

# Defining relevant markets and assessing SMP in a converged broadband world

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# Overview

Evolution of ICT and convergence of markets

Impact on regulatory policy

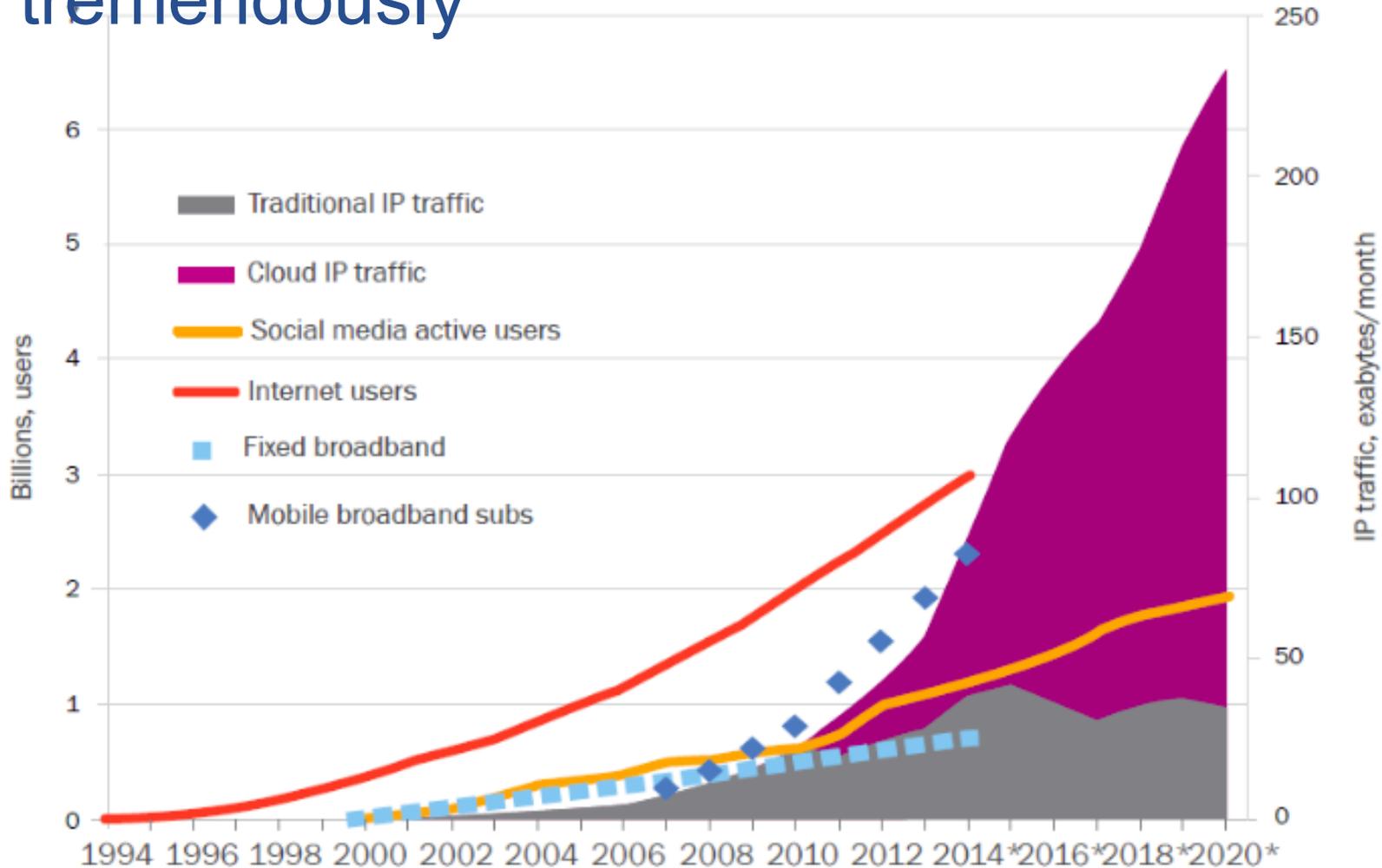
Impact on defining relevant markets and SMP assessment

