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Regulation and Competition Policy: Towards an Optimal Institutional Configuration in the Brazilian Telecommunications Industry

Gesner de Oliveira

Escola de Administração de
Empresas de São Paulo

REGULATION AND COMPETITION POLICY: TOWARDS AN OPTIMAL INSTITUTIONAL CONFIGURATION IN THE BRAZILIAN TELECOMMUNICATIONS INDUSTRY[1]

Gesner Oliveira[2]

Caio Mário da Silva Pereira Neto[3]

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[2] President of Conselho Administrativo de Defesa Econômica (CADE); PhD in economics, University of California, Berkeley; professor of economics, Fundação Getúlio Vargas, São Paulo.

[3] Attorney, graduate student, master's in economic and financial law, University of São Paulo Law School; research assistant, Fundação Getúlio Vargas, Research & Publications Center.

SUMMARY

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ABSTRACT

This paper is divided into two parts. The first section outlines the conceptual basis for possible institutional models of interaction between competition and regulatory authorities, focusing on the question of complementary jurisdictions. The second describes the institutional configuration implemented in the Brazilian telecommunications industry in accordance with the General Telecommunications Act (Federal Law 9472/97).

KEY WORDS

Antitrust, regulation, institutional reform, infrastructure, capture theory, telecommunications.

INTRODUCTION

As in several other emerging economies, the constitution of a new regulatory framework represents one of the key issues of the state reform agenda in Brazil. In particular, the interaction between competition and regulatory agencies within a system of complementary jurisdictions has become an essential element of the modernization process.

The implementation of such a system is an extremely complex task. Two challenges merit special attention: (i) institutional inertia and rigidity; (ii) the cost of coordinating the various government departments and agencies involved.

The purpose of this paper is to suggest criteria for choosing among different institutional configurations, taking into consideration the importance of bureaucratic transaction costs and possible economies of specialization between competition and regulation.

The study comprises two parts. The first section discusses theoretical aspects of the conceptual basis for a system of complementary jurisdictions articulating the competition authority and regulatory agencies, and highlights the possible advantages of such a system as compared to alternative institutional configurations.

The second part illustrates the point by analyzing the institutional model based on complementary jurisdictions implemented in the Brazilian telecommunications industry following privatization of the state-owned telecommunications operators in 1998. This analysis highlights the points of articulation between CADE (the competition authority) and ANATEL (the telecommunications regulator) in view of the new legal framework governing the industry (Federal Law 9472/97). A final section presents key conclusions.

I. DIVISION OF FUNCTIONS BETWEEN THE COMPETITION AUTHORITY AND REGULATORS: POSSIBLE INSTITUTIONAL CONFIGURATIONS

Following the privatization of infrastructure sectors and the creation of new regulatory agencies in Brazil, questions have been raised as to how regulation should be coordinated with the enforcement of competition law. These questions

are equally important at the local and state levels where independent regulatory activity has also gained in importance.

Section I addresses this issue. The first subsection recalls that regulation and competition policy were originally discrete activities. Subsection I.2 notes the changes that have occurred in the recent past, whereby the boundaries between competition and regulation have become blurred. Lastly, Subsection I.3 discusses various institutional alternatives.

I.1. COMPETITION POLICY VERSUS REGULATION: BOUNDARIES IN THE 19TH AND 20TH CENTURIES

The historical development of antitrust legislation and regulation since the late 19th century suggests a delimitation of boundaries between the two areas that seems self-evident at first glance. Competition policy was conceived as aiming to guarantee the proper functioning of market mechanisms; in contrast, traditional regulation was designed to replace such mechanisms in the event of inevitable market failures.

A recent OECD paper[4] establishes a useful comparison between antitrust and regulatory authorities from the standpoint of delimiting jurisdiction. Chart 1 calls attention to four key differentiating elements:

> i) the object of competition policy is narrower, generally restricted to allocative efficiency. Regulation typically incorporates a wider range of goals, including broader concerns such as universal access to services, regional integration and environmental protection;
>
> ii) the method employed by antitrust authorities features the use of market mechanisms, while traditional regulation seeks to replace them;
>
> iii) antitrust authorities take action *a posteriori*, except when controlling acts of concentration,[5] while traditional regulators establish *a priori* rules for compliance by the parties concerned;

[4] OECD, unpublished.

iv) antitrust authorities give preference to structural remedies designed to re-establish the functioning of market mechanisms. Because the latter tend to be replaced by regulation, regulatory authorities prefer to adopt behavioral remedies.

Chart 1 - Regulation Versus Competition Policy

DIMENSIONS	COMPETITION POLICY	TRADITIONAL REGULATION
OBJECTIVES	More restrictive: allocation efficiency	Broader: universal access to services, regional integration, environmental protection etc.
METHOD	Use of market mechanisms	Replacement of market mechanisms
TIMING	A *posteriori* except for concentration	*A priori*
TYPES OF RECOMMENDATION	Structural measures	Behavioral measures

Source: OECD (1998), adapted.

Hence competition policy is of a more general nature than regulation. The latter assumes a certain market structure, usually natural monopoly which itself justifies regulation. Competition policy seeks to intervene in the market and under certain circumstances may take preventive action against anti-competitive configurations, thus avoiding the need for regulation.

