

Competition Law Enforcement in
Regulated Markets: When competition
enforcement clashes with a regulatory
agency's enforcement

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Regulation in a nutshell

What is Regulation? Which markets/sectors are regulated?

- Regulation is a very general word covering many different types of public constraints on market behaviour or structures.
- Regulation is a much broader concept that may have very different economic or non-economic objectives. It relies on a variety of instruments and usually is more prescriptive than competition law.
- Some regulations are applicable to all sectors and **MUST** be taken into account by competition authorities when they enforce competition laws. (for example, the case with intellectual property rights). Because these laws confer important legal rights to the innovators, they occasionally allow innovators to benefit from a dominant position. The extent to which antitrust law applies to practices of the owner of an intellectual property is usually problematic (e.g. Microsoft case)

Regulated sectors

- Sector specific regulations exist in a very large number of sectors:
- Advertising, agriculture and food products, **air transport**, animal shelters, ambulance services, archaeological services, **banking**, beauty parlours, collective management of copyrights, **electricity**, **distribution of oil**, environmental services (such as waste collection), film production and distribution, **financial services**, fishing, funeral homes, harbour, health services, **insurance**, **liquefied gas**, maritime transport, mining, **natural gas**, newspapers, media services, ports, pharmaceutical industry and retail, professional services (such as lawyers, accountants, architects, doctors, surgeons, dentists, engineers, surveyors etc.), retail distribution, road and rail transport, shipping, taxis, travel agencies, telecommunications, TV and radio broadcasting, water distribution...
- The list is not exhaustive and many more sectors are regulated in some countries.
- A large number of services are regulated whereas manufacturing industries are more rarely subject to sectoral regulation (with the notable exceptions of agriculture, mining, food and pharmaceutical industries)

What is competition? Competition vs Regulation?

- Governments play a significant role in promoting competition and use a variety of policies for this purpose, including most prominently, trade policy and antitrust law enforcement.
- **(Alberto Heimler)The emphasis of competition law is on what undertakings should not do, whereas Regulation does the reverse and tells market agents what to do.**
- There is a major difference between the approach adopted for economic Regulation and that followed in antitrust enforcement. Regulation identifies a specific course of action for firms while in antitrust firms are informed on what is prohibited.
- (Temple Lang) “competition law gives power only to stop already identifiable illegal actions, whether by companies or State measures, while regulation gives power to alter an existing situation which is entirely legal, to promote regulatory objectives. Regulatory powers, or competition law powers being used or misused for regulatory purposes, therefore create a temptation to “improve” the existing market”.

Competition vs Regulation?

- In most cases, competition law and regulation pursue distinct objectives, use different tools, and affect different aspects of business conduct. Therefore, the two instruments complement each other and may be applied cumulatively (in an ideal World!)
- In some cases, however, the application of both competition law rules and Regulation are incompatible as Regulation may restrict competition (e.g. by establishing entry barriers) or impose behaviours that may be condemned under competition law (e.g. fixing minimum prices). In such cases, regulation may imply an exemption to the application of competition law. Such exemptions may be beneficial to society when the Regulation aims to correct market failure or ensure distributional objectives, whilst minimizing anti-competitive effects. If however, Regulation goes beyond what it is necessary to achieve the underlying public interest objectives, competition law exemption law is likely to be detrimental.

Competition vs Regulation?

- In many regulated markets, the option of relying exclusively on competition law has not been chosen because continuous monitoring is required to steer a market from a monopoly to a competitive market and continuous access regulation and/or price regulation is also needed. Competition policy is chiefly *ex post* (merger review excepted) whereas industry regulation is primarily *ex ante* and on-going.
- There are single-sector regulatory agencies (e.g. local electricity regulators) and multi-sector regulatory agencies (e.g. in Finland: electronic communications, information society and post, and electricity and gas; in France: radio and television or gas and electricity; in Germany: post and telecommunications; in Japan: gas and electricity etc.) The multi-sector agency approach has also been the common institutional form adopted at the several state level for well over 100 years in the USA. Multi-sector regulators serve to reduce the costs and provide for more consistent approaches across industries.
- Conversely several regulators can be active in a same sector (e.g. French and US banking sector or local energy regulators in federal states).

Competition enforcement in regulated sectors: goal of sectoral regulation

- There are some instances in which sectoral regulations prevent competition authorities from enforcing competition law altogether.
- However in many countries and in many regulated sectors competition law enforcement is possible to a certain degree.
- The most problematic fields of enforcement are usually telecommunications, financial services, ports, airports, railroads, energy (natural gas, liquefied gas, electricity).

