

**THE UNEASY COHABITATION BETWEEN SECTORAL
REGULATORS AND GENERAL COMPETITION
AUTHORITIES. THE CASE OF BELGIUM.**

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0. Introduction

In many countries competition policy is of recent origin. Thus Belgium introduced competition laws in the beginning of the nineties of the previous century, in contrast with, f.i. the United States (at the end of the 19th century) and the European Union (since the fifties). During the last 10 to 15 years the world has seen an explosion of competition laws. At present some eighty countries, of which about fifty less developed countries, understood the usefulness of implementing laws to secure competition.

Sector regulations have been around for a long time also. Especially in Anglo-Saxon countries the regulation of industries has been left to regulators, with varying degrees of independence towards government. In continental Europe regulators were not unknown in certain sectors, f.i. the financial sector.

A lot of regulators however came into existence in the wake of the liberalisation of markets since the eighties (cf. the European single market, the transition of the former communist countries to market economies, the many liberalisation initiatives worldwide,...). Especially in the network industries such as energy, telecommunication, railways,... this meant that a transition had to be made from market structures monopolized by public companies towards market structures based on competition between the privatised incumbents and new operators. To guide this process regulating bodies have been set up.

It shall be clear that there exists an overlap between the activities of the general competition authorities and those of the sector regulators. Both are addressing competition, but not necessarily in the same way. In that overlap is hidden a field of contention with few certainties. As a result countries all over the world are trying to establish relationships between the two types of authority, starting from their own institutional, historically grown, conditions.

The analysis of these efforts, in an empirical-comparative way, must lead to the development of generally agreed insights that can in turn be processed into best practices.

This paper tries to make a contribution to the mentioned process by making a comparative analysis of the ways in which the relationships between the Belgian competition authorities and the sectoral regulators are designed.

Firstly the paper examines the literature on the relationship between general competition law and sectoral rules on the one hand and between general competition authorities and sectoral regulators on the other hand. Can the tasks of both types of rules and institutions be distinguished from each other? How should they be designed? Is the relationship a static one or more of a dynamic nature?

Secondly the history of the Belgian general competition legislation is sketched, followed by an analysis of various sectors where government regulation and supervision is applied. The focus will be on the network industries that are going through a process of liberalisation since the nineties of the previous century, notably the telecommunication sector, the energy sector, the railway sector and the airport infrastructure sector. In these sectors national regulation has been dictated by the European Union.

For each of those sectors the institutional relationship installed by the state with regard to the general competition authority is analysed.

1. The relationship between general competition authorities and sectoral regulators: what is it about?

In this section we will first analyse the basic principles of competition policy and more specifically why a competition policy is needed.

Next we go on with the basic principles of sector regulation, whereby aspects such as externalities, asymmetric information, natural monopoly and universal service obligation play an important role.

This brings us to the cause of the problem: the need to introduce competition in regulated sectors by means of a deregulation process. The types of issues to be dealt with here are protection of competition, access regulation, economic regulation and technical regulation.

The features of competition authorities versus sector regulators have to be identified, bringing us to the need to define relationships between competition authorities and sector regulators.

1.1. The rationale of competition policy

Well functioning, efficient markets are an important factor in the creation and safeguarding of welfare. One of the functions of a good economic policy is therefore to enable markets to play their role. Efficiency of markets is crucial, because efficient markets are one of the drivers of the competitiveness of an economy.

An important instrument of economic policy is competition policy. In a broad interpretation competition policy is aimed at restoring and avoiding distortions in markets. The cause of these distortions can be twofold. The first source of distortions lies with the anti competitive conduct of undertakings in the market itself: competition restricting agreements on prices, market delineation, abuse of dominant positions, cartels, mergers and acquisitions that lessen competition.

The core business of competition policy therefore is the fight against restrictive competitive practices. A control mechanism on mergers and acquisitions usually is a part of the coverage of competition policy.

A second source of distortions lies with government. Using state aid governments sometimes try to offer to their national companies a competitive edge over competing companies abroad. Governments also initiate distortions through regulation itself, whereby regulation can be of a general or sectoral nature. Regulations often have other objectives besides the promotion of efficiency in the markets concerned (cf. infra).

Competition policy is of a broader nature than competition legislation. The conception of legislation and the permanent monitoring of the law is a part of this policy. This results in a certain legislation accompanied by a certain institutional and procedural infrastructure that has to be confronted with the practice of restrictive conduct by companies in the markets, leading to a certain body of jurisprudence.

In its concrete application competition policy is mainly of the ex post type. Action is only taken by competition authorities after certain facts have occurred.¹ Competition policy is moreover of a general nature: all economic activities, in all sectors or markets are covered.

The observation of competition rules by companies is usually controlled by a specially design institution that is preferably to a certain degree independent from political influence. Whereas the most important instruments of competition authorities used to be the interdiction of certain activities deemed to be incompatible with competition rules

and fines for the companies concerned, nowadays competition authorities more often take recourse to so called remedies and/or they incite companies concerned to take up certain engagements for future conduct.

