UNIVERSIDAD ADOLFO IBÁÑEZ

KEYS TO PLANNING REGULATORY PROJECTS ASSOCIATED WITH COMMERCIAL AGREEMENTS BETWEEN COMPETITORS

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Keys to planning regulatory projects associated with commercial agreements between competitors

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I. INTRODUCTION

Commercial agreements between competitors can be a relevant part of a company's business strategy. Such agreements include, for example, joint ventures, sales and marketing agreements[2]. Despite the relative prevalence of commercial agreements in each industry, developers[3] should consider that they may be regulated by antitrust and/or other laws[4]. Thus, depending on the scale and market, commercial agreements may result in regulatory projects that extend for years, generate high exposure and demand substantial financial, technical and human resources.

A regulatory project is structured around a commercial agreement to support and facilitate the negotiation and commercial implementation and - mainly - to obtain the approvals required before competition authorities and other authorities that turn out to be competent. These projects can reach high levels of complexity, which are difficult to anticipate for the companies involved, especially because they may lack the know-how required to plan, carry them out and complete them successfully.

The understanding of a regulatory project linked to a commercial agreement from the perspective of a company that is seeking approval from the authorities remains a poorly documented field. In this sense, companies could have unmet needs in terms of knowledge to narrow-down information gaps on how to face the task of planning regulatory projects associated with commercial agreements with competitors.

The purpose of this document is to share the knowledge that the author has learned from different authorities, experts, tens of agreements between competitors that have been filed before regulators and reached different outcomes, among other sources.

Beyond the particularities that the developers of a commercial agreement or the same agreement may have, in my opinion, certain keys could help to structure a regulatory project to reach a successful end[5]. In my

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1 I thank Aurora Acevedo, Julio Tapia, and José Miguel Huerta for their thoughtful comments. The author is solely responsible for the opinions expressed in this work, which may not reflect those of any specific company or organization.

2 This document does not cover the case of mergers and acquisitions. The concept commercial agreement is encompassed by what was defined as competitor collaboration. See Federal Trade Commission and U.S. Department of Justice, 2000. "Antitrust Guidelines for Collaborations Among Competitors" available at http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

3 Developers refers to the companies behind the commercial agreement and, in other cases, the areas within these companies that have responsibilities over the commercial project.

4 In what follows, the document focuses on the regulation of free competition, taking into account its transversal nature to different industries and geographies. The keys shared in this document could also be applicable to other regulations.

5 The working hypothesis is that the developers aim to achieve approvals. There may be other strategic motivations to develop commercial agreements that are not considered in this document.

opinion, there are four areas to take into account, which are disaggregated into fourteen keys. Below, there is a synthesis of the main points discussed in this document.

(1) Context for regulatory analysis

• A description of the commercial agreement (intended or negotiated) helps to think like a regulator, stakeholder, and consultant. Thereby, the more detailed the description of the deal, better the quality of the analysis and how it relates to past actions of the developers.

• Commercial agreements may fall within the scope of competition regulation and, consequently, within the scope of all participants in the ecosystem around that regulation. Hence, the regulators and the ecosystem define the arena where the commercial agreement must defend its viability.

(2) The regulatory project

• It is important to discuss when the regulatory project should start. The project may reach high levels of complexity and exposure, take a long time, and even extend beyond the time when all approvals are obtained. The multidisciplinary and multicultural nature of the teams involved may require sophisticated internal and external governance mechanisms.

• A commercial agreement that only sets out what is good for its developers may fail under the judgment of the ecosystem in which the regulator operates. Working to identify and quantify benefits for consumers is an important task to be addressed in the early stages of the regulatory project, especially when there are odds of being challenged. In parallel, and depending on the regulatory evaluation, the project developers must know how far they are willing to go if the negotiations with the regulator leads to mitigations (remedies or conditions).

(3) In-house areas related to the regulatory project

• The tasks of legal, compliance, commercial, and communications areas will follow through the whole regulatory project from start to end. All of them encompass fundamental tasks to achieve a good regulatory result, based on the importance of each one of them and on the required harmony between them.

(4) Particularities of the regulatory project

• Working with consultants and responding to information requests from authorities are tasks that may demand significant time and resources. Consequently, both work streams must be adequately planned. In relation to the former, it is important to first assess the need to work with consultants. Regarding the latter, the developers must be prepared to experience high exposure and requirements that can be overwhelming and/or extended. Also, any response may be subject to contrast procedures considering different sources of information.

In what follows, each of the abovementioned four areas and fourteen keys are developed in detail.