Competition Law enforcement in the US.A./exemptions

- In the U.S., the competition law provisions are contained in federal and state acts. competition law, which the Supreme Court has called “**the Magna Carta of free enterprise**”, generally applies to interstate commerce or any activity affecting interstate commerce, whether or not the conduct at issue is subject to state or federal regulation.
- Some federal regulatory acts, however provide for an express immunity to the federal competition law provisions either directly or by giving a federal agency the authority to grant competition law immunity via administrative decision. In general such explicit exemptions are strictly construed. There are **more than thirty** statutory **competition law exemptions** and they relate mainly to the following sectors: **agriculture and fishing, maritime or railroads transport, banking, insurance and financial services, sports leagues, professional societies, export cartels, labour, health care, education.**

Competition law enforcement in the EU/exemptions

- In the EU, the competition provisions are contained in the Treaty on the Functioning of the European Union (TFEU) which is the constitutional Charter of the EU and in the laws of the Member States. EU competition rules **apply to private and public “undertakings”** which have been defined by the Court of Justice as every entity engaged in an economic activity regardless of its legal status or the way it is financed. Economic activity, in turn, depends on the function carried out by the entity, and consists of offering goods or services on the market where that activity could, at least in principle, be carried out by private undertakings in order to make profits. Thus EU competition law applies to all entities, private or public, that offer products or services normally provided against remuneration. Conversely, competition law **does not apply to activities** where the **Member States exercise sovereign power** (such as control of air space, anti-pollution surveillance) or that are **governed by the principle of solidarity such as compulsory social security schemes**.

Competition law enforcement in the EU/exemptions

- **EU competition law applies to all sectors of the economy with rare exemptions.** The TFEU provides for a possible **exemption in the agricultural sector.** However the Council of Ministers decided to make competition law applicable to agriculture with certain exemptions to ART 101 TFEU in order to ensure a proper functioning of the Common Agricultural Policy and its national organisations of agricultural markets. The TFEU also provides for **exemptions for nuclear energy and military equipment.** Thus, in **all other sectors competition law applies fully.** The European Commission, however, adopted several block exemptions for certain economic sectors: motor vehicle, insurance, and transport (both air and maritime). In those cases, competition law applies but the agreements meeting the conditions set by the Commission are automatically exempted on the basis of art 101 (3) TFEU. The Commission has also adopted cross-sectoral block exemptions for some type of horizontal (research and development, and specialisation) agreements, vertical agreements and technology transfer agreements.

Competition law enforcement round the globe/exemptions

- In **Australia**, the competition provisions are included in a federal law (the competition and Consumer Act 2010) and several regulations are adopted at the federal level provide for an exception to the competition law. The main sectors are: **postal, banking, financial and insurance services and customs.**
- In **Singapore**, the Competition Act 2004's prohibitions against anti-competitive conduct **does not apply to the government, any statutory body, or person acting on behalf of the government.** Moreover, the Act creates a number of **sector exclusions, such as postal, rail, and cargo services** while in some other areas, competition oversight of **sector-specific businesses has been exempted (e.g. telecoms, media, and energy).**

relationship between competition agency enforcement and regulation

- The goals of regulations differ from sector to sector. 1-In telecommunications, electricity, gas and rail transport one goal of sectoral regulation is usually to open these sectors to competition.
- 2-In other sectors like professional services, health services, or environmental waste services, the goal of regulation is often to limit competition because of some perceived market failure.
- 3-In some sectors the goal of the sectoral regulation is (in principle, at least) not to promote or to restrain competition but rather to pursue some other social goal (for example to protect consumers against fraud or dangerous products as in the food industry or to ensure consumers that supplied services satisfy a minimum standard as in the professions).
- thus the ease or the difficulty of enforcement of competition law in regulated sectors will depend on which sector is involved. For some, sectoral regulation and competition law enforcement will complement each other while for others there will be a contradiction of goals between competition law and sectoral regulation.

I. Complementarity between sectoral regulation and competition law enforcement

- Generally: a general competition law applicable to all sectors + sectors which are just being exposed to competition + competition cannot yet work → need to monitor the gradual development of competitive forces.
- Incumbent operator is vertically integrated, manages a particular facility its competitors have to use to be able to compete with it → need to control and define the access price (+ timing of entry) to allow market entry
- access price (price-cap?incentives? Smart Regulation??)
- This type of regulation in general is not inconsistent with competition law. The enforcement of competition law may help ensure that the incumbent does not abuse its market power by engaging in anticompetitive strategies (such as predatory pricing or cross subsidization).
- Examples from Turkey: THY, Pegasus, airports, slots, jet fuels and use of airport facilities

I. Complementarity between sectoral regulation and competition law enforcement

- BUT: the question of who is in charge of enforcing competition law (and which competition law in multi-governance settings such as federal states) may arise and could be a source of tension or inconsistency. In some countries **a clear division of labour** between two complementary authorities (comp authority and sectoral authority). In some countries the sectoral regulator is also the competition law enforcer for the sector it regulates (U.K.) or the competition authority is also the sectoral regulator (ACCC in Australia). In Canada, in network industries high degree of cooperation between sectoral regulators and comp auth. In Mexico, sectoral regulators have the duty to promote competition.
- When sectoral regulation and competition aw have the same goal, competition law enforcement may be facilitated in the sense that the competition authority may not have to intervene because of the regulation alleviates potential competition problems.