1.2. The rationale of regulation

As for competition policy one can also dig into the reasons why government turns to regulation to attain its objectives. Characteristics of regulated sectors are the following:

✚ The presence of elements of natural monopoly

This is one of the most common arguments to enter into regulation. Because of the continuing diminishing average cost (i.e. of benefits of scale) in certain sectors, it is sometimes better for reasons of efficiency to only have one producer. In the light of the need for large and important investments duplication would lead to non efficient situations. This of course creates a monopoly position that has to be monitored by government in order not to victimize consumers in that sector. Examples of such natural monopolies are the local loop in telephone networks, transmission and distribution networks in the electricity sector, payment networks, rail infrastructure, airport infrastructure.

✚ External effects

Certain sectors especially the so called network industries such as telecommunication, energy, ... have as a special characteristic that the utility for the consumer is dependent on the number of other consumers. This can work in positive as well as negative sense. The more users of phones the more attractive it becomes to also buy a phone. The more drivers on the road the higher is the risk of traffic jams. These are called network externalities.

In some cases these externalities can be of a nature that necessitates government to intervene by a certain degree of regulation because parts of the societal structure are at risk. Examples here are system risk in the financial sector and environmental effects of energy production.

✚ Universal service obligations

A very important aspect in some sectors is the fact that their services are considered to be of general interest. From a societal point of view it is thought desirable that such services are supplied to each citizen irrespective of his income, wealth or geographical position: postal delivery on the entire territory, minimum banking services, insurance for everyone, public transport within a reasonable distance of the home of the citizen, telephone service for every citizen by guaranteeing public phone cells,...

It shall be clear that the market system will not on its own take care of universal service obligations. Whereas government used to fill the gap with its own companies and services it now more and more turns towards the market, combined with some kind of regulation.

✚ The occurrence of asymmetric information

A motive to regulate can also be found in the occurrence of asymmetric information in certain markets. Because producers, through the nature of the case, are better and more informed about the characteristics of their products and services (quality, price, safety,...) than the consumers, they can sometimes reap unadmissible benefits. Examples of these situations can be found in insurance with the problem of 'adverse selection'. In professional services consumers have sometimes difficulties to assess the quality of service providers resulting in the introduction of access regulation, minimum quality standards,...

The main purpose of regulation is thus to let the markets concerned work in an efficient way. This is the same objective as in the case of competition policy. Regulation has to eliminate the imperfections of these markets, and this beforehand, ex ante. Whereas this is generally the only objective in the case of competition policy, regulatory policy usually aims at some other objectives also, f.i. social objectives with regard to universal service or income redistribution.

As far as the market failures concerned are permanent one can state that the need for regulation is also permanent. Because of various reasons (abolition of government monopolies, evolutions in the markets themselves, technological changes,...) situations can occur whereby market failures are not permanent. In that case regulation should also be temporary and the markets concerned can fall under the general competition rules.

The network industries have some features in common. Until recently they were characterised by the existence of a strictly regulated, monopolised market with a government enterprise as the only or the dominant player. In the past two decennia although they were liberalised and privatised under the flag of the European Union single market. More specifically telecommunications, electricity, gas, railways, airport infrastructure are involved.² In these sectors a transition had to be brought about from a monopolized market structure with one incumbent that was usually government owned towards a market structure based on competition between an in the meantime privatised incumbent and new actors.

These same network industries (or parts of them) probably do not have to be regulated on a permanent base. In the table below it is indicated for several sectors which activities can potentially be deployed under normal competitive conditions and which activities should continue to be regulated.

To guide the transition process in most cases sectoral regulators were established. In some cases the competent minister looks after the needed regulation. Sector regulators usually but not always dispose of a certain independence from political influencing.

Industries Featuring Both Competitive and Non-competitive Components		
Sector	Activities which are usually non-competitive	Activities which are potentially competitive
Gas	High-pressure transmission of gas ¹ Local gas distribution ²	Gas production Gas storage (in some countries) Gas "retailing" and "marketing" activities
Electricity	High-voltage transmission of electricity ¹ Local electricity distribution ²	Electricity generation Electricity "retailing" or "marketing" activities Electricity market trading activities
Telecommunications	Local loop services in some areas ² Termination of calls on other networks	Long-distance services; Mobile services; Value-added services Local loop services to high-volume business customers, especially in high-density areas Local loop services in areas served by broadband (e.g., cable TV) networks
Postal Services	Door-to-door delivery of non-urgent mail in residential areas ²	Transportation of mail; Delivery of urgent mail or packages Delivery of mail to high-volume business customers, especially in high-density areas
Air services	Access to runways, such as take-off and landing slots	Aircraft operations Maintenance facilities; Catering services
Railways	Track and signalling infrastructure ¹	Operation of trains Maintenance facilities
Maritime transport	Port facilities (in certain cities)	Pilot services, port services

1. Scope for competition varies depending on geography and nature of demand, amongst other things.
2. Services in lower-density, lower volume residential areas are less likely to be competitive than services to high-density, higher volume commercial areas.

Source: OECD (2002)

Put before the thus ascertained necessity to have a general competition policy on the one hand and to have a regulatory policy in certain sectors on the other hand, a list of tasks

can be drawn up that have to be performed by policy makers. These can be listed as follows:³:

- ✚ Protection of competition: control of anti-competitive conduct and mergers and acquisitions;
- ✚ Access regulation: securing non discriminatory access to infrastructural networks;
- ✚ Economic regulation: adopting cost-based measures to control monopoly pricing;
- ✚ Technical regulation: setting and monitoring standards so as to assure compatibility and to address privacy, safety, and environmental protection concerns.

