From the viewpoint of principal qualification and in general sense school is affirmed to be a utility without taking profit-making as its goal, which will not fall within the scope of the term "business operator" as stated in this Law.

9. But from nature of the acts it conducted, school management performs profit-making services by sales promotion of insurance; although it does not have the principal qualification for carrying out various business activities including agency sales of insurance. In fact, however, in light of current educational and insurance regulations, it is impossible for the school management to obtain a legal principal qualification for agency sales of insurance. The acts, therefore, of violation of this Law during the school management's agency sale of insurance are identical in nature to those conducted by other business operators during their engagement in the same activities. From the viewpoint of the principle of modern law the same illegal acts shall bear identical legal liabilities. Because of it's engaging in profit-making services the school management should be affirmed to be a business operator as stated in Article of the "Law of the People's Republic of China against Unfair Competition" and regulated/punished in line with this Law.

4. Treatment

10. Based on the analysis mentioned above, the State Industrial and Commercial Administration has put forward the following treatment proposals to this case:

4.1 For the restricting competition acts conducted by the insurance company

11. The restricting competition acts conducted by the public utility enterprises or any other business operators occupying monopoly status according to law as specified in Article 6 of the "Law of PRC against Unfair Competition" refer to the abuse of its advantageous status as a public utility enterprise or any other business operator occupying monopoly status according to the law or restricting competition acts conducted by means of others advantageous status. The insurance company belongs to the category of a business operator occupying a monopoly status according to law as stated in Article 6 of the "Law of PRC against Unfair Competition", whose acts of compulsory insurance by means of the special status of schools, thereby precluding other insurance business operators from fair competition and violating the provisions as stated in Article 6 of the "Law of PRC against Unfair Competition" shall be investigated and treated according to the provisions in Article 23 of this Law, i.e. order the ceasing of the illegal acts and impose a fine of not less than 50,000 Yuan but not more than 200,000 Yuan in light of the circumstances.

4.2 For the restricting competition acts conducted by the school management

12. Because of its engaging in profit-making services the school management may be affirmed to be a business operator as stated in Article 2 of the "Law of PRC against Unfair Competition", that is, the acts of engaging in profit-making services conducted by the school management shall be regulated/punished in line with this Law.

13. In this law, however, for the acts of restricting transactions conducted by other business operators other than a utility enterprise or any other business operators occupying monopoly status according to law the applicable administration and legal liabilities have not yet been specified. Therefore how to treat the acts, according to law, of its compulsory insurance conducted by the school management, has no legal basis so far, it is suggested that the industrial and commercial administration authority stop such acts in terms of administrative warning or recommendations.

5. Updates

1. This case happened in 2001 when adequate competition had not been formed in the insurance market. It was the State Industrial and Commercial Administration that affirmed the insurance company to be an "enterprise occupying monopoly status according to law". At present in some fields of China's insurance market there exists keen competition. So it is worthy to be discussed whether or not the insurance company can continuously be affirmed to be "an enterprise occupying monopoly status according to law". But such cases of compulsory insurance by the insurance company using the advantageous status of an administrative organ, a public utility enterprise or other organisations will still happen, it is therefore of practical or immediate significance to deal with such cases.

2. To date in China the regulatory system for restricting competition acts in the insurance industry has greatly changed. Proper treatment of restricting competition acts happening in the insurance industry by the Insurance Supervision Commission instead of by the Industrial and Commercial Administration will further reflect the relationship between the competent institution in charge of insurance and the regulatory authority.

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ABUSE OF DOMINANCE IN REGULATED SECTORS

Case submitted by Peru

-- Session III --

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JT00176943

English - Or. English

TELE 2000 VS. TELEFONICA DEL PERÚ
TELECOMS OPERATOR APPLYING AUTOMATIC NATIONAL ROAMING

1. In Peru in 1995, TELEFONICA had a monopoly in fixed telephony (national and international calls). This monopoly had been established in the agreement between Peruvian government and TELEFONICA when TELEFONICA won the public concession offered by the Peruvian government in 1993. Besides that, Telefonica had the concession to operate the mobile telephony net in Lima – first concession acquired when it bought CPT – and in the rest of the country – second concession acquired when it bought ENTEL.

1. Roaming

2. Roaming is the attribute of mobile telephony systems that allows clients of one operator-undertaking to make and receive calls on their mobile phone using the net of another operator-undertaking. There are two kinds of roaming, manual and automatic. Manual is when one client communicates to his operator that he wants this facility in a specific place for a specific time, so his operator communicates to the other operator (the operator in the other place) in order that this operator includes in his system the client in the same way as it would include a client of its own. Automatic is permanent, the information of all clients who have this facility is in a centralized system and the mobile telephony systems of each operator connect to this centralized system to get the information.

3. In practical terms, roaming allows the clients of mobile telephony undertaking A to use their apparatus outside their service area by connecting to the net of another undertaking B. For this process to work, it is necessary for there to be a relationship between undertakings A and B.

2. Market structure

4. In 1971, the telecom market in Peru was divided into two government undertakings: CPT who provided fixed telephony services in Lima and ENTEL who provided fixed telephony services in the rest of the country, besides long distances calls, national and international.

5. When mobile telephony arrived, the Peruvian government gave concessions: two in Lima for TELE 2000 (A band) and CPT (B band) and one outside Lima for ENTEL (A band), however the government reserved B band outside Lima for being conferred in the future. So two undertakings competed in Lima (TELE 2000 and CPT) and only one—a different undertaking--outside Lima. In 1993 TELEFONICA bought CPT and ENTEL and in 1994 these two undertakings merged. So we have TELEFONICA and TELE 2000 with concessions in Lima competing and only TELEFONICA outside Lima.

6. In this scenario, TELEFONICA began to develop the ANR (Automatic National Roaming) and began to offer to his clients this facility, establishing an important difference in the market between the services provided by the two undertakings in Lima.

3 The case

7. In 1995 when TELEFONICA began to operate the ANR, his clients could move to any place in the country served by TELEFONICA’s mobile telephony net and make and receive calls. TELE 2000, on the basis of the agreement on Manual National Roaming entered into with ENTEL in 1991 asked for TELEFONICA to allow TELE 2000’s clients to accede to this facility. TELEFONICA communicated to TELE 2000 his decision to terminate unilaterally that agreement.

8. TELE 2000 sued TELEFONICA saying that the ANR was a telecommunication public service and therefore it should be available to the general public in exchange for a non-discriminatory monetary compensation and taking into consideration the operator's technical capabilities. TELE 2000 also said that competition law indicated that network and service interconnection is obligatory when there is a public and social interest; that TELEFONICA had a dominant position outside Lima because it was the only undertaking that provided mobile telephony service and denying this service to TELE 2000's clients was a violation of competition principles and it would constitute an abuse of his dominant position. TELE 2000 asked OSIPTEL (regulator and competition authority) to order TELEFONICA to grant access to the ANR's installation for his clients.

9. TELEFONICA answered the suit by saying that ANR was not a public service, the ANR was not an interconnection issue and TELE 2000 really wanted to enlarge the coverage of his concession and gain indirect benefits. TELEFONICA said that it had won the concession for mobile telephony service outside Lima and it had the privilege to exploit that right alone, and that that was not an abuse of his dominant position. TELEFONICA said that its refusal to deal with TELE 2000 was justified because to do so was opposed to its commercial interests and only TELE 2000 and TELE 2000's clients would be the beneficiaries if TELEFONICA provided the ANR services to them, besides, TELEFONICA would have to invest in its nets outside Lima to provide services to TELE 2000's clients.

4. Competition Authority

10. In Peru, OSIPTEL, Telecommunications Regulator, is also the authority who solves the competition cases in this sector. OSIPTEL has as its objectives to promote the development, modernisation and improvement of the quality of the telecommunications public services on the basis of the principles of non-discrimination, equity and neutrality. So, to solve this kind of case OSIPTEL has two perspectives, one with matters linked to obligations and rights of telecommunication sectoral regulations and the other with matters linked to competition rules and markets.

5. Telecommunications sectorial regulations

11. First it was necessary to determine if the ANR was an interconnection issue (regulatory matter) because the law says that interconnection is mandatory, so the case would be very clear. OSIPTEL said that ANR was not an interconnection issue because roaming is not assimilable to the interconnection concept; a network or service interconnection never occurs. Roaming really is a temporal integration of a client in the network of an undertaking with which this client does not have a contractual relationship. OSIPTEL also said that, contrary to what applies to interconnection, there are no laws that indicate the obligation to provide manual or automatic roaming.

12. So, considering that roaming is not interconnection and there is no law that says roaming is mandatory, OSIPTEL said that it is necessary to determine if it is possible to establish its obligation by the competition rules.

6. Competition rules

13. OSIPTEL should decide if TELEFONICA's conduct was an abuse of dominant position and a violation of the neutrality principle. First, the relevant market was defined. Geographically the relevant market was only Lima, because that market was the market where these undertakings compete. With respect to the services market, OSIPTEL said that this market was the mobile telephony in Lima because both undertakings offered that service in contrast to fixed telephony that does not allows mobility. So the relevant market was the market of mobile telephony service in Lima.

14. After that OSIPTEL had to decide if TELEFONICA had a dominant position. The competition law says what a dominant position is: "Dominant position in the market. It is understood that one or several companies are in a dominant position in the market when they can act independently regardless of their competitors, buyers, clients or suppliers because of such factors as a significant market share in the corresponding markets, the characteristics of supply and demand of products or services, the technological development and involved services, competitors' access to sources of funds or supply as well as distribution systems."

15. OSIPTEL said that TELEFONICA did not have a dominant position because the automatic national coverage, although it was an important advantage, would not seem by itself to be an element of TELEFONICA's offer which allows TELEFONICA to act independently of his competitors; there are other elements such as personal service, price, commercialisation net, complementary services, international roaming, which influence customers' decisions.

16. Having said that TELEFONICA did not have a dominant position, OSIPTEL proceeded to analyze whether TELEFONICA violated the neutrality principle. The telecommunications law says, "Because of the neutrality principle the operator of a telecommunications services which is in support of others' telecommunications services, or who has a dominant position cannot use these situations to provide simultaneously other telecommunications services with major advantages and with detriment to his competitors, using practices restrictive of free and fair competition, such as limiting interconnection or damaging services' quality.

17 In this case, OSIPTEL indicated that even if TELEFONICA did not have a dominant position in the relevant market, TELEFONICA had a dominant position in the market outside Lima; so OSIPTEL said that TELEFONICA transgressed the neutrality principle because it used its dominant position in the market outside Lima to generate advantages in the relevant market (Lima), TELEFONICA transferred his advantage to the relevant market. TELEFONICA, as the operator outside Lima, provided TELEFONICA's clients in Lima access to ANR while it gave TELE 2000's clients access to manual roaming. TELE 2000 could not compete with this offer because only TELEFONICA could provide it.

18. So OSIPTEL said that there was an objective situation which transgressed the neutrality principle and which was engendered by a dominant position.

7. Authority decision to solve the case

7.1 OSIPTEL ordered

19. TELEFONICA gives TELE 2000's clients access to ANR under the followed conditions:

- TELEFONICA and TELE 2000 would begin negotiations about the commercial, economic, technical and operative terms to give access to ANR to TELE 2000's clients. This negotiation would be completed within 7 days.

- To use TELEFONICA's net, the compensation would be established considering the magnitude of the ANR coverage; the installation cost; the traffic; the additional investment made by TELEFONICA to be able to provide ANR to TELE 2000's clients

- After 7 days, if TELEFONICA and TELE 2000 are not in agreement with all the terms, OSIPTEL would impose mandatory terms and conditions.

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

27-Jan-2005

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/GF/WD(2005)22
Unclassified

Global Forum on Competition

ABUSE OF DOMINANCE IN REGULATED SECTORS

Case submitted by Senegal

-- Session III --

This case is submitted by Senegal in view of its discussion in Sub-Session 3 on Friday 18 February 2005 (from 9.30 am).

JT00177611

English - Or. English

UNION OF SENEGALESE TRAVEL AND TOURISM AGENTS
vs.
AIR FRANCE

by Mr. M. Diawara
Chairman of the Senegalese National Competition Commission

1. The Union of Senegalese Travel and Tourism Agents (SAVTS) has 49 member agencies. These agencies sell international airline tickets for the 21 carriers serving Senegal, in exchange for commissions, as is standard practice elsewhere in the world.

2. For more than a decade, those commissions had been set at 9%. But things changed at the beginning of 2001, when Air France decided to reduce its commission rate to 7%, explaining that it was taking the action out of concern for "adapting its distribution costs to new global economic realities".

3. This decision was not endorsed by the travel agents, which through their Union lodged a letter of complaint to the National Competition Commission. That letter, dated 29 May 2001, alleged anti-competitive practices, and in particular abuse of dominance, citing Article 27 of Act 94-63 of 22 August 1994, which prohibits such practices in Senegal.

4. It could be considered from the outset that the incriminated practice was likely to infringe the rules on competition, insofar as various companies were believed to have consulted each other before Air France cleared the way as the most powerful company in the market, or in the relevant market segment, which was flights between Senegal and France.

5. The reaction by the Union of Senegalese Travel and Tourism Agents, which contended that the decision by Air France would cause their turnover to decline by 33% and would threaten thousands of jobs (see letter of 3 April 2001 to the Minister of Trade), was accompanied by a number of other actions and correspondence on the part of travel agencies at the international and African levels [United Federation of Travel Agents' Associations (FUAAV); Inter-State Federation of Trade Unions of Travel and Tourism Agencies of West and Central Africa (FISAVET/AOC)], meetings with the Senegalese press and retention of a lawyer.

6. In response to the complaint, the Competition Commission arranged for the selection of two investigators from the Internal Trade Directorate and appointed a *rapporteur*. It was subsequent to the inquiries and the investigation carried out by the *rapporteur*, during a session on 27 December 2002 at which both parties and their lawyers were present, that the Commission took a decision with regard to Air France.

7. The National Competition Commission found that Air France was in fact guilty of abusing a state of economic dependence, in the light of Air France's dominance of the relevant market, and of the airline's abuse of that position:

1. The Commission ruled that:

- Air France occupied a dominant position in the relevant market, not only because Air Afrique was no longer in business, but for other, psychological and historical, reasons as well. France was in fact the public's most popular destination, and for that reason Air France, to meet the strong demand, was serving Senegal with new 300-to-400-seat aircraft and had increased the frequency of its flights from 6 to 7 days per week.

- The travel agencies were in a state of economic dependence on Air France, which accounted for 50.72% of their combined turnover, and for between 54.79% and 86.98% of the turnover of five of the ten agencies covered by the investigation. In addition, they had no equivalent alternative. Some agencies, such as CSTT-AO, which had tried to work with other companies, could not get their customers to follow.

- Air France abused this state of economic dependence by unilaterally imposing a rate to which the travel agencies were forced to submit, and which they would not have accepted if they had enjoyed full independence.

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

14-Jan-2005

Français - Or. Français

DIRECTION DES AFFAIRES FINANCIÈRES ET DES ENTREPRISES
COMITÉ DE LA CONCURRENCE

DAF/COMP/GF/WD(2005)22
Non classifié

Forum mondial sur la concurrence

ABUS DE POSITION DOMINANTE

Cas présenté par le Sénégal

-- Session III --

Le présent cas est soumis par le Sénégal en vue de sa discussion en Sous-Session 3 le Vendredi 18 Février 2005 (à partir de 9 h.30).

Français - Or. Français

JT00176944

SYNDICAT DES AGENCES DE VOYAGES ET DE TOURISME DU SÉNÉGAL (SAVTS) CF. LA COMPAGNIE AIR FRANCE

Par Monsieur M. DIAWARA,
Président de la Commission Nationale
de la Concurrence du Sénégal

1. Le Syndicat des agences de voyages et de tourisme du Sénégal (SAVTS) regroupe en son sein 49 sociétés. Elles ont en charge de vendre les titres de transport internationaux émis par les compagnies aériennes au nombre de 21 au Sénégal et reçoivent, en retour, comme partout ailleurs dans le monde, des commissions.

2. Celles-ci étaient fixées à 9% pendant plus d'une décennie. Les choses vont changer quant, au début de l'année 2001, la compagnie Air France décide de rabaisser le taux de la commission à 7% expliquant cette décision par son souci « d'adapter ses coûts de distribution aux nouvelles réalités économiques mondiales ».

3. Cette décision n'emporta pas l'adhésion des agences de voyage qui, par l'intermédiaire de leur syndicat saisirent, par lettre du 29 mai 2001, la Commission Nationale de la Concurrence pour pratiques anticoncurrentielles, notamment pour abus de domination sur le fondement de l'article 27 de la loi 94-63 du 22 août 1994 qui, au Sénégal, réprime de telles pratiques.

4. La pratique incriminée pouvait être considérée, dès le départ, comme susceptible d'enfreindre les règles sur la concurrence dans la mesure où différentes compagnies se seraient concertées avant que la compagnie Air France n'ouvre la voie pour être la compagnie la plus puissante sur le marché ou segment de marché considéré : la destination France – Sénégal – France.

5. La réaction du Syndicat des agences de voyages et de tourisme du Sénégal (SAVTS) selon lequel cette décision réduirait leur chiffre d'affaires de 33% et menacerait des milliers d'emplois (lettre du 3 avril 2001 au Ministre du commerce) a été accompagnée de plusieurs démarches et correspondances des agences de voyages au niveau international et africain (FUAAV, FISAVET – AOC), de rencontre avec la presse au Sénégal et de commission d'un avocat.

6. Saisie du différend, la Commission de la Concurrence obtint la désignation de deux enquêteurs de la Direction du Commerce Intérieur et nomma, en son sein, un rapporteur. C'est au terme de l'enquête et de l'instruction menée par le Rapporteur que la Commission, en sa session contradictoire (présence des parties et de leurs avocats) du 27 décembre 2002, prit une décision à l'encontre d'Air France.

7. La Commission Nationale de la Concurrence a retenu l'abus d'un état de dépendance économique contre Air France en considérant, d'une part, la domination de Air France sur le marché en cause, d'autre part, l'abus de cette position :

1. Pour la commission

- Air France occupe une position dominante sur le marché considéré non seulement en raison de la disparition d'Air Afrique mais aussi pour d'autres causes qui sont d'ordre psychologique et historique. En effet, la destination vers la France est la plus prisée par la clientèle de sorte que Air France, pour faire face à la forte demande, dispose au Sénégal de

nouveaux aéronefs de 300 à 400 sièges et que d'une fréquence de 6/7, la compagnie est passée à une fréquence 7/7.

- Les agences de voyages sont en état de dépendance économique vis à vis d'elle puisqu'elles réalisent globalement avec elle un chiffre d'affaires moyens de 50,72% avec des pointes entre 54,79% et 86,98% pour cinq des dix agences retenues par l'enquête. En outre, elles n'ont pas de solution équivalente. Certaines, comme la CSTT-AO, qui ont essayé de travailler avec d'autres compagnies, n'ont pas été suivies par la clientèle.

- L'exploitation abusive de l'état de dépendance économique a consisté pour Air France à imposer unilatéralement aux agences de voyages un taux auquel elles ont été obligées de se soumettre et qu'elles n'auraient pas accepté si elles avaient joui de leur indépendance.

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

24-Mar-2005

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/GF(2005)4/REV1
Unclassified

Cancels & replaces the same document of 09 March 2005

Global Forum on Competition

PEER REVIEW OF TURKEY'S COMPETITION LAW AND POLICY

-- Note by the Secretariat --

This note by the Secretariat was revised further to the Peer Review under Session IV of the Global Forum on Competition (17 and 18 February 2005). It is circulated FOR INFORMATION.

JT00180988

English - Or. English

COMPETITION LAW AND POLICY IN TURKEY

Box 1. Summary

This Report assesses the development and application during the last three years of competition law and policy in Turkey. It follows an OECD report prepared in 2002 as part of a larger regulatory reform study. The previous Report found that the Turkish Competition Authority ("TCA") had made a good start since it began operations in late 1997. The agency has continued to make excellent progress since 2002, and has developed a reputation as one of Turkey's most effective and best administered agencies. It has pursued its mission with energy, imagination, and integrity and has won respect and support from leaders in the business community. Most importantly, it has played a critically important role in moving the Turkish economy forward to greater reliance on competition-based and consumer-welfare oriented market mechanisms.

The TCA does, however, face problems of the kind that often confront competition agencies in economies with a long tradition of strong government control. Public understanding of and appreciation for competition policy is far from well developed. The agency's law enforcement efforts are slowed by inexperienced judicial review organs. And support from other parts of the government is less than complete, although this is partially offset by the government's recognition that improving the competition policy framework will advance Turkey's goal of membership in the European Union.

The Competition Authority's particular strengths include its devotion to the articulation and efficient implementation of sound competition policy; its focus on due process and transparency; and its attention to the development and training of expert staff personnel. Its status as agency with fiscal and administrative autonomy, and the absence of substantive interference in its work by the government, also contribute significantly to its efficacy. It deserves commendation for its efforts to implement the recommendations addressed to it by the previous Report. Specifically, it has since 2002 advanced its competition advocacy activities within the government (in the privatisation process and elsewhere), assured timely resolution of merger review proceedings, sought to improve coordination with sector regulatory agencies in Turkey, and attempted to expand cooperative relationships with competition agencies in other countries. The agency's weaknesses include some disorganisation in its approach to harmonisation with EU competition law and the continuing problem of developing a robust competition culture. The most serious problems with competition law and policy in Turkey, however, entail not TCA operations but statutory deficiencies that will require Parliamentary action to correct. Necessary legislation includes institution of a mechanism to control state aids, elimination or control of state-created commercial enterprises that are vested with monopoly concessions or anticompetitive privileges, establishment of a mandatory role for the TCA in reviewing proposed laws and regulations, and modification of the Competition Act to improve the TCA's law enforcement capacity.

This Report makes proposals designed to address the full array of competition law and policy issues in Turkey today, and examines a variety of topics, including the competition policy provisions in the Customs Union Agreement between Turkey and the European Union, the interaction between the competition law and other statutory and regulatory regimes, the terms of the Competition Act itself, and various policies of the Competition Authority. Some of the following proposals recommend action by branches of the government other than the TCA, while some involve changes that the TCA itself can make. In the first category, the Report recommends that Turkey:

- Promptly establish a mechanism for controlling anticompetitive state aid;
- Eliminate or control state-created enterprises that are vested with monopoly concessions or with

powers and privileges enabling them to undertake anticompetitive conduct;

- Restore competition policy oversight of banking sector mergers;
- Mandate an explicit role for the TCA in regulatory analysis; and
- Improve the TCA's law enforcement capacity by amending the Competition Act to:
  - Simplify merger notification standards;
  - Adopt a revised standard for assessing mergers;
  - Modify the deadlines for the merger evaluation process;
  - Increase maximum fines for violations other than substantive infringements and make early consummation of mergers a substantive violation;
  - Create a *de minimis* exemption for agreements involving small enterprises;
  - Eliminate both mandatory notification of agreements and the negative clearance procedure, and consider modifying the 5-year duration limit for individual exemptions;
  - Establish a procedure for the settlement of cases by consent;
  - Eliminate minimum fines and authorize the TCA to offer lenient treatment to cooperative firms;
  - Establish personal fines and consider criminal penalties for managers who are responsible for substantive violations; and
  - Expand due process protections in TCA proceedings.

In the second category of proposals, the Report recommends that the Competition Authority:

- Adopt a more organized approach to harmonisation with EU competition law;
- Expand consultation with sectoral regulators;
- Exercise due care in employing the concerted practice presumption;
- Enhance transparency, particularly with respect to developing proposed statutory amendments and communiqués, and determining the size the fine assessments;
- Leverage and expand the Authority's reach through international co-operation;
- Consider requesting statutory authority to employ investigative powers in conducting non-law enforcement market studies;
- Promote public understanding of and support for competition policy; and
- Increase the numbers and expertise of TCA lawyers and augment the TCA's industrial organisation competence.

1. Competition policy in Turkey: foundations and context

1. This report assesses the development and application of competition law and policy in Turkey since 2002. It updates the OECD's "Background Report on the Role of Competition Policy in Regulatory Reform," prepared in 2002 as part of a larger OECD study of regulatory reform in Turkey (hereafter "2002 Report").[1] As did the previous Report, this analysis begins with a description of the background of competition policy in Turkey and the context in which it operates.

2. Turkey's economic policies after World War II resembled those of many other developing countries. State monopolies supplied raw materials at non-market prices, a state-controlled banking system steered credit to favoured firms or sectors, and various subsidies distorted market responses. The private sector was weakened by reliance on the government. A series of economic crises in the 1970s exposed the deficiencies of the existing system and led to reforms that opened Turkey's borders to international trade and liberalized domestic market operations.

3. The need for a formal competition policy was recognised at the outset of the reform process and work on a competition law began in the 1970s, producing some drafts but no legislation. The project was revived in 1991, when an expert panel was appointed to design a set of competition and consumer protection policies. Both internal and external forces supported the development of competition legislation, and closure on a legislative model was finally reached in 1994 during Turkey's negotiation of a customs union with the European Union. The customs agreement included the EU's standard substantive provisions about competition, and obligated Turkey to enact those provisions as part of its own law (and establish a competition authority to enforce them) prior to the agreement's effective date of December 31, 1995.[2] The Act on the Protection of Competition, adopted by Turkey at the end of 1994, created the Turkish Competition Authority (TCA) as an autonomous antitrust enforcement agency, with a Competition Board to resolve cases and set policy.[3]

4. Beyond the economic and political incentives that played a role in developing Turkey's competition law, Article 167 of the Turkish Constitution provides an explicit foundation for competition policy by requiring that the state "take measures to ensure and promote the sound, orderly functioning of the money, credit, capital, goods and services markets; and … prevent the formation, in practice or by agreement, of monopolies and cartels." In line with Article 167, the purpose of the Competition Act is stated simply as the "protection of competition" (Art.1), and the Act defines competition in terms of independent rivalry: "The contest among the undertakings in the markets for goods and services, which enables them to take economic decisions independently" (Art. 3). The Competition Authority adds, however, that the Act's ultimate objective is to protect the competitive process (not merely rivalry among firms) in order to achieve efficient markets and promote consumer welfare. The Authority considers this approach consistent not only with Article 167 of the Constitution, but also with Article 172, which requires that the state "take measures to protect and inform consumers."

5. Initially, competition policy was the responsibility of the General Directorate of Consumer and Competition Protection, which was established in 1993 in the Ministry of Trade and Industry.[4] The Competition Board was appointed on 27 February 1997, two years after the Competition Act was adopted, and most of another year passed before the Board began operations in November 1997. The Board at that time assumed the competition law and policy functions, while the General Directorate turned its focus to handling consumer protection issues. The Competition Act has now been in force for ten years, and the Board has been applying it for seven years of that period.

6. At present, implementation of competition policy in Turkey is one element of a much larger national initiative to advance beyond the Customs Union Agreement and achieve formal membership in the European Union. In October 2004, the European Commission recommended that the EU open formal

accession negotiations with Turkey, a recommendation that the EU member states accepted in December 2004. In Turkey, the Secretariat General for EU Affairs supervises a government-wide program to adopt the body of EU laws and regulations necessary for accession.[5] Turkey has also continued to implement economic reforms required for accession, despite an economic crisis in 2000-2002 characterized by severe inflation and disruption in the banking system. New monetary and fiscal policies have subdued inflation, while restructuring and improved regulation and supervision in the banking sector has increased credit funding for investment. The government has also adopted a variety of changes respecting government intervention in the product, labour, and financial markets; infrastructure industries; and agricultural sector support programs.[6]

7. An important aspect of Turkey's accession program that has implications for competition law is an ongoing effort to eliminate state monopolies and reduce the state's share of the economy. Privatisation activities, stalled due to adverse economic conditions in 2001 and 2002, rebounded in 2003-2004. Divestiture of state assets is now complete (or virtually so) in textiles, paper, alcoholic beverages, petroleum distribution, and port management; and partially complete in fertilizers, mining, and natural gas distribution. Privatisation proceedings are presently underway with respect to state assets in telephony (involving 55% of Turk Telekom), tobacco, airlines (although only a 20% share at the outset), petroleum refining, sugar, fertilizers, and motor vehicle inspection stations. Planning for future privatisation has commenced for banking, electricity generation and distribution, petrochemical manufacturing, and the national lottery.[7] Nonetheless, the share of the state sector in the national economy is still significant. In value-added terms, state owned enterprises and state banks amounted to 7% of GDP in 2003, while government services accounted for another 13%. In the manufacturing sector, fully state-owned enterprises account for about one fifth of the sector's value added and for about 12% of sector employment. Economy-wide, employment in state-owned enterprises, including the banking sector, amounted to 2% of total employment (430,000 persons) in 2003.[8] Further, despite some liberalisation, competition and private investment are notably weak in such sectors as electricity, natural gas, and some aspects of telecommunications, and service costs (especially those charged to businesses) remain high.

2. Substantive issues: content of the competition law

8. Because the 1995 Customs Union Agreement with the EU obliges Turkey to adopt a substantive competition law that follows the EU model, the following box provides a summary of the EU's legal provisions for context.

Box 2. EU Competition Law

The competition law of the European Union, as established in Articles 85 and 86 of the 1957 Treaty of Rome, was subsequently restated (and renumbered) in Articles 81 and 82 of the 1999 Treaty of Amsterdam. Article 81 deals with agreements and other forms of concerted action involving two or more firms, while Article 82 deals with unilateral conduct by a dominant firm or group of firms.

Agreements: Article 81(1) prohibits (and Article 81(2) renders legally void) all agreements and concerted practices "which have as their object or effect the prevention, restriction, or distortion of competition." The statutory text makes no distinction between horizontal and vertical restraints. The statute provides a non-exclusive list of unlawful conduct, including direct or indirect price fixing (both horizontal and vertical); limitation or control of "production, markets, technical development or investment;" sharing of markets or sources of supply; discrimination that places disfavoured firms at a competitive disadvantage; and the imposition of tying or other non-germane contract conditions.

Exemptions: Article 81(3) provides that an agreement that would otherwise be prohibited under Article 81(1) may nonetheless be permitted, provided that it (a) improves production or distribution, or promotes technical or economic progress; (b) allows consumers a fair share of the benefit; (c) imposes only such restrictions as are indispensable to attaining the beneficial results, and (d) does not eliminate competition for a substantial part of the affected product market. Article 81(3) may be invoked directly by the parties to a qualifying agreement as a defence to prosecution. In addition, the EU issues generally-applicable "block" exemptions that specify conditions under which various kinds of agreements (such as vertical distribution contracts and joint research and development arrangements) will enjoy the protection of Article 81(3).

Abuse of dominance: Article 82 prohibits the abuse of a dominant position. Again, the statute provides a non-exclusive list of conduct that is deemed to be abusive, including the imposition of unfair purchase or selling prices or other trading conditions; the limitation of production, markets, or technological development in ways that harm consumers; discrimination that places disfavoured firms at a competitive disadvantage; and the imposition of non-germane contract conditions. Dominance is often presumed at market shares over 50 percent, and may be found at lower market shares depending on other factors. The prohibition extends to abuse attributable to several firms acting together, even if no single firm has a sufficiently high market share to constitute dominance.

Mergers: Merger control does not arise directly from the Treaty articles, but from a separate EU regulation. Pre-notification is required for qualifying transactions, which are assessed to determine if they will "significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position."

9. The substantive prohibitions in Turkey's law appear in Articles 4, 6, and 7 of the Competition Act. Article 4 deals with agreements and concerted practices and therefore parallels Article 81(1) of the EU law. Article 6, directed to abuse of dominance, is designed to follow EU Article 82, while Article 7 on mergers and acquisitions follows the EU merger regulation. Under Article 4 of the Act, "agreements and concerted practices" that have as their object or effect the prevention, distortion, or restriction of competition, or that have the potential for such effects, are prohibited.[9] As in EU Article 81, the statutory text in Turkey makes no distinction between agreements in the horizontal and vertical dimensions. Also as in Article 81, Article 4 includes a non-exclusive list of anticompetitive practices that constitute potential violations.[10]

2.1 Horizontal agreements

10. With respect to horizontal agreements, the non-exclusive list of anticompetitive practices in Article 4 includes price fixing, market division, concerted control of outputs or inputs, boycotts, and entry deterrence. A unique feature of Article 4 is language providing that the existence of unlawful collusion among competitors may be inferred if market conduct or conditions are similar to those that would arise in a market where competition is artificially distorted. The Board's approach to this presumption has been a topic of considerable controversy and is discussed in a later section of the report.

11. There are no statutory exemptions for "depression cartels" or for agreements among small businesses. The Board has been considering for several years seeking a statutory amendment that would create a *de minimis* exemption for agreements involving small enterprises. Such an exemption would be designed to cover agreements that, even if producing some anticompetitive effect, were of trivial significance in the relevant market. The exemption would parallel the existing EU *de minimis* regulation, which applies where the aggregate market share of the participating parties does not exceed 5% for horizontal agreements and 10% for vertical agreements.[11]

12. Article 5 of the Competition Act empowers the Board to issue both individual and block exemptions, which operate to make the prohibitions in Article 4 inapplicable to specified conduct. Article 8 provides separately for the issuance of case-specific "negative clearances," which declare that a given agreement or practice is not contrary to Article 4. The criteria under Article 5 for granting both individual and block exemptions are the same as those established in Article 81(3) of the EU law, and require that the agreement at issue lead to improvements in production, distribution, or technology, and confer benefits on consumers; yet not eliminate competition in a significant part of the market or be more restrictive than necessary to achieve its beneficial objective. The maximum duration for an individual exemption is 5 years, subject to renewal. Both individual exemptions and negative clearances may be revoked if circumstances change, or if the parties fail to honour commitments or make misrepresentations in applying for the exemption (Art. 13). Block exemptions may be made applicable indefinitely or for any duration that the Board specifies, and may be revoked as to a particular agreement if the Board determines that the agreement has effects "incompatible" with the Article 5 standards.[12]

13. Although the principal features of the Turkish exemption and negative clearance scheme are modelled on the EU system, a significant distinction between the two has arisen because of recent changes in the EU's enforcement structure. Formerly, if the parties to an agreement wished to obtain protection under EU Article 81(3), but could invoke no applicable block exemption, they could file a notice of the agreement with EU competition authorities and request an exemption directed specifically to their agreement. The EU eliminated the system of case-specific exemptions under Article 81(3) effective May 1, 2004, while retaining the block exemption system. The EU "negative clearance" system, which enabled parties to obtain a declaration that there were no grounds for prosecution of an action under Article 81(1) or Article 82, was likewise eliminated effective May 1, 2004.[13] Turkey, in contrast, retains both individual exemptions and negative clearances, in addition to block exemptions.

14. In August 2003, the TCA issued a Communiqué on "Research and Development Agreements" No:2003/2, establishing a block exemption for R&D agreements. The TCA exemption differs in several ways from the comparable EU exemption (EU Regulation No 2659/2000). First, for projects in which the results of the R&D are jointly exploited, the EU exemption continues to apply for seven years after the products are first launched in the common market (art. 4.1), and thereafter for so long as the combined market share of the participants does not exceed 25 % of the relevant market for the contract products (Art. 4.3). In contrast, the TCA exemption for projects involving joint exploitation continues to apply for only five years after product launch in Turkey (Art. 4). The TCA describes its approach as reflecting both the five year duration specified for individual exemptions in Article 5(2) of the Competition Act, and the provision in the previous version of the EU's R&D block exemption (No. 418/85, Art. 3.1) which established a five year duration for R&D projects involving joint exploitation.

15. Second, the EU exemption requires that, where at least two of the project participants are competitors, the total market share of all project participants must not exceed 25 % of the relevant market at the time that the R&D agreement is initiated (Art. 4.2). The TCA employs a bifurcated scheme under which the total market share of the participants must not exceed 40% if project products are jointly marketed by competitors (Art. 5(a)), and must not exceed 20% if the project products are marketed solely by one of the participants or by a firm designated or controlled by the participants (Art. 5(b)). The TCA's explanation for this difference again refers to the earlier EU block exemption, which also employed a bifurcation under which the market share ceiling was 20% for agreements entailing joint manufacture by the participants (Art. 3.3) and 10% for agreements that involved distribution of products by a single party or joint undertaking (Article 3.3a). According to the TCA, the high 40% market share ceiling in its regulation reflects the fact that R&D programs in Turkey are initiated primarily by large companies. Establishing a lower ceiling would risk suppressing the volume of R&D expenditures, which is already a smaller share of Turkey's GDP than is considered desirable. On the other hand, the low 20 % ceiling

applicable to projects that involve restricted product distribution arises from the TCA's concern about the potentially serious anticompetitive impact of such restrictions in downstream markets.

16. Third, the EU block exemption specifically permits project participants to fix prices where the project products are jointly produced (Art. 5.2(b)). Further, whether or not products are jointly produced, project participants may, for the first seven years after product launch, implement customer marketing restraints (Art. 5.1(e)) and impose territorial marketing restrictions on "active sales" (Art. 5.1(g)).[14] The TCA exemption, in contrast, prohibits all such contract provisions unconditionally (Arts. 6(e) & 6(f)). The TCA explains that because restrictions involving downstream prices, customers, and territories are considered to have the potential for severe anticompetitive consequences, the agency prefers to address such contract provisions through applications for individual exemptions under Article 5.

17. No other block exemptions involving horizontal arrangements have been issued thus far by the TCA. The agency has undertaken preliminary planning to adopt block exemptions similar to the EU's existing exemptions for the maritime, airlines, and insurance industries. The agency's efforts to develop a technology transfer block exemption parallel to the comparable EU exemption are presently in abeyance because of provisions in Turkish patent law that permit exclusive patent licenses without restriction. The EU exemption, in contrast, permits exclusive licenses only if the combined market shares of the parties involved fall below specified ceilings (Art. 3). The TCA expects to formulate a solution to this conflict in laws during 2005 and will then resume its project to issue a technology transfer exemption.

18. The enforcement experience under Article 4 of the Act with respect to horizontal agreements reflects chronic problems of cartel behaviour in some sectors of the economy. In the period before the Authority was constituted in 1997, the General Directorate of Consumer and Competition Protection prosecuted cartel cases against the cement industry, bakeries, bus companies, the poultry industry, distributors of periodical publications, and the association of corrugated container manufacturers. Subsequently, between 1997 and 2002, the Board rendered decisions against further anticompetitive agreements among bakeries, periodical distributors, and cement producers, including a 1999 case in which five cement companies were fined nearly 900 billion Turkish Lira ("TRL") (USD 603,000) for a price-fixing and market-division agreement in the Aegean region. Since the previous OECD Report in 2002, additional cases have been filed with respect to bakeries (Ankara, Gaziantep, Kütahya) and buses (Konya), while yet another cement prosecution involving the Ankara and South Marmara markets resulted in fines against 18 firms totalling TRL 4.88 trillion (USD 3.3 million).

19. Other recent proceedings have involved different sectors, including cases that attacked price fixing, bid rigging, and market division in the agricultural fertilizer industry (6 firms fined TRL 7.3 trillion, USD 4.9 million); a joint marketing agency formed by competitors to sell advertising time on Turkish TV channels; bid rigging sales of individual-serving milk cartons to schools, and price fixing and market sharing in the ceramics industry (30 firms fined TRL 13 trillion, USD 8.7 million). A 2003 proceeding found an agreement between 11 insurance companies and a reinsurance facility to set prices for fire insurance, as well as a separate scheme orchestrated by the Turkish Union of Insurance Companies to set tariffs and conditions for various forms of insurance coverage.

20. The 2002 Report observed (p. 10) that, in the horizontal area, the TCA "concentrates its enforcement attention on price-fixing and market division cartels that restrict horizontal competition." In the past several years, the Board has also been examining fee agreements organized by public professional associations. In Turkey, the members of many professions are required to maintain membership in professional associations established by statute. Some association statutes have provisions that contemplate the promulgation of binding fee schedules, while others do not. In early 2002, the Board fined the Turkish Architects' and Engineers' Chambers Association (TAECA) and ordered it to abolish its by-law provisions setting minimum fees. The Association's authorizing statute entailed no price setting power.[15] By contrast,

in late 2003, the Board decided that no prosecution could lie against the minimum fee schedules promulgated by the Turkish Medical Association, the Turkish Dental Association, and the Turkish Bar Association, because the foundation laws for those associations clearly articulated their authority to establish fee minimums.

21. Even if an association has price setting authority, however, an anticompetitive agreement among members of the profession is susceptible to attack by the Board if the agreement is not established by the association itself. Thus, the Board imposed fines on a group of mechanical engineers in Konya found to have created a "revenue pool" through which they equally shared revenue from their various jobs. Such agreements were not contemplated by the Konya Chamber of Mechanical Engineers, thus making irrelevant whether the Chamber had statutory authority to authorize such arrangements.

22. The most recent (and interesting) action in this field is a January 2004 decision by the Board in a case against TURSAB, the Turkish Association of Tourism and Travel Agencies. By statute, membership in the Association is mandatory for travel agents in Turkey. The focus of the case was not fees charged by agents to customers, but rather fees charged by the Association to its members. The Association is empowered to make expenditures promoting tourism in Turkey and may raise funds for this and other purposes by establishing both annual membership fees and a registration fee for new travel agents. The Board concluded that the power to set a registration fee did not include power to create an entry barrier violating Article 4 of the Competition Act. Finding that the Association had set the registration fee so high as to deter new entry in the market, the Board ordered establishment of a reasonable fee and imposed a fine. This case is the first Board decision to invoke the "entry deterrence" clause in Article 4 as the basis for a violation.

2.2 Vertical agreements

23. Turkey uses the EU rulebook for vertical restraints. The non-exclusive list of anticompetitive vertical practices in Article 4 of the Act cites resale price fixing, discrimination between similarly situated parties, tying, and actions designed to impede competitors or prospective entrants. As is true for horizontal practices, the Board may issue both individual and block exemptions that make Article 4 inapplicable to specified forms of vertical conduct, while case-specific "negative clearance" declarations may be issued under Article 8.

24. In July 2002, the Board issued a new block exemption for vertical agreements (Communiqué No: 2002/2). The exemption, which superseded and revoked three previous block exemption regulations dealing with vertical agreements,[16] is based largely on the revised block exemption issued by the EU in December 1999 (Regulation 2790/1999). The TCA's new exemption is broader in scope than the three exemptions it superseded in that it covers vertical agreements involving more than two undertakings, purchase (supply) agreements as well as distribution agreements, and agreements relating to services as well as products. It also covers agreements involving the purchase, sale, transfer or use of intellectual rights by or to the buyer, provided that (1) the intellectual rights relate directly to the goods or services forming the primary subject of the agreement, (2) the transfer or use of intellectual rights is an ancillary feature of the agreement and not its principal objective, and (3) the agreement does not contain provisions that are excluded from the scope of the exemption.

25. Like its EU counterpart, the new exemption eliminates the list of "permissible" contract provisions that appeared in the predecessor exemptions, and simply specifies the provisions that render the exemption inapplicable (including, most prominently, resale price maintenance). At the time it was issued, the TCA exemption differed in two significant ways from the comparable EU block exemption. First, while the EU exemption excludes from protection any "non-compete" clause[17] the duration of which is indefinite or exceeds 5 years, the TCA exemption included a special provision permitting a longer duration

where a supplier undertook 35% or more of the investment required for the buyer to commence operations. In such circumstances, a non-compete restriction could extend for up to ten years if the buyer continued operations on the premises for which the investment was made. The Authority's explanation for adopting the ten year limit is that, in some sectors (including specifically fuel oil distribution), a five year period is insufficient time for a supplier who has invested in a distributor's facilities to recover the investment. After the block exemption was issued, however, the TCA became aware that the 35% investment clause was susceptible to exploitation in situations that did not truly warrant a ten year investment recovery period. Therefore, in September 2003, Communiqué 2003/3 was issued to delete the provision dealing with 35% investments, thus bringing the block exemption on that point into congruence with the EU model.

26. The second, more significant (and still existent) difference between the TCA exemption and the EU version is that the EU exemption protects agreements only if the supplier's share of the relevant market does not exceed 30%, while the TCA exemption has no market share ceiling. The Authority's explanation for this difference is that its version provides firms possessing market power with desirable flexibility to adopt efficient contract provisions. The Authority recognizes that such provisions can have anticompetitive effects, but considers that there are other enforcement alternatives preferable to a market share ceiling. First, the exemption may be withdrawn, either with respect to a specific offending firm by means of the Board's revocation authority under Article 13, or with respect to all of the firms in a particular market by issuing an amended Communiqué. Second, because block exemptions apply only to Article 4 of the Act and provide no protection from an abuse of dominance action, an enforcement action may be commenced against an offending firm under Article 6 of the Act,

27. In fact, the Board has withdrawn the vertical block exemption in three instances. In an August 2003 case, a leading bank that required retail outlets to honour only the bank's brand of credit card was stripped of protection. The bank was also assessed a fine because the non-compete clause in question extended for an indefinite duration and thus was not covered by the block exemption in any event. The Board withdrew the exemption as a precaution, to prevent the bank from re-instituting the non-compete clause with a 5 year duration that would have passed muster under the exemption's terms.[18] In the second case, the dominant firm in the salty snacks market was barred in May 2004 from including non-compete clauses in its distribution agreements with retail outlets. The third case involved withdrawal of the exemption in September 2004 from a firm that had established exclusive contracts with numerous food retailers to provide on-line order services to customers. In all three cases, the Board concluded that the restrictive clauses yielded no significant efficiencies and served principally as a barrier to entry by competing suppliers. At present, the Board has further cases underway to examine the non-compete clauses employed in agreements with retail outlets by certain firms in the beer and soft-drinks markets. More broadly, the TCA's staff is reassessing the entire Communiqué, with a particular focus on whether to introduce a market share limit similar to that in the EU exemption.[19]

28. In June 2003, the TCA issued Vertical Guidelines,[20] designed to provide guidance about vertical restrictions similar to that provided by the EU's 2000 Guidelines on Vertical Restraints (2000/C 291/01). The TCA Guidelines are considerably less elaborate and detailed than the EU version, and one difference between the two has proven consequential for franchisors doing business in Turkey. The difference relates, again, to the permissible duration of non-compete provisions. The vertical block exemptions of both the EU and the TCA generally limit non-compete clauses to a five year duration, subject to renewal by mutual agreement of the contracting parties. Section 200(2) of the EU's Vertical Restraints Guidelines, however, includes the following language directed specifically to franchise agreements:

> A non-compete obligation on the goods or services purchased by the franchisee falls outside Article 81(1) when the obligation is necessary to maintain the common identity and reputation of the franchised network. In such cases, the duration of the non-compete obligation is also

irrelevant under Article 81(1), as long as it does not exceed the duration of the franchise agreement itself.

The TCA's Guidelines have no comparable language, and the TCA takes the position that the five year limit applies to franchise non-compete clauses as it does to all others. Franchisors in Turkey complain that such clauses should be permitted for the life of the franchise agreement, as they are in Europe. The TCA responds that franchisors may petition for a negative clearance, which can be issued for an unlimited duration. Presumably, the petitioner would argue that a negative clearance was warranted because, in line with EU policy, a franchise non-compete clause does not violate Article 4 if it is limited to the life of the franchise contract.

29. The Authority has issued one other vertical block exemption. Communiqué No. 1998/3, dealing with distribution and servicing agreements for motor vehicles, is virtually identical to the EU's former Regulation No: 1475/95. The EU replaced its exemption with a new version in 2002 (No. 1400/2002). The problems that lead to the EU revision (especially those relating to the distribution of services and spare parts) have been experienced in Turkey as well, and the TCA has a project to develop revised language for its exemption modelled on the current EU text.

30. The 2002 Report (p. 12) observed that vertical agreements have drawn relatively little of the TCA's law enforcement attention, and this remains true. The TCA focuses some attention on resale price maintenance, bringing one or two cases per year. An enduring concern has been to prevent suppliers who operate restrictive distribution systems from suppressing intra-brand price competition by discouraging dealers from making "passive sales" in the territories of other dealers.[21] The TCA does not, however, attack maximum or suggested resale prices, which Article 4(a) of the vertical block exemption permits suppliers to specify if such prices "do not amount to a fixed or minimum sale prices as result of the pressures or incentives by any of the parties." Recent vertical cases include a 2002 proceeding in which the TCA attacked contracts employed by a port operator. Under the contracts, vessels using the port were required to employ a specified port services company. The Board treated the contracts as impermissibly tying port agent services to use of the port, thus restraining competition for the delivery of port agent services. Also in 2002, the Board assessed fines for maintaining resale prices against a manufacturer of liquid carbon dioxide. A similar case was prosecuted against a manufacturer of fruit juices and fruit drinks in 2003. And in 2004, the Board resolved a case involving alleged exclusivity requirements imposed on cigarette retailers by requiring cigarette manufactures to notify their distributors and retail sales outlets that prohibitions on the use of display racks provided by competing manufacturers were illegal.

2.3 Abuse of dominance

31. Article 6 bars abuse of a dominant position, whether perpetrated by a single firm or by several firms acting jointly. Concepts about dominance and abuse follow the EU model. "Dominance" is defined as the power to act independently of competitors and customers in determining parameters such as price, output, and amounts distributed (Art. 3). There is no particular market share test for presuming or identifying dominance, although EU case law is considered relevant about those subjects. The non-exclusive list of abusive practices in Article 6 is based on the list in EU Article 82, and the two lists overlap in their references to discrimination between similarly situated parties, tying, and the restriction of production or technical development to the detriment of consumers. Turkey, however, does not include the EU's reference to the imposition of "unfair purchase or selling prices or other unfair trading conditions," and adds references to the exclusion of competitors, the exploitation of market power to distort competition in a different market, and resale price maintenance.

32. The TCA fully recognizes the importance of preserving incentives for firms to improve their market position by introducing efficiencies and innovation, and is therefore cautious in pursuing abuse of dominance investigations. Recent cases have focused on efforts by market leaders to raise entry barriers or

otherwise exclude competitors. A 2003 decision involved ÇEAŞ, a company holding a monopoly concession for the distribution and transmission of electric power in one of Turkey's 33 designated distribution areas. The Board found that refusals by ÇEAŞ to provide system interconnections for independent electric generation facilities were unjustified and fined it TRL 9.5 trillion (USD 6.4 million). In a 2002 case against Karbogaz, the Board barred exclusive contracts for the sale of liquid carbon dioxide to end users and imposed a fine of TRL 311 billion (USD 208,000). In January 2004, the Board rejected a predatory pricing complaint against Coca-Cola, finding that Coke's prices, although below average total cost, were above average variable cost and that Coke had no predatory objectives in setting its pricing policies

33. The telecommunications sector has been a fertile field for proceedings under Article 6. In a March 2002 decision against Turkcell and Telsim, the Board concluded that the two firms exercised joint dominance over the "essential facility" infrastructure necessary to provide national roaming capability for GSM mobile telephone services. The Board found that the defendants had denied a prospective service provider use of their infrastructure without a legitimate basis in violation of Article 6, and assessed a total fine of TRL 30.4 trillion (21.8 trillion to Turkcell and 8.6 trillion to Telsim). The amount, equivalent to about USD 20.4 million, is the largest fine imposed by Board since its creation in 1997. The Council of State has suspended execution of the Board's decision pending appeal.

34. Other Article 6 cases have involved Turk Telekom (TTAŞ), the state-owned monopoly provider of land line telephone infrastructure. In late 2002, a fine of TRL 1.1 trillion (USD 737,000) was imposed on TTAŞ for excluding competition in the dial-up internet services provider ("ISP") market. The Board found that independent ISPs could not effectively compete for retail customers because of the spread between the low prices charged by TTAŞ to its own retail customers and the high prices charged to the competing ISPs. A separate proceeding in 2003 involved a refusal by TTAŞ, the only provider of ADSL internet service (broadband high-speed service over telephone lines), to allocate ADSL ports to other internet service providers. The Board advised TTAŞ to cease selling ADSL ports to new retail customers until promulgation of the access regulations that were then pending before the national Telecommunications Authority. The Board observed that severe entry barriers could arise if Turk Telekom sold all of its ADSL ports to retail customers without reserving any for re-sellers. The Board added that a refusal to cease sales would lead to the initiation of a formal investigation. TTAŞ duly ceased selling ports until the access regulations were issued. A pending investigation of TTAŞ focuses on its refusal to grant competing providers of broadband internet services access to its cable TV infrastructure.

35. Another abuse of dominance case that warrants mention here is the 2001 decision in the BELKO case. This case had been completed by the time of the 2002 OECD Report and is noted there as an important precedent showing the TCA's ability to assert jurisdiction over state-created monopolies (p. 21). It is also important, however, for the light it sheds on the Board's approach to Article 6. The city of Ankara granted BELKO a monopoly concession to import and sell coal for heating purposes. BELKO was found liable for abusing its dominant position by charging excessively high prices, even though it did not earn excessive profits. The Board ascribed the firm's excessive prices to its "failure to exercise maximum care and diligence in protecting the Company's interests in making purchases; overstaffing; [and incurring] costs higher than what they should have been, due to ineffective style of management."[22]

36. Prosecuting a dominant firm merely for charging monopolistic prices is ordinarily problematic, because it is unwise to punish a firm for the rational exercise of market power lawfully obtained. Inefficient monopolists that set high charges, moreover, are especially likely to attract new entrants.[23] In BELKO, the Board recognized these considerations and emphasized that the conjunction of two critical features justified a finding of illegality. The first was that BELKO's monopoly concession precluded any entry by competing suppliers, and the second was that heating coal was a commodity with a highly

inelastic demand function. After the decision was rendered, the Ankara city government accepted a recommendation from the Board to withdraw BELKO's monopoly concession.