II. When sectoral regulation have goals broader than the promotion of competition but still consistent with antitrust law

- When sectoral regulators apply broader standards than competition, they may consider some of the interests they must protect require that competition be mitigated. e.g. Public interest standard may clash with efficiency standard → sectoral regulator protects non-efficient competitor. (exceptional cases)
- Several U.S. Cases illustrate the complementarity between broad regulatory frameworks and antitrust law.
- Hughes/Echostar merger
- ATT/Media One merger

III. Sectoral regulation is a useful complement to competition law enforcement

- A. Cases where competition cannot function unless a sector specific Regulation is in place (e.g. Snam-Carriage in Italy)
- B. Cases where competition law does not allow the competition authority to exempt practices which should be exempted (insurance sector): Turkish insurance sector investigation leading to the Banking regulator's attempts to amend the competition law, EU frameworks, German Law, US McCarran-Ferguson Law: DONT TOUCH MY INSURANCE LAW!! NO competition enforcement
- C. Cases where competition law does not allow the competition authority to sanction anticompetitive practices: Canadian electricity, gas examples, Mexican airlines case,

IV. Competition law enforcement is a useful complement to sectoral regulation

- Italian, Turkish Norwegian cases

The problematic Area: Sectoral Regulation creates a difficulty for the enforcement of antitrust laws

Source of tension: increased power of regulatory authorities.

Claim: Regulatory agencies and competition authorities are formally entrusted with the implementation of two distinct sets of rules that apply in distinct situations; overlaps between regulatory agencies and competition authorities are limited because the former generally intervene on an ex ante basis through the imposition detailed and adjustable remedies while the latter essentially carry out ex post enforcement duties to eliminate actual abuses of market power through the adoption of prohibition decisions as well as fines, competition authorities enjoy an exclusive jurisdiction over certain matters which are left out of reach of regulatory agencies

The problematic area: Sectoral Regulation creates a difficulty for the enforcement of antitrust laws

- **Truth:** differences between regulatory agencies and competition authorities become increasingly blurred under the influence of several factors:
- 1-the growing convergence between competition law and sector specific regulation lead to substantial overlaps between competition sector regulators and competition authorities' mandates: opening of markets, elimination of bottlenecks accelerate the transition of network industries towards competitive markets; EC legislative reforms bring sector Regulation closer to competition law standards (e.g. In telecommunications, the concept of «significant market power» is identical to the Notion of dominance in competition law); extensive interpretation of the competition rules of the Treaty (emphasis on Access-based competition), the development of quasi-regulatory enforcement polices by competition authorities
- 2-regulatory agencies are increasingly entrusted with Powers that resemble the Powers enjoyed by competition authorities.
- 3-the proliferation of regulatory agencies across all network industries (telecommunications, electricity, gas, rail and post) through EC directives and the increased decentralization of competition rules towards national competition authorities and national courts have multiplier effect in terms of jurisdictional conflicts.

Main areas where conflicts arise

Main areas where competition rules interact with industry-specific rules: **interconnection, Access, monopoly/incumbent pricing, anti-competitive agreements and merger control.**

Sector regulatory agencies are often responsible for defining «entry conditions», their actions directly affect the nature of competition after entry has taken place.

The jargon of «**Access Regulation**»

Provisions requiring incumbent operators to grant effective Access to their networks and setting out conditions for Access.

In telecommunications, Directive 2002/19 and 2009/140: «significant market power»

In energy: network conditions are laid down under Third Party Access Regime which allows third parties (gas producers and suppliers that do not control the grid) to use the existing gas pipelines as to reach gas consumers Directive 2009/72

The jargon of competition law: essential facility

Access pricing vs excessive prices

The problematic area: sectoral regulation creates a difficulty for the enforcement of antitrust laws

- **I. cases where regulation limits the scope of application of antitrust laws:**

In sectors like agriculture, defense, banking, TV and radio broadcasting anticompetitive regulations limit the scope of competition law enforcement.

