

4 Chapter 4 Telecommunications Competition Tribunal



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One of the major reforms proposed by the Panel in this report is elimination of the presumption of economic regulation that underpins the current telecommunications legislation in favour of a presumption of deregulation. As discussed in Chapters 2 and 3, this reform will result in significantly lighter economic regulation than the existing model.

As the regulatory framework transitions from an historic approach that seeks to protect consumers from monopoly pricing to one that relies on competitive market forces to discipline pricing, the focus of economic regulation shifts toward ensuring that competition is not thwarted or significantly diminished as a result of anti-competitive conduct by those who might possess significant market power (SMP). In this environment, there is greater reliance on competition law principles, rather than on traditional public utility regulation, to assess whether barriers to entry exist, whether SMP exists and whether there has been abuse of such SMP that has resulted — or is likely to result — in a significant lessening or prevention of competition in the market.

As this shift in regulatory focus occurs, it is important to consider the most appropriate institutional framework to define markets, assess market power, determine whether there has been an abuse of such SMP when it is found to exist, and determine whether such conduct has resulted in a significant lessening or prevention of competition. It is equally important to ensure that the institution granted this authority has an in-depth understanding of the telecommunications sector as well as the requisite powers and procedures to make determinations in a timely manner, to impose effective remedies when justified and to monitor compliance with its orders. The question that arises is whether the existing sector-specific regulator — the Canadian Radio-television and Telecommunications Commission (CRTC) — the competition law authorities — the Commissioner of Competition, the Competition Tribunal and the courts — or some new institution would be the most appropriate and effective body to assume this role.

Canada is not alone in considering these issues. In fact, as discussed further below, other countries have been active in reforming their institutional framework to better address this issue. As a result, Canada currently lags some of its major trading partners in creating new institutional frameworks to better respond to the changing regulatory environment. In considering this issue, the Panel has had the benefit of consultations with a number of regulators in Europe, the United States, Asia, Australia and New Zealand in addition to a significant number of submissions from Canadian regulators, academics and industry participants in the course of its public consultations.

International Experience

In considering how best to capture the expertise of the competition authority and the telecommunications regulator, the Panel examined the approaches taken in a number of the member countries of the Organisation for Economic Co-operation and Development (OECD) that have addressed this issue.¹ A brief summary of some of the salient features of the approaches considered is set out below.

The European Union

During the first half of this decade, telecommunications regulation in Europe has undergone a major overhaul under the direction of the European Union (EU). These reforms have significantly transformed the regulatory landscape in Europe, moving member states away from a patchwork of diverse regimes with an emphasis on detailed economic regulation toward a more harmonized system based on competition law principles. Under the new regime, there is a presumption in favour of deregulation. Sector-specific regulation must be justified on the basis of a common set of economic and social principles, and must be no more intrusive than is necessary to achieve these ends.

Member states of the European Community (EC) are required by the Treaty of Rome Establishing the European Economic Community (EC Treaty) to prohibit certain forms of anti-competitive conduct that affect trade between member states or that restrict or distort competition within the common market. These prohibitions, which are contained in Articles 81² and 82³ of the EC Treaty, form the basis of EU competition law. Following a number of unsuccessful attempts to harmonize the approach to telecommunications regulation in Europe and the application of Articles 81 and 82 to that sector, the European Parliament and Council introduced a series

¹ Various sources were referenced in drafting this section, including Olivier Boylaud and Guiseppe Nicoletti, "Regulation, Market Structure and Performance in Telecommunications," OECD Economic Studies No. 32, 2001/I (OECD Publishing, 2000) (available online at: <http://www.oecd.org/dataoecd/24/33/2736298.pdf>); "Telecoms and Media 2005, An Overview of Regulation in 47 Jurisdictions Worldwide," *Global Competition Review*, 6th ed., 2005; CRTC, Submission in response to the Telecommunications Policy Review Panel Consultation Paper, August 17, 2005 (available online at: http://www.crtc.gc.ca/eng/publications/reports/t_review05.pdf); Laurence J. E. Dunbar and Leslie J. Milton, "Comparative Study on Interaction between Competition Law Authorities and Telecommunications Regulators in Australia, the United Kingdom, Germany and the United States of America," Submission of the Competition Bureau in response to the Telecommunications Policy Review Panel Consultation Paper, August 12, 2005 (available online at: [http://www.telecomreview.ca/epic/internet/intprp-gecrt.nsf/vwapj/Competition_Bureau_-_Appendix_A_\(Comparative_Study\).pdf/\\$FILE/Competition_Bureau_-_Appendix_A_\(Comparative_Study\).pdf](http://www.telecomreview.ca/epic/internet/intprp-gecrt.nsf/vwapj/Competition_Bureau_-_Appendix_A_(Comparative_Study).pdf/$FILE/Competition_Bureau_-_Appendix_A_(Comparative_Study).pdf)); and New Zealand, Ministerial Enquiry into Telecommunications, Final Report, September 27, 2000 (available online at: <http://www.teleinquiry.govt.nz/reports/final/final.pdf>).

² Section 81 addresses agreements between parties or concerted practices that have as their object or effect the prevention, restriction or distortion of competition within the common market. Available online at: http://europa.eu.int/comm/competition/legislation/treaties/ec/art81_en.html

³ Section 82 addresses situations of abuse of dominance. It includes a list of practices that may constitute abuse, including:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions
- (b) limiting production, markets or technical development to the prejudice of consumers
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Available online at: http://europa.eu.int/comm/competition/legislation/treaties/ec/art82_en.html

of major new directives in 2003. One of these directives, known as the Framework Directive,⁴ addresses the respective roles of competition law and sector-specific regulation in the new regime. The objectives of the Framework Directive are to harmonize regulation across Europe to reduce entry barriers in national markets and to foster development of effective competition both within domestic markets and across borders within the European Community.

As required by the Framework Directive, the European Commission issued a recommendation identifying some 18 retail and wholesale relevant product and service markets that it considers to be susceptible to *ex ante* regulation.⁵ The EC also issued guidelines setting out the economic and competition law principles to be employed by national regulatory authorities (NRAs) in defining relevant markets and assessing market power in those markets.⁶ The Framework Directive instructs member states to reduce sector-specific regulation so they address only those instances where it is warranted by the presence of SMP in relevant markets. Even when an NRA finds SMP to exist in a market segment defined by the European Commission, or defined by the NRA in accordance with the prescribed methodology, that fact alone does not necessarily justify sector-specific regulation.

The NRA is required to take a further step and determine that competition law alone does not adequately address the market failure in question. When sector-specific regulation is justified on this basis, the NRA must assess the regulatory options available and select the least intrusive option that will achieve the desired objective. In this environment, *ex ante* economic regulation is an option of last resort. When sector-specific regulation is not justified on this basis, generally applicable national and EU competition laws must be applied.