II. CONTEXT FOR REGULATORY ANALYSIS

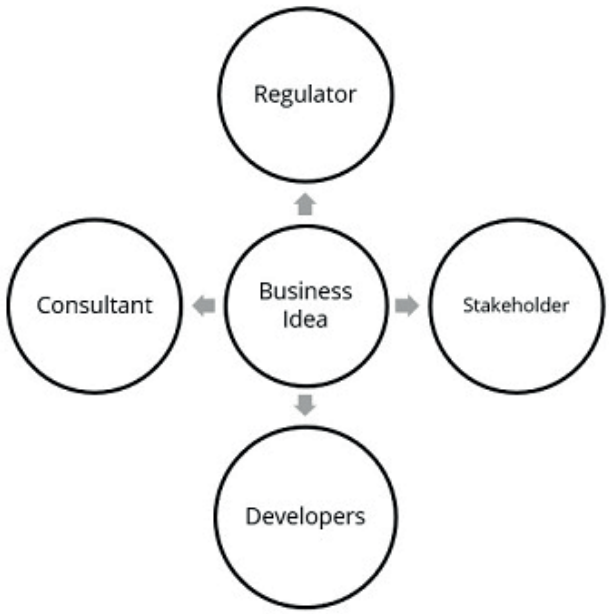
Before starting a regulatory project, not only will it be necessary to have basic information to understand the challenges that must be solved facing the applicable regulation, but also the relationship with a series of stakeholders that surround competition regulation. Not knowing the different facets that the regulator may have and the environment that surrounds the regulatory process may lead to planning errors.

1. Define the what and where

There is no worse enemy for a regulatory project than ambiguous business definitions regarding what it is intended to accomplish and its geographical scope. It is crucial to narrow-down the scope of the commercial agreement (e.g. companies and markets), activities (e.g. productive and commercial), and regions. Regarding the latter point, it should not be forgotten that the geographical definition is more related to the markets involved than to political-administrative borders.

When defining the regulatory project, the main challenge is that the commercial aspiration decants into a type of contract that is well-known to some habitual type and whose business purpose can be decoded in a language that allows thinking as a regulator, stakeholder and consultant (Figure 1).

Figure 1: Points of View for the Understanding of a Commercial Agreement



In my opinion, achieving a shared language among the various agents involved in the regulatory project is one of the most difficult tasks to achieve, yet one of the most important. Undertaking this task with the greatest possible attention pays off in terms of the achievement of the regulatory objectives and improving the chances of being able to implement the commercial agreement.

2. You are a slave to your words

Once the '*what*' and the '*where'* have been defined, it is appropriate to move to an introspective stage. The finding of negative public comments from the developers regarding similar past cases can place a heavy burden on the success of the project. Hence, it is critical to assess past opinions of senior executives (e.g. media and social networks) and the responses given to regulators in the course of regulatory processes initiated by the company and third parties.

Exposure can arise from the overvaluation of one's competitive strengths in relation to those of the competition. In general, these assertions may bias authorities' judgement and form a certain mistaken or not accurate belief. This may happen, for example, in the analysis of barriers to entry or concerning the attributes of the commercial agreement and its effects on the market.

Considering that a commercial agreement also involves at least one counterpart, it may be necessary to explore the counterpart's situation in terms of the dimensions described above. The burden that the counterpart brings in is a relevant piece of information to be addressed by the regulatory strategy. Considering all the above mentioned, in order to advance in the regulatory project with full knowledge of the starting point, introspective and exploratory insights are needed.

3. Think like a regulator

Many regulators produce guidelines to help users understand the applicable criteria when assessing commercial agreements. Moreover, there is also the possibility of obtaining specialized legal advice on this matter[6]. Even though both steps are a good starting point to get an idea about the scope of the regulatory task, they are far from exhausting all the angles of analysis from the regulator standpoint. In my opinion, there are also four other aspects to bear in mind.

First, the relationship between developers and regulators rarely starts from scratch. Rather, it is the result of multiple interactions that occur over long periods and that define a level of inertia. Managing relational inertia within the framework of a regulatory project is a complex task. A good understanding of what the relational starting point is and having conservative goals on the ability to modify it are important elements for the success of the project. Overconfidence in this regard can lead to underestimation of the regulatory term and false expectations on when implementation would be feasible.

Second, changes in the relationship between developers and regulators can also come from commercial developments that arrive in the middle of the regulatory project, usually other commercial initiatives that are not visible at the time when the particular commercial agreement is being studied because they are not known, were not communicated properly, or could not be communicated. Furthermore, a good understanding of this angle is of great relevance specially when the expected regulatory term is long and/or the developers are attempting to tackle a challenging project.

Moreover, a simple press release or rumor can lead the regulator to use the ongoing process to learn about other affairs. To avoid events with high regulatory impact, it is helpful to view the commercial agreement in the context of a realistic pipeline of prioritized projects. Each developer must bear in mind that the opening of a regulatory project may freeze or limit the speed of advance of other commercial initiatives.

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6 It is assumed that there is specialized legal advice in the relevant jurisdictions. Consequently, it is not the objective of this work to explain the legal and normative particularities of each jurisdiction.