Of these four types of regulation especially the first three are relevant for the issue at hand. It is not easily conceivable that technical regulation can, in relation with the other types, produce synergies for the competition authority.

Policy with regard to the regulated sectors is of the ex ante type. Regulators have to intervene before activities have taken place and in this way try to steer the conduct of companies in the desired direction.

1.3. The overlap

It must be clear that there is an overlap between the activities of the general competition authority and those of the sector regulators. Both address, although not exclusively in the case of sector regulators, competition, although not necessarily in the same manner. In other words, both are supposed to supply the same collective provision, namely markets that work efficiently.

The grey area between the two contains considerable potential conflict material. This problem however is not an exclusive one for Belgium. Countries all over the world are trying to deal with the relationship between the two types of institutions, each in their own fashion, taking into account their own institutional and historical circumstances.

The overlap is situated at several levels (Petit 2004). There is the overlap between general competition rules and sector specific rules. Many issues situated in the nucleus of sector regulation can be translated towards competition law. This is the case for the regulation on access to markets. Access can also be tackled by competition policy using the doctrine of the 'essential facilities'. The same applies in broad lines to issues such as cross subsidization and the non-discrimination between affiliates and other clients.

Another overlap is the one between jurisdictions. Competition authorities as well as sector regulators can offer remedies, while sector regulators sometimes have dispute settlement procedures to offer to operators. Furthermore several countries have given sanctioning powers to sector regulators.

Finally there can exist regulatory inconsistencies and jurisdictional confusion where there are different options available for plaintiffs. This can lead to contradictory decisions. The need for a system of case allocation is thereby put to the question.

Moreover as Petit (2004) correctly states: "The overlaps that have just been exposed may become a critical issue in the coming years, especially when conjugated with a third factor. The proliferation of NRAs across all network industries sectors through the impetus of EC liberalisation directives and the increased decentralisation of competition rules towards national competition authorities ... and national courts could have a multiplier effect in terms of jurisdictional conflicts" (Petit 2004).

Overview of Potential Divergences between NRAs and Competition Authorities Approaches

	NRA	Competition Authorities (Commission and NCAs)	Conflict of Rules/ Decisions?
Grant of Access by Incumbent	Not Favourable to Incumbent - Large Access for New Entrants - Article 12 of Access Directive	More Favourable to Incumbent - More difficult for New Entrants - Strict Conditions in <i>Brommer</i>	No - Granting Access cannot be an Infringement of Article 82 - Article 82 does not apply
Conditions of Access	Potentially Favourable to Incumbent - Return on Investments etc.	Less Favourable to Incumbents - Not Concerned by Returns on Investments etc.	Potential - Excessive Access Pricing can be an Infringement of Article 82
Infrastructure Sharing	Favourable - Environment, Public Health	Less Favourable - Less Concerned	Potential - Agreements containing Restrictions of Competition

Source: Petit 2004

1.4. How to handle the overlap?

In this context the question arises whether there exist scientific insights that can help to tackle the issue at hand. Generally speaking the issue is a coordination problem: identical/analogous powers are given to different parts of government at the same or at other levels of governments and the problems originating from this have to be avoided or controlled.⁴

In theory several instruments can be used: hierarchy, market and networking are put forward as coordination instruments.

In the table below one can find these instruments with their characteristics. In the next paragraph they will be analysed in relationship to the issue at hand.

Table: The features of hierarchies, markets and networks

	Hierarchy	Market	Network
Base of interaction	Authority and dominance	Exchange and competition	Cooperation and solidarity
Purpose	Consciously designed and controlled goals	Spontaneously created results	Consciously designed purposes or spontaneously created results
Guidance, control and evaluation	Top down norms and standards, routines supervision, inspection, intervention	Offer and demand, price mechanism, self-interest, profit and losses as evaluation, courts; invisible hands	Shared values, common problem analyses, consensus, loyalty, reciprocity, trust, informal evaluation - reputation
Role of government	Top down rule-maker and steering, dependent actors are controlled by rules	Creator and guardian of markets; purchaser of goods; actors are independent	Network enabler, network manager and network participant
Theoretical basis	Weberian bureaucracy	Neo-institutional economics	Network theory

Source: Verhoest (2005)

In general there are a number of basic conditions that have to be fulfilled in order to create a meaningful relationship between the competition authority and sector regulators⁵:

- ✚ A meaningful relationship can only be established if the competition authority is strong enough and can enjoy a certain degree of credibility.

- ✚ Government has a pioneering task to fulfil in the promotion of the idea of competition for the whole of the economy, including the regulated sectors.
- ✚ Various institutional designs for the relationship between competition authorities and sector regulators are possible without there being one ideal solution (see Duijm 2004, p. 14). The institutional design can differ from country to country and from sector to sector.
- ✚ It is not only in Belgium that considerable differences exist in the mentioned relationship from sector to sector. This can be a reasonable policy. Sectors can be very different from one another. Some sectors can be left to the general competition authority after a period of regulation. Other sectors show elements of natural monopoly or demand a minimum of universal service obligation, in both cases warranting some government regulation and control.
- ✚ The institutional design should be approached in a dynamic fashion, in the sense that as markets and technologies evolve the design must be allowed to evolve also.
- ✚ The framework should not be made for a too long period. Technological developments (cf. the growing nearer of telecommunication and media) compel for a continuing attention for the necessity to adapt the institutional framework.
- ✚ The competition authority and the sector regulators should show sufficient desire to cooperate.
- ✚ The best of institutional design cannot operate if the people that work in them are not pervaded by the notion that cooperation is necessary. This lays the responsibility with the people involved. Besides that government itself should keep up its efforts to point out to these persons their responsibility for cooperation.

