

I. The Interplay between Telecommunications Regulation and Competition Law

Telecommunications regulation and competition law are complementary instruments. Their objective is to maintain a competitive market structure within the European Internal Market and, ultimately, to maximise customer welfare. Their bases are Articles 3(c) and (g) of the EC Treaty which sets out the main activities of the European Community. The New Regulatory Framework creates a ‘complementary and convergent’ relationship between competition law and telecommunications regulation.¹ Competition rules tend to prohibit broad categories of behaviour, while focusing on the specific objective of promoting competition. Telecommunications rules tend to be more precise and to leave the enforcing authorities less discretion than competition rules.² The relationship between telecommunications regulation and competition law can be analysed at three different levels: First, the systemic level relating questions whether competition law will replace telecommunications regulation. Second, the systemic level relating to potential overlaps and common concepts between the two areas (for instance, expansion of competition law analysis and concepts into regulatory issues). Third, the institutional level relating to the role and powers of regulators.³

In the past, as far as the telecommunications sector was concerned, more emphasis was put on *ex ante* regulatory intervention. However, the 1998 European Commission Notice on the application of the competition rules to access agreements in the

¹ For a recent critical assessment of the relationship between regulation and competition law in practice, see Case Associates *Regulation v Antitrust. Gaps in the new EC regulatory regime for the communications sector* Casenote (October 2003).

² D Gerardin and M Kerf *Controlling Market Power in Telecommunications. Antitrust vs Sector-specific Regulation* (Oxford OUP 2003) 11-13.

³ These categories are based on a presentation made by Professor Pierre Larouche at the Workshop ‘Dispute in the Telecommunications Sector: Reforming National Legal Systems in the Light of the New Regulatory Framework’ British Institute of International and Comparative Law (30 October 2003).

telecommunications sector⁴ referred to a possible application of both *ex-ante* regulatory obligations and competition law. At the time when the Notice was issued, competition law analysis was already carried out to determine SMP operators (with more than 25% market share on the relevant market) under the Open Network Provision (ONP) Directives.

The 1999 Communications Review went one step further and considered that the establishment of *ex-ante* obligations should be assessed on the basis of a competition law analysis. It also stated that the concept of SMP should be equivalent to the ECJ case law on dominance (Article 82 EC). The consultation following the Communications Review covered the relationship between competition law and regulation. During the consultation, the main concern was that competition law alone would not be sufficient to carve out the problems posed by dominant operators that, at the same time, control network infrastructure. Access to facilities is mainly determined in terms of interconnection rights.⁵ The relationship between competition law and telecommunications regulation has also been subject to extensive academic debate.⁶

The New Regulatory Framework is based on the premise that *ex ante* regulation should only be applied where the level of competition is considered to be insufficient⁷ and where ‘national and Community competition law remedies are not sufficient to address the

⁴[1998] OJ C 265.

⁵ The regulatory framework dealing with access to telecommunications facilities borrows a number of concepts from the ‘essential facilities’ doctrine in EC competition law. See A Bavasso ‘Essential Facilities in EC Law: The Rise of an ‘Epithet’ and the Consolidation of a Doctrine in the Communications Sector’ (2002) 21 Yearbook of European Law 85, 105.

⁶ For a wider discussion on the relationship between competition law and telecommunications regulation see in particular P Larouche *Competition Law and Regulation in European Telecommunications* (Hart Oxford 2000) S Martinez Lage and H Brokelmann ‘The Respective roles of Sector-Specific Regulation and Competition Law and the Institutional Implications’, as well as other contributions, in CD Ehlermann and L Gosling (eds) *European Competition Law Annual 1998: Regulating Communications Markets* (Hart Oxford 2000), and D Gerardin and M Kerf *Controlling Market Power in Telecommunications. Antitrust vs Sector-specific Regulation* (Oxford OUP 2003).

⁷ See recently Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions *European Electronic Communications Regulation and Markets 2003. Report on the Implementation of the EU Electronic Communications Regulatory Package* COM(2003)715 (2003) 3.

problem.⁸ Mario Monti, the European Commissioner responsible for Competition Policy, recently pointed out ‘that we have not reached market conditions yet which would allow for *ex ante* regulation to be abandoned. Compared to other economic sectors, we are still in a transition period where we need to apply both, competition law instruments and sector specific-regulation. As long as problems such as unjustified impeded access to basic networks exist, *ex ante* regulation remains necessary.’⁹ *Ex ante* regulation will therefore in many cases take precedence over, and be more effective than, *ex post* competition law enforcement.

The Commission has recently initiated investigation proceedings on the basis of Article 82 EC Treaty against telecommunications operators, in particular KPN¹⁰, Wanadoo and Deutsche Telekom (DT). Wanadoo was fined heavily for predatory pricing in the ADSL retail sector,¹¹ and Deutsche Telekom was also fined for margin squeeze in the local loop.¹² In the case of KPN no formal decision was not reached. There were however few other Art 82 cases in advance of the cases mentioned above, despite a high number of complaints in the sector.

The *Deutsche Telekom* decision is particularly important as the German regulator (RegTP) had already fixed price-controls on the incumbent that allowed certain commercial freedom. DT subsequently employed this freedom in an abusive way by increasing retail prices and reductions in wholesale charges, thereby producing a margin

⁸ Framework Directive Recital 27. For a more detailed discussion of competition law principles in the New Regulatory Framework see S Farr and V Oakley *EU Communications Law* (Bembridge Palladian 2002) ch 2.

⁹ Commissioner Mario Monti ‘Competition Law and Regulation in the new Framework’ Speech at the Public Workshop on ‘The Electronic Communications Consultation Mechanism’ Brussels 15 July 2003, p.3.

¹⁰ European Commission Press Release 27th March 2002, IP /02/483.

¹¹ European Commission Press Release 16th July 2003, IP/03/1025.

¹² Commission Decision 21st May 2003, [2003] OJ L263/9. The fine imposed on Deutsche Telekom was Euro 12.6 Million.

squeeze to the income obtained by competitors.¹³ Therefore, in this case competition law and regulation were applied at the same time.

Competition law will become more important in the future and regulation rolled back. In the view of the European Commission ‘the aim is now progressively to phase out this specific framework in line with the improving market structure. So in a not too distant future most of this sector should operate under the exclusive scrutiny of antitrust rules. ... Indeed, competition authorities should guarantee that growth and innovation are not obstructed by monopolisation or other private anti-competitive practices.’¹⁴

The *Wanadoo* and *Deutsche Telekom* decisions are examples of the important role of competition law in the telecommunications sector, even though such cases have been rare yet. Regulatory authorities, applying *ex ante* regulation, will still have an important role to play in the future. In many instances competition law remedies will not be sufficient, given that they are imposed *ex post* and often after lengthy investigations. The New Regulatory Framework has significantly strengthened the powers of NRAs. In the future, their tasks will increasingly be based on competition law concepts applied to the telecommunications sector. The European Commission will act in a supervisory capacity to ensure the harmonised application of Community legislation and concepts.

¹³ Commission Decision para 163

¹⁴ Mario Monti ‘Reflections from the EU expertise’ Lewis Bernstein Memorial Lecture Department of Justice Washington, D.C. (27 October 2003).