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Economics of Competition & Regulatory Issues

October 2003

Regulation v Antitrust

Gaps in the new EC regulatory regime for the communications sector

The new EC regulatory framework for communications creates a complementary and convergent relationship between competition and regulatory laws. Its central reform is to base *ex ante* regulatory intervention on competition law principles. It is also based on the premise that *ex ante* regulatory law should complement competition law and be applied only where it is established that *ex post* competition law is insufficient. While these are the legal presumptions underpinning the EC *Framework Directive*, the reality may be quite different since no criteria are given to identify when competition law can be regarded as insufficient. Indeed, there is an inherent difficulty in areas other than price controls, since the remedies and principles of intervention are almost identical. Here several gaps and unresolved issues concerning the relationship between competition law and the new regulatory regime are discussed.

Insufficiency of competition law.

The new regulatory framework does not give guidance to the National Regulatory Authorities (NRAs) on how to decide when regulatory intervention should be preferred to competition law. This appears to be left to judgment by the NRA in consultation with the National Competition Authority (NCA) in each Member State. This provision makes sense at one level because NRAs do not generally enforce competition law. Yet the EC Commission has left the matter up in the air. In the EC *Recommendation* a number of markets susceptible to *ex ante* regulation are defined with the implication that these are also markets in which competition law is ineffective. Yet the selection of these markets was based on transitional requirements and superficial market analysis only. The role that competition law has or could play in dealing with competitive abuses is simply not discussed.

The case for *ex ante* regulation is apparently based on claims that competition law is costly, slow and ineffective in dealing with the type of market power abuses encountered in the communications sector. This is odd since the administration and enforcement of competition and regulatory laws are fairly similar – both are enforced by specialized administrative agencies; and both have available the same legal remedies, and face similar budgetary constraints, beaucratic payoffs and operate at similar speed (with the exception of mergers). This contrasts with the situation in other countries, such as the US, where antitrust law is essentially a judicial system. In these regimes it is arguable that regulatory intervention is cheaper, and that the intensity and effectiveness of regulatory enforcement greater than antitrust. This is not the case within the EU.

Differential Evidentiary Standards

In some quarters it is argued that the difficulty with using competition law is that the legal standard of proof is too high. Oftel, which almost uniquely among EC Member States enforces both regulatory and competition law in the communications sector, has stated that it rarely uses its competition law powers to intervene because establishing a competition law case is too demanding. This suggests that major criteria for the imposition of *ex ante* regulation will be administrative ease rather than the rigorous identification of permanent market power problems.

The proposition that NRAs can intervene on the basis of less analysis and evidence of market power abuses than NCAs is a highly suspect justification for *ex ante* regulation. This is especially so given that *ex ante* regulation is designed to deal with manifest and permanent market power concerns. The recent annulments of the EC Commission merger decisions point to the tendency for regulators to develop a culture of evidentiary short cuts which undermine their effectiveness and legitimacy. There is a need for checks and balances on the NRAs' exercise of discretion, and the *Framework Directive* provides for an appeal process. However, an appeal process is not an adequate substitute for proper evidentiary standards and reasoned decisions, nor does it justify a bifurcated approach in which different evidentiary standards are used to apply the same legal principles. Indeed, it is arguable that the evidentiary standard should be at least equivalent too if not higher than that used in competition law because of the permanence of *ex ante* remedies.

In the absence of clarification of the evidentiary standard there is a danger is that the new regulatory framework will be administered as a strict liability regime in which the identification of Significant Market Power (SMP) becomes a justification for extensive regulation of network operators' activities. This will especially be so because the focus of much regulatory intervention is

exclusionary practices (foreclosure) rather than exploitative abuses (high prices). The difficulty in determining whether an alleged exclusionary practice is anti-competitive or simply aggressive but legitimate rivalry is not straightforward.

Private Enforcement

Another "gap" in the relationship between antitrust and regulatory law is the role of private enforcement. Under EC law, antitrust actions can be enforced through EC and national courts by the harmed party. The EC Commission's modernisation proposals, which come into force in 2004, will make private antitrust enforcement even more prominent.

It is arguable that private enforcement will increase the effectiveness of antitrust intervention in the communications sector. Those harmed by an infringement have an incentive to enforce the law driven by the prospect of halting anticompetitive abuses and securing substantial compensatory damages. All things equal, this will increase the level of antitrust enforcement activity, and thereby diminish the need for *ex ante* regulation. On the other hand, a finding of SMP may strengthen private antitrust enforcement by easing the evidentiary burden if it is admitted as evidence of dominance. Allowing this would make *ex ante* regulation more potent, since it would lead to the prospect of civil damages in addition to the regulatory sanctions.

Yet one senses hostility among NRAs and NCAs to the prospect of private actions. These are seen as unnecessary and inefficient, and have the potential to make the public enforcement of both competition and regulatory law more difficult. Whatever the merits in this view, private enforcement has not been analysed in any detail, and it has not been taken into account in the discussion of remedies under the *Framework Directive*.

Clearly the nature of judicial proceedings differs among Member States, and will have an impact on the sufficiency of private enforcement of competition law. There is a need, for example, to investigate the differences between adversarial and inquisitorial approaches, and those of specialised judicial competition tribunals.

Emerging markets

Ex ante regulation should not be applied to new or emerging markets. The EC *Framework Directive* states, albeit in a Recital, that emerging markets provide a safe harbour where "First Mover Advantages" should not be treated as SMP. In emerging markets, market power is likely to be transient, and if not the NRA will have an opportunity to intervene at a later date. The *SMP Guidelines* warn against premature regulatory intervention based on speculative analysis.

The more difficult area is where a new product is introduced by an operator who has SMP in the provision of infrastructure or network services. In such cases the *Framework Directive* both accepts that leveraging SMP on downstream markets may be an abuse, but for new products this danger should "normally" be left to the case-by-case determination of competition law.

This is an area where there is a real danger of the illegitimate expansion of *ex ante* regulation. It is clear that some NRAs regard the prospect of operators with SMP leveraging their upstream market power onto new products as a frequent and serious anticompetitive abuse. This view may lead some NRAs to fashion *per se* rules which give downstream rivals and entrants access to the wholesale inputs to replicate the SMP operators new products. That is, a mandatory access regime for any new products. This danger has already been realised in Oftel's *Access Guidelines*.

The extension of *ex ante* regulation to emerging markets in this way is illegitimate for two reasons. First, it reverses the legal presumption at the heart of the *Framework Directive* - that regulatory law complements competition law – to one where competition law is seen as a stop gap to be progressively replaced by *ex ante* regulatory intervention. Second, it overturns the more measured approach adopted by a number of NRAs where the case for access has been granted only if there is a likelihood of significant incremental consumer benefits and/or it will not deter investment and innovation. This cost benefit approach is not only more economically rational but required under the *Framework Directive.*

Action points

The above discussion has highlighted a range of issues which urgently require further discussion and resolution. In summary these include:

- criteria for the choice between regulatory and competition law;
- specification of evidentiary standards which must be satisfied for imposing *ex ante* regulation;
- definition of and criteria for determining emerging markets, and the apparent "safe harbour" provision; and
- the role and impact of private antitrust enforcement.

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