1.5. Possible relationships

Within this framework there exist several concrete designs for the relationship between competition authorities and sector regulators. Hewitt (OECD 2003) identifies four prototypes of institutional relationships:

- ✚ Type 1: Full division of labour: separation of regulatory and competition protection functions

In this situation the economic and access regulation are taken up by the sector regulator (including also the technical regulation), while the competition authority takes up the protection of competition. Because, as was pointed out above, the delineation between economic and access aspects on the one hand and pure competition law aspects on the other hand is not perfect, coordination problems are not entirely solved.

- ✚ Type 2: The sector regulator takes up all four of the tasks

Even in this situation it is hard to accept that the competition authority should not have a role to play where competition law is involved. Again there is a potential coordination problem.

- ✚ Type 3: The general competition authority exclusively performs the four functions

Eventually technical regulation can be taken up by a sector regulator which in this case has severely restricted powers. This kind of integration within the general competition authority (the Dutch type) internalises the possible coordination problems.

- ✚ Type 4: The general competition authority and the sector regulator have concurrent powers.

In this situation the competition authority as well as the sector regulator have powers in the field of competition law. This can lead to a certain degree of institutional competition. The scarce examples of this system (cf. UK) show that all kinds of mechanisms are set up to guide the coordination between the two. Again there is a coordination problem.

The typology above can be confronted with the framework on coordination mechanisms that is offered by political science.

As seen before competition authority as well as sector regulators are supposed to deliver in this overlap the collective provision of efficiently operating markets. The mentioned coordination mechanisms should be able to do this in an efficient way. In the end the concrete manner in which the collective provision is supplied is a summing up of the punctual *ex post* interventions by the competition authority and of the general and specific *ex ante* decisions of the sector regulators. In this way a jurisprudence is established that guides the markets and offers legal security to the market actors.

Let us now look into the way hierarchy, markets and networking respectively can play a role in coordinating the activities of the competition authority and sector regulators.

1.5.1. Hierarchy

A choice can be made for a hierarchical relationship between competition authority and sector regulator. The competition authority then stands one step higher than the sectoral regulator. Such a choice can be based on the known premise that competition rules also apply to the regulated sectors.

The practical implementation of such a hierarchical relationship can be done in several ways. *A la limite* even a (partial) integration of the sectoral regulators in the general competition authority (type 3) can be envisaged. In that case the hierarchical relationship is anchored institutionally.

One of the benefits is that inconsistent decisions can be avoided. Decisions from a competition authority and a sectoral regulator on the same matters in a non unified system can sometimes be inconsistent leading to extra costs for companies thereby influencing negatively their investment plans.

Another benefit shows up in situations where the design of the relationship does not have to be permanent. If an institution then can fall back on its non-regulation powers then this institution will have less resistance against the fading out of the regulation. An independent regulator that only oversees regulation can be expected to show resistance to the ceding of competences and even more resistance to the total disappearance of the institution.

It can be noted that these benefits also apply when the joining of competition and regulation powers is not done inside the competition authority but inside the sectoral regulator. In that case the risk of capture through the regulation part of the sectoral regulator can also spread to the competition part.

Examples can also be found of a procedural anchorage of the hierarchical relationship. Some countries empower their competition authority to determine substantial market power in regulated sectors or compel the sectoral regulator to ask for advice from the competition authority before certain decisions may be taken.

Another possibility is the designation of the competition authority as the instance of appeal against decisions of sectoral regulators. This is not a much used design, although in Belgium some sympathy can be found for this solution (cf. *infra*). A variant in which the competition authority and sectoral regulators share the same instance of appeal is much more common.

1.5.2. Market

Since a relatively pure collective provision is concerned it is not easily imagined to see a role for the market in coordinating the activities of competition and sectoral authorities.

Nevertheless this is possible to a certain degree, namely when market actors in concrete cases look for satisfaction and reparation in law cases and decisions by regulators. The institutional and procedural design of competition policy, regulatory policy and the relationship between the two can be of a nature that plaintiffs in some instances have a choice where they can introduce a case (f.i. go before the competition authority, the sectoral regulator or the common courts,...) In that case one can speak of a very limited and rudimentary market system.

An important question is whether government explicitly wants such a situation in which case it can be promoted or whether it is a side effect of choices in other fields in which case it can be tolerated. It is suspected that the second situation is the more relevant one, at least in Belgium.

1.5.3. Networking

The concept of networking is much more relevant than the market concept when the coordination of activities of competition and sectoral authorities is concerned. In this concept cooperation and solidarity are central ideas, as are common problem analyses. For many governments it is a very easy and obvious way to tackle the problem at hand. Stimulating and promoting cooperation can take several forms, going from the obligation of written agreements over stimulating the exchange of information and staff to the obligation of cooperation in a system of concurrent powers.