Regulatory regime going forward

Co-ordination between NRA and NCA

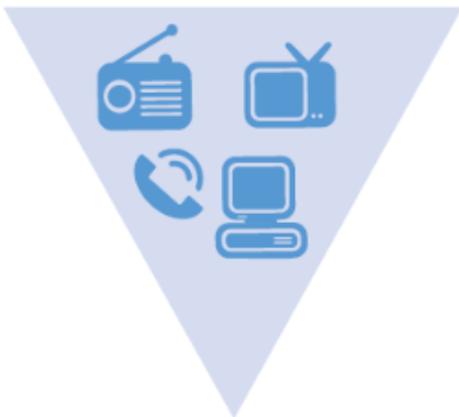
This presentation is based on a DotEcon report for the ITU on [Competition and Regulation in a Converged Broadband World](#).

# Internet use has grown tremendously



Source: Ashish Narayan, ITU Asia and Pacific Regional Office, presentation for the ACMA/ITU International Training Program on the 23-25 July 2015, Sydney Australia

# ICT markets have converged as a result



In the 90s telecoms, IT, broadcast and media were separate industries.  
Technology was an important differentiator of services :

- Fixed versus Mobile
- (Low-speed) copper versus (high-speed) fibre
- DTT versus Cable



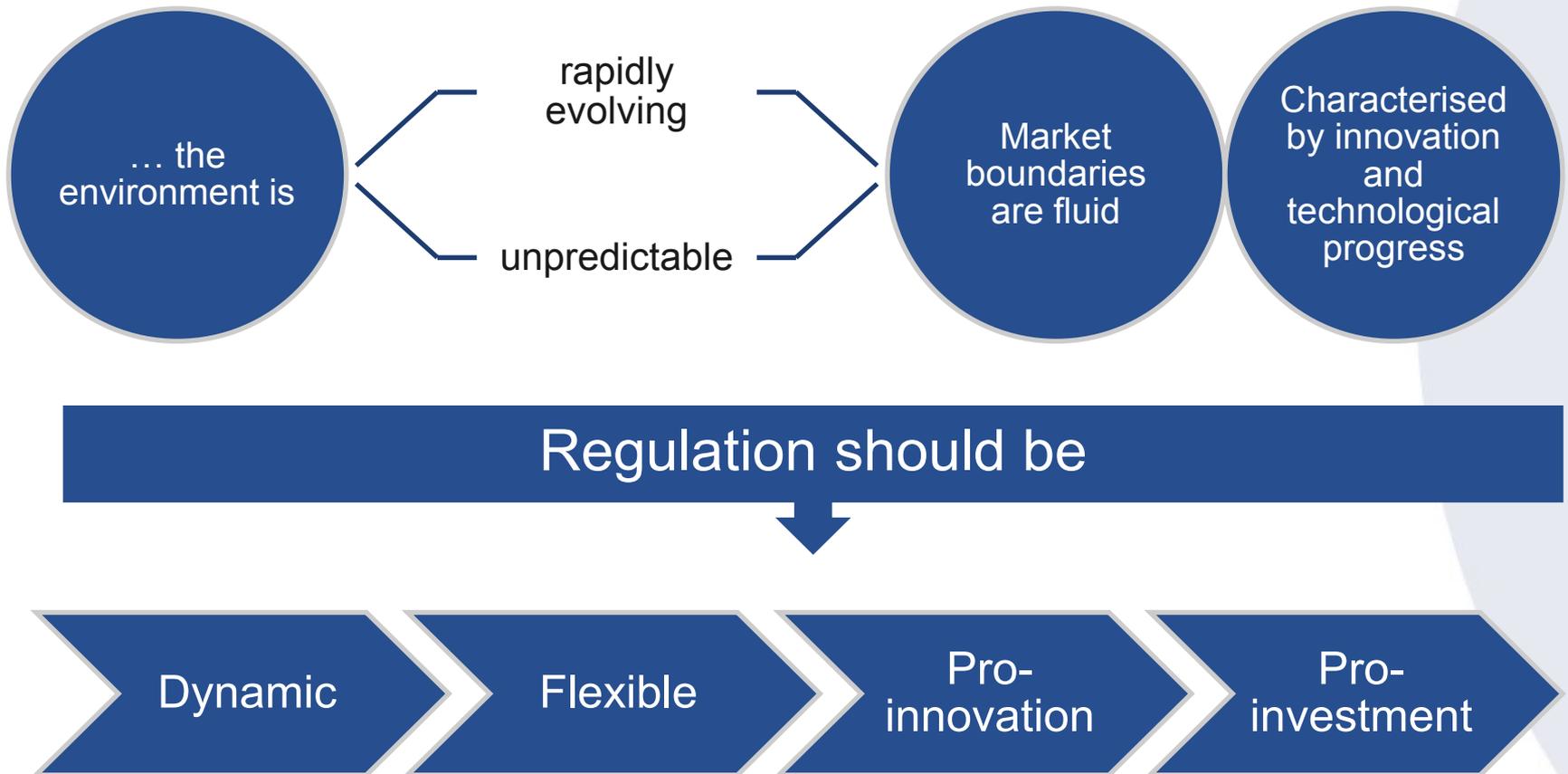
Growth in internet usage has been driven by, and is stimulating the proliferation of new OTT services.  
New IP based services compete with those traditionally provided by network operators.  
Services are available over different networks, and networks support a range of services