2.4 Mergers

37. Article 7 of the Competition Act, and the associated Merger Communiqué issued by the Board in 1997,[24] deal with mergers and acquisitions accomplished by the transfer of stock, assets, or managerial authority. Joint ventures are covered if the emerging entity is an autonomous economic actor.[25] Article 7 bars any merger or acquisition that "creates or strengthens the dominant position of one or more enterprises, as a result of which competition is significantly impeded" in a relevant market. At the time of Article 7's adoption, this language mirrored that in the EU's merger regulation (No 4064/89). In January 2004, however, the EU issued a new merger regulation (No 139/2004), effective May 1, 2004, that recast the prohibition so as to bar mergers or acquisitions that "would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position" (Art. 2(3)).

38. This change was introduced by the EU to deal with the mergers that presented the risk of anticompetitive "unilateral" effects even though not leading to dominance. The definition of dominance in the EU (like that in Turkey's law) covers market control consolidated in the hands of either a single firm *or a group* of cooperating firms. Mergers that produced oligopolistic market structures leading to anticompetitive coordination among the surviving firms could effectively be addressed under the dominance clause of the existing merger regulation. But the regulation could not be deployed against combinations that merely presented a risk of anticompetitive effects arising from "the non-coordinated behaviour" of the remaining firms.[26] The solution reached by the EU was to make dominance an example of a significant anticompetitive effect arising from a merger, rather than demanding the creation of dominance as a prerequisite for illegality. As is typical for changes in antitrust law adopted by the EU, the TCA has this amendment under consideration for inclusion in Article 7 of the Competition Act.

39. The Board's Merger Communiqué establishes the details of the merger review process and specifies the factors employed in merger assessment. Under Article 6(b) of the Communiqué, the Board applies a standard multi-element analysis to mergers, evaluating market structure, the parties' economic and financial situation, alternatives available to purchasers, likelihood of entry, legal or other barriers to entry, technological developments, supply and demand trends, and the interests of intermediaries and ultimate consumers. The Communiqué expressly contemplates approval of transactions that establish efficient-scale operations able to compete with imports.[27] The Board has in the past also approved acquisitions of failing firms where there were no alternative purchasers, although no such cases have been presented since the previous Report. Only 2 mergers have been rejected *in toto* during the years that the Board has been responsible for merger control. The following table summarizes merger review activity from 1999 to the present.

Table 1. Board Determinations in Merger, Acquisition and Joint Venture Matters under Article 7[1]

YEAR	Transactions Permitted without Conditions	Transactions Subjected to Conditions		Transactions Disapproved
		Substantive	Ancillary	
2004	98	4	5	0
2003	72	3	6	0
2002	53	1	5	2
2001	42	2	2	0
2000	48	2	1	0
1999	24	1	0	0
Total	337	13	19	2

1. Table includes mergers examined in privatisation proceedings

Source: Turkey, 2005

40. The Board has imposed conditions on about 9 % of transactions. Less than half of the conditional cases entail substantive requirements affecting the disposition of assets. The remainder involve ancillary provisions in acquisition agreements. DSM's 2003 acquisition of Roche's vitamins and chemicals division provides an example of a substantive condition case, as the Board in that matter approved the transaction subject to DSM's divestiture of its interest in an existing joint venture with BASF to produce animal food enzymes. Similarly, Syngenta, a manufacturer of seeds and crop protection products such as fungicides and herbicides, was permitted to acquire Advanta in 2004 subject to divestiture of Advanta's operations in the sunflower seed market.

41. An example of an ancillary condition case is Cargill's acquisition in 2002 of Cerestar, Montedison's starch and sweeteners subsidiary. The Board concluded that, due to the presence of large buyers and alternative sources of supply, coupled with an absence of entry barriers, no competitive concerns were presented by the acquisition itself. The Board approved the acquisition, but required that a non-compete provision against Cerestar be reduced from three to two years because the transaction involved no transfer of specialized know-how. Another provision that prohibited Cerestar from taking more than a 5 % share in any rival firm was altered to prohibit only the taking of a controlling share.

42. Most transactions (91%) have been approved without conditions. A 2002 joint venture involving four domestic producers of enamelled copper wire was permitted so that sufficient scale would be attained to permit competition for sales in the international market. Domestic wire purchasers were not at risk because prices were constrained by readily available imports and the production capacity of other suppliers could easily be increased. The impact of the transaction in the copper supply market was also assessed, because one of the joint venture partners was integrated into copper production. The Board concluded that, even in the unlikely event that the joint venture confined all of its copper purchases to an affiliated firm, any market effects would be minor. Also approved was a 2003 transaction in which the Dow Chemical Company acquired certain acrylic acid and acrylate product lines from Celanese AG. None of the affected production facilities were in Turkey, but Dow's post-merger share of sales in the relevant Turkish product markets would range from 57 to 90%. The Board decided to clear the acquisition despite the high market shares, because numerous firms exported the products to Turkey, there was excess production capacity, and domestic purchasers could easily switch suppliers if Dow increased its prices. The Board also noted that the high market shares held by Dow reflected, in part, the transient impact of currency fluctuations, since Dow's sales were denominated in US dollars while those of Dow's competitors were mainly denominated in higher-value euros.

43. In late 2003, the TCA reviewed the merger of two smaller GSM mobile telephone operators, Aria (İŞ-TİM) and Aycell. Aycell was a subsidiary of Turk Telekom, the state-owned company operating Turkey's fixed line telephone system. The Board permitted the merger because TTI, the resulting entity, would not obtain a dominant position in the GSM services market, nor would the dominant position of Turk Telekom in the telecommunications services and infrastructure markets be enhanced. The Board considered but rejected claims from other GSM operators that the merger should be barred because Turk Telekom might favour TTI through cross-subsidisation and discriminatory interconnection services.

44. Mergers in the banking sector of the economy have been effectively removed from the TCA's jurisdiction. Emergency banking legislation, adopted in 1999 and subsequently expanded and made permanent in 2001, contains the only example in Turkish law of an express exclusion from the Competition Act. Under the legislation, bank mergers in which the market share of the merged entity falls below 20% of a presumed national banking market are expressly made exempt from Article 7 and are subjected to control only by the national Banking Regulation and Supervision Agency. This ceiling is sufficiently high to constitute a *de facto* exclusion of all bank mergers. The 2002 Report recommended (p. 32) that the exemption be repealed once the bank emergency had been resolved, but the government has not proposed such legislation, despite the urging of the TCA.

45. Article 7 of the Competition Act, besides setting out the substantive standard for reviewing mergers, also provides that the Board shall specify by regulation the categories of transactions that require prior notification to and authorisation by the Board. Under Article 4 of the Merger Communiqué, notification is required if either (1) the parties' combined market share exceeds 25% of the relevant market in Turkey, or (2) their aggregated turnover in Turkey exceeds TRL 25 trillion (USD 16.75 million). The 2002 Report recommended (p. 32) that the merger notification system be modified to eliminate the market share test, on the grounds that the test rarely had independent significance and that the obligation of small firms to determine whether they met the test imposed costs without commensurate benefits. No action has been taken to implement this recommendation, but the TCA staff currently has underway a project to revise the merger review system and one item on the agenda for consideration is elimination of the market share test.

46. The Act also establishes the time limit by which the Board must complete its preliminary examination of a notified transaction. Under Article 10(2), the Board may take 15 calendar days after notification to determine whether it will either permit the transaction to proceed or commence a formal investigation. If the notification filing is incomplete or incorrect, however, the 15 day period does not begin to run until the deficiencies are resolved. The TCA reports that it must frequently request missing information, particularly with respect to transactions that appear to raise competition issues. Some merging parties, meanwhile, have taken advantage of the short 15 day period by filing their notification forms late on the Friday before a holiday week.

47. If the Board determines to open a formal investigation, the parties to the merger are advised of the agency's preliminary objections and the investigation then follows the normal process established by the Competition Act for all contested matters. If the Board neither replies to a notification nor takes any other responsive action within the initial 15 day period, Article 10(3) provides that the merger agreement "shall be legally effective after 30 days following the notification." This language leaves unclear the agreement's precise legal status during the period between 15 and 30 days after notification. The TCA staff, as part of its project to revise the merger review system, plans to recommend that the preliminary examination period be extended from 15 days to 30, a change that would both address the problem of late Friday filings and resolve the ambiguity in Article 10(3) respecting the effective date of transactions.

48. The 2002 Report expressed concern about the fact that formal investigations of notified mergers are subject only to the standard statutory deadlines applicable to any investigation under the Act. The

Report noted that formal processes can take 6 months (and well over a year if all available extensions are granted), and observed that parties might abandon a merger if obliged to wait 12 to 18 months for a decision (p. 14). The Report urged Turkey to follow the example of other jurisdictions and set deadlines or special procedures to ensure prompt final decisions in merger cases (p. 32). The TCA replies that only 10 merger cases since 1999 have involved opening a formal investigation, and that none of those investigations lasted more than three months. Nonetheless, the TCA staff expects to recommend creation of a process tailored for mergers that would subject case proceedings to a maximum duration of three months.

49. The Competition Board concluded shortly after its establishment that the broad merger control provisions in Article 7 were applicable to privatisation transactions conducted by the state.[28] To ensure timely review of such transactions, the Board issued a communiqué in September 1998 (No. 1998/4) specifically addressed to privatisation proceedings administered by the Privatisation Administration.[29] This was soon amended to cover privatisations carried out by any public institution or organisation.[30] The Communiqué provides (Art. 5) that a privatisation transaction will not be legally effective absent Board approval in any case (1) where advance notification of the transaction is required by the Communiqué or, (2) even if advance notification is not required, where the acquiring firm has a pre-transaction market share above 25% or turnover exceeding TRL 25 trillion. The separate advance notification requirement (Art. 3) applies wherever the entity being privatised (1) has a market share over 20%, (2) has turnover exceeding TRL 20 trillion, (3) possesses a legal monopoly, or (4) enjoys statutory or *de facto* privileges not accorded to private firms in the relevant market. Article 4 of the Communiqué requires that advance notification be provided to the Board before the tender is announced to the public, so that the Board can provide its views on the proper method of structuring sale of the privatisation assets. Thus, the Board has two opportunities to influence the outcome, one at the time the tender is devised, and again when a particular firm is identified as the acquirer. At the first stage, the Board acts as a competition advocate, providing its views for consideration by the agency responsible for conducting the privatisation. At the second stage, the Board acts as a law enforcement agency, issuing binding determinations under the merger control provision in Article 7 of the Competition Act.

50. The TCA has reviewed 33 privatisation transactions under Article 7 since 2000 – none in 2001 or 2002, but 13 in 2003, and 20 in 2004. In general, the Board has permitted the establishment of efficient-scale firms while resisting the creation of post-privatisation monopolies.[31] An important case in 2003 involved the alcoholic beverages division of TEKEL, which had previously been the state's monopoly provider of alcohol and tobacco products. TEKEL's monopoly was eliminated prior to the tender, and the Board approved a block sale of TEKEL's alcoholic beverage production facilities to a joint venture group. The Board found that, in the three relevant markets (beer, raki and other high alcohol drinks, and wine), TEKEL's share was either less than dominant or exposed to vigorous new entry that made maintenance of dominant power unlikely. Another 2003 case involved privatisation of IGSAS, a state firm that manufactured nitrogenous and composite fertilizers. The Board had rejected an earlier privatisation attempt in 2000 because the prospective purchaser already had a significant presence in the relevant market. The second proceeding resulted in the sale of IGSAS without objection to a firm that had no operations in the industry.

51. A 2004 privatisation proceeding involved TÜPRAŞ, a state corporation that held 86% of Turkey's petroleum refining capacity. The Board approved sale of the firm to a German subsidiary of a Tatarstan-based company,[32] but noted that any new refining capacity investment by the firm would be assessed for entry deterrence effects on potential entrants into the refining market.[33] Also privatized in 2004 were ESGAZ and BURSAGAZ, two natural gas distribution companies that had been affiliates of Turkey's vertically integrated natural gas company. The Board authorized acquisition of the companies by private sector firms without conditions because the highest bidders had not previously operated in the market and the sector was in any event heavily regulated under the Natural Gas Market Law.

2.5 State aids

52. Article 34 of the Customs Union Agreement, in language tracking Article 87 of the EU Treaty, bars Turkey and the EU Member States from providing state resources to aid undertakings or economic sectors where doing so "distorts or threatens to distort competition … between the Community and Turkey." Although this Article is part of the "Competition" section of the Agreement, state aids are treated differently from the substantive antitrust provisions found in EU Treaty Articles 81 and 82. The Customs Agreement required Turkey to adopt the competition provisions in Articles 81 and 82 as part of its own positive law, but imposes no such obligation for the state aid provision. Instead, under Article 39(2) of the Agreement, Turkey must "adapt" all of its existing aid schemes to EU standards, and comply generally with the notification and guidelines procedures established by the EU to control aid by Member States. In another important respect, however, the antitrust and state aids provisions are treated alike. Article 37 of the Agreement requires that Turkey adopt, within two years after the effective date of the Agreement, the "necessary rules" for the implementation of the provisions relating to both antitrust and state aid.

53. Despite that deadline, the required rules have not yet been adopted, essentially because Turkey has been unable to reach consensus on a mechanism for aligning its aid system with the EU's requirements. A draft version of the Article 37 implementing rules has been developed that specifies the organic entities in Turkey and the EU responsible for enforcing the competition laws and controlling state aid. The draft text establishes procedures for notification, information exchange, and coordination of enforcement activities between the two jurisdictions; and provides mechanisms for avoidance of conflicts and resolution of disputes. The draft lists the TCA explicitly as the agency responsible for competition enforcement, but the provision relating to state aid lists only a non-existent "Turkish State Aid Monitoring Authority." The EU's annual accession reports on Turkey routinely decry the failure to resolve this question and call for the establishment of an "operationally independent" state aid monitoring agency.[34] The 2002 OECD Report (p. 30) likewise recommended creation of an aid monitoring system.

54. The Turkish government proposed legislation in 2003 that would vest primary authority to control anticompetitive state aid in the State Planning Organization ("SPO"), an executive branch entity that is part of Turkey's existing state aids bureaucracy. The bill establishes a Directorate General for state aid within the SPO, along with a State Aid Monitoring and Supervising Board that would have power to render judgments on the propriety of particular state aid programs.[35] The TCA filed comments objecting to the bill on the grounds that primary authority to control anticompetitive aids should not be assigned to any agency that has responsibility for planning aid programs. The TCA argued that it is best suited for the task, since it is an independent agency with experience in assessing anticompetitive effects. The bill is pending.

2.6 Unfair competition and consumer protection

55. "Unfair" competition is not addressed in the Competition Act, but in Turkey's Commercial Code for regulating business dealings between private parties. The Code defines unfair competition as "deceptive action, or any kind of abuse of various ways of economic competition, contrary to the rules of goodwill."[36] Disputes involving commercial disparagement, unfair practices, sales below cost, abuse of economic dependence, and trademark infringement are resolved by private lawsuits, with no involvement by the Competition Authority. Deceptive practices that injure consumers may also be subject to public enforcement under the Consumer Protection Act.

56. Turkey's Consumer Protection Act,[37] adopted in 1995, regulates such marketing practices as door-to-door sales, consumer loans, instalment sales, and guarantees, as well as deceptive advertising and consumer contracts. A project to conform the regulations to the EU's consumer protection rules was completed in June 2003. The consumer protection law extends more widely than does competition law, imposing obligations on all kinds of entities, including government instrumentalities such as utilities. The

statute establishes an Advertising Board with power to enforce the rules about deceptive advertising, while vesting the Directorate for Competition and Consumer Protection in the Ministry of Trade and Industry[38] with authority for enforcing the other provisions of the law. The Directorate, in addition to its enforcement responsibilities, also has a consumer education function implemented through brochures and radio and television programs. The Directorate and the TCA exchange consumer complaints that relate to the other agency's jurisdiction, but do not otherwise interact.

3. Institutional issues: enforcement structures and practices

3.1 Competition policy institutions

57. The Competition Act establishes the Board as part of the Competition Authority and vests it with the agency's decision-making powers. The Chairman of the Board is also the President of the Authority and acts as its chief executive, managing the Authority and representing it publicly. The 11 members of the Board (including the Chairman) serve full-time. Board appointments are for fixed terms of 6 years, which can be renewed, and members may be removed from office only for cause (Art. 24).[39] To ensure continuity, one-third of the terms expire every 2 years. The government has recently introduced legislation styled as an omnibus reform act for autonomous agencies. It would apply to the TCA and the other independent agencies (including sector regulatory bodies) that have been established in Turkey's governmental scheme. The proposal would reduce the number of seats on all multi-member boards to a maximum of seven, and limit members to one six year term without possibility of re-appointment.

58. The Competition Act creates a complex mechanism for appointing Board members (Art. 22), designed to balance expertise with political responsiveness. Appointments are made by the government from among individuals nominated by several designated institutions. Each of these bodies nominates 2 individuals for a position on the Board, from which the government selects one. Nominees may, but need not, be drawn for among the personnel of the nominating institutions. The Ministry of Trade and Industry can nominate for 2 positions, and 5 bodies can each nominate for a single position: the Ministry of State with which the State Planning Organization is affiliated, the Court of Appeals, the Council of State, the Inter-University Board, and the statutorily-created business association, TOBB (the Turkish Union of Chambers and Exchanges). The Competition Board itself submits nominations for the remaining four positions, and half of those nominees must be experts from the Authority. The Chairman is appointed by the government from among three sitting members nominated by the Board.

59. Regardless of the source of the nomination, Board members are required to have 10 years of professional experience, as well as credentials in the form of a degree in law, economics, engineering, business, or finance (Art. 23). Of the ten current Board members (one seat is vacant), five (including the Chairman) have backgrounds in business administration or finance, and five have backgrounds in law or public administration. Only one member has formal academic credentials in economics. The business community would prefer to see more Board members drawn from a business background, while members of the academic and practitioner communities recommend the appointment of more Board members with personal experience in competition law and policy.[40] The government's bill for autonomous bodies would vest all nominating and appointing power in the government, but require that at least one appointee have a legal background, one have an economics background, and one have personal experience in the agency's substantive work. The government would be required to issue a statement for each appointment, explaining how the appointee meets the statutory criteria.

60. The Competition Act provides that the TCA "shall be independent," which means that "no organ, authority, entity or person can give orders or directives to affect the final decision of the Authority" (Art. 20). Board members are subject to conflict of interest rules about shareholdings (Art. 25) and, under applicable civil service law, may not be members of a political party. Although some of the members have

political backgrounds, the Board is uniformly regarded as truly autonomous, and there have been no serious complaints of political influence on particular decisions.[41] The 2004 EU accession report on Turkey remarks that the government's efforts to enact the proposed omnibus law on autonomous agencies "raise concerns about potential political intervention in the operations of the Competition Authority,"[42] but there is no overt evidence that such an objective motivates the government.

61. Although Article 20 of the Competition Act states that the TCA is "related" to the Ministry of Trade and Industry, the same provision also states that the agency is a legally separate entity from the government and possesses "administrative and financial autonomy." The Competition Act originally provided (Art. 39) that the "income" of the agency would arise from three sources: an appropriation in the budget of the Ministry, a 25% share of the fines it collected for violations of the Act, and revenues from sale of publications. No Ministry appropriation has ever been made, nor has the TCA ever charged for its publications. The provision for a 25% share of the fines collected was repealed in 2003 in response to criticism that such a mechanism created an improper prosecutorial bias. In any event, the fines provision was never a significant source of funds, as the amount received by the TCA totals only TRL 196 billion (USD $131,000).

62. The TCA's income actually comes from another law entirely. Under Law No. 4077, enacted in 1995, newly-constituted corporations are required to register their capital and pay a fee to the state, and existing corporations are required to pay a fee whenever they increase their registered capital. A portion of the registration fee, originally equal to .19% of the capital amount registered (that is, TRL 19 for every TRL 10,000 registered), was deposited to the TCA's account. In 2003, the law was amended (No. 4791, later incorporated into No. 5234) so that the TCA's share fell to .04% of the amount registered (that is, TRL 4 for every TRL 10,000 registered). The financial impact on the TCA of this reduction is discussed later in this report. The TCA does not, however, consider that the change in the fee percentage has any implications with respect to the agency's institutional autonomy.

63. Because the TCA's income is established as a fixed percentage of fees paid by private corporations, the TCA's autonomy is not threatened on the budgetary appropriations front by any authority held by the Ministry. A related issue with implications for autonomy, however, is the extent to which the Ministry controls the TCA's expenditures. The TCA notes that, although the government never directly interferes with expenditures relating to the agency's law enforcement functions, certain expenditure controls are imposed on a government-wide basis. For example, all public agencies in Turkey are required to obtain approval from the State Staff Presidency (a general directorate under the Prime Ministry) before hiring new employees. Thus far, all of the hiring requests submitted by the TCA have been accepted. Further, all trips abroad by public employees, including trips for post-graduate educational training, are subject to government approval. A 2003 TCA proposal to send 13 assistant experts to group training at the College of Europe was dropped when the government would approve only four slots, but the TCA's subsequent proposals for study abroad in 2003 and 2004 were approved. The Ministry of Trade and Industry also controls expenditure for international conferences hosted by the TCA in Turkey or attended by TCA personnel abroad. All TCA requests to date have been accepted.

3.2 Competition law enforcement

64. A significant feature of the enforcement scheme established by the Competition Act, and one that reflects a distinctive difference from the EU's approach, arises from Article 10 of the Act. Under that Article, any agreement, decision, or concerted practice "within the scope of Article 4" must be notified to the Board within one month of the conduct's execution, unless the conduct qualifies for protection under a block exemption. Failure to file where otherwise required is a separate violation subject to a fine, in addition to any penalty that may be assessed if the conduct is subsequently found to be unlawful. The EU's scheme formerly required notification only if the applicant firm wished to obtain a case-specific exemption

under EU Article 81(3) and, as discussed previously, the EU eliminated case-specific exemptions during 2004.

65. In Turkey, filing an Article 10 notification both protects the firm from a penalty for failure to file and constitutes an application for an individual exemption under Article 5. After the Competition Act came into force, firms anxious about their legal exposure began filing applications with the Board, mainly about vertical agreements. Most of those notifications also sought "negative clearance" under Article 8 of the Act. This was because no time limit is mandated for the duration of a negative clearance, whereas the statute itself limits the duration of an individual exemption to a maximum of five years.[43] From 1999 through 2004, the TCA received a total of 193 applications for exemption or negative clearance and resolved 159 of them. Of the applications resolved, about 31% (49) were subjected to conditions and the rest were granted unconditionally. The TCA's staff has underway a project to develop recommended amendments to the Competition Act, and two features of the package are elimination of the mandatory notification requirement in Article 10 and the negative clearance procedure in Article 8. The system for granting case-specific exemptions, however, would be retained.

66. Law enforcement procedures under the Act are commenced upon receipt of a complaint or upon the Board's own initiative (Art. 40). The Board may either open a preliminary inquiry to establish whether a formal investigation is warranted, or launch a formal investigation immediately. Preliminary inquiries are conducted by members of the TCA staff, and the resulting report is assessed by the Board to determine if the allegations are "serious and sufficient." If so, a formal investigation is initiated.

67. As required under Article 43 of the Act, a formal investigation is headed by one or more members of the Board, assisted by staff. There has been some concern about the Act's requirement for personal participation by Board members in investigations, as mixing investigative and judicial functions can obviously raise doubts about a tribunal's impartiality. The original rationale for requiring Board participation was to assure that investigative information favourable to the defendant was brought to the Board's attention, but the Act's adjudicative processes provide defendants with fully adequate opportunities to defend themselves. A proposal to eliminate the Board member participation requirement is a feature of both the TCA staff's statutory revision package and the government's proposed omnibus law on autonomous agencies.

68. Once an investigation is underway, the parties must be notified within 15 days and requested to present their views, which must be filed within the following 30 days. Parties may at any time obtain copies of the evidence against them, and "the Board cannot base its decision on any issue about which the parties are not informed or not given the right to defence" (Art. 44). At the conclusion of the investigation stage, the parties are advised of the results and again invited to submit their defence in writing. A public hearing is held, if the parties request it. Decisions are rendered after the hearing at an *in camera* meeting of the Board. A final decision requires a majority of the full Board (that is, 6 votes).[44] Other decisions, such as those involving interim measures and recommendations, can be taken by simple majority of members present.[45]

69. The TCA has broad investigative powers available during both the preliminary inquiry and the formal investigation. The Authority can request information from any firm or association and from any government body (Art. 14). It can also conduct on-site examinations at business premises to review and copy documents, take oral or written statements, and assess assets (Art. 15). Officials performing such on-site examinations must bring a certificate showing the subject matter and purpose of the investigation and specifying the administrative penalty (set by Article 16) for providing an inaccurate response. One problem that emerged with respect to "on-site" investigations was that penalties for resisting access were weak and target firms could simply elect to pay the daily penalty until they had sufficient opportunity to purge their files. Under an amendment to Article 15 adopted in 2003, the Authority may now obtain an *ex parte* court

order in advance that compels immediate access and that may be enforced, if necessary, with the aid of the police.

70. Article 9(4) of the Act provides that the Board may impose interim relief orders during the course of an investigation "where there may arise serious and irreparable damages until the final decision." The Board employed this authority on seven occasions in the years before 2002, but only once since that time. In 2003, the Board was investigating an abuse of dominance claim against a supplier of clinker (a component of cement). The Board issued an interim order requiring the firm, for the duration of the investigation, to resume deliveries of clinker to one of its customers at a specified daily volume and price. The customer, a cement and concrete producer, asserted that it was about to cease operations because of the supplier's action in terminating deliveries. The Board's interim order was subsequently annulled by the Council of State, which rested its decision on the intervening expiration of the supply contract and what it found to be inadequate proof that alternate sources of supply were unavailable.

71. There is no provision in the Competition Act that allows settlement of a pending case by consent. Under current practice, the Board permits a limited form of consent settlement by relying on Article 9(3) of the Competition Act, which provides that the Board, before formally determining that a defendant has violated the Act, must inform the defendant "in writing of the [the Board's] opinion and on how [the defendant] shall terminate the infringement." The Board considers that this language provides a basis for settling a matter without a formal determination of illegality, but only if the commitment is made during the preliminary inquiry stage. The usual mechanism is to advise the defendant that it can accept the proposed commitment or the Board will open a formal investigation. This approach has been used in eleven matters since 1999, eight of which occurred in the last two years.[46] One item in the TCA staff's package of proposed amendments to the Competition Act is a provision expressly permitting the Board to terminate a proceeding at any stage if the defendant commits itself to accepting the conduct modifications recommended by the Board.[47]

72. When the Competition Act was passed, the adversary hearings and procedures it provided were a novelty in Turkey's administrative practice, which did not historically envisage the direct participation of the parties in the decision-making process. Practitioners today generally regard the Board's proceedings as models of due process, although some express concern that the Competition Act accords procedural protections only in Board proceedings that lead to finding a violation, and not for such actions as withdrawing a block exemption from an individual firm.[48] The TCA responds that the exemption withdrawal provision in the vertical agreements block exemption expressly obliges the Board to request the written or oral views of the affected party before rendering a decision.[49]

Box 3. The Concerted Practice Presumption

A controversial issue associated with the TCA's enforcement policies relates to the "concerted practice presumption" in Article 4 of the Competition Act. As described earlier in this report, the "concerted practice presumption" permits the Board to infer the existence of unlawful collusion among competitors if conduct or conditions in a market are similar to those that would arise where competition was artificially distorted. The presumption, designed for oligopolistic markets in which proving overt agreement is difficult, shifts the burden to the parties to show "on economic and rational grounds" that they in fact are acting independently. A threshold issue presented by the statutory language is what kinds of market conduct and conditions should be deemed sufficient to trigger the presumption. Practitioners object strenuously, on due process and economic grounds, to any invocation of the presumption based on conditions that could merely reflect non-collusive "conscious parallelism."[50] Particular attention has focused on the issue of whether uniform pricing in oligopolistic markets with homogeneous products is sufficient to trigger the presumption.

The TCA has faced some internal disagreement about how to treat the presumption, and its policies have gradually emerged in a series of litigated cases over the past several years. The first case to arise was a proceeding in 2000 against yeast manufacturers who had posted uniform price increases unrelated to any changes in costs.[51] The Board considered applying the presumption, but ultimately declined to find unlawful collusion because there was no evidence on the record of any meetings or communications among the parties with respect to price changes. The Board did find, based on documentary evidence, that the producers had colluded to implement resale price requirements for downstream distributors, but this determination did not entail use of the presumption. On appeal before the Council of State, one of the appellants raised a constitutional due process claim against the concerted practice presumption. The Council's initial decision in 2003 upheld the Board's decision and rejected the constitutional claim as insubstantial without focusing on whether the presumption had actually been employed.[52] The appeal is still before the Council pending plenary review.

The second case, also in 2000, attacked a horizontal price agreement between two newspaper publishers.[53] The Board found collusive action, again based on documentary evidence, and stated explicitly in its decision that oligopolistic interdependence alone is not sufficient to trigger the concerted practice presumption. In a February 2004 decision against a cartel among ceramics manufacturers, the Board's finding of collusion relied on evidence that the participants had exchanged sensitive price information.[54] The Board's decision observed that, although the presumption is not triggered merely by consciously parallel pricing behaviour, it can be invoked where such behaviour is combined with additional factors that tend to show collusion, such as the exchange of commercial data. In such circumstances, the Board concluded, defendants may properly be burdened with the obligation to prove that the information exchanged was not susceptible to exploitation for price collusion.[55] Subsequently, in two December 2004 decisions involving the cement and ready-mix concrete markets, the Board cited circumstantial evidence and employed economic analysis to support its determinations of collusion. Thus, the Board asserts that it has not relied on the presumption in any of its decisions thus far.

The practitioner community is not fully convinced that the Board's treatment of the presumption is sufficiently cautious. There is still concern that the existence of the presumption influences the Board to rely on weak and non-probative "additional factors" to find collusion. Further, beyond the issue of finding an infringement of Article 4, practitioners also object to reliance on the presumption as the basis for initiating formal investigations. The Board's position on this point is that it may properly open an investigation of any market, oligopolistic or not, even if the only available evidence (such as, for example, a pattern of parallel pricing) could be consistent with lawful conduct. Practitioners retort that investigations impose costs on the target firms and expose them to negative publicity, and should not be lightly commenced in markets where parallel pricing or other interdependent behaviour could be the normal outcome of competitive forces.

73. Most members of the legal and academic communities in Turkey compliment the quality of the Board's decisions, particularly in comparison to those issued by other agencies. Some lawyers complain that the Board provides inadequate analysis of such legal issues as the proper admission of evidence. Also, the Board's decisions do not always describe and consider the EU case precedents relevant to the issues in dispute. The sophistication of the Board's economic analysis varies considerably from decision to decision,[56] reflecting in part the fact that the TCA is still a relatively new agency and partly the fact that the TCA does not have a staff of industrial organisation economists. Even the harshest critics of the TCA, however, do not usually assert that the decisions reached are incorrect on economic grounds, but rather that the analysis in the decisions should be more thorough and incisive.

74. Deadlines established in the Competition Act govern every stage of the process. A preliminary investigation must be completed within 30 days, and the Board then has 10 days to determine whether to commence a formal investigation (Arts. 40, 41). The deadline for completing a formal investigation is 6 months, which may be extended once for an additional 6 months (Art. 43). The post-investigation exchange between the parties and the staff, including the staff response and the parties' rebuttal, can take up to 75 days; and one 30 day extension is available to the parties (Art. 45). A hearing, if requested, must be held within 30 to 60 days after the end of the investigation, and the hearing itself is limited to a

maximum of 5 (consecutive) days (Arts. 46, 47). The Board's decision and reasoning must be issued within 15 days after the hearing (Art. 48). With the exception of the 15 day deadline for issuing a final reasoned decision after the hearing, the TCA has a track record of adhering to the statutory deadlines.

75. With respect to final decisions, the Board's traditional practice was to issue a short one or two page statement of its holding within 15 days after the hearing and then issue the full reasoned decision at its leisure, which often entailed a delay of a year or more. By 2002, a backlog of unreleased decisions had accumulated and the Board was subject to increasing criticism about the delay. The Board then initiated the practice of having staff competition experts assist in preparation of the final decisions. The backlog was eliminated, and presently most final decisions are released within about 30 days. For other decisions, such as those relating to preliminary investigations, mergers, and exemption applications, the lapse between the Board's determination and the final decision is ordinarily no more than 20 days. The proposed law for autonomous bodies entails a 30 day deadline after an agency determination for issuance of a final decision (backed by the threat of removal from office for recalcitrant board members), while the statutory amendments drafted by the TCA's staff specify a 60 day period.[57]

76. The Competition Act establishes two types of fines. Article 16 specifies one-time fines for committing various wrongful acts, while Article 17 provides daily accumulating fines for ongoing violations. Fine maximums under both articles are adjusted regularly for inflation. Under Article 16, fines for infringing the substantive antitrust prohibitions in Articles 4 and 6 range from a mandatory minimum level (set for 2004 at TRL 11.9 billion, USD 8,000) up to 10% of the violator's annual gross income. Factors specified in the statute for determining the size of fine assessments include intent, degree of fault, market power, and magnitude of harm (Art. 16). Other Article 16 fines range from TRL 3 billion (USD 2,000) for failure to notify a merger or Article 4 agreement, to TRL 5.9 billion (USD 4,000) for providing misleading information. The managers of a firm that is assessed a fine under these supplementary provisions in Article 16 (but not under the Article 16 provisions relating to substantive antitrust violations) must also each be assessed a fine, up to 10% of the fine levied against the firm. The daily accumulating fines set by Article 17, which apply for failing to comply with various kinds of Board orders and conditions, range (for 2004) from TRL 1.5 to 3 billion per day (USD 2,000), while impeding an on-site investigation warrants a daily fine under Article 17 of TRL 1.2 billion. The Competition Act does not provide any criminal penalties for violations, and none exist elsewhere in Turkish law with the exception that bid rigging during state tenders is a criminal offence.

77. The mandatory minimum fine required by Article 16 for substantive violations means that Board decisions finding such infringements always entail the imposition of some fine amount. In the years 1999 through 2004, the Board assessed a total of TRL 111.4 trillion (USD 74.6 million) in fines for substantive violations of the Competition Act. Violations of Article 4 accounted for 59 % of the total (of these, 34 percentage points entailed horizontal violations, 19 points entailed vertical violations, and 6 points entailed mixed horizontal and vertical violations), while Article 6 abuse of dominance violations accounted for the remainder. Fines for substantive merger violations under Article 7 accounted for only a fraction of a percentage point.

78. The minimum fine required by Article 16 also means that the Board cannot relieve a cooperating firm in a cartel investigation from monetary penalties. The TCA staff's draft statutory amendments would eliminate the mandatory minimum clause, and add language providing for the abatement of criminal sanctions against firms that cooperate actively with the TCA by disclosing unlawful conduct. The factors specified in Article 16 for determining the size of fine assessments would also be expanded to include consideration of whether the violator had assisted the investigation.

79. The 2002 Report suggested (p. 32) that higher maximum fines be set for failing to comply with or impeding investigative processes. The TCA staff's draft statutory amendments would satisfy that

recommendation, and more. Under the proposals, Article 16 would be amended to eliminate the individual fine limits provided for specific types of violations and to replace them with a provision establishing a maximum limit for all such fines at 1% of the violator's gross income. The limit for substantive antitrust violations at 10% of gross income would be retained. Article 17 would also be revised to eliminate the individual daily fine amounts provided for specific types of continuing violations and to replace them with a provision establishing a maximum daily limit for all such fines at 5% of the violator's gross income. The Article 16 clause presently dealing with the provision of "incorrect or misleading information" in response to an information request would be expanded to cover both the submission of incomplete information as well as the failure to provide information at all, conduct that is not now prohibited by Article 16. Likewise, a clause would be added to Article 17, applying a daily fine for providing "incomplete, false or misleading information, or no information at all," in response to an information request. Early consummation of a merger requiring Board approval would be made a substantive violation subject to a fine up to the 10% limit, thus filling a loophole in the existing law, which does not sanction early consummation. The language in Article 16(3) requiring imposition of fines on company managers for violations of that Article's supplementary provisions would be eliminated entirely, on the grounds that the violations involved do not warrant expenditure of the effort required to administer fines against individuals. The Board has found that identifying the managers responsible for ancillary violations of Article 16 consumes significant time that could be better spent on substantive issues.[58]

80. One criticism voiced by practitioners is that the Board's analysis in applying the Article 16 factors to determine fine assessments is not sufficiently transparent. The Board is aware of this criticism and has undertaken to provide more detailed reasons in its decisions explaining how fine amounts were calculated. The TCA also plans to develop and release guidelines for determining fines. As noted above, the TCA staff's draft statutory amendments would expand the factors specified in Article 16 for determining the size of fine assessments by adding consideration of whether the violator had assisted the investigation. Other factors that would be added include recidivism, duration of the violation, and whether the violator had transgressed commitments previously given to the TCA.

81. Appeals from the Board's decisions[59] may be taken to the Council of State.[60] Board decisions subject to review include those that determine legal violations; assess fines; impose interim measures; issue or withdraw individual exemptions, block exemptions and negative clearances; and reject complaints.[61] Although the Council acts as a "first instance" court, it cannot substitute a new decision for that of the Board, but may only affirm or reverse. Appeals are heard initially by a designated chamber within the Council of State, consisting of 5 judges. The first chamber's decision may then be appealed further to a second "plenary chamber" consisting of 29 judges, none of whom is from the chamber that issued the initial ruling. A party may also request that the plenary chamber reconsider its decision, although such requests rarely result in any modification. The judicial review process typically takes about three years to complete, but sometimes extends to four. Most of the Board's decisions imposing significant fines have been appealed, and most appeals raise both procedural and substantive issues. To address the problems posed by the unfamiliarity of Turkish judges with competition law, the Parliament recently enacted legislation[62] under which a new special chamber in the Council of State will be created specifically to deal with cases appealed from the TCA. The chamber's judges, to take office in 2005, are to be selected for their expertise in economics, and competition law training will also be provided.

82. Of the 744 decisions subject to judicial review that the Board rendered from 1999 through 2004, 136 (or about 18%) have been appealed to the Council of State. The TCA's experience with first and second instance judicial review since 1999 is summarized in the following table.[63] Virtually all of the adverse Council decisions thus far involve procedural points. The most significant adverse decision dealing with a competition policy issue is a November 2003 ruling that overturned the Board's 1999 decision in the Cine 5 case. The Board had brought an abuse of dominance case founded on Cine 5's exclusive contract with Turkey's professional soccer league to televise soccer contests. The alleged abuse entailed

discriminatory prices that Cine 5 charged to other TV broadcasters for film clips to be shown on news broadcasts. Although the Board argued that there was no proper basis for price discrimination among broadcasters, the Council concluded that the public interest warranted different prices for audiences with different demographics and demand functions.

Table 2. Judicial Review of Competition Board Decisions

Year	First Instance Appeals						Second Instance Appeals				
	Initiated	Resolved					Initiated	Resolved			
		Total	Favourable[1]	Unfavourable[2]	Mixed[3]	Dismissed		Total	Favourable[1]	Unfavourable[2]	Dismissed
2004	197	16	12	3	1	0	29	2	0	2	0
2003	41	38	31	6	0	1	16	4	3	0	1
2002	28	19	12	6	0	1	3	14	5	8	1
2001	43	14	3	9	0	2	11	2	0	0	2
2000	12	0	0	0	0	0	0	0	0	0	0
1999	8	1	1	0	0	0	1	1	1	0	0
Total	329	88	59	24	1	4	60	23	9	10	4

1. Decisions characterised by the TCA as favourable
2. Decisions characterised by the TCA as unfavourable.
3. Decisions characterised by the TCA as partially favourable and partially unfavourable.

Source: Turkey 2005

83. The 2002 Report noted (p. 18) that judicial review of Board decisions had led to significant difficulties in the process of collecting fines assessed in Competition Act cases. Under Article 55 as originally enacted, fines were not required to be paid until judicial review proceedings were complete, and the passage of several years during the pendency of appeals meant that inflation eroded the weight of the fine assessed. A 2003 amendment to Article 55 addressed the problem by specifying that fines must be paid within thirty days of the Board's order, whether or not an appeal is taken. In late 2004, the requirement was modified to extend the payment period from thirty to ninety days.[64] The Council of State retains the authority to stay execution of the fine pending appeal, upon application of the party. If the Council grants a stay, it also has discretion to require that the appellant post a bond.[65] The Finance Ministry, not the TCA, is responsible for collecting fines if the violator files no appeal or loses the appeal it does file.

84. The TCA is sensitive to the importance of transparency, but makes some compromises in the interests of economy. For example, Article 53 of the Competition Act, as enacted, provided that the TCA would itself publish final decisions issued by the Board. Article 53 was modified in 2003 to provide that Board decisions could be published instead in the government's official Gazette, but the introduction in 2004 of a fee for Gazette publication led to a further amendment permitting the Authority to forego the Gazette and publish Board decisions by posting them on the TCA's website. Some in the academic community are doubtful about the sufficiency of that approach. There is also uncertainty about the TCA's policies with respect to publication of Board decisions other than those dealing with substantive legal determinations arising under the Competition Act. Recently, for example, the Board took the novel action of posting summary versions of two opinions that it had provided to the Privatisation Administration at the initial stage of privatisation proceedings.[66] There are also complaints about the TCA's practices in exposing proposed statutory amendments and communiqués for public comment. The TCA has no regulation or formal policy on this point, but ordinarily follows the practice of posting draft communiqués and amendments on its website for comment. Although an announcement is issued at the time of posting, no statement is made indicating how long the comment period will last, nor are the comments received by the TCA posted or summarized on the website. Posted proposals are sometimes withdrawn without notice or explanation, and when proposals are finally adopted, the TCA does not routinely issue a statement explaining the reasons for the conclusions reached.

85. A separate transparency problem faced by competition law practitioners in Turkey arises from the fact that, although the Council of State publishes some of its decisions in the Council's Journal, most are merely provided to the parties in the case. The TCA publishes in its own Competition Bulletin a list of finalised Council decisions in which the TCA is a party, together with the text of selected, but not all, Council decisions.

86. One final enforcement issue that deserves mention arises from the obligation in the Customs Union Agreement to harmonize Turkey's competition law regime with that of the EU. Article 39(2) of the Agreement requires that Turkey not only enact Articles 81 and 82 of the EU Treaty as positive law and establish a competition enforcement agency, but also "ensure that, within one year after the entry into force of the Customs Union, the principles contained in block exemption Regulations in force in the Community … shall be applied in Turkey." The EU has issued various block exemptions that have no counterpart in TCA laws or communiqués. Examples mentioned previously in this report are the EU block exemptions for transfer of technology, and for the maritime, airlines, and insurance industries.

87. The TCA notes that all components of the EU's secondary competition legislation are on its agenda for eventual consideration. In the meantime, the TCA's position is that the absence of a block exemption in Turkish law does not mean that Turkey is out of compliance with the Customs Union requirement, because any agreement that is legal within the EU will in fact be treated as legal by the TCA. Firms covered by an EU exemption that wish complete assurance of protection from prosecution under

Turkish law may file for an individual exemption under Article 5, and expect to receive it. Even if no individual exemption is sought, the TCA will not prosecute a firm protected by an EU block exemption. As a case in point, the TCA cites a June 2003 decision by the Board not to prosecute a liner conference for price fixing activities protected by the EU's block exemption for the maritime industry (Regulation No.4056/86, Art. 3).[67] In the obverse situation, where conduct outside an EU exemption is protected by the TCA version, the TCA reserves the option to withdraw the exemption from an individual firm if its conduct proves anticompetitive.

3.3 Other enforcement methods

88. Private parties have several options for pursuing complaints. A party who is disappointed by the Board's rejection of its application, or by the Board's failure to take action with respect to it, may appeal to the Council of State (Art. 42). Under general principles of administrative law, applications are deemed to be rejected if not acted upon by the Board within 60 days. Article 57 of the Competition Act authorizes parties injured by conduct violating the Act to sue the perpetrator in civil court for damages. Although about 30 cases have been commenced under Article 57 since 1999, it is not yet clear whether the Board must find a violation to exist before private damages can be awarded. An appellate court ruled in one private case that an Article 57 damages action must be held in abeyance while the alleged antitrust violation is referred to the Competition Board for resolution.[68] The TCA staff's draft amendment package includes a provision designed to establish that holding as statutory law.

3.4 International aspects of enforcement

89. Article 2 of the Competition Act incorporates a basic "extraterritorial effects" test, so that anticompetitive conduct occurring outside Turkey that affects Turkish markets falls within the Act's prohibitions. In proceedings under the Act, foreign firms are treated no differently than domestic firms. The Authority recognizes the practical problems associated with obtaining information about conduct involving foreign firms and products. The 2002 Report (p. 19) noted that Turkey had no formal cooperation agreements with competition enforcement agencies in other countries, and urged the TCA to consider establishing such relationships in order to obtain necessary information and evidence from abroad in enforcement proceedings. The Report observed that such cooperative arrangements might be particularly important for Turkey, since it "is not part of a supra-national structure with competition policy competence, such as the EU" (p. 32).

90. The TCA states that it attaches great importance to cooperating with the competition components of major international organisations and to participating in their activities. It has recently reorganised its international relations unit and begun submitting more information about the Turkish competition policy experience to the OECD, UNCTAD, and WTO. Since the TCA's establishment in 1997, it has been a participant in the activities of the OECD's Competition Committee and in WTO meetings on competition policy. As a member of the WTO's Working Group on interaction between trade and competition policy, the TCA supported the attempt to include competition policy issues in the Doha Development Agenda. The TCA has also participated since 1997 in meetings convened by UNCTAD's Competition and Consumer Policies Branch, and recently proposed that Turkey host the UN's 5th Review Conference, to be held during 2005. At that Conference, member countries will review their progress in implementing a set of competition policy recommendations adopted by the UN in 1980. The TCA considers that this event would provide a particularly good forum for Turkey to share its competition policy experience with other developing countries.

91. Although the TCA wishes to expand cooperation with other countries through multilateral or bilateral platforms, it has not, as recommended in the 2002 Report, established any formal cooperation arrangements with enforcement agencies in other countries. On two occasions in the past year, the agency

sought the assistance of the EU in enforcement matters.[69] In May 2004, the Authority initiated an informal request to the EU's Directorate General for Competition (DG COMP), inquiring whether the EU's ongoing investigation of a cartel in the electrical equipment industry had revealed any information about the cartel's activities in Turkey. DG Comp replied that it could not provide any information to the TCA because the material collected was confidential and subject to the disclosure prohibition applied to such material by Article 28 of the EU's general competition regulation (No. 2003R001). DG COMP also noted that, under Article 36 of the Customs Union Agreement, any information exchanges between Turkey and the EU were subject to "the limitations imposed by the requirements of professional and business secrecy."

92. In June 2004, the TCA initiated a more formal request to DG COMP under Article 43 of the Customs Union Agreement. Article 43 provides that either the EU or Turkey may request the other party to initiate enforcement action if conduct carried out in the territory of the second party adversely affects the interests of the requesting party. Under Article 43(3), however, the second party retains full discretion to decide whether or not to initiate an investigation. The TCA's request arose from an investigation into a possible cartel in the coal industry that involved enterprises based in EU member countries but whose activities affected Turkish markets. The TCA sought an investigation by DG COMP and also requested that, if no EC enforcement action resulted, any relevant investigative information be provided to the TCA. In its response, DG COMP referred to the discretion it retained under Article 43(3) and noted that the Commission saw no appreciable effect in the EU arising from the conduct in question. Further, the response observed that because any information obtained would have been seized during an investigation, EU confidentiality regulations would have prevented its disclosure to the TCA.

93. The TCA has thus been unsuccessful in its efforts to cooperate in particular enforcement cases. Issuance of the competition implementing rules under the Customs Agreement would be a useful step in expanding interaction between the TCA and the EU, because those rules oblige the competition authorities to regard requests for co-ordination of enforcement activities "in a favourable way" (Art. 7). As discussed previously, however, the implementing rules cannot be adopted until Turkey establishes a system for controlling state aid programs.[70] Even then, legal obstacles to the exchange of confidential information between the TCA and DG COMP would persist. Although the TCA believes that it can properly disclose confidential information in its possession to other enforcement agencies if an agreement between the agencies expressly provides for such exchange, Article 5.3 of the draft implementation regulation merely provides (much like Article 36 of the existing Agreement) that "any exchange of information under this Article is limited by the requirements of professional and business secrecy and confidentiality." These provisions make clear, and DG COMP has confirmed, that adoption of the implementing rules would not permit disclosure to the TCA of protected information that it has been collected in EU investigations.

94. The TCA has no direct role in government proceedings that entail other competition issues raised by international trade. The Prime Ministry's Undersecretariat of Foreign Trade holds all responsibility for implementing Turkey's law dealing with dumping and unfair import competition,[71] and the Authority has had no involvement in those matters.

3.5 Agency resources, actions, and implied priorities

95. As noted previously, a portion of the fee paid by corporations for registering their capital is deposited to the TCA's account and serves as the principal source of the agency's income. The TCA's share of the fee was reduced substantially in 2003, but this decrease has not adversely affected the agency because, as shown in the following table, annual expenditures have consistently been less than the allotted amounts. The TCA considers that its budget allocation is sufficient for present and planned needs. There is a concern at the agency, however, about the level of salaries that may be paid to agency personnel. This issue arises not from any lack of available budget funds, but from a decree issued by the Council of Ministers that controls increases in salaries and benefits for all government personnel, including the TCA's

Board members and staff. The Council's administration of the decree in recent years has caused salaries and benefits to fall behind inflation. The number of agency staff has recently declined because of resignations, but the agency is presently engaged in recruiting efforts to replenish and increase the ranks of competition experts and lawyers.

Table 3. Trends in Competition Policy Resources

Year	Number of Personnel[1]	Budget Allowance[2] (TRL trillion)	Budget Allowance[2] (USD million)[3]	Expenditures (TRL trillion)	Expenditures (USD million)[3]
2004	304	17.8	12.5	14.5	10.2
2003	310	18.7	12.5	13.7	9.2
2002	317	17.3	11.4	12.1	7.9
2001	318	10.9	8.8	7.9	6.4
2000	300	44.1	70.8	15.6	25.0

1. "Number of personnel" refers to the person-years actually on staff at the end of the year.
2. "Budget Allowance" is the amount established at the beginning of a year as available for expenditure.
3. Currency conversion rates: 1 USD = TRL 1.42 million (2004), 1.49 million (2003), 1.52 million (2002), 1.23 million (2001), 0.62 million (2000).

Source: Turkey, 2005

96. The following table shows the TCA's enforcement activities over the past six years. Enforcement priorities appear balanced and well directed, with a focus on horizontal agreements and abuse of dominance. About 11 % of the cases opened under Articles 4 and 6 were initiated by the Board *ex officio*. Of the Article 4 *ex officio* cases, two-thirds involved horizontal conduct and the remainder involved vertical infringements.

Table 4. Trends in Competition Policy Actions[1]

	Horizontal Agreements[2, 5]	Vertical Agreements[2]	Abuse of Dominance[2, 4]	Mergers[3]
2004: matters opened	24	14	32	92
Matters in progress	15	5	10	3
Matters concluded	39	19	41	107
Total sanctions imposed (TRL million)	15,601,915	7,649,830	2,488,607	14,853
2003: matters opened	40	8	28	91
Matters in progress	30	10	19	18
Matters concluded	28	7	27	81
Total sanctions imposed (TRL million)	4,567,638	5,198,582	39,960,321	35,372
2002: matters opened	38	7	24	65
Matters in progress	18	9	18	8
Matters concluded	39	4	28	61
Total sanctions imposed (TRL million)	22,956,113	317,169	1,136,376	2,908
2001: matters opened	20	7	26	39
Matters in progress	19	6	22	4
Matters concluded	16	9	16	46
Total sanctions imposed (TRL million)	172,234	7,877,954	1,799,225	949
2000: matters opened	17	11	18	57
Matters in progress	15	8	12	11
Matters concluded	16	12	25	51
Total sanctions imposed (TRL million)	1,193,663	515,894	-	608
1999: matters opened	18	12	24	30
Matters in progress	14	9	19	5
Matters concluded	4	3	5	25
Total sanctions imposed (TRL million)	4,320	-	-	-

1. Data are for applications of the Competition Act by the Competition Authority, and do not include negative clearances, exemptions, opinions, and matters determined to be irrelevant under the Act.
2. The total number of non-merger matters opened in 2004 was 70; in 2003, 76; in 2002, 69; in 2001, 53; in 2000, 46; in 1999, 54.
3. Includes mergers reviewed in privatisation proceedings but excludes mergers that were below notification thresholds or otherwise deemed out of scope.
4. Includes cases in which both Articles 4 and 6 were applied.
5. Includes cases in which both horizontal and vertical agreements were involved.

