

## **On the institutional setting of ex-post regulation in regulated industries**

### **1. Introduction**

In many countries there has been a trend to transform highly regulated markets to competitive markets. Most economists agree that in many cases the introduction of competition on markets previously dominated by state monopolies or vertically integrated firms cannot be achieved simply by abolishing the old anti-competitive regulations. Often the pure market forces would not lead to the development of competition even if the anti-trust laws were strictly applied. Therefore, the process of liberalisation of these sectors should be accompanied by a new kind of regulation policy, not aiming at preventing competition, but at making competition possible and fostering it.

The competition-orientated economic regulation<sup>1</sup> may include obligations for the incumbent firm to give access to certain facilities to new entrants on the market at prices fixed or at least permitted by a regulator. While competition-orientated regulation policy and competition policy share the same objective, namely fostering competition, the methods of both fields of policy differ considerably. The usual goal of competition policy is to prevent anti-competitive behaviour and concentrations processes which are expected to reduce competition. With the exception of merger control the instruments of competition policy are applied ex post. They are used in a manner to forbid certain economic activities (including doing mergers and acquisitions which would lead to a dominant position or strengthen an already existing dominant position).

On the other hand, the instruments of regulation policy are applied ex ante. Usually, they prescribe the regulated firms to act in a specified manner or in other words: they fix some of the variables or the way of setting the variables indicating market performance, like prices, quantities etc.

Of course, competition policy is also a kind of regulatory policy and is sometimes called ex-post regulation policy. For the sake of clarity, in this paper the term “regulation” is used in the sense of ex-ante regulation only.

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<sup>1</sup> Aspects of technical regulations will not be discussed in this paper.

In a market economy market performance is usually the outcome of market forces. In such a system the replacement of the market forces by settings of a regulator<sup>2</sup> can be justified only in certain circumstances and where other policy instruments would be ineffective, e.g. in addressing particular market failures or in achieving specified policy objectives. In order to prevent any misuse of regulation policy there is general agreement that regulators should be politically independent. This requirement is fulfilled when there are independent regulatory agencies separate from the government. But also autonomous ministerial agencies linked to a ministry may be able to act with a substantial degree of independence (OECD/IEA, 2001, p. 14.) However, a minister acting directly or indirectly as a regulator may use his regulatory power to achieve non-competition goals, e.g. reducing regulated postages during an election campaign.

In respect of the regulator's sectoral scope of authority there are three main ways (Estache, de Rus, 2000, p. 45):

An *industry-specific* approach leads to separate regulators for all regulated industries, e.g. one for electricity, one for gas, one for water, one for rail and so on.

In a *sector-specific* approach, a regulatory agency deals with a group of related industries, e.g. an energy regulator for electricity and gas.

In a *multi-sectoral* approach there is a single regulatory agency for all or most regulated sectors.

The institutional designs differ with regard to the sectoral breadth of authority; which of them is optimal depends on various determinants. Industry- or sector-specific regulators might be superior when regulations in different sectors or industries differ considerably. Main advantages of a single regulation agency are seen in savings from "economies of scope" and in the avoidance of regulatory inconsistencies across industries (Hewitt, 1999, pp. 196 ff.).

However, in the view of most market economists, even a well designed regulation is inferior to a functioning market. Not least because of regulatory failure, regulation should be limited to specific situations. Therefore, even in regulated industries, not all economic activities should be subject to ex-ante regulations. But of course the rules of the competition law(s) are applicable to those activities, and – depending on the legal system – even to activities permitted by the regulation agency.

So, some industries are subject as well to regulation rules as to general competition law and perhaps to sectoral competition law. Here the question arises which authority should be in charge of competition law enforcement in regulated industries. As there is interference

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<sup>2</sup> Regulator, regulatory authority, and regulatory agency are used as synonyms. For the institutional design of regulatory agencies see OECD/IEA (2001), p. 23.

between competition and regulation policy (or in other words: ex-post and ex-ante regulation) the conduct of competition policy in a certain industry may influence the conduct and even the need of (ex-ante) regulations in this industry and vice versa. The assignment of authority in the field of competition policy is therefore a very important political decision.