2. Competition policy and sectoral regulation in Belgium

2.1. General

In this part of the paper we shall look at the choices that have been or are being made by the Belgian government concerning the possible types of relationships as sketched by Hewitt (Hewitt 2004). We firstly sketch the situation of Belgian competition policy and then proceed with the analysis of the competition aspects in the chosen regulated sectors, i.e. telecommunications, energy, railways and airport infrastructure.

2.2. General competition policy

Competition policy in Belgium is of a fairly recent date. The law 'protecting economic competition' passed parliament in 1991 and came into force in 1993. It copied to a large extent the EU competition rules. The content of articles 81 (about undertakings that negatively affect competition) and 82 (about the abuse of dominant position) were more or less taken over and supplemented with a system of rules to avoid mergers that were supposed to threaten competition.

On the institutional side a two-leg ('dualistic') system was introduced. On the one hand a Competition Service was created which is charged with investigating the cases brought before it. The Service is integrated into the Ministry of Economic Affairs. Later on (1999) a Body of Examiners was installed. The Examiners take the lead of the staff of the Competition Service in the investigations. On the other hand the Competition Council was installed, an administrative jurisdictional college that makes decisions over the cases based on the reports of the service. The Council is independent from the Ministry.

The competition law marked the shift in economic policy away from a rather strict ex ante price regulation system towards a more relaxed ex post system in which more economic freedom was granted to businesses.

From the beginning on the Belgian competition policy had big troubles to establish itself. Although the regulatory framework of the law was adequate enough, the lack of means endowed on the institutions made the system a lame duck. Rumours went that this was the result of a silent consensus within successive governments. An efficiently performing competition policy would possibly be harmful to the interests of some big companies with large employment and accompanying trade union power. Since some trade unions seem

to have some influence on some government parties it was thought better to provide only lip service to the competition policy.

As Belgium can be qualified as a small open economy with a important trade ties it was esteemed that import competition took over the role of the guardian of competition.

The invisibility of Belgian competition authorities can be pointed at as an important factor explaining how the relationship between the competition authority and sector regulators is policed in Belgium.

More specifically the law on the protection of economic competition includes a clause that the King (i.e. the government by royal decree) can regulate the cooperation between the Competition Service and the Body of Examiners on the one hand and the sector regulators on the other hand for as far as the investigation is concerned.

This clause is until now withheld in the new proposal of law that was agreed upon in the Council of Ministers on 20 May 2005, but which still has to be approved by the parliament.⁶

Until now only one such a cooperation has been established, namely for the energy sector. In this instance the cooperation is based not on the competition law but on the electricity law (cf. *infra*).

In the recent proposal of the law on the protection of economic competition another possibly important innovation is introduced. There is a clause that provides for a so called 'reception structure'. This clause means that an appeal procedure is introduced with the Competition Council against the decisions made by sector regulators that fall under the cover of competition matters. The legislator can then choose, sector by sector, if he wants to use this possibility. The legislator is free to eventually take another instance of appeal (f.i. the Court of Appeal in Brussels). When the Competition Council would be chosen a kind of hierarchical relationship would be created between the competition authority and the sector regulator (cf. *infra*).

2.3. Sectoral regulation policies

2.3.1. Introduction

In Belgium as in most other countries many sectors, activities and markets are being regulated by government in one way or another. As stated before most of the time good motives can be put to the support of this regulation, in other cases some less useful remnants from the past are involved (cf. the access to a range of professional services).

2.3.2. Telecommunication

The telecommunications market is a market where the incumbent Belgacom still takes in a dominant position, as well in the competition on the market as in the supply of essential facilities to the other actors in the market. As long as this situation lasts there is a need for intervention by the sector regulator. Furthermore as long as there are elements of a natural monopoly in the network of fixed telephone services (the so called local loop), permanent attention by a sectoral regulator is called for.

This regulator, the Belgian Institute for Postal Services and Telecommunications was established in 1991 as the regulatory body of the postal and telecommunications sector and started its activities in 1993. The BIPT has competences in access, economic and technical regulation.

The relationship between the competences of the competition authorities and the BIPT is organised on several locations in the (future) legislation.

One instance is the telecommunications law of 17 January 2003. Article 4 of this law stipulates that the Competition Council is empowered to judge on some conflicts between telecom operators.

Specifically conflicts are involved on the application of telecom rules that have a direct impact on the market conduct of undertakings and that can be viewed as specifications of the general competition rules. The law mentions i.a. conflicts over interconnection conditions and over unbundled, shared or special access to network services.

In all these cases the BIPT determines the policy. Thus in the case of interconnection tariffs for operators with significant market power (so called SMP status) there will in principle be a BIPT decision available (with other operators there usually are no conflicts over interconnection). Article 4 of the mentioned law thus only concerns conflicts between a plaintiff telecommunications company and the BIPT policy.

The law provides for the following relation:

- ✚ Are involved conflicts over which the BIPT already took a decision. There is already a viewpoint of the BIPT, which guarantees that the considerations of the sectoral regulator constitute an important element in the judgment of the Competition Council.
- ✚ The examination of disputes is done by the Competition Service who therefore can count on the support of the sector regulator.
- ✚ The decision is made by the Council.