Source: Turkey, 2005

97. The main functions of the Authority are organized into eight departments under the supervision of two vice-presidents reporting to the President. The various sectors of the economy are divided among

the four operating departments that are responsible for law implementation and enforcement activities. The other four departments include Research (for studies of domestic and international market activities), Data Processing and Statistics, Human Resources, and Administrative and Financial Affairs. Ancillary offices include the Legal Office, which serves as the base for the agency's lawyers, the Executive Secretary's Office, and the Press Office, all of which are attached to the Presidency. At the time of the Authority's establishment in 1997, one vice president was placed in charge of the Authority's four operating departments, plus Research and Data Processing, while the second was charged with Human Resources and Administration. The assignment of one vice president exclusively to administrative issues was considered important during the agency's formative period. Now that the agency has reached relative maturity, a reorganisation has been undertaken that allocates one of the operating departments to the "administrative" vice-president and includes the Legal Office in that vice president's portfolio. The agency presently has 300 employees, including 10 Board members, 25 executives, 81 competition experts, 4 lawyers, and 180 supporting staff.[72]

98. The professional staff work of the TCA is performed primarily by employees holding the positions of "competition expert" and "assistant competition expert." These positions are created and defined by Articles 35 and 36 of the Competition Act. Applicants must hold a university degree and pass a specially designed examination. The Authority has an ambitious and comprehensive system for training its competition experts. Every two to three years, the Authority conducts entrance examinations and hires a class of 10 to 15 new "assistant experts." The new employees are subjected to a training program that extends for three and a half years and begins with five months of intensive schooling at the agency in law, economics, and competition policy, followed by at least one year of practical experience in case handling under the supervision of senior competition experts. The trainees are then sent as a group to a four-week seminar at the College of Europe in Bruges, Belgium, where they undertake advanced seminars and begin identifying subjects for their thesis projects. In the final phase, they complete a thesis paper on a topic of competition law and policy, and defend the paper before a committee of three Authority officers and two outside academicians. Successful completion of these steps leads to promotion from "assistant" to the position of "competition expert." Competition experts are encouraged to undertake further study for masters degrees in law or economics at the Authority's expense at various universities in Europe and the United States. Experts also attend other training programs, including international trade seminars and courses in intellectual property and specialized topics of EU law. The TCA's staff of experts is held in uniformly high regard by the Turkish academic community and by competition law practitioners. The agency believes that, over the next ten years, the present number of about 80 experts should be increased to 200.

99. Lawyers in the TCA's Legal Office represent the agency in judicial review proceedings and provide legal counsel to the Board and Authority staff. The normal complement of lawyers in the Office is eight, but the present level is half that because several lawyers have recently departed from the agency. The TCA also employs lawyers who work as competition experts in the operating departments. These, however, are very few in number, with the result that personnel with legal training rarely participate directly in the investigation of cases. Further, technical drafting in the preparation of Board decisions is undertaken by competition experts with little input from lawyers and, as noted previously, legal practitioners complain that Board decisions provide insufficient analysis of legal issues. The Authority recognizes these problems, and plans to increase over the next two years both the number of Legal Office lawyers and the number of lawyers working as competition experts. The TCA will also consider utilizing its authority to hire attorneys from private practice on a temporary basis to deal with specific cases or projects.

4. Limits of competition policy: exemptions and special regulatory regimes

100. By its terms, the Competition Act appears to cover all forms of economic activity. The only express exemption from its ambit appears in banking legislation that applies to exempt bank mergers. In fact, however, a significant portion of Turkish commerce is beyond the TCA's jurisdictional reach, because standard rules of statutory construction and administrative law apply to override the Act. For example, if a state ministry displaces competition by exercising statutory authority to regulate the price of a commodity (such as the Health Ministry does in Turkey with respect to the price of pharmaceuticals), the TCA has no power to act, except in a competition advocacy role, because the competition statute is not deemed applicable to state agencies and organs acting in a governmental capacity. Sector reform legislation that involves creation of a regulatory agency may also effectively oust the TCA, by vesting authority in the regulator to control or approve various aspects of the sector's operation. In such circumstances, the TCA retains its ability to enforce the Competition Act only with respect to whatever conduct (if any) the regulator remits to free market forces. There are also numerous statutes that create commercial undertakings and expressly vest them with powers and privileges that enable them to undertake anticompetitive conduct. This last category, which includes state-owned companies, has been the focus of particular controversy in Turkey with respect to the applicability of the TCA's jurisdiction.

101. Some state-owned firms in Turkey are granted a statutory monopoly that gives them exclusive control of a market, while others have no such protection and compete in the market with private firms. The 2002 Report (p. 21) describes a case in the latter category brought by the Authority against TFA, the state sugar firm, for abusing its dominant position to force private competitors out of business. The Board ultimately dismissed the case because TFA's prices and policies were determined by a government ministry and hence considered beyond the ambit of the Competition Act. The significance of the case lies in the Board's conclusion that the Act applies to anticompetitive conduct by an economic entity only if the conduct is undertaken at the entity's own volition. Where state-owned commercial entities act autonomously, the Authority has not hesitated to attack anticompetitive behaviour, as its several cases against Turk Telekom attest.[73]

102. The TCA has also addressed another variation on the theme of state involvement in commercial activity by prosecuting BELKO, a commercial enterprise owned by the city of Ankara that had been granted a monopoly over heating coal. That case, discussed previously, involved a charge that BELKO had violated Article 6 of the Competition Act by abusing its monopoly power. The TCA's jurisdiction applied because nothing in the grant of monopoly power purported to mandate the excessive prices that BELKO charged.

103. The Board's decision that it had no jurisdiction in the TFA sugar case, and similar holdings by the Board in other cases, generated criticism because the Board was perceived as resting its jurisdictional analysis on the term "undertaking" in the Competition Act. The Act, by its terms, covers only "undertakings," a term defined in Article 3 as "any natural or legal person who produces, markets or sells goods and services and who forms an economic whole, capable of acting independently in the market." The words "acting independently" were included in the definition to assure that a subsidiary of a larger firm would not be treated as an economic actor separate from its parent. Some ambiguous language employed by the Board in its decisions, however, made it seem that the Board was resting the requirement for autonomous conduct on that clause. The TCA has since confirmed that the language in Article 3 plays no role in determinations of jurisdiction, and that commercial entities, whether or not owned by the state, are "undertakings" subject to the Act. The relevant question for establishing jurisdiction is whether the conduct at issue reflects autonomous behaviour by the commercial entity or is conduct dictated by the state acting in a governmental capacity. The 2002 Report (¶p. 31) recommended that the TCA adopt a broader approach to the definition of "undertaking," to bring Turkey into conformity with the EU with respect to

jurisdiction over public entities. The Board's requirement for autonomous behaviour, as currently formulated, comports both with that recommendation and with EU practice.[74]

104. The 2002 Report made two related recommendations on the subject of state monopolies. The first (p. 30) was that any monopoly concessions (and related special privileges, such as tax exemptions) held by state firms should be withdrawn, so that entry by private competitors would not be prohibited or otherwise handicapped. The second (p. 31) was that Turkey should consider adopting legislation equivalent to Article 86 of the EU Treaty with respect to monopolies that provide public services.[75] Article 86(1) prohibits EU member states from granting special or exclusive rights to public or private undertakings in such a manner as to create a Treaty violation. Conduct that violates EU Articles 81 or 82 by distorting competition among the Member States is cited specifically as an example. Article 86(2) moderates that prohibition with respect to "undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly." Such enterprises are made subject to the competition rules only where application does not "obstruct the performance" of the particular tasks assigned to them. A closing sentence provides that, in waiving application of the competition rules for such undertakings, the "development of trade must not be affected to such an extent as would be contrary to the interests of the Community."

105. These provisions in Article 86 are the basis for a large and complicated body of law developed by the EU in the course of enforcing the provisions against member states. The Customs Union Agreement between the EU and Turkey does not contain any provision requiring that Turkey adopt Article 86 as part of its positive law or designate an authority to enforce the Article's provisions. Rather, Article 41 of the Agreement simply provides that "with regard to public undertakings and undertakings to which special or exclusive rights have been granted," Turkey must assure that the principles in the EU treaty, including particularly those in Article 86, are "upheld." This requirement, which applies only to provisions in Turkish law that distort competition between Turkey and the EU Member States, was supposed to have been satisfied within one year after the Agreement's effective date of December 31, 1995. As in the case of controlling state aid programs, however, Turkey has not fully complied with its obligations and the annual EU accession reports routinely demand further action by Turkey on this subject.[76]

106. Turkey's General Secretariat for EU Affairs, which administers the program to adopt laws and regulations necessary for accession, at one point established a working group (including TCA representatives) to prepare an inventory of "special or exclusive rights legislation" subject to Article 41 of the Customs Agreement. That group, however, has not convened anytime recently, and the General Secretariat advises that Turkey's ongoing privatisation program for state-owned firms is the principal means by which Turkey is addressing its Article 41 obligations.[77]

107. As the 2002 Report urged, Turkey has eliminated some monopolies and special privileges, usually in the context of preparing for privatisation. An example is TEKEL, the state alcohol and tobacco firm that once had regulatory powers over both cigarette and alcohol sales and a statutory monopoly over certain alcoholic beverages. The regulatory powers were transferred to a newly-created Tobacco and Alcoholic Beverages Board and the alcohol monopoly was terminated before TEKEL's privatisation. No action has been taken, however, on the 2002 Report's recommendation to consider adopting EU Article 86 into Turkish law. The TCA staff proposals for amending the Competition Act include a provision under which the Board, after determining that a state measure (including "public disposals, regulations [or] transactions") had an anticompetitive effect under Articles 4 or 6 of the Act, could petition the Council of State to annul the offending regulations or transaction.

108. The 2002 Report, in its treatment of exemptions from the Competition Act, noted that one of the most significant exclusions arises from the fact that various trade and professional associations with quasi-public status and statutory responsibilities for self-regulation can employ those powers to fix prices and

limit competition (p. 31). Self-regulatory bodies of professionals and other service providers are recognised in the Turkish Constitution as quasi-public entities.[78] Although the constitutional language does not provide protection from the Competition Act, the statutes establishing such associations frequently authorise them to set their members' prices. As described previously in this report, the TCA has attacked fee agreements administered by associations in circumstances where the authorizing statue entailed no price-setting power. The Board has not, however, attempted to proceed where the foundation law for an association clearly articulated its authority to establish minimum fees. The 2002 Report recommended that the authorizing statutes for associations be amended to eliminate authority for fixing prices and restraining entry on grounds other than competence (p. 31). No such statutory amendments have been enacted, although the TCA is engaged in competition advocacy on this topic, as described in the next section.

5. Competition advocacy

109. Competition advocacy by the TCA has two dimensions. The first reflects the agency's role as a consultant to the government and to sector regulatory agencies concerning legislation and regulations that implicate competition policy. The second is as a proponent at large for increased public recognition and acceptance of competition principles. As to the first dimension, Article 27(g) of the Competition Act empowers the Board to opine, on its own initiative or on a Ministry's request, with respect to competition policy aspects of government legislation and regulations. The 2002 Report observed that TCA advocacy with respect to the competitive effects of government policies and proposals had been limited in the past, and recommended an increased emphasis on the competition advocacy mission and closer integration of regulatory and competition policy generally (p. 31). The TCA agrees that it devoted relatively little attention to competition advocacy in its formative years, when the prevailing view was that law enforcement constituted the best employment for agency resources. The TCA states that, more recently, it has recognized that government interference in competitive processes can produce results worse than those of anticompetitive practices by private undertakings. The agency has therefore paid increased attention to its competition advocacy mission.[79]

110. The 2002 Report noted (p. 31) that a communiqué had been issued in 1998 by the office of the Prime Minister encouraging other agencies of the government to consult with the TCA in advance about proposed regulations and decisions that had implications for competition policy.[80] The Report observed that the Board had sometimes been afforded an opportunity to comment on proposals as contemplated by the communiqué, but sometimes not, and sometimes only very late in the regulatory formulation process. The Report recommended that consultation with the Board be made a formal, authoritative requirement (p. 31). Although such a requirement has not been established, the TCA reports that the government and regulatory agencies have alerted the TCA more frequently in recent years about pending bills and proposals. Lapses, however, still occur. The Prime Ministry's communiqué is not treated as obligatory and there are no sanctions if an agency fails to notify the TCA of an important regulation. The TCA staff's draft amendments to the Competition Act include a provision expressly requiring public institutions and organisations to obtain the Board's opinion concerning any "acts, bylaws and regulations … which shall affect competitive conditions in markets for goods or services in the whole or a significant part of the territory." State agencies would not be obliged to accept the TCA's opinion, but failure to obtain it would render the resulting measure unenforceable as a matter of law.

111. The number of opinions on competition policy issues issued by the TCA to public institutions and sector regulatory authorities has fluctuated over the years, in tandem with the number of requests received. In 2000, 16 opinions were issued, followed by 26 in 2001, 37 in 2002, 42 in 2003, and 25 in 2004. The TCA provides opinions in a variety of contexts. One important category comprises views delivered with respect to proposed legislation. Two examples mentioned previously are the TCA's opinions on the establishment of an agency to control sate aid programs and on the applicability of the Competition Act to bank mergers. Other examples include the Board's opinion on a 2003 draft bill to

revise the foundational legislation for the Turkish Union of Chambers and Exchanges (TOBB). The Board concluded that the provision in the bill maintaining the authority of business chambers to establish price tariffs was inconsistent with Article 4 of the Competition Act, regardless whether merchant associations purported to set maximum, minimum, or any other price terms. The Board also analyzed a provision vesting business chambers with authority to collect and disseminate business data. The Board remarked that although the provision was not itself contrary to the Competition Act, a law enforcement action might be brought against a chamber that employed the authority to anticompetitive effect, such as by circulating current prices, sales figures, and production capacity in an oligopolistic market with homogeneous products. In contrast, a Board opinion issued in 2004 on amendments to the Tradesmen and Craftsmen Act reached a different conclusion on the provision authorizing trade chambers to set price tariffs. The Board did not insist, as in TOBB, on eliminating that provision entirely. Rather, the Board concluded that language must be added specifying that the tariffs were "maximum prices" and that additional regulations must be issued to "ensure that tradesmen and craftsmen adequately perceive that prices in price tariffs indicate merely the maximum limit."[81] Both bills are presently pending.

112. Another advocacy matter involved a bill designed to restrict the competitive impact of large retail stores on smaller competitors. In October 2003, the Board criticized the first version of the bill for, among other things, unnecessarily prohibiting certain forms of conduct (such as charging exorbitant prices, discounting prices excessively, and forcing competitors from the market) that could be addressed directly under the Competition Act. Those prohibitions were deleted from the next draft of the bill, but other features of the legislation attracted further Board comments in April 2004. The Board objected to provisions that restricted the private label sales of large stores to a maximum 20% of store turnover, and limited price reduction sales campaigns to certain periods of the year (and even then required that the sale be approved in advance by the relevant business chamber). The Board noted that such restrictions harmed consumers by denying them the benefit of lower prices and that the limitation on private label sales also injured small and medium manufacturers who were the most likely producers of private label brands. The bill is presently pending. In other action, the TCA's comments on a draft bill regulating the distribution of magazines and other periodicals successfully urged adoption of an amendment that prohibits distributors from establishing exclusive dealing contracts with retail sales outlets and requires retailers to treat competing distributors on a non-discriminatory basis.[82]

113. A second variety of competition advocacy is commentary on regulations proposed by sector regulatory agencies. The TCA opined on a draft interconnection offer submitted to the Telecommunications Authority by Turk Telekom (TTAŞ), the state-owned monopoly provider of land line telephone infrastructure. The Board objected unsuccessfully to various features of the offer, including provisions under which (1) TTAŞ would charge interconnecting providers for incomplete calls despite the fact that TTAŞ did not charge its own customers for such calls, (2) competing operators would be required to establish exchange facilities in at least 12 provinces to be selected by TTAŞ, and (3) the number of transmission circuits to be allocated to a competing provider would be determined unilaterally by TTAŞ. Although rejecting those points, the Telecommunications Authority partially accepted the Board's recommendation to reduce interconnection fees to levels more commensurate with costs. In another Telecommunications Authority matter, the TCA reviewed proposed regulations relating to separation of accounts and cost accounting. The Board observed that the regulations were intended to facilitate detection of cross-subsidisation and enable the Authority to establish appropriate fees for interconnection access. The Board concluded that the accounting requirements need not be imposed on all operators of fixed and mobile telecommunications networks, but only on operators that had market power or were otherwise obliged by the Telecommunications Authority to offer interconnection access to competitors. The Authority accepted this opinion and modified the regulations accordingly.

114. In comments to the Tobacco and Alcoholic Beverages Board, the TCA advised against pending regulations designed to limit the adverse health effects of alcohol consumption by restricting

advertisements for alcoholic beverages. The Board cited as unduly restrictive of competition the provisions that prohibited "buy one-get one free" promotions, sales campaigns involving price reductions, contests requiring the purchase of a drink to participate, and price labels that featured high prices struck out and replaced by lower prices.

115. The Energy Market Regulatory Authority (EMRA) has consulted with the TCA on numerous draft regulations, including proposals concerning licenses, tariffs, import and export restrictions, network accounting and financial reports, and consumer services. In 2004, the TCA provided comments to EMRA respecting a proposed regulation on natural gas distribution. EMRA made certain modifications based on the TCA's comments and issued the final regulation. Just before publication, however, EMRA added a new provision relating to "letters of guarantee" issued by banks for capital investment projects undertaken by distribution companies. The provision specified that such guarantee letters would be considered acceptable to the Authority only if issued by financial institutions that were among the 10 largest banks in Turkey. The TCA advised EMRA that such a restriction discriminated unnecessarily among banks, and EMRA thereafter annulled the provision.

116. A third type of competition advocacy involves statutes that accord monopoly rights or special privileges to state enterprises. This subject area has been a concern of the TCA for several years, motivated in part by Turkey's obligation under the Customs Union Agreement to adjust such statutes in compliance with EU Article 86. In 2002, the TCA published in its Competition Journal, and delivered to the government, an analysis of thirty Turkish statutes that posed competition policy issues of this kind.[83] Although no statutory amendments resulted from that effort, the TCA has extended the original project and expects to publish a report by June 30, 2005, that will update developments since the 2002 report and add an analysis of additional statutes. The agency plans to use the study as the basis for an advocacy initiative to eliminate unjustified legal privileges. The agency recognizes, however, that statutes establishing monopolies and special privileges often respond to public policy objectives other than competition. As the TCA succinctly puts it, "some of these legal privileges are crucially important, and the rationale behind them outweighs any benefit accrued from a competitive market structure."

117. Also in this field, the TCA has recently completed a review of laws authorising self-regulatory professional and trade associations. The study's objective was to identify provisions vesting associations with authority to fix minimum prices and adopt other anticompetitive regulations.[84] The final report, with recommendations for appropriate statutory amendments, will be sent to the government in June 2005 in conjunction with the TCA's report on special privilege laws.

118. A fourth variety of competition advocacy arises in the context of privatisation. As described previously, Board participation occurs at two stages in a privatisation proceeding. At the first stage, the Board acts as a competition advocate in the process of designing a privatisation plan for an industry or asset. At the second stage, the Board acts as a law enforcement agency in applying the merger provisions in Article 7 of the Competition Act to particular transactions. The law establishing the Privatisation Administration requires it to consult with the Board, and the Board's Privatisation Communiqué provides specifically for consultation at the first phase of the process, before tender offers are released to the public.

119. A currently controversial example of the Board's activities in structuring privatisation tender offers involves the sale of a majority share in Turk Telekom (TTAŞ), the state-owned monopoly provider of land line telephone infrastructure. TTAŞ also owns and operates infrastructure for GSM mobile phone services, cable television, and Internet access. The Board concluded that the sale of Turk Telekom should be conditioned upon a requirement that the purchaser divest the cable television operation to a different entity within one year after purchase, and that the Internet access operation be established as a separate (but wholly owned) entity within the divested company within six months after purchase. The Board further recommended that the dominant private sector GSM service provider not be permitted to acquire

TTAŞ nor hold a controlling interest in any consortium that submitted a bid. Finally, the Board urged that certain communication taxes that are charged to private sector operators but not to TTAŞ be eliminated before the sale. The Board's recommendation for structural separation of the cable television assets was criticized by some government officials who preferred to sell TTAŞ intact, but the Privatisation Administration's November 2004 tender announcement provided that the cable assets would not be part of the sale.

120. In August 2004, the Board was unsuccessful in urging disaggregation in another privatisation proceeding. At stake were the factories, warehouses, and brands of TEKEL's tobacco products division. Although TEKEL's previous cigarette monopoly ended in the 1980's, and several multinational firms have since established strong brands in the market, TEKEL's overall retail share is still about 60%. It holds even higher shares in some segments if the market is subdivided into price-point ranges. Introduction of new brands is difficult because cigarette advertising has been banned by law since 1996 on health grounds. The Board recommended that TEKEL's brands be divided and sold separately, reasoning that the possibility of purchasing a single brand would increase the likelihood of entry by more firms not already participating in the cigarette market. It would also enable smaller, less wealthy enterprises to participate in the tender auction proceedings. The Board added that selling the brands as a single block would make more likely enforcement action by the Board under Article 7 once the purchaser was identified. The pending tender announcement, however, contemplates selling the tobacco products division as a block.[85]

121. Another aspect of the TCA's competition advocacy role entails its relationship with the regulatory agencies responsible for the telecommunications and energy sectors. This topic has been a particular focus of interest, both for the TCA itself and for affected private firms. The telecommunications law both obliges the Telecommunications Authority to consult with the TCA about certain matters (such as investigations of Turk Telecom and preparation of proposed regulations) and provides that the TCA should consult with the Telecommunications Authority before taking any decisions respecting the telecommunications sector. In September 2002, a cooperation protocol was signed between the TCA and the Telecommunications Authority to promote cooperation and coordination between the two agencies with respect to law enforcement investigations, merger review, and exemptions and negative clearances under the Competition Act.[86] The protocol established a coordination committee of senior agency officers that was scheduled to convene four times per year, and a working group of more junior staff members that was expected to meet monthly. The TCA reports, however, that the working group has not been meeting and that the protocol has not been effectively implemented.

122. Meanwhile, private sector telecommunications firms complain that, due to overlapping jurisdictions, they are subject to penalties by both the TCA and the TA for the same conduct. It is also apparently possible that a firm could be subject to directly conflicting rules. For example, telephone service providers face both the Competition Act's prohibition of resale price maintenance and the Telecommunication Authority's regulations barring price discrimination in sales of phone services to end users (including retail purchasers of telephone cards). The TCA confirms that the existing laws vest the two agencies with overlapping jurisdiction respecting competition enforcement. A new draft law on telecommunications has recently been released for public comment. The government has requested the opinion of Competition Authority with respect to the proposal, and the TCA is developing comments with a particular focus on the problem of overlapping jurisdiction.

123. The 2002 Report (p. 81) noted the "curious" inconsistency between the telecommunications law, which (as described above) requires consultations between the TCA and Telecommunications Authority, and the sector laws on electricity and natural gas, which do not contain analogous provisions requiring consultations between the TCA and the Energy Market Regulatory Authority (EMRA). The 2002 Report concluded that, although the two agencies "could co-ordinate the consideration of common issues even without legislative direction," statutory authority should be provided to "eliminate any uncertainty about

either agency's power, so that the [TCA] could participate as appropriate in the process of restructuring and developing the regulatory system" for the energy sector" (p. 94). No action has been taken on that recommendation. The TCA observes that a recent Competition Act case against an electricity distribution firm implicated the jurisdiction of both agencies and exposed a need to delineate their respective roles and establish formal procedures for communication and coordination.[87] Although the TCA believes that a protocol for cooperation with EMRA should be developed, it states that no progress has yet been made on this front due to the press of other business.

124. A final form of activity relating to the first dimension of competition advocacy is the study of competitive dynamics in individual markets and other aspects of competition in Turkey. Although the TCA has been largely inactive in this area, the agency's Economic Research Directorate was recently reorganized and 2004 saw the issuance of reports on media diversity, concentration in the software industry, tying agreements in the banking industry, and concentration ratios in production markets. More reports are expected in 2005.

125. The TCA staff's proposed amendments to the Competition Act included at one point a provision that would have made the investigative tools in Articles 14 and 15 available for use in non-law enforcement market studies. That provision was later discarded, on the grounds that investigative tools may not be appropriate for use in research projects, and the agency now expects to obtain data for market studies by relying on outside contractors and using information collected by other government agencies (such as the Central Bank and the State Statistical Institute). The databanks held by other agencies are, however, protected by strong confidentiality protections that would have to be modified if the TCA is to gain access.

126. The second dimension of competition advocacy entails the agency's efforts as a proponent for the acknowledgment and acceptance of competition principles in society at large. The TCA appreciates the importance of such advocacy and has developed a variety of programs to advance public recognition. In cooperation with local chambers of commerce, the TCA has periodically held one-day conferences on competition law and policy in Turkey's main cities. From 1998 to 2001, eleven conferences were convened in such cities as Bursa, Antalya, Izmir, Istanbul, and Gazientep. Although no such conferences were held from 2002 to 2004, the TCA plans to convene conferences in thirteen cities during 2005. The agency also regularly presents conferences and symposia for the competition law and policy community. Recent symposia have focused on such topics as legal monopolies, developments in EU competition law, mergers and acquisitions, the interface between regulation and competition, public tenders, and abuse of dominance. "Thursday Conferences," open to the public, feature less formal discussions of current competition issues.

127. Other means by which the agency communicates with the public include the TCA's website, which contains decisions, opinions, announcements, and updated news, with links to legislation and other related materials.[88] The TCA also publishes a 28-page booklet entitled "Competition, Why?" that describes the objectives and principal provisions of the Competition Act, and provides procedural charts, frequently asked questions, and one-paragraph summaries of selected cases involving cartels, abuse of dominance, and other violations. Now in its second edition, the booklet is designed to make basic information about the agency available to the public in a readily understandable form. It will soon be joined by an interactive CD-ROM, covering much of the same information as the booklet but also including video extracts and links to legislative documents, regulations, Board decisions and opinions, and TCA annual reports. The TCA also publishes the proceedings of many of its conferences and symposia, and issues the "Competition Journal," a periodical that contains articles of interest to the competition policy community as well as the text of selected Council of State decisions rendered in TCA cases.

128. Training offered to external parties is another tool that the TCA employs to disseminate information about competition policy. In conjunction with the Bar Associations of Istanbul and Ankara, the agency holds one-week training programs in competition law for lawyers in private practice, taught by academicians and senior agency personnel. The fact that few law schools in Turkey offer courses in competition law has led the TCA to sponsor two-week training sessions in competition law for law students. Eighty students attended such sessions in 2004, which not only disseminate competition law principles in the legal community but also help the TCA identify candidates for employment as attorneys. Beginning in 2005, TCA experts will serve as guest lecturers for a competition law course offered by the law faculty at Ankara University. Within the government, the TCA staff provides lectures on competition policy at training programs offered to the personnel of other agencies. Agencies that have invited TCA lecturers include the Ministry of Energy, the State Planning Organization, the under secretariats of the Foreign Trade and Treasury Ministries, and the Central Bank. The Authority also supports training in competition law and policy for judges in the Turkish judicial system. For conflict of interest reasons, however, it does not undertake to provide such training itself, but facilitates efforts to obtain judicial training assistance from outside institutions.

129. With respect to media relations, the following table shows the number of news stories published about the TCA each year since 1999, accompanied by the number and percentage of stories that the TCA's media office characterizes as negative.

Table 5. News Media Coverage of the TCA

Year	Total stories	Negative stories	Negative %
2004	772	21	2.7
2003	769	38	4.9
2002	455	28	6.2
2001	577	10	1.7
2000	780	4	0.5
1999	772	8	1.0

Source: Turkey 2005

130. The amount of media coverage devoted to the TCA and competition issues is generally considered modest. The 2002 Report suggested (p. 17) that at least part of the difficulty faced by the TCA in getting media attention was attributable to the fact that the agency had prosecuted several actions against media companies. The TCA does not, however, believe that factor to be significant in accounting for variations in media coverage. The TCA attributes part of the decline in stories in 2001 and 2002 to the fact that the Turkish economy in those years was enduring a crisis that brought privatisation and liberalisation efforts to a virtual halt, thus reducing the number of TCA determinations that drew media attention. Part of the decline may also be due to the fact that the President of the agency in the 2001-2002 period offered less encouragement for media coverage than does the current administration. The TCA's media office notes that most news media in Turkey have only one reporter covering economic issues for the entire country, making it more difficult for the TCA to get substantial and continuing coverage for its activities.

131. The media office does not typically prepare a press release announcing the Board's decisions in law enforcement proceedings. A press conference is called when such decisions are issued and the major news bureaus (such as Reuters) usually attend. The news bureaus then prepare wire stories that are disseminated to other media outlets. Press releases in media-friendly language are, however, prepared for Board opinions on structuring privatisation proceedings, because the issues involved in those matters are usually more technical and complicated. Media representatives agreed that the TCA's press relations are generally well handled. The TCA hopes to encourage increased media coverage by offering to provide more television and radio interviews

132. Knowledge about the TCA, the Competition Act, and competition policy is reasonably prevalent among large businesses in Turkey. It is considerably less so among small and medium business enterprises and, in the TCA's words, "poor" as to the public generally. The degree of support for competition policy follows the same pattern. TUSIAD (Turkish Industrialists' and Businessmen's Association), a private sector association of 550 business leaders of major companies in Turkey, reports a significantly increased awareness of competition policy among its members over the past few years, but notes that the depth of understanding and the degree of support for competitive principles is uncertain. TUSIAD's leadership, at least, supports competition policy and gives high marks to the TCA as an agency. TOBB, the Turkish Union of Chambers and Exchanges, reports similar sentiments at the national organisation level. The extent to which the views of TOBB's leadership have penetrated to the level of the association's many members is far more doubtful.[89] Development of general public support is hampered generally by the absence in Turkey of any strong civic institution with competition policy as part of its agenda.

133. The origin of the Competition Act as a requirement in the Customs Union Agreement with the EU does not, in the TCA's view, adversely affect prospects for public support. The TCA notes that Article 167 of the Constitution requires the state to assure orderly functioning of markets and prevent monopolies, and that government efforts to develop and adopt a competition law date back to the early 1970s. Consequently, the Competition Act has domestic origins that can be cited quite apart from the Customs Union.

6. Conclusions and policy options

6.1 Current strengths and weaknesses

134. The 2002 Report remarked (p. 29) that the Turkish Competition Authority was "off to a good start." The agency has continued to make excellent progress in the years since. It has played a critically important role in moving the Turkish economy forward to greater reliance on competition-based and consumer-welfare oriented market mechanisms. As an agency, it can take justifiable pride in its reputation as one of Turkey's most effective and best administered agencies. It has pursued its mission with energy, imagination, and integrity and has won respect and support from leaders in the business community. The TCA faces problems that often confront competition agencies in economies with a long tradition of strong government control, including deficiencies in public understanding of and appreciation for competition policy, inexperienced (and slow) judicial review organs, and less than complete support from other parts of the government. It is, however, aided by the fact that improving the competition policy framework will advance Turkey's goal of membership in the European Union.

135. Particular strengths of the TCA include its devotion to the articulation and efficient implementation of sound competition policy; its focus on due process and transparency; and its attention to the development and training of expert staff personnel. Its status as agency with fiscal and administrative autonomy, and the absence of substantive interference in its work by the government, also contribute significantly to its efficacy. Weaknesses include some disorganisation in its approach to harmonisation with EU competition law and the continuing problem of developing a robust competition culture. Other problems with competition law and policy in Turkey, reflected in the recommendations below, arise from statutory deficiencies that will require Parliamentary action to correct. Indeed, most of the recommendations made by the 2002 Report that remain unmet, and that are renewed here, entail action by the parts of the government other than the TCA. The TCA has responded, at least partially, to all of the proposals in the previous report directed specifically to it. It has advanced its competition advocacy activities within the government, assured timely resolution of merger review proceedings, and made efforts (albeit not notably successful thus far) to improve coordination with sector regulatory agencies in Turkey and to expand cooperative relationships with competition agencies in other countries. The following recommendations are designed to address the full array of competition law and policy issues in Turkey

today and treat a variety of topics, including the implementation of the Customs Union Agreement, the interaction between the competition law and other statutory and regulatory regimes, the terms of the Competition Act itself, and various policies of the Competition Authority.

6.2 Recommendations

6.2.1 Promptly establish a mechanism for controlling anticompetitive state aid.

136. Turkey should, without further delay, adopt a mechanism for controlling state aid, consistent with its obligations under the Customs Union Agreement. The pending question is how that mechanism should be organized. The TCA's independent status and competition policy expertise plainly make it an appropriate agency to discharge the responsibility. Resistance to that approach may be based on concerns that the TCA will be too enthusiastic in restraining aid programs. Its discretion would not be unlimited, of course, because state aid decisions by the TCA can be made subject to judicial review. Moreover, the draft implementation rules for the Customs Union Agreement require that final decisions about particular aid programs be communicated to the EU, and contemplate ongoing consultations between Turkey and the EU with respect to enforcement policies. Thus, there will be procedures in place to avoid either over- or under-enforcement and to promote convergence between Turkey and the EU on state aid policies.

137. If the government's pending proposal to vest primary authority for controlling anticompetitive state aid in the State Planning Office is nonetheless enacted, the TCA would still retain an important role in the review process through its seat on the State Aid Monitoring and Supervising Board. The TCA should, of course, participate vigorously in the deliberations of that Board, which will have power to render judgments on the competitive effects of particular state aid programs.

6.2.2 Adopt an organized approach to harmonisation with EU competition law.

138. The Customs Union Agreement (Art. 39(2)) requires Turkey to assure that "the principles contained in the block exemption Regulations in force in the Community, as well as in the case-law developed by EC authorities" are effectively applied. The TCA has issued block exemptions for vertical arrangements and for research and development agreements that differ in significant ways from the EU counterpart exemptions. There have been no consultations between the TCA and the EU to determine whether the TCA text is compliant with the obligations under the Customs Union Agreement. A more efficient approach would involve solicitation of the EU's views on proposed block exemptions while the exemptions are being formulated. Whether such consultations could have been undertaken previously is unclear, due to the absence of implementing regulations under the Customs Union Agreement. Once Turkey establishes a state aid control program and the implementing regulations are adopted, however, the TCA should routinely consult with the EU with respect to the adoption and modification of block exemptions.

139. The TCA should also establish and publish an agenda, with timetables, for the prompt consideration of EU block exemptions that presently have no Turkish counterpart and of block exemption amendments issued by the EU. In the past, the TCA has typically taken about three years to adopt regulations corresponding to new EU exemption regulations or amendments, although the Customs Union Agreement provides that Turkey should adapt its provisions to EU amendments within one year.[90]

140. Finally, to assure compliance with the obligation under the Customs Union Agreement to apply EU case law principles, the Board's formal case decisions should routinely describe and consider the EU precedents relevant to the issues in dispute.

6.2.3 Eliminate or control state-created enterprises and associations that are vested with monopoly concessions or with powers and privileges enabling them to undertake anticompetitive conduct.

141. This recommendation arises from three related recommendations made by the 2002 Report, which urged (1) the elimination of state monopolies and anticompetitive protections accorded to favoured commercial enterprises, (2) the development of competition policy controls akin to EU Article 86(2) with respect to monopolies providing public services, and (3) the restriction of self-regulatory powers vested in public professional associations, to prevent anticompetitive regulation of prices and entry on grounds other than competence. Ideally, Turkey should simply terminate state monopolies, privatize all state commercial enterprises, and eliminate the anticompetitive legislative provisions identified by the TCA in its various studies. Failing that, however, the TCA staff proposals for amending the Competition Act include a means for addressing state measures that establish monopolies or accord special privileges or powers to enterprises or associations. The proposal would empower the Board, after it determined that a state measure distorted competition in Turkey under Articles 4 or 6 of the Act, to petition the Council of State for annulment of the offending legislation or regulation. The fact that a state measure would be inconsistent with the Competition Act is a sound reason for triggering formal scrutiny. The proposal, however, leaves open the standard to be employed by the Council in resolving the TCA's application where policy objectives other than competition are raised to justify the measure in question. EU Article 86(2) could serve as guidance in identifying the kinds of public policy concerns that are sufficient to trump competition principles, and Turkey should consider adopting some version of that legislation.[91]

6.2.4 Restore competition policy oversight of banking sector mergers.

142. This recommendation, which relates to the TCA's authority under Article 7 of the Competition Act, renews the same recommendation made in the 2002 Report. As observed then, assuring competition in the banking sector is important because constraints on access to funds can discourage entry into other market sectors. The prudential concerns of banking regulators are, of course, entitled to full recognition, but such concerns do not justify complete elimination of competition analysis. In the EU, on whose system Turkey is supposed to be modelled, the antitrust authorities generally retain authority to conduct competition reviews of bank mergers, while the member states may still undertake prudential supervision and analysis.[92]

6.2.5 Mandate a role for the TCA in regulatory analysis.

143. The 2002 Report recommended that a formal, authoritative requirement be imposed on government agencies requiring advance consultation with the TCA on proposed laws and regulations. No legislation to that effect having been enacted, the TCA staff's draft amendments to the Competition Act appropriately require public institutions and organisations to obtain the Board's opinion concerning any "acts, bylaws and regulations … which shall affect competitive conditions in markets for goods or services in the whole or a significant part of the territory." This provision would not oblige agencies to accept the TCA's opinion, but failure to obtain it would render the resulting measure unenforceable as a matter of law. The proposed provision should be enacted, but should be modified so that agencies declining to follow the TCA's recommendation are required to state on the public record the reasons for their position.

6.2.6 Expand consultation with sectoral regulators.

144. Although part of this recommendation reiterates an item from the 2002 Report, the problems of coordination between the TCA and sector regulatory agencies have become broader and more pressing since that time. The TCA should continue to seek opportunities for cooperation with the Telecommunications Authority. The issues of overlapping jurisdiction that impose uncertainty on private sector firms and impair competitive market operations should be promptly addressed, but not necessarily

by a statutory amendment specifying precise jurisdictional boundaries. Statutory demarcations of authority cannot readily be altered to reflect changes in the market, and provide additional issues for parties to contest in court. The affected agencies should consider the possibility of devising a more flexible solution, such as by negotiating and issuing an expanded protocol that contains an explicit allocation of enforcement authority. Such a protocol could be designed to preserve each agency's core jurisdiction while eliminating the exposure of private parties to conflicting or duplicative legal requirements. The agencies should also address the suggestion in the 2002 OECD Report that they develop a common framework for determining whether a firm has a dominant market position.

145. With respect to the Energy Market Regulatory Authority (EMRA), action should be taken on the 2002 recommendation to establish a statutory basis for TCA participation in EMRA regulatory proceedings. Also, the TCA should pursue adoption of a formal protocol with EMRA, to establish the procedures for communication and coordination that the TCA recognizes are now lacking.

146. Finally, on a related point, consideration should be given to affording the Board a formal opportunity to comment on proposed determinations by the Prime Ministry's under secretariat of Foreign Trade in proceedings to enforce Turkey's unfair import and dumping laws.

6.2.7 Exercise due care in employing the concerted practice presumption.

147. The TCA has correctly concluded that the concerted practice presumption should not be invoked to find an infringement of Article 4 merely on the basis of parallel pricing. Due process issues aside, it is a commonplace proposition of economic analysis that parallel pricing in oligopolistic markets is as consistent with competition as it is with collusion. The Board's present policy on this point appears to be correct, and the Board's decisions properly recognize that economic analysis of market conditions and careful assessment of additional evidentiary factors is important to avoid erroneous determinations of illegality. To address practitioners' concerns in this respect, the Board should make special efforts to articulate in its decisions what role, if any, the presumption played in its analysis of the case and to explain what additional evidence was deemed probative of collusion for each of the firms found liable.

148. More subtle issues are presented by the Board's reliance on parallel pricing or other interdependent behaviour as the basis for opening investigations in oligopolistic markets. Target firms have legitimate concerns about the costs and burdens associated with TCA investigations, and the question of standards for commencing investigations warrants focused debate. The Board should consider developing, and publishing for public comment, a formal policy statement on its standards for opening investigations, particularly in oligopolistic markets. The statement would explain the role of the concerted practice presumption, describe the minimum factual evidence deemed necessary to justify an investigation, and discuss the circumstances in which a research study by the TCA could be a preferable initial approach to a problematic market.[93]

6.2.8 Amend the Competition Act to improve law enforcement capacity.

149. The Competition Act should be revised in a number of ways to make the law enforcement process more efficient and fair. Many of the following recommendations already appear in the TCA staff's draft amendment package and two of them (respecting the market share test for merger notifications and fines for non-compliance with investigative processes) are reiterations of proposals in the 2002 Report.

- Simplify merger notification standards.

150. Merger notification requirements keyed to market share are problematic. Experience elsewhere has shown that reporting obligations should not depend on issues critical to the substantive evaluation of

the underlying transaction. Requiring judgments about market definition and market share imposes costs and risks on the filing parties and detracts from efficient administration of the notification program. Nearly all of countries that previously employed market share as a notification trigger have eliminated it. The TCA, as part of its ongoing project to revise the merger review system, should ascertain how many transactions are filed only because they meet the market share threshold, and determine whether the benefits associated with such filings justify the costs. The same point applies to privatisation notifications, which are also subject to a market share trigger. If most notifications are based on the aggregate turnover threshold, the market share test should be eliminated unless it can be established that high-market-share mergers among relatively small firms pose a particularly significant competition problem in Turkey.

- Adopt the revised EU standard for assessing mergers.

151. Article 7 of the Competition Act, which bars any merger or acquisition that "creates or strengthens the dominant position of one or more enterprises, as a result of which competition is significantly impeded" in a relevant market, should be conformed to the EU's new merger regulation, which prohibits transactions that "would significantly impede effective competition [in a relevant market], in particular as a result of the creation or strengthening of a dominant position." This change is desirable both to achieve harmonisation with the EU and because the revised EU formulation provides a more flexible and refined standard for identifying anticompetitive transactions.

- Revise the deadlines for the merger evaluation process.

152. The 15 day preliminary examination period now provided by the Competition Act for notified transactions is too short. It should be extended to 30 days, a change that would provide adequate time for review and also resolve both the problem of "late Friday" filings and the ambiguity in Article 10(3) respecting the effective date of notified transactions. On the other hand, the maximum period for litigated merger case proceedings is now too long. The Act provides that such proceedings are subject to the same deadlines as other competition cases, which means that more than a year could elapse before final case resolution by the Board. The maximum duration for merger case proceedings should be limited to 90 days, as the TCA staff's proposal recommends.

- Increase maximum fines for violations other than substantive infringements and make early consummation of mergers a substantive violation**.**

153. The inadequate fines now provided in the Competition Act for ancillary violations should be increased. Article 16 should be amended, as the TCA staff proposes, to eliminate the existing individual fine limits and to replace them with a maximum limit set at 1% of the violator's gross income. Article 17 should likewise be revised to eliminate the individual daily fine amounts provided for specific types of violations and to replace them with a maximum daily limit set at 5% of the violator's gross income. Submission of incomplete information and the failure to provide any information at all in response to an information request should be added to the list of violations for both Articles 16 and 17. Finally, early consummation of a merger requiring Board approval should be made a substantive violation, thus subject to a fine up to the 10% gross income limit applicable to other substantive violations.

- Create a de *minimis* exemption for agreements involving small enterprises.

154. The TCA should be vested with statutory authority to establish, by communiqué, a *de minimis* exemption protecting small firms from prosecution. The model for the communiqué would be the EU's *de minimis* exemption, which applies where the aggregate market share of the participating parties does not exceed 5% for horizontal agreements and 10% for vertical agreements. The TCA has expressed concern about the wisdom of prosecuting horizontal agreements in local markets, on the grounds that the agency

risks expending its enforcement resources on numerous small cases. Although adoption of a *de minimis* exemption will assist in resolving questions of enforcement priority, it is important to note that the EU exemption does not protect "hardcore" agreements to fix prices or allocate markets. Such agreements should likewise be excluded from protection under the TCA's communiqué. Local price fixing cases, especially in consumer markets like bread and bus transportation, often produce benefits well beyond termination of the offending agreement. Such cases usually receive significant attention in the local news media and serve to educate both consumers and the local business community about the Competition Authority as an agency and the role of competition law in a market economy.

155. It is fair to observe, however, that the exclusion of "hard core" cases from the EU's *de minimis* exemption does not mean that EU competition authorities must prosecute all such cases. Under EU Article 81, agreements cannot be prosecuted in any event unless they "appreciably restrict competition" among the Member States. While hard core agreements among small firms in Turkey should not be sheltered from attack by a *de minimis* exemption, neither should the TCA be compelled to prosecute all such agreements. It would therefore be appropriate to include language in the Competition Act specifying that the TCA has discretion whether to prosecute hard core agreements that fall beneath the *de minimis* exemption's market share ceilings.

- Eliminate mandatory notification and the negative clearance procedure, and consider modifying the duration limit for individual exemptions.

156. As another step to achieve conformity with the EU and efficient practice for the TCA, the Competition Act should be amended, as the TCA staff proposes, to eliminate both the mandatory notification requirement in Article 10 and the negative clearance procedure in Article 8. Besides relieving the Authority from dealing with a plethora of notification filings, elimination of mandatory notification will avoid the enforcement problem presented when firms (such as the liner conference described previously in this report) enter agreements that are protected by an EU block exemption but not by a TCA exemption. Such firms typically do submit an Article 10 notification and thus make themselves technically liable to a fine for failure to file. The TCA correctly declines to seek a fine in such circumstances, but its position on that point is inconsistent with the letter of the Competition Act.

157. It may be observed that the TCA staff proposal to eliminate mandatory notification does not take the further step toward conformity with the EU by eliminating individual exemptions altogether. This is largely because the TCA relies on the individual exemption authority in Article 5 to resolve issues that arise from the incomplete congruence between the TCA's block exemptions and those of the EU. For example, as noted previously, the EU's research and development block exemption permits project participants to fix prices for project products that are jointly produced, and also permits the imposition of certain customer and territorial marketing restraints on downstream product sales. The TCA block exemption prohibits all such contract provisions unconditionally, with the consequence that the Authority addresses the acceptability of downstream market restraints through applications for individual exemptions under Article 5. If the Authority is committed to retaining the individual exemption system, it might nonetheless consider amending Article 5 to lengthen or eliminate the statute's 5 year limit on the duration of any individual exemption granted. The existence of that limit thwarts franchisors in Turkey who wish to impose non-compete clauses for the duration of franchise contracts lasting longer than five years. The only mechanism available presently to them is to seek a negative clearance for such non-compete clauses, but that option will disappear if the TCA implements its proposal to eliminate negative clearances.

- Establish a procedure for settlement of cases by consent.

158. To permit efficient resolution of TCA investigations and achieve another point of conformity with the EU, the Competition Act should be amended as the TCA staff proposes to permit termination of a

proceeding at any stage if the defendant commits itself to accepting the conduct modifications recommended by the Board.

- Eliminate minimum fines and authorize the TCA to offer lenient treatment to cooperative firms.

159. Enforcement experience in other countries has amply demonstrated that competition authorities should be able to offer lenient treatment or immunity from penalties to companies that reveal their participation in unlawful concerted agreements and activities. Therefore, as also proposed by the TCA staff, the Competition Act should be amended to (1) eliminate the mandatory minimum fine for substantive violations; (2) authorize the Board, in determining fine assessments, to consider whether the violator has assisted the investigation; and (3) provide for the abatement of criminal sanctions with respect to cooperative firms.

- Establish personal fines for company managers and consider criminal penalties for managers who are responsible for substantive violations.

160. Article 16 of the Competition Act presently requires the imposition of personal fines for managers (up to 10% of the fine assessed against the fine against the manager's firm), but only for ancillary violations like obstructing investigations, providing misleading information, or failing to file required notifications. The Act does not provide any criminal penalties for substantive competition law violations, and none exist elsewhere in Turkish law except for bid rigging of state tender offers. If the TCA wishes to administer an effective leniency program, the prospect of substantial personal fines and criminal prosecution is a powerful inducement for managers to cooperate with agency investigations. The existence of the bid rigging penalty shows that the concept of criminal punishment for price fixing is not completely novel in Turkey. Personal fines should be established for substantive violations, and consideration should be given to providing criminal penalties for at least hard core Article 4 violations. The TCA staff's proposal to eliminate entirely the provision requiring imposition of fines on company managers for violating the ancillary provisions in Article 16 may be too sweeping. Eliminating the mandatory element of the provision and providing the Board with authority to assess such fines at its discretion would retain the Board's ability to address managerial misconduct in egregious cases and strike a reasonable balance between effective law enforcement and administrative efficiency.

- Expand due process protections in TCA proceedings.

161. Although some of the TCA's block exemptions already require the Board to request the views of the affected party before withdrawing the exemption for an individual firm, the Competition Act should be amended to assure that the due process protections provided by Part IV of the Act are extended to all actions withdrawing block or individual exemptions or negative clearances. Also, for due process reasons of impartiality, the TCA staff proposal amending Article 43 of the Act to eliminate personal participation by Board members in agency investigations should be adopted.[94]

6.2.9 Enhance transparency.

162. Although the TCA is already among the most transparent of Turkish agencies, it could improve its transparency practices further by issuing a policy statement or regulation that would specify the procedures it employs for developing proposed statutory amendments and communiqués. The regulation would establish standard procedures for notice and public comment on such proposals, and provide for posting on the public record the public comments received, the TCA's responses to the issues that the commentators present, and the TCA's rationale for its final conclusions. The Board should also develop and publish guidelines for determining the size the fine assessments. Finally, the Authority should follow

routinely the practice it has recently commenced of publishing summary versions of the opinions it delivers at the initial stage of privatisation proceedings, and should also post on its website the text of all Council of State decisions delivered in TCA cases.

6.2.10 Leverage and expand the Authority's reach through international co-operation.

163. This is another recommendation of the 2002 report that deserves reiteration. The TCA's efforts to establish a more cooperative arrangement with DG COMP can presumably advance once a state aid monitoring system is established and implementing rules are adopted under the Customs Union Agreement. As noted previously, however, the implementation rules will not permit the EU to disclose confidential law enforcement information. The TCA should therefore consider the possibility of developing cooperation agreements with antitrust agencies in other countries that would permit sharing of investigative information.

6.2.11 Consider requesting statutory authority to employ investigative powers in conducting non-law enforcement market studies.

164. Competition agencies can perform an extremely valuable service by conducting in-depth analyses of the competitive dynamics in individual markets or sectors. Such studies can reveal previously unsuspected forms of private conduct or government regulation that impair competition. And study results can play an important role in promoting public understanding of how competition works and what benefits it produces. The details and data of industry operations are not, however, often readily available on the public record or willingly provided by the companies under examination. Other government agencies that have collected sensitive commercial data for statistical or regulatory reasons are typically unwilling to share such data with competition agencies, because of concerns that such disclosure might prejudice the accuracy of data submitted by firms in the future. For these reasons, the TCA should consider requesting express authority to employ its own statutory investigative powers in non-law enforcement market studies. Private firms will likely raise concerns that market studies conducted by a competition law enforcement agency are not impartial efforts to collect and analyze facts but rather investigations seeking violations of the law. Such concerns are legitimate, and should be addressed by imposing confidentiality restrictions on the agency's study staff with respect to firm-specific information, and prohibiting study staff members for some period of years from involvement in law enforcement proceedings related to the industry examined. It should also be recognized that market studies can impose significant resource costs both on the agency conducting the study and the firms under focus, as well as generate public expectations that law enforcement or other governmental intervention in the market will be forthcoming. Studies should therefore be conducted only where the need is well justified, and any public announcement should emphasize that the investigation is not based on a suspicion of unlawful behaviour.

6.2.12 Promote support for competition policy.

165. The Authority engages in several notable activities to promote the development of a competition culture in Turkey. Its programs to provide training in competition law and policy to practicing attorneys, law students, and the personnel of other government agencies are worthy of emulation by competition authorities in any developing economy. There are, however, additional possibilities that the TCA could explore. It should (1) encourage establishment by the bar association of a competition law committee or similar organisation to organize interaction between the TCA and the legal community, (2) seek cooperation with the Directorate for Competition and Consumer Protection in the Ministry of Trade and Industry to include information about competition cases significant for consumers in the education programs sponsored by that agency, (3) increase media coverage of its actions by implementing its plan to offer more television and radio interviews to media outlets, (4) consider issuing press releases, written in consumer-friendly language, to describe Board decisions in competition enforcement cases, (5) explore

expanded interaction with TUSIAD (the Turkish Industrialists' and Businessmen's Association), which advises that it would welcome participation by the TCA in such TUSIAD projects as the development of policy recommendations for Turkey's energy sector, (6) implement the planned reinvigoration of its one-day competition programs offered in conjunction with city business chambers and (7) generally increase the frequency with which TCA representatives make presentations to national and local business groups.