## **2. Assignment of authorities in the field of competition policy**

For the sake of simplicity, let us first assume that there are one or several regulatory agencies separate from the general competition authority. The second assumption is that there is only a general competition law; sector-specific competition laws do not exist. There are at least five major ways of assigning the power to apply the competition law.

(1) Regulatory and competition policy competencies<sup>3</sup> are combined within the regulatory agency giving this agency the exclusive right to apply independently the general competition law to the firms in industry regulated by the agency.

(2) As in (1) only the regulatory agency can apply the competition law, but there are rules concerning the co-operation with the competition authority. Different degrees of co-ordination exist: The influence of the competition agency is relatively low, when it has only the right to be informed before the regulatory agency takes action based on competition law. The highest degree of influence is the right of the competition agency to veto against decisions of the regulatory agency. But even then, only the regulatory agency can initiate actions based on competition law.

(3) There is a concurrent authority to apply the competition law. So, both the regulatory agency and the competition agency can act independently.

(4) In opposition to (2), the competency of applying competition law lies with the competition agency, but in the case of regulated industries co-operation with the appropriate regulatory agency is compulsory. Here, competencies in regulation and competition policies are institutionally separated while a certain degree of formal co-ordination exists.

(5) The strictest form of separating regulatory and competition authorities is to give the competition agency the exclusive right to apply competition law absolutely independently to all industries including the regulated ones.

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<sup>3</sup> In this paper competency in competition policy and regulation policy means the power to apply the competition law resp. the laws concerning economic regulations (regulation law). Usually, both types of law give considerable discretionary powers to the agency applying the law. Competency in the sense of making laws is not discussed, although the agencies in charge of conducting policies might play an important role in designing the legal framework. Of course, courts have also important competencies concerning competition policy, but they are omitted in this paper.

In practice the situation might be more complex: The kind of assignment may not only differ from industry to industry. It might be different also within one industry depending on the kind of the anti-competitive activity concerned. Generally, regulatory agencies are more involved in mergers and acquisitions than in the application of rules concerning anti-competitive behaviour of firms.<sup>4</sup> The official institutional design may lie between one of the five “pure” ways of assignment described above. And the institutional design practised in reality may be different from the one laid down in laws. This might be especially true in the field of cooperation between the regulatory and the competition agency.

There is a more general aspect one has to deal with when the assignment of competencies is discussed: Can general competition law be applied to issues laid down in a (specific) regulation law or not? Or in other words: Does the application of a (specific) regulation law exclude the application of the general competition law or are both laws equally applicable?<sup>5</sup> If the latter is the case then all regulatory decisions can be supervised by the agency in charge of competition policy.

### **3. Combining regulation and competition policy enforcement – pros and cons**

#### **3.1. Pros**

One possible advantage of combining regulation and competition policy enforcement within one agency may be the avoidance of inconsistent decisions. As both fields of policy deal with promoting and protecting competition – although those sub-goals have different weights in both policies – a decision taken on the base of the appropriate regulation law might counteract decisions based on competition law and vice versa. These inconsistent decisions can be avoided in cases where a single agency is in charge of applying the relevant regulation laws and general competition law.

Inconsistencies of regulation and competition law enforced by two different agencies may cause severe problems for the regulated firms. The same or similar activities which are permitted by the regulator under regulation law may be forbidden by the competition agency under competition law. But even the simple fact that regulators and the competition agency have concurrent competencies for the same activities may lead to higher costs for the firms.

It can be assumed that every regulator is reluctant to leave a case to the competition agency when he is empowered to deal with that case under the relevant regulation law. If he has the

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<sup>4</sup> However, there are important deviations from this rule.