In practice it appears that undertakings are not very eager to take this road of the Competition Council. They prefer to demand a new decision by the BIPT in which case they eventually go for appeal before the Court of Appeal in Brussels.

In the meantime a new telecommunications law is shortly coming into force transforming the European framework directives in telecommunication.⁷

These directives i.a. contain clauses about the modalities of ex ante regulation by national governments. In principle this is only allowed in markets where actors are present with significant market power. The Commission itself has in a recommendation defined 18 relevant markets. The member states then can on their own behalf define more or less relevant markets. In doing this they must use a number of guidelines that are taken over from the practice of general competition policy. These guidelines also contain directions on the concept of 'significant market power'.

Strictly speaking what is at hand is not the application of the competition law itself. Better is to say that 'competition-law-like' rules are applied. This brings us into the mentioned grey area of the overlap between sector regulation and competition law.

The European Union stipulates in the framework directive that the general competition authority must be involved in this exercise and that for this purpose information has to be exchanged between the two.

As regards the relationship with the general competition authority the law stipulates that the Competition Council has to deliver a preliminary opinion on some of the BIPT decisions. In some cases the opinion is binding, in other cases it is non binding but preliminary concertation is called for.

This preliminary concertation is needed for decisions on:

- ✚ The analysis of relevant markets
- ✚ The occurrence of competition in the market
- ✚ The imposing of obligations regarding non discrimination
- ✚ Obligations regarding transparency in the field of access
- ✚ The obligation to have separate book keepings
- ✚ The obligation to comply with reasonable access requests

- ✚ The imposing of obligations regarding the cost orientation of prices and systems of cost allocation
- ✚ The designation of SMP operators offering carrier select and carrier preselect services.
- ✚ The designation of SMP operators that offer a minimum package of rental lines.

A binding opinion is required for decisions on:

- ✚ The imposing of obligations regarding price control
- ✚ The imposing of obligations on SMP operators in final users markets (prohibition to apply abnormally high prices, impeding access to the market, applying breakdown prices that limit competition, applying unfounded preferences for certain final users, unreasonable binding of services).

It is difficult to trace the rationale behind the distinction made between the option of concertation leading to an opinion by the Competition Council and the option of a binding opinion by the Council. Nor is it possible to trace the choice over which kind of decision is put under which option.

Until now the cooperation that was announced in the respective laws has not yet been regulated. There has been put forward by the BIPT a proposal for a royal decree on the cooperation between the BIPT and the national competition authorities. The Competition Council however gave an opinion on this proposal that can be considered to be rather negative.

In terms of the Hewitt typology and the three mentioned coordination mechanisms it can thus be stated that as far as the Belgian telecommunications sector is concerned the choice has been for a type 1 constellation, based on networking through opinions and cooperation agreements (although not yet in place). A certain competitive situation can be discerned whereby plaintiffs prefer the Court of Appeal above the Competition Council. The future requirement for a binding opinion by the Competition Council introduces a slight hierarchic element.

2.3.3. Energy

European and Belgian legislation in the energy sector provides for the disintegration of the production process in production, transmission, distribution and supply respectively. In the production and supply sections competition should prevail in the future and therefore the sector specific regulation could thus also be abolished. At present both stages are still dominated by the incumbent and competition has still to be guided by a sector regulator.

Concerning the distribution of energy (f.i. the transmission of electricity over the high tension network, the distribution of electricity over the low tension network, the distribution of gas) some elements of natural monopoly are present, making competition in the present state of technology impossible. This requires a permanent control by a sector regulator.

In Belgium a Federal Regulatory Commission (CREG) has been set up in 2000 in order to monitor the electricity and gas market. It is charged with advising the authorities on the organization and operation of the liberalised electricity and gas markets. Moreover, it supervises and monitors the application of relevant laws and regulations. In terms of the four types of regulation the CREG caters for economic, access and technical regulation.

Besides the federal regulator three regional regulators are active (Flemish, Walloon and Brussels). These are responsible for establishing the technical legislation regulating the distribution networks (up to 70 kV) and defining the eligibility conditions for customers connected to this grid (most SMEs and the households).

The rules for energy as laid down in the electricity and gas legislation, provide for a number of clauses that are also envisaged by competition law (f.i. on the prohibition for the network managers to discriminate between (categories of) users of the network, the

prohibition of cross subsidisation). Again 'competition-policy-like' rules are at stake which are not the real competition rules.

In those cases where parties feel that they have been harmed by the decisions of the network managers, they can in the present law choose to initiate a procedure before the CREG, before the Competition Council or before both.

If cases are brought before the Competition Council the Law on the Organisation of the Electricity Market ((Belgian) Official Journal 11/05/99) provides for a cooperation of the CREG with the Competition Service. This cooperation is regulated in detail by a royal decree of 20 September 2002 ((Belgian) Official Journal 8/10/02)

At present the Belgian government is occupied by the transposition of the recent directives on electricity (2003/54) and gas (2003/55) issued by the European Union in 2003.