While the EU has determined that there is still a role for sector-specific regulation, it has structured that role to suit the state of competition in the market and to respond to social and other policy objectives that cannot readily be achieved by market forces. It has ordered that designated NRAs must define markets and apply competition law where SMP is not found to exist — but it has not dictated to member states which domestic regulators must make these determinations. This has left individual member states with the option of deciding which roles their domestic regulators will assume. This has resulted in different institutional approaches being taken in different member states. Two such approaches are briefly described below, followed by a review of other international approaches.

⁴ Directive 2002/21/EC of the European Parliament and of the Council, March 7, 2002. Available online at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_201/l_20120020731en00370047.pdf

⁵ Commission Recommendation of February 11, 2003, on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and Council on a common regulatory framework for electronic communications networks and service, 2003/311/EC, OJ L 114/45.

⁶ Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic networks and services, 2002/C 165/03, OJ C 165/6 (11.7.2002).

Germany

The Regulatory Authority for Telecommunications and Posts (RegTP) has authority under the German *Telecommunications Act* to regulate rates for telecommunications services and address abusive practices by dominant telecommunications carriers.⁷ The RegTP was already required to employ domestic competition law principles in defining relevant markets and assessing market power in the telecommunications sector prior to the issuance of the Framework Directive. However, as a result of the Framework Directive, it now must also ensure that its review is in compliance with the EC tests for defining markets and determining the existence of SMP. Since the RegTP has not been designated as the NRA in Germany responsible for administration and enforcement of EU competition law, it must turn to another German institution, the Federal Cartel Office (FCO), to perform this function.

The FCO is the federal competition authority in Germany with authority over cartels, abusive practices and mergers under the German *Act Against Restraints of Competition*. The FCO also has authority to enforce Articles 81 and 82 of the EC Treaty. In order to comply with the Framework Directive, the *Telecommunications Act* requires the RegTP to obtain the agreement of the FCO on decisions intended to address competitive distortions concerning the definition of telecommunications markets, the assessment of market power and the principles of frequency allocation. As a result, the RegTP and FCO cooperate throughout the course of any investigation by sharing information and consulting with each other to reach a consensus determination. The final draft of any RegTP decision is sent to the FCO for its formal consent. This close cooperation throughout the process minimizes the potential for disagreement between the RegTP and FCO and satisfies the institutional requirements of the Framework Directive.

The United Kingdom

The United Kingdom has taken a different approach in implementing the Framework Directive. It has not maintained the traditional split in jurisdiction between the national competition authority (the Office of Fair Trading, or OFT) and the national communications regulator (the Office of Communications, or Ofcom), and has attempted to coordinate the relationship between the two regulators with respect to the enforcement of EU anti-trust law and communications policy. The U.K.'s approach has been to confer on Ofcom concurrent powers to administer competition laws with respect to the communications sector. This extends not only to the enforcement of Articles 81 and 82 of the EC Treaty and implementation of EC Communications Directives, but also to the enforcement of domestic competition law embodied in the *Competition Act, 1998*. Ofcom has been designated as an NRA for these purposes. However, Ofcom's powers do not extend to mergers or criminal behaviour under the *Enterprise Act, 2002*.

⁷ It has authority of technical regulation as well. Examples include such matters as frequency assignments, numbering and universal service. With respect to broadcast issues, the RegTP assigns radio frequencies to state media authorities who then assign the frequencies to broadcasters and address content issues. However, the states have no jurisdiction over telecommunications.

The U.K.'s approach to the jurisdictional issues raised by the EU's reforms is intended to foster consistency in regulation, provide regulated entities with access to a single regulator ("one-stop shopping") and avoid double jeopardy under U.K. and EU law.⁸ In accordance with EC requirements, the *Communications Act, 2003* requires Ofcom to make a finding of SMP before imposing SMP regulatory conditions. In adopting this approach, the U.K. has avoided the difficulties of coordinating the activities between its two domestic regulators with respect to both the enforcement of EU competition law and communications policy as well as its domestic competition law.

Decisions by Ofcom that involve competition law interpretation and application under Articles 81 or 82, or under the *Competition Act, 1998*, are subject to appeal to the Competition Appeal Tribunal on both the substance of the decision and any penalties imposed. The Competition Appeal Tribunal is the same body that reviews decisions of the OFT. The U.K.'s use of the same tribunal is intended to ensure that a common appeal body reviews and interprets decisions regarding the application of competition law and policy by both the OFT and Ofcom, thereby ensuring application of the same standards and rigour to all industry sectors.

The U.K. recognizes that conferring concurrent jurisdiction on two regulatory bodies could give rise to confusion over which body has jurisdiction in a particular case. This issue has been addressed by putting in place "concurrency regulations" that require consultation between the regulators whenever they receive an application that raises competition law issues in the telecommunications sector. The concurrency regulations have been supplemented by a letter of agreement between the regulators that for practical purposes confers jurisdiction on the sector-specific regulator, Ofcom, in cases primarily involving the communications sector.⁹

The United States

The United States has a long history of conferring concurrent anti-trust¹⁰ enforcement powers on its telecommunications sector regulator, the Federal Communications Commission (FCC),¹¹ and its anti-trust authorities. It also has a long history of informal consultation between these anti-trust authorities and the FCC.

In the United States, there are two principal statutes dealing with federal communications regulation and three principal statutes that address anti-trust enforcement. The *Communications Act* of 1934 establishes the regulatory framework for interstate and international communications, including common carrier, broadcasting/radio, and cable regulation. Section 601(b)(1) of *The*

⁸ U.K. Department of Trade and Industry, *Our Competition Future: Building the Knowledge Driven Economy*, 1998. Available online at: http://www.dti.gov.uk/comp/competitive/pdfs/es_pdf1.pdf

⁹ *Competition Act 1998 (Concurrency) Regulations 2004*, SI 2000/260. Available online at: <http://www.opsi.gov.uk/si/si2004/20041077.htm>

¹⁰ In the U.S. and some other countries, competition law referred to as "anti-trust" law.

¹¹ The FCC is the federal communications regulator in the U.S. with the authority to enforce the *Communications Act* of 1934.

Telecommunications Act of 1996 contains an “anti-trust saving clause” that expressly provides that nothing in the Act “shall modify, impair, or supersede the applicability of any of the antitrust laws.” The *Sherman Act*, the *Clayton Act* and the *Federal Trade and Commerce Act* set out the general laws regarding anti-trust enforcement. Three different bodies have jurisdiction to enforce these Acts: the FCC, the Anti-Trust Division of the Department of Justice (USDOJ), and the Federal Trade Commission (FTC).¹² With respect to anti-trust and telecommunications, the FCC also has authority to enforce the *Clayton Act* provisions, including the merger provisions, in respect of common carriers engaged in wireline or radio communications.

