The Role of Regulation in EU Competition Law Assessment

Niamh Dunne

LSE Law, Society and Economy Working Papers 09/2021
London School of Economics and Political Science
Law Department

The Role of Regulation in EU Competition Law Assessment

Niamh Dunne*

Abstract: The relationship between competition law and regulation is a perennial question in competition policy. This article considers what happens when we apply competition law within markets already subject to a degree of alternative regulatory intervention—and, more specifically, how the presence of regulation can inform the antitrust assessment exercise. First, it asks why we might need, but also be reluctant, to apply competition law to market problems arising in regulated sectors. It then examines the potential impact of regulation within the task of competition law assessment from three overlapping perspectives: (i) where regulation forms an integral part of the "legal and economic context"; (ii) where a regulatory standard is applied to set the boundaries of competition on the merits; and (iii) where competition intervention functions as a means of "course correction" to the underlying regulatory regime.

* Law Department, London School of Economics and Political Science. Email: N.M.Dunne@lse.ac.uk. An earlier draft of this article was presented at the OECD's Roundtable on *Competition Enforcement and Regulatory Alternatives* in June 2021.

I. INTRODUCTION

The relationship between competition law and regulation is a perennial question in competition policy.[1] Almost all modern markets are subject to a degree of regulation which limits and directs competition to an extent. This ranges from control of labour standards, health and safety rules, environmental protection, intellectual property rights, data privacy, to more closely-tailored regimes in areas like financial services, telecommunications and energy. The interaction between competition law and other forms of market regulation is complex and multi-faceted. Competition intervention may function as a precursor to, or deliberate substitute for, sector-specific regulation. Conversely, enactment of the latter may oust residual jurisdiction of the former, as an example of the *lex specialis derogat legi generali* principle. Regulation may mirror the approach of the competition rules, or aim at policy objectives that, though socially valuable in their own right, sit uneasily with the consumer welfare focus of contemporary competition law.

Our focus is EU competition law, specifically Articles 101 and 102 TFEU, as these rules are interpreted and applied by the European Commission, the Court of Justice of the EU and national competition authorities. EU law offers an expansive vehicle through which to explore the interaction between competition law and other regulation, insofar as it is well established that the competition rules continue to have—*almost*—complete application within regulated markets. A small number of sectors are expressly exempted or subject to truncated coverage of competition law.[2] The "State action" doctrine, moreover, provides undertakings with a defence to application of the competition rules where their conduct was either entirely required by the underlying regulatory regime, or where that regulation removes any prospect for competitive behaviour within the market concerned.[3] Otherwise, competition law and regulation have been conceived as constituting "two barriers" to lawful market participation: each of which imposes distinct and not necessarily coextensive obligations on market operators, and each entailing separate demands as to compliance.[4] The upshot is that the existing EU jurisprudence

---

[1] A small sample of work on the topic includes: Pierre Larouche, *Competition and Regulation in European Telecommunications*, Hart Publishing (2000); Tony Prosser, *The Limits of Competition Law*, Oxford University Press (2004); W. Kip Viscusi, Joseph E. Harrington, Jr. and David E.M. Sappington, *Economics of Regulation and Antitrust*, 5th ed., MIT Press (2005); Giorgio Monti, "Managing the Intersection of Utilities Regulation and EC Competition Law" 4 *Competition Law Review* 123 (2008); Martin Hellwig, "Competition Policy and Sector-Specific Regulation for Network Industries" in Xavier Vives (ed.), *Competition Policy in the EU*, Oxford University Press (2009), pp.203-35; Pablo Ibáñez Colomo, "On the Application of Competition Law as Regulation: Elements for a Theory" 29 *Yearbook of European Law* 261 (2010); Howard Shelanski, "Antitrust and Deregulation" 127 *The Yale Law Journal* 1922 (2018), and previously by this author, Niamh Dunne, *Competition Law and Economic Regulation*, Cambridge University Press (2015). The practical importance of the topic for competition enforcers is moreover reflected in significant work by the OECD's Competition Committee in the area, including Roundtables on *The Relationship between Competition Authorities and Sectoral Regulators* (DAF/COMP/GF(2005)2), the *Regulated Conduct Defence* (DAF/COMP(2011)3), *Independent Sector Regulators and Competition* (DAF/COMP/WP2(2019)3) and *Competition Enforcement and Regulatory Alternatives* (DAF/COMP/WP2(2021)2).