<sup>5</sup> In Germany, this question is discussed especially with regard to the telecommunications sector; see Möschel (2001).

authority to apply the competition law equally, he will probably choose the most appropriate regime (regulation law or competition law) to solve the problem (Hewitt, 1999, p. 185). If he does not have these concurrent powers he must use regulation law, even in cases where the application of competition law would be sufficient. The result is that detailed rules (based on regulation law) have to be observed by the regulated firms with negative consequences for competition.<sup>6</sup> Regulatory interventions may also affect investment and hence economic growth in the long run.<sup>7</sup>

This argument is based on a static point of view. It can be modified slightly for a dynamic point of view. Many regulations are presumed to be temporary. They are expected to be applied only until a functioning competition has developed. This process might be speeded up by technical progress, international integration of markets and so on, but also by the conduct of regulation policy. In order to ensure that regulations remain only temporary many laws contain obligations for regular assessments concerning the need for continued regulation and in some cases the need for the regulatory agency itself (Haffner, 2000, p. 212).

Such a regulation policy cannot be evaluated continuously, but in intervals of e.g. three to four years. Making regulation superfluous as soon as possible is not in the interest of the regulator when the abolishment of regulation is connected with the abolishment of the regulatory agency. Therefore, the regulator might be inclined to retain more regulations than necessary in order to demonstrate the need of regulations and the need for the regulatory agency.

Empowering the regulatory agency with competition law enforcement in the relevant industry may act as an incentive to reduce regulations sooner and faster, for under this institutional design the agency does not lose “responsibilities”, as long as there are reasons for maintaining the agency. Only the instruments adopted have to be changed.

Another advantage of combined competencies is the possibility of synergies. Within an agency, information gathered for regulatory decisions are available for competition decisions, while the exchange of information between different agencies might be hindered. There might only be a few people having in-depth knowledge of a certain industry. Then, scarce human resources can be used in a more efficient manner when regulation and competition law enforcement is combined. Other possibilities of saving costs may also exist.

### **3.2. Cons**

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<sup>6</sup> See Boyfield (2000), p. 38 for examples of over-detailed regulations.

<sup>7</sup> See Nicoletti (2001), pp. 22 ff. for network industries.

However, combining regulatory and competition law competencies shows some serious drawbacks.

The conduct of regulation policy might influence the conduct of competition policy concerning the non-regulated activities of the regulated companies as well. For example, a regulator being used to set prices according a certain rule when applying the relevant regulation law might ask for detailed commitments before giving his consent to a merger of two firms.<sup>8</sup> This can lead to a permanent supervision of the behaviour of the merged firms which is not intended by competition law. The differences in the conduct of regulation and competition policy then diminish by implicitly expanding regulations to the non-regulated areas of economic activities. But here, the de facto ex-ante regulation (instead of a pure ex post regulation) might lead to a reduction in competition.

This “bias” towards regulatory measures may be reinforced by a least two factors:

(1) Regulatory agencies do not exclusively pursue the goal of “protecting and fostering competition”, but are assigned a wider set of policy objectives. Being in charge of competition law enforcement in the relevant industry the agency is enabled to use the instruments of competition policy for achieving all of their objectives. This might reduce competition, e.g. when the regulator grants an exemption to the general prohibition of cartels in order to achieve his objectives.

(2) Due to the – compared with the competition agency – wider range of objectives, including those with considerable distributional importance, that regulatory agencies have to pursue, they are often less politically independent than the competition agency. And even if the political independence is guaranteed by law, it may be difficult for newly set-up agencies to make use of it. A lack of de-facto political independence allows politicians to achieve their goals even through competition law rules applied by the regulatory agency because a potential counteracting agency enforcing the competition law is then missing.

Compared with the competition agency, a regulatory agency may show a less strict or even lax attitude towards actual or potential violations of anti-trust law. This can be explained by the fact that the regulatory agency might resort to the instruments of regulation law in cases where the anti-competitive behaviour leads to unwanted market performance. The result of the inappropriate application of competition law is more regulation than necessary. By doing so, the regulation agency can demonstrate the supposedly still existing need for regulation and for its existence.

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<sup>8</sup> For other examples see Hewitt (1999), p. 184.

Therefore, there are reasons for applying sunset legislation with respect to temporary regulation. But combining regulation and competition policy enforcement might make it more difficult to put through sunset legislation as competition law enforcement is a permanent task to be pursued also after all regulations of an industry have been abolished. It is hardly acceptable that a separate “regulatory” agency should exist any longer in order to apply general competition rules to an industry when no specific ex-ante regulations are applicable any more. As one can assume the employees of the regulatory agency to be reluctant to give up their jobs, especially when some of their tasks, namely applying the competition law, still exist, they will continue to regulate ex ante as long as possible. An agency which has only explicitly temporary regulatory tasks can be dissolved with less resistance.