Third, the political dimension is another relevant aspect[7]. Regulators operate in an environment that is sensitive to changes in the political context. It is important to detect what that context is and address it when structuring the filing or presentation of the commercial agreement. This, however, does not imply abandoning the search for attributes related to the merits of the commercial agreement it-self. A disproportionate interest in developing political advocacy may be an indication of a low level of conceptualization about the commercial agreement and its benefits.

Finally, the human scale in the regulator should not be forgotten. Although institutions are the ones that decide, they are made up of people who may have their own agenda or be particularly sensitive to certain opinions. Detecting how aligned the institutional discourse is with each agenda can alert on matters that require further attention before they become a threat. Hence, an adequate advocacy calibration can only be carried out once the person in front of the developers is known.

For instance, regulators can be characterized one by one according to the explicit information about them (laws, regulations, and guidelines), but also according to what is not written about them (i.e. the relationship with the developers, politics, and the people who will make the decision). On a broader scale, communication between regulators is increasingly fluid and consequently, there is a global regulatory intelligence that can cross the entire regulatory project. Therefore, consistency is a fundamental principle when pursuing a regulatory objective that encompasses more than one regulator.

4. Think as a stakeholder

Every regulatory framework forms an ecosystem where various actors play specific roles and define a spectrum of influence over the regulator. There are two types of actors in this ecosystem: habitual and circumstantial. Distinguishing between the two of them allows anticipating third-party actions with heterogeneous impacts on the regulatory project.

On the one hand, among habitual actors, there are consumer associations and the likes. They develop an organizational musculature of a procedural and relational nature. These organizations face low costs when participating in a regulatory process, although they tend to have diffuse incentives and limitations to develop their statements in depth. They usually present procedural themes mixed with other generic and/or popular ones (buzzwords), easily consumed by the media. The procedural know-how transforms them into actors with the ability to accompany a process from beginning to end, and their relational facet can provide them with themes of greater technical depth as the process progresses.

On the other hand, circumstantial stakeholders also participate in the regulatory process. The motivation that they have arises from a particular interest linked to the commercial agreement (e.g. harm or benefit) or as a result of a relationship that turned in tit-for-tat behavior. Among these stakeholders are suppliers, customers, unions, and competitors (including trade associations).

In my opinion, regulators have difficulty distinguishing their true motivations or face reputational costs when they do not take their positions into account. For this reason, the merit of the opposition can play a secondary role to the extent that the interested party is able to follow due process and invest time and resources to accompany it. Thus, the regulatory arena may become the backdrop for disputes broader than what concerns the commercial agreement itself.

7 The word political refers to the context of influence in general terms.

A type of stakeholder that can be habitual or circumstantial and that was not addressed in the previous paragraphs corresponds to governmental actors. They can participate in the process by their own free will or by being invited by the authority from which authorization is being requested. Among all the stakeholders, this group is the most influential one, given that they have a high level of reputational assets and can deploy considerable resources to achieve their objectives. When they decide to oppose a commercial agreement, they will most likely follow the process to the end.

Identifying potential stakeholders and understanding their motivations allows anticipating eventual opposition and the magnitude that they may reach. Likewise, this knowledge opens up opportunities to think in advance and realistically about the range of actions aimed at mitigating the potential negative effects in the regulatory process. The relational knowledge of some of the circumstantial stakeholders is usually dispersed in commercial areas, so discovering and systematizing them requires time and detailed knowledge about the exposure that each company has.

Eventually, a regulatory project could identify stakeholders with a favorable view of the commercial agreement. Bearing this possibility in mind, it is important to measure expectations about the actions they could take to support the project and the weight of the effect that those actions will have within the regulator. Scenarios between neutrality and others where there are some favorable opinions in the press or letters of support represent positive results. Expecting more than that may be in the realm of overconfidence.

5. Think like a consultant

In some countries, it is common for consultants to participate in the regulatory environment. Verifying their presence is important because it defines a line of work that can demand considerable time and resources. Also because submitting independent reports in places where it is unusual to do so can have unexpected consequences.

Consultants can be of different types. Roughly, they can differentiate between non-specialized and specialized ones. There must be very good reasons to work with a non-specialized one when you can opt for a specialist. Among these reasons is the reputation of the consultant, credibility and affinity with who will make a regulatory decision regarding the commercial agreement.