Under s. 271 of the *Communications Act* of 1934, the FCC was required to consult with the USDOJ and accord “substantial weight” to the USDOJ’s analysis before finding that a regional Bell operating company’s (RBOC) local markets were sufficiently open to competition that it should be permitted to enter the long distance market. Section 271 now is essentially of historical significance since all of the RBOCs have been granted approval to provide long distance services under the section. However, the “substantial weight” threshold is an important concept. It is interpreted as meaning that although the USDOJ’s position was not conclusive, the FCC had to consider the USDOJ views and, if it rejected those views, explain the basis for the rejection in its decision. In other matters before the FCC, the USDOJ has the right to file comments in any FCC proceeding.

As noted above, both the FCC and USDOJ investigate mergers of communications entities. There are no formal consultation requirements. Typically, however, the FCC and USDOJ are in contact with each other early in an investigation at the staff level and discuss issues of common concern. Cooperation and consistency in the competition analysis by both the FCC and the USDOJ are fostered by the FCC’s use of the USDOJ guidelines for assessing markets and market power, the timelines established for FCC and USDOJ assessment of mergers and the right of the USDOJ to appear and make submissions in any appeal of an FCC decision.

For example, with respect to a merger file, the FCC typically takes longer to review a merger than the USDOJ. As a result, it has the benefit of the USDOJ’s analysis and decision in its deliberations and typically avoids inconsistent assessment of markets and market power. Also, if the USDOJ imposes conditions on a merger (through a consent decree), the application before the FCC will need to be modified to reflect the USDOJ terms. The FCC acts on the modified application and, if necessary, imposes additional conditions on its approval.

¹² Both the USDOJ and the FTC have a general anti-trust mandate that is governed by the provisions of the *Sherman Act*, the *Clayton Act* and, in the case of the FTC, the *FTC Act*. Common carriers that are subject to the *Communications Act* of 1934 are expressly excluded from the FTC’s jurisdiction to prevent persons and corporations from engaging in unfair methods of competition or unfair or deceptive practices under the *FTC Act*. The FTC does have jurisdiction under these statutes to review non-common carrier matters including, for example, cable and broadcasting issues.

Australia

In 1997, the Commonwealth Government of Australia extensively reformed its competition and telecommunications legislation and undertook a restructuring of its regulatory institutions. This restructuring resulted in the redistribution of economic regulatory functions, previously exercised by a telecommunications industry-specific regulator (AUSTEL), to the Australian Competition and Consumer Commission (ACCC), which also has responsibility for competition law enforcement and consumer protection. At the same time, AUSTEL's responsibility for "technical regulation" was transferred to a new agency called the Australian Communications Authority (ACA). In 2005, the ACA was merged with the Australian Broadcasting Authority (ABA) to form the Australian Communications and Media Authority (ACMA).

The restructuring of Australia's telecommunications regulatory institutions was driven by a number of factors, including a desire to deliver consistency in regulation across various sectors of the economy, to produce administrative savings by pooling skills and providing predictability in regulation across sectors, to lessen the risk of "regulatory capture" of a sector-specific regulator that maintains close contact with the entities it regulates, and to inject a more "pro-competitive culture" into the regulatory process.¹³

While the restructuring process resulted in the economic regulation of the telecommunications sector and general competition regulation being brought together under the unified jurisdiction of the ACCC, it did not result in the elimination of economic regulation or a simplistic application of competition laws of general application to the telecommunications sector. Rather, the approach taken was to add to the primary statute governing competition regulation (the *Trade Practices Act*) two new telecommunications-specific chapters dealing with anti-competitive conduct in the telecommunications sector (Part XIB) and with regulated access to telecommunications carriage services (Part XIC). The ACCC has established a separate regulatory division to administer its telecommunications regulatory functions. The division that is responsible for economic regulation of the telecommunications sector has the ability to exercise both *ex ante* and *ex post* regulatory powers.

The other general provisions of the *Trade Practices Act* continue to apply to the telecommunications sector. However, in practice, the industry-specific provisions in Parts XIB and XIC of the Act are applied in respect of issues affecting anti-competitive conduct or access to facilities or services in the telecommunications sector and price regulation.

This division of responsibility between the ACCC and the ACMA has resulted in a number of intersecting areas of jurisdiction, which are addressed through mandatory consultation between the agencies. Consistency in approach is also assisted by the cross-appointment of an ACCC Commissioner on the ACMA and an ACMA Commissioner on the ACCC.

¹³ Independent Committee of Inquiry, National Competition Policy, August 1999, chapter 14.

New Zealand

New Zealand is the only OECD country that experimented with total reliance on its general competition law (the *Commerce Act*) rather than sector-specific regulation for addressing issues in the telecommunications sector. This experiment followed New Zealand's decision to deregulate much of its economy in the late 1980s. It is well recognized that this approach proved to be a failure, as it was too slow and ineffective to deal with key issues that required resolution for development of telecommunications markets such as interconnection conditions and rates for access to local loops.¹⁴

In 2001, the New Zealand government abandoned this approach and introduced a new *Telecommunications Act*, which contains provisions for the sector-specific regulation of the telecommunications market. While the new regime retains the practice of applying general competition law provisions to the telecommunications sector, it also creates a new Telecommunications Commissioner with authority to address a number of telecommunications regulatory issues using sector-specific powers. The commissioner has jurisdiction to regulate interconnection, resolve access disputes, establish service obligations, establish costing and accounting mechanisms, set rates and establish a contribution regime. The commissioner also has a degree of control over certain potential anti-competitive conduct. In addition, the commissioner has the power to regulate new services under certain circumstances. All other issues regarding the application of the general competition law, including review of abuse of dominance and mergers, remain under the jurisdiction of the *Commerce Act* and the *Fair Trading Act* and are enforced by the commerce commission.

¹⁴ For a more detailed discussion of this issue, see CRTC, Submission in response to the Telecommunications Policy Review Panel Consultation Paper, August 17, 2005, paragraphs 157–160. Available online at: http://www.crtc.gc.ca/eng/publications/reports/t_review05.pdf

Lessons from International Experience

The following table summarizes the international experience discussed above.