I.2. BLURRING OF THE BOUNDARIES IN THE NEW MILLENNIUM

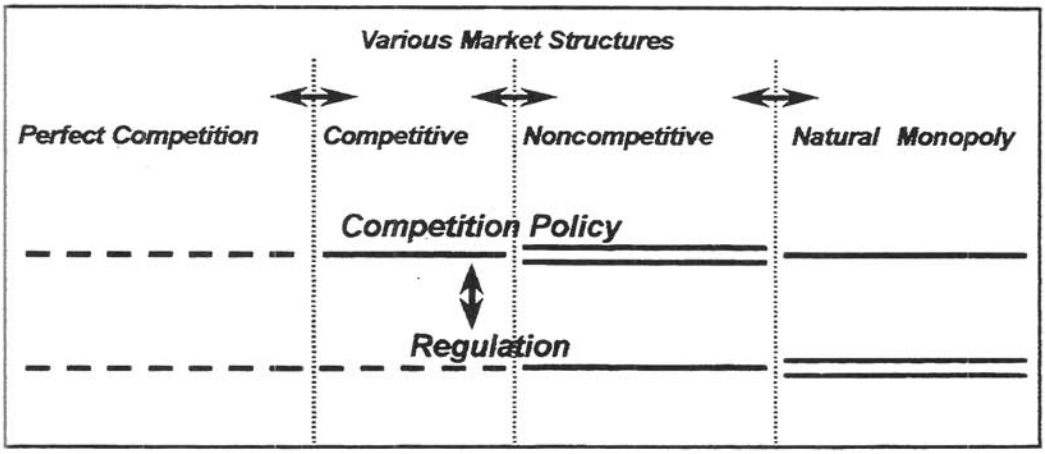
On the threshold of a new millennium, the differences between competition and regulation are diminishing, the area of intersection is growing and the definition of the boundaries between the two areas has become increasingly difficult.

Chart 2 clarifies this issue by dividing the markets for the sake of simplicity into those with perfect competition, competitive, non-competitive, and natural monopolies. Perfect competition is an abstraction introduced for

[5] In jurisdictions with more experience, control of acts of concentration is typically *a posteriori*.

theoretical purposes, since it rarely occurs in practice. At the other extreme, many markets are sufficiently competitive to make action by the authority unnecessary.

Chart 2: Boundaries between Competition and Regulation



Competition agencies focus on non-competitive markets in which there is scope for unfair practices due to market dominance. However, in these markets many problems arise owing to inadequate regulation. The introduction of rules designed to foster competition may eliminate or at least mitigate market failures. For example, appropriate regulation of healthcare plans could diminish the number of problems in this area. Thus competition policy cannot dispense with regulatory authorities in these markets.

Regulation focuses on natural monopolies. Under natural monopoly conditions, production cost constantly decreases as business expands, thus making production by a sole company the most efficient (i.e. low-cost) form of production.[6] Hence the need for a regulatory agency to establish specific industry rules designed to prevent a natural monopolist from abusing its dominant position.

Such activity is closely related to that of a competition authority because regulation is best when it mimics the market. Thus, in this instance the two types of authority may overlap in scope. In practice, moreover, a regulated segment comprises several sub-segments that may not necessarily be natural monopolies and therefore may not need specific regulation.

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[6] The technical definition of a natural monopoly is a segment in which the cost function is sub-additive for the relevant production intervals.

In addition, the boundaries between natural monopolies and competitive markets are dynamic. Because cost, technology and demand vary significantly over time, natural monopolies are temporary. Hence a segment that initially requires regulation may at a later stage require only market rules. The boundaries shown in Chart 2 are therefore changeable. This situation has become increasingly frequent as a result of the accelerating pace of innovation in certain industries such as telecommunications and transportation.

Thus no matter what type of institutional configuration is chosen for a country or industry, it should be flexible enough to ensure that bureaucratic inertia does not hinder development at a time when markets are highly dynamic and technological innovation is rapid.

In the course of the 20th century, competition policy has tended to become preventive rather than merely repressive or characterized by exclusively *ex post facto* action. This development began with early antitrust movements in the United States to control concentration in the initial decades of the 20th century, becoming more structured in the mid-1970s. A similar approach has been implemented in the European Union since the late 1980s. In both jurisdictions, competition advocacy has gained considerable importance.

In many of the developing countries, the 1990s have seen the introduction of legislation to strengthen competition policy, highlighting new dimensions of public policy in this sphere. Because these countries often have an overwhelmingly interventionist tradition, there is a clear need to promote competition in environments where market values and institutions are fragile. Latecomers to competition policy have therefore emphasized its convergence with regulation, in contrast with the trend observed in mature jurisdictions.

It is of course a most complex task to transform institutions in order to allow for such changes, especially in more mature jurisdictions where each type of agency has a clearly delimited sphere of action and remodeling may encounter formidable bureaucratic resistance. For this reason, latecomers may actually enjoy an advantage. The next section discusses some of the possibilities open to policy makers.

