Competition Law and Sector-Specific Regulation

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Antitrust is not another form of regulation. Antitrust is an alternative to regulation and, where feasible, a better alternative.


Regulation does not diminish demand for Antitrust, but should boost it. … [R]egulation and antitrust are complements, not substitutes.


Regulation and Competition policy are very close relatives. As you probably all know, relationships between close relatives can be quite complicated.

N Croes (then EU Commissioner for Competition), 2013
Structure

• Part I: Concurrent Application of Competition Law and Sector-Specific Regulation
  • Is it legal? Is it appropriate?

• Part II: Regulatory Antitrust
  • Can competition law enforcement be used in order to achieve regulatory goals?
  • Is it legal? Is it appropriate?
Part I: Concurrent Application of Competition Law and Regulation: The Case of Telecommunications

Two approaches to controlling market power in telecommunications:

• Ex ante: Imposing regulatory obligations (e.g., price controls, access obligations, etc.) on the incumbent or any other operator that has market power
• Ex post: Applying competition law to operators
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<th>Sector-Specific Regulation</th>
<th>Competition law</th>
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<td>Prone to capture?</td>
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Case C-280/08 P Deutsche Telekom (14 October 2010)

Background to the case

• 1996: liberalization of the market - DT lost its legal monopoly of retail fixed-line telecom services

• 1998: DT required to offer unbundled access to the local loop - indispensable for new entrants in retail market

• The Access Price was authorized by the Regulator based on DT’s long run incremental cost information

• The Regulator was already setting a price cap on a basket of DT’s services, including retail call charges
• 2003, DT investigated by the European Commission

• DT found to be dominant in the upstream and downstream markets for access to local fixed networks at the wholesale and retail level

• The Access charge was higher than the internal charge within DT to its retail services unit, leaving an- as efficient as DT - potential entrant still unable to compete – margin squeeze

• **State Action defence?** In its defence, DT argued that its local access tariffs had been approved by the German NRA (RegTP)

• DT contended that if there was any infringement of EU law, the Commission should not be acting against an undertaking whose charges were regulated, but against Germany under Article 258 TFEU
Note that DT could also have argued that the Commission should have lodged proceedings against Germany on the basis of Article 102 and 106 TFEU, an approach that the Commission had considered initially.

Despite the fact that Deutsche Telekom’s prices had been approved by the German NRA (RegTP), the Commission condemned them as a price-squeeze violating Article 102 TFEU. The GC and the ECJ supported the Commission’s decision.
To what extent is the pricing behaviour attributable to the regulatory regime rather than the dominant firm’s conduct?

83. Dominant undertakings have a special responsibility not to allow their conduct to impair genuine undistorted competition on the common market.

84. It follows from this that the mere fact that the appellant was encouraged by the intervention of a national regulatory authority such as RegTP to maintain the pricing practices which led to the margin squeeze of competitors who are at least as efficient as the appellant cannot, as such, in any way absolve the appellant from responsibility under Article 82 EC [now Art 102 TFEU].

85. Since, notwithstanding such interventions, the appellant had scope to adjust its retail prices for end-user access services, the General Court was entitled to find, on that ground alone, that the margin squeeze at issue was attributable to the appellant.
• If the undertaking has **scope for acting independently** of the regulator’s actions; e.g. Maximum prices; recommendation → liability may be imposed on the undertaking.

• Conduct engaged by undertakings **in their own initiative** → Art 102 may apply.

- “If the anticompetitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Article 102 TFEU does not apply. In such a situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings.” Case C-52/09, Konkurrensverket v Telia Sonera Judgment of 17 Feb 2011, [49-50]
A Triangular Relationship

The fact that DT’s charges had to be approved by the NRA does not absolve it from responsibility to submit applications for adjustment of its charges as those charges had the effect of impairing genuine undistorted competition on the common market.