Contrary to the sector of electronic communication in the energy sector the European Commission has not paid attention to the grey zone with the general competition rules. In directive 2003/54/EC, contrary to the framework directive for telecom, no reference can be found to any involvement of the general competition authority. Nor is it mentioned in the note that the Commission has issued regarding the role of regulators (Note of DG Energy & Transport on Directives 2003/54/EC and 2003/55/EC on the internal market in electricity and natural gas. The role of the regulatory authorities. 14.1.2004).

Belgian government nevertheless is conscious that the grey area is also present when energy is concerned. The Belgian Council of Ministers in May 2005 approved a proposal of law organising the possibilities of appeal against the decisions taken by the CREG.

In this proposal the possibility is provided for an appeal before the Competition Council against certain CREG decisions. More specifically are targeted the CREG decisions on the approval, the demand for reconsideration or the refusal of approval in the following cases:

- ✚ The conflicts between the network manager and the network users over the access to the transmission network (excluding conflicts over contractual rights and engagements)
- ✚ The methods of allocation of the border crossing capacity for exchange of electricity with foreign transmission networks.

These decisions fall under article 11 of the electricity law which addresses the technical regulation for the management of the transmission network and the access to it, made up by royal decree. This technical regulation i.a. provides for:

- ✚ The technical minimum standards for connection and the times fixed for connection to the transmission network.
- ✚ The operational rules to which the network manager is subjected in the matter of technical management.
- ✚ The priority that has to be given to environmentally friendly energy production.
- ✚ The supporting services that have to be offered by the network manager.
- ✚ The data that have to be handed over by the network users to the network manager
- ✚ The information to be handed over by the network manager to the managers of other electricity networks.
- ✚ The provisions in the field of information or of preliminary approval by the CREG of operational rules, general conditions, type-agreements, forms or procedures applicable to the network manager and, eventually, to the users.

For a whole range of other CREG decisions the Court of Appeal in Brussels is designated as the instance of appeal. Not to be found in the law proposal is an argumentation pointing out why for a given decision one or the other institution is chosen as instance of

appeal. In the accompanying texts it is said that the Competition Council is selected for the CREG decisions narrowly linked to the protection of competition in the market. The way this principle is translated into the listing of concrete decisions, remains unclear.

Furthermore it must be added that the above mentioned cooperation between the Competition Service and the CREG is abolished by this law proposal. The government wants to avoid that this ex ante cooperation should influence the position of the Council as the ex post instance of appeal.

We can thus diagnose that for energy a somewhat different constellation was chosen than for telecom, although type 1 is still applicable. At present networking through coordination, combined with a certain competitive element in the form of forum shopping by parties to a conflict.

This system will probably be replaced by a more hierarchical system in which the Competition Council has to provide consistency and coherence through the appeal system.

2.3.4. Railways

In the Belgian railway sector recently a restructuring took place, in execution of the so called railway package, more specifically the European directives 2001/12/EC, 2001/13/EC and 2001/14/EC. The operation and the infrastructure were disintegrated. The two divisions were organised as affiliates of a holding company. The national railway company NMBS takes care of the exploitation, another company called Infrabel manages the infrastructure.

The operation has opened up for competition already but is presently almost entirely in the hands of the incumbent NMBS. Infrastructure is a natural monopoly. In such circumstances it is proper to have an independent supervisory organism⁸, on the one hand to guide the market process in the operation part and on the other hand to control the manager of the infrastructure. Thus the Belgian government provided for the setting up of a 'supervisory body'. This supervisory body is not independent and operates directly under the supervision of the transport minister⁹.

More specifically for infrastructure, the competences over the allocation of railway infrastructure capacity, the tarification, the invoicing and the collection of the levies, the certification of the personnel and rolling material of the railway companies have been given to Infrabel. The supervisory body looks after the correct and the non-discriminatory application of levies and after the allocation of capacity.

This means that there are decisions by Infrabel, as well as by the minister (inside or outside the functions of the supervisory body) which have to do with competition and which can be disputed. General competition rules as well as specific rules originating from the railway legislation and that can be interpreted as specifications of general competition rules are involved.

For both kinds of situations the Competition Council was attributed supplementary powers and is supposed to expand with three extra members. Appeal against the decisions of the Council is possible before the Court of Appeal in Brussels.

The new position of the Competition Council is not very clear. In some cases it has to act as a supervisor, i.e. as a kind of regulator. This is the case where the Council is supposed to decide over complaints against decisions made by the minister in his competences lying outside the supervisory body for the railway sector and by the network manager Infrabel.

In other cases the Competition Council is supposed to apply the competition rules (which sounds trivial) and in still other cases the Council acts as a body of appeal against the decisions made by the supervisory body.

This system is not yet in operation. The enlargement of the Council has not taken place yet. There have not been any complaints until now.

This kind of institutional design falls outside the Hewitt typology. The general competition authority partly acts as a sectoral regulator alongside the proper sector regulator. Thus a hybrid system is created with elements of type 1 and type 3. The system is dominated by hierarchical elements: appeal before the Competition Council, partial supervision by the Council. There is no sign of networking or market elements.

2.3.5. Airport installations

As a consequence of the privatisation of the Brussels International Airport Company (BIAC) a private company obtained a monopoly over the operation of the Brussels airport installations. This situation necessitated a supervision by government. In the royal decree of 27 May 2004 a 'economically regulating government body' is mentioned, under which has to be understood 'the minister or every governmental body or supervisory body that would by law replace the minister'. At present there is only the minister.