6.2.13 Increase the numbers and expertise of TCA lawyers and enhance the TCA's industrial organisation competence.

166. The TCA already recognizes that it needs more competition experts with legal training to participate in investigations and prepare the analysis of legal issues in Board decisions, as well as more Legal Office attorneys to defend Board decisions on appeal before the Council of State. The agency should pursue its plans to increase significantly the number of agency lawyers in the near term. The TCA should also continue and expand its program offering agency lawyers the opportunity to obtain post-graduate degrees in competition law.

167. With respect to economic expertise, although the TCA's competition experts are trained in and conversant with economic analysis, none of them holds a doctorate in industrial organisation economics or any other branch of economics. The agency needs, and should promptly obtain, advanced industrial organisation expertise to provide support and supervision for economic analysis in difficult cases. Programs that offer present TCA experts the opportunity to obtain post-graduate degrees in industrial organisation economics should be expanded.

NOTES

1. Background Report on the Role of Competition Policy in Regulatory Reform, in OECD, Regulatory Reform in Turkey (2002), also available at www.oecd.org/dataoecd/3/0/27068413.pdf.

2. Art. 39(2)(a) & (b), Decision 1/95 of the EU-Turkey Association Council Implementing the Final Phase of the Customs Union (Dec. 22, 1995). Article 39(2)(a) also requires Turkey to "ensure that, within one year after the entry into force of the Customs Union, the principles contained in the block exemption Regulations in force in the Community, as well as in the case-law developed by EC authorities, shall be applied in Turkey."

3. Law No. 4054, on the Protection of Competition; passed 7 December 1994, effective 13 December 1994 ("Competition Act").

4. Statutory Decree No. 494, amending Organisational Act No. 3143.

5. National Program for the Adoption of the Acquis, Official Gazette, 24 July 2003 No. 25178 bis.

6. For further information, see 2004 OECD Economic Survey of Turkey.

7. Pre-Accession Economic Programme (State Planning Organization, Ankara, Nov. 2004) pp. 73-74, 134-35.

8. European Commission, 2004 Regular Report on Turkey's Progress Towards Accession (Oct. 6, 2004) p. 64.

9. No practical difference between Turkey and the EU appears to arise from the fact that Article 4 covers conduct that has an anti-competitive "object or effect or … possible impact" while the comparable language in Article 81(1) refers only to "object or effect." In the EU, Article 81(1) has been interpreted to reach potential as well as actual effects and covers, for example, agreements that were never put into operation. Bellamy, Christopher, and Graham Child (2001), *European Community Law of Competition*, London. ¶¶ 2-101, 2-106.

10. Turkey's Article 56, which provides that agreements violating Article 4 are void and unenforceable as a matter of law, is the counterpart to the similar provision in EU article 81(2).

11. EU Notice 2001/C 368/07, implements EU case precedent under which agreements are deemed to violate Article 81(1) only if they "appreciably restrict competition." The Notice provides, however, that no protection is accorded for "hardcore" horizontal agreements that fix prices or allocate markets, or for certain vertical agreements (such as those designed to control resale prices).

12. Authority to revoke a block exemption as to a particular agreement involving a given firm is typically reserved by a provision in the exemption itself. Further, a provision in the vertical agreements block exemption (Communiqué No. 2002/2, Art. 6(2)) reserves the Board's option to issue a separate communiqué withdrawing the exemption as to all the firms in a relevant market if a "significant part" of that market is covered by a "parallel network" of similar vertical restraints.

13. As a substitute, Article 10 of the EU's new general competition regulation (No. 2003R001) provides for the issuance of declarations that "the prohibition in Article 81 or Article 82 of the Treaty does not apply" to a particular agreement or practice. Such declarations are, however, available only in "exceptional cases where the public interest of the Community so requires," and are intended particularly to deal with "new types of agreements or practices that have not been settled in the existing case-law and administrative practice." Council Regulation No. 1/2003 (Dec. 16, 2002) (OJ L 1, 4.1.2003), ¶ 14.

14. The EU defines "active sales" as those made by direct marketing methods, such as (1) sales calls, visits, or direct mail to individual customers; (2) specifically targeted advertising; or (3) the establishment of a distribution outlet in another distributor's exclusive territory. *Guidelines on Vertical Restraints*, Commission Notice 2000/C 291/01, (Oct. 13, 2000) ¶50.

15. The case is on judicial review, and the Board's decision has been suspended pending the appeal.

16. Communiqué No. 1997/3 Concerning Exclusive Distribution Agreements, Communiqué No. 1997/4 Concerning Exclusive Purchasing Agreements, and Communiqué No. 1998/7 Concerning Franchise Agreements.

17. A "non-compete clause," as defined identically in Article 3(d) of the TCA's Communiqué and Article 1(b) of the EU's exemption, is a contract provision that either (1) prohibits the buyer from manufacturing, purchasing, or selling goods or services that compete with the goods or services involved in the vertical agreement at issue, or (2) requires the buyer to purchase from the supplier (or from a source designated by the supplier) more than 80% of the buyer's requirements for the subject goods or services. Clauses of the second type are often referred to as "exclusive dealing."

18. An earlier September 2001 proceeding with respect to the same non-compete clause involved the only occasion on which the Board has revoked a negative clearance. The Board had originally granted a negative clearance for a non-compete clause of indefinite duration, but concluded that, by 2001, the bank's share of the relevant market had become so large as to impair unduly the prospects of new entrants.

19. The Board has never withdrawn any of the other block exemptions from an individual firm. Nor has it ever withdrawn an individual exemption previously granted to a firm.

20. Explanation of the Block Exemption Communiqué on Vertical Agreements (Decision No. 03-46/540-M, June 30, 2003).

21. The TCA's Vertical Guidelines (¶23) define "passive sales" as those which do not result from any active attempt to solicit sales in another distributor's assigned territory. Sales arising from general media advertisements are considered to be passive. Article 4(b) of the TCA's vertical block exemption prohibits suppliers from restricting passive sales.

22. Decision No. 01-17/150-39 (April 6, 2001), p. 56.

23. For these reasons, the EU's competition authorities (as most others) do not normally prosecute firms with monopoly power for charging "high" prices, even though Article 82(a) (unlike Article 6 of the Turkish statute) expressly mentions charging "unfair" selling prices as an example of abuse. The EU has instead reserved the pricing clause in Article 82 for cases attacking predatory pricing. See Faull, Jonathan, and Ali Nikpay (1999), The EC Law of Competition, Oxford, §§ 3.295-3.304.

24. Communiqué No.1997/1, Mergers and Acquisitions Calling for the Authorization of the Competition Board (Jan. 1, 1997).

25. Merger Communiqué Art. 2(c).

26. For the EU's analysis of this point, see Regulation 139/2004 (Jan. 20, 2004), paragraphs 24-26.

27. Article 6(1)(a) of the Merger Communiqué provides that the Board, in assessing mergers, will consider "the need to maintain and develop effective competition within the country in view of … actual or potential competition from the undertakings located either within or outside the country."

28 The language of Article 7, which covers any form of acquisition by which one enterprise gains control of another, excludes only acquisitions by inheritance.

29. The Privatisation Administration determines how to structure the sale of assets designated for privatisation. The Privatisation High Council, a political body, decides whether and when to include particular assets in the privatisation program and approves the winning bidder.

30. See Communiqué No. 1998/5 (Nov. 18, 1998).

31. The Board's activities as a commentator at the initial stage of privatisation proceedings are treated later in the discussion of competition advocacy.

32. The Board did not object to privatisation of the firm as a block sale because legislation enacted in late 2003 terminated Turkish petroleum import restrictions effective January 1, 2005. Large capacity refineries in the Mediterranean and Black Sea areas could readily defeat any price increase by TÜPRAŞ.

33. The transaction was, however, subsequently annulled on procedural grounds by the Council of State. The Privatisation Administration is preparing to renew the proceeding.

34. See, *e.g.*, European Commission, 2004 Regular Report on Turkey's Progress Towards Accession (Oct. 6, 2004) pp. 93-94.

35. The Board, chaired by the Deputy Undersecretary of the SPO, would consist of the General Director for State Aid and representatives from the Ministry of Finance, the Undersecretariats of the Treasury and of Foreign Trade, the Ministry of Industry and Trade, and the Competition Authority. Board decisions would be subject to review by the Council of State.

36. Commercial Code, Art. 56.

37. Law No. 4077.

38. The Directorate's title reflects the fact that it was responsible for enforcing the Competition Act before the Competition Board was constituted. It no longer has a competition enforcement function.

39. The terms of Board members are staggered against the terms of Presidential administrations and Parliamentary cohorts. Turkey elects its national president every 7 years and its unicameral Parliament every 5 years.

40. It may be noted that an institutional check on the capacity of the Board to diverge too greatly from the recommendations of its expert staff arises for the conjunction of Articles 43 and 52 of the Competition Act. The former requires that formal investigations have one or more assigned staff rapporteurs, and the latter requires that Board's final decision include the opinion that the rapporteurs prepare at the end of the formal investigation.

41. One academician observed that, although the Board appears free from external political influence, Board members may nonetheless have an incentive to cultivate the government's favour in hopes of winning re-appointment. The solution suggested was to extend the term of Board members from six years to ten and to forbid re-appointment. The members of the Board responded that they did not consider the prospect of re-appointment so attractive as to skew their case decisions. Some observed, however, that a single ten year appointment was superior to the proposed omnibus law for autonomous agencies, under which members would be limited to a single six year term.

42. European Commission, 2004 Regular Report on Turkey's Progress Towards Accession (Oct. 6, 2004) 93.

43. On the other hand, the standard for granting a negative clearance is more demanding, as it entails a determination that the conduct notified does not violate Article 4 at all. In contrast, an individual exemption reflects a determination that, although the conduct violates Article 4's prohibitions, the particular circumstances involve sufficient countervailing benefits to make the conduct acceptable.

44. If there are not enough votes at the first meeting, the matter may be put on the agenda for the next meeting, and a decision may then be taken by a simple majority of the required quorum of 8. In case of a tie, the Chairman's vote controls. (Art. 51.)

45. For such decisions, the required quorum is at least one-third of the members, or 4. Thus, as a practical matter, these measures require at least 3 affirmative votes (Art. 51).

46 . Two examples described previously in this report are the cigarette display rack exclusivity case and the TTAŞ/ADSL matter.

47 The effect of the provision would be roughly similar to that of the consent settlement provision in Article 9 of the EU's competition regulation (No. 2003R0001).

48. On a different point, some practitioners expressed doubt about the willingness of the TCA to honour claims of attorney-client privilege in the investigative process. In the EU, the Court of Justice has recognised that attorney-client privilege protects communications between a client and an independent lawyer. AM&S v. Commission, [1982] ECR 1575, [1982] 2 CMLR 16. The TCA states that it follows EU policy and neither requests privileged documents nor employs as evidence any that are found.

49. See Article 6 of the exemption, Communiqué No. 2002/2. Similar language requiring the views of the affected parties appears in the withdrawal provision (Article 7) of the Research & Development exemption, Communiqué No. 2003/2, but not in the withdrawal provision (Article 8) of the Motor Vehicle Distribution and Servicing exemption, Communiqué No. 1998/3.

50. See Gürkaynak, Gönenç, *Shifting the Burden of Proof in Turkish Competition Law*, Global Competition Review 29 (Feb./Mar. 2002), London, Law Business Research Ltd., for a treatment of this and related issues.

51. Decision No. 00-24/255-138 (June 27, 2000).

52. When a constitutional claim is presented to the Council of State in a pending appeal, the Council must make a preliminary determination of the claim's merit. If the Council concludes that the claim is substantial, it must refer the issue to the Turkish Constitutional Court for resolution. If the Council decides that the constitutional claim is insubstantial, that determination may itself be appealed to the plenary chamber of the Council.

53. Decision No. 00-26/291-161 (July 17, 2000).

54. Decision No. 04-16/123-26 (Feb. 24, 2004).

55. The Board's ceramics decision, which includes an analysis of precedents in the EU and the United States that involve proof of concerted action, relies particularly on the EU's *Polypropylene* litigation, citing EU Commission Decision No. 86/398/EEC (OJ 1986 L 230/1), and the subsequent European Court of Justice decision on appeal in *Hercules Chemicals NV v. Commission*, [1999] ECR 4235, [1999] CMLR 976.

56. The Board's holding in the Coca-Cola predatory pricing case (Decision No. 04-07/75-18 (Jan. 23, 2004)), described earlier in this report, is an example of a decision replete with economic and econometric analysis.

57. One deadline that the Authority's staff finds problematic is the provision in Article 40 requiring that preliminary inquiries be completed within 30 days (as opposed to 6 months for formal investigations). The difficulty arises because commencement of a formal investigation must be notified to the target firm, and the staff therefore cannot conduct an unannounced and unexpected on-site investigation of the target firm unless it does so during the short preliminary inquiry period. The TCA staff's draft amendments would solve this problem by eliminating the separate deadline for preliminary inquiries and establishing instead a single deadline requiring issuance of the Board's final decision within 18 months after initiation of a matter.

58. For the years 1999 through 2004, the Board assessed about TRL 38 billion (USD 25,500) in fines against managers under Article 16 (3).

59. The Competition Act provides no mechanism by which a defendant may seek Board reconsideration of an adverse final decision. The TCA is not inclined to propose creation of such an option, because it anticipates that petitions for reconsideration would be filed routinely in every case, thus deflecting the Board's attention from more significant matters.

60. The title of this judicial body ("Danıştay" in Turkish) is also sometimes translated as "Supreme Administrative Court" or "Supreme Council." It is responsible for handling cases involving actions of the government. A separate court (the Supreme Court of Appeals) handles cases involving litigation between private parties.

61. Authority to seek judicial review of various Board decisions arises from Articles 42 and 55 of the Competition Act and from Article 24 of the Council of State Act. Judicial review is available only upon final resolution of the TCA proceeding. Parties cannot obtain interlocutory judicial review during the proceeding to hear (for example) arguments that the defendant is not an "undertaking" under Article 3 and hence not subject to TCA jurisdiction, or claims that a request for information under Article 14 is too broad or burdensome.

62. Law No. 5183 (June 2, 2004), Art. 34(C) (creating 13th Division).

[63] Although 136 Board decisions were appealed, the Table reports that 329 appeal proceedings were initiated. The difference is attributable to the fact that some Board decisions involved multiple parties, each of whom filed a separate appeal.

64. Law No. 5234 (Sept. 21, 2004). The Article 55 amendment does not apply retroactively to pending appeals, but only to cases in which the Board's reasoned decision was delivered to the parties after the effective date of the amendment.

65. Under current law, if collection of the fine is stayed and the appellant ultimately loses the appeal, the appellant does not have to pay interest for the period of the appeal's pendency. The draft law on autonomous bodies includes a provision that requires payment of accumulated interest in that situation.

66. The opinions related to the privatisations of Turk Telekom and the tobacco assets of TEKEL.

67. A separate problem associated with situations like that in the liner conference case arises from the mandatory notification requirement in Article 10 of the Competition Act. Notification is mandatory, under penalty of a fine, for any conduct violating Article 4 that is not covered by a block exemption. In the liner

conference case, the Board ultimately decided not to pursue this point against the conference, although no notification had been filed.

68. Because the case involved litigation between two private parties, the ruling was by a chamber of the Supreme Court of Appeals, not by the Council of State.

69. The EU is, of course, the prime focus of TCA interest with respect to enforcement cooperation. In December 2004, however, the TCA sent a delegation of competition experts to the United States for meetings with the US Department of Justice Antitrust Division and the US Federal Trade Commission. The TCA is now considering development of a cooperation agreement with those agencies.

70. Once Turkey establishes a state aid control program and the Customs Union implementing rules are adopted, the TCA expects to open consultations with DG Comp on a variety of topics beyond cooperation in law enforcement investigations. In particular, the TCA hopes to resolve questions about the degree of necessary harmonisation between Turkey's competition law regime and that of the EU.

71. Act on Prevention of Unfair Competition in Imports (Law No. 3577) and Regulations on Prevention of Unfair Competition in Imports.

72. One feature of the government's proposed omnibus law on autonomous bodies is a provision limiting the number of an agency's support staff to 30% of its professional staff.

73. Similarly, in 2003, the Board asserted jurisdiction to investigate an abuse of dominance complaint against TCDD, the Transport Ministry's state-owned railroad. The complaint, which alleged discrimination by TCDD against the use of imported railcars on its lines by private freight companies, was ultimately rejected on the merits. But the Board claimed jurisdiction because TCDD's decisions on such matters such as the operation of imported railcars were made independently by TCDD and not controlled by the Transport Ministry.

74. See *Altair Chimica SpA v ENEL Distribuzione SpA*., [2003] ECR 8875. A detailed analysis of the Board's holdings on this issue appears in İ. Selçuk, *State Monopolies and Exclusive Rights in Turkish Competition Law* (Oct. 2004) (paper presented at Colloquium on Current Issues of Competition Law in the Light of EU-Turkey Relations (Istanbul, Oct. 13-17, 2004).

75. This recommendation was based on the observation that no provision in Turkish law is available to constrain public enterprises from undertaking anti-competitive practices mandated in some fashion by the state (and hence outside the TCA's jurisdiction). Indeed, as the 2002 Report noted (p. 22), Turkish law contains provisions that exacerbate market distortions arising from the commercial operations of public enterprises, such as provisions providing state funds if costs exceed revenue (Statutory Decree No. 233, Art. 2).

76. See, e.g., the 2004 Accession Report at 94: "Major efforts concerning alignment in the adjustment of state monopolies and companies having exclusive and special rights are needed."

77. It is interesting to note that, on appeal of the Board's BELKO decision, the Council of State exercised its own initiative to consider the applicability of EU Article 86. The Council concluded that although BELKO, as a monopoly provider of heating coal, was "entrusted with the operation of services of general economic interest" within the meaning of Article 86(2), application of the Competition Act in the case at issue would not impermissibly obstruct BELKO's performance of its assigned task. Council of State (10). Dairesi E. 2001/4817, K. 2003/4770 (Dec. 5, 2003).

78. The Constitution describes the objectives of public professional organisations as "meeting the common needs of the members of a given profession, to facilitate their professional activities, to ensure the

development of the profession in keeping with common interests, [and] to safeguard professional discipline and ethics in order to ensure integrity and trust in relations among its members and with the public." (Art. 135, para.1.)

79. The 2002 Report observed (p. 29) that the TCA's oversight role with respect to the competitive effects of proposed government regulations was supplemented to some degree at the Ministry level, citing the example of a draft law prepared by the small business directorate of the Industry and Trade Ministry. The bill was designed to protect small stores by regulating the locations of large retailers. Both the TCA and the Ministry's Director General pointed out that the proposal would deny the benefits of superstores to consumers. No recent examples of such involvement by the Industry and Trade Ministry are available, because no recent legislative proposals emerging from that Ministry have involved anti-competitive provisions.

80. The 1998 communiqué was issued by the General Directorate of Personnel and Principles of the Prime Ministry and re-issued in 2001.

81. The Board's opinion in TOBB mentioned the fact that tradesmen chambers set maximum prices. The Board recommended adding a provision to the TOBB legislation that would prohibit merchants from joining tradesmen chambers. The Board remarked that implementation by merchants of maximum price schedules established for tradesmen not only distorted competition among the participating merchants but also "complicates, on the other hand, the maintenance of existence and the sustenance of activity by tradesmen." The Board added that, compared to merchants, tradesmen are disadvantaged "in many aspects, the production scale and the structure of costs being in the lead."

82. A variation on the theme of providing commentary with respect to proposed legislation arose from an application filed by the Turkish Union of Banks that complained about certain existing laws. The Board advised the government to remove provisions in various budget acts that required public institutions to maintain their accounts at public banking institutions rather than at private banking companies. Banking legislation in 1999 had formally eliminated the distinctions between the two types of financial institutions and there was no reason to deny public organisations the benefits of competition as customers for financial services. The Board's recommendation is pending.

83. This study was mentioned in the 2002 Report. (p. 28)

84. This study was also mentioned in the 2002 Report. (p. 25).

85. In 2003, the TCA considered another matter involving TEKEL, this one for the privatisation of TEKEL's salt division. The assets to be sold were four salt pans, three located near Turkey's Salt Lake, and the fourth (a sea-salt pan) located in İzmir. Together, the four pans produce all of Turkey's salt needs. The Board recommended that the three pans located near the Salt Lake be sold separately to three different purchasers, while concluding that the Izmir pan could be sold either separately or to one of the three purchasers of the Salt Lake pans.

86. The protocol did not, however, address the suggestion in the 2002 OECD Report (p. 25) that the two agencies develop "a common framework for determining whether a firm has a dominant position, a determination that is made by the telecoms regulator in that sector."

87. The case, described earlier in this report, was against ÇEAŞ, a company holding a monopoly concession for the distribution and transmission of electric power in one of Turkey's designated distribution areas. The Board found that ÇEAŞ had abused its dominant position by refusing to provide system interconnections for independent electric generation facilities.

88. The address is www.rekabet.gov.tr. The site also has an English version that includes, among other items, translations of selected Board decisions and opinions.

89. TOBB is created by statute to serve as the national trade association for businesses in Turkey. All business concerns must belong and about 1.2 million companies are presently on the membership rolls.

90. Article 39(2)(a).

91. Turkey is already obligated by Article 41 of the Customs Union Agreement to "uphold" the principles of Article 86, including that Article's secondary legislation and case law, with respect to state measures that distort competition between Turkey and the EU Member States.

92. Article 21(4) of the EU Merger Regulation (No. 139/2004) explicitly contemplates that member states may undertake separate reviews of mergers on prudential grounds.

93. Identifying the best techniques for examining oligopolistic markets is also a topic about which the TCA could usefully solicit technical advice from other competition law enforcement agencies.

94. The government's proposed omnibus law on autonomous agencies has a provision that would reduce the number of Board members from eleven to seven. If that provision is adopted, there would be a further practical reason for eliminating personal Board member participation in TCA investigations, as the number of available members would be insufficient to staff all pending investigations.

Non classifié **DAF/COMP/GF(2005)4/REV1**

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development **24-Mar-2005**

Français - Or. Anglais

DIRECTION DES AFFAIRES FINANCIÈRES ET DES ENTREPRISES
COMITÉ DE LA CONCURRENCE

DAF/COMP/GF(2005)4/REV1
Non classifié

Forum mondial sur la concurrence

EXAMEN PAR LES PAIRS DE LA POLITIQUE DE LA CONCURRENCE DE LA TURQUIE

-- Note du Secrétariat --

Cette note du Secrétariat a été révisée suite à l'examen par les pairs sous la session IV du Forum Mondial sur la Concurrence (17 et 18 février 2005). Elle est diffusée POUR INFORMATION.

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Français - Or. Anglais

DROIT ET POLITIQUE DE LA CONCURRENCE EN TURQUIE

Encadré 1. Synthèse

Le présent rapport retrace l'évolution et l'application, au cours des trois dernières années, du droit et de la politique de la concurrence en Turquie. Il fait suite à un autre rapport de l'OCDE, élaboré en 2002 dans le cadre d'une étude plus générale de la réforme de la réglementation. Le rapport précédent avait constaté que l'Autorité turque de la concurrence (« l'Autorité ») était sur la bonne voie depuis qu'elle avait démarré son activité vers la fin de 1997. L'Autorité a continué de faire d'excellents progrès depuis 2002, et elle est désormais considérée comme l'un des organismes les plus efficaces et les mieux administrés de Turquie. Elle poursuit sa mission avec énergie, imagination et intégrité, de même qu'elle a gagné le respect et le soutien des dirigeants dans les milieux d'affaires. Surtout, elle a joué un rôle extrêmement important pour aider l'économie turque à s'acheminer plus nettement vers l'adoption de mécanismes de marché concurrentiels et axés sur le bien-être des consommateurs.

L'Autorité est cependant confrontée à des problèmes qui s'apparentent à ceux que connaissent souvent les organismes de la concurrence de pays où l'État a exercé longtemps une forte mainmise sur l'économie. L'opinion publique est encore loin de bien comprendre et d'apprécier la politique de la concurrence. Les efforts de l'Autorité s'agissant de l'application de la Loi sur la concurrence sont ralentis par l'inexpérience des organes d'examen judiciaire. Par ailleurs, le soutien des autres secteurs du gouvernement est loin d'être total, même si ce problème est en partie compensé par le fait que le gouvernement est conscient que l'amélioration du cadre de la politique de la concurrence rapprochera la Turquie d'une adhésion à l'Union européenne.

Au nombre des points positifs à mettre au crédit de l'Autorité, il convient de mentionner en particulier les efforts qu'elle consacre à la formulation et à l'application efficace d'une solide politique de la concurrence, son attachement au respect de la légalité et à la transparence, et à l'attention qu'elle porte au perfectionnement et à la formation de ses experts. Son statut en tant qu'agence bénéficiant d'une autonomie administrative et budgétaire et l'absence d'ingérence sur le fonds dans sa mission de la part du gouvernement, contribuent également grandement à son efficacité. Il faut par ailleurs reconnaître les efforts qu'elle a déployés pour mettre en œuvre les recommandations qui lui avaient été faites dans le précédent rapport. Plus précisément, depuis 2002, elle a intensifié ses activités d'incitation à la prise en compte des effets concurrentiels des politiques et des propositions au sein du gouvernement (dans le processus de privatisation et ailleurs), elle a veillé au règlement en temps et en heure des procédures d'examen de fusions, elle a cherché à améliorer la coordination avec les organismes de réglementation sectorielle en Turquie et elle s'est efforcée d'élargir les relations de coopération avec les organismes de la concurrence d'autres pays. Au nombre des points faibles de l'Autorité, il convient de mentionner une certaine désorganisation dans la manière dont elle aborde l'harmonisation avec le droit communautaire de la concurrence et le problème récurrent de la mise en place d'une solide culture de la concurrence. Cependant, les problèmes les plus graves en matière de droit et de politique de la concurrence en Turquie ne concernent pas le fonctionnement de l'Autorité, mais plutôt des insuffisances d'ordre réglementaire auxquelles l'on ne pourra remédier que par des mesures parlementaires. La législation requise porte notamment sur la création d'un mécanisme d'encadrement des aides publiques, la suppression ou le contrôle des entreprises commerciales créées par l'État et investies de concessions monopolistiques ou de

privilèges anticoncurrentiels, l'instauration d'une obligation pour l'Autorité de revoir les projets de lois et de règlements et la modification de la loi sur la concurrence en vue d'améliorer les capacités de l'Autorité en matière d'application.

Le présent rapport contient un certain nombre de propositions visant à répondre à l'ensemble des problèmes de droit et de politique de la concurrence qui se posent aujourd'hui à la Turquie, et il passe en revue une série de sujets, y compris les dispositions en matière de politique de la concurrence de l'Accord d'union douanière entre la Turquie et l'Union européenne, l'interaction entre droit de la concurrence et les autres régimes juridiques et réglementaires, les termes de la loi sur la concurrence elle-même et diverses politiques de l'Autorité. Quelques-unes des propositions suivantes constituent des recommandations faites à des administrations turques autres que l'Autorité de la concurrence elle-même, tandis que d'autres concernent des modifications que l'Autorité elle-même peut apporter. Dans la première catégorie de mesures, le Rapport recommande à la Turquie de :

- mettre en place le plus rapidement possible un mécanisme de contrôle des aides publiques anticoncurrentielles ;
- supprimer ou encadrer les entreprises créées par l'État qui sont investies de concessions monopolistiques ou de pouvoirs et de privilèges leur permettant de se livrer à des pratiques anticoncurrentielles ;
- rétablir le contrôle par la politique de la concurrence des fusions dans le secteur bancaire ;
- attribuer à l'Autorité un rôle explicite dans l'analyse de la réglementation ; et
- améliorer les moyens dont dispose l'Autorité pour faire appliquer la Loi sur la concurrence afin de :
  - simplifier les normes de notification des fusions ;
  - adopter une norme révisée d'évaluation des fusions ;
  - modifier les délais du processus d'évaluation des fusions ;
  - relever les amendes maximales pour les violations autres que les infractions matérielles et ériger la réalisation prématurée d'une fusion en infraction matérielle ;
  - instaurer une exemption *de minimis* pour les accords concernant de petites entreprises ;
  - supprimer à la fois la notification obligatoire des accords et la procédure d'attestation négative et envisager de modifier la durée maximale de 5 ans pour les exemptions individuelles ;
  - instaurer une procédure de règlement amiable de certaines affaires ;
  - supprimer les amendes minimales et habiliter l'Autorité de la concurrence à proposer un traitement de clémence aux entreprises qui coopèrent ;
  - introduire des amendes personnelles et envisager des sanctions pénales pour les dirigeants responsables d'infractions matérielles ; et

– élargir les protections au titre du respect de la légalité dans le cadre des procédures de l'Autorité de la concurrence.

Dans la deuxième catégorie de propositions, le Rapport recommande à l'Autorité de la concurrence de :

- adopter une démarche plus systématique de son action d'harmonisation du droit turc avec le droit communautaire de la concurrence ;
- élargir les consultations avec les organismes de tutelle sectorielle ;
- faire preuve de la diligence et de la prudence voulues lors de l'invocation de la présomption de pratiques concertées ;
- améliorer la transparence, notamment pour ce qui est de la rédaction de projets de modifications réglementaires et de Communiqués et de la détermination du montant des amendes à infliger ;
- utiliser et élargir son poids et son influence par la coopération internationale ;
- envisager d'obtenir l'autorisation légale d'utiliser les pouvoirs d'enquête pour procéder à des études sur les marchés en dehors des missions liées à l'application de la loi ;
- faire en sorte que le public comprenne et appuie la politique de la concurrence ; et
- renforcer les effectifs et les compétences des avocats de l'Autorité et développer ses compétences en matière d'organisation industrielle.

1. La politique de la concurrence en Turquie : fondements et contexte

1. Le présent Rapport retrace l'évolution et l'application du droit et de la politique de la concurrence en Turquie depuis 2002. Il constitue la mise à jour du rapport de l'OCDE intitulé « Le rôle de la politique de la concurrence dans la réforme de la réglementation », préparé en 2002 dans le cadre d'une étude plus générale de l'OCDE sur la réforme de la réglementation en Turquie (ci-après dénommé « Rapport de 2002 »).[1] Comme le Rapport précédent, cette analyse débute par un historique de l'évolution de la politique de la concurrence en Turquie et une description du contexte dans lequel elle est mise en œuvre.

2. Après la seconde guerre mondiale, la politique économique de la Turquie ressemblait à celle de nombreux autres pays en développement. Les monopoles publics assuraient l'approvisionnement du pays en matières premières à des prix qui n'étaient pas des prix de marché, et le système bancaire contrôlé par l'État privilégiait les prêts à certaines entreprises ou certains secteurs, tandis que les subventions faussaient les réponses du marché. Le secteur privé était affaibli par sa dépendance à l'égard de l'État. Une série de crises économiques survenues dans les années 1970 ont révélé les insuffisances du système et mené à des réformes qui ont ouvert les frontières de la Turquie au commerce international et à une libéralisation des transactions sur le marché national.

3. La nécessité d'une politique officielle dans le domaine de la concurrence a été reconnue dès le début du processus de réforme, et la Turquie a commencé dans les années 70 à élaborer sur une législation ; il en est sorti quelques projets mais pas de loi. Les travaux ont véritablement repris en 1991, lorsqu'un groupe de spécialistes a été désigné pour mettre au point un programme de mesures sur la concurrence et la protection des consommateurs. Des facteurs intérieurs et extérieurs ont poussé à l'élaboration de la Loi sur la concurrence. C'est en 1994 que l'on a finalisé un modèle de législation, alors que la Turquie négociait une union douanière avec l'Union européenne. L'Accord d'union douanière reprenait les dispositions types de l'UE en matière de concurrence, que la Turquie a dû intégrer à sa législation (de même qu'elle a dû former une Autorité de la concurrence chargée de les faire appliquer) avant la date d'entrée en vigueur de l'Accord, le 31 décembre 1995.[2] C'est ainsi que la Loi sur la protection de la concurrence adoptée par la Turquie fin 1994 porta création de l'Autorité turque de la concurrence en tant qu'organisme autonome d'application de la législation antitrust, doté d'un Conseil de la concurrence chargé de résoudre les affaires et de définir les politiques.[3]

4. Au-delà des incitations économiques et politiques qui ont joué un rôle dans l'élaboration du droit de la concurrence, l'article 167 de la Constitution turque pose les fondements explicites de la politique de la concurrence, en garantissant que l'État prendra des mesures pour assurer et promouvoir le bon fonctionnement des marchés monétaires, du crédit, des capitaux et des produits et des services et qu'il « … empêchera la formation, dans la pratique ou en vertu d'un accord, de monopoles et de cartels.». Conformément à l'article 167, l'objet déclaré de la Loi sur la concurrence est simplement la « protection de la concurrence » (Art.1), qui est définie en termes de concurrence indépendante : « la compétition entre les entreprises sur les marchés des biens et services, leur permettant de prendre des décisions économiques de manière indépendante » (Art. 3). L'Autorité de la concurrence ajoute cependant que l'objectif ultime de la Loi consiste à protéger le processus concurrentiel (pas simplement la compétition entre les entreprises) afin de constituer des marchés efficients et de promouvoir le bien-être des consommateurs. L'Autorité considère cette approche conforme, non seulement à l'article 167 de la Constitution, mais également à son article 172, qui oblige l'État à « prendre des mesures pour protéger et informer les consommateurs. »

5. A l'origine, la politique de la concurrence relevait de la Direction générale de la protection des consommateurs et de la concurrence, créée en 1993 au sein du Ministère du commerce et de l'industrie.[4] Le Conseil de la concurrence a été mis en place le 27 février 1997, deux ans après l'adoption de la Loi sur la concurrence, et il a fallu encore près de deux ans pour qu'il commence à exercer ses fonctions en novembre 1997. A cette époque, le Conseil assumait les fonctions relatives à la politique de la concurrence, notamment l'élaboration de la politique et de la législation, la Direction générale s'occupant de protection des consommateurs. La Loi sur la concurrence est en vigueur depuis presque dix ans, mais le Conseil ne l'a appliquée que pendant environ sept ans au cours de cette période.

6. À l'heure actuelle, la mise en œuvre de la politique de la concurrence en Turquie n'est qu'un élément parmi d'autres d'une initiative nationale beaucoup plus vaste devant permettre au pays d'aller au-delà de l'Accord d'union douanière et d'adhérer officiellement à l'Union européenne. En octobre 2004, la Commission européenne a recommandé que l'Union européenne entame avec la Turquie des négociations d'adhésion officielles, une recommandation acceptée par les États membres de l'UE en décembre 2004. En Turquie, le Secrétariat général aux affaires européennes surveille la mise en oeuvre à l'échelle du gouvernement du Programme national d'adoption de l'acquis communautaire, nécessaire à l'adhésion.[5] La Turquie a également poursuivi la mise en œuvre des réformes économiques indispensables à son entrée dans l'UE, malgré une crise économique en 2000-2002 marquée par une inflation élevée et de fortes perturbations du système bancaire. De nouvelles politiques monétaires et budgétaires ont permis de maîtriser l'inflation, alors que la restructuration et l'amélioration de la réglementation et de la tutelle du secteur bancaire se sont traduites par une amélioration de l'offre de crédit aux fins d'investissement. Le gouvernement a également introduit une série de modifications relatives aux modalités de ses interventions

sur les marchés de produits, du travail et des capitaux, les secteurs d'infrastructure et les programmes de soutien au secteur agricole.[6]

7. L'un des aspects importants du programme d'adhésion de la Turquie ayant des répercussions sur le droit de la concurrence concerne les efforts permanents déployés pour supprimer les monopoles publics et réduire la part de l'État dans l'économie. Les privatisations, qui ont dû être interrompues en raison de la dégradation de la situation économique en 2001 et en 2002, ont repris en 2003-2004. Le démantèlement des actifs de l'État est désormais terminé (ou presque) dans les textiles, le papier, les boissons alcoolisées, la distribution de pétrole et la gestion portuaire ; il est partiellement terminé dans les engrais, l'exploitation minière et la distribution de gaz naturel. Les opérations de privatisation en cours portent sur les actifs de l'État dans la téléphonie (concernant 55 % de Turk Telekom), le tabac, les compagnies aériennes (même si l'État ne possède que 20 % de ce secteur), le raffinage pétrolier, le sucre, les engrais et les stations-service assurant l'entretien de véhicules automobiles. Des programmes de privatisation ont été préparés s'agissant de la banque, de la production et de la distribution d'électricité, de la fabrication de produits pétrochimiques et de la loterie nationale.[7] L'État conserve malgré tout une part non négligeable de l'économie nationale. En valeur ajoutée, les entreprises détenues par l'État et les banques publiques représentaient 7 % du PIB en 2003, alors que les services publics totalisaient par ailleurs 13 %. Dans le secteur manufacturier, les entreprises détenues à 100 % par l'État représentent un cinquième de la valeur ajoutée du secteur et quelque 12 % des emplois. A l'échelle de l'économie, l'emploi dans les entreprises détenues par l'État, avec le secteur bancaire, représentait 2 % de l'emploi total (430 000 personnes) en 2003.[8] De plus, en dépit d'une certaine libéralisation, la concurrence et l'investissement privés restent remarquablement discrets dans des secteurs comme l'électricité, le gaz naturel et certains domaines des télécommunications ; enfin les frais de service (en particulier ceux facturés aux entreprises) restent élevés.

2. Les questions de fond : contenu de la Loi relative à la concurrence

8. Dans la mesure où l'Accord d'union douanière signé en 1995 avec l'UE oblige la Turquie à adopter un droit positif relatif à la concurrence calqué sur le modèle communautaire, on trouvera dans l'encadré ci-dessous un résumé des dispositions juridiques de l'UE à titre d'information.

Encadré 2. Le droit communautaire de la concurrence

La législation en matière de concurrence de l'Union européenne, telle que définie par les articles 85 et 86 du Traité de Rome de 1957, a été refondue (et re-numérotée) ultérieurement par les articles 81 et 82 du Traité d'Amsterdam de 1999. L'article 81 traite des accords et autres formes d'action concertée entre deux sociétés ou plus, tandis que l'article 82 traite des actions d'une seule société ou d'un groupe de sociétés en en position dominante.

Accords : l'article 81, paragraphe 1) interdit (et l'article 81, paragraphe 2) rend nuls de plein droit tous accords et pratiques concertées « qui ont pour objet ou pour effet d'empêcher, de restreindre ou de fausser le jeu de la concurrence. » Le texte légal ne fait pas de distinction entre les restrictions horizontales et les restrictions verticales. On y trouve une liste non exhaustive de pratiques illicites, comme le fait de fixer de façon directe ou indirecte les prix (horizontalement et verticalement), de limiter ou de contrôler la « production, les débouchés, le développement technique ou les investissements », de répartir les marchés ou les sources d'approvisionnement, d'appliquer à des partenaires commerciaux des conditions inégales en leur infligeant de ce fait un désavantage dans la concurrence et de subordonner la conclusion de contrats à l'acceptation de prestations qui n'ont pas de lien avec l'objet de ces contrats.

Exemptions : l'article 81, paragraphe 3) prévoit que les dispositions de l'article 81, paragraphe 1) peuvent être déclarées inapplicables a) à tout accord ou catégorie d'accords entre entreprises a) qui contribuent à améliorer la production ou la distribution ou à promouvoir le progrès technique ou économique ; b) tout en réservant aux utilisateurs une partie équitable du profit qui en résulte ; c) sans imposer aux entreprises intéressées des restrictions qui ne sont pas indispensables pour atteindre ces objectifs ; et d) donner à des entreprises la possibilité, pour une partie substantielle des produits en cause, d'éliminer la concurrence. L'article 81, paragraphe 3) peut être invoqué directement par les parties à un accord remplissant les conditions requises à titre de défense dans le cadre d'une assignation en justice. En outre, l'UE accorde généralement des « exemptions par catégorie » d'application générale, qui précisent les conditions dans lesquelles diverses catégories d'accords (tels les contrats de distribution verticale et les arrangements conjoints de recherche-développement) bénéficieront de la protection de l'article 81, paragraphe 3).

L'abus de position dominante : l'article 82 interdit le fait d'exploiter de façon abusive une position dominante. Le texte de l'article contient, une fois de plus, une liste non exhaustive de pratiques réputées abusives, comme le fait d'imposer des prix d'achat ou de vente ou d'autres conditions de transaction non équitables, de limiter la production, les débouchés ou le développement technologique au préjudice des consommateurs, d'appliquer à l'égard de partenaires commerciaux des conditions inégales à des prestations équivalentes en leur infligeant de ce fait un désavantage dans la concurrence et le fait de subordonner la conclusion de contrats à l'acceptation, par les partenaires, de prestations supplémentaires qui, par leur nature ou selon les usages commerciaux, n'ont pas de lien avec l'objet de ces contrats. On estime généralement qu'il y a abus de position dominante à partir de 50 pour cent de part de marché, voire moins en fonction d'autres facteurs. L'interdiction s'étend aux abus commis par plusieurs sociétés agissant de concert, même si aucune de ces entreprises ne détient à elle seule une part de marché suffisante pour constituer un abus de position dominante.

Fusions : Le contrôle des fusions ne découle pas directement des articles du Traité, mais d'un règlement séparé de l'UE. Une notification préalable est obligatoire pour toutes les transactions dont on estime après examen qu'elles « créent ou renforcent une position dominante ayant comme conséquence qu'une concurrence effective serait entravée de manière significative dans le marché commun ou une partie substantielle de celui-ci ».

9. Les interdictions caractérisées prévues dans la législation turque font l'objet des articles 4, 6 et 7 de la Loi relative à la concurrence. L'article 4 traite des accords et des pratiques concertées, reprenant de ce fait l'article 81, paragraphe 1) du droit communautaire. L'article 6, qui vise l'exploitation abusive de position dominante, est censé reprendre l'article 82 de l'UE, tandis que l'article 7 sur les fusions et acquisitions est calqué sur le Règlement de l'UE sur les concentrations. En vertu de l'article 4 de la Loi, les « accords et pratiques concertées » qui ont pour objet ou pour effet d'empêcher, de fausser ou de restreindre la concurrence, ou qui sont susceptibles d'avoir de tels effets, sont interdits.[9] Comme l'article 81 du Traité de l'UE, le texte légal de la Turquie ne fait pas de distinction entre les restrictions horizontales et les restrictions verticales. Comme l'article 81, l'article 4 dresse une liste non exhaustive de pratiques anticoncurrentielles qui constituent des violations potentielles.[10]

2.1 Accords horizontaux

10. En ce qui concerne les accords horizontaux, la liste non exhaustive de pratiques anticoncurrentielles figurant à l'article 4 comprend les ententes sur les prix, la répartition de marchés, la concertation en vue du contrôle des extrants ou des intrants, les boycotts et les mesures dissuasives à l'entrée. L'article 4 présente la caractéristique unique de prévoir que l'on peut déduire l'existence d'une collusion illicite entre concurrents si la conduite sur le marché ou les conditions sur ce marché sont analogues à celles que l'on pourrait constater sur un marché où la concurrence est faussée artificiellement. Nous reviendrons sur l'approche retenue par le Conseil de la concurrence à l'égard de cette présomption, qui a fait l'objet de controverses considérables.

11. Il n'est pas prévu d'exemptions réglementaires concernant les « cartels de crise » ou les accords entre petites entreprises. Le Conseil envisage depuis plusieurs années d'adopter une modification légale qui créerait une exemption *de minimis* pour les accords entre petites entreprises. Cette exemption viserait les accords qui, même s'ils ont un certain effet anticoncurrentiel, n'ont qu'une importance limitée sur le marché pertinent. Elle s'alignerait sur la réglementation *de minimis* de l'UE et s'appliquerait lorsque la part totale de marché des parties concernées ne dépasse pas 5 % pour les accords horizontaux et 10 % pour les accords verticaux.[11]

12. L'article 5 de la Loi sur la concurrence habilite le Conseil à accorder à la fois des exemptions individuelles et des exemptions par catégorie, qui ont pour effet de rendre les interdictions prévues à l'article 4 inapplicables à une pratique donnée. L'article 8 prévoit, quant à lui, la délivrance « d'attestations négatives » propres à une affaire, en vertu desquelles un accord ou une pratique donnés sont déclarés non contraires à l'article 4. Les critères de l'article 5 relatifs à l'octroi d'exemptions individuelles ou par catégorie sont identiques à ceux de l'article 81, paragraphe 3) de la législation communautaire : l'accord en question permet d'améliorer la production, la distribution ou la technologie, il profite au consommateur, il n'élimine pas la concurrence sur une partie importante du marché et il n'est pas plus restrictif que ne le nécessite la poursuite de son objectif. La durée maximale de l'exemption individuelle est de 5 ans, renouvelable. L'exemption individuelle comme l'attestation négative peuvent être révoquées si les circonstances changent, si les parties ne respectent pas leurs engagements ou si elles font une fausse déclaration pour obtenir l'exemption (Art. 13). Les exemptions par catégorie peuvent être applicables pour une durée indéterminée ou pour toute durée fixée par le Conseil et peuvent être annulées s'agissant d'un accord particulier si le Conseil estime que ce dernier a des effets « incompatibles » avec les normes de l'article 5.[12]

13. Même si les caractéristiques principales du régime turc d'exemptions et d'attestations négatives sont calquées sur le système en vigueur au sein de l'UE, il existe cependant entre les deux systèmes une différence importante liée aux modifications récentes apportées à la structure communautaire d'application de la loi. Auparavant, si les parties à un accord souhaitaient bénéficier d'une protection au titre de l'article 81, paragraphe 3) de l'UE sans pouvoir invoquer d'exemption par catégorie, elles pouvaient déposer solliciter auprès des autorités communautaires de la concurrence une exemption visant spécifiquement leur accord. Or, l'UE a supprimé le système d'exemptions spécifiques au titre de l'article 81, paragraphe 3) depuis le 1er mai 2004, tout en conservant le mécanisme de l'exemption par catégorie. Le dispositif des « attestations négatives » de l'UE, qui permettait aux parties d'obtenir une déclaration selon laquelle il n'existait aucun motif de poursuites à l'encontre d'une action au titre de l'article 81, paragraphe 1) ou de l'article 82, a également été supprimé depuis le 1er mai 2004.[13] La Turquie, par contre, conserve à la fois les exemptions individuelles et les attestations négatives, parallèlement aux exemptions par catégorie.

14. En août 2003, l'Autorité turque de la concurrence a publié le Communiqué n°2003/2004 relatif aux «accords de recherche-développement», portant création d'une exemption par catégorie pour les accords de R.-D. Cette exemption diffère à plusieurs égards de l'exemption comparable du Règlement

(CE) n°2569/2000 de la Commission. Premièrement, pour les projets de R.-D. dont les résultats font l'objet d'une exploitation en commun, l'exemption de l'UE continue de s'appliquer pendant une période de sept ans à compter de la date de première mise dans le commerce des produits contractuels à l'intérieur du marché commun (art. 4.1) et tant que la part de marché cumulée des entreprises participantes n'est pas supérieure à 25 % du marché en cause des produits contractuels (Art. 4.3). Par contre, l'exemption de l'Autorité relative aux projets dont les résultats font l'objet d'une exploitation en commun ne s'applique que pendant une période de cinq ans après la date de première mise dans le commerce du produit en Turquie (Art. 4). L'Autorité précise au sujet de sa démarche qu'elle tient compte à la fois de la durée d'application de cinq ans prévue pour les exemptions individuelles par l'article 5, paragraphe 2) de la Loi sur la concurrence et de la disposition contenue dans la version précédente de l'exemption par catégorie relative aux projets de R-D de l'UE (n° 418/85, art. 3.1) qui fixait une durée de cinq ans pour les projets de R-D faisant l'objet d'une exploitation en commun.

15. Deuxièmement, l'exemption de l'UE stipule que lorsque deux ou plusieurs des entreprises participantes sont des entreprises concurrentes, la part de marché cumulée des entreprises participantes ne doit pas être supérieure à 25 % du marché en cause à la date de conclusion de l'accord de recherche et développement (Art. 4.2). L'Autorité utilise un système mixte en vertu duquel la part de marché cumulée des entreprises participantes ne doit pas dépasser 40 % si les produits du projet font l'objet d'une mise sur le marché commune par les concurrents (Art. 5, a)) et 20 % si les produits du projet sont commercialisés uniquement par l'une des entreprises participante ou par une société ou contrôlée par les entreprises participantes (Art.5(b)). En guise d'explication de cette différence, l'Autorité cite encore l'ancienne exemption par catégorie de l'UE, qui utilisait également un système mixte en vertu duquel le plafond de part de marché était de 20 % pour les accords supposant une fabrication en commun par les entreprises participantes (Art. 3.3) et de 10 % pour les accords faisant intervenir la distribution de produits par une seule partie ou une par une co-entreprise (Article 3.3a). D'après l'Autorité, le niveau élevé (40 %) du plafond de part de marché prévu dans son règlement tient au fait qu'en Turquie, les programmes de R.-D. sont lancés principalement par de grandes entreprises. En fixant un plafond plus bas, on aurait risqué de limiter le volume des dépenses de R.-D, dont la part dans le PIB de la Turquie est déjà inférieure au niveau considéré comme souhaitable. D'un autre côté, le plafond assez bas de 20 % applicable aux projets faisant intervenir une distribution de produits restreinte s'explique par le fait que l'Autorité redoute l'incidence anticoncurrentielle potentiellement grave de ces restrictions sur les marchés en aval.

16. Troisièmement, l'exemption par catégorie de l'UE permet expressément aux entreprises participantes au projet de fixer les prix pratiqués à l'égard des clients directs lorsque l'exploitation des résultats s'étend à la distribution en commun des produits contractuels (Art. 5.2, paragraphe b)). En outre, que les produits fassent ou non l'objet d'une production en commun, les entreprises participantes peuvent restreindre la clientèle à laquelle les entreprises participantes peuvent livrer, à la fin d'une période de sept ans à compter de la date à laquelle les produits contractuels sont mis pour la première fois dans le commerce à l'intérieur du marché commun (Art. 5.1(e)) et pratiquer une politique de ventes actives pour ceux-ci, dans les territoires réservés à d'autres parties à l'intérieur du marché commun (Art. 5.1(g)).[14] L'exemption de l'Autorité, par contre, interdit de telles dispositions contractuelles sans conditions (Articles 6(e) et 6(f)). L'Autorité explique que, dans la mesure où les restrictions faisant intervenir des prix, des clients et des territoires en aval sont réputées avoir la capacité d'avoir de graves conséquences anticoncurrentielles, elle préfère traiter ces dispositions contractuelles par des demandes d'exemptions individuelles au titre de l'article 5.

17. Aucune exemption par catégorie n'a été délivrée pour des accords entre concurrents horizontaux. L'Autorité a lancé un certain nombre de travaux préliminaires visant l'adoption d'exemptions par catégories analogues à celles dont l'UE s'est dotée pour les industries maritimes, les compagnies aériennes et les assurances. Les efforts de l'Autorité en vue d'élaborer une exemption par catégorie pour des accords de transfert de technologie semblable à celle de l'UE ont été suspendus en raison des dispositions du droit

turc des brevets qui autorisent les licences de brevet exclusives sans restrictions. L'exemption de l'UE, par contre, ne permet les licences exclusives que si la part de marché combinée des parties concernées est inférieure à plafonds donnés (Art. 3). L'Autorité espère trouver une solution à ce conflit de législation en 2005, et reprendra alors son projet de publier une exemption pour transfert de technologie.

18. L'application de l'article 4 de la Loi en matière d'accords horizontaux reflète les problèmes chroniques d'ententes dans certains secteurs de l'économie turque. Au cours de la période ayant précédé la création de l'Autorité en 1997, la Direction générale de la protection des consommateurs et de la concurrence a engagé des poursuites pour ententes dans les secteurs du ciment, de la boulangerie, des transports par autocar, de la volaille, de la distribution de périodiques et contre l'association de fabricants de conteneurs en carton ondulé. Par la suite, entre 1997 et 2002, le Conseil a rendu des décisions contre d'autres accords anticoncurrentiels entre boulangeries, distributeurs de périodiques et cimentiers, dont une affaire en 1999, condamnant cinq cimenteries à près de 900 milliards TRL (603 000 USD) pour avoir passé un accord d'entente sur les prix et de répartition des marchés dans la région de la mer Egée. Depuis le dernier Rapport de l'OCDE en 2002, d'autres poursuites ont été engagées à l'encontre de boulangeries (Ankara, Gaziantep, Kütahya) et de sociétés d'autocars (Konya), alors que de nouvelles poursuites dans le secteur du ciment ont été engagées à l'encontre de marchés à Ankara et au sud de Marmara ont abouti à des amendes infligées à 18 sociétés pour un total 4 88 milliards TRL (3, 3 millions USD).