No clear delineation of market boundaries by technology.  
Shape and size of markets changes according to changes in demand and the capabilities of technologies  
There is more scope for the development of vertical relationships amongst providers

# In a converged broadband world

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# Regulation in a converged broadband world

## Shift in economic regulatory purpose and focus

- Primary concern remains ensuring competitive markets, but encouraging investment in new technologies and services becomes more and more important
- As new infrastructure is needed and legacy infrastructures requires substantial upgrades, emphasis increasingly on the dynamic side of competition (innovation and investment) in addition to the static (price, number of competitors)
- This should be reflected in the approach to regulating relevant markets as well as the regulatory measures introduced

## Extending reach and changing role of the regulator

- New regulatory authorities combining communications, media and IT formed in Australia, Malaysia, HK and the UK.
- MoU/MoA between different regulators, e.g. between telecoms regulator and banking regulator in India, Pakistan and Tanzania.
- New responsibilities to regulate new services such as VoIP as well as new areas such as cyber security
- New legislation and policies introduced, for instance in relation to data protection and cyber security

# Competition regulation - defining relevant markets and assessing

SMP

## Defining markets

- Markets not predominantly differentiated by technology any more
- Similar services may be delivered over different platforms
- Market definition should focus on demand and supply substitutability of services consumed, focusing on comparability from the end user perspective
- Services available may depend on commercial strategies – bundling, exclusive vertical arrangements

## Assessing SMP

- Market shares may not be particularly reflective of market power
- Move away from formulaic criteria towards a full assessment of market power
- New modes of competition - presence of excess capacity may not indicate lack of competition
- Vertical relationships and bundling strategies have to be assessed

# No hard and fast rules for regulating anti-competitive behaviour

Markets characterised by dynamism



Market boundaries are fluid and shifting



SMP may only be transient (though first mover advantages may equally be strong)



Regulate and design appropriate remedies/policies on a case by case basis

# Converging markets may also blur geographical market boundaries

Increasing need to regulate conduct of foreign companies and co-operate with foreign authorities

Harmonising regulatory or competition policies however is difficult due to trade barriers; differences in level of development and national policies; and applying “general principles” when the application of competition policy is very much case specific