Table 4-1. Telecommunications Regulation, 2005							
Country	Regulatory institution	Approval of merger	Review of anti-competitive conduct	Interconnection		Other regulation	
				Authorization of charges of operators with SMP	Dispute resolution	Pricing	Service quality
Australia	• Telecom technical regulator						X
	• Competition authority with sector-specific division applying sector-specific legislation	X	X	X	X	X	
Canada	• Minister (spectrum regulation)	X					
	• Telecom regulator		X	X	X	X	X
	• Competition authority	X	X				
Germany	• Telecom regulator		X	X	X	X	
	• Competition authority	X	X				
New Zealand	• Ministry (Kiwi share obligation)					X	X
	• Telecom regulator operating within competition authority, but applying sector-specific legislation		X	X	X	X	X
	• Competition authority	X	X				
United Kingdom	• Telecom regulator		X	X	X	X	X
	• Competition authority	X					
United States	• Telecom regulator	X	X	X	X	X	X
	• Competition authority	X	X				
	• Other (state level)			X (intra-state only)	X (intra-state only)		

Source: See footnote 1.

The Panel's review of experience in other countries has led it to reach the following conclusions regarding the interface between competition law and sector-specific telecommunications regulation:

- In both regulated and unregulated markets, many of Canada's major trading partners have taken steps to place much greater reliance on conventional competition theory in their telecommunications legislation, rather than continuing to rely on "public utility policy" or "common carrier regulation." Canada's current regime is becoming more of an exception to the norm applied by its major trading partners.
- Most OECD countries continue to rely on some form of sector-specific regulation in the telecommunications sector. New Zealand is the only OECD country to experiment with relying solely on competition law, and this approach has proved to be a failure.
- Other countries have developed better mechanisms than Canada for coordination of their anti-trust and telecommunications regulatory activities and for the integration of competition law principles into their sector-specific regimes.
- The United Kingdom, Australia and New Zealand have recently reformed their regulatory institutions in an effort to inject more rigorous competition law analysis into their sector-specific regulation. Although the approaches in each jurisdiction are quite different, each of the new institutions or divisions has a different mandate from that of traditional competition authorities, one that is tailored to the requirements of the telecommunications sector.

A New Canadian Approach

In considering Canada's requirements, the Panel believes the government authority that deals with competition issues in the telecommunications sector should have the following attributes:

- strong sector-specific knowledge, including technical knowledge of the telecommunications industry
- strong background in economic analysis and competition law principles
- quasi-judicial structure
- expertise in conducting public hearings, including expedited proceedings
- ability to impose a wide range of behavioural remedies
- ability to monitor or supervise behavioural remedies
- ability to impose fines or order divestiture.

There are a number of options for the future Canadian institutional framework, many of which have been proposed in submissions to the Panel during its public consultations. They include:

- amending the *Telecommunications Act* to empower the CRTC to apply competition law
- amending the *Competition Act* to better equip the Commissioner of Competition and the Competition Tribunal to carry out these functions
- enabling the CRTC to consult with the Competition Bureau when considering competition issues
- enabling the Competition Bureau to consult with the CRTC when considering telecommunications issues
- enhancing the weight given to submissions presented by the Commissioner of Competition to the CRTC on competition-related issues
- appointing the Commissioner of Competition or another person with competition law experience to sit on the CRTC in respect of competition issues
- establishing a new specialized tribunal to consider competition issues arising in the telecommunications sector.

The Panel is not convinced that its concerns will be met by simply amending the *Telecommunications Act* to empower the CRTC to apply competition law principles to competitive telecommunications issues on a broader basis than it currently does.¹⁵ The CRTC clearly has a high degree of sector-specific knowledge and is well-equipped as a quasi-judicial tribunal to conduct proceedings as well as impose and monitor behavioural remedies. However, there is a fairly strongly held view in the industry that the CRTC does not rigorously apply competition law principles in adjudicating complaints of anti-competitive conduct. The CRTC's long history of economic regulation based on the jurisprudence of public utility and common carrier regulation makes it hard for the CRTC to make the shift away from a presumption of regulation to an approach more oriented toward competition law.

This regulatory tradition in many ways defines the CRTC's current approach to issues of competitive safeguards and abuse of dominance. It has led to an environment in which the CRTC has adopted competition law tests for defining markets and assessing market power in forbearance proceedings, but has pursued a public policy approach to competition issues in other contexts. Its approach has been to engage in a "balancing of interests," rather than an economic analysis of market power. This results in a tendency to micro-manage competitive market behaviour in order to influence competitive outcomes, rather than to seek less intrusive remedies. This has led to uncertainty in results and a lack of rigour in economic analysis. In the Panel's view, this approach to regulation is unlikely to change by simply amending the governing legislation. This problem is exacerbated by the fact that the CRTC lacks the depth of expertise resident in the Competition Bureau to apply competition law principles in a rigorous manner to issues of market definition and assessment of SMP.

¹⁵ The CRTC's current use of competition law principles appears limited to its application of the forbearance tests in s. 34 of the *Telecommunications Act*.

At the same time, while the Competition Bureau has a higher level of expertise in defining markets and assessing market power than does the CRTC, the Panel is not satisfied that the *Competition Act* provides an appropriate framework for the resolution of competitive disputes in the telecommunications sector where SMP still exists or where markets are in transition from SMP. Nor does it provide an appropriate framework in situations where the development, ongoing monitoring and supervision of sector-specific competitive safeguards may be required. As a body with responsibility for administering Canada's competition laws in all sectors of the Canadian economy, the Competition Bureau clearly lacks the degree of sector-specific knowledge possessed by the CRTC.

In addition, the Competition Bureau is constituted as an enforcement agency rather than as a quasi-judicial body. Its process does not allow for the timely resolution of disputes that routinely arise in the dynamic and rapidly changing telecommunications sector. The *Competition Act* has constituted the Competition Bureau as an investigative body that investigates and reviews complaints of anti-competitive conduct. It then decides whether there is sufficient evidence to pursue either civil or criminal proceedings before the Competition Tribunal or the courts. This two-stage process involves significant time lags, sometimes measured in years, between the lodging of complaints and the resolution of issues. This lengthy process is not well suited to an environment in which competitive disputes arise on a fairly frequent basis and require prompt resolution. In addition, the Competition Tribunal does not view itself as a regulator that monitors behavioural remedies on an ongoing basis.

While it is arguable that these shortcomings of the *Competition Act* regime could equally apply to other sectors of the economy, other sectors do not share the same attributes as the telecommunications sector. Chapter 3, Economic Regulation, describes some of the specific economic and technical conditions of telecommunications markets. As discussed elsewhere in this report, telecommunications is widely regarded as an enabling technology that is vital to both the social and economic well-being of Canadians. Governments, businesses, individuals, educational institutions, hospitals and emergency services all depend on an efficient and technically advanced telecommunications infrastructure. If the recommendations in this report are adopted, there will be significantly lighter regulation in the Canadian telecommunications sector than there has been in the past. In this new environment, it will be important to have the capability to address allegations of anti-competitive conduct in a timely and effective manner.

These factors have led the Panel to consider a number of other institutional and procedural approaches adopted in other OECD countries that share Canada's legal and regulatory traditions.