[2] The best-known remaining example is the limited application of competition law in the agricultural sector under Common Agricultural Policy: see Article 42 TFEU and Regulation 1308/2013 establishing a common organisation of the markets in agricultural products (OJ L 347/671, 20.12.2013).

[3] See discussion at text accompanying fns.18-24 below.

[4] Opinion of Advocate General Mazak in Case C-280/08 P *Deutsche Telekom* EU:C:2010:212, para.21.

provides a broad array of examples of how regulatory considerations may affect antitrust analysis.

II. WHY APPLY COMPETITION LAW TO REGULATED MARKET PROBLEMS?

Two preliminary questions worth considering are why we might need, but also be reluctant, to apply competition law to market problems arising in regulated sectors. The mere presence of sectoral regulation does not, in most instances, imply the complete removal of ordinary competitive dynamics. It is thus unsurprising that "normal" *anti*competitive behaviour continues to arise in such sectors. Yet the presence of sector-specific regulation typically represents a deliberate and considered effort by the state (perhaps also involving private actors within a co-regulation framework) to direct or limit ordinary competitive behaviour within that sphere. To what extent is it sensible and legitimate to seek to further fine-tune the regulatory settlement through the application of competition law?

The key justification for concurrent application of competition law in regulated sectors is to protect the **effectiveness** of competition enforcement. The principle of effectiveness has emerged as one of the most influential determinants of the progressive development of the EU competition rules.[5] The aim, in short, is to ensure that the rules are interpreted and enforced in a manner which best achieves their overarching objective, namely "the maintenance of effective competition within the internal market".[6] Concurrent application allows the competition rules to be applied to their fullest extent against suspect behaviour, the essential question being whether the conduct falls within the substantive scope of Articles 101 or 102. Relatedly, concurrent application avoids the risk that legislators or regulatory agencies may inadvertently or arbitrarily curtail the scope of competition law through their regulatory choices. Unregulated markets are the exception rather than the rule today. If we accept too readily that the presence of regulation *ex ante* ought to oust the competition rules *ex post*, in practice this would cede large swathes of jurisdiction in respect of socially harm practices, without any guarantee that the existing regime provides adequate alternative protection. Moreover, an approach to concurrent application that hinges on whether the regulatory regime instead acts as "effective steward of the antitrust function"[7] might be considered to put the cart before the horse: as the threshold question of whether the competition rules *can apply* to behaviour would be determined by substantive assessment of what those rules *would achieve* in the market compared with existing regulatory controls.

---

[5] See, e.g., Cases C-453/99 *Courage and Crehan* EU:C:2001:465, para.26; C-194/14 P *AC-Treuhand AG* EU:C:2015:717, para.36; and C-547/16 *Gasorba SL* EU:C:2017:891, para.29.

[6] Opinion of Advocate General Kokott in Case C-307/18 *Generics (UK) Ltd and Others v Competition and Markets Authority* EU:C:2020:28, para.246.

[7] As is the approach under US competition law, following *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP,* 540 U.S. 398 (2004).

This links to a second reason for continuing to apply competition law in the presence of even a significant degree of sector-specific regulation, namely, to secure the benefits of **regulatory complementarity**. The characterisation of concurrent application as two distinct barriers to lawful market operation reflects the fact that competition law and regulation rarely traverse precisely the same substantive ground, nor do they aim to protect and realise the same policy goals. The very presence of sector-specific regulation suggests that *merely* supervising the market through competition enforcement in order to maintain effective competition is viewed by policymakers as insufficient to achieve the full range of socially beneficial objectives envisaged for the sector. Conversely, even regulation that is intentionally designed to foster greater effective competition may fail to prevent the sort of individual instances of anticompetitive behaviour by firms that are the bread and butter of the competition rules. In principle, concurrent application allows for the realisation of competition policy and alternative regulatory goals in tandem. As explored further below, complications arise where these objectives are not complementary, and the "two barriers" analogy fails to account for circumstances where one barrier imposes requirements that set it at odds with the other. Concurrent application nonetheless reflects the fact that pursuit of the public interest, broadly understood, can be a complex task that requires input from multiple legislative regimes and regulatory actors.