In this way of looking at the assignment, combining regulation policy and competition policy within the regulatory agency will lead to a rather long life of the latter.

#### **4. Separating regulation and competition law enforcement**

A division of tasks between the regulatory agencies and the competition agency giving the latter the exclusive power to enforce competition law might be advantageous for several reasons (Duijm, 2000, pp. 16 ff.):

(1) The centralised design of competition policy conduct will ensure that competition law rules are equally adopted throughout the whole economy, in regulated and in non-regulated industries. This is not guaranteed when regulatory agencies can apply competition law independently. If there are sector- or industry-specific agencies, the application of competition law rules can even differ from sector to sector, from industry to industry, causing distortions in competition. Such distortions can be avoided by entitling a single agency to enforce competition law.

(2) The competition policy is likely to be less interventionist when it is conducted by the general competition agency rather than by regulatory agencies. Instead of monitoring firms continuously like regulators do, the competition agency usually begins an investigation after having received a complaint or other information indicating a potential violation of the competition law. It aims at deterring firms from restricting competition rather than setting the outcome of the market process more or less directly.

(3) A third advantage can be seen in the role of the competition agency as a counteracting institution. There might be situations where the competition agency – applying competition law – can reduce anti-competitive effects caused by regulatory decisions.

## **5. Co-operation and co-ordination between the competition agency and the regulatory agencies**

If the enforcement of competition law and the enforcement of regulation laws are separated, co-operation and co-ordination of the agencies involved is absolutely necessary in order to avoid inconsistencies. A proper co-operation makes it easier for all agencies responsible for an industry or a sector to fulfil their tasks. But even if a regulator has combined competencies for a regulated industry or sector, co-operation with the competition agency is necessary to avoid inter-industry or inter-sector distortions of competition resulting from considerable differences in applying competition law.

Co-operation and co-ordination may include the exchange of information and the common definition of subjects relevant for conducting competition policy, like the definition of markets and of market power. A far-reaching kind of co-operation is the obligation for the regulatory agencies to consult with the competition agency when they want to apply competition law and vice versa the obligation for the competition agency to consult with the appropriate regulatory agency before taking action against firms in a regulated industry or sector.

## **6. The industry coverage of regulators**

Whether and to what extent the above-mentioned arguments and other arguments in favour or against combining resp. separating regulation law and competition law enforcement are valid depends on many factors, which cannot be analysed here, except for one. One important factor is the institutional design of regulatory agencies concerning their sector responsibilities, whether there are (many) industry-specific regulators or (a few) sector-specific regulators or one general regulator. Generally, the narrower the industry coverage of a regulatory agency the higher the probability that the regulator is captured by the regulated firms. So, an industry-specific regulator is more likely to be captured by the firms than a sector-specific one, for in the latter case there are probably different interests among the regulated industries, which cannot be taken into account by one regulator conducting a unique regulation policy in all industries he is responsible for. Another reason for industry-specific regulators to be more prone to be captured is the fact that persons preparing and taking regulatory decisions will be well acquainted with the regulated firms after some time because within the agency there is no possibility for job rotation. Job rotation would effect a regular change of the industry an employee of a regulator deals with. When the captured regulator is in charge of the enforcement of regulation and competition law he will probably conduct both, regulation and

competition policy, more in the interest of some or all regulated firms than in the interest of the public. Multi-sectoral or general regulators are expected to be the least capture-prone agencies for they are confronted with a wide range of divergent interests. From this point of view, giving the general regulator the competency of competition law enforcement seems to be the least harmful alternative with regard to a “proper” competition policy.

One has to ask whether this institutional design is really ideal for preserving a proper competition policy.