Evident from the struggles of the EC to implement a single telecoms market (and now Digital Single Market)

Most countries rely on bilateral, regional or multilateral agreements on the application of competition policy but also on informal co-operation channels such as ICN that allow less developed countries to participate. In general, agreements on procedural provisions (such as the use of confidentiality waivers) seem to be an effective means of co-operation

# Ex ante versus ex post regimes

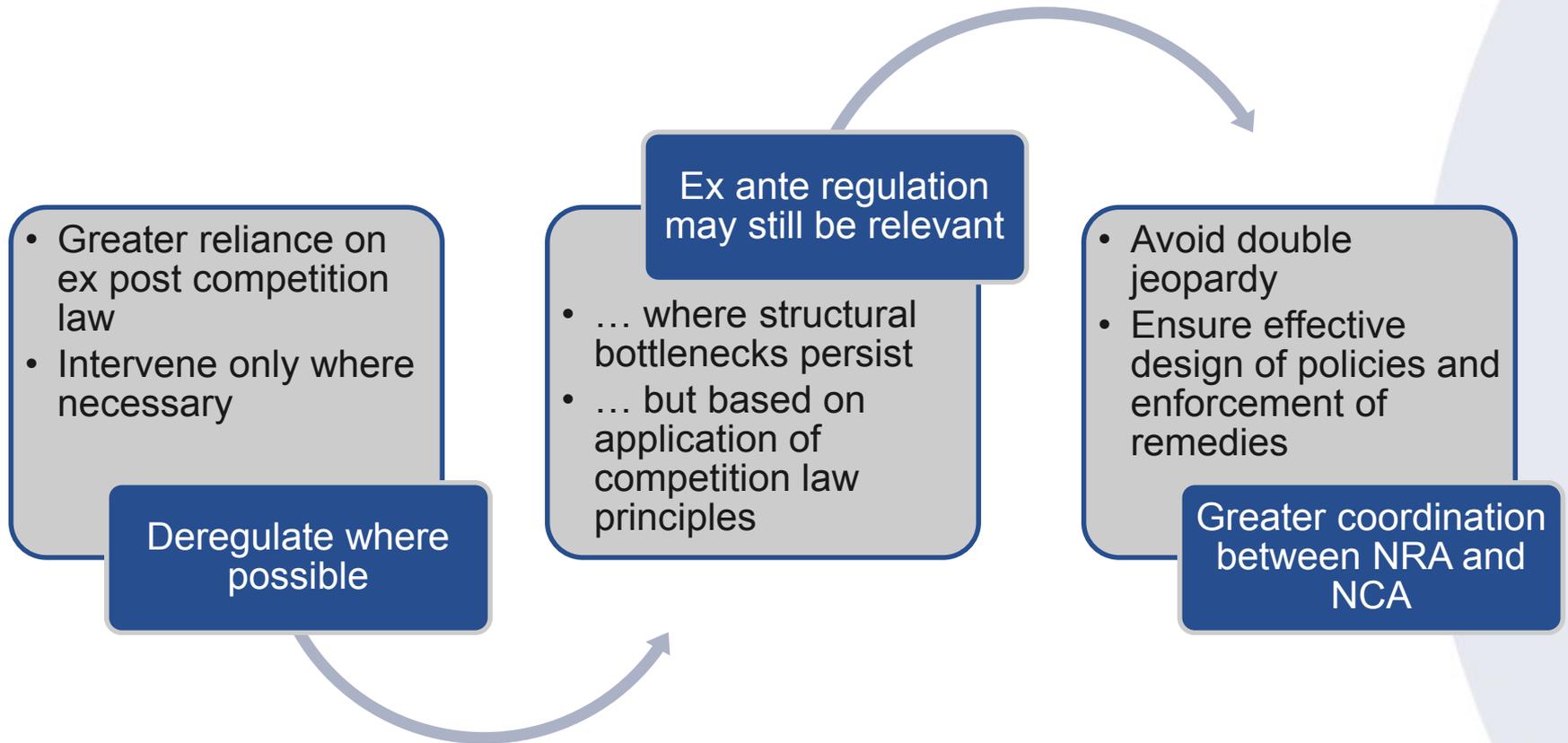
## Ex ante regulation

- Forward looking and prospective (based on expectations about future developments)
- Deals primarily with structural issues and their implications
- Aims to mimic competitive outcomes and increase competition
- Prescribe business conduct (e.g. price controls)
- Intervention is easier (burden of proof lower)