19. D'autres actions récentes ont été engagées dans différents secteurs, notamment pour ententes sur les prix, soumissions concertées et répartitions de marché dans l'industrie des engrais agricoles (6 sociétés condamnées à 7,3 milliards TRL ou 4,9 millions USD), une agence de co-commercialisation formée par des concurrents pour vendre des espaces publicitaires à des chaînes de télévision turques, des ventes en soumissions concertées de briquettes de lait à des écoles et des accords d'ententes sur les prix et d²e répartition de marchés dans l'industrie de la céramique (30 sociétés condamnées à 13 milliards TRL ou 8,7 millions USD). Une action ouverte en 2003 a révélé un accord d'entente sur les prix entre 11 sociétés d'assurances et une facilité de réassurance concernant une assurance incendie, ainsi qu'un système séparé orchestré par l'Union turque des compagnies d'assurance pour fixer les tarifs et les conditions de diverses formes de couverture d'assurance.

20. Le Rapport de 2002 indiquait en page 10 que, s'agissant des accords entre concurrents horizontaux, « l'Autorité porte surtout son attention sur les cartels de fixation de prix et de division des marchés qui restreignent la concurrence horizontale. » Depuis plusieurs années, le Conseil s'intéresse également aux accords de fixation de tarifs au sein d'associations professionnelles publiques. En Turquie, les membres de nombreuses professions ont l'obligation d'adhérer à des associations professionnelles fondées en vertu de statuts. Certains de ces statuts contiennent des dispositions qui envisagent la promulgation de barèmes de prix contraignants, ce que d'autres ne font pas. Au début de l'année 2002, le Conseil a condamné à une amende l'Association turque des chambres d'architectes et d'ingénieurs (TAECA), lui ordonnant de supprimer les dispositions de ses statuts imposant des prix minimums. La Loi portant création de l'Association ne prévoyait aucun pouvoir de fixer les prix.[15] Par contre, fin 2003, le Conseil a décidé qu'aucune action ne pouvait être engagée contre les barèmes de prix minimums promulgués par l'Association turque des médecins, l'Association dentaire turque et le Barreau turc, dans la mesure où les textes fondateurs de ces associations définissaient clairement leur pouvoir de fixer des tarifs minimums.

21. Même si une association est habilitée à fixer les prix, un accord anticoncurrentiel passé entre les membres de la profession est susceptible d'être attaqué par le Conseil s'il n'est pas prévu par l'association elle-même. Ainsi, le Conseil a infligé des amendes à un groupe d'ingénieurs mécaniques de Konya qui avaient constitué un « pool de recettes » grâce auquel ils se répartissaient à parts égales les fruits de leurs différentes missions. De tels accords n'avaient pas été prévus par la Chambre d'ingénieurs mécaniques de

Konya, ce qui rendait non pertinente la question de savoir si la Chambre avait ou non le pouvoir légal de les autoriser.

22. L'action la plus récente (et la plus intéressante) dans ce domaine concerne une décision prise en janvier 2004 par le Conseil dans une affaire l'ayant opposé à la TURSAB, l'Association turque des agences de tourisme et de voyages. De par la loi, l'adhésion à l'Association est obligatoire pour toutes les agences de voyage exerçant en Turquie. Le Conseil ne s'est pas tant intéressé aux frais facturés par les agences à leurs clients qu'aux droits exigés par l'Association à ses membres. L'Association est habilitée à engager des dépenses de promotion du tourisme en Turquie et peut lever des fonds dans ce but notamment, en prélevant à la fois des droits d'adhésion annuels et un droit d'inscription pour les nouvelles agences de voyage. Le Conseil a conclu que le pouvoir de fixer un droit d'entrée n'incluait pas celui d'ériger une barrière à l'entrée en violation de l'article 4 de la Loi sur la concurrence. Estimant que l'Association avait fixé le droit d'entrée à un niveau susceptible de décourager toute nouvelle entrée sur le marché, le Conseil a ordonné l'établissement d'un droit raisonnable et infligé une amende. Cette affaire est la première dans laquelle le Conseil invoque la clause de « dissuasion à l'entrée » de l'article 4 pour constater une infraction.

2.2 Accords verticaux

23. Pour les restrictions verticales, la Turquie reprend l'ensemble des règles de base de l'Union européenne. La liste non exhaustive contenue à l'article 4 de la Loi sur les pratiques verticales anticoncurrentielles cite entre autres les prix de revente imposés, la discrimination entre parties en situation identique, les accords liés et les actions visant à barrer la route aux concurrents ou aux entrants potentiels. Comme pour les pratiques horizontales, le Conseil peut délivrer des exemptions individuelles ou par catégorie qui rendent l'article 4 inapplicable à certaines formes de pratiques verticales, alors que des déclarations « d'attestations négatives » propres à certaines affaires peuvent être délivrées en vertu de l'article 8.

24. En juillet 2002, le Conseil a publié une nouvelle exemption par catégorie applicable aux accords verticaux (Communiqué n°2002/2). Cette exemption, qui remplace et annule trois règlements précédents relatifs à des exemptions par catégorie applicables à des accords verticaux,[16] repose en grande partie sur l'exemption par catégorie révisée publiée par l'UE en décembre 1999 (Règlement 2790/1999). La nouvelle exemption de l'Autorité a un champ d'application plus vaste que les trois exemptions qu'elle a remplacées, puisqu'elle couvre les accords verticaux entre plus de deux entreprises, les accords d'achat (fourniture) ainsi que les accords de distribution et les accords liés aux services et aux produits. Elle englobe également les accords portant sur l'achat, la vente, le transfert ou l'utilisation de droits intellectuels par l'acheteur, pour autant que 1) les droits intellectuels se rapportent directement aux biens ou aux services formant le sujet primaire de l'accord, 2) le transfert ou l'utilisation de droits intellectuels constituent une caractéristique annexe de l'accord, et non son objet principal ; et (3) l'accord ne contient pas de dispositions qui soient exclues du champ d'application de l'exemption.

25. Comme le Règlement de l'UE, la nouvelle exemption supprime la liste des dispositions contractuelles « autorisées » qui figuraient dans les textes précédents et recense simplement les dispositions qui rendent l'exemption inapplicable (y compris et surtout les prix de revente imposés). Au moment de sa publication, l'exemption par catégorie de l'Autorité différait à deux égards importants de celle de l'UE. Premièrement, si l'exemption de l'UE exclut de la protection toute clause de « non-concurrence »[17] à durée indéterminée ou de plus de 5 ans, l'exemption de l'Autorité prévoyait une disposition spéciale permettant une durée d'application plus importante dans les cas où un fournisseur assure 35 % ou plus de l'investissement à effectuer pour que l'acheteur puisse commencer son exploitation. Dans ces conditions, une restriction de non-concurrence pouvait avoir une durée de validité allant jusqu'à dix ans si l'acheteur poursuivait son exploitation sur le lieu de réalisation de l'investissement

du fournisseur. L'explication donnée par l'Autorité à l'adoption d'une durée de dix ans est que, dans certains secteurs (y compris et en particulier dans la distribution de mazout), une durée de cinq ans est trop courte pour permettre à un fournisseur ayant investi dans les installations d'un distributeur de récupérer sa mise. Mais après la publication de cette exemption par catégorie, l'Autorité a pris conscience du fait que la clause d'investissement de 35 % risquait d'être invoquée dans des situations ne justifiant pas véritablement une période de récupération de l'investissement de dix ans. Par conséquent, elle a publié en septembre 2003 le Communiqué 2003/3 supprimant la disposition relative au seuil d'investissement de 35 %, ce qui a permis de mieux aligner l'exemption de l'Autorité sur celle de son modèle au sein de l'UE.

26. La deuxième différence, plus importante (et qui existe toujours) entre l'exemption de l'Autorité et celle de l'UE tient au fait que cette dernière ne protège les accords que si le fournisseur ne détient pas plus de 30 % du marché en cause, alors que l'on ne retrouve pas ce plafond dans l'exemption de l'Autorité. L'explication donnée par l'Autorité à ce sujet consiste à dire que sa version de l'exemption laisse aux entreprises ayant une puissance de marché la souplesse voulue pour adopter des dispositions contractuelles efficientes. L'Autorité reconnaît que ces dispositions peuvent avoir des effets anticoncurrentiels, mais considère qu'il existe d'autres solutions réglementaires préférables à un plafond de part de marché. Premièrement, l'exemption peut être retirée, soit à une entreprise contrevenante au titre du pouvoir de révocation conféré au Conseil de l'Autorité par l'article 13, soit à toutes les entreprises sur un marché donné par la publication d'un Communiqué modifié. Deuxièmement, dans la mesure où les exemptions par catégorie ne s'appliquent qu'à l'article 4 de la Loi et n'offrent aucune protection contre une action pour exploitation abusive de position dominante, des mesures coercitives peuvent être prises à l'encontre d'une entreprise contrevenante en vertu de l'article 6 de la Loi.

27. En fait, le Conseil a retiré une exemption par catégorie relative à un accord vertical à trois reprises. Dans une affaire survenue en août 2003, une grande banque nationale qui exigeait de ses points de vente au détail qu'ils n'acceptent que sa marque de carte de crédit s'est vue retirer sa protection. La banque a par ailleurs dû s'acquitter d'une amende en raison du fait que la clause de non-concurrence en question était prévue pour une durée indéterminée et n'était donc pas couverte par l'exemption par catégorie dans tous les cas. Le Conseil a retiré l'exemption par précaution, pour empêcher la banque de rétablir la clause de « non-concurrence » pour une durée de 5 ans cette fois, ce qui aurait été acceptable aux termes de l'exemption.[18] Dans la deuxième affaire, une entreprise en position dominante sur le marché des apéritifs salés s'est vu interdire en mai 2004 d'inclure des clauses de non-concurrence dans ses accords de distribution avec les points de vente au détail. La troisième affaire portait sur l'exemption retirée en septembre 2004 à une entreprise ayant passé des contrats d'exclusivité avec de nombreux commerces alimentaires en vue de proposer aux clients un service de commande en ligne. Dans les trois cas, le Conseil a conclu que les clauses de restriction ne produisaient aucune efficience significative et faisaient principalement office de barrières à l'entrée pour les fournisseurs concurrents. Actuellement, le Conseil examine d'autres affaires de clauses de non-concurrence insérées dans des accords passés avec des points de vente au détail par des sociétés sur les marchés de la bière et des boissons non alcoolisées. Plus généralement, le personnel de l'Autorité est en train de revoir l'ensemble du Communiqué, s'intéressant notamment à la question de savoir s'il convient ou non d'introduire un seuil de part de marché analogue à celui qui existe dans l'exemption de l'UE.[19]

28. En juin 2003, l'Autorité a publié des Lignes directrices sur les restrictions verticales,[20] destinées à fournir des orientations analogues à celles des Lignes directrices de l'UE sur les restrictions verticales (2000/C 291/01). Le texte de l'Autorité est considérablement moins élaboré et détaillé que la réglementation communautaire, avec une différence qui s'est avérée avoir des conséquences pour les franchiseurs faisant affaires en Turquie. Cette différence concerne, une fois de plus, la durée d'application des clauses de non-concurrence. Qu'il s'agisse de l'UE ou de l'Autorité, les exemptions par catégorie applicables aux accords verticaux limitent généralement les clauses de non-concurrence à une durée de 5 ans, sous réserve de renouvellement par consentement mutuel entre les parties contractantes. Cependant,

on trouve à l'article 200, paragraphe 2 des Lignes directrices de l'UE sur les restrictions verticales les indications suivantes concernant spécifiquement les accords de franchise :

> Une obligation de non-concurrence relative aux biens ou services achetés par le franchisé ne relèvera pas de l'article 81, paragraphe 1, lorsqu'elle est nécessaire au maintien de l'identité commune et de la réputation du réseau franchisé. Dans de tels cas, la durée de l'obligation de non-concurrence n'est pas un facteur pertinent au regard de l'article 81, paragraphe 1, pour autant qu'elle n'excède pas celle de l'accord de franchise lui-même.

Les Lignes directrices de l'Autorité ne contiennent aucune indication analogue, et l'Autorité estime que la limite de cinq s'applique aux clauses de non-concurrence des franchises comme à tous les autres. Les franchiseurs en Turquie prétendent que ces clauses devraient être autorisées pour toute la durée de vie de l'accord de franchise, comme elles le sont en Europe. L'Autorité répond que les franchiseurs peuvent faire une demande d'attestation négative, qui peut être délivrée pour une durée indéterminée. Vraisemblablement, le requérant ferait valoir qu'une attestation négative est justifiée, parce que, conformément à la politique de l'UE, une clause de non-concurrence pour une franchise n'enfreint pas l'article 4 si elle est limitée à la durée de vie du contrat de franchise.

29. L'Autorité a publié une autre exemption par catégorie applicable aux restrictions verticales. Le Communiqué n°1998/3 relatif aux accords de distribution et d'entretien de véhicules automobiles est pratiquement identique à l'ancien Règlement de l'UE n°1475/95. L'Union européenne a remplacé son exemption par une nouvelle version en 2002 (n°1400/2002). Les problèmes ayant mené l'UE à adopter une version révisée de son texte réglementaire (s'agissant notamment de la distribution de services et de pièces détachées) se posant également en Turquie, l'Autorité envisage, elle aussi, d'adopter un texte révisé pour son exemption, calqué sur le texte actuellement en vigueur dans l'UE

30. On pouvait lire dans le Rapport de 2002 (p. 12) qu'en matière d'application de la loi, les accords verticaux faisaient l'objet d'une moins grande vigilance de la part de l'Autorité, ce qui reste vrai aujourd'hui. L'Autorité axe une partie de son attention sur les prix de revente imposés, qui donnent lieu à une ou deux affaires par année. Une préoccupation persistante consiste à empêcher les fournisseurs qui exploitent des systèmes de distribution restrictifs d'éliminer la concurrence par les prix entre les marques en dissuadant les distributeurs de faire des « ventes passives » sur le territoire d'autres distributeurs.[21] L'Autorité ne s'attaque pas cependant aux prix de revente maximaux ou suggérés, que l'article 4, paragraphe a) de l'exemption par catégorie applicable aux accords verticaux permet de préciser si ces prix « ne correspondent pas à un prix de vente fixe ou minimal résultant de pressions ou d'incitations de la part de l'une ou l'autre des parties. » Au nombre des affaires récentes relatives à des accords verticaux, il convient de mentionner la procédure engagée en 2002 par l'Autorité contre les contrats utilisés par un opérateur portuaire. Aux termes de ces contrats, les bâtiments utilisant le port étaient tenus de faire appel aux services d'une entreprise donnée de services portuaires. Le Conseil a estimé que ces contrats liaient de manière intolérable les services de l'agent portuaire à l'utilisation du port, restreignant ainsi la concurrence en matière de fourniture de services portuaires. En 2002 encore, le Conseil a infligé des amendes pour prix de revente imposés à un fabricant de dioxyde de carbone liquide. Des poursuites analogues ont été engagées à l'encontre d'un fabricant de jus de fruits et de boissons fruitées en 2003. En 2004, enfin, le Conseil a résolu une affaire faisant intervenir une obligation d'exclusivité imposée à des détaillants de cigarettes, en vertu de laquelle les fabricants devaient signaler à leurs distributeurs et aux points de vente au détail que les interdictions relatives à l'usage de présentoirs émanant de concurrents étaient illégales.

2.3 Exploitation abusive de position dominante

31. L'article 6 interdit l'exploitation abusive d'une position dominante, qu'elle soit le fait d'une seule entreprise ou de plusieurs sociétés agissant de concert. Les concepts appliqués en matière de position dominante et d'abus suivent le modèle de l'Union européenne. La « position dominante » est le pouvoir de déterminer indépendamment des concurrents et des consommateurs des paramètres comme le prix, la production et la distribution (Art. 3). Il n'existe pas de critères particuliers de part de marché permettant de présumer ou de vérifier une position dominante, mais la jurisprudence de l'UE est considérée comme pertinente sur ces sujets. La liste non exhaustive de pratiques abusives répertoriées à l'article 6 de la Loi sur la concurrence suit le modèle de la liste de l'UE, article 82, les deux listes se recoupant dans leurs références à la discrimination entre des parties en situation identique, les accords liés et la restriction de production ou de développement technique au détriment des consommateurs. Par contre, on ne trouve pas dans le texte de la Turquie la même référence que dans le texte communautaire à l'imposition de « prix d'achat ou de vente ou d'autres conditions de transaction non équitables », alors qu'on trouve des références à l'éviction des concurrents, à l'exploitation d'une puissance de marché pour fausser la concurrence sur un marché différent et aux prix de revente imposés.

32. Pleinement consciente du fait qu'il est important de continuer d'inciter les entreprises à améliorer leur position sur le marché par les gains d'efficience et l'innovation, l'Autorité fait donc preuve de prudence dans la conduite de ses enquêtes pour exploitation abusive de position dominante. Les affaires récentes ont surtout porté sur les efforts déployés par les leaders du marché pour ériger des barrières à l'entrée ou évincer leurs concurrents par d'autres moyens. Une décision a été rendue en 2003, qui concernait la ÇEAŞ, entreprise détentrice d'une concession monopolistique pour la distribution et le transport d'électricité dans l'une des 33 zones de distribution désignées de la Turquie. Estimant injustifié son refus de fournir des interconnexions au système aux installations indépendantes de production d'électricité, le Conseil a condamné la ÇEAŞ à payer 9,5 milliards TRL (6,4 millions USD). Dans une affaire l'ayant opposé en 2002 à Karbogaz, le Conseil a interdit les contrats d'exclusivité pour la vente de dioxyde de carbone liquide à des utilisateurs finaux et condamné Karbogaz à verser 311 milliards TRL (208 000 USD). En janvier 2004, le Conseil a rejeté une plainte déposée contre Coca-Cola pour une politique de prix prédateurs, estimant que les prix de Coca, bien qu'inférieurs au coût total moyen, restaient supérieurs au coût variable moyen et que la politique en matière de détermination de prix de Coca-Cola ne visait pas d'objectifs prédateurs.

33. Le secteur des télécommunications a donné lieu à un grand nombre de procédures engagées au titre de l'article 6. Dans une décision de mars 2002 contre Turkcell et Telsim, le Conseil a conclu que les deux sociétés avaient exercé une domination conjointe sur «l'infrastructure essentielle » nécessaire à la fourniture d'une capacité nationale d'itinérance aux opérateurs de téléphonie mobile GSM. Le Conseil a jugé que les défendeurs avaient refusé sans motif valable à un fournisseur de services potentiel l'utilisation de leur infrastructure, et ce en violation de l'article 6. Il a donc infligé une amende totale de 30,4 milliards TRL (21,8 milliards à Turkcell et 8,6 milliards à Telsim). A 20,4 millions USD, il s'agit de la plus lourde amende jamais imposée par le Conseil depuis sa création en 1997. Le Conseil d'État a décidé de surseoir à l'exécution de la décision du Conseil dans l'attente d'un appel.

34. D'autres affaires engagées en vertu de l'article 6 ont fait intervenir Turk Telekom (TTAŞ), le fournisseur monopolistique détenu par l'État d'infrastructures de téléphonie fixe. Vers la fin de l'année 2002, une amende de 1,1 milliard TRL (737 000 USD) a été infligée à TTAŞ pour avoir éliminé la concurrence sur le marché des fournisseurs de services d'accès à Internet par ligne commutée (FSI). Le Conseil a estimé que les FSI indépendants ne pouvaient pas véritablement se disputer les clients au détail en raison de l'écart entre les faibles prix demandés par TTAŞ à ses propres clients au détail et les prix élevés facturés aux FSI concurrents. Une procédure distincte a été engagée en 2003 contre TTAŞ, le seul fournisseur d'accès à l'Internet par ADSL (service d'accès à large bande et à haut débit par les lignes

téléphoniques), pour avoir refusé d'affecter des ports ADSL à d'autres fournisseurs d'accès à Internet. Le Conseil a demandé à TTAŞ de cesser de vendre des ports ADSL à de nouveaux clients de détail jusqu'à la promulgation des règlements en matière d'accès en cours d'examen devant l'Autorité des télécommunications. Le Conseil a fait observer que le fait pour Turk Telekom de vendre tous ses ports ADSL à des clients de détail sans en réserver aux revendeurs risquait d'ériger de graves barrières à l'entrée. Le Conseil a ajouté qu'un refus de cesser les ventes incriminées conduirait à l'ouverture d'une enquête officielle. TTAŞ a effectivement cessé de vendre des ports en attendant la publication des règlements relatifs à l'accès. Une enquête est en cours concernant le refus de TTAŞ d'accorder aux fournisseurs concurrents de services Internet à haut débit l'accès à son infrastructure de télévision câblée.

35. Une autre affaire d'exploitation abusive de position dominante mérite d'être mentionnée, qui concerne la décision prise en 2001 dans l'affaire BELKO. Cette affaire était terminée au moment de la publication du Rapport de l'OCDE en 2002, mais elle est citée ici à titre de précédent important démontrant la capacité de l'Autorité à établir sa compétence à l'égard des monopoles créés par l'État (p. 22). Toutefois, elle est également importante du fait de l'éclairage qu'elle jette sur l'approche du Conseil vis-à-vis de l'Article 6. La Ville d'Ankara a accordé à BELKO une concession monopolistique pour l'importation et la vente de charbon à des fins de chauffage. BELKO a été reconnue coupable d'avoir abusé de sa position dominante en facturant des prix excessifs, même si elle n'a pas enregistré de profits excessifs. Le Conseil a imputé les prix excessifs facturés par l'entreprise à « son incapacité à faire preuve d'autant de soin et de diligence que possible s'agissant de protéger les intérêts de l'entreprise lors de ses achats, à un problème de sureffectifs et à [l'engagement] de coûts supérieurs à ce qu'ils auraient dû être, en raison d'un style de gestion inefficace. »[22]

36. Il est généralement problématique de poursuivre une firme en position dominante tout simplement parce qu'elle facture des prix de monopole, dans la mesure où il n'est pas judicieux de sanctionner l'exercice rationnel d'une puissance de marché légalement acquise. Qui plus est, les monopolistes inefficients qui fixent des frais élevés sont particulièrement susceptibles d'attirer de nouveaux entrants.[23] Dans le cas de BELKO, le Conseil a reconnu ces considérations et souligné que la conjonction de deux éléments critiques méritait un constat d'illégalité. Premièrement, la concession monopolistique de BELKO empêchait l'entrée sur le marché de tout fournisseur concurrent et, deuxièmement, le charbon de chauffage est un produit de base dont la fonction de demande est fortement inélastique. Une fois la décision rendue, la Municipalité d'Ankara a accepté la recommandation du Conseil et résilié le monopole de BELKO.

2.4 Fusions

37. L'article 7 de la Loi sur la concurrence et le *Communiqué* annexe sur les fusions publié par le Conseil en 1997[24] traitent des fusions et des acquisitions réalisées par transfert d'actions, d'actifs ou d'autorité de gestion. Les co-entreprises sont également concernées si la nouvelle entité constitue un acteur économique autonome.[25] L'article 7 interdit toute fusion ou acquisition qui « crée ou renforce la position dominante d'une ou de plusieurs entreprises, entraînant une restriction significative de la concurrence » sur un marché pertinent. Au moment de l'adoption de l'article 7, cette formulation reprenait celle du Règlement de l'UE sur les fusions (n° 4064/89). En janvier 2004 cependant, l'UE a publié un nouveau Règlement sur les fusions (n° 139/2004), entré en vigueur le 1er mai 2004, que remanie l'interdiction de manière à empêcher les fusions ou les acquisitions qui « entraveraient de manière significative une concurrence effective, sur le marché commun ou sur une partie importante de celui-ci, en particulier du fait de la création ou du renforcement d'une position dominante » (Art. 2, paragraphe 3).

38. Cette modification a été introduite par l'UE pour lutter contre les fusions présentant un risque d'effets anticoncurrentiels « unilatéraux » même sans déboucher sur une position dominante. Comme en droit turc, la définition retenue par l'UE de la notion de position dominante couvre le contrôle du marché

consolidé entre les mains d'une seule entreprise *ou d'un groupe* d'entreprises qui coopèrent. Les fusions qui ont produit des structures de marché oligopolistiques ayant conduit à une coordination anticoncurrentielle entre les entreprises restantes pouvaient effectivement tomber sous le coup de la clause de domination du Règlement existant sur les fusions. Mais ce texte ne pouvait être invoqué à l'encontre de rapprochements présentant simplement un risque d'effets anticoncurrentiels résultant du « comportement non coordonné » des autres entreprises.[26] La solution à laquelle est parvenue l'UE a consisté à faire de la dominance un exemple parmi d'autres d'effets anticoncurrentiels significatifs découlant d'une fusion, au lieu de faire de la création d'une position dominante un préalable au constat d'illégalité. Comme cela est généralement le cas pour les modifications apportées à la législation antitrust de l'UE, l'Autorité envisage d'inclure cette modification à l'article 7 de la Loi sur la concurrence.

39. Le *Communiqué* du Conseil sur les fusions précise les détails du processus d'examen des fusions, ainsi que les critères employés lors de l'évaluation des opérations. En vertu de l'article 6, paragraphe b du Communiqué, le Conseil effectue une analyse plurifactorielle type des fusions, afin d'apprécier la structure du marché, la situation économique et financière des parties, les autres possibilités qui s'offrent aux acquéreurs, les probabilités d'entrée sur le marché, les obstacles juridiques ou autres à l'entrée, les évolutions technologiques, les tendances de l'offre et de la demande et les intérêts des intermédiaires et du consommateur final. Le Communiqué envisage expressément d'autoriser les fusions qui créent des entreprises de taille rentable capables de concurrencer les importations.[27] Par ailleurs, le Conseil a déjà approuvé l'acquisition de sociétés en difficulté pour lesquelles il ne se présentait pas d'autre acquéreur, même si aucune autre affaire de ce type ne s'est présentée depuis le précédent Rapport. Seules deux fusions ont été rejetées entièrement depuis que le Conseil a assumé sa mission de contrôle des fusions. Le tableau suivant résume les activités au titre de l'examen des fusions depuis 1999.

Tableau 1. Décisions du Conseil dans des affaires de fusions, d'acquisitions et de co-entreprises en vertu de l'article 7[1]

ANNÉE	Transactions autorisées sans conditions	Transactions autorisées sous conditions		Transactions refusées
		De fond	Annexes	
2004	98	4	5	0
2003	72	3	6	0
2002	53	1	5	2
2001	42	2	2	0
2000	48	2	1	0
1999	24	1	0	0
Total	337	13	19	2

1. Le tableau comprend les fusions examinées dans le cadre de procédures de privatisation.

Source : Turquie, 2005

40. Le Conseil a imposé des conditions dans environ 9 % des fusions examinées. Moins de la moitié des affaires autorisées sous condition ont été assorties d'obligations de fond relatives à la cession d'actifs. Les autres concernent des dispositions annexes des accords d'acquisition. En 2003, l'acquisition par DSM de la division de Roche fabriquant des vitamines et des produits chimiques a constitué un exemple de transaction assortie de conditions fondamentales, dans la mesure où le Conseil n'a autorisé la transaction qu'à la seule condition que DSM se défasse de ses intérêts dans une entreprise commune existante avec BASF productrice d'enzymes alimentaires pour l'alimentation animale. De même, Syngenta, fabricant de semences et de produits de protection des cultures comme des fongicides et des herbicides, a été autorisé en 2004 à faire l'acquisition d'Advanta à condition de se défaire des activités d'Advanta sur le marché de la graine de tournesol.

41. Un exemple d'affaire autorisée sous conditions annexes concerne l'acquisition en 2002 par Cargill de Cerestar, la filiale de Montedison fabriquant de l'amidon et des édulcorants. Le Conseil a conclu que, du fait de la présence d'acheteurs importants et de l'existence d'autres sources d'approvisionnement possibles, au vu également de l'absence de barrières à l'entrée, l'acquisition en tant que telle ne présentait aucun risque pour la concurrence. Le Conseil a donc autorisé la transaction, mais a exigé que la durée de la clause de non-concurrence contre Cerestar soit ramenée de trois à deux ans étant donné que la transaction ne faisait intervenir aucun transfert de savoir-faire spécialisé. Une autre disposition interdisant à Cerestar d'acquérir plus de 5 % de toute entreprise concurrente a été modifiée pour interdire seulement l'acquisition d'une minorité de blocage.

42. La majorité des transactions (91 %) ont été autorisées sans conditions. En 2002, une co-entreprise constituée par quatre fabricants nationaux de fil de cuivre émaillé a été autorisée pour atteindre une échelle suffisante et permettre la concurrence pour les ventes sur le marché international. Les acheteurs nationaux ne couraient aucun risque dans la mesure où les hausses de prix étaient limitées par des importations aisément accessibles et où la capacité de production d'autres fournisseurs pouvait facilement être renforcée. L'incidence de la transaction sur le marché de l'offre de cuivre a également été évaluée, étant donné que l'un des associés de la co-entreprise était intégré dans la production de cuivre. Le Conseil a conclu que, même dans l'hypothèse improbable où la co-entreprise aurait limité tous ses achats de cuivre à une société affiliée, les effets potentiels sur le marché ne pourraient être que mineurs. En 2003, une autre transaction a été autorisée, dans le cadre de laquelle la Dow Chemical Company a fait l'acquisition de certaines lignes de produits d'acide acrylique et d'acrylates de Celanese AG. Aucune des installations de production concernées ne se trouvait en Turquie mais, après la fusion, la part de Dow dans les ventes sur les marchés de produits pertinents en Turquie est passée de 57 % à 90 %. Le Conseil a décidé d'autoriser l'acquisition malgré une part de marché élevée car, étant donné que de nombreuses sociétés exportaient les produits en Turquie, il existait une surcapacité de production et les acheteurs nationaux pouvaient facilement changer de fournisseurs si Dow augmentait ses prix. Le Conseil a également noté que les parts de marché élevées détenues par Dow tenaient en partie à l'incidence transitoire des variations de change liées au fait que les ventes de Dow sont libellées en dollars des États-Unis, alors que celles de ses concurrents le sont principalement en euros, une monnaie plus chère.

43. Fin 2003, l'Autorité a examiné la fusion de deux petits opérateurs de téléphonie mobile GSM, Aria (İŞ-TİM) et Aycell. Aycell était une filiale de Turk Telekom, l'entreprise détenue par l'État assurant l'exploitation du réseau turc de téléphonie fixe. Le Conseil a autorisé la fusion dans la mesure où TTI, l'entité issue de la fusion, n'allait pas obtenir une position dominante sur le marché des services GSM, pas plus que la transaction ne risquait de renforcer la position dominante de Turk Telekom sur les marchés des services de télécommunications et des infrastructures. Le Conseil a examiné, mais rejeté les demandes d'autres opérateurs GSM préconisant une interdiction de la fusion au motif que Turk Telekom risquait de favoriser TTI par des subventions croisées et des services d'interconnexion discriminatoires.

44. Les fusions dans le secteur bancaire de l'économie ont été, dans la pratique, exclues de la compétence de l'Autorité. La législation bancaire d'urgence, adoptée en 1999, puis élargie et pérennisée en 2001, offre l'unique exemple en droit turc d'exclusion expresse de la Loi sur la concurrence. En vertu de cette législation, la fusion entre banques dans laquelle les parts de marché de l'entité fusionnée tombent en dessous de 20 % du marché bancaire national présumé sont expressément exemptées de l'application de l'article 7 et ne sont assujetties qu'au contrôle de l'Autorité nationale de réglementation et de tutelle bancaires. Ce plafond est suffisamment élevé pour constituer une exclusion *de facto* de toutes les fusions bancaires. Le Rapport de 2002 recommandait (p. 32) la suppression de la dérogation appliquée une fois que la situation d'urgence aurait été maîtrisée dans le secteur financier, mais le gouvernement n'a pas proposé de législation en ce sens malgré les recommandations de l'Autorité.

45. L'article 7 de la Loi sur la concurrence, outre le fait qu'il énonce la norme en matière d'examen des fusions, stipule également que le Conseil devra préciser par voie de règlement les catégories de transactions soumises à notification préalable et à autorisation du Conseil. En vertu de l'article 4 du Communiqué sur les fusions, une notification est obligatoire si : 1) la part de marché cumulée des parties à la fusion dépasse 25 % du marché pertinent en Turquie; ou si 2) leur chiffre d'affaires cumulé en Turquie dépasse 25 milliards TRL (16,75 millions USD). Le Rapport de 2002 avait recommandé (p. 32) une réforme du mécanisme de notification des fusions et la suppression du critère des parts de marché, indiquant que ce test avait rarement une signification indépendante et que l'obligation faite aux petites entreprises de décider si elles passaient ou non le test leur imposait des coûts sans avantages proportionnels en contrepartie. Aucune mesure n'a été prise en vue de mettre en oeuvre cette recommandation, mais le personnel de l'Autorité a lancé un projet de révision du dispositif d'examen des fusions, et l'un des points à l'ordre du jour pour examen concerne la suppression du test de la part de marché.

46. La Loi fixe également le délai au terme duquel le Conseil doit avoir terminé son examen préliminaire d'une transaction notifiée. En vertu de l'article 10, paragraphe 2, le Conseil a 15 jours après la notification pour décider d'autoriser la transaction ou de procéder à une enquête officielle. Mais si le dossier de notification est incomplet ou erroné, le délai de 15 jours ne commence à courir qu'à partir du moment où les erreurs ou lacunes ont été corrigées. L'Autorité indique qu'elle est souvent obligée de réclamer des informations manquantes, en particulier s'agissant des transactions qui semblent poser des problèmes de concurrence. En attendant, certaines parties à la fusion profitent de la brièveté du délai réglementaire de 15 jours pour déposer leurs formulaires de notification tard dans la journée du vendredi, avant une semaine de congés.

47. Si le Conseil décide d'ouvrir une enquête officielle, il doit communiquer aux parties à la fusion ses objections préliminaires, et l'enquête suit alors le cours normal fixé par la Loi sur la concurrence pour toutes les affaires contestées. Si le Conseil de la concurrence ne répond pas ou ne donne pas suite à la notification dans le délai initial de 15 jours, l'accord de fusion « prend légalement effet 30 jours après la notification » (Art 10, paragraphe 3). Le statut juridique exact de l'accord au cours de cette deuxième période de 15 jours après la notification n'est pas clair. Dans le cadre de son projet de révision du régime actuel de notification des fusions, le personnel de l'Autorité compte recommander que la période d'examen préliminaire soit portée de 15 à 30 jours, une réforme qui, non seulement réglerait le problème des dépôts effectués en fin de journée le vendredi soir, mais lèverait aussi l'ambiguïté de l'article 10, paragraphe 3 eu égard à la date effective des transactions.

48. Dans le Rapport de 2002, il était indiqué que le fait que les enquêtes officielles ne soient assujetties qu'aux délais réglementaires types applicables à toutes les enquêtes en vertu du de la Loi risquait de poser problème. Le Rapport relevait que la procédure officielle pouvait durer jusqu'à 6 mois (voire au-delà d'un an si toutes les prorogations possibles étaient utilisées) et que les parties pouvaient décider de renoncer à une fusion s'il leur fallait attendre de 12 à 18 mois avant d'avoir une décision (p. 15). Ce même Rapport exhortait la Turquie à suivre l'exemple d'autres juridictions, qui fixent des délais ou des procédures spéciales pour assurer une décision finale rapide sur les affaires de fusion (p. 35). L'Autorité de la concurrence répond que dix affaires de fusion seulement depuis 1999 ont nécessité l'ouverture d'une enquête officielle, aucune de ces enquêtes n'ayant duré plus de trois mois. Cependant, le personnel de l'Autorité compte recommander la mise en place d'un processus adapté aux fusions, dans le cadre duquel la durée de la procédure serait fixée à un maximum de trois mois.

49. Le Conseil de la concurrence a estimé, peu de temps après sa création, que les dispositions générales en matière de contrôle des fusions prévues à l'article 7 étaient applicables aux opérations de privatisation menées par l'État.[28] Pour garantir l'examen en temps opportun de ces transactions, le Conseil a publié en septembre 1998 un Communiqué spécial (n° 1998/4) sur les opérations de privatisation décidées par l'Autorité des privatisations.[29] Cette disposition a été modifiée peu après pour englober les

privatisations menées par toute institution ou organisation publique.[30] Le Communiqué stipule (Art. 5) qu'une opération de privatisation ne prendra pas légalement effet sans l'autorisation du Conseil dans tous les cas où 1) le Communiqué exige la notification préalable de la transaction ; ou 2) même si une notification préalable n'est pas nécessaire, l'entreprise acquéreuse détient, avant la transaction, une part de marché supérieur à 25 % ou réalise un chiffre d'affaires de plus de 25 milliards TRL. L'obligation de notification préalable (Art. 3) s'applique dans tous les cas où l'entité à privatiser : 1) détient plus de 20 % de part de marché ; 2) réalise un chiffre d'affaires supérieur à 20 milliards TRL ; 3) possède un monopole légal ; ou 4) bénéficie de privilèges réglementaires ou *de facto* non accordés aux entreprises privées sur le marché pertinent. L'article 4 du Communiqué exige que la notification préalable parvienne au Conseil avant l'annonce au public de l'adjudication, afin que le Conseil puisse s'exprimer sur la meilleure façon de structurer la vente des actifs à privatiser. Ainsi, le Conseil bénéficie de deux occasions pour peser sur l'issue de la privation, l'une au moment de la préparation de l'adjudication et l'autre lorsqu'un acquéreur est identifié. Au premier stade, le Conseil fait office d'avocat de la concurrence, en donnant son point de vue à l'organisme responsable de la conduite de la privatisation. Au second stade, il joue le rôle d'organisme d'application de la loi, rendant des décisions contraignantes au titre de la disposition en matière de contrôle des fusions de l'article 7 de la Loi sur la concurrence.

50. Depuis 2000, l'Autorité de la concurrence a examiné 32 privatisations en vertu de l'article 7, aucune en 2001 et 2002, mais 13 en 2003 et 20 en 2004. D'une manière générale, le Conseil de la concurrence a autorisé la mise en place d'entreprises de taille rentable tout en empêchant la création de monopoles après les privatisations.[31] Une affaire importante est survenue en 2003, qui concernait la division des boissons alcoolisées de TEKEL, l'ancien monopole fournissant à l'État alcool et produits du tabac. Le monopole de TEKEL a été supprimé avant l'appel d'offres, et le Conseil a autorisé la vente en bloc des installations de production de boissons alcoolisées de TEKEL à un groupe de co-entreprises. Le Conseil a estimé que, sur les trois marchés en cause (bière, raki et autres boissons et vins à forte teneur en alcool), la part de TEKEL, soit n'était pas dominante, soit risquait l'entrée d'un nouveau concurrent dynamique rendant improbable le maintien d'un pouvoir dominant. En 2003, une autre affaire est intervenue, qui concernait cette fois la privatisation d'IGSAS, une entreprise d'État fabriquant des engrais et des composés azotés. Le Conseil avait rejeté une demande de privatisation en 2000 au motif que l'acquéreur potentiel avait déjà une présence importante sur le marché pertinent. La deuxième procédure a abouti à la vente d'IGSAS sans objection à une entreprise n'ayant pas d'activités préalables dans le secteur.

51. En 2004, une opération de privatisation a concerné TÜPRAŞ, une entreprise d'État détenant 86 % de la capacité nationale de raffinage pétrolier. Le Conseil a autorisé la vente de l'entreprise à une filiale allemande d'une société basée au Tatarstan,[32] mais il a fait remarqué qu'à l'avenir, avant de procéder à un nouvel investissement dans ses capacités de raffinage, l'entreprise serait tenue d'en faire évaluer les éventuels effets dissuasifs à l'égard de nouveaux entrants potentiels sur le marché du raffinage.[33] Au nombre des autres entreprises également privatisées en 2004, ESGAZ et BURSAGAZ, deux entreprises de distribution de gaz naturel anciennes filiales de l'entreprise verticalement intégrée de gaz naturel en Turquie. Le Conseil a autorisé sans conditions la vente des entreprises à des sociétés du secteur privé dans la mesure où les mieux-disants étaient nouveaux venus sur le marché et où le secteur était, dans tous les cas, fortement règlementé par la Loi relative au marché du gaz naturel.

2.5 Aides publiques

52. L'article 34 de l'Accord d'union douanière, en des termes calqués sur l'article 87 du Traité de l'UE, interdit à la Turquie et aux États membres de l'UE d'accorder à des entreprises ou à des secteurs économiques des ressources qui « faussent ou menacent de fausser la concurrence … entre la Communauté et la Turquie. » Bien que cet article figure dans la partie de l'Accord consacrée à la « concurrence », les aides publiques n'y sont pas traitées de la même manière que par les dispositions de fond antitrust des articles 81 et 82 du Traité de l'UE. L'Accord d'union douanière a contraint la Turquie à transposer dans

son propre droit positif les dispositions en matière de concurrence des articles 81 et 82, mais n'impose aucune obligation analogue s'agissant de la fourniture d'aides publiques. En fait, au titre de l'article 39, paragraphe 2) de l'Accord, la Turquie doit « adapter » tous ses régimes d'aide aux normes communautaires et se conformer généralement aux procédures et lignes directrices en matière de notification fixées par l'UE pour réglementer les aides publiques accordées par les États membres. Dans un autre domaine important, toutefois, les dispositions en matière de législation antitrust et d'aides publiques sont traitées de la même manière. L'article 37 de l'Accord exige de la Turquie qu'elle adopte, dans un délai de deux ans à compter de l'entrée en vigueur de l'union douanière, les « règles nécessaires » à la mise en œuvre des dispositions relatives à la fois à la législation antitrust et aux aides publiques.

53. Malgré l'imposition de ce délai, les règles nécessaires n'ont toujours pas été adoptées, principalement parce que la Turquie n'est pas parvenue à trouver de consensus sur un mécanisme d'alignement de son régime en matière d'aides publiques aux exigences de l'UE. Une première mouture de règles d'application de l'article 37 de l'Accord d'union douanière a été rédigée, qui recense les entités organiques en Turquie et dans l'UE responsables de l'application des lois de la concurrence et du contrôle des aides publiques. Le projet de texte fixe des procédures de notification, d'échange d'informations et de coordination des mesures d'application de la loi entre les deux instances, de même qu'il prévoit des mécanismes permettant d'éviter les conflits et de résoudre les différends. Le projet désigne explicitement l'Autorité comme organisme responsable de l'application de la réglementation en matière de concurrence, mais la disposition relative aux aides publiques ne mentionne qu'une « Autorité de contrôle des aides publiques », toujours inexistante. Les rapports réguliers de l'UE sur les progrès réalisés par la Turquie sur la voie de l'adhésion à l'Union européenne décrient régulièrement l'incapacité du pays à résoudre ce problème et appellent de leurs voeux la mise en place d'une autorité de contrôle des aides publiques « opérant en toute indépendance ».[34] Le Rapport de l'OCDE de 2002 recommandait également (p. 30) la mise en place d'un mécanisme de contrôle des aides publiques (p. 33).

54. Le gouvernement turc a proposé en 2003 un texte législatif qui donnerait l'autorité principale en matière de contrôle des aides publiques anticoncurrentielles à l'Organe central de planification, une entité du pouvoir exécutif qui fait partie de la bureaucratie existante des aides publiques en Turquie. Le projet de loi porte création d'une Direction générale des aides publiques au sein de cette autorité, ainsi que d'un Conseil de suivi et de surveillance des aides publiques, qui serait habilité à se prononcer sur le bien-fondé de certains programmes d'aides publiques.[35] L'Autorité a fait part d'observations négatives à l'égard du projet de loi, au motif que le pouvoir principal de contrôler les aides anticoncurrentielles ne devait pas être confié à un organisme quel qu'il soit responsable de la planification de programmes d'aides. L'Autorité a fait valoir qu'elle était la mieux placée pour s'acquitter de cette mission, en sa qualité d'organe indépendant ayant l'expérience de l'évaluation des effets anticoncurrentiels. Le projet de loi est en cours d'examen.

2.6 Concurrence déloyale et protection des consommateurs

55. La question de la concurrence « déloyale » n'est pas abordée dans la Loi sur la concurrence, mais dans le Code du commerce national, au chapitre de la réglementation des transactions d'affaires entre parties privées. Le Code définit la concurrence déloyale comme « toute action trompeuse ou tout abus de concurrence économique contraire aux règles de la bonne foi. »[36] Les différends pour cause de dénigrement commercial, de pratiques déloyales, de vente à perte, d'abus de dépendance économique et de contrefaçon de marques sont réglés dans le cadre du droit privé, sans intervention de l'Autorité. Cependant, les cas de tromperie des consommateurs peuvent aussi faire l'objet d'un contrôle public de l'application de la Loi sur la protection des consommateurs.

56. La Loi turque sur la protection des consommateurs,[37] adoptée en 1995, régit les pratiques commerciales telles que le démarchage à domicile, le crédit à la consommation, les ventes à tempérament,

les garanties, la publicité mensongère et les contrats passés avec les consommateurs. Un projet d'adaptation de la réglementation aux textes communautaires en matière de protection des consommateurs a été finalisé en juin 2003. La Loi sur la protection des consommateurs touche davantage de domaines que la Loi sur la concurrence, imposant des obligations à toutes sortes d'entités, notamment des organes gouvernementaux tels que les services publics. Le texte institue un Conseil de la publicité habilité à faire appliquer les règles en matière de publicité mensongère, tout en conférant à la Direction de la concurrence et de la protection des consommateurs du Ministère du commerce et de l'industrie[38] le pouvoir de faire appliquer les autres disposition de la Loi. Outre ses responsabilités en matière d'application de la loi, la Direction remplit également une mission d'éducation du consommateur par des brochures et des émissions à la radio et à la télévision. La Direction et l'Autorité échangent les plaintes de consommateurs relevant de leur compétence respective, mais elles n'ont pas d'autres interactions.

3. Enjeux d'ordre institutionnel : structures et pratiques de mise en application

3.1 Institutions de la politique de la concurrence

57. La Loi sur la concurrence a porté création du Conseil de la concurrence, qui fait partie de l'Autorité de la concurrence et qui en est l'organe décisionnaire. Le président du Conseil est également celui de l'Autorité, qu'il dirige et représente à l'extérieur. Les 11 membres du Conseil de la concurrence (dont le président) le sont à plein temps. Les membres du Conseil de la Concurrence sont nommés pour une période de 6 ans renouvelable, et ils ne peuvent être démis de leurs fonctions que pour un motif valable (Art. 24).[39] Afin de garantir une certaine continuité, les mandats sont renouvelables par tiers tous les deux ans. Le gouvernement a introduit récemment une législation se présentant sous la forme d'une loi-cadre de réforme des organismes autonomes. Ce texte s'appliquerait à l'Autorité et aux autres organes indépendants (dont les organes de réglementation sectorielle) qui constituent le dispositif de l'administration publique turque. La proposition réduirait le nombre de sièges de tous les Conseils comportant plusieurs membres à un maximum de sept et limiterait les membres à un seul mandat de six ans sans possibilité de renouvellement.

58. La Loi sur la concurrence a institué un processus complexe de nomination des membres du Conseil de la concurrence (Art. 22) qui tient compte à la fois de l'expertise et de la réactivité politique. Ils sont en effet nommés par le gouvernement parmi les candidats proposés par plusieurs institutions désignées. Chacune d'entre elles propose deux candidats pour deux postes au Conseil, parmi lesquels le gouvernement n'en retient qu'un. Les personnes désignées peuvent, sans y être obligées, provenir du personnel des institutions ayant procédé à la désignation. Le Ministère du commerce et de l'industrie peut proposer des candidats pour deux postes, et cinq institutions peuvent chacune proposer des candidats pour un seul poste : le Sous-secrétariat d'État à l'Organe central de planification, la Cour d'appel, le Conseil d'État, le Conseil interuniversitaire et l'organisation professionnelle privée TOBB (Union turque des Chambres de commerce, des Bourses et des Marchés). Le Conseil de la concurrence peut lui-même proposer des candidats pour quatre postes, dont la moitié doivent être des experts de l'Autorité. Le Président est nommé par le gouvernement, parmi les trois personnes proposées par le Conseil de la concurrence.

59. Quelle que soit leur origine, les membres désignés du Conseil doivent compter au moins 10 ans d'expérience professionnelle, et disposer d'un diplôme en droit, en économie, en ingénierie-conseil, en gestion ou en finance (Art. 23). Sur les dix membres actuels du Conseil (un siège est vacant), cinq (dont le Président) ont suivi une formation en gestion des entreprises ou en finance, et cinq ont un diplôme de droit ou d'administration publique. Un membre seulement du Conseil seulement est titulaire d'un diplôme universitaire d'économie. Les milieux d'affaires préféreraient voir davantage de membres ayant l'expérience de la gestion d'une entreprise, tandis que les membres de milieux universitaires ou les praticiens recommandent la désignation d'un nombre plus important de membres du Conseil ayant une

expérience personnelle du droit et de la politique de la concurrence.[40] Le projet de loi du gouvernement relatif aux organes autonomes donnerait tous les pouvoirs de nomination et de désignation au gouvernement, mais exigerait qu'au moins une personne désignée ait une formation juridique, une autre, une formation économique et qu'une dernière enfin ait une expérience personnelle des travaux de fond de l'organisme en question. Le gouvernement serait tenu de publier une déclaration pour chaque nomination, expliquant la mesure dans laquelle la personne désignée répond aux critères réglementaires établis.

60. La Loi sur la concurrence stipule que l'Autorité « est indépendante », ce qui signifie qu'«aucun organe, aucune autorité, entité ou personne ne peut donner d'ordres ou de directives susceptibles d'influencer la décision finale de l'Autorité » (Art. 20). Les membres du Conseil sont soumis aux règles relatives aux conflits d'intérêts en cas de possession d'actions (Art. 25) et, en vertu de la Loi sur la fonction publique, ils ne peuvent appartenir à un parti politique. Bien que certains des membres du Conseil de la concurrence aient des antécédents politiques, le Conseil est unanimement reconnu comme véritablement autonome, et aucune décision n'a jusqu'ici été sérieusement contestée pour cause d'influence à ce titre.[41] Dans son Rapport 2004 sur l'adhésion de la Turquie, l'UE souligne les efforts déployés par le gouvernement pour adopter une législation cadre sur les instances de régulation indépendante « suscitent quelques inquiétudes quant au risque d'intervention politique dans son fonctionnement, »[42] mais l'on ne dispose d'aucune preuve flagrante que le gouvernement soit effectivement guidé par un tel objectif.

61. Bien que l'article 20 de la Loi sur la concurrence stipule que l'Autorité est « liée » au Ministère du commerce et de l'industrie, la même disposition indique également qu'elle est une entité juridiquement distincte du gouvernement et qu'elle bénéficie de « l'autonomie administrative et financière ». La Loi sur la concurrence prévoyait à l'origine (Art. 39) que les « recettes » de l'Autorité proviendrait de trois sources : des crédits affectés dans le budget du Ministère, une part de 25 % des amendes perçues pour infractions à la loi et les recettes tirées de la vente de publications. Or, aucun crédit ministériel n'a jamais été affecté, pas plus que l'Autorité a jamais facturé de publications. La disposition relative à la part de 25 % des amendes perçues a été annulée en 2003 suite à des critiques qu'un tel mécanisme risquait d'introduire un biais regrettable dans le cadre des poursuites. Quoi qu'il en soit, la disposition relative aux amendes n'a jamais constitué pour l'Autorité une source de fonds importante, puisque le montant total perçu ne s'élève qu'à 196 milliards TRL (131 000 USD).

62. L'Autorité tire en fait ses recettes d'une tout autre loi. En vertu de la loi n° 4077 promulguée en 1995, les entreprises nouvellement créées sont tenues de déclarer leur capital social et de s'acquitter d'un droit à l'État, tandis que les entreprises existantes doivent payer un droit dès qu'elles augmentent leur capital social déclaré. Une portion du droit d'enregistrement, à l'origine égale à 0,19 % du montant en capital souscrit (soit 19 TRL pour 10 000 TRL déclarées), était versée au compte de l'Autorité. En 2003, la loi a été modifiée (n° 4791, intégrée par la suite à la loi n° 5234), de sorte que la part de l'Autorité a chuté à 0,04 % du capital social déclaré (soit 4 TRL pour 10 000 TRL). Nous reviendrons sur l'incidence financière de cette réduction pour l'Autorité. Celle-ci ne considère pas cependant que la modification du pourcentage ait la moindre répercussion sur son autonomie institutionnelle.