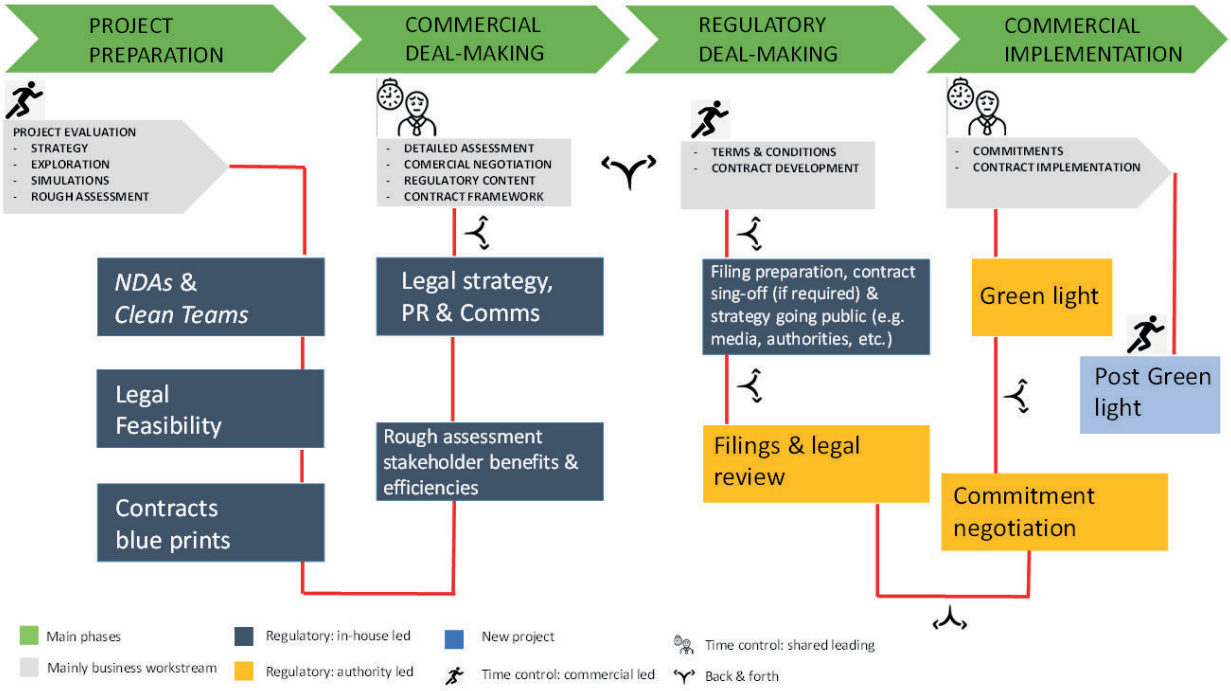
The consultant selection process uses the information gathered by thinking as a regulator and stakeholder: this is where the motivation for hiring them is defined. Meanwhile, strategists have to discuss their identity, retention, the format under which they will work, the questions they will have to answer, and the information that will be made available for them. Once secured, consultants will answer the questions, limited to the available information, know-how, and their standards.

III. THE REGULATORY PROJECT

Before structuring a regulatory project, developers should spend time and resources in exploring all the above points which will enlighten the calculation of the probability of success that the project has. Lacking background information to structure a project of this nature is likely to result in poor planning and disproportionate expectations. A regulatory project is a complex endeavor, which could involve considerable expenses, require the expansion of the fixed productive capacities of the legal and commercial areas for a considerable period, and may demand support from areas such as compliance and communications.

A commercial project that triggers the regulatory one may have discontinuities important to keep in mind before starting regulatory work. Discontinuities are triggered by changes from a purely commercial plane to others where the regulatory project takes more prominence and can immobilize or limit part of the predominantly commercial activities such as negotiating and implementing an agreement. For long periods, the commercial teams of the developers may be focused on supporting the regulatory project and waiting for the regulatory conditions to be in place before it can move towards the implementation stage. Figure 2 shows four stages dominated by objectives of different nature, these are: i) Project preparation; ii) Commercial deal-making; iii) Regulatory deal-making; and iv) Commercial implementation.

Figure 2: Commercial discontinuity and change in predominant objective



Note: The transition from the commercial agreement to the regulatory agreement phases is gradual, which implies greater challenges for planning and leadership. This may be amplified when there are multiple regulatory procedures.

The transit of the commercial agreement between the different stages is not unidirectional and could go back and forth depending on the available information. In any case, there are two more general phases defined by the level of reversibility of the decisions. Once the commercial agreement focuses on the development of the contract, there could be a level of commercial commitment that makes it costly to return to preliminary stages of analysis such as project preparation. Subsequently, the reversibility to previous stages is even less feasible, since the regulatory project completely leaves the control of the developers when it is notified (or made public) and the legal review by the competent authorities begins. This phase ends with obtaining the necessary approvals.

In my opinion, changes in objectives and the passage between stages can have greater or less resistance depending on the type of culture that the developers of the commercial agreement have. In any case, commercial areas without awareness of the different phases and discontinuities in the commercial activities are more exposed to take actions that may fire back. Achieving the goal of implementing a commercial agreement is more like a 4x100 post-race than a 400-meter dash with one sole runner.