I.3. ALTERNATIVE INSTITUTIONAL CONFIGURATIONS

The issues discussed in the preceding section indicate why institutional configurations vary in time and space. Institutional frameworks vary considerably from one country to another and even within the same country, according to the different segments involved and the stage of development of a particular jurisdiction.

Despite the influence of such structural factors, it is important to discuss the alternatives for an efficient division of functions between the two types of agency.

There are at least five options for the design of any legal system in terms of the relationship between competition policy and regulation, as shown in Charts 3.1 through 3.5.[7]

For a better understanding of the divisions established, it is useful to distinguish three functions:

- Technical regulation (TR): the establishment of rules, standards and goals to be adopted by the private agents of a regulated industry.

- Economic regulation (ER): the establishment of conditions for pricing, rates and quantities to be observed by private agents when supplying regulated goods and/or services.

- Competition law (CL): Legislation governing free competition.

The five alternatives shown in Charts 3.1 through 3.5 correspond to different distributions of the three functions described above:

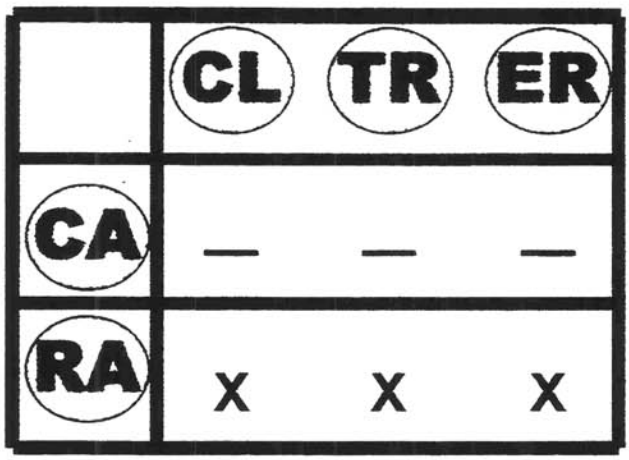
i) Antitrust exemption: the regulatory authority (RA) applies competition law; specific legislation always prevails over antitrust law. In this case, the regulatory agency carries out the three tasks described above, with emphasis on regulatory aspects, leaving no scope for action

[7] The alternatives developed in this section are adapted from OECD (1998).

on the part of the competition authority (CA). It is even possible to conceive of situations in which competition policy legislation does not apply.

Chart 3.1 – Possible Institutional Configurations: Model 1

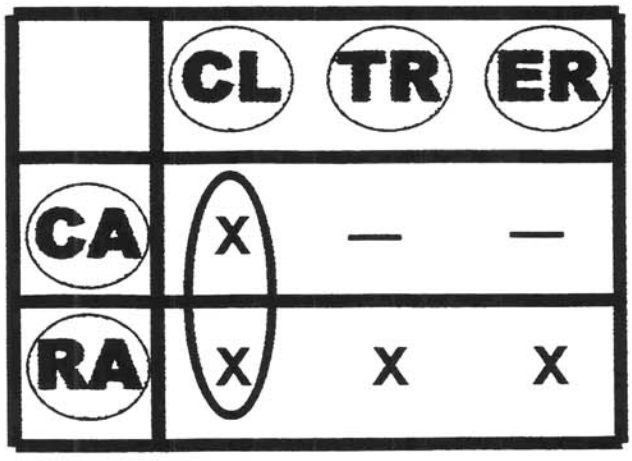
(Antitrust Exemption)



ii) Concurrent jurisdictions: the competition and regulatory authorities both have jurisdiction to apply antitrust sanctions. Although less common, one could also imagine shared responsibilities in the area of economic regulation.

Chart 3.2 – Possible Institutional Configurations: Model 2

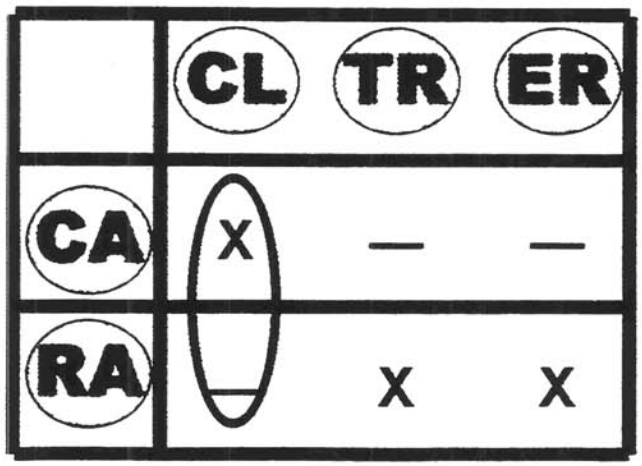
(Concurrent Jurisdictions)



iii) Complementary jurisdictions: there is no overlapping of the two authorities' functions. The division of tasks is clear and determines that the regulatory agency deals exclusively with economic and technical tasks, while the competition authority enforces antitrust law.