At the present time, the Commissioner of Competition is empowered to present submissions to the CRTC in public proceedings that raise competition issues under s. 125 of the *Competition Act*. This has led some participants in the Panel's consultations to propose a requirement for the CRTC to give greater weight to such submissions and explain why it is deviating from the Commissioner of Competition's analysis, if it decides not to adopt it. This is somewhat similar to the mechanism adopted in the United States in respect of USDOJ submissions regarding RBOC entry into long distance markets. While giving greater weight to submissions of the Competition Commissioner may improve the quality of the CRTC's analysis of competition issues, it may not necessarily result in the type of rigour the Panel believes should apply to decisions respecting deregulation or the abuse of market power, since it does not entail participation in the decision-making process by the competition law experts.

In addition, other parties in the CRTC's public proceedings might justifiably ask why their submissions were given less weight than those of the Competition Commissioner. One of the strengths of the CRTC's process is its open public hearing process. This strength would be undermined if one party's submissions were to be given greater weight, no matter how compelling the submissions of opposing parties.

The Panel also considered recommending the appointment of a commissioner with competition law expertise as one of several commissioners at the CRTC, as is done in Australia. However, this approach is unlikely to ensure a fundamental change in approach by the CRTC and is unlikely to improve the level of competition law analysis at the CRTC staff level.

In considering the available options, the Panel has also been aware of the need to preserve the CRTC's status as a quasi-judicial body. *Ex parte* consultations between agencies may be appropriate in jurisdictions where communications regulation is conducted to a greater extent on an administrative level. However, it is inappropriate in a country such as Canada where the regulator is constituted as a quasi-judicial body and proceedings are conducted by means of an open and transparent public process. In the Panel's view, the legitimacy of regulatory proceedings before the CRTC may also be undermined if the CRTC is required to reach agreement with the Commissioner of Competition prior to rendering a decision. Thus, the German model is not compatible with the Canadian legal and institutional framework.

These considerations have led the Panel to conclude that the best way forward is to combine the competition law expertise of the Competition Bureau and the sector-specific knowledge of the CRTC in a new hybrid tribunal with jurisdiction to make decisions on telecommunications matters involving significant competition policy issues. This approach would combine the expertise of these two agencies while maintaining the strengths of a public quasi-judicial process and the ability to act expeditiously in addressing sector-specific issues.

Establishment of a Telecommunications Competition Tribunal

The telecommunications industry is particularly complex, and the network infrastructure it utilizes is quite different from that in other sectors of the economy. The industry is evolving very quickly, both technologically and from the point of view of market dynamics. The Panel believes proper consideration of anti-competitive conduct in telecommunications markets can benefit from:

- expertise in the economics of industrial organization and its application to telecommunications issues
- detailed knowledge of the telecommunications industry.

It is for this reason that the Panel proposes the creation of a Telecommunications Competition Tribunal (TCT), a new type of “joint panel” that will draw upon resources of both the Competition Bureau and the CRTC.

The TCT would have both investigative and adjudicative functions. As a result, the process of considering complaints should be considerably expedited compared with the two-stage process followed by the Competition Bureau and the Competition Tribunal.

In the Panel’s view, complaints of anti-competitive conduct in all telecommunications markets, whether or not subject to economic regulation, should go to the TCT rather than to the CRTC, the Competition Bureau or the Competition Tribunal. This would include telecommunications services that have already been forborne by the CRTC and that may be subject currently to the jurisdiction of the Competition Bureau and Competition Tribunal. In particular, complaints of anti-competitive conduct as they affect long distance services, mobile services and Internet access services, whether dial-up or high-speed, would be heard by the TCT.

As an exception, terminal equipment and related services would remain under the jurisdiction of the Competition Bureau and Competition Tribunal. In the Panel’s view, terminal equipment does not share the complex features characteristic of telecommunications networks and so does not require special treatment of complaints of anti-competitive conduct.

The TCT will be a transitional regulatory mechanism designed for the specific purpose of guiding the telecommunications industry through the next stage of its evolution from sector-specific economic regulation, characterized by less *ex ante* price regulation and greater reliance on competition law principles, to regulation that is subject to the laws of general application including the *Competition Act*. The *Telecommunications Act* should include a sunset provision terminating the TCT at the end of five years, unless there continues to be significant market power in a substantial number of telecommunications markets.

The role of the TCT should therefore be reviewed as part of the more complete review of the telecommunications policy and regulatory framework in five years, which the Panel has recommended in Chapter 9. If technology and market forces continue to evolve as they have over the past few years, it is anticipated that many of the remaining markets can be deregulated over the next five years.¹⁶ At that time, competition in telecommunications markets may have intensified to the point where review of complaints of anti-competitive conduct can be moved from the TCT to the Competition Bureau and Competition Tribunal.

Recommendation 4-1

A new Telecommunications Competition Tribunal should be established operating as a type of “joint panel” of the CRTC and the Competition Bureau to address competition issues in the telecommunications sector.

Recommendation 4-2

The Telecommunications Competition Tribunal should be a transitional regulatory mechanism. Its mandate should terminate after five years, unless there continues to be significant market power in a substantial number of telecom markets.

The tribunal should have three members:

- the Vice Chair, Telecommunications of the CRTC or another CRTC commissioner appointed by the CRTC
- the Commissioner of Competition or one of the Competition Bureau’s senior staff appointed by the Commissioner
- a third member to be appointed by the Governor-in-Council in accordance with the new recruitment and selection process recommended in Chapter 9 of this report for CRTC telecommunications commissioners.

To balance the perspectives brought by the representatives of the CRTC and the Competition Bureau to this new tribunal, the member appointed by the Governor-in-Council should act as chair of the TCT. Since the chair will not be encumbered with other duties at the CRTC or the Competition Bureau, he or she will also be better positioned to devote time to administration of the new tribunal. The TCT should make its decisions on the basis of a simple majority, with each of the three members being accorded a single vote. Members of the TCT should be appointed for a three- to five-year term, with the possibility of extension or reappointment.

¹⁶ Such a process of deregulation would be expedited if cable and wireless networks continue to provide competitive alternatives to incumbent local exchange carriers networks in progressively smaller markets.

Recommendation 4-3

The Telecommunications Competition Tribunal should be comprised of three members as follows:

- (a) the Vice Chair, Telecommunications of the CRTC or another CRTC commissioner appointed by the CRTC,**
- (b) the Commissioner of Competition or one of the Competition Bureau's senior staff appointed by the Commissioner, and**
- (c) a third member to be appointed by the Governor-in-Council in accordance with the new recruitment and selection process for new CRTC telecommunications commissioners as recommended in Chapter 9.**

Recommendation 4-4

The Governor-in-Council's appointee to the Telecommunications Competition Tribunal should act as its chair.