Canada: Regulated conduct defence

Mexico: Strategic areas (postal services, telegraphs, radio telegraphy, petroleum and other hydrocarbons, basic petrochemicals, radioactive minerals, nuclear energy, electric power, central bank), labour unions, intellectual property rights, export cooperatives

U.S.: Federal Reserve Bank, bank regulator does not want the DOJ to intervene, Fleet Financial/Bank Boston merger

Regulation creates a difficulty for the enforcement of antitrust laws

- **II. cases where Regulation does not preclude competition law enforcement but makes it more difficult to enforce:**

i- Because it creates a structure which is not conducive to competition:

- EU airport or harbor cases
- U.S. Pacific/Enove merger

ii- Because it creates an ambiguity (an overlap between comp law and Regulation)

- Spanish telecom regulator
- US Schering-Plough case

iii- Because it allows firms to avoid sanctions

Regulation creates a difficulty for the enforcement of antitrust laws

- **III.** Goal of Regulation is to limit (or even eliminate!) competition because of a perceived market failure
- France, Turkey, Italy, U.K. And many countries: Lawyers, architects, public notaries, doctors legally binding self regulations enforced by their Professional associations → limit competition by restricting entry, freedom of establishment, advertising, price competition.

Famous conflict Cases

- Deutsche Telekom
- Trinko
- Microsoft

Mechanisms of Conflict Avoidance

- The optimal choice? Always a compromise varies from country to country and across industries within the same country
- **It is a matter of policy choice, depends on the perception which agency is more powerful, has a higher voice, or more reputable**
- In EU, Court of Justice puts a general duty on national regulatory agencies to observe competition rules. (GB-Inno-BM/ATAB; Ahmed Saeed, Italian Matches cases)
- **Various forms of cooperation and means to avoid inconsistencies:**
- Informal and soft techniques of cooperation: contacts, meetings, Exchange of info, staff training and Exchange of officials
- Delimitation of jurisdiction: abstention, written delimitation of jurisdiction, cooperation and coordination, federal logic
- Organized cooperation: right to make submissions, participate in hearings and ask for optional referrals, joint proceedings, mandatory agreements, consultations and referrals, consultation time-frame, appeal proceedings

Mechanisms of Conflict Avoidance

- Finally in the U.K. (where the regulator is entrusted with the enforcement of competition rules) a well-designed cooperation mechanism. A rule of priority determines which of the regulator or competition agency must deal with the case and reciprocal consultation requirements are set up. In case of conflict between two authorities the minister decides which authority shall have jurisdiction

Mechanisms of Conflict Avoidance

- **The regulated conduct defence:**
- *In many jurisdictions a regulated conduct defence shields conduct from competition law consequences where it is required by a federal or state regulation. When firms invoke the doctrine as a defence against allegations of illegal anti-competitive behaviour, they seek what is sometimes called a regulated conduct defence or regulated conduct exemption. The regulated conduct defence is narrower form of immunity than exempting an entire sector from the application of competition law, and permitting this defence should be preferred to broad, sector-wide exemptions from competition law.*

The regulated conduct defence

- If, however, regulation goes beyond what is necessary to achieve the underlying public interest objectives, the competition law exemption is likely to be detrimental. Thus where a specific rationale for exemption has been identified, consideration should be given to the means by which its scope can be minimised. For example, an exemption which is narrow and focused is better than a broad one. In **Romania**, any intervention by the national regulatory agencies must respect the principle of minimum distortion of competition.
- These issues are now clearly understood in most jurisdictions where the solution to “exempt” the whole regulated sector from the application of competition law has been progressively abandoned. In the **US**, several antitrust exemptions have been narrowed or eliminated over time, due in part to **advocacy efforts** of the antitrust agencies directed at federal and state entities.
- Similarly in **Korea**, the KFTC enacted the Omnibus Cartel Repeal Act in 1999, a series of 19 laws which abolished 20 cartel practices by implementing measures such as lifting the limit on wage schemes for professional service providers such as lawyers, and reducing the number of items subject to group private contract. More recently, the KFTC has focused on reforming entry regulations. In **Japan**, the antitrust agency requested a fundamental review of antitrust exemptions in several sectors, including international aviation and the international shipping industry.

The regulated conduct defence

- The underlying legal doctrine of the regulated conduct defence could be viewed as related to a hierarchy of norms.
- When competition law and regulation are at the same hierarchical level, the regulated conduct defence may be based on express immunity when one of the legal rules explicitly provides for competition law immunity or an implied immunity when there is a plain repugnancy in the application of both legal rules to the challenged conduct. In some jurisdictions, the defence also applies when there is no added value in applying competition law in conjunction with regulation.
- In multilevel governance settings such as federal states, when competition law is at a “superior” level to the regulation, the regulated conduct defence may be based on some form of “state action” doctrine and applies, in accordance with national law, when the challenged conduct is imposed or at least actively supervised by the regulator.

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