63. Etant donné que les recettes de l'Autorité proviennent en partie d'un pourcentage de droits acquittés par des entreprises privées, son autonomie n'est pas menacée, s'agissant des crédits budgétaires affectés, par quelque autorité que ce soit détenue par le Ministère. Un autre thème, connexe, a celui-là des répercussions pour l'autonomie de l'Autorité et concerne le contrôle exercé par le Ministère sur les dépenses de l'Autorité. Celle-ci remarque que, même si le gouvernement n'intervient jamais directement dans ses dépenses liées à ses fonctions d'application de la loi, certaines mesures de maîtrise des dépenses sont imposées à l'échelle du gouvernement. Par exemple, tous les organismes publics de Turquie sont tenus d'obtenir l'autorisation de la Présidence d'État (une direction générale relevant du Premier ministre) avant de recruter de nouveaux employés. Toutes les demandes d'embauche présentées jusqu'à présent par l'Autorité ont été acceptées. De plus, tous les déplacements de fonctionnaires à l'étranger, y compris les

voyages pour formation post-universitaire, sont soumis à autorisation gouvernementale. En 2003, l'Autorité a dû renoncer à envoyer 13 experts adjoints suivre une formation collective au Collège d'Europe, puisque le gouvernement n'a autorisé que quatre missions, mais les demandes suivantes présentées en 2003 et 2004 par l'Autorité pour des voyages d'études à l'étranger ont été acceptées. Le Ministère du commerce et de l'industrie encadre également les dépenses engagées par l'Autorité pour organiser des conférences internationales en Turquie ou pour envoyer des membres de son personnel assister à des manifestations à l'étranger. Toutes les demandes présentées par l'Autorité à ce jour ont été acceptées.

3.2 Application du droit de la concurrence

64. Une caractéristique importante du dispositif d'application mis en place par la Loi sur la concurrence et qui traduit une différence notable par rapport à la démarche de l'UE, concerne l'article 10 de la Loi. En vertu de cet article, tout accord, toute décision ou pratique concertée « relevant du champ d'application de l'article 4 » doit être notifié au Conseil dans un délai d'un mois à compter de l'exécution de la conduite en cause, à moins que l'acte en question ne remplisse les conditions pour bénéficier d'une protection au titre d'une exemption par catégorie. Tout manquement à une obligation légale de déclaration constitue une violation séparée, passible d'une amende qui s'ajoute à toute sanction susceptible d'être imposée si la conduite en question est par la suite jugée illicite. Auparavant, le dispositif communautaire n'exigeait de notification que si l'entreprise candidate souhaitait bénéficier d'une exemption spécifique au titre de l'article 81, paragraphe 3 du Traité de l'UE ; mais, comme nous l'avons vu précédemment, l'UE a supprimé cette catégorie d'exemption dans le courant de l'année 2004.

65. En Turquie, le fait de déposer une notification au titre de l'article 10, non seulement met l'entreprise à l'abri d'une sanction pour non-déclaration, mais correspond également à une demande d'exemption individuelle aux termes de l'article 5. Après l'entrée en vigueur de la Loi sur la concurrence, les entreprises inquiètes des risques de poursuites encourus se sont mises à déposer des demandes auprès du Conseil, principalement reliées à des accords verticaux. La plupart de ces notifications comportaient par ailleurs une demande d'« attestation négative » en vertu de l'article 8 de la Loi. En effet, la durée de vie d'une attestation négative n'est assortie d'aucun délai, tandis que la loi elle-même limite la durée d'une exemption individuelle à un maximum de cinq ans.[43] Entre 1999 et 2004, l'Autorité a reçu au total 193 demandes d'exemption ou d'attestation négative, et elle en a réglé 159. Sur les demandes réglées, environ 31 % (49) ont été assorties de conditions, les autres ayant été acceptées sans conditions. Le personnel de l'Autorité a lancé un projet de modifications à la Loi sur la concurrence, proposant notamment la suppression de l'obligation de notification prévue à l'article 10 et de la procédure d'attestation négative de l'article 8. Le mécanisme des exemptions spécifiques, cependant, serait maintenu.

66. Les procédures légales d'application de la Loi débutent au moment de la réception d'une plainte ou à l'initiative même du Conseil (Art. 40). Celui-ci peut ouvrir une enquête pour décider de l'opportunité d'ouvrir une enquête officielle ou entamer d'emblée une enquête officielle. L'enquête préliminaire est menée par des membres du personnel de l'Autorité, et leur rapport est ensuite soumis au Conseil, qui doit indiquer si les allégations sont « sérieuses et suffisantes ». Si tel est le cas, une enquête officielle est ouverte.

67. Conformément à l'article 43 de la Loi, une enquête officielle est conduite par un ou plusieurs membres du Conseil, assistés de membres du personnel. Certains ont exprimé quelques préoccupations quant à l'exigence formulée dans la Loi s'agissant de la participation personnelle des membres du Conseil aux enquêtes, étant donné que le fait d'associer fonctions d'enquête et fonctions judiciaires peut à l'évidence soulever des doutes quant à l'impartialité d'un tribunal. A l'origine, la raison pour laquelle on avait requis la participation du Conseil consistait à faire en sorte que les informations favorables au défendeur recueillies dans le cadre de l'enquête soient effectivement portées à l'attention du Conseil, mais

les processus prévus dans la Loi offrent aux défendeurs toutes les possibilités voulues de se défendre. On trouve une proposition de suppression de l'exigence de participation des membres du Conseil, à la fois dans le projet de révisions réglementaires de l'Autorité et dans le projet de loi-cadre du gouvernement sur les organes autonomes.

68. Les parties sont informées dans les 15 jours qui suivent l'ouverture d'une enquête et invitées à présenter leurs points de vue dans les 30 jours. Elles peuvent à tout moment demander un double des éléments de preuve à charge, et « le Conseil ne peut pas fonder sa décision sur quelque élément que ce soit au sujet duquel les parties n'ont pas été informées ou n'ont pas eu le droit de se défendre » (Art. 44). A l'issue de l'enquête, les parties sont informées des conclusions et invitées à présenter leur défense par écrit. Si les parties le demandent, il peut y avoir une audition publique. Les décisions sont rendues à l'issue de l'audition, après une réunion à huis clos du Conseil. La décision finale requiert la majorité du Conseil plénier (c'est-à-dire 6 voix).[44] Les autres décisions, telles que les mesures et les recommandations provisoires, peuvent être prises à la majorité simple des membres présents.[45]

69. L'Autorité dispose de pouvoirs d'enquête étendus, tant au stade de l'enquête préliminaire que pendant l'enquête officielle. L'Autorité peut demander des informations à des organismes gouvernementaux, à des associations et à des entreprises (Art. 14). Elle est habilitée à effectuer des vérifications sur site dans des locaux commerciaux, étudier et copier des documents, obtenir des témoignages écrits ou oraux et examiner les installations (Art. 15). Les agents chargés de la vérification doivent présenter une attestation précisant la nature et l'objet de l'enquête ainsi que la sanction administrative encourue en cas de fausse déclaration (Art. 16). Un problème qui s'est posé dans le cadre des inspections « sur site » concerne le fait que les sanctions pour obstruction sont légères et les entreprises visées peuvent simplement opter pour le paiement de l'astreinte en attendant d'avoir eu suffisamment de possibilités de purger leurs dossiers. En vertu d'une modification à l'article 15 adoptée en 2003, l'Autorité peut désormais obtenir à l'avance une ordonnance judiciaire unilatérale, qui lui donne accès immédiat aux locaux à inspecter et qui peut être appliquée, au besoin, avec l'aide de la police.

70. L'article 9, paragraphe 4 de la Loi prévoit que le Conseil peut imposer des mesures provisoires pendant le déroulement d'une enquête « s'il risque de se produire des dommages graves et irréparables avant la décision finale. » Le Conseil a fait usage de cette possibilité à sept reprises avant 2002, mais une fois seulement depuis. En 2003, le Conseil a ouvert une enquête en réponse à une plainte d'exploitation abusive de position dominante déposée contre un fournisseur de mâchefer (composante du ciment). Le Conseil a rendu une ordonnance provisoire exigeant de l'entreprise que, pendant la durée de l'enquête, elle reprenne ses livraisons à l'un de ses clients, dans des proportions quotidiennes et à un prix donnés. En effet, le client producteur de ciment et de béton a affirmé qu'il était sur le point de fermer en raison de l'arrêt des livraisons de son fournisseur. L'ordonnance provisoire du Conseil a par la suite été annulée par le Conseil d'État, qui a fondé sa décision sur l'expiration intervenue entre temps du contrat de fourniture et sur les preuves à son avis inadéquates de l'absence d'autres sources d'approvisionnement possibles.

71. On ne trouve dans la Loi sur la concurrence aucune disposition qui autorise le règlement d'une procédure en cours à l'amiable. En vertu de la pratique actuelle, le Conseil permet une forme limitée de règlement à l'amiable par recours à l'article 9, paragraphe 3, de la Loi sur la concurrence, qui prévoit que le Conseil, avant de décider officiellement qu'un défendeur a enfreint la loi, doit l'informer « par écrit de l'avis [du Conseil] et de la manière dont [le défendeur] mettra un terme à l'infraction. » Le Conseil estime que cette formulation permet de régler une affaire sans jugement officiel d'illégalité, mais uniquement si l'engagement est pris au stade de l'enquête préliminaire. Le mécanisme habituel consiste à avertir le défendeur qu'il peut accepter l'engagement proposé ; dans le cas contraire, le Conseil ouvrira une enquête officielle. Cette démarche a été utilisée à onze reprises depuis 1999 et, plus précisément, dans huit affaires au cours des deux dernières années.[46] L'une des modifications proposées par le personnel de l'Autorité à la Loi sur la concurrence concerne une disposition permettant expressément au Conseil d'interrompre une

procédure à n'importe quel stade si le défendeur s'engage à accepter les modifications de conduites recommandées par le Conseil.[47]

72. Au moment de l'adoption de la Loi sur la concurrence, les audiences et procédures contradictoires qu'elle prévoyait constituaient une nouveauté dans la pratique administrative de la Turquie, qui n'avait jamais encore envisagé la participation directe des parties au processus de décision. Aujourd'hui, les praticiens considèrent généralement les procédures du Conseil comme des modèles de respect de la légalité, même si d'aucuns indiquent redouter que la Loi sur la concurrence n'accorde de protections de procédure que dans les affaires portées devant le Conseil débouchant sur un constat d'infraction, mais pas pour les mesures telles que le retrait à une entreprise d'une exemption par catégorie.[48] L'Autorité répond que la disposition relative au retrait d'exemption dans le cas des exemptions par catégorie relatives aux accords verticaux oblige expressément le Conseil, avant de se prononcer, à solliciter le point de vue de la partie concernée, par écrit ou oralement.[49]

Encadré 3. La présomption de pratique concertée

L'un des aspects controversés des politiques d'application de la loi de l'Autorité concerne la « présomption de pratique concertée » de l'article 4 de la Loi sur la concurrence. Comme nous l'avons déjà dit, la « présomption de pratique concertée » autorise le Conseil à supposer l'existence d'une collusion illicite entre concurrents si la conduite ou les conditions sur un marché sont analogues à celles que l'on pourrait constater dans un cas où la concurrence a été artificiellement faussée. Cette présomption qui vise les marchés oligopolistiques où il est difficile de prouver qu'il y a manifestement entente fait porter aux parties le fardeau de la preuve, puisque celles-ci doivent démontrer que, « pour des raisons économiques et rationnelles », elles agissent en fait de manière indépendance. Un problème de seuil créé par la formulation du texte réglementaire concerne la question de savoir quels types de conduites et de conditions de marché doivent être réputés suffisants pour déclencher la présomption. Les praticiens s'opposent vigoureusement, pour des raisons de respect de la légalité et pour des motifs économiques, à toute utilisation de l'argument de la présomption fondée sur des conditions qui pourraient simplement refléter un « parallélisme conscient » non collusif. [50] Une attention particulière a été portée à la question de savoir si des prix uniformes sur de marchés oligopolistiques avec des produits homogènes sont suffisants pour déclencher la présomption.

L'Autorité a connu quelques désaccords internes sur la question de savoir comment traiter la présomption, et ses politiques se sont progressivement dégagées au fil d'une série d'affaires contestées au cours des quelques dernières années. La première affaire concernait une procédure en 2000 contre des fabricants de levure ayant décidé d'augmentations de prix uniformes indépendantes de toute variation de coûts.[51] Le Conseil a envisagé d'appliquer la présomption, mais il a fini par ne pas reconnaître de collusion illicite en raison du fait qu'il manquait de traces écrites de réunions ou de communications entre les parties au sujet de changements de prix. Le Conseil a par contre constaté, pièces à l'appui, que les producteurs s'étaient entendus pour imposer des prix de revente aux distributeurs en aval, mais cette décision n'a pas entraîné la mise en œuvre de la présomption. En instance d'appel devant le Conseil d'État, l'une des parties appelantes a présenté une demande constitutionnelle au titre du respect de la légalité, à l'encontre de la présomption de pratique concertée. La décision initiale du Conseil d'État en 2003 a confirmé la décision du Conseil de la concurrence et déclaré la plainte constitutionnelle sans fondement, sans s'attarder sur la question de savoir si la présomption avait ou non été employée.[52] L'appel est toujours en instance devant le Conseil dans l'attente de son examen en assemblée plénière.

La deuxième affaire, toujours en 2000, concernait une plainte pour accord de prix horizontal entre deux éditeurs de journaux.[53] Le Conseil a constaté une action collusive, encore une fois sur la base de pièces à l'appui et indiqué explicitement dans sa décision que l'interdépendance oligopolistique ne suffit

pas à déclencher une présomption de pratique concertée. Dans une décision de février 2004 contre une entente entre fabricants de céramiques, le verdict de collusion du Conseil reposait sur des preuves que les participants avaient échangé des informations sur les prix sensibles.[54] Dans sa décision, le Conseil observait que, même si la présomption n'est pas déclenchée simplement par un comportement de fixation de prix consciemment parallèles, elle peut intervenir lorsque ce comportement est associé à d'autres facteurs qui tendent à prouver une collusion, comme l'échange de données commerciales. Dans ces conditions, a conclu le Conseil, les défendeurs peuvent légitimement être chargés de l'obligation de prouver que l'information échangée n'était pas susceptible d'être exploitée dans le cadre d'une collusion par les prix.[55] Par la suite, lors de deux décisions prises en décembre 2004 concernant les marchés du ciment et du béton prêt à l'emploi, le Conseil a cité des preuves indirectes et utilisé une analyse économique à l'appui de ses constats de collusion. Ainsi, le Conseil a fait valoir qu'à ce jour il n'avait fondé aucune de ses décisions sur des présomptions.

La communauté des praticiens n'est pas entièrement convaincue que le Conseil fasse preuve de suffisamment de prudence dans le traitement de la présomption. On continue de craindre que l'existence de cette présomption n'incite le Conseil à se fonder sur des « facteurs de preuve supplémentaires » faibles et non probant pour trouver la collusion. En outre, au-delà de la question de savoir si l'on peut ou non utiliser la présomption pour prouver une infraction à l'article 4, les praticiens contestent également le fait d'utiliser cet outil pour justifier l'ouverture d'une enquête officielle. La position du Conseil sur ce point est qu'il peut légitimement ouvrir une enquête sur tout marché quel qu'il soit, oligopolistique ou pas, même si les seuls éléments de preuve disponibles (comme une tendance au parallélisme des prix) pourraient en fait indiquer une conduite légale. Les praticiens rétorquent que les enquêtes supposent des coûts pour les entreprises cibles et les exposent à une publicité négative, qu'elles ne doivent pas être ouvertes à la légère sur les marchés où le parallélisme des prix ou d'autres comportements indépendants pourraient en fait être l'issue normale du jeu des forces concurrentielles.

73. La plupart des experts juridiques et universitaires de Turquie ont félicité le Conseil pour la qualité de ses décisions, notamment en comparaison avec celles d'autres organismes. Certains avocats reprochent au Conseil de ne pas fournir suffisamment d'analyses juridiques de problèmes tels que la recevabilité de la preuve. Par ailleurs, on regrette parfois que les décisions du Conseil omettent parfois de décrire et de citer les précédents communautaires pertinents dans les affaires en cause. Le degré de complexité de l'analyse économique du Conseil varie considérablement d'une décision à l'autre,[56] notamment en raison du fait que l'Autorité est encore relativement récente et n'a pas d'économistes spécialisés en organisation industrielle. Même les détracteurs les plus durs de l'Autorité, cependant, n'ont pas pour habitude d'affirmer que les décisions sont erronées pour des motifs économiques, mais plutôt que l'analyse fournie dans les décisions devrait être plus approfondie et plus pointue.

74. Des délais prévus par la Loi sur la concurrence sont fixés à tous les stades du processus. L'enquête préliminaire doit être terminée dans les 30 jours, et le Conseil de la concurrence a ensuite 10 jours pour autoriser une enquête officielle (Articles 40 et 41). L'enquête officielle doit être terminée dans un délai de 6 mois, renouvelable une fois (Art. 43). Ensuite, le délai d'échange entre les parties et les agents du Conseil de la concurrence, à savoir les observations des enquêteurs et la réponse des parties, est de 75 jours, délai qui peut être prolongé de 30 jours pour les parties (Art. 45). Une audition doit se tenir dans les 30 à 60 jours après la fin de l'enquête. Les auditions elles-mêmes sont limitées à 5 jours consécutifs (Articles 46 et 47). La décision du Conseil de la concurrence et son argumentation doivent être publiées dans les 15 jours qui suivent l'audition (Art. 48). Hormis le délai de 15 jours fixé à la publication d'une décision finale motivée après l'audition, l'Autorité a pour réputation de respecter les délais réglementaires.

75. En ce qui a trait aux décisions finales, la pratique du Conseil a traditionnellement consisté à faire une déclaration succincte d'une ou deux pages de son jugement dans un délai de 15 jours à l'issue de l'audition, puis de publier la décision complète motivée à sa convenance, ce qui signifie souvent un délai supplémentaire d'une ou deux années. En 2002, le Conseil avait un grand nombre de décisions en attente, ce qui a suscité de plus en plus de critiques au sujet des retards accumulés. C'est alors que le Conseil a commencé à faire appel aux services d'experts de la concurrence auxquels il a demandé de l'aider dans la préparation des décisions définitives. Tous les dossiers en suspens ont ainsi pu être réglés et, désormais, la plupart des décisions finales sont publiées dans un délai d'environ 30 jours. Pour les autres décisions, comme celles qui concernent les enquêtes préliminaires, les fusions et les demandes d'exemption, il ne s'écoule généralement pas plus de 20 jours entre le jugement du Conseil et sa décision définitive. La proposition de loi concernant les organes autonomes prévoit un délai de 30 jours entre la saisine de l'organisme et la publication d'une décision finale (avec la menace d'une révocation pour les membres du Conseil récalcitrants), tandis que les modifications réglementaires rédigées par le personnel de l'Autorité prévoient une période de 60 jours.[57]

76. La Loi sur la concurrence prévoit deux sortes d'amendes. L'article 16 concerne les amendes ponctuelles infligées pour divers actes délictueux, tandis que l'article 17 porte sur les astreintes en cas d'infractions répétées. Les montants maximums prévus au titre des deux dispositions sont régulièrement indexés sur l'inflation. En vertu de l'article 16, les amendes infligées en cas de violations caractérisées de la législation antitrust des articles 4 et 6 vont d'un minimum obligatoire (fixé en 2004 à 11,9 milliards TRL ou 8 000 USD) à 10 % du revenu annuel brut du contrevenant. Les facteurs énoncés dans la loi concernant la détermination du montant des amendes portent notamment sur l'intention, la gravité de la faute, la puissance de marché de l'entreprise concernée et l'ampleur des torts causés (Art. 16). Les autres amendes prévues à l'article 16 vont de 3 milliards TRL (2 000 USD) pour non-déclaration d'une fusion ou d'un accord relevant de l'article 4 à 5,9 milliards TRL (4 000 USD) en cas d'informations trompeuses. En outre, chacun des gérants d'une entreprise condamnée à payer une amende au titre de ces dispositions supplémentaires de l'article 16 (et non au titre des dispositions de l'article 16 relatives aux infractions caractérisées de la législation antitrust) sera condamné à verser une amende, qui peut représenter jusqu'à 10 % de l'amende imposée à son entreprise. Les astreintes prévues à l'article 17 pour non-respect de diverses catégories d'ordonnances et de conditions du Conseil allaient (en 2004) de 1,5 à 3 milliards TRL par jour (2 000 USD), l'obstruction à une inspection sur site étant passible d'une astreinte en vertu de l'article 17 de 1,2 milliard TRL. La Loi sur la concurrence ne prévoit aucune sanction pénale en cas d'infractions. Il n'en existe d'ailleurs aucune en droit turc, sauf pour les soumissions concertées dans le cadre des appels d'offres de l'État, qui constituent une infraction pénale.

77. Etant donné que l'article 16 prévoit toujours l'imposition d'une amende minimale obligatoire en cas d'infractions caractérisées, les décisions du Conseil constatant lesdites infractions entraînent systématiquement la condamnation à une amende d'un certain montant. Entre 1999 et 2004, le Conseil a imposé au total 111,4 milliards TRL (74,6 millions USD) d'amendes pour infractions caractérisées à la Loi sur la concurrence, dont 59 % pour infractions à l'article 4 (dont 34 points de pourcentage pour des violations horizontales, 19 points pour des violations verticales et 6 points pour des violations mixtes, horizontales et verticales). Le reste des amendes ont été infligées pour infractions aux dispositions de l'article 6 en matière d'exploitation abusive de position dominante. Les amendes pour infractions caractérisées du droit des fusions au titre de l'article 7 n'ont représenté qu'une fraction d'un point de pourcentage.

78. L'amende minimale imposée par l'article 16 signifie également que le Conseil ne peut pas, dans le cadre d'une enquête pour entente, exonérer de sanctions pécuniaires une entreprise s'étant montrée coopérative. Le projet de modifications réglementaires élaboré par le personnel de l'Autorité propose de supprimer l'amende minimale obligatoire et d'ajouter une clause prévoyant la réduction des sanctions pénales à l'encontre des entreprises qui coopèrent activement avec l'Autorité en révélant un comportement

illicite. La liste des facteurs recensés à l'article 16 s'agissant de la détermination du montant des amendes serait par ailleurs étendue à la prise en compte de la question de savoir si le contrevenant a coopéré ou non à l'enquête.

79. Le Rapport 2002 laissait entendre (p. 35) qu'il conviendrait de relever le niveau des amendes minimales en cas de non-respect des processus d'enquête ou d'entrave à ces processus. Le projet de modifications réglementaires préparé par le personnel de l'Autorité satisferait à cette recommandation, voire plus. En vertu de ces propositions, l'article 16 serait modifié pour supprimer les amendes maximales fixées pour différentes catégories de violations et remplacé par une disposition fixant l'amende maximale dans tous les cas à 1 % du revenu brut du contrevenant. Le plafond relatif aux infractions caractérisées à la législation antitrust, fixé à 10 % du revenu brut, serait maintenu. L'article 17 serait également corrigé pour supprimer les montants d'astreinte fixés pour différentes catégories d'infractions continues et remplacé par une disposition fixant le montant maximal de l'astreinte dans tous les cas à 5 % du revenu brut du contrevenant. La clause de l'article 86 qui traite actuellement de la fourniture d'« informations erronées ou trompeuses » à une demande de renseignements serait élargie pour couvrir à la fois la fourniture d'informations incomplètes et l'absence de réponse, comportement actuellement sanctionné par l'article 16. De même, une clause serait ajoutée à l'article 17, prévoyant une astreinte pour fourniture « d'informations incomplètes, erronées ou trompeuses, voire l'absence de réponse » à une demande de renseignements. La réalisation prématurée d'une fusion soumise à autorisation préalable du Conseil serait érigée en infraction caractérisée, passible d'une amende pouvant aller jusqu'au plafond de 10 %, modification qui comblerait une lacune du droit en vigueur, en vertu duquel aucune sanction n'est prévue pour l'exécution précoce d'une fusion. La partie du paragraphe 3 de l'article 16 prévoyant l'imposition d'amendes aux dirigeants d'entreprises en cas d'infractions aux dispositions supplémentaires de cet article serait entièrement supprimée, dans la mesure où les violations en question ne justifient pas l'effort que suppose l'administration d'amendes à l'encontre de particuliers. Le Conseil a estimé qu'il faudrait un temps assez considérable pour retrouver les gérants responsables de violations annexes au titre de l'article 16, temps qui pourrait être plus utilement consacré à des questions de fond.[58]

80. Les praticiens reprochent un manque de transparence à l'analyse menée par le Conseil s'agissant de l'application des facteurs de l'article 16 à la fixation du montant des amendes. Le Conseil est conscient de cette insuffisance, et il a commencé à accompagner ses décisions de raisons plus détaillées expliquant la manière dont les amendes ont été calculées. L'Autorité prévoit également de rédiger et de publier des Lignes directrices relatives à la détermination du montant des amendes. Comme nous l'avons indiqué précédemment, le projet de modifications réglementaires préparé par le personnel de l'Autorité rajouterait à la liste des facteurs prévus à l'article 16 pour la détermination du montant des amendes la prise en compte de la question de savoir si le contrevenant a coopéré ou non à l'enquête. Seront également pris en considération d'autres facteurs tels qu'une éventuelle récidive, la durée de l'infraction et la question de savoir si le contrevenant a transgressé des engagements antérieurs à l'égard de l'Autorité.

81. Les décisions du Conseil de la concurrence[59] peuvent faire l'objet d'un appel devant le Conseil d'État.[60] Les décisions du Conseil de la concurrence susceptibles de révision concernent les décisions ayant constaté l'existence d'une violation de la loi, infligé une amende, ordonné des mesures provisoires, délivré ou retiré des exemptions individuelles, des exemptions par catégorie et des attestations négatives et rejeté des plaintes.[61] Bien qu'il s'agisse d'un tribunal statuant en « première instance », le Conseil d'État ne peut prendre une décision qui remplace celle du Conseil de la concurrence, mais seulement la confirmer ou l'annuler. Les appels sont d'abord entendus par une chambre désignée au sein du Conseil d'État, composée de 5 juges. La décision de cette première chambre peut alors faire l'objet d'un nouvel appel formé une deuxième « chambre plénière » comprenant 29 juges, dont aucun ne fait également partie de la chambre ayant rendu la décision initiale. Une partie peut aussi demander à ce que la chambre plénière revienne sur sa décision, même si ces requêtes aboutissement rarement à quelque changement que ce soit. Le processus de contrôle juridictionnel dure généralement trois ans environ, voire quatre. La plupart des décisions du

Conseil ayant infligé des amendes élevées ont fait l'objet d'un appel, dans la majorité des cas à la fois sur des points de procédure et de droit. Pour répondre aux problèmes posés par le fait que les juges turcs connaissent encore assez mal le droit de la concurrence, le Parlement a récemment promulgué une législation[62] portant création au Conseil d'État d'une nouvelle chambre spécialement chargée des appels formés contre les décisions de l'Autorité. Les juges de cette chambre, qui doivent entrer en fonction en 2005, seront choisis en fonction de leurs connaissances économiques, de même qu'ils bénéficieront d'une formation en droit de la concurrence.

82. Sur les 744 décisions du Conseil de la concurrence entre 1999 et 2004 ayant donné lieu à une révision judiciaire, 136 (soit environ18 % ont fait l'objet d'un appel devant le Conseil d'État. L'issue des différentes procédures de révision judiciaire en première et en seconde instance dont les décisions de l'Autorité ont fait l'objet depuis 1999 est résumée au tableau suivant[63]. La quasi-totalité des décisions défavorables du Conseil ont concerné jusqu'à présent des points de procédure. La décision négative la plus importante s'agissant d'une question de politique de la concurrence date de novembre 2003, renversant la décision de 1999 du Conseil de la concurrence dans l'affaire Cine 5. Le Conseil avait alors introduit une action en justice pour exploitation abusive de position dominante fondée sur le contrat d'exclusivité de Cine 5 avec la ligue de football professionnel de Turquie pour la télédiffusion des matches. La présomption d'abus portait sur les prix discriminatoires que Cine 5 facturait à d'autres télédiffuseurs pour des extraits devant être diffusés dans le cadre d'émissions d'information. Même si le Conseil a fait valoir qu'il existait aucun motif légitime de pratiquer une discrimination par les prix entre diffuseurs, le Conseil a conclu que l'intérêt public justifiait des prix différents selon les auditoires, leurs caractéristiques démographiques et les fonctions de demande.

Tableau 2. Révision judiciaire des décisions du Conseil de la concurrence

Année	Appels en première instance						Appels en seconde instance				
	Début	Réglées					Début	Réglées			
		Total	Favorables[1]	Défavorables[2]	Mixtes[3]	Rejetées		Total	Favorables[1]	Défavorables[2]	Rejetées
2004	197	16	12	3	1	0	29	2	0	2	0
2003	41	38	31	6	0	1	16	4	3	0	1
2002	28	19	12	6	0	1	3	14	5	8	1
2001	43	14	3	9	0	2	11	2	0	0	2
2000	12	0	0	0	0	0	0	0	0	0	0
1999	8	1	1	0	0	0	1	1	1	0	0
Total	329	88	59	24	1	4	60	23	9	10	4

1. Décisions déclarées favorables par l'Autorité
2. Décisions déclarées défavorables par l'Autorité.
3. Décisions déclarées partiellement favorables et partiellement défavorables par l'Autorité.

Source : Turquie 2005

83. Le Rapport 2002 signalait (p. 19) que le contrôle juridictionnel des décisions du Conseil avait entraîné des difficultés considérables pour la perception des amendes infligées en cas d'infractions au droit de la concurrence. En vertu de l'article 55 tel qu'initialement promulgué, les amendes n'étaient pas exigibles tant que les procédures de contrôle juridictionnel n'étaient pas terminées et, étant donné qu'il peut s'écouler plusieurs années pendant la procédure d'appel, l'inflation érodait le poids de l'amende infligée. En 2003, une modification à l'article 55 a voulu régler le problème en indiquant que les amendes étaient désormais payables dans un délai de trente jours à compter de l'ordonnance du Conseil, que la décision ait fait ou non l'objet d'un appel. Fin 2004, cette obligation a été modifiée pour allonger le délai de paiement de trente à quatre-vingt-dix jours.[64] Le Conseil d'État conserve le pouvoir de surseoir à l'exécution de l'amende en attendant l'issue de l'appel, à la demande de la partie concernée. Si le Conseil accorde un sursis, il a également la possibilité de demander que la partie appelante dépose une caution.[65] C'est le Ministère des finances, et non l'Autorité qui est responsable de la levée des amendes si le contrevenant n'interjette pas appel ou s'il est débouté.

84. L'Autorité est sensible à l'importance de la transparence, mais fait certains compromis dans l'intérêt de l'économie. Par exemple, l'article 53 de la Loi sur la concurrence, tel que promulgué, prévoyait que l'Autorité elle-même publierait les décisions finales rendues par le Conseil. L'article 53 a été modifié en 2003 pour indiquer que les décisions du Conseil seraient publiées au Journal officiel du gouvernement, mais la mise en place en 2004 d'un droit de publication au Journal officiel a entraîné une nouvelle modification autorisant l'Autorité à ne pas publier au JO et à afficher carrément les décisions du Conseil sur le site Internet de l'Autorité. D'aucuns doutent, dans les milieux universitaires, de la suffisance de cette méthode. Il se pose également une incertitude quant à la politique de l'Autorité s'agissant de la publication des décisions du Conseil autres que celles relatives aux jugements de fond relatifs à la Loi de la concurrence. C'est ainsi que récemment, le Conseil a pris la décision originale d'afficher des versions abrégées de deux avis qu'il avait donné à l'Autorité de la privatisation au stade initial de procédures de privatisation.[66] D'autres se plaignent par ailleurs de la manière dont l'Autorité présente ses projets de modifications réglementaires et ses communiqués pour commentaires publics. Elle ne dispose d'aucune réglementation ou politique officielle sur ce point, mais a généralement pour habitude d'afficher les projets de communiqués et de modifications sur son site Internet pour commentaires. Même si elle fait une annonce au moment de l'affichage sur Internet, elle ne donne aucune indication quant à la durée de la période de commentaires, pas plus qu'elle ne précise si les commentaires envoyés seront affichés ou résumés sur le site Internet. Les propositions affichées sur Internet sont parfois retirées sans préavis ni explication et, lorsqu'elles sont finalement adoptées, l'Autorité n'a pas pour politique de faire systématiquement de déclaration exposant les motifs des conclusions auxquelles elle est parvenue.

85. Un autre problème de transparence auquel sont confrontés les praticiens du droit de la concurrence en Turquie découle du fait que, même si le Conseil d'État publie certaines de ces décisions dans son Journal, la plupart des décisions sont simplement fournies aux parties à l'affaire. L'Autorité publie dans son propre Bulletin de la concurrence une liste des décisions finalisées du Conseil auxquelles elle est partie, ainsi que le texte d'une partie des décisions du Conseil, mais pas de toutes.

86. Un dernier point en matière d'application de la loi qui mérite d'être mentionné concerne l'obligation faite à la Turquie par l'Accord d'union douanière d'harmoniser le régime turc du droit de la concurrence avec celui de l'UE. L'article 39, paragraphe 2 de l'Accord exige que la Turquie, non seulement transpose les articles 81 et 82 du Traité de l'UE en droit positif et fonde une Autorité d'application du droit de la concurrence, mais qu'elle « veille également à ce que, dans un délai d'un an à compter de l'entrée en vigueur de l'union douanière, tous les principes contenus dans les règlements d'exemption par catégorie en vigueur dans la Communauté……soient appliqués en Turquie ». L'UE a publié diverses exemptions par catégorie qui n'ont pas d'équivalents dans les lois ou les communiqués de l'Autorité. Les exemples mentionnés précédemment dans ce rapport concernent les exemptions par

catégorie de l'UE pour le transfert de technologie et pour les transports maritimes, aériennes et les assurances.

87. L'Autorité note que toutes les composantes de la législation secondaire de l'UE en matière de concurrence sont à l'ordre du jour pour examen éventuel. Dans l'intervalle, la position de l'Autorité consiste à dire que l'absence d'une certaine exemption par catégorie en droit turc ne signifie pas que la Turquie ne soit pas en conformité avec les exigences de l'Union douanière, car tout accord qui est légal au sein de l'UE sera en fait considéré comme légal par l'Autorité. Les entreprises couvertes par une exemption de l'UE qui souhaitent une assurance de protection totale contre des poursuites en droit turc peuvent déposer une demande d'exemption individuelle au titre de l'article 5 et s'attendre à la recevoir. Même sans demande d'exemption individuelle, l'Autorité n'engagera pas de poursuites contre une entreprise protégée par une exemption par catégorie de l'UE. A titre d'exemple, l'Autorité cite une décision de juin 2003 du Conseil de ne pas poursuivre un regroupement de transporteurs maritimes pour entente sur les prix protégée au titre de l'exemption par catégorie de l'UE applicable aux transports maritimes (Règlement n° 4056/86, Art. 3).[67] Dans la situation opposée, où une conduite non prévue par l'exemption de UE est protégée par le texte de l'Autorité, celle-ci se réserve la possibilité de retirer son exemption à une entreprise dont le comportement s'avère anticoncurrentiel.

3.3 Autres méthodes d'application

88. Les parties privées ont plusieurs voies de recours. Une partie qui est déçue par le rejet de sa demande par le Conseil de la concurrence ou par son absence de réponse peut faire appel auprès du Conseil d'État (Art. 42). En vertu des dispositions générales de la loi administrative, les demandes sont présumées rejetées s'il n'y est pas répondu dans les délais de 60 jours. L'article 57 de la Loi sur la concurrence permet aux parties ayant subi un préjudice du fait d'une violation de la loi d'entamer des poursuites en dommages et intérêts devant un tribunal civil. Bien qu'une trentaine d'affaires aient été ouvertes au titre de l'article 57 depuis 1999, on ne sait pas encore si le Conseil de la concurrence doit prouver une violation avant que des dommages intérêts puissent être accordés. Un jugement a déclaré que la cour d'appel ayant à juger une affaire privée qu'une action en dommages intérêts au titre de l'article 57 devait être suspendue en attendant que l'infraction présumée à la législation ait été renvoyée au Conseil de la concurrence pour règlement.[68] Le projet de modifications élaboré par le personnel de l'Autorité contient une disposition visant à faire de cette décision un règlement obligatoire.

3.4 Aspects internationaux de l'application de la loi

89. L'article 2 de la Loi sur la concurrence prévoit un critère « effets extraterritoriaux ». En d'autres termes, une conduite anticoncurrentielle exercée hors des frontières de la Turquie mais affectant des marchés turcs relève des interdictions prévues par la Loi sur la concurrence. Dans le cadre des procédures engagées en vertu de la Loi, les sociétés étrangères ne sont pas traitées différemment des sociétés nationales. L'Autorité reconnaît qu'il est difficile, en pratique, d'obtenir des informations sur les comportements qui impliquent des sociétés ou des produits étrangers. Le Rapport 2002 (p. 20) relevait qu'il n'existait aucun accord officiel de coopération entre la Turquie et les autres organismes chargés de l'application de la concurrence dans d'autres pays. Il exhortait l'Autorité à envisager d'instaurer des relations plus solides avec ces organismes afin d'obtenir les informations et les éléments de preuves venant de l'étranger dans le cadre des procédures d'application de la loi. Le Rapport faisait observer que de tels accords de coopération pourraient être particulièrement importants pour la Turquie, étant donné qu'elle « ne fait pas partie d'une structure supranationale, comme l'UE, ayant compétence en matière de politique de la concurrence » (p. 35).

90. L'Autorité estime très important de coopérer avec les divisions chargées de la concurrence dans les principales organisations internationales et de prendre part à leurs activités. Elle a récemment

réorganisé son service des Relations internationales et commencé à soumettre davantage d'informations sur l'expérience de la Turquie en matière de politique de la concurrence à l'OCDE, à la CNUCED et à l'OMC. Depuis sa création, en 1997, l'Autorité a participé aux activités du Comité de la concurrence de l'OCDE et aux réunions de l'OMC sur la politique de la concurrence. En tant que membre du Groupe de travail de l'OMC de l'interaction du commerce et de la politique de la concurrence, l'Autorité a apporté son soutien à l'initiative visant à faire figurer les questions de politique de la concurrence au Programme de Doha pour le développement. L'Autorité participe également depuis 1997 aux réunions du Service de la CNUCED des politiques de la concurrence et de la protection des consommateurs et proposé récemment que la Turquie accueille la 5e Conférence d'examen des Nations Unies, prévue en 2005. Lors de cette Conférence, les pays membres feront le bilan des progrès accomplis dans la mise en œuvre d'une série de recommandations en matière de politiques de la concurrence adoptées par l'ONU en 1980. L'Autorité considère que cette manifestation pourrait offrir une tribune particulièrement intéressante pour la Turquie pour partager son expérience en matière de politique de la concurrence avec d'autres pays en développement.

91. Alors que l'Autorité souhaite étendre sa coopération avec d'autres pays par le biais de plateformes bi ou multilatérales, elle n'a pas, comme on le lui avait recommandé dans le Rapport 2002, noué de relations de coopération officielles avec les organismes d'application de la loi d'autres pays. En deux occasions, l'année dernière, l'autorité a recherché le concours de l'UE en matière d'application de la loi.[69] En mai 2004, l'Autorité a présenté une requête officieuse à la Direction générale de la concurrence de la Commission européenne pour demander si l'enquête en cours à l'UE concernant une entente dans l'industrie de l'équipement électrique avait permis de révéler des informations sur les activités du cartel en Turquie. La Direction générale de la concurrence a répondu à l'Autorité qu'elle n'était pas en mesure de la renseigner étant donné que les données recueillies étaient confidentielles et soumises à l'interdiction de divulgation relative à ce type de données au titre de l'article 28 de la réglementation communautaire sur la concurrence (N° 2003R001). DG Comp a également relevé qu'au titre de l'articcle 36 de l'accord d'union douanière, tout échange d'informations entre la Turquie et l'UE était soumis aux « limites imposées par les exigences de secret professionnel et des affaires ».

92. En juin 2004, l'Autorité a adressé une requête plus officielle à la Direction générale de la concurrence au titre de l'article 43 de l'Accord d'union douanière. L'article 43 stipule que l'UE ou la Turquie peuvent demander à l'autre partie d'adopter une mesure coercitive si elles estiment que les activités anticoncurrentielles menées sur le territoire de l'autre partie affectent défavorablement ses intérêts. Au titre de l'article 43(3), la partie requise peut cependant décider ou non d'engager une action coercitive. La demande de l'Autorité faisait suite à une enquête relative à une entente présumée dans l'industrie du charbon entre des entreprises basées dans des pays membres de l'UE mais dont les activités avaient un retentissement sur les marchés turcs. L'Autorité a demandé à la DG COMP l'ouverture d'une enquête, et en admettant que l'UE n'adopte aucune mesure coercitive, que les informations pertinentes recueillies lors de l'enquête puissent lui être communiquées. Dans sa réponse, la Direction générale de la concurrence a évoqué la règle discrétionnaire qui lui appartenait au titre de l'article 43(3) et a fait valoir que la Commission ne voyait pas que la conduite en cause ait un effet appréciable dans l'Union européenne. De plus, elle a noté que dans la mesure où toute information obtenue l'aurait été dans le cours de l'enquête, les régles de confidentialité de l'UE, auraient fait obstacle à leur divulgation à l'Autorité.

93. L'Autorité n'a donc pas réussi à coopérer dans des cas particuliers d'application de la loi. La publication de textes d'application en matière de concurrence en vertu de l'Accord d'union douanière constituerait une étape utile dans le développement d'interactions entre l'Autorité et l'UE, dans la mesure où ces règles obligeraient les autorités de la concurrence à envisager les demandes de coordination des activités d'application de la loi « de manière favorable » (Art. 7). Comme nous l'avons déjà vu, toutefois, les règlements d'application ne pourront pas être adoptés tant que la Turquie n'aura pas mis en place un mécanisme de contrôle des programmes d'aides publiques.[70] Même dans ces conditions, il semble qu'il

subsistera des obstacles légaux à l'échange d'informations confidentielles entre l'Autorité et la DG Comp. Quoique l'Autorité estime pouvoir dûment divulguer les informations confidentielles en sa possession à d'autres organismes d'application de la loi dans la mesure où un tel échange est prévu par un accord. L'article 5.3 du projet de réglementation prévoit simplement (comme l'article 36 de l'Accord actuel d'union douanière) que tout échange d'informations au titre de cet article s'inscrit dans les limites qu'imposent le respect des secrets d'affaires et du secret professionnel ». Ces dispositions clarifient, et la DG Comp l'a confirmé, que l'adoption de règles d'application de la loi ne permettrait pas la divulgation à l'Autorité d'une information protégée collectée dans le cadre d'une enquête de l'UE.

94. L'Autorité ne joue aucun rôle direct dans les procédures gouvernementales concernant les autres problèmes de concurrence liés au commerce international. L'entière responsabilité s'agissant de l'application de la loi turque sur le dumping et la concurrence déloyale en matière d'importations revient au Sous-secrétariat au commerce extérieur du Premier ministre,[71] et l'Autorité n'a pas été impliquée dans ces questions.

3.5 Ressources, actions et priorités implicites des organismes

95. Comme nous l'avons déjà indiqué précédemment, une partie des droits versés par les entreprises pour déclarer leur capital social est versée au compte de l'Autorité et constitue sa principale source de revenus. Le pourcentage de ce droit revenant à l'Autorité a été fortement réduit en 2003, mais cette baisse n'a pas eu de conséquences néfastes dans la mesure où, comme le montre le tableau suivant, les dépenses annuelles de l'Autorité ont été régulièrement inférieures aux montants affectés. L'Autorité considère que son affectation budgétaire lui suffit à couvrir ses besoins actuels et futurs. Au niveau interne cependant, certains ont fait part de doutes quant au niveau de salaires susceptibles d'être versés aux personnels de l'Autorité. Le problème ne provient pas d'une quelconque pénurie de crédits budgétaires, mais d'un décret publié par le Conseil des Ministres qui réglemente l'augmentation des salaires et des avantages pour tous les fonctionnaires, y compris les membres et le personnel du Conseil de l'Autorité. Etant donné la manière dont le Conseil a administré le décret ces dernières années, les salaires et les avantages sociaux ont été inférieurs à l'inflation. Les effectifs de l'Autorité ont récemment diminué en raison de démissions, mais une campagne de recrutement a été lancée qui vise à reconstituer et à étoffer les équipes d'experts et d'avocats de la concurrence.

Table 1. Tendances des ressources de la politique de la concurrence

Année	Effectifs[1]	Enveloppe budgétaire[2] (milliards TRL)	Enveloppe budgétaire[2] (millions USD)[3]	Dépenses (milliards TRL)	Dépenses (millions USD)[3]
2004	304	17,8	12,5	14,5	10,2
2003	310	18,7	12,5	13,7	9,2
2002	317	17,3	11,4	12,1	7,9
2001	318	10,9	8,8	7,9	6,4
2000	300	44,1	70,8	15,6	25,0

1. « Effectifs » : nombre de personnes-années effectivement employées à la fin de l'année.
2. « Enveloppe budgétaire » : montant fixé en début d'année et susceptible d'être engagé en vue de dépenses.
3. Taux de conversion : 1 USD = 1,42 million TRL (2004), 1,49 million TRL (2003), 1,52 million TRL (2002), 1,23 million TRL (2001), 0,62 million TRL (2000).

Source : Turquie, 2005

96. Le tableau suivant décrit les tendances des actions engagées par l'Autorité dans le cadre de l'application de la politique de la concurrence au cours des six dernières années. Les priorités d'application semblent équilibrées et bien dirigées, les accords horizontaux et les abus de position dominante apparaissant comme les principales cibles. Environ 11 % des affaires engagées en vertu des articles 4 et 6 l'ont été d'office par le Conseil. Deux tiers de ces cas concernaient des pratiques horizontales et le reste des violations verticales.

Tableau 4. Tendances des actions engagées dans le cadre de la politique de la concurrence[1]

	Accords horizontaux[2, 5]	Accords verticaux[2]	Abus de position dominante[2, 4]	Fusions[3]
2004 : dossiers ouverts	24	14	32	92
Dossiers en cours	15	5	10	3
Dossiers conclus	39	19	41	107
Total des sanctions imposées (En millions TRL)	15 601 915	7 649 830	2 488 607	14 853
2003 : dossiers ouverts	40	8	28	91
Dossiers en cours	30	10	19	18
Dossiers conclus	28	7	27	81
Total des sanctions imposées (millions TRL)	4567638	5198582	39 960 321	35 372
2002 : dossiers ouverts	38	7	24	65
Dossiers en cours	18	9	18	8
Dossiers conclus	39	4	28	61
Total des sanctions imposées (millions TRL)	22 956 113	317 169	1 136 376	2 908
2001 : dossiers ouverts	20	7	26	39
Dossiers en cours	19	6	22	4
Dossiers conclues	16	9	16	46
Total des sanctions imposées (millions TRL)	172 234	7 877 954	1 799 225	949
2000 : dossiers ouverts	17	11	18	57
Dossiers en cours	15	8	12	11
Dossiers conclus	16	12	25	51
Total des sanctions imposées (en millions TRL)	1 193 663	515 894	-	608
1999 : dossiers ouverts	18	12	24	30
Dossiers en cours	14	9	19	5
Dossiers conclus	4	3	5	25
Total des sanctions imposées (en millions TRL)	4 320	-	-	-

1. Ces données concernent les applications de la Loi sur la concurrence par l'Autorité de la concurrence. Elles n'incluent pas les attestations négatives, les exemptions, les avis et les questions présumées ne pas relever de la Loi sur la concurrence.
2. Le total nombre de dossiers de fusion ouverts en 2004 était 70 ; en 2003, de 76 ; en 2002, de 69 ; en 2001, de 53 ; en 2000, de 46 ; en 1999, de 54.
3. Avec les fusions examinées dans le cadre de procédures de privatisation mais sans les fusions en deçà des seuils de notification ou jugées hors du champ à un autre titre.
4. Avec les affaires dans lesquelles les articles 4 et 6 ont été appliqués.
5. Avec les affaires faisant intervenir à la fois des accords horizontaux et des accords verticaux.

Source : Turquie, 2005

97. Les principales missions de l'Autorité sont organisées en huit départements placés sous la surveillance de deux vice-présidents relevant du Président. Les quatre divisions opérationnelles se répartissent les divers secteurs de l'économie, s'agissant de l'application de la loi et des activités de répression. Les quatre autre départements comprennent la recherche (pour les études de marchés nationaux et internationaux), le traitement des données et la statistique, les ressources humaines et les affaires

administratives et financière. Les fonctions annexes comprennent le service juridique, qui sert de base aux avocats de l'Autorité, le bureau du secrétaire exécutif et le bureau de presse, tous rattachés à la Présidence. Au moment de la création de l'Autorité en 1997, l'un des deux vice-présidents a été chargé des quatre départements opérationnels de l'Autorité, plus la recherche et le traitement de données, tandis que l'autre s'est vu confier les ressources humaines et l'administration. La nomination d'un vice-président exclusivement chargé des questions administratives a été jugée importante au cours de la période de formation de l'Autorité. A présent que l'Autorité a atteint une relative maturité, une réorganisation a été engagée, dans le cadre de laquelle l'un des départements opérationnels a été affecté au vice-président « administratif » et le service juridique rattaché à ce même vice-président. L'Autorité compte actuellement 300 employés, dont 10 membres du Conseil, 25 cadres, 81 experts de la concurrence, 4 avocats et 180 membres du personnel administratif.[72]

98. Les travaux de l'Autorité turque de la concurrence sont confiés pour l'essentiel aux membres du personnel détenant un poste d'« expert de la concurrence » ou « d'expert-adjoint de la concurrence. » Ces postes sont créés et définis par les articles 35 et 36 de la Loi sur la concurrence. Les candidats doivent posséder un diplôme universitaire et réussir un examen spécial. L'Autorité s'est dotée d'un système ambitieux et exhaustif de formation de ses experts de la concurrence. Tous les deux à trois ans, elle procède à des examens d'embauche et recrute un groupe de 10 à 15 nouveaux « experts-adjoints ». Les nouvelles recrues suivent une formation d'une durée de trois ans et demi, avec cinq mois de cours intensifs à l'Autorité en droit, en économie et en politique de la concurrence, suivis d'un stage pratique d'au moins un an en gestion de cas, sous la supervision d'experts plus chevronnés. Les stagiaires sont ensuite envoyés en Belgique, où ils suivent ensemble un séminaire de quatre semaines au Collège d'Europe, à Bruges ; ils y assistent à des ateliers avancés et commencent leurs recherches sur un sujet de thèse. Enfin, ils terminent une thèse sur un sujet de droit ou de politique de la concurrence, qu'ils soutiennent ensuite devant un comité de trois membres de l'Autorité et deux universitaires extérieurs. La réussite de ces différentes étapes permet de passer de la position « d'adjoint » à celle « d'expert de la concurrence. » Les experts de la concurrence sont encouragés à poursuivre leur formation en obtenant une maîtrise en droit ou en économie, aux frais de l'Autorité, dans diverses universités d'Europe et des États-Unis. Les experts suivent aussi d'autres programmes de formation, y compris des ateliers de commerce international et des cours de propriété intellectuelle et de sujets spécialisés du droit communautaire. L'équipe d'experts au sein de l'Autorité est tenue en haute estime par l'ensemble des universitaires et praticiens turcs du droit de la concurrence. L'Autorité estime que le nombre d'experts devrait passer, d'ici les dix prochaines années, de 80 à 200.

99. Les avocats du service juridique représentent l'Autorité de la concurrence lors des procédures de révision judiciaire et donnent des avis juridiques au Conseil et au personnel de l'Autorité. L'effectif normal est de huit avocats dans le service, mais il n'est pour l'instant que de quatre dans la mesure où plusieurs avocats ont récemment quitté l'Autorité. Celle-ci emploie également des juristes qui travaillent comme experts de la concurrence dans des départements opérationnels. Ils sont cependant très peu nombreux ce qui fait que le personnel avec une formation de juristes participe rarement directement à des enquêtes. De plus, la rédaction technique lors de la préparation des décisions du Conseil est confiée aux experts de la concurrence, sans grande participation des avocats et, comme indiqué précédemment, les praticiens juristes se plaignent de ce que les décisions du Conseil n'offrent pas d'analyse suffisamment approfondie des aspects juridiques. Consciente de ces problèmes, l'Autorité envisage d'augmenter dans les deux ans à la fois le nombre des juristes employés au service juridique et de ceux qui travaillent comme experts de la concurrence. L'Autorité envisage par ailleurs d'utiliser ses prérogatives pour recruter des avocats de cabinets privés à titre temporaire et leur confier des affaires ou des projets spécifiques.