Recommendation 4-5

Each member of the Telecommunications Competition Tribunal should have one vote, and decisions should be made by a majority of votes.

The Panel recommends constituting the TCT as an independent, quasi-judicial tribunal empowered to make independent rulings on matters within its jurisdiction. These decisions would have the same force and effect as CRTC decisions or orders. The TCT should also be subject to the same statutory policy objectives and regulatory principles as the CRTC under the *Telecommunications Act*. Since the TCT will be considering competition issues in the telecommunications sector, it is important for it to have the flexibility to apply all *Telecommunications Act* powers available to the CRTC and all *Competition Act* powers available to the Competition Tribunal in civil cases, including the power to order divestiture in appropriate cases.

This type of specialized tribunal, operating as part of a broader regulatory scheme, is not without precedent in Canada. For example, the former *National Transportation Act* made extensive use of committees. While these committees' purposes and functions were quite different from those of the proposed TCT, there are some useful points of comparison.

Section 24 of the former *National Transportation Act* established five separate committees of the Canadian Transportation Commission (CTC) to regulate five different sectors covering rail, air, water and motor vehicle transport as well as commodity pipelines. The Act empowered the CTC to appoint commissioners from among its members to sit on the committees and to appoint

a chair of each committee from among them. The committee chair was accorded the same powers as the president of the CTC in respect of matters within the jurisdiction of the committee in question. Subsection 23.(3) of the former Act authorized the committees to exercise all of the powers of the Commission, and the orders, rules or decisions of the committee were accorded the same effect as though they had been made or issued by the full Commission.

One of the committees established by this legislation, the commodity pipeline transport committee, had jurisdiction over pipelines other than those used solely for carrying oil or gas, which fell subject to the jurisdiction of the National Energy Board. However, when a combined pipeline was used for purposes of transporting gas or oil and another commodity, para. 32.(3)(a) of the Act stipulated that it would be heard jointly by the National Energy Board and the Canadian Transportation Commission. In practice, this was accomplished by having both institutions appoint a commissioner to a panel that jointly heard the application. This type of tribunal, with members appointed by two different agencies, has some parallels with the proposed TCT.

There are other precedents in Canada for the cross-appointment of members of one agency or tribunal to sit on another such body. For example, ss. 6.(2) of the *Northern Pipeline Act* empowers the Governor-in-Council to “designate one of the members of the National Energy Board to be the administrator of the Northern Pipeline Agency. Section 3 of the *Competition Tribunal Act* requires the Governor-in-Council to appoint both judges of the Federal Court and lay members to sit on the Competition Tribunal.

The Panel believes the approach it is recommending will achieve the objectives of importing the Competition Bureau’s expertise in competition policy, as applied in the general economy and in other countries, into the sector-specific regulatory framework applicable to telecommunications. Such a hybrid tribunal should be well suited to resolve competitive disputes in the telecommunications sector and to monitor any remedies imposed.

Recommendation 4-6

The Telecommunications Competition Tribunal should be constituted as an independent quasi-judicial regulatory authority empowered to make rulings on matters within its jurisdiction that have the same force and effect as CRTC decisions or orders.

Recommendation 4-7

The Telecommunications Competition Tribunal should have all *Telecommunications Act* powers available to the CRTC and all *Competition Act* powers available to the Competition Tribunal in civil cases.

While the Panel is recommending a TCT constituted as an independent tribunal, it proposes housing the TCT within the CRTC and drawing on the CRTC's administrative resources. Consistent with the goal of harnessing the combined expertise resident within the CRTC and the Competition Bureau to address competition issues in the telecommunications sector, the TCT should be jointly staffed to the greatest extent possible with personnel from the Competition Bureau and the CRTC. The Panel envisages that the TCT will make its requirements for staff known to the CRTC and the Competition Bureau from time to time, depending on its workload and the types of issues with which it deals. Personnel with the relevant expertise will be assigned by both authorities to support the TCT in carrying out its duties.

The assigned CRTC and Competition Bureau staff should operate under the supervision of the TCT while working for it, but should remain employed by their host institution. In addition to being able to call on these shared resources of the CRTC and the Competition Bureau, the TCT should be empowered to hire an executive director and several senior managers with competition law, economics, telecommunications and engineering skills. The TCT should also have a dedicated administrative staff to support the processing of applications, the organization of hearings and the smooth running of the tribunal.

In the Panel's view, this approach will meet the objective of combining the existing resources of the CRTC and the Competition Bureau in a new quasi-judicial body with all of the flexibility required to satisfy its mandate. The Panel believes the TCT can be established in a cost-effective manner with a minimal number of new positions being created. To the extent that functions assigned to the TCT were formerly assigned to the CRTC, there should be at least a partial offsetting reduction in the CRTC's workload and staffing requirements. It will, however, be important to provide funding for additional personnel positions at the Competition Bureau to accommodate the increased demand on resources created by the TCT.

Recommendation 4-8

The Telecommunications Competition Tribunal should be staffed, to the greatest extent possible, by employees of the CRTC and the Competition Bureau. The CRTC and the Commissioner of Competition should be directed to assign personnel with the appropriate expertise to work under the direction of the Telecommunications Competition Tribunal in support of its mandate, as required by the Telecommunications Competition Tribunal from time to time.

Recommendation 4-9

The Telecommunications Competition Tribunal should also be empowered to retain a small secretariat of managers and support staff to carry out its functions.

There is a risk that a hybrid tribunal such as the TCT, which relies on resources of two other institutions, may run into resource conflicts. In addition, there may be cases requiring specialized expertise not available within the CRTC or the Competition Bureau. To ensure that the TCT has access on a timely basis to the type of expert advice required, the TCT should be empowered to retain advisers on an *ad hoc* contractual basis. This authority is analogous to the power granted to the Commissioner of Competition in s. 25–27 of the *Competition Act* and similar to the power proposed for the CRTC in Chapter 9 of this report.

Recommendation 4-10

The Telecommunications Competition Tribunal should be granted clear authority and sufficient budget to retain outside expert consultants at market rates when required to provide specialized expertise or to meet heavy workload requirements.

In order for the TCT to make full use of the expertise of the Competition Bureau and the CRTC, the Panel recommends allowing Competition Bureau and CRTC staff assigned to work with the TCT to share information with staff at the Competition Bureau and the CRTC, respectively, including the Commissioner of Competition, his or her deputies and CRTC telecommunications commissioners. To the extent such information is filed in confidence with the TCT, provisions should be put in place to extend this protection to confidential information imparted to Competition Bureau or CRTC officials.

