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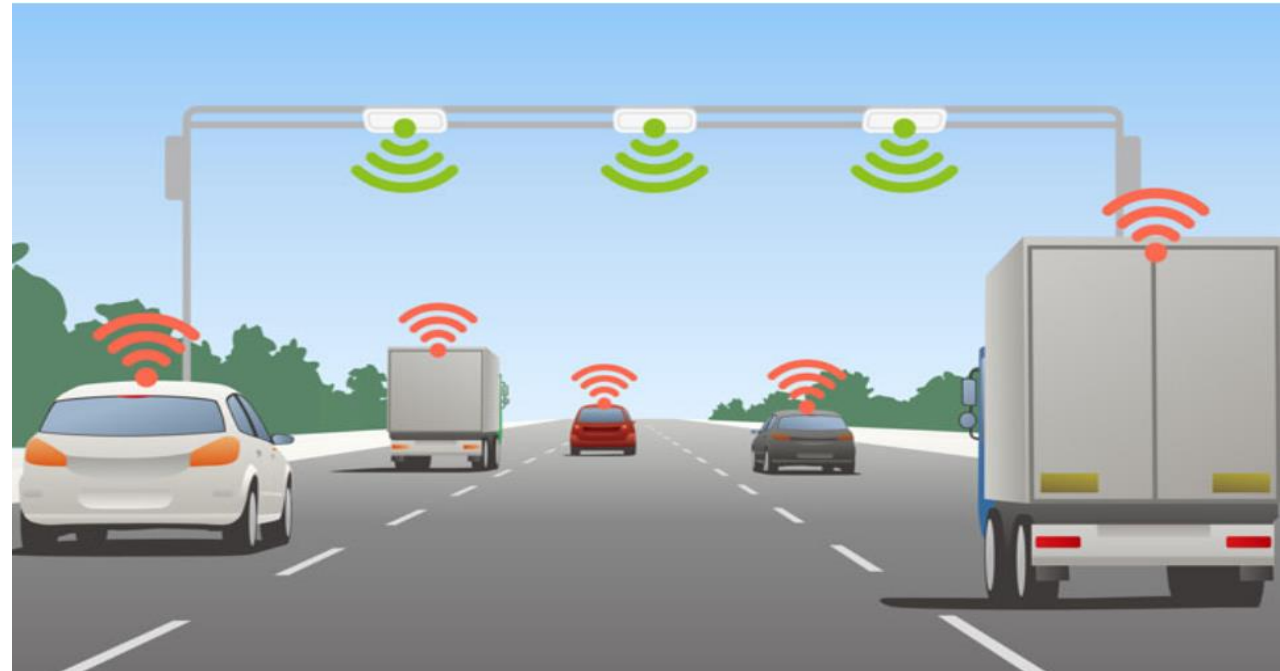
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The Broadband Cost Reduction Directive

A legal primer in cross-sector regulation of infrastructures

Charlotte DUCUING – June 2020



BCR Directive: what type of cross-sector regulation?

Factors influencing the (im)balance between sectors / sectoral regulation?

- The BCR Directive: flagship provisions
- Between continuation and disruption of sectoral regulations
- Substantive provisions: sectoral balance as a multi-level sensitive ridgeline
- DSBs and sectoral regulatory authorities: fit for cross-sector regulation?

The BCR Directive: flagship provisions

- **Right of access to the physical infra of network industries in other sectors (Art. 3)**

- Beneficiaries (access seekers): telecom network operators **for the purpose of** deploying high-speed broadband networks
- Access providers: ‘**network operators**’ in telecom but also energy, transport, etc.
- Right... & obligation to provide access under “**fair and reasonable terms & conditions, including price**”.
- Non-exhaustive list of exceptions

- **Transparency concerning physical infra (Art. 4)**

- Instrumental to the right of access to physical infra
- Single info point by public authority or, for lack thereof, info due by network operator upon request
- Under transparent & non-discriminatory terms