6. Structuring the regulatory project

When defining a regulatory project, the specific organizational structure and its culture will have to be considered. Beyond the particularities that may exist in each company, in my opinion, there are eight areas that deserve special attention to properly structure a regulatory project.

a. **Project start:** A regulatory project can start with a requirement from the commercial area to evaluate a certain business idea or, by the contrary, with a signed commercial agreement. Between these two extremes there are many other possible scenarios. The starting point of the regulatory project is not a minor matter regarding its success. In certain cases, it is advisable to align the start of commercial negotiations with a certain level of progress in the regulatory project. For instance, to prevent the regulatory project from starting within the framework of an investigation initiated by an authority.

b. **Confidentiality:** Evaluate the need to limit in-house diffusion about the project and safeguards to avoid leaks (involuntary or forced). Whatever the type of leak, they can put the entire project at risk. Consequently, it is common to use non-disclosure agreements (NDA) and limit the participation of collaborators only to those with the need to be informed. Clean team arrangements can also be useful in some contexts.

c. **Regulatory term:** Using a realistic estimate of regulatory term is essential. Depending on the complexity of the project, it could take years of work and be subject to uncertainty (see Figure 3). For this reason, the term is a parameter that should be updated regularly as there is new information. Moreover, a poor definition of the regulatory term can result in a struggle. Business teams could reserve resources for executing an activity that takes longer than expected to occur. Therefore, it is convenient to associate the endowment of commercial resources with the achievement of specific regulatory milestones, rather than with fixed terms, which generally do not depend on the will of the developers of the commercial agreement.

d. **Milestones:** Roughly, there are linear regulatory processes and others that are more entangled. In the former, different stages follow each other in a clear sequence of escalation within the relevant institution. Tangled processes are those in which one regulatory process could be substituted for another or whose favorable end result may be vulnerable to certain actions by third parties. Therefore, there is uncertainty about the possibility of completing the chosen regulatory process or sustaining its final result. Having a list of possible processes and milestones in each one of them allows anticipating the main regulatory developments once a certain regulatory process begins. The possibility of implementing a commercial agreement could require going through new processes after having obtained the approvals.

Figure 3: Selected Examples of Extended Terms

Joint Ventures	Term
American Airlines - Qantas	**> 4 years:** Filed before U.S. Department of Transportation (DOT) in June 2015, withdraw filed by the developers in November 2016, re-filed in February 2018, and Antitrust Immunity granted by DOT in July 2019.
i) LATAM – International Aviation Group (IAG); & ii) LATAM - American Airlines	**> 3 years:** made public in January 2016 (accessed by the National Economic Prosecutor of Chile, FNE, as one case), lifted before the Chilean Antitrust Tribunal (TDLC) in August 2016, approved by TDLC in October 2018, lifted to the Chilean Supreme Court (CSC) in November 2018, and couched by the CSC in May 2019 regarding the air transportation of passengers from/to Chile.
Delta Air Lines – Westjet	**3 years:** Filed before DOT in October 2018 and withdraw filed by the developers in November 2020.

Sources: DOT (DOT-OST-2018-0030, DOT-OST-2015-0129 & DOT-OST-2018-0154), TDLC (NC-434-2016) and FNE (https://www.fne.gob.cl/wp-content/uploads/2019/05/Corte-Suprema-JBA-31502-18.pdf).

e. **Multidisciplinarity:** Although these are processes that are regulated in laws or regulators' guidelines, meeting all the needs of the project can rarely be achieved by teams only made up of lawyers. Business knowledge, decoding skills, quantitative, relational, and communication skills are typically critical to the success of the project. Furthermore, external knowledge (e.g. consultancy) to develop ad hoc studies can be very important as well. All in all, the regulatory project has the great challenge of breaking knowledge silos and taking advantage of the value that exists by considering different perspectives (see figure 4).

f. **Multiculturalism:** Transactions between companies from different countries or cross-border agreements require knowledge of the main cultural features of each party and of the country in which the procedure is carried out. Poor management of cultural differences can trigger avoidable risks.

g. **Internal governance:** A regulatory project exists between commercial and regulatory interests, within the framework of compliance, and exposed to external judgment. Undoubtedly there will be differences between areas, so the management of the project requires an explicit governance process to make decisions, to depressurize and avoid fissures within a multidisciplinary team of the developer where no one is redundant. Also because the commercial negotiation can be crossed by discussions on regulatory affairs far beyond what it takes to prepare the contracts. If the regulatory project is a Project Management Office (PMO) itself or part of a broader structure, it is not as relevant as there is clarity about what the critical decisions are and how they will be decided.