Yet, applying competition law in regulated sectors brings its own risks. The first concern, explored further below, is a fear of **disruptive impact within competition analysis**. That is, the presence of regulation can complicate the application of competition law, in ways that make us less confident that enforcement is in fact contributing to the maintenance of effective competition in the market concerned. Regulation can significantly alter the competitive dynamics of a market, so that the task of counterfactual analysis—asking what a market might look like absent the suspect behaviour[8]—is less straightforward and more uncertain. Regulation may, for example, restrict current competitors' freedom to engage in competitive (or anticompetitive) conduct; it may affect opportunities for entry; or it may influence the extent to which countervailing efficiencies can be realised. The fact that competition assessment becomes more complex is not, by any means, a wholesale argument against concurrent application, as the discussion below illustrates. It is, however, a reason for caution in this context, and it is imperative that enforcers and courts understand how the underlying regulatory framework feeds into and impacts upon the suspect behaviour in a particular instance.

A second concern is the risk that applying competition law to regulated behaviour may lead to outcomes that result in objective **unfairness for defendant undertakings**. The most obvious way in which this might arise is where the ostensibly anticompetitive behaviour is required or at least encouraged by the regulatory framework, to such an extent that it might reasonably be concluded that it is not really attributable to the defendant as such. As noted, EU law provides a so-called State action defence in such circumstances. Yet this exception is incredibly narrow in scope, essentially requiring *all* freedom of

[8] See, e.g., Case C-307/18 *Generics (UK) and Others* EU:C:2020:52, paras.115-20.

competitive action to be removed by the regulatory requirements.[9] This creates not-insignificant risks that defendants may be held *legally liable* for anticompetitive behaviour in circumstances where one might struggle to conclude that their conduct was inherently *wrongful* as such.[10]

An alternative source of unfairness could arise where the defendant indeed acts in a reprehensible manner from a competition policy perspective, but its behaviour has already been punished under a parallel regulatory enforcement framework. EU competition law takes a similarly narrow view of the *ne bis in idem* principle. Parallel prosecutions do not amount to double jeopardy to the extent that the competition rules and sector-specific regulation are considered to protect different legal interests, even if the identity of the offender and the facts underlying both actions are the same.[11] Commission enforcement practice recognises the potential for unfairness here;[12] the fine distinctions that follow from a fixation on legal interests has been criticised by multiple Advocates General as inconsistent with the wider corpus of EU fundamental rights law;[13] and the adequacy of this settlement is under scrutiny in a pending case before the Court of Justice.[14] As yet, however, the existing legal framework does not formally preclude multiple prosecutions of the same behaviour under different legal regimes.

A final risk is an **institutional jostling for jurisdiction** between competition and other regulators. This manifests as what might be termed "antitrust proxy wars": namely, where the impetus for competition enforcement is not merely concern about a defendant's behaviour, but also dissatisfaction with the way in which the pre-existing regulatory framework has been designed or is being administered. In many of the most prominent and arguably contentious examples of concurrent application in regulated markets in the EU, the competition action was prompted at least in part by concern that the sector-specific regulator had made choices at odds with good competition policy, or lacked effective enforcement powers, or failed to act against instances of consumer harm. As discussed below, the regulatory framework within a market is an integral element of the wider context underlying an alleged competition violation. Thus, the fact that sector-specific regulation is not working is not an irrelevant consideration within the competition assessment exercise. Yet to the extent that a competition enforcer is substantially motivated by the subjective belief that the appointed regulator *is not doing a good job*, then the use of individual law enforcement against regulated actors as an indirect means of correcting the regulator's actions is less defensible. Where concurrent application cases

---

[9] Case C-280/08 P *Deutsche Telekom* EU:C:2010:603, paras.80-88. Contrast, e.g., Case C-209/07 *Beef Industry Development Society and Barry Brothers* EU:C:2008:643, where the fact that the collective capacity-reduction scheme had explicit government sponsorship provided no defence to a finding that it nonetheless constituted an object restriction of competition.

[10] In Case C-280/08 P *Deutsche Telekom*, para.89, the Court of Justice confirmed that the absence of any perceived "fault" on the part of a defendant is no barrier to a finding of liability under Article 102.

[11] Case C-204/00 P etc. *Aalborg Portland and Others* EU:C:2004:6, para.338.

[12] See discussion of the Commission's approach of *Telekomunikacja Polska* at fn.75 below.