- **The Dispute Settlement Body (DSB)**

- Legal & functional independence from network operators
- Binding decision to resolve disputes
 - Incl. terms & conditions setting
 - **Incl. price setting**
- Within the shortest possible time frame (4 / 2 months)

Between continuation and disruption of sectoral regulations

- **Regulatory tools in the BCR Directive: a *déjà vu* feeling**

- Similarities with access regulation in ‘liberalization law’ of network industries
 - Transparency; obligation to grant access to infra under FRAND conditions; regulatory authority with far-reaching competences
 - Aim to create new cross-sector markets ⇔ ‘sleeping beauty’ rationale

- **Cross-sector access obligations: illustration of symmetric regulation?**

- Asymmetric v symmetric regulation in telecom law: both start with EFD, but
 - Asymmetric: *ex ante* obligations (e.g. to provide access) imposed by NRAs on SMP companies
 - Symmetric obligations fall on all operators (irrespective of SMP) *vis-à-vis* each other (reciprocity), e.g. interconnection
- **BCR Directive: not symmetric, because no reciprocity when cross-sector**
 - However, **reciprocity principle** transposed in some MS! (e.g. DE, LUX, DNK)

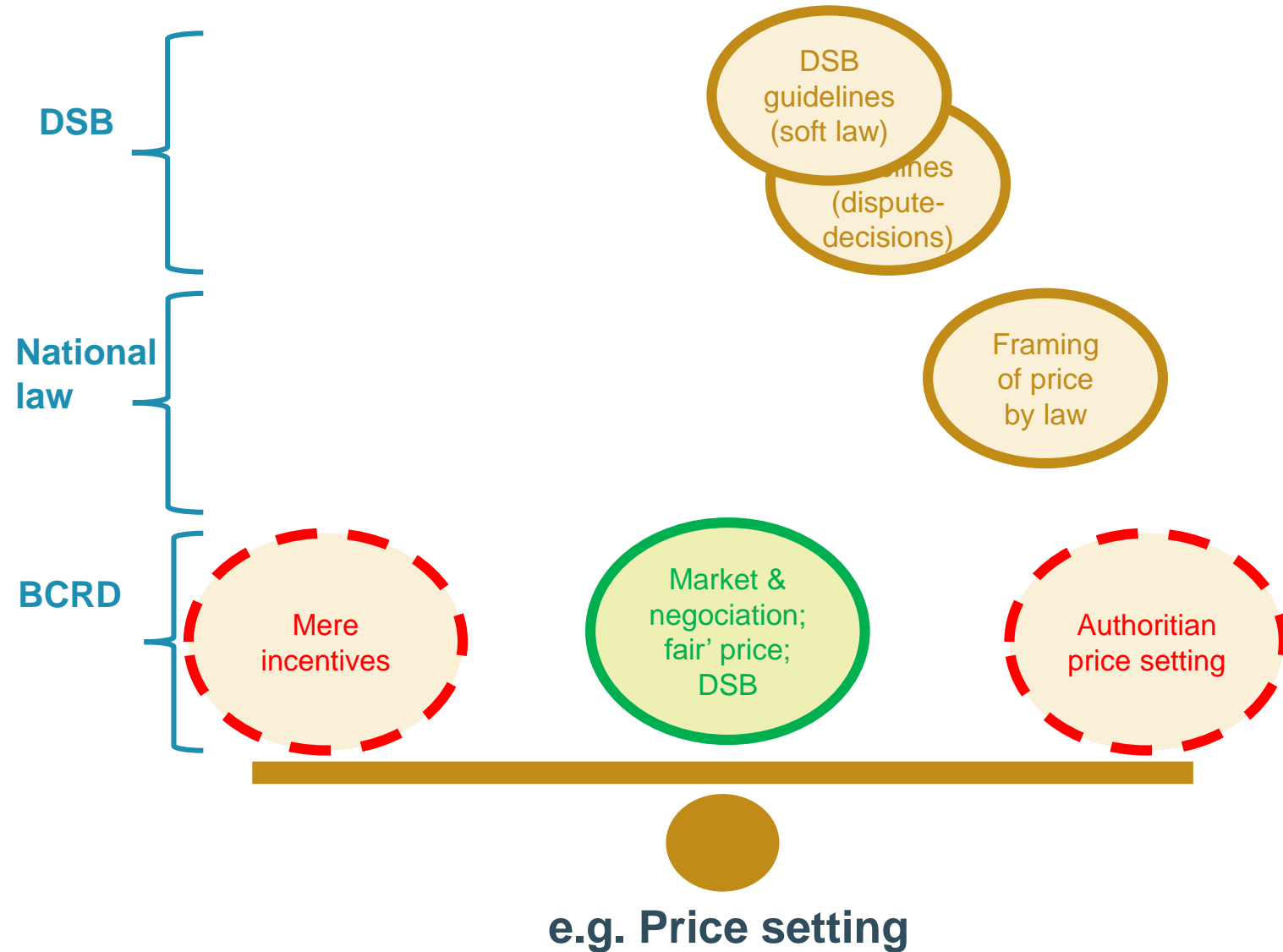
- **Creating markets: a means to industrial policy ends**