Figure 4: Information and Perspective Silos

Perspective	Areas *in-house*			Consultants
	Commercial	Legal & *Compliance* (*)	Communication	
Business	-Motivation -Assessments -Negotiation -Routines	-Contract (formal agreement) -Regulatory process	-Novelty -Scale -Appeal	-Contract -Training -Assessments -Benchmarks
Assessments	-Private benefit -Strategy	-Legal -Public benefit	-Scope -Relevance	-Private benefit -Public benefit
Risk	-Missing an opportunity -Missing other opportunities	-Breach -Investigation -Exposition -Precedent	-Complexity -Saturation -Irrelevance	-Reputational risk -Induction to error -Weak data
Surrounds	-Customers (Revenue) -Supplier (Costs) -Consultants (*e.g. management &* negotiation) -Competitors	-Stakeholders -Consultants (e.g. counsels & economists) - Trade associations	-Public opinion -Social networks -Media -Politics	-Regulators -Universities -Think Tanks -Trade associations -Other consultants
Direct audience (**)	-Commercial counterpart -Other business interest	-Regulators -Authorities -Legal counterparts	-Communities -Customers -Opinion leaders	-Regulators -Promotors

(*) Legal and compliance may be independent areas; (**) To a greater or lesser extent, all in-house areas have the top management and board of directors as part of their direct audience.

h. **Joint governance:** There are at least two interested parties in a commercial agreement. Knowing who makes up the counterpart and what their role will be within the project are basic building blocks. Especially, when it is necessary to align aspects such as regulatory strategy, compliance, and communication. Also because the regulatory environment can play an active role during commercial negotiation. An orderly escalation and decision process facilitates the interactions between teams of the developers that could be working together for a long time.

7. Consumers benefits

The guides of the regulators and the expert legal advice will deliver certain ideas of the main knots that the regulatory project must know how to untie. This usually leads to generic guidelines as to what constitutes the benefits that arise from the commercial agreement. Nevertheless, the authority keeps to itself the possibility of minimizing or not even accepting the alleged benefits.

Therefore, there is a not depreciable likelihood of not getting verified all the benefits estimated by the

developers of the commercial agreement[8].

Even when the above-mentioned could be discouraging, it should be noted that working to identify and quantify the benefits for consumers in the early stages of the project can deliver significant dividends and avoid costly setbacks in later stages of the project.

The task of conceptualizing the benefits for consumers is the field that makes possible to tie the commercial idea with the true regulatory possibility of the project. It is not advisable to venture into a challenging regulatory undertaking without first having verified that there is an adequate level of conceptualization in this field and the possibility of quantifying some, or all, of its components with a certain level of detail. After all, commercial agreements may be subject to an exposed regulatory assessment and could attract the attention of habitual and circumstantial stakeholders within the ecosystem in which the regulator operates.

Quantifying the benefits to consumers is a complex task, and it may even require obtaining external know-how. However, an approach where external consultants are used only to deduce from the business idea what the benefits to the consumer are can become a mechanical exercise, lacking reality and depth. The question about the benefits to consumers can even be valuable to verbalize the value proposition for the customer, a task that may be elusive for commercial areas of a transactional nature, that operate intuitively, or with low levels of formalization. A final benefit of this task is in the possibility of developing explanations on technical matters in a simple, direct, and well-founded language. This can be very useful when it comes to disseminating benefits through the press or when interacting with agents with tight agendas and/or limited preparation on the matter under discussion.

8. Setting boundary conditions

Regulatory projects –sooner or later– face the reality of the judgment of the relevant authority. At a certain point in time, the balance between risks and benefits is disclosed, and that is the moment when the developers of the commercial agreement may be forced to offer mitigations (remedies and conditions). How these types of conditions are offered corresponds to the particular legal process at stake, although it always - with greater or lesser intensity - contemplates a degree of negotiation. To face the negotiation of conditions, it is advisable to know how far the developers are willing to go. Credibility in front of an authority is a high-value asset, which cannot be put at risk based on improvisations or intuitive approaches.

IV. AREAS RELATED TO THE REGULATORY PROJECT

A regulatory project is not a task for lone runners. It could hardly be pigeonholed in a particular area, as it will demand the attention and work of different teams. In my opinion, the in-house areas that are usually involved in the regulatory project are: legal, compliance, commercial and communications.

9. Legal

Initiating negotiations without having implemented confidentiality safeguards can represent an entry error that may be difficult to reverse later on in the project. Confidentiality is relevant for strategic commercial

8 Not every regulatory project needs to demonstrate benefits for consumers before a regulator. However, if necessary, resources and time must be allocated to identify the ideal executor and meet a standard that satisfies the need of the regulator. And, there may also be needed from legal, communications, and consultants to understand what are the benefits to stakeholders (consumers and others) and efficiencies.

purposes, but also in terms of the exposure that the commercial agreement may have in the regulatory sphere. Negotiating when there are constraints to the exchange of information is a delicate task that could require legal advice regarding confidentiality and compliance.

The counterpart may have more or less experience in dealing with approvals of commercial agreements. Whatever the case is, there will always be local or particular idiosyncratic aspects to each company that should not be overlooked. An unbalanced regulatory relationship in which one party leads the regulatory project with high independence from the other can lead to cultural errors or unnecessary commercial concessions as a result of opinions that are taken as reality.