## Ex post competition law

- Backward looking (informational advantage)
- Deals primarily with behaviour (though structural remedies may also be imposed)
- Aims to maintain competitiveness in industries
- Harm-based approach, penalise abusive conduct
- Intervention is more difficult, burden of proof is higher

# Competition regulation going forward



# Competencies, interaction and coordination

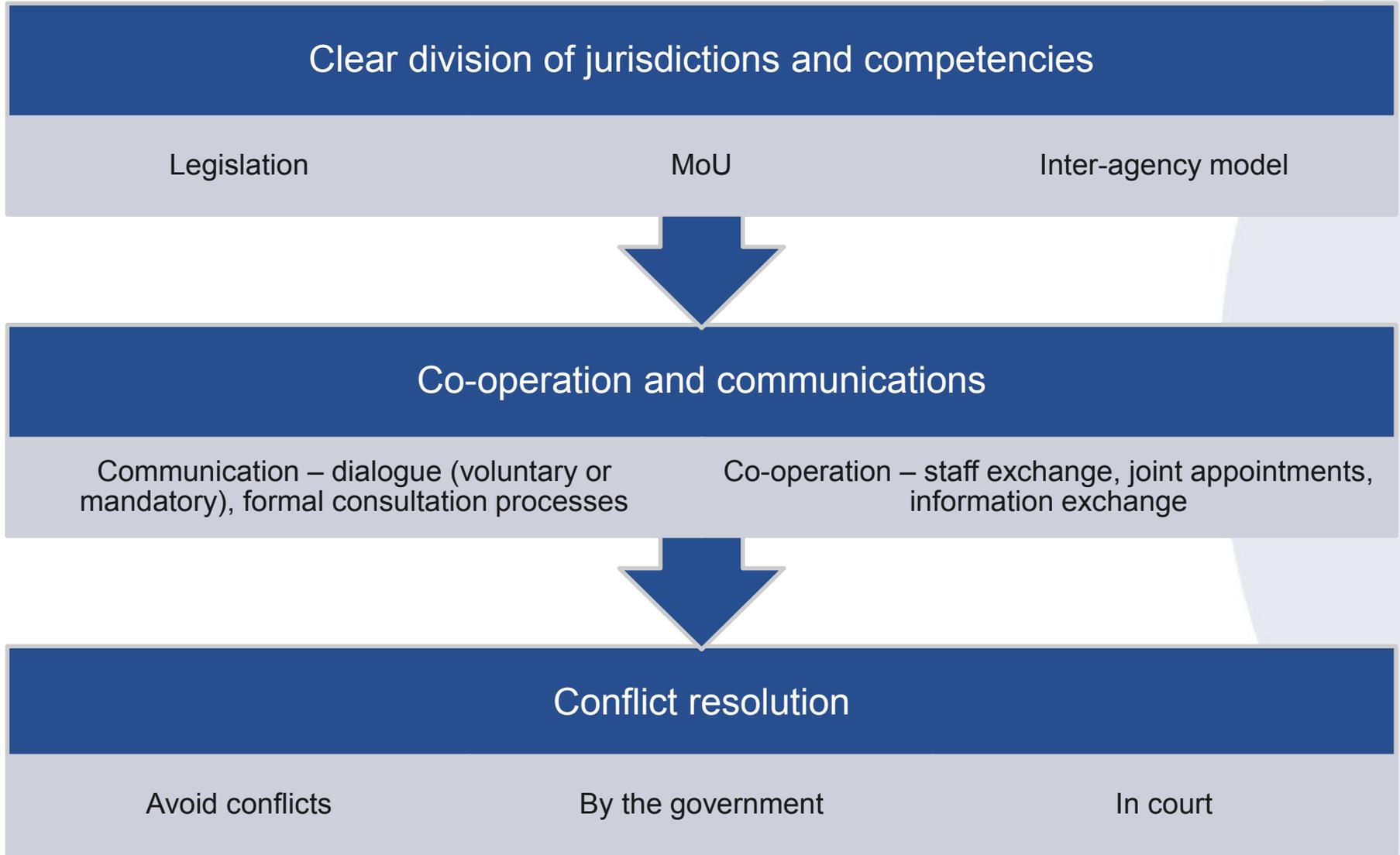
## NRA -> NCA

- NRA may consult with NCA when applying competition law concepts or seek advice on specific matters such as market definition.
- NCAs may have advocacy role, hold open dialogue with NRAs, build consensus on competition principles and ensure consistent application of competition law principles across sectors
- In some cases, the NRA is required to 'give weight' to assessments and comments made by the NCA either via private or public consultation
- NCA may make binding regulatory policy recommendations, veto proposed policy or terminate existing regulation

## NCA-> NRA

- NRA can provide technical expertise to assist with assessment of cases often in the form of an expert panel (for e.g. in Croatia, France, Mongolia, Namibia and Viet Nam)
- NRA may provide comments on the case proceedings of the NCA
- NCA may ultimately refer the case back to the NRA or rely on NRA to enforce certain remedies imposed as conditions for clearing mergers (for e.g. Newscorp/Telepiu merger in Italy)

# How to coordinate?



# Conflict of jurisdiction between NRA and NCA

## Avoid conflicts

- Sign MoU , co-operation agreements or protocols to agree respective responsibilities and avoid duplication of activities
- Involve NCA in the design and implementation of regulatory policy or consult NCA on competition issues
- Reciprocated by the NCA with the NRA on competition cases in regulated sectors, seeking technical input

## Resolution by government

- In the UK, the Competition Act provides the Minister with dispute resolution powers if authorities cannot come to an agreement