- Liberalization of network industries >< BCR → liberalisation regulatory mechanisms used for **industrial policy ends** > competition itself
- High-speed broadband network as the digital infra of tomorrow society (innovation purpose)
- **Not entirely new though!** Liberalisation of network industries → Europeanisation of national utilities = public policy (Finger & Laperrouza, 2011).

Substantive provisions: sectoral balance as a multi-level sensitive ridgeline

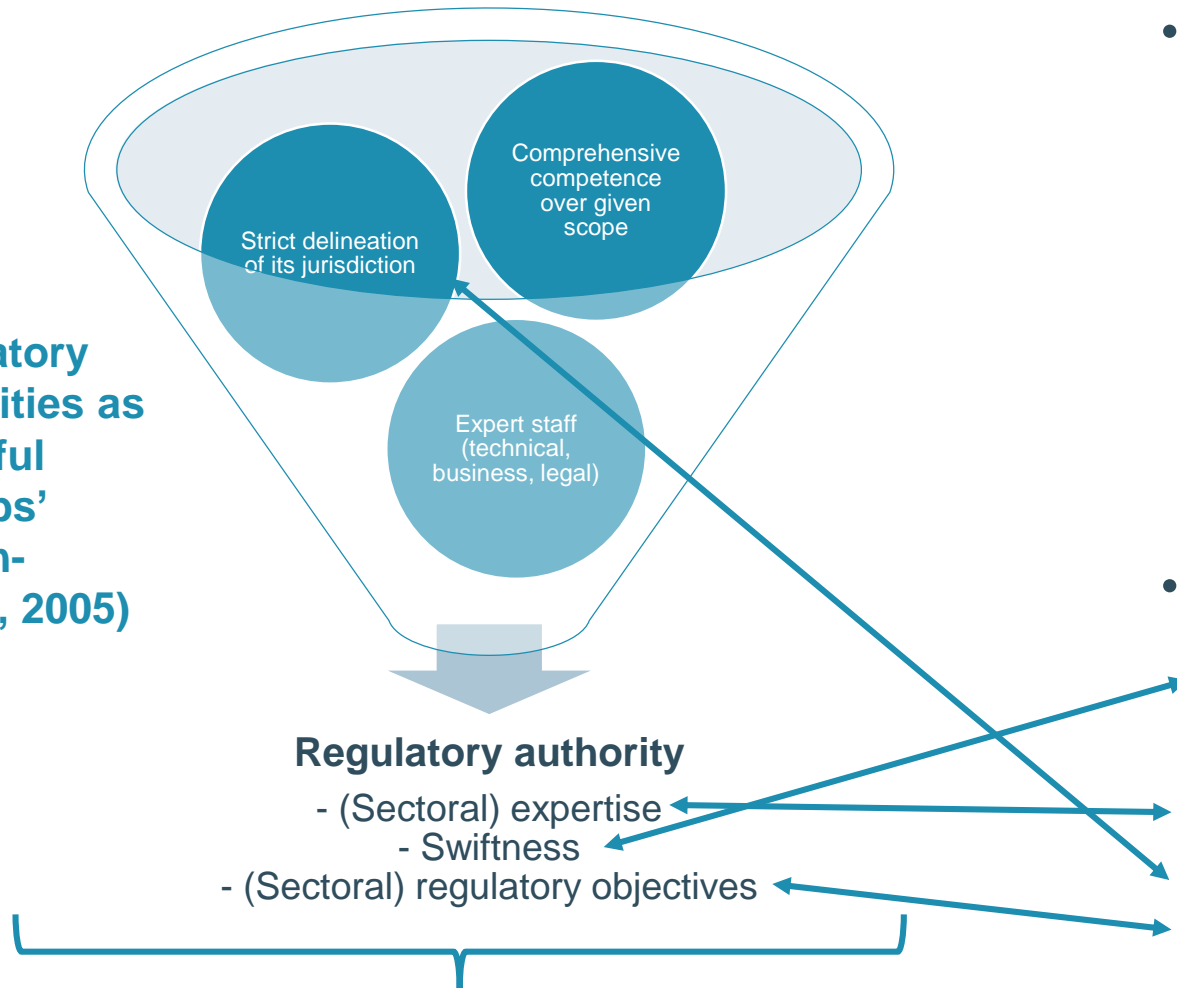
Towards “cross-sector coordination” & “interregulation”?