The confidentiality and compliance standards are not static, as they will be exposed to a commercial negotiation that can be highly dynamic and changing. Certainly there will be commercial differences and some of them may demand a regulatory solution. It should be noted that the level of transparency of the commercial negotiation process towards the in-house legal area will contribute positively to the credibility of its opinions on the eyes of the counterpart. This is relevant in the event of needing to unblock commercial differences that have led to regulatory affairs.

The contract is the result of the negotiation. To achieve this, the commercial areas agree to follow a blue print, which will be negotiated in each of its areas. However, part of the contract does not have a commercial content and some other areas may raise regulatory interest. Among the latter ones are the term and exclusivity clauses. Also, it is relevant to review the content of the blue print in terms of the cultural biases that may contain and work on aligning it with the argumentation that has been chosen to follow in the regulatory process. The commercial agreement can be complete or partially complete when submitted to the regulator. Regarding pending matters, it is important to have well-founded reasons to justify why they have not been completed. The contract may be one of the main sources of inquiries.

While the regulatory project is structured and the negotiations take place, there will be multiple legal consultations. The geographic boundaries where the commercial agreement will take place define the starting point for seeking legal advice. Legal advice may be joint (a legal study for all parties) or individual. Beyond how the queries and representations will be carried out, it is important to consider that there could also be a non-explicit space. The counterparty may use separate outside counsels, especially when faced with opaque processes or where there is little experience dealing with the regulator.

Ad hoc studies carried out by consultants can be a relevant part of the regulatory project. The scope is wide, and may involve reports on law, economics, audits and business. Beyond the topic that each one of them covers, it is appropriate to know how the study will be contracted in consideration of the definitions of confidentiality that have been agreed within the framework of the regulatory project.

10. Compliance

Regulatory processes can culminate when obtaining authorizations that enables the commercial implementation stage. However, before that happens, the relationship with the counterparts must be kept within the normal courses of agreements with competitors. An adequate tone at the top of the compliance program (or the closest policy available) contributes to provide clear boundaries to the business areas involved in the project. Inasmuch, regulations on free competition are applicable as long as the regulatory conditions are not in place to advance with the commercial implementation. Also because a commercial agreement increases exposure and the risks linked to it.

Once the commercial agreement has the necessary approvals, it may be subject to commitments or remedies

established within the regulatory framework. Incorporating the supervision of the commitments into the compliance framework allows the commercial agreement to be sustainable and to avoid interruptions caused by questions from the regulator regarding the implementation of the agreement.

Consequently, the only certainty that exists when embarking on a regulatory endeavor is regarding the moment of initiation. The term will finally depend on the achievement of the approval and the conditions established therein. Therefore, the parties to the commercial agreement must consider eventual carry-over costs for the regulatory project or a delegation process from a PMO structure or similar to structural compliance areas (post-green light).

11. Commercial

The commercial area of the developer can take different roles regarding the regulatory project. For instance, it may be the developer of the commercial agreement, the information provider, and the link with other commercial areas. Before the authorizations needed for the implementation of the commercial agreement, they focus mainly on project evaluation, completing the negotiation, and collaborating with the regulatory project. Moreover, being mindful of implementing the boundaries set out by compliance is fundamental to the success of the regulatory project.

Without commercial collaboration, it may be difficult for the regulatory project to structure an appealing argument before the regulator, either due to asymmetries of information in terms of the agreement and commercial evaluations; or due to delays in knowing the news of the commercial negotiation process, new commercial initiatives, or developments in the relationship with stakeholders.

This area may also play an important role in providing information conducting ad hoc studies and responding to requests for information. Finally, its participation in the definition of boundary conditions regarding mitigations or remedies is as important as its contribution in the process of monitoring compliance. Thus, the commercial area is a critical actor during the entire extension of the regulatory project and post regulatory green light.

The relational role of the commercial area may differ in two sides. Within the company, it is about implementing the compliance guidelines. In the external forum, it must promptly raise the commercial aspirations of the counterpart that may have regulatory impacts. This requires knowledge of the main risk factors.

12. Communication

Regarding the content of the commercial agreement and the regulatory progress, the communication area may demand clarity and simplicity to communicate the agreement, its benefits and what is missing for the implementation. This brings us back to the starting point of this document, which emphasizes the importance of spending time understanding what is intended to be done, where, and what are the benefits associated with the commercial agreement. All public releases can be taken into consideration by the regulators, so it is important to avoid improvisations in the content of them and the inclusion of statements without known foundations.

Communication about the regulatory project requires the point of views of commercial, legal, and compliance areas. The former may look for opportunities to talk about what is to come or simply review what has been done. Although these are legitimate objectives, it should not be forgotten that these initiatives may have negative impact on the regulatory project. The areas need to work together especially when there are updates on the term of the project or when relevant milestones are approaching (e.g. notifications or approvals). Good internal governance helps to resolve differences and define the appropriate content of any communication that may be required.

