

University of Amsterdam

Merging Market Authorities: Mix and Match

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**“Market authorities moving in together: some economic aspects of setting up shop”**

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# Public interest objectives of institutional design of regulatory agencies

## ☐☐☐ Process

- Fairness
- Independence

## ☐☐☐ Outcome

- Control costs
- Maximise social welfare from interventions

*With no linkage between interventions, cost minimisation is the chief goal, but ...*

## **In fact there is competition in the supply of interventions: this ‘market’ has to be appropriately structured.**

- ⋮ There is some convergence between ‘pre-emptive competition law’ and ‘regulatory anti-trust.’
- ⋮ But which is used **does** matter; there are significant differences between:
  - objectives: consumer welfare for competition authority vs. consumer welfare and profits for sector regulator
  - *ex ante* and *ex post* processes
  - essential facilities & mandated access
  - competition law and regulatory definitions of margin squeezes
  - appeal mechanisms
  - etc, etc.

## The balance between *ex ante* and *ex post*

*“As a general matter, regulated dominant firms in Europe have often been unduly shielded from the disciplines of both competition and competition law, while at the same time being over-regulated. The application of competition law, although far from perfect, is less prone than regulation to sector-specific capture (whether by vested or political interests), is not monopolised by the regulator, and can facilitate desirable deregulation.”*

J Vickers, ‘Competition Policy and Property Rights’.  
*Economic Journal*, 2010

## **To manage the process we need to understand what it is that bureaux maximise?**

- ⌘ The public interest alone?
- ⌘ Or, additionally, private interests:
  - the bureau's size/budget?
  - its influence?
  - its discretion?
- ⌘ There will be incentives to hoard issues, preempt decisions, prevent mergers (poison pills) etc.
- ⌘ Where private interests are recognised, institutional design should take account of them.

# The design options to be considered

## ⌘ Horizontal options

- unitary structure of competition/ economic regulation (ACCC, Netherlands post merger)
- separate regulators (most commonly observed)
- concurrency/shared (different models: division of labour – may be close to unitary model; or embody a veto from either party)

## ⌘ Plus a range of vertical options, such as unification or separation of Phases 1 and 2 in UK merger cases

## Separate(S) vs Unitary (U): pros and cons I

- ❏ Firm opportunism: especially via forum shopping. *If it applies, it favours U*
- ❏ Agency opportunism: regulator chooses easiest, not most appropriate route (usually a sector-specific one). *Favours S*
- ❏ Additionally, agency maximises activity, 'keeps the work to itself'. *May favour S*
- ❏ Regulatory capture: harder to suborn two agencies. *Favours S*
- ❏ Expertise: separated competition authority lacks expertise to cope with complex network industry cases. *Favours U, if it applies.*

## Separate (S) vs Unitary (U): pros and cons II

- ⌘ “Double jeopardy”: Can improve outcome – eg DT margin squeeze case, where competition authority impugns tariffs approved by the regulator; note also UK water case. *Favours S?*
- ⌘ Need for multiple viewpoints: ‘why is there only one monopolies commission?’ *Favours S*
- ⌘ Will sector-specific activity overwhelm competition law in a unitary system? *Has not done so in Australia*
- ⌘ Cost savings: can be important in small country. *Favours U, but how material?*



## Is concurrency the solution?

- ⋮ In the UK, concurrency means that the sectoral regulator takes the leading role in applying competition law. This is close to a unitary system in specific network industries
- ⋮ Regulators in the UK with competition powers have been criticised for favouring easier regulatory interventions over more radical competition law ones, eg including divestment
- ⋮ Alternatively, concurrency can mean the need for agreement by agencies rather than competition between them. See analysis by Barros & Hoernig, CEPR 2004

## My (debatable) overall evaluation

- ⌘ Decision must take account of likely agency objectives, including dysfunctional ones
- ⌘ Cost savings likely to be small in relation to benefits of better interventions
- ⌘ Desirable to build in a bias in favour of deregulation
- ⌘ Two independent agency voices are better than a monopoly opinion
- ⌘ Hence a tentative preference for separation
- ⌘ Parenthetically, in communications, a unitary telecommunications, broadcasting , spectrum agency is highly desirable.