First of all: Does it make sense to create one single regulatory agency in order to enforce different regulation laws? Should not the – in most cases – already existing competition agency be assigned with conducting competition *and* regulation policy? Such an approach is followed for example in Australia, where the Australian Competition and Consumer Commission (ACCC) is the competition authority and a multi-sector regulator in charge of inter alia electricity, gas, telecommunication and airports on the national level (OECD/IEA, 2001, pp. 40 ff.).

Here, the question of assignment of competition policy competencies, the question of combining them with or separating them from regulatory competencies, is easily answered for there are no alternative agencies. This kind of approach had been favoured by the German Monopolies Commission until recently. It opposed the creation of a Regulatory Authority for Telecommunications and Posts and wanted the regulatory competencies in these industries to be assigned to the Federal Cartel Office. According to the last biennial report – published some weeks ago – the Monopolies Commission has changed its opinion. Due to the fact that regulatory measures – taken to create and promote competition – seem to be necessary for a longer time than originally expected, the Commission pledges for a separation of regulation and competition policies. It fears that the conduct of competition policy will be negatively affected if the Federal Cartel Office would gain regulatory competencies e.g. in the field of the gas market (Monopolkommission, 2002, p. 50\*). To avoid a fragmentation of regulation policy it proposes the creation of a general regulation agency for all network infrastructure industries which should be in charge of the economic regulation, whereas technical regulations are assigned to sector-specific agencies.

But then the question of assignment of competition policy competencies still remains: Should the general competition agency (in Germany: Federal Cartel Office) retain competencies in applying competition Law (in Germany: Act Against Restraints of Competition) to all industries or only to the non-regulated industries while the single regulation agency is in charge of applying it to the regulated industries?

There is no reason to expect different competition law enforcements across the regulated industries when a single regulatory agency is empowered to apply this law. This is in contrast to a set of sector- or industry-specific regulators where even closely related industries might be treated unequally. But one problem remains even if there is only one regulator: He might apply competition law towards regulated industries in a different way than the competition agency does towards non-regulated industries. If the regulator applies competition law in a regulatory manner, his competency in competition policy has more and farther-reaching effects on competition compared to – small – industry-specific regulators doing so. As even a politically independent central bank cannot ignore fiscal policy in designing the monetary policy, the general competition agency cannot ignore the competition law enforcement in the regulated industries. Otherwise, serious distortions of the level playing field throughout the economy may arise. The same number of regulated industries assumed, the balance of powers in applying competition law is more affected to the disadvantage of the competition agency when there is only one general regulator than when there are many – smaller – regulators with competition policy competencies. This change in the balance of powers will remain for a long time, although the general regulator will probably be less reluctant to end regulation (and at the same time his competition policy competencies) in certain industries.

Another argument put forward in favour of combining regulation and competition law enforcement is less valid in the case of a general regulator: specific knowledge of a certain industry. This special knowledge can be found in industry-specific agencies, especially when they are also in charge of technical regulations. However, it is doubtful whether there are industries with exceptional production processes or other peculiarities justifying a special competition policy (Behrends, 2001, p. 84 f.). But even when one ignores this objection, there are still some disadvantages in empowering industry-specific regulators with competencies in competition policy:

(1) The narrower the industry coverage of an agency, the more non-competition goals are assigned to this agency, which it will seek to achieve not only by regulatory measures but also by competition law enforcement.

(2) There is empirical evidence that especially industry-specific agencies are captured by the interests of the regulated firms when acting or co-acting as a competition authority. Until the 80s, the German Federal Cartel Office (FCO) had to seek consent with the Federal Banking Supervisory Office before taking actions against anti-competitive behaviour of banks. More than once, consent was not found and the FCO could not act (Duijm, 2000, p. 7). In the US,

the Surface Transportation Board approved a merger of railroad companies despite a protest of the Antitrust Division of the Department of Justice.<sup>9</sup>

It can be expected that industry-specific agencies are very reluctant in phasing out a special regulatory regime because this phasing out would lead to the end of their existence. The reluctance tends to prolong the separated enforcement of competition law in this industry.