Chart 3.3 – Possible Institutional Configurations: Model 3

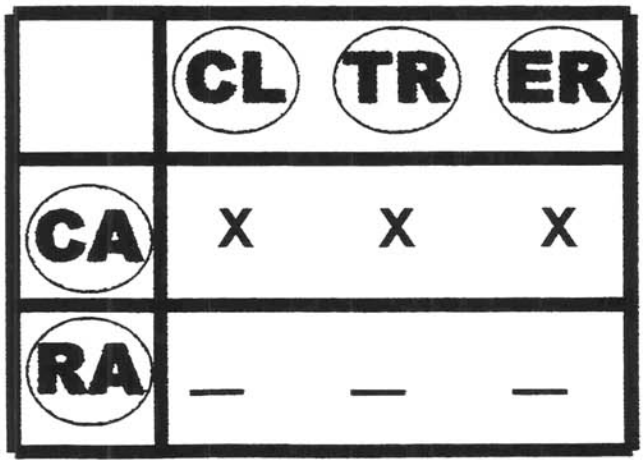
(Complementary Jurisdictions)



iv) Antitrust Regulation: the competition authority applies both antitrust law and economic and technical regulations. This case is symmetrical to (i), in that emphasis is typically placed on antitrust legislation and regulation is limited to the necessary minimum.

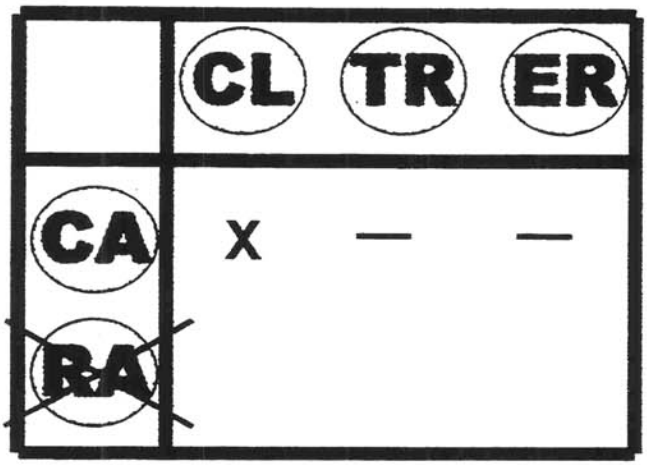
Chart 3.4 – Possible Institutional Configurations: Model 4

(Antitrust Regulation)



v) Deregulation: the antitrust authority has sole jurisdiction, eliminating economic and technical regulation.

Chart 3.5 – Possible Institutional Configurations: Model 5 (Deregulation)



The possibilities outlined in Charts 3.1 through 3.5 can be classified according to the importance attributed to market mechanisms, as suggested by Chart 4. Emphasis on competition policy rather than regulation increases as one moves from left to right.

Chart 4 – Continuum of Institutional Configurations

As noted earlier, because of the diversity of modern economies all five situations and variants of them may be found in a single country, in accordance with the institutional history and specificities of each industry.

Certain examples seem representative of each of the configurations described above. In Bolivia, the rules governing competition must be enforced by regulatory agencies. In the US and Canada, various industries are subject concurrently to two or more agencies. In Australia, regulatory powers were given to the antitrust authority. New Zealand adopted what is known as "light-handed regulation", in which the antitrust authority monitors regulated sectors using a minimum of regulatory rules, in a situation similar to Model 5. As will be shown in the second part of this paper, the system adopted in the Brazilian telecommunications industry closely resembles that of complementary jurisdictions.

The possibilities described above seem compatible with the range of alternatives suggested by the World Bank (1998, pp. 24-28) in a study that highlights the alternative of making the competition authority function as an administrative court for appeals against decisions handed down by regulatory agencies. This would be compatible with one or more variants of the configurations discussed. In a system of complementary jurisdictions, for example, one could imagine that only in cases involving antitrust issues would the regulatory agencies be transformed into fact-finding bodies charged with raising evidence and issuing a ruling, which in turn could be appealed to an administrative court subordinated to the competition authority.

I.4. CRITERIA FOR CHOOSING AN OPTIMAL INSTITUTIONAL DESIGN

The choice of an optimal institutional configuration is not a straightforward one. Nor would it be reasonable to aver that there is a single model to be adopted. The different configurations present advantages and disadvantages depending on specific conditions.

Chart 5 suggests a selection procedure that takes the following five factors into consideration:

- 1. Institutional flexibility: As mentioned above, the fast pace of technological change can transform a natural monopoly into a competitive market, thus demanding regulatory changes. Likewise, the appearance of new production processes and products may alter supply

and demand elasticities. Ideally, regulators should be flexible enough to deal with such structural changes;

- 2. Efficiency and timeliness: Decisions must be taken swiftly and firmly; lengthy bureaucratic processes increase uncertainty and diminish the expected return on investments. A correct assessment of the best way to distribute powers between the competition authority and regulators depends on (i) whether there are economies of scale and specialization in regulatory activities as applied to specific industries and as between competition policy and regulation; (ii) the comparative bureaucratic transaction costs of relatively autonomous units. As discussed below, these two items combined will determine the institutional design adopted from a strictly operational standpoint;

- 3. Bureaucratic transaction costs: Analogously to Williamson's classic notion of transaction costs in the theory of the firm, it is useful to define bureaucratic transaction costs as those relating to the drawing up of agreements among public bodies. The level of bureaucratic transaction costs varies according to the complexity of inter-institutional operating routines.