Inform the NRA in the event where the implementation of regulation may allow them infringe competition law.
Justification

• **Supremacy of EU Law over national law**
  ‘Subject to the principle of the primacy of Community law, the national regulatory framework and the EU competition rules are of parallel and cumulative application. National rules may neither conflict with the EU competition rules nor can compatibility with national rules and regulations prejudice the outcome of an assessment under the EU competition rules.’ (O2)

• **Implications**
  Competition law values take precedence over any other non-competition policy objectives that may be pursued by the State or the NRA subject to:
  1. Article 106,2: anticompetitive effect necessary to ensure SGEI
  2. Article 101 (3): efficiencies
  3. Article 102: objective justification
Concurrent Application of Competition Law – Concerns

• False positive findings of liability in regulated markets
• Duplication of market supervisory functions
• Rule of law concerns
  • Double jeopardy? But see Case C-2014/00, Aalborg Portland and Telekomunikacja Polska and Franz Fischer v. Austria, judgment of 29 May 2011
  • Presumption of innocence (Case T-336/07, Telefonica)
• Remedies: are antitrust remedies effective/administrable?
Transatlantic Divide

• Refusal to deal claim denied because Federal Regulation had addressed access issues
• ‘the [Telecommunications Act] was an effective steward of the antitrust function’
• “Where a regulatory remedy designed to deter and remedy competition harm exists”, there will be little scope left for antitrust intervention.

VS
• Deutsche Telekom (European Commission): “Competition rules may apply where the sector-specific legislation does not preclude the undertakings it governs from engaging in autonomous conduct that prevents, restricts or distorts competition.”
Part II: Regulatory Antitrust

• Is economic regulation and competition law conceptually distinct?
• Can competition law be used in a regulatory fashion?
  • Substantive mechanism: Prescriptive competition law doctrines (e.g. essential facilities; excessive pricing)
  • Procedural mechanism: Commitment decisions (strategic deployment of antitrust in markets)
  • Regulatory remedies (Google)

• Is it appropriate?
Procedural mechanism - Commitment Decisions

Article 9 of Regulation 1/2003

“Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.”
“Undertakings which offer commitments on the basis of Article 9 of Regulation No 1/2003 consciously accept that the concessions they make may go beyond what the Commission could itself impose on them in a decision adopted under Article 7 of the regulation after a thorough examination. On the other hand, the closure of the infringement proceedings brought against those undertakings allows them to avoid a finding of an infringement of competition law and a possible fine.”

C-441/07 P Commission v Alrosa, para.48
Pattern of EU enforcement via Commitment Decisions: Energy Sector

- Targeting the incumbent’s unilateral conduct aiming at excluding its competitors from the market
  - through long-term exclusive supply contracts
  - through margin squeeze strategies
  - by limiting the available capacity of the network
  - Sanctioned exploitative conduct which jeopardised the liberalisation of the market and which could not be ‘caught’ by the relevant sector regulation but left to the NRAs of the EU Member States the task of safeguarding the interests of final consumers by regulating retail tariffs and contractual obligations
Source: European Commission
Source: European Commission

- ‘primary capacity hoarding’
- ‘strategic underinvestment’
- ‘pre-emptive long-term booking’
- ‘capacity degradation’
- ‘capacity withholding’
Competition Law as a Can Opener – Strategic Deployment of Antitrust (temporary?)

Antitrust issue: market sharing
Agreed remedies: (1) ENI offers significant gas volumes to customers outside Italy; (2) ENI to increase capacity on TAG pipeline
• Remedies unrelated to the breach of Article 101, but help create more competition in Austria and Germany

ENI (2010)
– new type of abuse abuse: ‘strategic underinvestment’
– agreed remedy: divest pipelines
Judicial Review?

“Application of the principle of proportionality by the Commission in the context of Article 9 of Regulation No 1/2003 is confined to verifying that the commitments in question address the concerns it expressed to the undertakings concerned and that they have not offered less onerous commitments that also address those concerns adequately”

C-441/07 P Commission v Alrosa, para.41
Is Regulatory Antitrust Appropriate?

Procedural economy and efficiency

But…
- Legitimacy? Given the lack of judicial scrutiny
- Use vis-à-vis controversial theories/new theories of harm
- Effect on case law – is there precedential value?