Furthermore, the number of decisions based on competition law made by one industry-specific agency is probably relatively small. This small number creates uncertainty for the firms involved in competition law cases. And there is high probability that overlapping competencies exist, resulting from economic activities of firms operating in different industries, for example in the electricity and in the gas market. Firms operating in both markets are in the interest of customers who want a “one-stop energy shopping” (Hewitt, 1999, p. 197). Technical progress may lead to other converging markets, e.g. the communication and the broadcasting market. When there are different agencies for both markets uncertainty concerning the responsibility arises. If two or more agencies have equal competencies, probably a forum-shopping arises.

So, in the case of industry-specific regulators with competencies in competition policy it is not the individual power of the regulatory agencies which might give rise to concern for the general competition agency, but the potential differences and fragmentation in competition law enforcement.

Therefore, in the case of a general regulator as well in the case of industry-specific regulators there are – albeit different – reasons to give the general competition agency some power to control the actions of the regulators concerning the competition law enforcement. E.g. the regulatory agency could be obliged to request the opinion of the competition agency when it wants to apply competition law. A publication of the opinion forces the regulator to explain his competitive decisions if not in line with the policy of the competition agency.<sup>10</sup>

There is little need for the general competition agency to supervise or control competition law enforcement by regulators when the regulatory agencies are organized on a sectoral level. On the one hand, the individual coverage of industries of a certain agency is small enough not to impede the general competition agency in conducting competition policy as intended and not to distort the economy-wide level playing field seriously. On the other hand, the coverage of industries is large enough to resist attempts of capture from single industries and to facilitate consistent conduct of competition policy across closely related industries of the sector,

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<sup>9</sup> See OECD (1999), pp. 190 ff. for this example and other cases.

<sup>10</sup> This kind of co-operation is adopted between the Italian Central Bank as the regulator of the banks and the Italian Anti-trust Authority; see Wise (2001), p. 100.

provided that *all* industries of the relevant sector are under the regulatory and competitive responsibility of the appropriate agency. The last-mentioned condition is a serious drawback of this institutional design: The agency would have to be empowered to apply competition law to certain industries only because other industries, belonging to the same sector, are regulated! As in many countries not all industries of a sector are regulated (e.g. often the oil market in the energy sector is not regulated) this would reduce the competencies of the general competition agency, when a regulatory agency is created for the network-based gas and electricity market and effect a change of the responsible competitive agency for some industries, which might lead to a change in competition policy in these industries. Therefore, this institutional design is a viable solution only for sectors, where all or most industries are regulated.

### **7. Specific Competition Laws and Rules**

Up to now, the analysis was made under the assumption that no industry- or sector-specific competition laws or rules exist. However, industry- or sector-specific laws often do not only contain regulatory rules, but also competitive rules.<sup>11</sup> These specific competition rules might be either equally applicable with the general competition law or might overrule the latter. They might be enforced by the general competition agency or by the regulator(s). When the specific competition rules are enforced by the general competition agency, the results discussed above have not to be altered significantly.

When they are applied independently by the regulatory agency, most of the problems concerning competition law enforcement by regulators are reinforced: An even greater resistance of regulators against phasing out can be expected, as there are special competition policy (permanent) tasks fulfilled exclusively by them; overlapping applicability of several specific competition rules; divergent application of similar rules, causing uncertainties; and so on.

Some of these problems can be overcome by concurrent competencies of the general competition agency – applying general competition law – and the regulators – enforcing specific competition rules. But this will probably lead to forum shopping if it is not ensured that the strictest policy – in the sense of the most pro-competitive policy – is put through. But uncertainties remain: Will a permission of one authority be repealed by another authority? Therefore, also specific competition rules - enforced by regulators - call for co-operation between them and the general competition agency.

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<sup>11</sup> See Koenig and Kühling (2001) for the German electricity and railroad industries.

If specific competition rules or laws exclude the applicability of the general competition law, the need for co-operation also exists. The objectives of specific competition rules and the objectives of general competition law are essentially the same. Instruments, definitions and so on should be used in a similar manner to prevent competitive distortions. There is no place for an uncontrolled competition of competition policies within one economy, although some procedural rules might differ according to different market structures, e.g. the existence of market entry barriers.