- 4. Minimizing the risk of conflicting jurisdictions: When more than one institution has powers to rule on a certain matter, or when two or more institutions have similar powers, there is a risk of conflicting jurisdictions. This tends to cause delay, uncertainty and consequently legal insecurity.

- 5. Minimizing the risk of capture: As discussed by Oliveira (1998, pp.30-31), and according to the original work of Stigler (1971), regulatory experience in mature countries shows that regulatory agencies are highly likely to be "captured" by the segments that should be subject to regulation. Aside from the ethical problems involved, it is relatively easy for certain industries to "capture the regulators" owing to asymmetry of information to the detriment of the public sector, and to professional identification between the specialists who are temporarily performing adjudication functions and segments subject to the specific administrative jurisdiction in question. The extent to which recruitment and the future careers of regulatory authorities are confined to the regulated industry constitutes a relevant variable in determining the probability of capture.

It is no easy task to appraise the different alternatives according to reasonable public policy criteria. Chart 5 highlights the strengths and weaknesses of the models discussed in 1.3 according to the criteria listed above.

Model 5 (deregulation) is excluded, since the elimination of regulation means there is no need to decide which authority does what. A plus sign (+) is used to indicate that a model has advantages in regard to a particular criterion; a minus sign (-) indicates a possible limitation or disadvantage.

Chart 5 – Criteria for Choosing an Optimal Institutional Configuration

Criteria / Model	Institutional Flexibility	Economies of		Bureaucratic Transaction Cost	Risk of Capture	Potential Jurisdictional Conflict	Total
		Scale	Specialization				
M_1 Antitrust Exemption	-	+	-	+	-	+	0
M_2 Concurrent Jurisdictions	+	-	-	-	+	-	-2
M_3 Complementary Jurisdictions	+	-	+	-	+	+	2
M_4 Antitrust Regulation	+	+	-	+	-	+	2

Model 1 (M_1) – antitrust exemption – lacks flexibility since there is no incentive for the regulatory authority to eliminate market controls in the event of structural changes. On the other hand, given the concentration of activities in one institution, it can be assumed that there are scale economies and no economies of specialization. However, the risk of capture is high since this design typically favors regulators that are close to the industry they are supposed to be overseeing. Lastly, this model features the advantage of avoiding jurisdictional conflict.

Model 2 (M_2) – concurrent jurisdictions – features greater institutional flexibility insofar as it includes an authority whose purpose is to promote competition and which should therefore pose no bureaucratic resistance to the elimination of industry regulation. However, economies of scale are lost by

introducing a new bureaucratic structure while overlapping of tasks tends to eliminate economies of scope. On the other hand, the risk of capture is reduced by introducing another agency to take charge of the more general aspects of competition policy (albeit at the cost of a certain risk of jurisdictional conflict).

Model 3 (M_3) – complementary jurisdictions – is similar to that of concurrent jurisdictions except that the regulators specialize in economic and technical regulation while the competition authority specializes in enforcing antitrust law. As in Model 2, this eliminates possible gains in terms of economies of scale, but allows for economies of specialization. Again there is less risk of capture, but this model has the advantage of offering less potential for conflict between jurisdictions since the roles of the agencies do not overlap.

Model 4 (M_4) – antitrust regulation – achieves economies of scale at the cost of economies of specialization. Bureaucratic transaction costs are lower because there is only one agency. As in Model 1, and theoretically in Model 3, there is no risk of jurisdictional conflict. Because there is one agency, the risk of capture will presumably be greater, but this is mitigated by the fact that the model proposes a general regulator rather than industry-specific regulators.

Chart 5 does not provide an immediate answer for the optimal configuration. Each of the six criteria must be weighed up for its importance to each specific case before drawing a conclusion. Chart 5 does not lead to the conclusion that Models 3 and 4 are necessarily optimal but provides elements for judgement by the legislator.

For example, if minimizing risk of capture were held to be a fundamental variable, it would be advisable to opt for a multi-agency model. On the other hand, Model 4 offers advantages in cases where flexibility and enabling regulation to keep pace with market change are given priority.

A subset of the criteria set out in Chart 5 can be helpful in determining the division of functions between competition and regulatory agencies. Here the following two variables are singled out:

i) the presence of economies of scale in antitrust and regulation activities, or considerable economies of specialization between the two;

ii) the costs of bureaucratic transactions between relatively autonomous specialized units.

Chart 6 shows the possibilities to be considered. If transaction costs and economies of specialization are low, Models 1 and 4 should have preference, as indicated in cell (c) of Chart 6. Indeed, a single agency would avoid the cost of coordinating actions between competition and regulatory authorities, while losing little in terms of economies of specialization.

On the other hand, if transaction costs are low but economies of specialization are significant, Models 2 and 3 would seem advantageous. It would presumably be easy to coordinate actions among different government bodies and possible losses in terms of economies of specialization would be small.