V. PARTICULARITIES OF THE REGULATORY PROJECT

The regulatory project will require explanations from the developers of the commercial agreement and - eventually - other explanations that are outside the scope of the developers. Planning based on these premises allows anticipating events that, if not considered from the beginning, could determine difficulties for the regulatory project and even harm its chances of success. Depending on the type of commercial agreement and the identity of the developers, these tasks can require considerable time and resources.

13. Requests for information

One aspect that is often overlooked is the exposure when submitting a commercial agreement to a regulator's appraisal, not only in terms of the information that must be delivered at the time of notification but also for the instance in which all types of documents can be required from the developers and other entities (e.g. competitors, suppliers, clients, trade associations, local and international regulators, among others). Regulators are sophisticated organizations, endowed with technical resources and skills to contrast numerous and diverse sources of information. Likewise, they may be empowered to request all kinds of information, including testimonies from executives and/or consultants and may cover long periods in their request for information.

Embarking on a regulatory project overlooking the above mentioned can generate surprises that entail high exposure costs, high demand for time and resources, and a lot of frustration. Roughly speaking, there are two types of problems that can be anticipated. First, there is the risk of receiving overwhelming information requests or falling into exhausting and endless cycles of questions and answers. Second, no one would like to be exposed to discovering inconsistencies between the business idea that was filed or the argumentation around it and the material gathered to respond to the regulator or the information provided by third parties[9].

Realistic planning allows developers to prepare for the first type of problem. However, it is essential to mitigate exposure to situations similar to the second problem. This reinforces the need for a detailed description of what is intended to be done, where, and the expected benefits for consumers, but also what the parties have done or said, and what they do or hope to do in parallel to the project under discussion.

14. Work with consultants

Consultants usually need to be trained on the industry in which they will work, the particular business agreement, and the information available. It may also be necessary to guide them on the methodologies used in similar regulatory processes and the relevant literature. The result achieved will be largely constraint by the ability of the parties to guide the consultants quickly and effectively.

A strong assumption is that commercial teams are able to verbalize or decode the agreement and its private benefits in a language that allows consultants to explore the relevant dimensions with implications beyond the limits of the company. Business language can be cryptic even for in-house teams and wrapped with limited number of explanations and details. Information asymmetries can also occur in the opposite direction. It is not unusual for the teams of the developers to be unfamiliar with the social benefits and to be discouraged from learning about them by the cost of entering into an unfamiliar language or by excessive amount of details and explanations. So, again, the challenge is to

9 At this point it may be necessary to go back to the recommendation in key number 2 ("You are a slave to your words") and consider the relational inertia with the regulator.

find a common language, one that allows to communicate assertively about the commercial agreement, its private and social benefits, and that connects all that through a coherent and appealing narrative.

The dynamics of working with consultants varies from place to place. Some work close to companies, while others work more independently. In my opinion, working with greater independence will pay off to the extent that the consultant is applying a familiar methodology on a standardized dataset. Otherwise, an intense interaction between the developers of the commercial agreement and the consultant is almost inevitable.

VI. CONCLUSIONS

To face the challenge of implementing a commercial agreement with competitors, it may be necessary to structure a regulatory project. Its complexity may vary depending on the jurisdiction, markets involved, type of agreements, scale and identity of the developers. In certain cases, a regulatory project can last for years, generate high exposure and demand substantial financial, technical and human resources.

This document is based on what the author has learned from different authorities, companies, experts, tens of agreements between competitors that have been filed before regulators and reached different outcomes, among other sources. The main purpose of this document is to share knowledge with organizations that may be faced with the challenge of planning a regulatory project associated with a commercial agreement with competitors. This is relevant, because companies may lack their own experiences or lose knowledge and, therefore, face difficulties when it comes to carrying out this task.

To plan a regulatory project that maximizes the chances of success, I recommend to pay attention to four main areas. The context for the regulatory analysis is the first step and allows the planner to approximate the probability of success of the project. Then, the structuring of the regulatory project provides the parameters, resources and governance to execute what was planned, minimizing internal and external tensions. A regulatory project is essentially multidisciplinary and multicultural, so the presence of related areas such as legal, compliance, commercial and communications is important to achieve positive results. Finally, regulatory projects have particularities that are revealed in their true dimension as they progress. The information requirements and the need to involve consultants stand out for their relevance and prevalence. Figure 5 summarizes the fourteen keys presented above.

Figure 5: Keys to planning regulatory projects associated with commercial agreements

Areas	Keys
Context for regulatory analysis	1. Define the what and where
	2. You are a slave to your words
	3. Think like a regulator
	4. Think as a stakeholder
	5. Think like a consultant
The regulatory project	6. Structuring the regulatory project
	7. Consumer benefits
	8. Setting boundaries conditions
Areas related to the regulatory project	9. Legal
	10. Compliance
	11. Commercial
	12. Communication
Particularities of the regulatory project	13. Requests for information
	14. Work with consultants

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