[13] See Opinion of Advocate General Kokott in Case C-17/10 *Toshiba Corporation and Others v Úřad pro ochranu hospodářské soutěže* EU:C:2011:552, paras.120-22 and Opinion of Advocate General Wahl in Case C-617/17 *Powszechny Zakład Ubezpieczeń na Życie S.A. w Warszawie v Prezes Urzędu Ochrony Konkurencji i Konsumentów* EU:C:2018:976, paras.18-49.

[14] Case C-117/20 *bpost SA v Autorité belge de la concurrence* (pending).

ultimately disclose a jostling for jurisdiction and priority between different regulators, we should be wary of the risks of using competition enforcement to settle institutional scores.

III. COMPETITION ASSESSMENT IN REGULATED MARKETS

It was argued above that neither the existing EU legal rules nor considerations of good competition policy present insurmountable obstacles to concurrent application of competition law to regulated market problems. Most basically, EU law has long required a context-specific consideration of allegedly anticompetitive behaviour within its wider economic and legal context.[15] This naturally entails taking account of the extent to which either the conduct under scrutiny or wider market dynamics have been influenced by the underlying regulatory framework. This necessitates a case-by-case assessment of the impact of such regulation upon what is claimed to be independent economic activity of undertakings.

The purpose of Articles 101 and 102 is to identify and proscribe instances of anticompetitive coordinated and dominant unilateral behaviour, respectively, by market operators. The underlying regulatory regime may, accordingly, influence the extent to which it can be concluded that behaviour takes the proscribed form (e.g. voluntary agreement between separate undertakings, the existence of a single undertaking holding significant market power, etc.), or whether it has the requisite anticompetitive effects on the market(s) concerned. Below, we examine the potential impact of regulation within the task of competition law assessment from three overlapping perspectives: (i) where the regulation forms an integral part of the "legal and economic context" of a putative restraint; (ii) where a regulatory standard is applied to set the boundaries of competition on the merits in a sector; and (iii) where competition law intervention functions as a means of "course correction" to the underlying regulatory regime.

(I) REGULATION AS PART OF THE ECONOMIC AND LEGAL CONTEXT OF COMPETITION ASSESSMENT

The not-uncontentious movement towards a more economic approach to EU competition law makes one point absolutely clear: context is (almost) everything when it comes to antitrust assessment. In *Budapest Banks*, the Court of Justice reiterated that, when considering whether coordinated conduct violates Article 101(1), "regard must be had to the content of its provisions, its objectives and the *economic and legal context of which it forms a part*. When determining that context, it is also necessary to take into consideration…the *real conditions of the functioning and structure of the market* or markets in question".[16] Equivalent statements are to be found in recent case-law regarding dominant firm conduct contrary

[15] Starting with Case C-56/65 *Société Technique Minière v Maschinenbau Ulm* EU:C:1966:38, p.249. See more recent case-law cited at fns.16-17 below.

[16] Case C-228/18 *Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others* EU:C:2020:265, para.51 (emphases added).

to Article 102.[17] Any pre-existing regulation must thus be taken into account when considering whether behaviour might be considered restrictive or abusive contrary to the competition rules.

Most radically, it is conceivable that a pervasive and overriding regulatory framework might make it impossible to classify suspect behaviour as anticompetitive conduct for the purposes of competition law. To the extent that a regulatory framework imbues the regulated entity with special powers that make it akin to a public body,[18] or that take its market behaviour outside the scope of "economic" activity as such,[19] the entity might lose its designation as an undertaking.[20] It would thus fall entirely outside the substantive scope of the competition rules from the outset. Alternatively, the regulatory regime may make free competition legally or practically impossible within the market concerned.[21] In such circumstances, outwardly restrictive behaviour may be incapable of limiting competition insofar as no competition exists to be distorted or harmed. Or the regulation may formally endorse or even require the restraint, to the extent that it cannot be attributed to the voluntary behaviour of the undertaking(s) concerned, but rather constitutes an instance of State action.[22] This may cause problems for the Member State within the multi-layered EU legal framework system that supervises the internal market,[23] but probably exempts the undertakings concerned from liability.[24]