Chart 6 – Possibilities of Choice, Economies of Specialization, and Bureaucratic Transaction Costs

TRANSACTION COSTS ECONOMIES OF SPECIALIZATION	HIGH	LOW
HIGH	a)	b) M_2 – Concurrent Jurisdictions M_3 – Complementary Jurisdictions
LOW	c) M_1 – Antitrust exemption M_4 – Antitrust regulation	d)

In actual fact, bureaucratic transaction costs have been high. Coordination among different agencies is far from straightforward, but this seems to be the relevant policy variable, insofar as it is the one that can be altered by deliberate public effort in minimizing transaction costs. Note that the costs of coordination among public agencies may be seen as a variable that can be influenced by policy.

Meanwhile, economies of specialization seem to be high. Although regulation and competition have converged, as argued earlier, they entail a number of complex and detailed tasks which require a great deal of specialization. It does not seem advisable to merge specialized bureaucracies.

Since it seems easier to reduce bureaucratic transaction costs than economies of specialization, improving coordination among competition and regulatory authorities should be seen as a policy priority if the goal is to obtain a satisfactory institutional configuration such as the one represented by M3.

Institutions are not built up in a void. Their foundations, which are especially important, are the material and human resources available for the implementation of any particular configuration. If, for example, the banking industry has traditionally been regulated by a central bank that is highly active in the regulatory field, there will probably be a tendency to extend its activity to the area of competition policy, and in this case it will be more difficult to implement a system of complementary or even concurrent jurisdictions. Such situations may involve high transaction costs because of possible jurisdictional conflicts or the need to develop industry-specific expertise within a relatively short length of time. This would justify a special strategy including the anticipation of a longer period for institutional change, for example.

As amply demonstrated by the preceding discussion, the choice of institutional model to be adopted in any given country or for any given economic sector involves a number of variables and should always take concrete historical experience into account. The next section illustrates how the model of complementary jurisdictions has been implemented in Brazil, with emphasis on the successful effort to minimize the cost of coordination between the competition authority (CADE) and the new regulatory agency for the telecommunications industry (ANATEL).

II. IMPLEMENTATION OF AN INSTITUTIONAL FRAMEWORK BASED ON THE COMPLEMENTARY JURISDICTIONS MODEL IN THE TELECOMMUNICATIONS INDUSTRY: ASPECTS OF THE RECENT BRAZILIAN EXPERIENCE

The institutional framework for regulation of the telecommunications industry in Brazil has been entirely reformulated owing to the privatization of the state-owned operators and the creation of a competitive environment for this industry. The legal framework for this institutional restructuring was furnished by the 1997 General Telecommunications Act (Federal Law 9472/97). The Act introduced an entirely new set of general rules for the provision of telecommunications services.

From an institutional perspective, the most significant change introduced by the Act was the creation of a new regulatory agency for the telecommunications industry. Known as ANATEL (National Telecommunications Agency), the telecoms regulator is charged under article 19, clause I with the enforcement of national telecommunications policy and is given the jurisdiction and resources necessary for broad regulation of the industry.

It is important to stress that on establishing a new legal framework for the telecoms industry, the Act expressly states that the rules of competition policy are to be applied to telecoms operators. Some questions have been raised on this matter. On the one hand, the Act empowers ANATEL to enforce competition policy. On the other hand, the Act expressly preserves the competition authority's general jurisdiction over the telecoms industry. The competition authority in Brazil is CADE (Conselho Administrativo de Defesa da Econômica – Administrative Council for Economic Defense).

This necessarily entailed coordination between CADE and ANATEL in enforcing competition policy for the industry, resulting in an approximation to Model 3 with elements of Model 2, as described in the first part of this paper.

II.1. RELATIONSHIP BETWEEN THE GENERAL TELECOMMUNICATIONS ACT AND COMPETITION POLICY

The legislator's concern to establish a competitive environment for the telecoms industry is an essential feature of the entire Act. Article 2 states that it behooves the public authorities *"to take steps to promote competition and diversification of services"* (clause III), *"to create investment opportunities, and to foster technological and industrial development in a competitive environment"* (clause V).

Article 7 reflects the legislator's concern with competition policy even more obviously. This article states that *"the general rules governing the protection of the economic order shall apply to the telecommunications industry whenever they do not conflict with the provisions of this Act"*. "Protection of the economic order" evidently includes competition policy, as established by Federal Law 8884/94.

The Act is even more specific in Article 19, clause XIX, where it states that ANATEL *"shall have the legal authority to control, prevent and curb any breach of the economic order in the telecommunications industry, without prejudice to the powers vested in Conselho Administrativo de Defesa da Econômica – CADE"*.

This provision brings the above-mentioned issue into evidence. ANATEL is empowered to enforce competition law without prejudice to the jurisdiction of CADE. Although this leaves a "gray area" in which jurisdictions overlap whatever the institutional configuration to be adopted. as far as competition policy for the telecommunications industry is concerned it will require cooperation between the two authorities, and will therefore tend to constitute a model of complementary jurisdictions.

Under the terms of the Act the relationship between CADE and ANATEL in enforcing competition policy is complex insofar as it varies according to the legal regime under which a particular telecommunications service is provided (public law or private law), and according to whether oversight focuses on structures or behavior. The next subsection discusses how the Act deals with the articulation between CADE and ANATEL in each of these situations.