- In the US, Congress would assess and decide on a case by case basis which agency to give jurisdiction over competition matters though a Supreme Court decision on the Verizon v Trinko case in 2004 suggests jurisdiction will be given to the agency that was the first authority to deal with the matter

## Dispute resolution in court

- Competition Commission of South Africa v Telkom SA (2008). The Supreme Court ruled in favour of the CC
- In France, dispute settlements between ART and the Conseil are judged by the Court of Appeals

# Take-aways

- As market boundaries are increasingly blurred in a converged broadband world, regulation acquires new focus (on investment incentives) and needs a more dynamic approach – markets should be defined and SMP assessed on a case by case basis based on core principles
- Deregulate where possible and where ex-ante regulation remains necessary, establish general principles through applying competition law principles in regulatory provisions
- More co-operation between NRAs and NCAs is likely to be required:
  - Co-ordination may be facilitated by clearly defining respective jurisdictions, responsibilities and roles be it via agreements or statute, also to avoid double jeopardy
  - The aim should be to consult with, or give statutory power to the NCA on competition issues while allowing the NRA to provide technical inputs to be taken account of in competition proceedings
  - In the case of concurrency, set out means for dispute resolution, ensuring the resolution process is fairly swift

# Thank you!

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# Annex

# Jurisdiction over competition

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## NCA

- Australia (regulated access and access charges of utilities)
- Switzerland
- Panama

## Integrated agency model

- The Netherlands (energy and transport)
- Peru

## NRA

- Singapore
- Greece
- Kenya
- Saudi Arabia

## Concurrency

- UK
- Germany
- The US
- South Africa
- The Netherlands (post and telecoms)