In order to ensure the continued effectiveness of competition scrutiny as discussed above, however, it is important that any exemption is not interpreted too broadly or applied too readily. In *FENIN*, Advocate General Poiares Maduro distinguished behaviour that can be attributed to actions of an entity "acting as an economic operator,"[25] from conduct occurring "in sectors which have *no* market characteristics" or where "the exercise of the activity does not involve the pursuit of an objective of capitalisation *in any way*".[26] The basic question is thus whether the underlying regulatory regime allows the entity concerned sufficient wiggle room *in its guise as market operator* to restrict or distort competition to its own advantage and to the disadvantage of consumers. This must be

---

[17] See Cases C-413/14 P *Intel* EU:C:2017:632, para.139 and C-165/19 P *Slovak Telekom (Slovak Telekom)*, para.42 (concerning exclusionary conduct contrary to Article 102(b)); C-525/16 *MEO—Serviços de Comunicações e Multimédia* EU:C:2018:270, paras.26-28 (concerning discriminatory conduct contrary to Article 102(c)); and following from the context-specific approach endorsed in Case C-177/16 *Biedrība "Autortiesību un komunicēšanās konsultāciju aģentūra - Latvijas Autoru apvienība" Konkurences padome (AKKA)* EU:C:2017:689, particularly para.55 (concerning exploitative conduct contrary to Article 102(a)).

[18] See, e.g., Case C-113/07 P *Selex Sistemi Integrati v Commission* EU:C:2009:191.

[19] See, e.g., Case C-205/03 P *FENIN v Commission* EU:C:2006:453.

[20] Defined as any "entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed": Case C-41/90 *Höfner and Elser v Macrotron* EU:C:1991:161, para.21.

[21] As in Case T-370/09 *GDF Suez v Commission* EU:T:2012:333.

[22] See, e.g., Cases C-94/04 etc. *Cipolla v Fazari* EU:C:2006:758.

[23] The Member State might face action for breach of its duty to avoid enacting measures that require violation of the competition rules contrary to Article 106(1) TFEU, for breach of its duty of loyalty under Article 4(3) TEU, or for substantive violation of one of the fundamental freedoms to the extent the measure hinders free movement of goods, services, capital or workers.

[24] In addition to the State action defence and possibility that the entity might fall outside the definition of an undertaking, Article 106(2) TFEU provides a partial exemption from application of the competition rules for undertakings "entrusted with the operation of services of general economic interest".

[25] Opinion in Case C-205/03 P *FENIN* EU: EU:C:2005:666, para.26.

[26] Ibid, para.27 (emphases added).

differentiated from any genuine regulatory role played by that entity, and/or where the underlying explanation for commercial behaviour is the State "acting for political purposes".[27] The Advocate General warned, however, against too ready an acceptance of purely pretextual claims about the latter.[28]

Another complex and ultimately fact-specific question is how to account for competitive distortions caused by regulation that fall short of removing a sector from the purview of the competition rules completely. The fact that anticompetitive behaviour has been, in part, encouraged or facilitated by the underlying regulatory regime does not exempt it from liability,[29] on the basis that economic operators remain responsible for their conscious choices to act in a manner that harms competition. Such conduct may nonetheless be considered less morally culpable—or, put another way, the underlying breach deemed less serious—meaning that the sanction imposed is reduced accordingly.[30]

There is also the possibility that the presence of effective regulation-for-competition may make anticompetitive behaviour less likely to arise. In the UK, where a long-established "concurrency" regime largely delegates enforcement of the competition rules to certain sector regulators,[31] levels of enforcement are much lower than in equivalent competition regimes in similarly-placed European countries.[32] Yet, a recent UK government review struggled to determine whether the relative absence of cases stemmed from the fact that successful regulatory intervention *ex ante* largely removed the need for *ex post* enforcement, or instead from the comparative ease and suitability of regulatory remedies to solve regulated markets problems alongside constraints of capacity and expertise faced by regulators.[33]

At the other end of the spectrum, the existence of certain regulatory powers and duties may function to hasten or heighten the liability of defendants. Where regulation grants special or exclusive powers to an undertaking, this may ease the path to a finding of significant market power.[34] In tandem, the regulatory framework might serve to enhance the "special responsibility" of dominant undertakings "not to allow [their] conduct to impair genuine undistorted competition,"[35] where pre-existing regulatory advantages can be taken into account in determining whether a defendant has done enough to avoid further harm to the competitive structure of the market.[36] Efforts to