II.2. LEGAL REGIMES FOR THE PROVISION OF TELECOMMUNICATIONS SERVICES

The General Telecommunications Act states that telecommunications services in Brazil may be provided under two legal regimes: public law and private law. Providers of public-law services are deemed to be operating in the public interest and are therefore obliged to guarantee universal access and continuity, i.e. uninterrupted service (Article 79).

Providers of public-law services must be licensed by ANATEL (Article 83), although in exceptional circumstances a permit may be granted (Article 118).[8] These services are stringently controlled by ANATEL, which has the authority to determine rate structures among other items.

Private-law services are subordinated to the principles of economic activity (Article 126),[9] whose key corollary is free enterprise. Providers of private-law services are not bound to guarantee universal access and continuity. In this case, the rule is to intervene as little as possible (Article 128, I) in order to guarantee freedom of action for operators.

Private-law providers must obtain authorization from ANATEL in order to operate. In principle there is no limit to the number of authorizations, and as many companies as are technically eligible can provide such services. However, the regulatory agency may restrict the number of authorizations for certain reasons such as technical limitations or what is termed "relevant collective interest".

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[8] The terms "license" (*concession*) and "permit" (*permissão*) are concepts taken from administrative law and used by the state to grant private firms the right to provide a public service.

[9] The term "economic activity", as used in Article 126 of the Act, designates economic activity *sensu stricto*. This item deserves some explanation. Economic activity *sensu lato* can be divided into two categories: economic activity *sensu stricto* and public service. The former comprises the economic sphere allotted to private agents and in which the state may operate only in the exceptional cases set forth in Article 173 of the Federal Constitution. "Public service" comprises the economic sphere allotted to the state and in which private enterprise is allowed to operate only under license from the state, or by permission or authorization, as per Article 175 of the Federal Constitution. For a detailed explanation of the difference between economic activity *sensu lato*, economic activity *sensu stricto* and public service, see Grau (1997, p. 131ff).

The state is empowered under the Act to decide which services are to be provided under public or private law. The same service can be provided simultaneously by private-law and public-law carriers (Article 18, I).[10]

II.3. CONTROL OF MARKET STRUCTURES: THE GENERAL RULE

Market structure control can be defined as a form of *a priori* competition policy in which government authorities analyze acts of business concentration that may have an impact on the market, banning those deemed to represent a potential threat to competition. Hence its main purpose is to prevent concentration and abuse of market power.

Federal Law 8884/94 (Article 54, paragraph 3) establishes that in certain circumstances (if the companies involved attain a certain level of business volume or a certain share of the material markets in which they operate), a corporate merger or acquisition must be authorized by CADE no later than two weeks after it takes effect.[11]

The Act provides specifically for market structure control mechanisms in Article 7, paragraphs 2 and 3, where reference is made to the general rules governing protection of the economic order. These two clauses establish that: (i) acts of concentration involving telecoms service providers shall be submitted to structure controls as stipulated in competition law (Federal Law 8884/94), and (ii) acts of concentration shall be presented to ANATEL, which shall refer them to CADE for judgment.

Article 71 of the Act grants ANATEL broad preventive powers in connection with the granting and transfer of licenses, permits and authorizations. ANATEL may impose limitations, restrictions or conditions when granting these or

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[10] This situation may cause intricate problems for competition policy enforcement, because of structural inequalities between public-law and private-law providers. The former are submitted to severe state control and are bound by obligations of universal access and continuity. The latter provide exactly the same services free of state intervention and without the obligations cited. This asymmetry must be taken into account by CADE and ANATEL when enforcing competition policy.

[11] In more mature jurisdictions, mergers and acquisitions are normally controlled *a priori*. In Brazil, however, this control usually takes place after the event. For a brief discussion of recent trends in Brazilian merger control, see Oliveira (1999).

authorizing their transfer, in order to assure effective competition among the telecoms operators.

Thus, as far as market structure control is concerned the general rule is that ANATEL acts as a fact-finding agency while CADE adjudicates. If the procedures set forth in Federal Law 8884/94 are enforced, ANATEL may also act as a consultative body and issue an opinion on any case. Using the terminology defined in the first part of this paper, this situation constitutes a model of complementary jurisdictions (M3) based on a division of functions between the competition authority and the industry regulator.

II.4. CONTROL OF MARKET STRUCTURES FOR PUBLIC-LAW SERVICE PROVIDERS

Acts of concentration involving public-law telecommunications service providers are submitted to stringent control of market structures.

Firstly, the Act establishes that all spin-offs, mergers, transformations, amalgamations, capital reductions or transfers of ownership shall be submitted to ANATEL for prior approval[12] (Article 97). ANATEL bases a decision on (i) whether the change in question will hinder competition, and (ii) whether it will endanger performance of the licensing contract signed by the incumbent (Article 97, sole paragraph).

This provision does not preclude application of Article 7 of the Act, which states that acts of concentration in the telecommunications industry must be submitted to CADE. Thus any act of concentration that fits the terms set forth in Federal Law 8884/94, Article 54, paragraph 3 must be examined by CADE.