4. Limites de la politique de la concurrence : exemptions et régimes réglementaires particuliers

100. De par sa formulation, la Loi sur la concurrence paraît couvrir toutes les formes d'activité économique. La seule exemption expresse semble concerner la législation bancaire qui s'applique aux fusions bancaires exonérées. Dans la réalité, cependant, une partie non négligeable du commerce turc échappe à la compétence de l'Autorité, étant donné que des règles générales sur l'interprétation de la loi et du droit administratif s'appliquent pour prévaloir sur la Loi. Par exemple, si un Ministère d'État déplace la concurrence en exerçant son pouvoir légal de réglementer le prix d'un produit de base (comme le Ministère de la santé le fait en Turquie pour le prix des produits pharmaceutiques), l'Autorité n'a aucun pouvoir d'agir, sauf dans un rôle de promotion de la concurrence, dans la mesure où la Loi sur la concurrence n'est pas présumée applicable aux organes et organismes de l'État agissant dans une capacité gouvernementale. Un texte législatif de réforme d'un secteur prévoyant la création d'un organisme de réglementation peut effectivement avoir également pour effet de priver l'Autorité de son rôle, en donnant à cet organisme nouveau le pouvoir de contrôler ou d'approuver divers aspects du fonctionnement du secteur. Dans ces conditions, l'Autorité ne garde la capacité de faire appliquer la Loi sur la concurrence qu'à l'égard de pratiques, quelles qu'elles soient (le cas échéant) laissées par l'organisme de réglementation au jeu des libres forces du marché. Il existe également de nombreuses lois qui créent des entreprises commerciales et qui les investissent expressément de pouvoirs et de privilèges leur permettant de se livrer à des comportements anticoncurrentiels. Cette dernière catégorie, qui inclut les entreprises détenues par l'État, a fait l'objet d'une controverse particulière en Turquie s'agissant de la compétence de l'Autorité.

101. Certaines entreprises détenues par l'État bénéficient en Turquie d'un monopole légal qui leur confère un contrôle exclusif sur le marché, tandis que d'autres n'ont pas cette protection et rivalisent sur le marché avec des sociétés privées. A cet égard, le Rapport 2002 rappelle (p. 22) le cas de la plainte déposée par l'Autorité contre TFA, l'entreprise nationale de production de sucre, pour abus de position dominante dans le but d'éliminer les autres entreprises du marché. Le Conseil a finalement rejeté l'affaire au motif que les prix et les politiques de TFA étaient décidés par un ministère du gouvernement et, de ce fait, réputés hors du champ d'application de la Loi sur la concurrence. L'importance de l'affaire tient à la conclusion du Conseil selon laquelle la Loi ne s'applique au comportement anticoncurrentiel d'une entité économique que si ce comportement est adopté à l'initiative de l'entité elle-même. Face à des entités commerciales détenues par l'État agissant de manière autonome, l'Autorité n'a pas hésité à attaquer des comportements anticoncurrentiels, comme le montrent plusieurs affaires contre Turk Telekom.[73]

102. L'Autorité a également abordé une autre variation sur le thème de la participation de l'État à l'activité commerciale en poursuivant BELKO, une entreprise commerciale détenue par la Ville d'Ankara, à laquelle on avait octroyé un monopole sur le charbon de chauffage. Cette affaire, discutée précédemment, faisait intervenir une accusation selon laquelle BELKO aurait violé l'article 6 de la Loi sur la concurrence en faisant une exploitation abusive de son pouvoir de monopole. L'Autorité était compétente dans la mesure où rien dans l'octroi d'un pouvoir monopolistique ne justifiait les prix excessifs facturés par BELKO.

103. La décision du Conseil selon laquelle il ne s'estimait pas compétent dans l'affaire de l'entreprise sucrière TFA et d'autres jugements analogues rendus par le Conseil dans d'autres affaires ont suscité des critiques dans la mesure où le Conseil a donné l'impression de fonder ses décisions en matière de compétence sur le terme « entreprise » dans la Loi sur la concurrence. Dans sa formulation, la Loi ne couvre que les « entreprises », notion définie à l'article 3 comme « toute personne physique ou morale qui produit, commercialise ou vend des biens et des services et qui forme un tout économique, capable d'agir de manière indépendante sur le marché ». L'expression « agir de manière indépendante » a été incluse dans la définition pour veiller à ce que la filiale d'une grande entreprise ne soit pas considérée comme un acteur distinct de la maison mère. L'ambiguïté de certaines décisions du Conseil, cependant, a donné le sentiment

que le Conseil fondait sur cette clause l'obligation de comportement autonome. L'Autorité a confirmé depuis que le libellé de l'article 3 ne jouait aucun rôle dans les jugements de compétence et que toutes les entités commerciales, détenues ou non par l'État, sont des « entreprises » assujetties à la Loi. La question à poser pour établir la compétence du Conseil consiste à savoir si la conduite en cause traduit un comportement autonome de l'entité commerciale ou si elle correspond à une conduite dictée par l'État agissant dans une capacité gouvernementale. Le Rapport 2002 (¶p. 33) recommandait à l'Autorité d'adopter une vision plus large de sa définition de la notion d'« entreprise » pour mettre la Turquie en conformité avec l'UE s'agissant de la question de la compétence à l'égard des entités publiques. L'exigence, telle que formulée actuellement par le Conseil, d'un comportement autonome concorde à la fois avec cette recommandation et avec la pratique de l'UE.[74]

104. Le Rapport 2002 faisait à la Turquie deux recommandations annexes sur le sujet des monopoles publics. La première consistait (p. 30) à inviter la Turquie à en finir avec tous les monopoles d'État (et avec les privilèges spéciaux annexes tels que les exonérations fiscales) accordés aux sociétés publiques, afin que l'entrée sur le marché de concurrents privés ne soit pas interdite ou autrement entravée. La deuxième était que (p. 31) la Turquie devrait envisager d'adopter une législation équivalente à l'article 86 du Traité de l'UE s'agissant des monopoles de services publics.[75] L'article 86, paragraphe 1) interdit aux États membres de l'UE d'accorder des droits spéciaux ou exclusifs à des entreprises publiques ou privées d'une manière contraire au Traité, notamment aux règles prévues aux articles 81 ou 82 du Traité. L'article 86, paragraphe 2 module cependant l'interdiction applicable aux « entreprises chargées de la gestion de services d'intérêt économique général ou présentant le caractère d'un monopole fiscal. » Ces entreprises sont soumises aux règles de concurrence, dans les limites où l'application de ces règles « ne fait pas échec à l'accomplissement » des missions particulières qui leur ont été imparties. Une dernière clause prévoit, s'agissant de la non-application des règles de la concurrence à ces entreprises, « le développement des échanges ne doit pas être affecté dans une mesure contraire à l'intérêt de la Communauté. »

105. Ces dispositions de l'article 86 constituent le fondement d'un ensemble vaste et complexe de législations élaborées par l'UE dans le cadre de l'application des dispositions aux États membres. L'Accord d'union douanière entre l'UE et la Turquie ne contient aucune disposition obligeant la Turquie à transposer l'article 86 dans son droit positif ou à désigner une Autorité chargée d'en faire appliquer les dispositions. L'article 41 de l'Accord prévoit simplement que, « eu égard aux entreprises publiques et aux entreprises auxquelles des droits spéciaux ou exclusifs ont été accordés, » la Turquie doit veiller à ce que les principes du Traité de l'UE, y compris en particulier ceux de l'article 86, soient « respectés » Cette prescription, qui s'applique uniquement aux dispositions du droit turc qui faussent la concurrence entre la Turquie et les États membres de l'UE, devait avoir été remplie dans un délai d'un an à compter de la date du 31 décembre 1995. Comme pour le contrôle des programmes d'aides publiques cependant, la Turquie ne s'est pas entièrement conformée à ses obligations, et les rapports annuels de l'UE sur les progrès de la Turquie sur la voie de l'adhésion invitent régulièrement le pays à prendre d'autres mesures sur ce point.[76]

106. Le Secrétariat général de la Turquie aux affaires européennes, qui administre le Programme d'adoption de l'acquis nécessaire à l'adhésion, a constitué un groupe de travail (composé notamment de représentants de l'Autorité) chargé de dresser l'inventaire des « textes législatifs relatifs aux droits spéciaux ou exclusifs » assujettis à l'article 41 de l'Accord d'Union douanière. Ce groupe ne s'est toutefois pas réuni récemment, et le Secrétariat général estime que le programme actuel de privatisation en Turquie d'entreprises détenues par l'État constitue le principal moyen par lequel la Turquie s'acquitte de ses obligations au titre de l'article 41.[77]

107. Comme elle y avait été invitée dans le Rapport 2002, la Turquie a supprimé certains monopoles et privilèges spéciaux, le plus souvent en préparation à une privatisation. Ainsi, l'exemple de TEKEL, l'entreprise publique de fabrication d'alcools et de tabac qui bénéficiait jusqu'à présent de prérogatives réglementaires sur la vente de cigarettes et d'alcools et d'un monopole légale sur certaines boissons

alcoolisées. Les pouvoirs de réglementation ont été transférés à un nouveau Conseil du tabac et des boissons alcoolisées, et le monopole sur l'alcool a été résilié avant la privatisation de TEKEL. Aucune mesure n'a été prise, cependant, quant à la recommandation du Rapport de 2002 relative à la transposition de l'article 86 du Traité de l'UE en droit national. Les propositions de l'Autorité concernant la modification de la Loi sur la concurrence prévoient une disposition en vertu de laquelle le Conseil, après avoir statué qu'une mesure émanant de l'État (notamment des « cessions publiques, des règlements [ou] des transactions ») a un effet anticoncurrentiel en vertu des articles 4 ou 6 de la Loi, peut demander au le Conseil d'État d'annuler les règlements ou la transaction en cause.

108. Le Rapport 2002 relevait, au sujet des exemptions à la loi sur la concurrence, qu'une des exclusions les plus importantes découlait du fait que diverses associations commerciales et professionnelles qui ont un statut quasi-public et des pouvoirs d'auto-réglementation peuvent les utiliser pour fixer les prix et limiter la concurrence (p. 33). Les organismes d'auto-réglementation regroupant des membres de professions libérales et autres prestataires de services sont reconnus dans la Constitution turque comme des entités quasi-publiques.[78] Bien que le libellé de la Constitution ne prévoie aucune inapplicabilité de la Loi sur la concurrence à l'égard de ces associations, les textes fondateurs de ces organismes les autorisent souvent à fixer les prix. Comme nous l'avons déjà indiqué plus haut, l'Autorité s'est attaquée aux accords conclus en matière de fixation d'honoraires administrés par ces associations dans les cas où leur texte fondateur ne leur donnait aucunement le pouvoir de fixer les prix. Le Conseil n'a jamais cependant fait de tentatives face aux associations dont le texte fondateur précisait clairement leur pouvoir de fixer des prix minimums. Le Rapport 2002 recommandait que les dispositions de la législation qui régissent ces associations soient révisées pour éliminer les aspects qui leur permettent de fixer les prix et de limiter l'accès au marché pour des raisons autres que des motifs de compétence (p. 33). Or, aucune modification législative n'a été adoptée en ce sens, même si l'Autorité a engagé des activités de promotion de la concurrence sur ce thème, comme nous le verrons au chapitre suivant.

5. Incitation à la prise en compte du facteur concurrence dans la réforme de la réglementation

109. L'action visant à la prise en compte des effets concurrentiels menée par l'Autorité comporte deux dimensions. La première correspond au rôle de conseil que joue l'Autorité auprès du gouvernement et des organismes de réglementation sectorielle s'agissant de la législation et des règlements touchant la politique de la concurrence. La deuxième se rapporte à la mission dont s'acquitte l'Autorité pour faire reconnaître et accepter les principes de la concurrence. Pour ce qui est de la première dimension, l'article 27, paragraphe g), de la Loi sur la concurrence habilite le Conseil à donner son avis, de sa propre initiative ou à la demande du Ministère, sur les aspects touchant la politique de la concurrence de la législation et des règlements gouvernementaux. Le Rapport 2002 faisait observer que l'action de l'Autorité visant à la prise en considération des effets concurrentiels des politiques et des propositions du gouvernement avait été limitée jusqu'à présent et recommandait que l'on mette davantage l'accent sur la mission de promotion de la concurrence et sur un renforcement de l'intégration entre politiques de réglementation et politiques de la concurrence d'une manière générale (p. 33). L'Autorité reconnaît avoir consacré relativement peu d'attention à la promotion de la concurrence au cours de ses premières années d'existence lorsque, de l'avis général, les efforts d'application de la loi constituaient le meilleur emploi que l'Autorité puisse faire de ses ressources. L'Autorité indique que plus récemment, elle a reconnu que l'ingérence du gouvernement dans les processus concurrentiels peut donner des résultats pires que ceux des pratiques anticoncurrentielles par les entreprises privées. L'Autorité a donc accordé davantage d'attention à sa mission de promotion de la concurrence.[79]

110. Le Rapport 2002 notait (p. 34) qu'un Communiqué avait été publié en 1998 par le Cabinet du Premier ministre encourageant les autres secteurs et organismes du gouvernement à consulter l'Autorité de la concurrence au sujet de propositions de règlements ou de décisions susceptibles d'affecter la politique de la concurrence.[80] Le Rapport faisait remarquer par ailleurs que le Conseil s'était effectivement vu donner

l'occasion à quelques reprises de commenter des propositions, conformément à la recommandation du Communiqué, mais pas de manière systématique et parfois à un stade très avancé seulement du processus d'élaboration réglementaire. Le Rapport recommandait que cette exigence de consultation du Conseil soit considérée comme une exigence formelle, de manière plus autoritaire (p. 34). Bien qu'une telle obligation n'ait pas été établie, l'Autorité rapporte que le gouvernement et les organismes de réglementation ont signalé plus souvent à l'Autorité, au cours des quelques dernières années, des projets de loi et des propositions en instance. Mais les choses ne sont pas encore systématiques. Le Communiqué du Premier ministre n'est pas considéré comme contraignant, et aucune sanction n'est prévue si un organisme omet de notifier à l'Autorité un règlement important. Le projet de modifications à la Loi sur la concurrence élaboré par l'Autorité inclut une disposition exigeant expressément des institutions et des organismes publics qu'ils obtiennent l'avis du Conseil concernant tout « loi, statut ou règlement … susceptible de retentir sur les conditions de la concurrence sur les marchés de produits ou de services, sur la totalité ou sur une partie importante du territoire». Les organismes publics ne seraient pas tenus de se conformer à l'avis de l'Autorité, mais le fait de ne pas le demander rendrait la mesure inapplicable de plein droit.

111. Le nombre d'avis formulés par l'Autorité sur des problèmes de politique de la concurrence à des institutions publiques et à des organismes de réglementation sectorielle a fluctué en fonction des années, parallèlement au nombre de requêtes reçues. En 2000, 16 avis ont été rendus, contre 26 en 2001, 37 en 2002, 42 en 2003 et 25 en 2004. L'Autorité peut être appelée à s'exprimer dans toutes sortes de contextes. Une catégorie importante est liée aux avis qu'elle rend sur les projets de législation. Deux exemples mentionnés précédemment concernent les avis rendus par l'Autorité au sujet de la mise en place d'un organisme de contrôle des programmes des aides publiques et de l'applicabilité de la Loi sur la concurrence aux fusions dans le secteur bancaire. Mentionnons également l'avis du Conseil de la concurrence sur un projet de loi en 2003 visant la révision du texte fondateur de l'Union turque des Chambres de commerce, des Bourses et des Marchés (TOBB). Le Conseil a estimé que la disposition du projet de loi maintenant le pouvoir des associations membres de fixer des barèmes de prix était contraire à l'article 4 de la Loi sur la concurrence, indépendamment de la question de savoir si les associations commerciales indiquaient ou non fixer des prix maximums, minimums ou d'autres conditions de prix. Le Conseil a également analysé une disposition donnant aux associations professionnelles la capacité de collecter et de diffuser des données commerciales. Le Conseil a fait remarquer que, même si la disposition en tant que telle n'était pas contraire à la Loi sur la concurrence, des mesures d'application de la loi pourraient être prises à l'encontre d'un organisme ayant fait usage de son droit pour produire des effets anticoncurrentiels, comme le fait de diffuser des prix pratiqués, des chiffres de ventes ou la capacité de production sur un marché oligopolistique avec des produits homogènes. Par contre, un avis rendu en 2004 par le Conseil sur des modifications à la Loi relative aux professions libérales et aux artisans tirait une conclusion différente quant à la disposition autorisant les ordres à fixer des barèmes de prix. Le Conseil n'a pas insisté, comme dans le cas de l'affaire TOBB, pour obtenir la suppression totale de cette disposition. Il a plutôt estimé qu'il convenait de revoir le texte pour ajouter que ces tarifs constituaient des « prix maximums » et que des règlements supplémentaires devaient être adoptés pour « veiller à ce que professions libérales et artisans comprennent bien que les prix figurant dans les barèmes correspondaient simplement à une borne supérieure. »[81] Les deux projets de loi sont actuellement en cours d'examen.

112. Une autre question de promotion de la concurrence a fait intervenir un projet destiné à limiter l'incidence sur la concurrence des grandes surfaces sur les petits commerces concurrents. En octobre 2003, le Conseil a critiqué la première version du projet de loi, notamment pour avoir interdit inutilement certaines pratiques (comme la facturation de prix exorbitants, l'application de rabais excessifs et l'éviction des concurrents), autant d'aspects qui auraient pu être traités directement au titre de la Loi sur la concurrence. Ces différentes interdictions ont donc été retirées de la version suivante du projet de loi, mais d'autres aspects de la législation ont suscité de nouveaux commentaires de la part du Conseil en avril 2004. Le Conseil s'est opposé aux dispositions du texte limitant les ventes de marques de distributeur par les grands magasins à 20 % de leur chiffre d'affaires total et restreignant les campagnes de ventes à prix

réduits à certaines périodes de l'année (ces ventes devaient même être préalablement autorisées par la chambre professionnelle compétente). Le Conseil a relevé que de telles restrictions avaient pour effet de léser les consommateurs, les privant du bénéfice de prix plus bas et que les limites imposées aux ventes de marques de distributeurs portaient également préjudice aux petites et moyennes entreprises qui assurent le plus souvent la fabrication de ces marques. Le projet de loi est actuellement en cours d'examen. Dans une autre affaire, les commentaires de l'Autorité sur un projet de loi règlementant la distribution de magazines et autres périodiques ont permis l'adoption d'une modification interdisant aux distributeurs de passer des contrats d'exclusivité avec les points de vente au détail et exigeant des détaillants qu'ils traitent les distributeurs concurrents de manière non discriminatoire.[82]

113. Une deuxième forme de promotion de la concurrence concerne les observations de l'Autorité sur les règlements proposés par les organismes de réglementation sectorielle. L'Autorité a ainsi donné son avis sur un projet d'offre d'interconnexion soumis à l'Autorité des télécommunications par Turk Telekom (TTAŞ), le monopole détenu par l'État fournisseur de l'infrastructure de téléphonie fixe. Le Conseil s'est opposé sans succès à divers éléments de l'offre, notamment les dispositions prévoyant que : 1) TTAŞ facturerait aux fournisseurs interconnectés les appels n'ayant pas abouti, même si TTAŞ ne facturait pas ses appels à ses propres clients, 2) les opérateurs concurrents seraient contraints de mettre en place des centraux téléphoniques dans au moins 12 provinces choisies par TTAŞ ; et 3) le nombre de circuits de transmission affectés à un fournisseur concurrent serait fixé unilatéralement par TTAŞ. Bien qu'ayant rejeté ces points, l'Autorité des télécommunications a partiellement accepté la recommandation du Conseil de ramener les frais d'interconnexion à des niveaux plus proportionnels aux coûts. Dans une autre affaire concernant encore une fois l'Autorité des télécommunications, l'Autorité de la concurrence a examiné des projets de règlements concernant la séparation des comptes et la comptabilité analytique. Le Conseil a observé que ces règlements visaient à faciliter la détection d'éventuelles subventions croisées et à permettre à l'Autorité de fixer de droits adaptés pour l'accès à l'interconnexion. Le Conseil a estimé qu'il était inutile d'imposer les règles comptables à tous les opérateurs de réseaux de télécommunications fixes et mobiles et qu'il suffisait de le faire aux opérateurs ayant une puissance de marché ou tenus à un autre titre par l'Autorité des télécommunications d'offrir une interconnexion à des concurrents. L'Autorité a accepté cet avis et modifié les règlements en conséquence.

114. Dans ses commentaires à l'Office de réglementation du tabac, des produits du tabac et des boissons alcoolisées, l'Autorité s'est prononcée contre des règlements envisagés visant à limiter les effets néfastes de l'alcool sur la santé par des restrictions publicitaires. Le Conseil a estimé que les dispositions interdisant les promotions du type « un produit acheté, un produit gratuit », les campagnes de vente avec réductions de prix, les concours obligeant le consommateur à acheter une boisson pour participer et les étiquettes de prix avec un prix élevé barré et remplacé par un prix plus bas constituaient des mesures indûment restrictives de la concurrence.

115. L'Office de réglementation du marché de l'énergie (OMRE) a consulté l'Autorité de la concurrence au sujet de nombreux projets de règlements, dont des propositions concernant les licences, les tarifs, des restrictions à l'importation et à l'exportation, la comptabilité de réseau, les rapports financiers et les services au consommateur. En 2004, l'Autorité a fait part à l'OMRE de ses commentaires sur un projet de règlement relatif à la distribution de gaz naturel. L'OMRE a apporté quelques modifications consécutives aux observations de l'Autorité et publié le règlement. Juste avant la publication, cependant, l'OMRE a ajouté au texte une nouvelle disposition liée aux « lettres de garantie » émises par les banques dans le cadre des projets d'équipement entrepris par les sociétés de distribution. Cette clause précisait que seules seraient prises en considération par l'OMRE les lettres issues par des établissements financiers comptant parmi les 10 plus grandes banques de Turquie. L'Autorité ayant indiqué que cette restriction constituait une discrimination inutile entre les banques, l'OMRE a décidé de retirer la disposition en cause.

116. Une troisième forme de promotion de concurrence porte sur les textes de loi qui accordent des droits monopolistiques ou des privilèges spéciaux aux entreprises publiques. Ce sujet constitue pour l'Autorité un thème de préoccupation depuis plusieurs années, en partie du fait de l'obligation faite à la Turquie par l'Accord d'union douanière d'aligner sa législation à l'article 86 du Traité de l'UE. En 2002, l'Autorité a publié dans son Journal de la Concurrence, et communiqué au gouvernement, une analyse relative à trente cas en Turquie posant des problèmes de concurrence de cette nature.[83] Bien qu'aucune modification réglementaire n'ait résulté de cet effort, l'Autorité a élargi le projet d'origine et compte publier un rapport d'ici le 30 juin 2005, qui fera le point sur les évolutions survenues depuis le Rapport 2002, avec une analyse de lois complémentaires. L'Autorité a prévu de faire de cette étude le fondement d'une initiative de promotion de la concurrence visant la suppression des privilèges légaux injustifiés. Elle admet cependant que les lois portant création de monopoles et de privilèges spéciaux répondent souvent à des objectifs politiques autres que la concurrence. Ainsi que l'indique succinctement l'Autorité, « quelques-uns de ces privilèges légaux revêtent une importance cruciale, et les raisons de leur maintien vont au-delà de tout bienfait susceptible de découler d'une structure de marché concurrentielle. »

117. Toujours dans le même domaine, l'Autorité a mis récemment la dernière main à un examen des lois autorisant les associations professionnelles et commerciales d'auto6réglementation. L'objectif de cette étude consistait à recenser les dispositions juridiques habilitant ces organismes à fixer des prix minimums et à adopter d'autres règlements anticoncurrentiels.[84] Le rapport final, assorti de recommandations de modifications légales, sera adressé au gouvernement en juin 2005, avec le rapport de l'Autorité sur les lois relatives aux privilèges spéciaux.

118. L'Autorité effectue une quatrième forme d'activités de promotion de la concurrence dans le contexte de la privatisation. Comme nous l'avons déjà indiqué plus haut, le Conseil de la concurrence peut intervenir à deux niveaux de la procédure de privatisation. Au premier stade, le Conseil fait office d'avocat de la concurrence lors de la conception d'un programme de privatisation d'une industrie ou d'une entreprise. Au second stade, le Conseil joue le rôle d'organisme d'application de la loi dans la mise en œuvre des dispositions en matière de fusions de l'article 7 de la Loi sur la concurrence applicables à certaines transactions. La loi générale portant création de l'Autorité de la privatisation invite l'Autorité à consulter le Conseil, et le Communiqué du Conseil sur la privatisation prévoit spécifiquement une consultation au premier stade du processus, avant que les appels d'offres ne soient rendus publics.

119. Un exemple actuellement controversé des activités du Conseil dans la structuration des appels d'offres de privatisation concerne la vente d'une part majoritaire de Turk Telekom (TTAŞ), fournisseur monopolistique détenu par l'État de l'infrastructure de téléphonie fixe. TTAŞ possède et exploite également une infrastructure de services de téléphonie mobile GSM, de télévision câblée et d'accès à l'Internet. Le Conseil a estimé que la vente de Turk Telekom ne devait être autorisée qu'à condition que l'acquéreur accepte de céder l'exploitation de la télévision câblée à une autre entité dans un délai d'un an à compter de l'achat et que l'activité d'accès à l'Internet fasse l'objet d'une entité distincte (mais détenue à 100 pour cent) au sein de l'entreprise cédée dans un délai de six mois à compter de l'achat. Le Conseil a également recommandé que le fournisseur privé de services GSM en position dominante ne soit pas autorisé à acquérir TTAŞ, ni à détenir de minorité de blocage dans tout consortium ayant fait une offre. Enfin, le Conseil a demandé la suppression avant la vente de certaines taxes de communication facturées aux opérateurs du secteur privé, mais pas à TTAŞ. La recommandation faite par le Conseil d'une séparation structurelle des actifs de télévision câblée a été critiquée par certains responsables gouvernementaux, qui préféraient vendre TTAŞ en bloc, mais l'appel d'offres de l'Autorité de la privatisation en novembre 2004 stipulait que les actifs liés à la télévision câblée ne feraient pas partie de la vente.

120. En août 2004, le Conseil n'a pas réussi à obtenir le démantèlement qu'il avait conseillé dans le cadre d'autre procédure de privatisation. Il s'agissait en l'occurrence des usines, des entrepôts et des

marques de la division « produits du tabac » de la société TEKEL. Malgré la résiliation dans les années 1980 du monopole de TEKEL sur les cigarettes et même si plusieurs entreprises multinationales ont réussi depuis à implanter des marques solides sur le marché, TEKEL conserve sur le marché de la vente au détail une part globale d'environ 60 %. Ce pourcentage est encore plus élevé sur certains segments si l'on subdivise le marché en fourchettes de prix phares. L'introduction de nouvelles marques est difficile étant donné l'interdiction, imposée par la loi depuis 1996, de la publicité sur les cigarettes pour raisons de santé. Le Conseil a recommandé que les marques de TEKEL soient divisées et vendues séparément, arguant du fait que la possibilité donnée aux acquéreurs potentiels de n'acheter qu'une seule marque donnerait davantage d'occasions à des sociétés jusque-là étrangères au marché de la cigarette d'y faire leur entrée. Cette décision donnerait également les moyens à des entreprises plus petites et moins fortunées de participer aux procédures d'appels d'offres. Le Conseil a ajouté qu'une vente des marques en bloc augmenterait le risque de mesures coercitives au titre de l'article 7 une fois l'acquéreur trouvé. Cependant, dans sa formulation actuelle, l'annonce d'appels d'offres envisage la vente de la division des produits du tabac en un seul bloc.[85]

121. Un autre aspect de la mission de promotion de la concurrence de l'Autorité est celui qui concerne sa relation avec les organismes de réglementation des secteurs des télécommunications et de l'énergie. Ce sujet a suscité un intérêt particulier, à la fois de l'Autorité elle-même et des entreprises privées concernées. La Loi sur les télécommunications non seulement oblige l'Autorité des télécommunications à consulter l'Autorité de la concurrence pour certaines affaires (comme les enquêtes relatives à Turk Telecom et la préparation de projets de règlement), mais elle prévoit aussi que l'Autorité de la concurrence doit elle aussi consulter l'Autorité des télécommunications avant toute décision liée au secteur des télécommunications. En septembre 2002, un protocole de coopération a été signé entre les deux organismes en vue de promouvoir la collaboration et la coordination en matière d'enquêtes dans le cadre de l'application de la loi, d'examen des fusions et de délivrance d'exemptions et d'attestations négatives en vertu de la Loi sur la concurrence.[86] Le protocole a mis en place un comité de coordination composé de hauts responsables des deux organismes, qui devait se réunir quatre fois par année et un groupe de travail de responsables moins expérimentés qui devait se réunir une fois par mois. L'Autorité signale cependant que le groupe de travail ne n'est pas réuni et que le protocole n'a pas été mis en œuvre dans la pratique.

122. Dans l'intervalle, les sociétés privées de télécommunications se plaignent que, du fait d'un chevauchement de compétences, elles sont l'objet de sanctions imposées à la fois par l'Autorité de la concurrence et de l'Autorité des télécommunications pour les mêmes pratiques. Par ailleurs, il semble possible qu'une entreprise puisse être assujettie à des règles directement contradictoires. Par exemple, les fournisseurs de services téléphoniques sont soumis à la fois à l'interdiction prévue par la Loi sur la concurrence sur les prix de revente imposés et aux règlements de l'Autorité des télécommunications interdisant la discrimination lors des ventes de services téléphoniques aux consommateurs finaux (y compris les acheteurs au détail de cartes téléphoniques). L'Autorité confirme que les lois en vigueur confèrent aux deux organismes des compétences qui se chevauchent en matière d'application du droit de la concurrence. Un nouveau projet de loi sur les télécommunications a été publié récemment pour commentaires publics. Le gouvernement a sollicité l'avis de l'Autorité de la concurrence au sujet de la proposition, et l'Autorité rédige actuellement ses commentaires, en mettant plus particulièrement l'accent sur le problème du chevauchement de compétences.

123. Le Rapport 2002 relevait (p. 30) les « étranges incohérences » entre la Loi sur les télécommunications qui, comme indiqué précédemment, exige des consultations entre l'Autorité de la concurrence et celle des Télécommunications, et les lois sectorielles sur l'électricité et le gaz naturel, qui ne contiennent pas de dispositions analogues exigeant des consultations entre l'Autorité de la concurrence et l'Autorité de régulation du marché de l'énergie (OMRE). Le Rapport 2002 concluait que, bien que les deux organismes « puissent coordonner la prise en compte des problèmes communs même en l'absence de dispositions expresses dans la loi » (p. 34), une autorité précisée par la loi permettrait « d'éliminer toute

incertitude concernant le pouvoir de l'un et de l'autre, de telle sorte que [l'Autorité de la concurrence] pourrait participer de manière appropriée au processus de restructuration et de développement du système de réglementation » du secteur énergétique (p. 34). Aucune mesure n'a encore été prise pour donner suite à cette recommandation. L'Autorité fait observer qu'une procédure engagée récemment au titre de la Loi sur la concurrence contre une société de distribution d'électricité a posé le problème de la compétence des deux organismes et révélé la nécessité de préciser leurs rôles respectifs et d'instaurer des mécanismes officiels de communication et de coordination.[87] Bien que l'Autorité estime qu'il faudrait un protocole de coopération avec l'OMRE, elle précise qu'aucun progrès n'a pour l'instant été enregistré sur ce front du fait du caractère plus urgent d'autres affaires.

124. Une dernière forme d'activité liée à la première dimension de la promotion de la concurrence concerne l'étude de la dynamique concurrentielle sur certains marchés et d'autres aspects de la concurrence en Turquie. Quoique l'autorité ait été largement inactive dans ce domaine, l'agence de la Direction des recherches économiques a récemment été réorganisée, et l'année 2004 a été marquée par la publication de rapports sur la diversité des médias, la concentration dans l'industrie du logiciel, les accords liés dans le secteur bancaire et les ratios de concentration sur les marchés de production. D'autres rapports devraient être rendus publics en 2005.

125. Le projet de modifications à la loi sur la concurrence préparé par le personnel de l'Autorité a comporté un certain temps une disposition qui aurait permis l'utilisation des outils d'enquête prévus aux articles 14 et 15 de la Loi lors des études de marché non liées à l'application de la loi. Mais cette clause a été abandonnée par la suite, au motif que ces outils d'enquête ne convenaient pas nécessairement aux projets de recherche, et l'Autorité compte désormais obtenir les données nécessaires à ses études de marché auprès d'entrepreneurs extérieurs et d'autres organismes publics (comme la Banque centrale et l'Institut national de la statistique). Les banques de données tenues par ces autres entités sont cependant protégées par de strictes mesures de confidentialité qu'il conviendrait de modifier pour que l'Autorité puisse y accéder.

126. La deuxième dimension de la promotion de la concurrence concerne les efforts de l'Autorité pour faire reconnaître et accepter les principes de la concurrence à l'échelle de la société tout entière. Consciente de l'importance de cette activité, l'Autorité a élaboré une série de programmes destinés à promouvoir la reconnaissance par le public des principes de la concurrence. En coopération avec des chambres de commerce locales, l'Autorité organise régulièrement des conférences d'une journée sur le droit et les politiques de la concurrence dans les principales villes de Turquie. De 1998 à 2001, onze manifestations ont ainsi été organisées dans des villes comme Brousse, Antalya, Izmir, Istanbul et Gaziantep. Bien qu'aucune conférence n'ait eu lieu entre 2002 et 2004, l'Autorité prévoit d'en organiser dans treize villes en 2005. Par ailleurs, elle présente régulièrement des conférences et des symposiums à des spécialistes du droit et des politiques de la concurrence. Les réunions récentes ont porté principalement sur des thèmes tels que les monopoles légaux, l'évolution du droit communautaire de la concurrence, les fusions et les acquisitions, l'interface entre réglementation et concurrence, les appels d'offres publics et l'exploitation abusive de position dominante. Les « Conférences du jeudi », ouvertes au public, sont des débats moins formels sur des thèmes d'actualité en matière de concurrence.

127. L'Autorité dispose par ailleurs pour communiquer avec le public d'un site Internet, où elle fait figurer ses décisions, ses avis, ses annonces et des actualités, avec des liens vers la législation et autres documents connexes.[88] L'Autorité publie également une brochure de 28 pages intitulée « La concurrence, pourquoi ? » décrivant les objectifs et les grandes dispositions de la Loi sur la concurrence. On y trouve des tableaux de procédures, une foire aux questions et des résumés d'un paragraphe de certaines affaires d'ententes, d'abus de position dominante et d'autres infractions. A présent dans sa deuxième édition, la brochure vise à mettre à la disposition du public des informations de base sur l'Autorité, sous une forme aisément compréhensible. Elle sera prochainement accompagnée d'un cédérom interactif reprenant pour

l'essentiel les informations de la brochure, mais offrant également des extraits vidéo et des liens en direction des documents législatifs, des règlements, des décisions et des avis du conseil, ainsi que les rapports annuels de l'Autorité. Par ailleurs, elle publie les actes d'un grand nombre des ses conférences et symposiums, ainsi que le « Journal de la concurrence », un périodique qui contient des articles intéressants pour les spécialistes des politiques de la concurrence, ainsi que le texte de certaines décisions du Conseil d'État dans de le cadre d'affaires traitées par l'Autorité.

128. Les actions de formation proposées à des participants extérieurs constituent un autre outil qui permet à l'Autorité d'informer sur la politique de la concurrence. En association avec l'Ordre des avocats d'Istanbul et d'Ankara, l'Autorité organise à l'intention d'avocats de cabinets privés des formations d'une semaine en droit de la concurrence, dispensées par des universitaires et de hauts responsables de l'Autorité. Les facultés de droit étant peu nombreuses en Turquie à proposer des cours en droit de la concurrence, l'Autorité a été amenée à parrainer des formations de deux semaines en droit de la concurrence destinées aux étudiants en droit. Quatre-vingt étudiants ont ainsi participé à ces sessions en 2004, qui permettent non seulement de faire connaître les principes du droit de la concurrence aux juristes, mais aussi à l'Autorité de trouver des candidats à ses postes d'avocats. A compter de 2005, les experts de l'Autorité seront les conférenciers invités d'un cours sur la législation de la concurrence proposé par la faculté de droit à l'Université d'Ankara. Au sein du gouvernement, le personnel de l'Autorité organise des conférences consacrées aux politiques de la concurrence lors des formations dispensées aux employés d'autres organismes. Au nombre des organismes ayant invité des conférenciers de l'Autorité, il convient de citer le Ministère de l'énergie, l'Office national de la planification, les Sous-secrétariats des Ministères du commerce extérieur et du trésor et la Banque centrale. L'Autorité contribue également à l'organisation de formations en droit et aux politiques de la concurrence à l'intention des magistrats du système judiciaire turc. Pour des raisons de conflits d'intérêts, cependant, elle a choisi de ne pas dispenser elle-même ces formations, mais elle participe aux efforts déployés pour trouver, auprès d'établissements extérieurs, des personnes susceptibles de dispenser une formation judiciaire.

129. S'agissant des relations avec les médias, le tableau suivant indique le nombre de reportages publiés chaque année au sujet de l'Autorité depuis 1999, ainsi que le nombre et le pourcentage de reportages que le bureau de l'Autorité chargé des relations avec les médias estime négatifs.

Tableau 5. L'Autorité de la concurrence dans les médias

Année	Nombre total de reportages	Reportages négatifs	% de pourcentages négatifs
2004	772	21	2,7
2003	769	38	4,9
2002	455	28	6,2
2001	577	10	1,7
2000	780	4	0,5
1999	772	8	1,0

Source : Turquie 2005

130. La couverture médiatique de l'Autorité de la concurrence et le nombre de reportages consacrés aux questions de concurrence sont généralement considérés comme modestes. Le Rapport 2002 donnait à penser (p. 17) qu'une partie au moins de la difficulté éprouvée par l'Autorité à attirer l'attention des médias tient au fait que l'organisme de la concurrence a engagé plusieurs actions contre des entreprises de ce secteur. L'Autorité ne croit pas, cependant, que ce facteur joue un rôle d'explication important dans les variations de couverture médiatique. L'Autorité attribue partiellement la baisse du nombre de reportages constatée entre 2001 et 2002 au fait que l'économie turque a traversé, au cours de ces années, une crise qui a entraîné un arrêt quasi-total des efforts de privatisation et de libéralisation, d'où la chute du nombre de

jugements de l'Autorité susceptibles d'attirer l'attention des médias. Ce déclin pourrait également s'expliquer par le fait que le Président de l'Autorité entre 2001 et 2002 a moins insisté pour que l'on parle de son organisme dans les médias que ne le fait la direction actuelle. Le bureau de l'Autorité chargé des relations avec les médias relève que la plupart des médias d'information en Turquie ne comptent qu'un seul journaliste pour les questions économiques pour tout le pays. Dans ces conditions, il est difficile pour l'Autorité de bénéficier d'une couverture médiatique importante et continue de ses activités.

131. Règle générale, le bureau de l'Autorité chargé des relations avec les médias ne prépare pas de communiqué de presse annonçant les décisions du Conseil dans le cadre des procédures d'application de la loi. Une conférence de presse est organisée au moment de la publication de ces décisions, à laquelle les grandes agences de presse (comme Reuters) assistent le plus souvent. Les agences de presse préparent ensuite des reportages qui sont diffusés à d'autres médias. Par contre, des communiqués de presse sont rédigés à l'intention des médias pour ce qui est des avis rendus par le Conseil dans le cadre des procédures de structuration des privatisations, dans la mesure où celles-ci soulèvent généralement des questions plus techniques et plus complexes. Les représentants des médias ont reconnu que, de manière générale, l'Autorité gère bien ses relations avec la presse. Elle espère bénéficier d'une plus grande couverture médiatique en proposant davantage d'entrevues à la télévision et à la radio.

132. Les grandes entreprises ont habituellement en Turquie une assez bonne connaissance de l'Autorité, de la Loi sur la concurrence et des politiques en matière de concurrence. Tel est loin d'être le cas dans le cas des petites et moyennes entreprises, sans parler du grand public dont, pour reprendre les termes mêmes de l'Autorité, le niveau de sensibilisation est carrément « mauvais ». Le degré de soutien en faveur de la politique de la concurrence suit la même tendance. La TUSIAD (Association turque des industriels et des gens d'affaires), une association du secteur privé réunissant 550 chefs de grandes entreprises en Turquie, indique que ses membres ont un niveau de connaissance de la politique de la concurrence qui s'est nettement amélioré au cours des quelques dernières années, nées mais note que leur degré de compréhension et de soutien des principes de la concurrence est difficile à déterminer. Quoi qu'il en soit, la direction du TUSIAD appuie la politique de la concurrence et se félicite de l'action de l'Autorité de la concurrence. La TOBB, l'Union turque des Chambres de commerce, des Marchés et des Bourses, fait état de sentiments analogues au niveau de l'organisation nationale. La mesure dans laquelle les points de vue de la direction de la TOBB sont connus des nombreux membres de l'association et partagés par eux reste, quant à elle, beaucoup plus douteuse.[89] Les efforts déployés pour obtenir le soutien du public sont généralement gênés par l'absence en Turquie d'une quelconque institution civique forte ayant fait de la politique de la concurrence l'un de ses axes d'action.

133. Le fait que la Loi sur la concurrence tire une partie de ses origines de l'Accord d'union douanière avec l'UE ne risque pas, de l'avis de l'Autorité, d'avoir un retentissement négatif sur les perspectives en matière de soutien de la part du public. L'Autorité note que l'article 167 de la Constitution oblige l'État à garantir le bon fonctionnement des marchés et à empêcher les monopoles et que les efforts du gouvernement en vue d'élaborer et d'adopter une Loi sur la concurrence remontent au début des années 1970. Par conséquent, la Loi sur la concurrence a également des origines nationales que l'on peut citer, bien en dehors de l'Union douanière.

6. Conclusions et politiques possibles

6.1 Les atouts et faiblesses actuels

134. Le Rapport de 2002 notait (p. 32) que l'Autorité turque de la concurrence était « sur la bonne voie ». L'Autorité a continué de réaliser des progrès remarquables dans les années qui ont suivi. Elle a joué un rôle déterminant dans les avancées de la Turquie vers une économie de marché reposant sur la concurrence et soucieuse du bien-être du consommateur. En tant qu'autorité, elle peut se prévaloir de sa

réputation d'être l'un des organismes les plus efficaces et les mieux administrés de Turquie. Elle a mené sa mission avec énergie, imagination et intégrité et a gagné le respect et le soutien des chefs de file des milieux d'affaires. L'Autorité se heurte aux problèmes que connaissent souvent ses homologues dans des économies ayant une longue tradition de contrôle administratif important : la méconnaissance de la politique de la concurrence et de son utilité de la part de l'opinion, l'inexpérience (et la lenteur) des instances judiciaires d'appel et un soutien loin d'être unanime de la part d'autres composantes de l'administration publique. Elle bénéficie en revanche du fait que l'amélioration des conditions générales de la politique de la concurrence va dans le sens de l'ambition de la Turquie d'entrer dans l'Union européenne.

135. Les atouts particuliers de l'Autorité résident notamment dans son attachement à l'articulation et à la mise en œuvre efficace d'une politique saine de la concurrence, son souci de régularité de la procédure, sa transparence et son autonomie politique, enfin l'attention qu'elle prête à la promotion et la formation de ses experts. Son statut d'Autorité pourvue d'une autonomie budgétaire et administrative, et l'absence d'ingérence dans son travail de la part du gouvernement, contribuent également grandement à son efficacité. Au nombre de ses points faibles on retiendra une certaine désorganisation de son approche de l'harmonisation avec le droit de la concurrence de l'UE et le problème lancinant de l'instauration d'une véritable culture de la concurrence. En Turquie, les autres problèmes du droit et de la politique de la concurrence, qui sont pris en compte dans les recommandations ci-après, proviennent de déficiences des textes législatifs et réglementaires qui devront être corrigées par la voie parlementaire. De fait, la plupart des recommandations formulées dans le rapport de 2002 qui ne sont toujours pas respectées et que l'on renouvelle ici, supposent des initiatives de la part d'autres composantes de l'administration publique que l'Autorité. Cette dernière a réagi, au moins partiellement, à toutes les propositions figurant dans le précédent rapport et qui la concernaient spécifiquement. Elle a développé ses activités de promotion de la concurrence au sein de l'administration publique, veillé au règlement en temps opportun des procédures d'examen des fusions et consenti des efforts (même s'ils n'ont pas jusqu'ici été véritablement couronnés de succès) pour améliorer la coordination avec les organismes de tutelle sectoriels de Turquie et pour développer ses relations de coopération avec les autorités de la concurrence d'autres pays. Les recommandations qui suivent sont destinées à couvrir tout l'éventail des problèmes que connaît actuellement la Turquie en matière de droit et de politique de la concurrence et à traiter des thèmes des plus divers, y compris la mise en œuvre de l'Accord d'union douanière, l'interaction entre le droit de la concurrence et d'autres dispositifs législatifs et réglementaires, la formulation de la Loi sur la concurrence elle-même et les diverses mesures prises par l'Autorité de la concurrence.

6.2 Recommandations

6.2.1 Mettre en place le plus rapidement possible un mécanisme de contrôle des aides publiques anticoncurrentielles

136. la Turquie doit sans délai se doter d'un mécanisme de contrôle des aides publiques, conformément à ses obligations aux termes de l'Accord d'union douanière. La question en suspens est de savoir comment organiser ce mécanisme. Le statut indépendant de l'Autorité et ses compétences en matière de politique de la concurrence en font véritablement l'organisme idoine pour assumer cette responsabilité. Les réticences à cette approche peuvent se fonder sur la crainte que l'Autorité ne soit trop enthousiaste à l'idée de restreindre les programmes d'aide. Sa latitude en la matière ne sera bien évidemment pas sans limite, car des décisions de l'Autorité sur les aides publiques peuvent donner lieu à un recours devant les tribunaux. De plus, le projet de règlement d'application de l'Accord d'union douanière dispose que les décisions finales sur des programmes spécifiques d'aide soient communiquées à l'UE et il envisage des consultations permanentes entre la Turquie et l'UE sur les mesures d'application. En conséquence, il y aura des procédures pour éviter une sous-application comme une surapplication des textes et pour promouvoir la convergence entre la Turquie et l'UE sur les aides publiques.

137. Si la proposition actuelle du gouvernement tendant à confier à l'Office de la planification de l'État les pouvoirs de contrôle des aides publiques anticoncurrentielles est tout de même promulguée, l'Autorité conserverait un rôle important dans le processus d'examen puisqu'elle siège au Conseil de suivi et de contrôle des aides publiques. L'Autorité doit, naturellement, participer activement aux délibérations de ce conseil qui sera habilité à rendre des jugements sur les effets de programmes spécifiques d'aides publiques sur la concurrence.

6.2.2 Adopter une démarche plus systématique de l'harmonisation avec le droit de la concurrence de l'UE.

138. L'Accord d'union douanière (Art. 39(2)) demande à la Turquie de veiller à ce que « les principes contenus dans les règlements d'exemption par catégorie en vigueur dans la Communauté, ainsi que ceux contenus dans la jurisprudence développée par les autorités de la Communauté » soient effectivement appliqués. L'Autorité a promulgué des exemptions par catégorie pour les accords verticaux et pour les accords de recherche-développement qui s'écartent de façon sensible des exemptions correspondantes prévues par l'UE. l n'y a pas eu de consultations entre l'Autorité et l'UE pour déterminer si le texte de l'Autorité est conforme aux obligations prévues par l'Accord d'union douanière. Pour que l'approche soit plus efficiente, il faudrait solliciter l'avis de l'UE sur les exemptions par catégorie proposées au moment où elles sont formulées. On ne sait pas si de telles consultations auraient pu être entreprises auparavant, en raison de l'absence de règlements d'application de l'Accord d'union douanière. En revanche, dès lors que la Turquie met en place un programme de contrôle des aides publiques et que des règlements d'application sont adoptés, l'Autorité devrait avoir des consultations systématiques avec l'UE sur l'adoption et la modification des exemptions par catégorie.

139. L'Autorité doit aussi établir et publier un plan assorti d'un calendrier, pour l'examen rapide des exemptions par catégorie de l'UE qui n'ont pas actuellement d'exemption correspondante en Turquie et des amendements aux exemptions publiés par l'UE. Par le passé, l'Autorité a normalement mis trois ans environ pour adopter les règlements correspondant aux règlements ou amendements de l'UE en matière d'exemptions, alors que l'Accord d'union douanière prévoit que la Turquie doit adapter ses dispositions aux amendements de l'UE dans un délai d'un an.[90]

140. Enfin, pour assurer le respect de l'obligation prévue par l'Accord d'appliquer les principes de la jurisprudence de l'UE, les décisions formelles du Conseil doivent systématiquement décrire et prendre en compte les précédents de l'UE pertinents pour les questions faisant l'objet de différends.

6.2.3 Supprimer ou encadrer les entreprises créées par l'État qui sont investies de concessions monopolistiques ou de pouvoirs et de privilèges leur permettant de se livrer à des pratiques anticoncurrentielles

141. Cette recommandation découle de trois recommandations connexes formulées dans le rapport de 2002 qui préconisaient (1) d'en finir avec les monopoles d'État et les protections anticoncurrentielles accordées à des entreprises commerciales privilégiées, (2) la mise au point de mesures de contrôle relevant de la politique de la concurrence analogues à celles que prévoit l'article 86(2) du Traité de Rome en ce qui concerne les monopoles assurant des services d'intérêt général ; enfin, (3) la limitation des prérogatives d'auto-réglementation accordées aux associations professionnelles publiques, pour empêcher une réglementation anticoncurrentielles des prix et de l'entrée sur le marché pour des motifs ne concernant pas des questions de compétence. Idéalement, la Turquie devrait simplement mettre fin aux monopoles d'État, privatiser toutes les entreprises commerciales publiques et éliminer les dispositions législatives anticoncurrentielles mises en évidence par l'Autorité dans ses diverses études. Faute d'aller jusque là, les propositions des experts de l'Autorité en vue d'amender la Loi sur la concurrence prévoient une solution pour traiter le problème des mesures publiques qui instaurent des monopoles ou accordent des privilèges

ou des ou prérogatives à des entreprises ou des associations. Cette proposition devrait permettre au Conseil, après avoir constaté qu'une mesure publique faussait la concurrence en Turquie aux termes des articles 4 ou 6 de la loi, de saisir le Conseil d'État en vue de l'annulation du texte législatif ou réglementaire concerné. Le fait qu'une mesure publique ne soit pas conforme à la Loi sur la concurrence est un bon motif de déclenchement d'un examen formel. Cela étant, la proposition ne dit rien de la norme que le Conseil doit employer pour répondre à la demande de l'Autorité lorsque d'autres objectifs publics que la concurrence sont invoqués pour justifier la mesure visée. L'article 86(2) du Traité de Rome pourrait servir d'orientation afin de déterminer le type de préoccupations des pouvoirs publics suffisantes pour passer outre les principes de concurrence et la Turquie doit envisager d'adopter une version de cette législation.[91]

6.2.4 Rétablir le contrôle par la politique de la concurrence des fusions dans le secteur bancaire

142. Cette recommandation qui concerne le pouvoir attribué à l'Autorité aux termes de l'article 7 de la Loi sur la concurrence, reprend la même recommandation formulée dans le rapport de 2002. Comme on l'avait alors observé, assurer la concurrence dans le secteur bancaire est important car les contraintes sur l'accès au financement peuvent décourager les entrées sur d'autres secteurs du marché. Les préoccupations prudentielles des autorités de tutelle bancaire méritent certes d'être pleinement reconnues, mais ces préoccupations ne justifient pas l'élimination de toute analyse de la concurrence. Dans le cadre de l'UE dont le système est censé inspirer la Turquie, les autorités de la concurrence conservent généralement le pouvoir d'examiner les fusions bancaires sous l'angle de la concurrence, sans pour autant empêcher les États membres de procéder à une surveillance et une analyse prudentielle.[92]

6.2.5 Attribuer un rôle à l'Autorité en matière d'analyse de la réglementation

143. Le rapport de 2002 recommandait d'imposer une obligation formelle aux organismes publiques leur imposant de consulter préalablement l'Autorité sur des projets de lois et de règlements. Aucun texte n'ayant été promulgué à cet effet, le projet d'amendements à la Loi sur la concurrence rédigé par les agents de l'Autorité prescrit à juste titre aux institutions et organisations publiques d'obtenir l'avis du Conseil sur tous les « lois, statuts et règlements … susceptibles d'affecter les conditions de concurrence sur les marchés des biens ou des services sur l'ensemble ou sur une partie significative du territoire ». Cette disposition n'obligerait pas à accepter l'avis de l'Autorité, mais ne pas avoir obtenu cet avis rendrait la mesure prise inapplicable au regard de la loi. Il convient de promulguer cette proposition, tout en la modifiant de façon que les organismes refusant de suivre la recommandation de l'Autorité soient tenues de motiver publiquement leur position.

6.2.6 Élargir les consultations avec les autorités de tutelle sectorielles

144. Bien qu'une partie de cette recommandation reprenne un élément du rapport de 2002, les problèmes de coordination entre l'Autorité et les autorités de tutelle sectorielles se sont élargis et leur règlement est devenu plus urgent. L'Autorité devrait continuer à chercher des occasions de coopérer avec l'Autorité des télécommunications. Les questions de chevauchement de compétences qui créent des incertitudes pour les entreprises du secteur privé et portent préjudice aux activités concurrentielles sur le marché devraient être réglées rapidement, mais pas nécessairement par un amendement aux textes législatifs spécifiant des frontières de compétence bien précises. Il peut en effet être difficile de modifier de telles lignes de démarcations officielles pour tenir compte de changements intervenant sur le marché et elles donnent davantage matière à des contestations devant les tribunaux. Les autorités en cause devraient examiner la possibilité d'une solution plus souple par exemple en négociant et en publiant un protocole élargi qui prévoie une répartition explicite des pouvoirs d'application du droit. Un tel protocole pourrait être conçu de façon à préserver les compétences essentielles de chaque autorité tout en éliminant le risque que des parties privées soient soumises à des obligations juridiques contradictoires ou faisant double

emploi. Les autorités devraient aussi étudier la proposition du rapport de l'OCDE de 2002 les invitant à se doter d'un cadre commun pour déterminer si une entreprise occupe une position dominante sur le marché.