Recommendation 4-11

Personnel assigned by the Commissioner of Competition or the CRTC to support the Telecommunications Competition Tribunal should have access to confidential information filed with it and should be permitted to share such information with other officials at the Competition Bureau or the CRTC to the extent necessary to perform their duties at the Telecommunications Competition Tribunal. Where information is filed in confidence with the Telecommunications Competition Tribunal and the claim for confidentiality is accepted by the Telecommunications Competition Tribunal, protection should be extended to any disclosure of the information to other officials of the Competition Bureau or the CRTC.

Bill C-73, which was given first reading on November 14, 2005, but which died with the dissolution of Parliament, proposed amendments to the *Telecommunications Act* that would have allowed greater sharing of confidential information between the CRTC and the Competition Bureau. The Panel supports this initiative and recommends accelerating and expanding it to work bilaterally. In the Panel's view, there should be greater opportunities for two-way sharing of expertise between the Bureau and the CRTC, as well as between both institutions and the TCT.

The Bureau could benefit from the industry knowledge and technical expertise of the CRTC when the Bureau is considering mergers or criminal complaints involving analysis of the telecommunications market. Consistent with the approach taken in other jurisdictions to share information between anti-trust and telecommunications regulatory agencies, the Panel recommends that the Commissioner of Competition should be empowered to request assistance from the CRTC and should be empowered to share relevant confidential information for such purposes with any CRTC personnel assigned to assist in the Bureau's investigation, subject to appropriate safeguards. Similarly, the CRTC and the TCT should be required to share relevant confidential information with the Bureau, subject to appropriate safeguards.

Consequential amendments to s. 29 of the *Competition Act* will be required to enable the Commissioner of Competition to share confidential information with the CRTC and to share personnel resources with the TCT. Consequential amendments will also be required to the *Telecommunications Act* to enable the CRTC to share confidential information with the Competition Bureau and to share personnel resources with the TCT.

Recommendation 4-12

Upon request by the Commissioner of Competition in the course of an investigation under the *Competition Act* involving the telecommunications sector, the CRTC or the Telecommunications Competition Tribunal should be required to provide assistance to the Competition Bureau in the form of personnel (subject to resource constraints) and to provide any information in their possession that may assist in the investigation or market analysis.

In the Panel's view, the TCT's activities should be financed in the same way as the CRTC's activities; that is, by means of an industry levy pursuant to the Telecommunications Fees Regulations. The CRTC's annual expenses should be combined with the TCT's annual expenses and should be recovered through the Telecommunications Fees Regulations.

It should be noted that the Panel recommends other changes to the Telecommunications Fees Regulations in Chapter 9 of this report that involve a broadening of the contribution base beyond carriers with tariffed services and a new mechanism for collecting fees.

Recommendation 4-13

The Telecommunications Fees Regulations should be amended to provide for recovery of the Telecommunications Competition Tribunal's annual operating expenses from the telecommunications industry.

Jurisdiction of the TCT and Application of Competition Law Principles

As discussed in Chapter 2, one of the policy objectives included in the *Telecommunications Act* is the enhancement of the competitiveness of Canadian telecommunications at the national and international levels. This policy objective is intended to provide the CRTC with direction on Parliament's desire to move away from the former monopoly supply model that had been predominant until then toward a more competitive market structure. At the same time, the 1993 policy objectives called on the CRTC to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective. These policy objectives set the tone for much of the CRTC's regulatory agenda over the past twelve years during a transitional phase from a monopoly to a competitive supply model.

However, with a few limited exceptions, including s. 34 and 35,¹⁷ the 1993 legislation does not equip the CRTC with many new tools to address competitive issues. As noted by the CRTC in its submission to the Panel, the *Telecommunications Act* grants the CRTC essentially the same powers to address competitive issues as it had enjoyed under the *Railway Act* in a monopoly environment. These powers are largely anchored in the tariff and rate approval process set out in s. 24 to 27, and especially in ss. 27.(2), which prohibits Canadian carriers from unjustly discriminating against any person or granting any person, including itself, an undue preference or advantage. While ss. 27.(2) has proven to be a very important provision in the development of competitive markets in Canada, it was clearly designed for a monopoly environment and does not embody principles of competition law or provide a predictable regulatory framework for business decisions.

As the Canadian telecommunications sector moves along the continuum from a monopoly supply model toward fully competitive markets, ss. 27.(2) provides an increasingly poor framework for analyzing and resolving competitive disputes between carriers or between telecommunications service providers and carriers.

The Panel considers that now there is a need to provide more specific direction on the application of competition policy to the more competitive market structure that has emerged and will continue to evolve in the coming years. It is time to move on from reliance on statutory provisions that are rooted in 19th century railway law.

¹⁷ Section 34 empowers the CRTC to forbear from regulation of a service or class of services provided by a carrier pursuant to five specific sections of the Act when competitive market forces were considered sufficient to protect the interests of users. Section 35 enables the Commission to require the provision or cessation of services by a Canadian carrier.

Competition analysis will play an important role in several areas, including defining relevant markets, assessing market power, addressing anti-competitive conduct and reducing barriers to entry. The first two of these tasks underpin competition law in most western economies including the European Union, the United States, Canada and Australia. Properly defining relevant markets and identifying the presence or absence of significant market power underpin the decision to continue to regulate or to forbear from regulation pursuant to s. 34 of the *Telecommunications Act*. Market definition and the assessment of market power also comprise an important element of the analysis of allegations of anti-competitive conduct. Failure to properly define relevant product and geographic markets or to properly assess market power can result in overregulation of markets that are workably competitive or, conversely, in a failure to regulate markets where one or more service providers abuse their significant market power. In either case, the outcome is not optimal from a public policy or economic perspective.

To better ensure that this critical analysis is performed in accordance with accepted competition law principles, the Panel recommends granting the TCT jurisdiction to conduct this analysis and make this determination with regard to both deregulation or re-regulation proceedings and alleged instances of anti-competitive conduct in telecommunications markets. This would extend to all segments of the market including both wireline and wireless services.

As discussed in Chapter 3 of this report, matters related to the definition of essential services and its application involve a combination of competition law, economics and telecommunications technology. The Panel therefore considers the TCT to be best placed to address these issues.

Finally, the Panel has considered the question of which institution should be responsible for reviewing mergers involving telecommunications service providers. The current arrangements for review of mergers in the broadcasting industry have been problematic. Both the CRTC and the Competition Bureau have authority to review changes of control in the broadcasting industry and, in at least one major case,¹⁸ the two institutions have issued conflicting decisions, leading to confusion and uncertainty.

The same problem will exist in the telecommunications industry, particularly if the Panel's proposal is adopted to transfer spectrum regulation powers to the CRTC. The current spectrum regime requires regulatory approval from Industry Canada for changes of control of spectrum licensees, and this approval power would be transferred to the CRTC. The CRTC currently has the indirect power to review mergers (changes of control) involving most telecommunications service providers in their capacity as broadcasting licensees. The Competition Bureau also has power to review mergers involving telecommunications service providers as well as broadcasting undertakings under the *Competition Act*.