- (Kitsos & Maniatis, 2019; ARCEP)
- “**Interregulation**”: process to connect autonomous regulations whilst no process is in place to establish priorities between them but decision is eventually made → needed where sectoral regulations get overrun by multi-sectoral reality (Frison-Roche, 2005)
- >< **BCR**: regulatory attempt to create convergence + pride given to telecom networks (operators)
- **Yet, attempts to foster cross-sectoral synergies to the benefit of network operators**
 - E.g. the “principle of reciprocity” and symmetric regulation.
 - E.g.2: price setting mechanisms



DSBs & sectoral regulatory authorities: fit for cross-sector regulation?

Regulatory authorities as powerful 'cyclops' (Frison-Roche, 2005)



• Who to appoint as DSB?

- Mostly NRAs...
- ...but often 'cross-sectoral coordination' (although nothing in BCR Directive) → a 'networked DSB'.
- Great variety of modalities but yet missing comprehensive comparative analysis throughout the EU
- Study for the EC on the implementation of BCRD + FR

• The 'networked DSB'

- Deadlines *de facto* often exceeded
 - Coordination
 - Multi-expertise (e.g. price setting)
- Jurisdictional issues (more incidental?)
- Sectoral 'bias' of regulatory authorities?

Is the DSB fit for cross-sector regulation?



- Early to conclude; no comprehensive data
- 'Networked DSB' as solution but remaining challenges

Conclusions

- **Cross-sector & interactions between regulatory authorities not new with BCRD!**
 - Growing interfaces - or even contradictions - between regulations and regulatory authorities
 - BCRD part of this growing trend
- **Issue lies in lack of prioritisation? (Frison-Roche, 2005)**
 - E.g. Competition law v data protection law in data sharing remedies (Kathuria & Globocnik, 20019)
 - >< BCR Directive
 - Deployment of high-speed broadband network as clear (superseding) objective
 - **Also relevant factor:** BCRD brings sectors closer together (>< reality becoming *de facto* cross-sectoral)
- **BCR Directive**
 - ⇔ Sectoral industrial policy objective
 - Throughout the whole regulatory 'system': Directive, transposition, role of DSBs
 - However: attempts to turn the BCRD into an instrument for genuine cross-sector synergies
 - EU-wide comprehensive information on DSBs establishment & practice still missing
 - Needed now that upcoming revision of the Directive

Thank you for your attention!

Do you have any questions or comments?

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