### **8. Some empirical evidence**

Many countries are undertaking regulatory reforms, some of them like Ireland in a public consultation process (Department of the Taoiseach, 2002). One of the key problems in all the countries is the relationship between regulation and competition and the relationship between competition and regulatory authorities. According to the OECD, there are an increasing number of combined regulation/competition laws being tried in the OECD member states, most of them assigning sector specific regulators with regulatory and competition policy tasks (Hewitt, 1999, p. 186).

Such developments could be observed in Germany, where in the telecommunications industry certain competencies concerning competition policy were transferred from the Federal Cartel Office to the Regulatory Authority for Telecommunications and Posts. In the UK, the Office of Gas and Electricity Regulation (OFGEM) was established in 1999. Thus, a sector regulator was created in place of the former industry-specific regulatory agencies for gas supply and electricity regulation. OFGEM has concurrent power in applying the competition act in cases concerning anti-competitive behaviour, but not with regard to mergers (OECD/IEA, 2001, pp. 86 ff.). In Germany, the government gave up plans to extend the federal railroad authority with primary technical regulatory functions into an economic regulator with considerable competencies in the area of competition policy. Nevertheless, the authority is now empowered to investigate *ex officio* in cases of alleged discriminatory access to the railroad networks.

However, other developments can be observed as well. In Italy, up to 1997 the Broadcasting and Publishing Authority was in charge of enforcing general competition law in these industries. This assignment was repealed in 1997 and the general competition authority has assumed responsibility for these industries. A new Communication Regulatory Authority was established, which has no competencies for competition law enforcement; it can express its opinion on competition policy issues (Wise, 2001, p. 101). This can be regarded as a

separation of competencies and as a division of labour according to the supposed relative advantages of competition and regulatory agencies.

In the Netherlands, the regulator for the electricity market was created as a chamber of the general competition agency, but for the telecommunication sector an independent regulatory agency was established, which has to co-operate closely with the general competition authority. This can be seen as an institutional design where the regulators are linked to the competition agency (OECD, 1999, pp. 224 and 232).

It is interesting that in the UK the Financial Services Authority has no important competition policy competencies – contrary to the other sectoral regulators (Hewitt, 2000, p. 38). The same is true for Germany.

So, rather divergent developments in assigning powers concerning competition policy can be observed.

## **9. Some concluding remarks**

Why do differences in the institutional design of regulatory and competition agencies exist?

Why do they exist between countries and within countries?

There are at least two answers. First, not all governments tried to reform regulation in a systematic manner. In Germany, the energy bill did not contain rules concerning the assignment of agencies in order to circumvent the second chamber of parliament, where the government had no majority (Bundesrat, 1998, pp. 124 f.). The Dutch parliament opposed a telecommunication authority integrated into the competition authority (OECD, 1999, pp. 224, 232). So, even if the optimal institutional design would have been known, there was – for political reasons – not always the possibility to realise it.

But – and this is the second answer – the ideal institutional design is not yet known. Which of the “models” described above is ideal depends on many factors, varying from country to country and on time. I will mention just a few factors:

(1) Are regulatory and competition agencies equally politically independent? Especially in the EU the European Commission is more concerned with the independence of regulatory agencies than that of competition agencies.

(2) How is the market structured? Is the state a major owner of firms in the regulated industries?

(3) How are laws concerning liberalisation and de-regulation designed? Is a light-handed regulation approach applied?

(4) What is the role of courts in competition and regulatory policy?

(5) Are there real possibilities to split off vertically integrated firms?

(6) Is there a wide-spread “spirit of competition” throughout the economy, the administration, agencies,... ?

The answers to those and similar questions are different in different countries. In a negative way, some institutional designs can be excluded as obviously inferior to other, e.g. dozens of regulators, whether with or without power to enforce competition law. But a positive selection cannot be done. A “good” regulatory and competition policy can be achieved by various designs, which may sometimes combine some of the described models, e.g. a general regulatory agency with no competition policy competencies and very few sectoral regulators with competencies in competition policy.

Whichever policy is adopted, an intensive co-operation of the authorities involved and a clear-cut pro-competitive regulation is essential to foster competition throughout the economy.

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