¹⁸ In 2001, Astral Media Inc. agreed to purchase certain radio businesses from Telemedia Radio Inc., including radio businesses in the province of Quebec.

Thus, both the Competition Bureau and the CRTC have jurisdiction, directly or indirectly, to review mergers in the telecommunications industry, and there is a demonstrated potential for inconsistent decisions, which can lead to confusion and uncertainty as well as delays. The Panel considers that it would be desirable to have a single review authority in order to expedite and lend certainty to the merger review process.

After considering the options, the Panel believes the TCT would be the best-suited institution to review changes of control in the telecommunications industry. The TCT will combine the competition policy and economy-wide merger review expertise of the Competition Bureau with the telecommunications sector-specific expertise of the CRTC. This expertise has become increasingly important in a converged industry environment, where telecommunications and broadcasting service providers have been, and will be, involved in merger and acquisition activity. In current and future telecommunications markets, the skills required to conduct merger reviews will be very similar to the skills required to conduct the other tasks of the TCT related to the application of competition policy in the telecommunications industry. These tasks include market definition and the determination of whether significant market power exists in pre- and post-merger telecommunications markets.

Recommendation 4-14

The Telecommunications Competition Tribunal should have exclusive jurisdiction to determine the following matters:

- (a) applications for deregulation of services in telecommunications markets on the basis that significant market power does not exist,**
- (b) complaints of anti-competitive conduct in all telecommunications markets, other than the terminal equipment market,**
- (c) determinations on which services should be subject to mandated wholesale access services and establishment of the regulatory regime applicable to such services,**
- (d) applications for re-regulation of services in telecommunications markets where significant market power is alleged to exist, and**
- (e) reviews of mergers involving telecommunications service providers.**

To ensure that the TCT and the Competition Bureau employ consistent principles, the Panel recommends requiring the TCT to define relevant markets and assess market power within those markets in accordance with jurisprudence under the *Competition Act*.

As discussed in Chapter 3, rather than continuing to rely on the non-discrimination provision set out in ss. 27.(2) of the *Telecommunications Act* to address all manner of anti-competitive conduct, the Panel recommends enacting a new provision to expressly address anti-competitive conduct in telecommunications markets. This would provide the TCT with analytical tools and guidelines specifically designed for telecommunications markets and would be consistent with the approaches to telecommunications reform in the European Union and Australia.

Recommendation 4-15

The Telecommunications Competition Tribunal should define telecommunications markets and assess whether significant market power exists in accordance with competition law principles.

Resolving Jurisdictional Issues

One of the criticisms of the current split in jurisdiction between the Competition Bureau and the CRTC is that the dividing lines between them are blurred and that CRTC orders for “conditional forbearance” leave the industry unclear about which institution has jurisdiction in a given case. This in turn leads to “jurisdiction shopping” or to multiple applications in respect of the same issue. In the Panel’s view, the proposed reforms will help to address this issue by granting the TCT exclusive jurisdiction over all allegations of civil anti-competitive conduct in telecommunications markets.

The Panel is not proposing changes to the Competition Bureau’s jurisdiction to:

- investigate allegations of anti-competitive conduct that give rise to criminal law sanctions under the *Competition Act*
- review cases of misleading advertising or other consumer protection provisions
- investigate allegations of anti-competitive conduct in the telecommunications equipment market.

To clarify the respective roles of the TCT, the CRTC and the Commissioner of Competition, the Panel recommends putting formal mechanisms in place to further define these institutions’ respective jurisdictions in telecommunications and to provide a process for resolving borderline cases. Such a process would be similar to the “Concurrency Regulations” used in the United Kingdom to clarify jurisdiction between Ofcom and OFT. In the Panel’s view, the guiding principle should be the TCT’s exclusive jurisdiction over civil allegations of anti-competitive conduct in the telecommunications sector. Whenever the CRTC or the Commissioner of Competition receives a complaint that gives rise to such allegations, they should be required to refer it promptly to the TCT for action and to advise the complainant of this action.

When a complaint deals primarily with an allegation in another sector of the economy and only tangentially affects the telecommunications sector, the Commissioner of Competition should be required to consult with the TCT to determine which institution should assume jurisdiction. In appropriate cases, the telecommunications aspect of the proceeding should be referred to the TCT for consideration. Where the Commissioner of Competition retains jurisdiction, he or she should be permitted to consult with the TCT.

Similarly, when the CRTC entertains a proceeding that involves a competition-related issue as part of a broader proceeding, it should be required to consult with the TCT to determine how best to proceed. If the TCT decides that it should have jurisdiction over the issue, the CRTC should be required to refer such issues to the TCT for its consideration and resolution.

Where the TCT finds issues of technical, social or rate regulation in a competition issue before it, it should refer such issues to the CRTC for determination. Similarly, if a remedy imposed by the TCT involves implementation of technical regulation (such as the establishment of a number portability regime or a new interconnection arrangement), it should be empowered to refer the issue to the CRTC for implementation. This is consistent with the approach taken in countries such as Australia where there is a split between the competition and technical regulators in the telecommunications sector.

Recommendation 4-16

The Telecommunications Competition Tribunal should be granted exclusive jurisdiction over civil allegations of anti-competitive conduct in the telecommunications sector. Mechanisms should be put in place for consultation among the Telecommunications Competition Tribunal, the CRTC and the Commissioner of Competition to determine which institution should exercise jurisdiction in borderline cases.

Recommendation 4-17

Mechanisms should be put in place to enable the CRTC and the Commissioner of Competition to refer telecommunications competition issues to the Telecommunications Competition Tribunal when they arise in the context of broader proceedings that are properly within their respective jurisdictions, and for the Telecommunications Competition Tribunal to refer issues of a technical, rate-setting or social nature to the CRTC for determination or implementation.

The Panel believes these measures will alleviate much of the uncertainty that characterizes the current environment. The proposed jurisdictions of the TCT, Commissioner of Competition and the CRTC in respect of telecommunications issues are summarized in the table below.

Table 4-2. Division of Jurisdictions

Issue	TCT	Competition Bureau	CRTC
Deregulation of services where no SMP	X		
Re-regulation of services where SMP exists	X		
Definition of wholesale access services and delineation of applicable regime	X		
Review of allegations of anti-competitive conduct (civil) where SMP is alleged to exist	X		
Mergers	X		
Anti-competitive conduct (criminal)		X	
Misleading advertising		X	
Competition in terminal equipment markets		X	
Technical regulation			X
Spectrum management and licensing			X
Social regulation			X
Regulation of service providers with SMP			X