145. En ce qui concerne l'Office de réglementation du marché de l'énergie (ORME), il convient de prendre des mesures s'inspirant de la recommandation de 2002 visant à donner une base légale à la participation de l'Autorité aux procédures réglementaires de l'ORME. De même, l'Autorité doit s'efforcer d'obtenir un protocole formel d'accord avec l'ORME en vue de mettre en place les procédures de communication et de coordination dont l'Autorité admet qu'elles font actuellement défaut.

146. Enfin, sur un point connexe, il convient d'envisager de donner au Conseil une possibilité officielle de donner son avis sur les propositions de décisions du sous-secrétariat au commerce extérieur auprès du Premier ministre dans les procédures visant à faire appliquer les lois relatives aux pratiques déloyales en matière d'importations et de dumping.

6.2.7 Procéder avec prudence lors de l'invocation de la présomption de pratiques concertées

147. L'Autorité a conclu avec raison que ne doit pas être invoquée la présomption de pratiques concertées pour établir une infraction à l'article 4 uniquement sur la base de tarifications parallèles. En dehors des questions de régularité de la procédure, on sait en analyse économique que les tarifications parallèles sur des marchés oligopolistiques sont aussi compatibles avec la concurrence qu'avec la collusion. La politique actuelle du Conseil sur ce plan semble correcte et ses décisions reconnaissent à juste titre que l'analyse économique des conditions du marché et l'évaluation prudente des éléments de preuve supplémentaires sont importantes pour éviter de décider à tort de l'illégalité d'une pratique. Pour répondre aux préoccupations des praticiens à cet égard, le Conseil doit faire des efforts particuliers pour préciser dans ses décisions le rôle joué, s'il existe, par la présomption dans son analyse du dossier et d'expliquer quels ont été les éléments supplémentaires qui sont apparus comme des preuves de collusion pour chacune des entreprises considérées comme responsables.

148. Des problèmes plus subtils sont liés au recours par le Conseil aux tarifs parallèles ou à d'autres comportements interdépendants comme motifs d'ouverture d'enquêtes sur des marchés oligopolistiques. Les entreprises visées ont des raisons légitimes de craindre les charges et les contraintes associées aux enquêtes de l'Autorité et la question de savoir quelles normes justifient l'ouverture d'une enquête mérite un débat précis. Le Conseil doit envisager d'élaborer et de soumettre à des commentaires publics une déclaration officielle sur ses normes d'ouverture d'enquêtes, notamment sur des marchés oligopolistiques. Cette déclaration expliquerait le rôle de la présomption de pratiques concertées, décrirait les éléments factuels minimums devant être réunis pour justifier une enquête et examinerait les circonstances dans lesquelles une étude approfondie de l'Autorité constituerait une approche préalable plus adaptée vis-à-vis d'un marché problématique.[93]

6.2.8 Amender la Loi sur la concurrence pour améliorer ses possibilités d'application

149. Il convient de réviser la Loi sur la concurrence à plusieurs égards de façon à donner plus d'efficience et d'équité à l'application de cette loi. Nombre de recommandations formulées plus loin figurent déjà dans l'ensemble des amendements proposés par les experts de l'Autorité et deux d'entre elles (respecter le critère de la part de marché pour les notifications des fusions, ainsi que les amendes pour non-respect des procédures d'enquête) se font l'écho les propositions du rapport de 2002.

- Simplifier les normes de notification des fusions

150. Les conditions de notification des fusions liées aux parts de marché posent des problèmes. L'expérience dans d'autres pays a montré que les obligations de déclaration ne doivent pas dépendre de

questions déterminantes pour l'évaluation au fond de l'opération correspondante. Imposer des jugements sur la définition du marché et la part de marché impose des coûts et des risques aux parties déclarantes et porte préjudice à une administration efficiente du programme de notification. Pratiquement tous les pays qui utilisaient la part de marché comme un seuil de déclenchement de la procédure de notification y ont renoncé. Dans le cadre de son projet en cours de révision du dispositif d'examen des fusions, l'Autorité, doit vérifier combien d'opérations ne sont déclarées que parce qu'elles dépassent le seuil de part de marché et déterminer si les avantages découlant de ces déclarations en justifient les coûts. Il en va de même des notifications de privatisation qui sont également soumises au critère de part de marché. Si la plupart des notifications reposent sur le seuil de chiffre d'affaires agrégé, le critère de la part de marché doit être éliminé, à moins que l'on puisse établir que les fusions portant sur une forte part de marché entre entreprises relativement petites posent un problème de concurrence particulièrement important en Turquie.

- Adopter la norme révisée de l'UE en matière d'évaluation des fusions

151. L'article 7 de la Loi sur la concurrence, qui interdit toute fusion ou acquisition qui « instaure ou renforce la position dominante d'une ou de plusieurs entreprises de nature à entraver de manière significative la concurrence » sur un marché pertinent, doit se conformer au nouveau règlement de l'UE sur les fusions, qui interdit les opérations qui entraveraient de manière significative une concurrence effective [sur un marché pertinent], notamment du fait de la création ou du renforcement d'une position dominante ». Cette modification est souhaitable pour parvenir à l'harmonisation avec l'UE et parce que la formulation révisée du règlement de l'UE définit une norme plus souple et plus fine d'identification des opérations anticoncurrentielles.

- Revoir les délais du processus d'évaluation des fusions

152. La période d'examen préliminaire de 15 jours, désormais prévue par la Loi sur la concurrence pour les opérations notifiées, est trop courte. Elle doit être portée à 30 jours, ce qui laisserait suffisamment de temps pour l'examen et aussi pour résoudre le problème de déclarations le vendredi soir et l'ambiguïté de l'article 10(3) relative à la date effective des opérations notifiées. En revanche, le délai maximum des procédures relatives aux affaires de fusion portées devant les tribunaux est désormais trop long. La loi prévoit que ces procédures sont soumises aux mêmes délais que les autres affaires de concurrence, ce qui signifie que plus d'un an peut se passer avant que n'intervienne le règlement définitif de l'affaire par le Conseil. Il convient de limiter à 90 jours la durée des procédures dans les affaires de fusion, comme le recommande la proposition des experts de l'Autorité.

- Relever les amendes pour des contraventions autres que des infractions matérielles et faire de la consommation anticipée de fusions une infraction matérielle

153. Le niveau actuellement inadapté des amendes prévues dans la Loi sur la concurrence pour des contraventions accessoires doit être relevé. Il convient d'amender l'article 16, comme le proposent les experts de l'Autorité, de façon à éliminer les différents plafonnements actuels des amendes pour les remplacer par un plafond fixé à 1 % du revenu brut du contrevenant. L'article 17 doit de même être révisé pour éliminer les différents montants des amendes journalières prévues pour certains types de manquements et il convient de les remplacer par une limite journalière maximum de 5 % du revenu brut du contrevenant. La transmission d'informations incomplètes et la non-communication d'informations face à une demande de renseignements doivent être ajoutés à la liste des contraventions au titre des articles 16 comme 17. Enfin, la consommation anticipée d'une fusion nécessitant l'approbation du Conseil doit devenir une infraction matérielle et donc être passible d'une amende maximale de 10 % du revenu brut applicable aux autres infractions matérielles.

- Instaurer une exemption *de minimis* pour les accords concernant de petites entreprises

154. L'Autorité doit être investie du pouvoir légal d'instaurer, par Communiqué, une exemption *de minimis* protégeant les petites entreprises vis-à-vis des poursuites. Le modèle de ce communiqué serait l'exemption *de minimis* de l'UE, qui s'applique lorsque la part de marché agrégée n'excède pas 5 % pour les accords horizontaux et 10 % pour les accords verticaux. L'Autorité a exprimé des préoccupations quant à la sagesse d'engager des poursuites contre des accords horizontaux sur des marchés locaux, au motif que l'autorité risque de disperser inutilement ses ressources opérationnelles sur de nombreuses petites affaires. Même si l'adoption d'une exemption *de minimis* va permettre de mieux résoudre les questions de priorité en matière d'application du droit, il convient de noter que l'exemption de l'UE ne protège pas les « accords injustifiables » de fixation des prix ou de répartition des marchés. Ces accords doivent de même être exclus de la protection du Communiqué de l'Autorité. Les affaires de fixation de prix sur le plan local, en particulier sur des marchés de produits de consommation comme le pain ou les transports en bus, produisent souvent des avantages bien après la cessation de l'accord illicite. Ces affaires suscitent généralement beaucoup d'attention de la part des médias locaux et servent à faire connaître aux consommateurs comme aux milieux d'affaires locaux l'Autorité de la concurrence en tant qu'organisme officiel et le rôle du droit de la concurrence dans une économie de marché.

155. Il faut cependant reconnaître que l'exclusion des affaires « injustifiables » de l'exemption *de minimis* de l'UE ne signifie pas que les autorités de la concurrence de l'UE doivent engager systématiquement des poursuites. Aux termes de l'article 81 du Traité de Rome, les accords ne peuvent en tout état de cause donner lieu à des poursuites que s'ils « restreignent sensiblement le jeu de la concurrence » entre les États membres. Même si les accords injustifiables entre petites entreprises en Turquie ne doivent pas être protégés de toute attaque par une exemption *de minimis*, l'Autorité ne doit pas non plus être obligée d'engager systématiquement des poursuites contre ces accords. Il conviendrait donc de faire figurer dans la Loi sur la concurrence une formule précisant que l'Autorité dispose de la faculté de décider d'engager des poursuites contre des accords injustifiables lorsqu'ils sont en deçà du plafond de part de marché prévu par l'exemption *de minimis*.

- Supprimer la notification obligatoire et la procédure d'attestation négative et envisager de modifier la durée maximale des différentes exemptions

156. Autre mesure pour se conformer aux règles de l'UE et à la pratique efficiente de l'Autorité, il convient d'amender la Loi sur le concurrence, comme le proposent les experts de l'Autorité, en vue d'éliminer à la fois l'obligation de notification de l'article 10 ainsi que la procédure d'attestation négative de l'article 8. Outre le fait de libérer l'Autorité du traitement de pléthore de notifications, l'élimination de la notification obligatoire évitera le problème de mise en œuvre qui se pose lorsque des entreprises (comme dans le cas de la conférence maritime précédemment évoquée dans ce rapport) conclut des accords qui sont protégés par une exemption par catégorie de l'UE, mais pas par une exemption de l'Autorité. Ces entreprises soumettent effectivement une notification au titre de l'article 10 et se placent donc elles-mêmes techniquement en position de se voir infliger une amende pour non-déclaration. L'Autorité refuse à juste titre de demander une amende dans de telles circonstances, mais sa position sur ce point ne suit pas la lettre de la Loi sur la concurrence.

157. On pourra observer que la proposition des experts de l'Autorité visant à éliminer la notification obligatoire ne franchit pas l'étape suivante de la mise en conformité avec les règles de l'UE qui consisterait à éliminer purement et simplement les exemptions individuelles. C'est en grande partie parce que l'Autorité s'appuie sur son pouvoir d'exemption individuel prévu par l'article 5 pour résoudre les problèmes qui résultent de la congruence incomplète entre les exemptions par catégorie de l'Autorité et celles de l'UE. Par exemple, comme on l'a vu précédemment, l'exemption par catégorie prévue par l'UE pour la recherche-développement permet aux participants à des projets de fixer des prix pour les produits

du projet lorsqu'ils font l'objet d'une fabrication conjointe et elle permet aussi d'imposer certaines restrictions concernant des clients ou des territoires aux ventes de produits en aval. L'exemption par catégorie de l'Autorité interdit toutes ces dispositions contractuelles de façon inconditionnelle, ce qui a pour conséquence que l'Autorité traite la recevabilité de restrictions en aval par l'application d'exemptions individuelles aux termes de l'article 5. Si l'Autorité veut conserver le régime des exemptions individuelles, elle doit tout de même envisager de modifier l'article 5 de façon à allonger ou éliminer la durée maximale légale de 5 ans de toute exemption individuelle accordée. L'existence de cette limite dissuade les franchiseurs en Turquie qui souhaitent imposer des clauses de non-concurrence pour la durée de contrats de franchise supérieure à cinq ans. Le seul mécanisme dont ils disposent actuellement consiste à demander une attestation négative pour ces clauses de non-concurrence ; or, cette solution va disparaître si l'Autorité met en œuvre sa proposition visant à éliminer les attestations négatives.

- Instaurer une procédure de règlement amiable des affaires

158. Pour permettre aux enquêtes de l'Autorité de déboucher sur des règlements efficients et les mettre plus encore en conformité avec les règles de l'UE, il convient d'amender la Loi sur la concurrence, comme le proposent les experts de l'Autorité, en autorisant l'arrêt à tout moment de la procédure si le prévenu s'engage lui-même à accepter les modifications de comportement recommandées par le Conseil.

- Supprimer les amendes minimales et habiliter l'Autorité à proposer un traitement clément aux entreprises qui coopèrent

159. L'expérience de l'application du droit dans d'autres pays a amplement démontré que les autorités de la concurrence doivent pouvoir proposer un traitement clément, voire l'immunité vis-à-vis des sanctions aux sociétés qui avouent leur participation à des accords et activités concertés illicites. En conséquence, comme le proposent également les experts de l'Autorité, il convient d'amender la Loi sur la concurrence de façon à (1) éliminer le montant minimum obligatoire de l'amende pour les infractions matérielles ; (2) autoriser le Conseil, lors de la détermination du montant de l'amende, de prendre en compte l'éventuel concours apporté à l'enquête par le contrevenant, et (3) prévoir un allégement des sanctions pénales pour les entreprises qui coopèrent.

- Introduire des amendes personnelles aux dirigeants de sociétés et envisager des sanctions pénales pour les dirigeants qui sont responsables d'infractions matérielles

160. L'article 16 de la Loi sur la concurrence prévoit actuellement l'imposition d'amendes personnelles aux dirigeants (à concurrence de 10 % de l'amende calculée pour l'entreprise correspondante), mais uniquement pour des infractions accessoires comme les obstructions à l'enquête, la communication d'informations trompeuses ou le non-respect d'obligations de notification. La Loi ne prévoit pas de sanctions pénales pour des infractions matérielle à la Loi sur la concurrence et il n'en existe aucune en droit turc hormis pour les soumissions concertées dans des marchés publics. Si l'Autorité souhaite mettre en œuvre un véritable programme de clémence, la perspective pour les dirigeants d'entreprises de faire l'objet d'amendes personnelles élevées et de poursuites pénales constitue une puissante incitation à coopérer aux enquêtes de l'Autorité. L'existence de la sanction pour soumissions concertées montre que le concept de sanction pénale en cas de fixation de prix n'est pas sans précédent en Turquie. Des amendes personnelles doivent être infligées en cas d'infraction caractérisée et il convient d'envisager l'application de sanctions pénales au moins pour les infractions les plus graves à l'article 4. La proposition des experts de l'Autorité visant à éliminer totalement la disposition imposant des amendes aux dirigeants d'entreprise en cas de manquement aux dispositions accessoires de l'article 16 est sans doute trop radicale. Éliminer l'élément obligatoire de cette disposition et autoriser le Conseil à déterminer de façon discrétionnaire ces amendes permettrait de conserver la possibilité de remédier aux agissements

illicites des dirigeants d'entreprises dans des cas manifestes et de trouver un bon compromis entre application effective du droit et efficience administrative.

- Elargir les garanties de régularité de la procédure dans les poursuites engagées par l'Autorité

161. Bien que certaines exemptions par catégorie de l'Autorité imposent déjà au Conseil de solliciter le point de vue de la partie affectée avant de retirer l'exemption accordée à une entreprise à titre individuel, il convient d'amender la Loi sur la concurrence pour s'assurer que les garanties de régularité de la procédure prévue par la Partie IV de la Loi s'étendent à toutes les mesures visant à retirer des exemptions par catégorie ou individuelles, ou encore aux attestations négatives. De même, pour des motifs d'impartialité relevant de la régularité de la procédure, il convient d'adopter la proposition des experts de l'Autorité visant à modifier l'article 43 de la loi pour éliminer la participation de membres du Conseil aux enquêtes de l'Autorité[94].

6.2.9 Renforcer la transparence.

162. Bien que l'Autorité soit déjà le plus transparent des organismes officiels turcs, elle pourrait améliorer encore ses pratiques dans ce domaine en publiant une déclaration officielle ou un règlement précisant les procédures qu'elle emploie pour élaborer ses propositions d'amendements aux textes législatifs ou réglementaires et ses communiqués. La réglementation devrait définir les procédures normales de notification et d'appel à commentaires du public sur ces propositions et prévoir la diffusion dans le public des commentaires reçus, des réponses de l'Autorité aux questions soumises par les commentateurs et du raisonnement suivi par l'Autorité pour arrêter ses conclusions finales. Le Conseil doit aussi élaborer et publier des lignes directrices pour déterminer le montant des amendes. Enfin, l'Autorité doit suivre systématiquement sa pratique récente consistant à publier des versions résumées des avis qu'elle rend au stade initial des procédures de privatisation ; de même, elle doit afficher sur son site web le texte de toutes les décisions du Conseil d'État rendue sur des affaires traitées par l'Autorité.

6.2.10 Utiliser et élargir le poids et l'influence par la coopération internationale.

163. C'est une autre recommandation du rapport de 2002 qui mérite d'être réitérée. Les efforts de l'Autorité pour établir un mécanisme de coopération avec la DG Comp peuvent sans doute progresser une fois qu'un système de surveillance des aides publiques sera mis en place et que les règlements d'application seront adoptés conformément à l'Accord d'union douanière. Comme on l'a vu précédemment, cependant, le règlement d'application ne permettra pas à l'UE de divulguer des renseignements confidentiels aux fins de l'application de la loi. L'Autorité devrait donc envisager la possibilité de développer des accords de coopération avec des autorités antitrust d'autres pays qui permettraient l'échange de renseignements.

6.2.11 Demander l'autorisation légale d'utiliser les pouvoirs d'enquête pour procéder à des études sur les marchés en dehors des missions d'application du droit.

164. Les autorités de la concurrence peuvent rendre des services extrêmement précieux en procédant à des analyses approfondies de la dynamique concurrentielle de certains marchés ou secteurs. Ces études peuvent mettre en lumière des formes précédemment insoupçonnées de comportements des intervenants privés ou de règlements officiels qui entravent la concurrence. De plus, les résultats de ces études peuvent contribuer pour une part importante à faire mieux comprendre au public la façon dont la concurrence fonctionne et les avantages qu'elle produit. Toutefois, les précisions et les statistiques sur les activités des différents secteurs sont assez difficiles à trouver dans les documents publics ou de les obtenir de leur plein gré auprès des entreprises étudiées. Les autres organismes officiels qui ont collecté des données commerciales sensibles pour des motifs d'ordre statistique ou réglementaire sont généralement peu enclins

à partager de telles données avec les organismes de la concurrence, de crainte que la communication de ces informations ne porte préjudice à l'exactitude des données que les entreprises fourniront par la suite. Pour ces raisons, l'Autorité doit envisager de demander l'autorisation expresse d'utiliser ses propres pouvoirs d'enquête prévus par la loi pour procéder à des enquêtes sur les marchés en dehors du cadre de ses missions d'application du droit. Selon toute vraisemblance, les entreprises vont exprimer leur crainte que les études menées par un organisme chargé de faire appliquer le droit de la concurrence ne soient pas impartiales dans leurs efforts de collecte et d'analyse des faits, mais qu'il s'agisse plutôt d'enquêtes visant à mettre en évidence des infractions à la loi. Ces préoccupations sont légitimes et il convient d'y répondre en imposant des normes de confidentialité au personnel de l'Autorité chargé des études pour ce qui est des informations spécifiques à des entreprises, et en interdisant à ces agents pendant un certain nombre d'années d'intervenir dans les procédures d'application de la loi dans le secteur examiné. Il faut aussi admettre que les études sur les marchés peuvent aussi avoir un coût important en termes de ressources, aussi bien pour l'organisme réalisant l'étude que pour les entreprises sous revue, et qu'elles peuvent créer des anticipations dans le public quant à une intervention prochaine des services opérationnels ou d'autres instances gouvernementales. Ces études ne doivent donc être réalisées que lorsque leur nécessité est vraiment justifiée et les éventuelles annonces publiques doivent souligner que l'enquête ne repose pas sur des soupçons de comportements illicites.

6.2.12 Favoriser le soutien à la politique de la concurrence

165. L'Autorité se livrent à plusieurs activités notables de promotion d'une culture de la concurrence en Turquie. Ses programmes visant à assurer des formations au droit et à la politique de la concurrence aux avocats praticiens, aux étudiants en droit et au personnel d'autres organismes publics mériteraient d'être imités par les autorités de la concurrence de n'importe quel pays en développement. Il existe cependant des possibilités que l'Autorité pourrait étudier. Elle devrait (1) encourager la mise en place par le Barreau d'une commission du droit de la concurrence ou une instance analogue afin d'organiser l'interaction entre l'Autorité et les milieux juridiques, (2) solliciter la coopération avec la Direction de la concurrence et de la protection des consommateurs du ministère du Commerce et de l'Industrie afin d'introduire des informations sur des affaires de concurrence importantes pour les consommateurs dans les programmes de formation parrainés par la Direction, (3) renforcer la couverture par les médias de ses initiatives en appliquant son plan visant à accorder aux médias plus d'entretiens à la télévision ou à la radio, (4) envisager la diffusion de communiqués de presse, rédigés dans un langage accessible aux consommateurs, afin de rendre compte des décisions du Conseil dans des affaires de concurrence, (5) étudier la possibilité d'élargir l'interaction avec L'Association turque des chefs d'entreprise qui a appelé de ses vœux la participation de l'Autorité à des projets de l'association comme l'élaboration de recommandations à l'attention du secteur turc de l'énergie, (6) procéder à la relance prévue de ses programmes d'une journée sur la concurrence que l'Autorité propose en lien avec les chambre de commerce des grandes villes, enfin, (7) accroître de façon générale la fréquence des exposés que font ses représentants auprès de groupements nationaux ou locaux d'entreprises.

6.2.13 Accroître le nombre et les compétences des avocats de l'Autorité et renforcer ses compétences en matière d'organisation industrielle

166. L'Autorité admet déjà qu'elle a besoin de plus d'experts de la concurrence avec une formation de juristes pour participer aux enquêtes et préparer l'analyse des aspects juridiques des décisions du Conseil ainsi que davantage d'avocats pour défendre ces décisions en appel devant le Conseil d'Etat. L'Autorité doit mettre en œuvre ses projets de renforcement sensible à court terme du nombre d'avocats de l'Autorité. L'Autorité doit aussi poursuivre et élargir son programme consistant à donner à ses avocats la possibilité d'obtenir des diplômes universitaires supérieurs en droit de la concurrence.

167. En ce qui concerne les compétences économiques et même si les experts de l'Autorité en matière de concurrence sont formés à l'analyse économique et sont familiers de cette analyse, aucun d'entre eux n'est titulaire d'un doctorat d'économie de l'organisation industrielle ni d'une autre branche des sciences économiques. L'Autorité a besoin, et doit se doter rapidement de compétences avancées en matière d'organisation industrielle afin de pouvoir conforter et contrôler l'analyse économique dans des affaires difficiles. Il convient d'élargir les programmes qui offrent aux experts actuels de l'Autorité la possibilité d'obtenir des diplômes universitaires supérieurs d'organisation industrielle.

NOTES

1. Le rôle de la politique de la concurrence dans la réforme de la réglementation, Examens de l'OCDE de la réforme de la réglementation, La réforme de la réglementation en Turquie (2002), également disponible à l'adresse suivante www.oecd.org/dataoecd/3/0/27068413.pdf

2. Art. 39(2)a) et b), Décision N°1/95 du Conseil d'association CE-Turquie du 22 décembre 1995 relative à la mise en place de la phase définitive de l'union douanière5). L'article 39, paragraphe 2) a) requiert également que la Turquie veille « à ce que, dans un délai d'un an à compter de l'entrée en vigueur de l'union douanière, tous les principes contenus dans les règlements d'exemption par catégorie en vigueur dans la Communauté, ainsi que ceux contenus dans la jurisprudence développée par les autorités de la Communauté, soient appliqués en Turquie. »

3. Loi n°4054 sur la protection de la concurrence ; adoptée le 7 décembre 1994 et entrée en vigueur le 13 décembre 1994 (« Loi sur la concurrence »).

4. Décret n° 494 amendant la Loi organique n° 3143.

5. Programme national d'adoption de l'acquis communautaire, Gazette officielle, 24 juillet 2003 n°25178 bis.

6. Pour de plus amples informations, voir l'Étude économique de la Turquie 2004 OCDE.

7. Programme économique de préparation de l'adhésion (Office national de planification, Ankara, nov. 2004) pp. 73-74, 134-35.

8. Commission européenne, Rapport régulier 2004 sur les progrès réalisés par la Turquie sur la voie de l'adhésion (6 oct. 2004) p. 65.

9. Aucune différence pratique entre la Turquie et l'UE ne semble découler du fait que l'article 4 de la législation turque se rapporte à une pratique ayant « un objet, un effet ….ou un impact possible » anticoncurrentiel, alors que le texte équivalent de l'article 81, paragraphe 1, ne parle que d'« objet ou d'effet. » Au sein de l'UE, l'article 81, paragraphe 1, a été interprété de manière à couvrir les effets potentiels aussi bien que les effets réels, ainsi les accords n'ayant jamais été mis en oeuvre. Bellamy, Christopher et Graham Child (2001), *European Community Law of Competition*, Londres. ¶¶ 2-101, 2-106.

10. L'article 56 de la législation turque, qui stipule que les accords contraires à l'article 4 sont nuls, non et inapplicables de plein droit, fait pendant à la disposition communautaire de l'article 81, paragraphe 2 de l'UE.

11. Communication de la Commission concernant les accords d'importance mineure (2001/C 368/07), qui met en œuvre le précédent de l'UE en vertu duquel les accords ne sont présumés contraires à l'article 81, paragraphe 1 que s'ils restreignent « sensiblement le jeu de la concurrence » La Communication prévoit cependant qu'aucune protection n'est accordée aux accords horizontaux contenant des restrictions « flagrantes » ayant pour objet la fixation des prix ou la répartissent les marchés ou à certains accords verticaux (comme ceux visant à déterminer les prix de revente).

12. La capacité de retirer une exemption par catégorie s'agissant d'un accord donné faisant intervenir une entreprise donnée est généralement prévue par une disposition contenue dans le texte même de l'exemption. De plus, une disposition contenue dans le texte relatif aux exemptions par catégorie applicables aux accords verticaux (Communiqué n°2002/2, Art. 6, paragraphe 2) réserve au Conseil de la concurrence la possibilité de publier un Communiqué séparant retirant leur exemption à toutes les

entreprises sur un marché donné si « une partie substantielle » de ce marché fait l'objet d'un « réseau parallèle » de restrictions verticales analogues.

13. Désormais, l'article 10 du nouveau Règlement général de l'UE sur la concurrence (CE n°1/2003) prévoit que la Commission peut adopter une décision de nature déclaratoire constatant « l'inapplication de l'interdiction énoncée par l'article 81 ou 82 du Traité » pour ce qui de certains types d'accords ou de pratiques. Mais ces décisions ne peuvent être prises que dans des « cas exceptionnels et lorsque l'intérêt public communautaire le requiert », et elles visent particulièrement de « nouveaux types d'accords ou de pratiques au sujet desquels la jurisprudence et la pratique administrative existantes ne se sont pas prononcées. » Règlement du Conseil n°1/2003 (16 déc. 2002) (JO L 1, 4.1.2003), ¶ 14.

14. L'UE entend par « ventes actives » le fait d'utiliser des méthodes de commercialisation directe le fait de prospecter des clients individuels à l'intérieur du territoire exclusif ou parmi la clientèle exclusive d'un autre distributeur, par exemple par publipostage ou au moyen de visites, le fait de prospecter une clientèle déterminée ou des clients à l'intérieur d'un territoire donné concédés exclusivement à un autre distributeur. *Lignes directrices en matière de restrictions verticales*, Communication de la Commission 2000/C 291/01 (13 oct. 2000) ¶50.

15. L'affaire est en examen judiciaire, et la décision du Conseil a été suspendue en attendant l'appel.

16. Communiqué n°1997/3 concernant les accords de distribution exclusive, Communiqué n°1997/4 concernant les accords d'achat en exclusivité et Communiqué n°1998/7 concernant les accords de franchise.

17. Une « clause de non-concurrence », telle que définie à l'identique à l'article 3, paragraphe d) du Communiqué de l'Autorité et à l'article 1, paragraphe b) de l'exemption de l'UE, est une disposition contractuelle qui, soit : 1) interdit à l'acquéreur de fabriquer, d'acheter ou de vendre des biens ou des services qui font concurrence aux biens ou aux services impliqués dans l'accord vertical en cause, ou 2) exige de l'acheteur qu'il achète au fournisseur (ou à une source désignée par le fournisseur) plus de 80 % de ses besoins des biens ou des services en cause. Les clauses de la seconde catégorie sont souvent assimilées à des clauses dites « d'exclusivité ».

18. Lors d'une procédure antérieure, survenue en septembre 2001 et concernant cette même clause de non-concurrence, le Conseil de la concurrence a été exceptionnellement amené à annuler une attestation négative. Il avait d'abord accordé cette autorisation pour une clause de non-concurrence à durée indéterminée, mais il a conclu qu'en 2001, la part du marché pertinent détenue par la banque était devenue à ce point importante qu'elle portait indûment atteinte aux perspectives des nouveaux entrants.

19. Le Conseil n'a jamais retiré aucune autre exemption par catégorie à une société. Il n'a jamais non plus retiré d'exemption individuelle précédemment accordée à une firme.

20. Explication du Communiqué sur les exemptions par catégorie sur les accords verticaux (Décision n°03-46/540-M, 30 juin 2003).

21. Les Lignes directrices sur les restrictions verticales de l'Autorité (¶50) définissent les « ventes passives » comme celles qui résultent de demandes non sollicitées sur les territoires exclusifs d'autres distributeurs. Les ventes découlant des publicités générales dans la presse sont réputées passives. L'article 4, paragraphe b) de l'exemption par catégorie applicable aux restrictions verticales de l'Autorité interdit aux fournisseurs de restreindre les ventes passives.

22. Décision n°01-17/150-39 (6 avril 2001), p. 56.

23. Pour ces raisons, les autorités communautaires de la concurrence (comme la plupart des autres) ne poursuivent pas, normalement, les entreprises dotées d'une puissance monopolistique pour avoir facturer des prix « élevés », même si l'article 82, paragraphe a) (contrairement à l'article 6 du texte turc) mentionne expressément le fait de facturer des prix de vente « déloyaux » comme un exemple d'exploitation abusive. L'UE préfère réserver la clause relative aux prix de l'article 82 aux affaires engagées pour prix prédateurs. Voir Faull, Jonathan et Ali Nikpay (1999), *EC Competition Law*, Oxford, §§ 3.295-3.304.

24. Communiqué n°1997/1, Fusions et acquisitions appelant l'autorisation du Conseil de la concurrence (1er janv. 1997).

25. Communiqué sur les fusions, art. 2, paragraphe c).

26. Pour l'analyse de l'UE sur ce point, voir le Règlement 139/2004 (20 janv. 2004), paragraphes 24-26.

27. L'article 6, paragraphe 1), alinéa a) du Communiqué sur les fusions prévoit que le Conseil, au moment d'évaluer les fusions, envisagera « la nécessité de maintenir et de développer une concurrence effective dans le pays en vue … d'une concurrence effective et potentielle entre les entreprises situées dans le pays ou à l'extérieur du pays. »

28 La formulation de l'article 7, qui couvre toute forme d'acquisition par laquelle une entreprise s'assure le contrôle d'une autre, exclut uniquement les acquisitions de parts par héritage.

29. L'Autorité de la privatisation détermine la manière dont il convient de structurer la vente des actifs à privatiser. Le Haut Conseil de la privatisation, organe politique, décide à quel moment il convient d'inclure certains actifs dans le programme de privatisation et donne son accord au soumissionnaire sélectionné.

30. Voir le Communiqué n°1998/5 (18 nov. 1998).

31. Le rôle de commentateur que joue le Conseil au stade initial de la procédure de privatisation est développé plus loin dans le rapport, s'agissant de la question de la promotion de la concurrence.

32. Le Conseil ne s'est pas opposé à la privatisation en bloc de la société dans la mesure où la législation promulguée fin 2003 a mis fin aux restrictions sur les importations de pétrole turc à partir du 1er janvier 2005. Etant donné l'existence de raffineries ayant des capacités importantes dans la région de la mer Méditerranée et de la mer Noire, il aurait été difficile à TÜPRAŞ d'augmenter ses prix.

33. La transaction a cependant été annulée par la suite par le Conseil d'État pour raisons de procédure. L'Autorité de la privatisation se prépare à relancer la procédure.

34. Voir par ex. Commission européenne, Rapport régulier 2004 sur les progrès de la Turquie vers l'adhésion (6 oct. 2004) pp. 93-94.

35. Ce Conseil, présidé par le Sous-secrétaire adjoint de l'Organe central de planification, serait composé du Directeur général aux aides publiques et de représentants du Ministère des finances, des Sous-secrétariats au Trésor et au Commerce extérieur, du Ministère du commerce et de l'industrie et de l'Autorité de la concurrence. Les décisions du Conseil seraient soumises à l'examen du Conseil d'État.

36. Code du commerce, art. 56.

37. Loi n°4077.

38. Le nom de la Direction reflète le fait qu'elle était responsable de l'application du droit de la concurrence avec la formation du Conseil de la concurrence. Mais elle n'a plus aujourd'hui de fonctions d'application des dispositions de la concurrence.

39. Les mandats des membres du Conseil sont décalés par rapport aux mandats des administrations présidentielles et parlementaires. La Turquie élit son président national tous les 7 ans et son Parlement monocaméral tous les 5 ans.

40. On peut relever que la lecture simultanée des articles 43 et 52 de la Loi sur la concurrence peut amener certains à se poser la question de savoir dans quelle mesure le Conseil peut ou non s'écarter des recommandations des experts. En effet, l'article 43 stipule que les enquêtes officielles doivent être menées par un ou plusieurs rapporteurs désignés, membres du personnel, tandis que le second indique que la décision finale du Conseil doit inclure l'avis que les rapporteurs préparent à l'issue de l'enquête officielle.

41. Un universitaire a fait observer que, même si le Conseil semble libre de toute influence politique extérieure, les membres du Conseil peuvent parfois être incités à cultiver les faveurs du gouvernement dans l'espoir d'obtenir une nouvelle nomination. La solution proposée à ce problème consistait à étendre le mandat des membres du Conseil de six à dix ans et d'interdire toute reconduction. Les membres du Conseil ont répondu que la perspective d'une reconduction de mandat ne les séduisait pas au point de fausser leurs décisions dans le cadre des affaires en instance. Certains ont fait observer, cependant, qu'une nomination unique pour un mandat de dix ans était préférable aux dispositions de la loi-cadre proposée sur les organismes autonomes, en vertu de laquelle les membres ne pourraient avoir qu'un seul mandat de six ans.

42. Commission européenne, Rapport régulier 2004 sur les progrès de la Turquie vers l'adhésion (6 oct. 2004), p 93.

43. D'un autre côté, le critère d'octroi d'une attestation négatif est plus strict, puisqu'il suppose que la conduite notifiée ne soit en rien contraire à l'article 4. Par contre, une exemption individuelle traduit le fait que l'on a estimé que, même si la conduite est contraire aux interdictions de l'article 4, les circonstances particulières comportent suffisamment d'avantages compensatoires pour la rendre acceptable.

44. Dans l'hypothèse où les votes ne seraient pas suffisants à la première réunion, la question peut être mise à l'ordre du jour de la réunion suivante, et une décision peut alors être prise à la majorité simple du quorum requis de 8 personnes. En cas de vote ex-aequo, la voix du Président est déterminante (Art. 51.)

45. Pour de telles décisions, le quorum requis est d'au moins un tiers des membres, soit 4 personnes. Ainsi, dans la pratique, ces mesures nécessitent au moins 3 votes positifs (Art. 51).

46 . Deux exemples précédemment décrits dans ce rapport concerne l'affaire d'exclusivité sur les présentoirs de cigarettes et l'affaire TTAŞ/ADSL.

47 L'effet de la disposition serait à peu près équivalent à celui de la disposition relative au règlement à l'amiable de l'article 9 du règlement de l'UE sur la concurrence (n°2003R0001).

48. Sur un point différent, certains praticiens ont exprimé quelques doutes à la volonté de l'Autorité de respecter les règles en matière de secret professionnel entre clients et avocats dans le cadre du processus d'enquête. Au sein de l'UE, la Cour de justice a reconnu que la règle du secret entre l'avocat et son client permet de protéger les communications entre un client et un avocat indépendant. AM&S v. Commission, [1982] ECR 1575, [1982] 2 CMLR 16. L'Autorité déclare qu'elle suit la politique de l'UE et n'exige pas de documents confidentiels, pas plus qu'elle n'utilise comme preuve tout document confidentiel susceptible d'avoir été trouvé.

49. Voir l'article 6 de l'exemption, Communiqué n° 2002/2. On trouve une formule analogue exigeant le recueil du point de vue des parties dans la disposition relative au retrait de l'exemption (Article 7) relative à la recherche-développement, Communiqué n°2003/2, mais pas dans la disposition en matière de retrait (Article 8) de l'exemption relative à la distribution et l'entretien de véhicules automobiles, Communiqué n°1998/3.

50. Voir Gürkaynak, Gönenç, *Shifting the Burden of Proof in Turkish Law on Competition*, Global Concurrence Review 29 (Fév-mars 2002), Londres, Law Business Research Ltd., pour un développement de ce point et d'autres questions connexes.

51. Décision n°00-24/255-138 (27 juin 2000).

52. Lorsqu'une plainte constitutionnelle est présentée au Conseil d'État dans le cadre d'un appel en instance, le Conseil doit d'abord se prononcer sur le bien-fondé de la demande. S'il estime la requête fondée, il doit en référer à la Cour constitutionnelle pour règlement. Si le Conseil estime la réclamation constitutionnelle non fondée, cette décision peut elle-même faire l'objet d'un appel devant le Conseil réuni en assemblée plénière.

53. Décision n°00-26/291-161 (17 juillet 2000).

54. Décision n°04-16/123-26 (24 fév. 2004).

55. La décision du Conseil concernant les céramiques, qui comprend une analyse de précédents au sein de l'UE et des États-Unis avec preuves d'actions concertées, se fonde en particulier sur l'affaire de l'UE *Polypropylene*, citant la Décision de la Commission n°86/398/EEC (JO 1986 L 230/1) et la décision subséquente de la Cour européenne de justice relative à l'appel de l'affaire *Hercules Chemicals NV v. Commission*, [1999] ECR 4235, [1999] CMLR 976.

56. Le jugement du Conseil de la concurrence dans l'affaire de prix prédateurs concernant Coca-Cola (Décision n° 04-07/75-18 du 23 janv.2004), précédemment décrit dans ce rapport, est un exemple de décision fondée sur des analyses économiques et économétriques.

57. Un délai que le personnel de l'Autorité trouve problématique concerne la disposition de l'article 40 exigeant que les enquêtes préliminaires soient terminées au bout de 30 jours (contre 6 mois pour les enquêtes officielles. La difficulté tient au fait que l'ouverture d'une enquête officielle doit être notifiée à l'entreprise concernée, et que le personnel ne peut donc pas procéder à une inspection surprise dans les locaux de la société visée, à moins de le faire dans la courte période prévue pour l'enquête préliminaire. Le projet de modifications élaboré par l'Autorité résoudrait ce problème en éliminant le délai séparé pour les enquêtes préliminaires et en fixant un seul délai requérant la publication de la décision définitive du Conseil dans un délai de 18 mois après l'ouverture d'un dossier.

58. Au cours des années 1999 à 2004, le Conseil a infligé quelques 38 milliards TRL (25 500 USD) d'amendes à des dirigeants au titre de l'article 16 (3).

59. La Loi sur la concurrence ne prévoit pas de mécanisme permettant à un défendeur d'obtenir le réexamen par le Conseil d'une décision définitive défavorable. L'Autorité n'est pas encline à proposer une telle option, dans la mesure où elle pense que des demandes de réexamen seront alors systématiquement déposées, ce qui risque de détourner l'attention du Conseil d'affaires plus importantes.

60. Le titre de cet organe judiciaire (« Danıştay » en turc) est également parfois traduit par « Cour administrative suprême » ou « Conseil suprême. » Il est chargé des affaires relatives aux actes et décisions du gouvernement. Une cour séparée (la Cour d'appel suprême) traite des affaires d'appel en cas de différends entre parties privées.

61. La capacité de demander la révision judiciaire de diverses décisions du Conseil découle des articles 42 et 55 de la Loi sur la concurrence et de l'article 24 de la Loi sur le Conseil d'État. La révision judiciaire n'est possible qu'après règlement final de la procédure de l'Autorité. Les parties ne peuvent pas obtenir de révision judiciaire provisoire avant la procédure pour entendre (par exemple) les arguments en vertu duquel le défendeur n'est pas une « entreprise » au sens de l'article 3 et, de ce fait, ne relève pas de la compétence de l'Autorité ou estime qu'une demande d'informations au titre de l'article 14 est trop vaste ou représente trop de travail.

62. Loi n°5183 (2 juin 2004), art. 34, paragraphe C) (portant création de la 13e Division).

63 Quoique 136 décisions du Conseil aient fait l'objet d'un appel, le tableau montre que 329 procédures d'appels ont été lancées. La différence résulte de ce que certaines décisions du Conseil concernaient de nombreuses parties, chacune d'entre elles introduisant un recours séparé.

64. Loi n°5234 (21 sept. 2004). La modification de l'article ne s'applique pas rétrospectivement aux appels en instance, mais uniquement aux affaires où la décision motivée du Conseil a été rendue après la date effective de la modification.

65. Dans la loi actuelle, si la perception de l'amende est reportée et si la partie appelante est finalement déboutée, celle n'a pas à régler d'intérêts pour la période de l'appel. Le projet de loi sur les organes autonomes inclut une disposition prévoyant cependant le paiement des intérêts échus au cours de cette période.

66. Avis relatifs aux privatisations de Turk Telekom et aux actifs de TEKEL dans le domaine du tabac.

67. Un problème distinct lié à des situations telles que celles que l'on a connues dans l'affaire du regroupement de transporteurs maritimes découle de l'obligation de notification prévue à l'article 10 de la Loi sur la concurrence. Doit impérativement être notifiée, sous peine d'amende, toute pratique contraire à l'article 4 qui n'est pas couverte par une exemption par catégorie. Dans l'affaire du regroupement de transporteurs maritimes, le Conseil a finalement décidé de ne pas poursuivre sur ce point, même si aucune notification n'avait été déposée.

68. Dans la mesure où l'affaire faisait intervenir un différend entre deux parties privées, la décision a été prise par une chambre de la Cour d'appel suprême, et pas par le Conseil d'État.

69. Bien entendu, l'UE constitue le principal centre d'intérêt de l'Autorité s'agissant de coopération en matière d'application de la loi. En décembre 2004, toutefois, l'Autorité a envoyé aux États-Unis une délégation d'experts de la concurrence assister participer à des réunions avec la Division Antitrust du Ministère américain de la justice et la FTC, avec lesquels elle envisage à présent de conclure des accords de coopération.

70. Une fois que la Turquie aura mis en place un programme de contrôle des aides publiques et que des règlements d'application des dispositions de l'Union douanière auront été adoptées, l'Autorité compte engager des consultations avec la Direction générale de la concurrence sur toute une série de sujets au-delà de la coopération dans les enquêtes en matière d'application de la loi. L'Autorité espère en particulier résoudre les problèmes relatifs au degré d'harmonisation nécessaire entre le régime juridique en vigueur en matière de concurrence en Turquie et celui de l'UE.

71. Loi sur la prévention de la concurrence déloyale dans les importations (Loi n°3577) et Règlements sur la prévention de la concurrence déloyale dans les importations.

72. L'une caractéristique de la loi-cadre proposée par le gouvernement sur les organes autonomes concerne une disposition limitant le nombre de personnels administratifs à 30 % des cadres.

73. De même, en 2003, le Conseil s'est déclaré compétent pour enquêter sur une plainte d'exploitation abusive de position dominante contre TCDD, la société publique de chemins de fer détenue par le Ministère des transports. La plainte, qui concernait une discrimination présumée de TCDD à l'encontre de sociétés privées de transport de marchandises voulant utiliser des wagons importés, a finalement été rejetée au fond. Mais le Conseil s'est déclaré compétent dans la mesure où les décisions de TCDD dans des affaires comme celle de l'utilisation de wagons importés avaient été prises en toute indépendance et non sur l'ordre du Ministère des transports.

74. Voir *Altair Chimica SpA v ENEL Distribuzione SpA*., [2003] ECR 8875. Une analyse détaillée des jugements du Conseil sur cette question figure dans İ. Selçuk, *State Monopolies and Exclusive Rights in Turkish Competition Law* (oct. 2004) (texte présenté au Colloque sur les thèmes d'actualité du droit de la concurrence à la lumière des relations UE-Turquie (Istanbul, 13-17 octobre 2004).

75. Cette recommandation reposait sur le fait qu'aucune disposition en droit turc n'empêche les entreprises publiques de se livrer à des pratiques anticoncurrentielles ordonnées d'une manière ou d'une autre par l'État (et de ce fait, échappant à la compétence de l'Autorité). En fait, ainsi que le faisait observer le Rapport 2002 (p. 22), la loi turque comporte un certain nombre de dispositions qui exacerbent les distorsions sur le marché issues des transactions commerciales des entreprises publiques, comme les clauses prévoyant que leur déficit sera pris en charge si elles ne couvrent pas leurs coûts (Décret n° 233, Art. 2).

76. Voir, par ex., le Rapport 2004 page 96 : « D'importants efforts d'alignement s'imposent en ce qui concerne l'aménagement des monopoles d'État et les sociétés bénéficiant de droits spéciaux ou exclusifs.».

77. Il est intéressant de noter que, suite à l'appel interjeté contre la décision du Conseil au sujet de l'affaire BELKO, le Conseil d'État a exercé son propre droit d'examiner l'applicabilité de l'article 86 de l'UE. Le Conseil a conclu que, même si BELKO en tant que fournisseur monopolistique de charbon de chauffage « devait assurer l'exploitation de services d'intérêt économique général » au sens de l'article 86, paragraphe 2), l'application de la Loi sur la concurrence dans l'affaire en cause ne pouvait pas en aucun cas empêcher BELKO de s'acquitter de la mission lui ayant été assignée. Conseil d'État (10). Dairesi E. 2001/4817, K. 2003/4770 (5 déc. 2003).

78. La Constitution indique que les organismes professionnels publics doivent « répondre aux besoins communs des membres d'une profession donnée, faciliter leurs activités professionnelles, assurer le développement de la profession dans le respect de l'intérêt général [et] sauvegarder la discipline et la déontologie professionnelles afin d'assurer l'intégrité et le confiance dans les relations entre ses membres et avec le public. » (Art. 135, para.1.)

79. Le Rapport 2002 indiquait (p. 30) que le rôle de suivi de l'Autorité était complété dans une certaine mesure par une surveillance des effets concurrentiels des projets de réglementation au niveau du Ministère, citant l'exemple d'un projet de loi préparé par la Direction des petites et moyennes entreprises du Ministère du commerce et de l'industrie. Ce projet de loi visait à protéger les petits détaillants par une réglementation de l'implantation des grandes surfaces. L'Autorité comme le Directeur général du Ministère ont fait ressortir que la proposition, si elle était mise en œuvre, priverait les consommateurs des bienfaits des supermarchés. L'on ne dispose d'aucun autre exemple récent de participation du Ministère du commerce et de l'industrie, étant donné qu'aucune proposition législative récente issue de ce Ministère n'a comporté de dispositions anticoncurrentielles.

80. Le Communiqué de 1998 a été publié par la Direction générale du personnel et des principes du Premier ministre et réédité en 2001.

81. L'avis rendu par le Conseil dans l'affaire TOBB mentionnait le fait que les ordres de professions libérales fixent des prix maximums. Le Conseil a recommandé l'ajout d'une disposition à la législation relative à la

TOBB qui interdirait aux négociants ou aux commerçants d'adhérer à des ordres de professions libérales. Le Conseil a fait observer que la mise en oeuvre par les négociants ou les commerçants de barèmes de prix maximums applicables aux professions libérales non seulement faussait la concurrence entre les négociants participants, mais aussi « compliquait la survie et la subsistance des professions libérales en question. » Le Conseil a ajouté, que par comparaison aux négociants et aux commerçants, les professions libérales sont désavantagées « à de nombreux égards, notamment pour ce qui est de l'échelle de production et de la structure de coûts. »

82. Toujours au chapitre des commentaires relatifs aux textes législatifs, mentionnons la demande déposée par l'Union turque des Banques, qui s'est plainte de certaines lois en vigueur. Le Conseil a conseillé au gouvernement de retirer les dispositions contenues dans divers textes budgétaires exigeant des institutions publiques qu'elles tiennent leur compte dans un établissement bancaire publique et non dans une banque privée. La législation bancaire en 1999 ayant officiellement éliminé les distinctions entre les deux types d'institutions financières, il n'y avait plus de raison de priver les organismes publics les bienfaits de la concurrence dans le domaine des services financiers. La recommandation du Conseil est en cours d'examen.

83. Cette étude a été mentionnée dans le Rapport 2002. (p. 28)

84. Cette étude est également mentionnée dans le Rapport 2002. (p. 25).

85. En 2003, l'Autorité a étudié une autre affaire concernant TEKEL, cette fois pour la privatisation de la division de TEKEL s'occupant de saliculture. Les actifs à vendre étaient constitués par quatre marais salants, trois situés à proximité du Lac salé de Turquie et le quatrième (d'eau salée) situé à İzmir. A eux quatre, ces sites couvrent la totalité des besoins en sel de la Turquie. Le Conseil a recommandé que les trois marais situés près du Lac salé soient vendus à trois acheteurs différents, et estimé que le marais d'Izmir pourrait être soit vendu séparément, soit cédé à l'un des trois acquéreurs de marais du Lac salé.

86. Le protocole n'a pas cependant donné suite à la proposition faite dans le Rapport 2002 de l'OCDE selon laquelle (p. 26-27) les deux organismes devraient mettre en place « un cadre de travail commun pour déterminer si une entreprise a une position dominante, détermination qui dans ce secteur est réalisée par l'organisme de régulation des télécommunication. »

87. L'affaire, décrite précédemment dans ce rapport, avait été engagée contre ÇEAŞ, une entreprise détenant une concession monopolistique pour la distribution et le transport d'électricité dans l'une des zones de distribution désignées de Turquie. Le Conseil a jugé que la ÇEAŞ avait fait une exploitation abusive de sa position dominante en refuser de fournir des interconnexions aux producteurs indépendants d'électricité.

88. L'adresse est la suivante www.rekabet.gov.tr Le site comprend également une version anglaise qui inclut notamment des traductions de certaines décisions et opinions du Conseil.

89. La TOBB a été fondée en vertu de la loi pour jouer le rôle d'association nationale des entreprises de Turquie. Toutes les entreprises doivent en faire partie, et l'Association compte actuellement quelques 1,2 million d'entreprises membres.

90. Article 39(2)(a).

91. La Turquie est déjà tenue par l'article 41 de l'Accord d'union douanière de « respecter » les principes de l'article 86,, notamment du droit dérivé et de la jurisprudence développée sur cette base, s'agissant de mesures d'un État qui faussent la concurrence entre la Turquie et les États membres de l'UE.

92. L'article 21(4) du Règlement de l'UE sur les fusions (n°139/2004) envisage explicitement que les États membres puissent entreprendre des examens de fusions pour des motifs prudentiels.

93. La mise en évidence des meilleures techniques d'examen des marchés oligopolistiques est aussi un thème sur lequel l'Autorité pourrait utilement solliciter des avis techniques auprès d'autres organismes chargés d'appliquer le droit de la concurrence.

94. Le projet de loi cadre du gouvernement sur l'autonomie des autorités comporte une disposition qui réduirait le nombre de membres du Conseil de 11 à 7. Si cette disposition était adoptée, il y aurait encore davantage de raisons de supprimer la participation des membres du Conseil aux enquêtes de l'autorité, dans la mesure où le nombre des membres disponibles serait insuffisant pour le nombre d'enquêtes en cours.