Against the decisions that are made in this framework appeal can be brought before the Court of Appeal in Brussels.

For the airport installation sector there is at present no provision about the relationship of the airport supervisory body and the competition authorities. It is to be expected however that competition problems will occur sooner or later, meaning that the present arrangement cannot be considered as being stable.

3. The Belgian relationship between competition authorities and sector regulators evaluated

To begin with it has to be diagnosed that this relationship is in Belgium still in the build up stage. The regulation is being developed in a somewhat haphazardly fashion. Fragmentary kick offs are made, as well from the side of competition legislation as from the side of sector regulations. This fragmentary approach, sometimes justified by the urge to transpose European directives into national legislation in time, makes for a lack of policy consistency, although future lines are becoming clearer.

For the time being this situation is not very problematic since few cases are presented for which a good institutional design of the relationship between competition authorities and sector regulators is relevant. In the railway and airport installations sectors there are no cases. In the energy sector there have some important mergers in which the cooperation between the CREG and the Competition Service has proved to be quite useful. In the telecommunication sector the Competition Council is avoided, probably because of its limited credibility.

It can be expected that in the future, in the wake of the continuing liberalisation, the need will become stronger for a well suited relationship.

When scanning the various sectors one mainly detects two kinds of relationship, the first being based on hierarchy and the second based on cooperation in a network context.

The first kind is based on the possibility of appeal before the Competition Council against decisions made by sector regulators (energy, railways). Independent from the question of which body of appeal is designated the underlying thought seems to be that the appeal can be seen as a partial compensation for the independency of the sector regulator vis-à-vis the political authorities.

The second kind is based on a cooperation between the general competition authority and de sector regulator (telecom).

These two types mutually exclude each other to a certain degree. Ex ante cooperation, f.i. in the form of a preliminary opinion by the competition authority addressed to the sector regulator or the exchange of information from one body to the other, cannot be easily reconciled with an ex post appeal before the general competition authority. The competition authority is 'affected' and is thereby deemed unable to judge in all objectivity in a case where it has been already involved. The more or less forced – because of the European rules – preliminary advisory competence of the Competition Council in telecommunication matters stand in the way of this same Council as a body of appeal against BIPT decisions.

However the bipolar structure of the Belgian competition authority, with the Council as the decision making part on the one hand and the Body of Examiners and the Competition Service as the investigating parts on the other hand, offers possibilities to deal with this issue. The two pillars are independent from each other. If investigation is done by the one pillar, an appeal before the other pillar remains possible without problems. If the Council, in order to prepare its decision, uses information coming from the investigation pillar, it must be deemed objective and independent enough to deal with this information.

This construction installing some hierarchical link in the relationship between the competition authority and the sector regulators offers some advantages.

The hierarchical link avoids that powers have to be divided a priori between the competition authority and the sector regulators. A conflict of competences can only arise after the sector regulator has taken a position. A deadlock of decision making can thus be avoided.

Furthermore the competition authority will always know beforehand the viewpoint of the regulator before it has to speak out itself. This allows the competition authority to judge in a better informed way and it leaves the last word to this authority (of course under the proviso that there is no appeal against the decision by the competition authority).

In this way the contours are beginning to stand out of a relationship for which there are not many pioneers to be found abroad.

4. Conclusions

In this paper we have tried to develop an approach to the relationships between a general competition authority and sector regulators which we then applied to some Belgian network industries.

The conclusions that we can draw from our analysis are the following.

As in so many other countries Belgium is going through a search process for the appropriate relationship. For this trial and error stage the end is not within reach for the moment.

Nevertheless a direction that is relatively unique in the world seems to stand out for the future. It is not unimaginable that a constellation is developing putting the competition authority on a higher hierarchical level than the sector regulators by installing it as the body of appeal for the decisions of the sector regulators.

A long way however is still to be gone before we will see the concrete filling in of this outline in the various sectors.

Endnotes

¹ It has to be mentioned that in the treatment of merger cases takes place also before the 'economic fact' materialises.

² This means that i.a. the financial sector, taxis, water, professional services are not treated here.

³ OECD (1999), *Relationship between regulators and competition authorities*, DAF/CLP(99)8

⁴ According to Peters, cited by Verhoest (2005): 'Coordination in an inter-organisational, public sector context is the alignment of tasks and efforts of multiple units in order to achieve a defined goal. Its aim is to create a greater coherence in policy, and to reduce redundancy, lacunae and contradictions within and between policies.'

⁵ OECD (2005), *The relationship between competition authorities and sectoral regulators*, Issues Paper, DAF/COMP/GF(2005)2

⁶ See <http://www.marcverwilghen.be/mededinging.htm>

⁷ Directive 2002/58/EC on privacy and electronic communications;
Directive 2002/21/EC on a common regulatory framework;
Directive 2002/20/EC on the authorisation of electronic communications networks and services;
Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services;
Directive 2002/19/EC on access and interconnection.

⁸ Also required by the EC directives.

⁹ This is treated by the royal decree of 12 March 2003 concerning the conditions for the use of railway infrastructure ((Belgian) Official Journal 14 March 2003), as changed by the royal decree of 11 June 2004 (OJ 15 June 2004).

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