It is important to point out that ANATEL analyzes all acts of concentration involving public-law operators, regardless of their business volume or market share, while CADE examines only those falling with the terms of Federal Law 8884/94, Article 54, paragraph 3. Thus some transactions may be submitted to prior analysis by ANATEL but not necessarily sent on to CADE. This subset of operations would presumably pose regulatory issues but not potential competition concerns.

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[12] The introduction of *a priori* structure control is a significant innovation in the Brazilian legal system.

Naturally, this division of functions between the two authorities entails a number of routines which have to be developed in order to minimize bureaucratic transaction costs. This is the purpose of a cooperation program signed by CADE and ANATEL.

II.5. CONTROL OF MARKET STRUCTURES FOR PRIVATE-LAW SERVICE PROVIDERS

CADE is basically responsible for market structure control for private-law telecoms operators, in accordance with Federal Law 8884/94. This makes perfect sense since the services involved are governed by the principles applying to economic activity *sensu stricto*. The only difference in relation to the general rules established in Federal Law 8884/94 is that under Article 7 of the Act ANATEL is responsible for preparing an opinion on the case instead of *Secretaria de Direito Econômico* (the Economic Law Office), which normally performs that task.

II.6. CONTROL OF MARKET STRUCTURES FOR PRIVATE-LAW SERVICE PROVIDERS WITH A LIMITED NUMBER OF AUTHORIZATIONS

As mentioned earlier, in principle there are no limits to the number of authorizations granted to private-law service providers. However, in exceptional cases (i.e. when "material collective interest" or "technical limitations" are involved), the number of authorizations may be limited.

In this case, transfer of an authorization must abide by the same rules that apply to the transfer of a license to provide public-law services as per Article 98 of the Act. Hence ANATEL has prior control over such a transfer.

However, it is important to note that this prior control requirement applies only to the transfer of authorizations: the Act does not require prior control of private-law operators when the number of authorizations is limited (Article 97). Thus acts of concentration involving private-law operators are controlled only *ex post facto* by CADE, along the lines described earlier.

Chart 7 summarizes the above discussion.

CHART 7 –SUMMARY OF MARKET STRUCTURE CONTROL PROVISIONS IN THE GENERAL TELECOMMUNICATIONS ACT

Regime / Body	Public	Private with limited authorizations	Private with unlimited authorizations
CADE	X	X	X
ANATEL	XXX	XX	--

Legend:

Types of acts that require authorization by public authorities:

X = acts defined in competition law (Article 54)

XX = transfers of licenses, permits and authorizations

XXX = mergers and acquisitions, changes in corporate form, capital reductions, and transfers of licenses, permits and authorizations

◯ = prior authorization required (*a priori* control)

It is important to note that all cases examined by CADE will have been investigated and submitted to it by ANATEL. ANATEL therefore performs a major role as fact-finding body even in cases involving private-law operators, which only require approval by CADE.

II.7 CONTROL OF CONDUCT IN THE TELECOMMUNICATIONS INDUSTRY

The General Telecommunications Act is vague as to the jurisdictional boundaries for enforcement of the rules designed to avert anti-competitive behavior on the part of economic agents in the telecommunications industry.

Again the relevant provision is Article 19, clause XIX, which empowers ANATEL to punish violations without prejudice to the powers vested in CADE.

However, Article 70 of the Act states that conduct prejudicial to competition "shall be cohibited", listing among others (i) the practice of subsidies aimed at artificially reducing prices, (ii) the use of information obtained from competitors by virtue of inter-company service agreements, and (iii) omission of technical and commercial information relevant to the rendering of services by third parties.

A logical interpretation of this article would be that it merely extends the list of violations included for the purpose of exemplification in Article 21 of Federal Law 8884/94, by inserting anti-competitive practices specific to the telecommunications industry. Indeed, extending the list of violations confirms the jurisdiction of CADE to judge these "new" violations. However, as in the case of merger control, the role of ANATEL is crucial, since it replaces the Economic Law Office in the investigation of cases involving conduct.

In drafting the General Telecommunications Act the legislator clearly opted for a model based on complementary jurisdictions. This realization demands more clearly delimited boundaries for each agency's role in preventing and punishing violations of the economic order. Hence the importance of coordination between CADE and ANATEL.

III. CONCLUSIONS

Competition policy and regulation have increasingly converged in recent years, and it is difficult to draw clear boundaries between the two areas. Thus any effort to optimize the activities of competition authorities and regulators requires more effective coordination between them.

From this perspective there are various possible institutional configurations, ranging from antitrust exemption to deregulation via models that feature concurrent jurisdictions, complementary jurisdictions and antitrust regulation.

Various factors must be taken into consideration when choosing an optimal institutional model: institutional flexibility, economies of scale and specialization between competition policy and regulation, bureaucratic transaction costs, the risk of capture, and potential jurisdictional conflict.

However, it must be stressed that the choice should always take account of concrete historical experience in each jurisdiction and industry.

In the specific case of the Brazilian telecommunications industry, this paper has suggested that the model of complementary jurisdictions applies. If current efforts to coordinate activities between ANATEL (regulatory agency) and CADE (competition authority) succeed, this model may prove to be the optimal institutional configuration.

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CEP 01313-902 - São Paulo – Brasil
Tel.: (011) 281-7813/281-7765