---

[27] Ibid.
[28] Ibid.
[29] As in Case C-209/07 *Beef Industry Development Society and Barry Brothers* EU:C:2008:643.
[30] As provided in the Commission's Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ C 210/2, 1.9.2006), para.29.
[31] Following the Enterprise and Regulatory Reform Act 2013, a detailed framework for the sharing of jurisdiction with the UK competition agency, the Competition and Markets Authority, has been developed.
[32] National Audit Office, *The UK Competition Regime*, HC 737, 3 February 2016, para.2.15.
[33] Department for Business, Energy and Industrial Strategy, *Competition law review: post implementation review of statutory changes in the Enterprise and Regulatory Reform Act 2013*, July 2019, 49-50.
[34] *AKKA*, fn.17 above, para.34.
[35] First established in Case C-322/81 *Michelin I* EU:C:1983:313, para.57.
[36] See, e.g., Case C-209/10 *Post Danmark (I)* EU:C:2012:172, para.23; Case T-814/17 *Lietuvos geležinkeliai* EU:T:2020:545, paras.93-94; and *Slovak Telekom*, para.57. See also the definition of abuse of dominance in Case C-85/76 *Hoffmann-La Roche* EU:C:1979:36, para.91.

escape the burden of regulation may also serve to provide a plausible anticompetitive rationale for more ambiguous behaviour.[37]

A tricky question, however, is the extent to which privileges conveyed (but presumably also controlled) by regulation can and should approximate to market power in the sense that that concept raises suspicion from a competition policy perspective. Self-evidently, a legal monopoly (or perhaps a tightly-controlled licensing regime) constitutes a significant, maybe even insurmountable, barrier to entry into the relevant market.[38] Where the conditions of competition within the sector are also closely prescribed by the regulatory regime, however, it might be queried whether the requisite degree of "independence"[39] regarding the "behaviour"[40] of the undertaking concerned can be demonstrated. This, again, ultimately requires a detailed assessment of the nature of the regulatory regime at hand.

(II) REGULATION THAT SETS THE BOUNDARIES OF COMPETITION ON THE MERITS

Thus far, our discussion has considered regulation as a contextual aspect within regulated markets: an element, though not necessarily a determinative one, of the wider legal and economic setting. Yet a subset of recent jurisprudence goes further, positing the regulatory standard as, in effect, setting the boundaries of "competition on the merits"[41] within the sector concerned. From this perspective, regulation is relevant not merely to the overarching question of whether competition can be and has been harmed; it moreover conditions our attitude to whether the defendant's conduct is permissible in the circumstances.

The most prominent recent cases which take this approach involve behaviour which, broadly understood, amounts to a refusal to deal by a dominant undertaking. The orthodoxy under Article 102 is that such conduct is abusive only in "exceptional circumstances".[42] In particular, it is necessary to demonstrate that access to the input or facility is "indispensable" to competition in an adjacent market, meaning there is an absence of economically viable substitutes.[43] Yet if there is a mandatory duty to provide access under a parallel sector-specific regulatory regime, this is taken to supersede the standard Article 102 requirements.[44] Demonstrating indispensability is thus no longer a standalone requirement; instead, the pre-existing regulatory duty provides sufficient reason to scrutinise whether any failures in providing access can be said to have likely or potential anticompetitive effects. A broadly equivalent approach has been taken in cases involving

---

[37] In its *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* (OJ C45/7, 24.2.2009), para.57, the European Commission gives the example of price regulation in one of two complementary markets, where the dominant firm seeks to raise prices in a tied market in order to compensate for the loss of revenue caused by the regulation in the tying market.

[38] See, e.g., Opinion of Advocate General Wahl in Case C-177/16 *Biedrība "Autortiesību un komunicēšanās konsultāciju aģentūra - Latvijas Autoru apvienība" Konkurences padome (AKKA)* EU:C:2017:286, para.48.

[39] See the definition of dominance from Case C-27/76 *United Brands* EU:C:1978:22, para.65.

[40] See the definition of abuse of dominance, *Hoffmann-Law Roche*, fn.36 above.

[41] *Generics*, paras.87 & 152.

[42] Case C-7/97 *Oscar Bronner* EU:C:1998:569, paras.39-40.

[43] *Ibid*, para.41; reaffirmed in *Slovak Telekom*, para.49.

[44] *Lietuvos geležinkeliai*, fn.36 above, paras.91-92; and *Slovak Telekom*, para.57.

FRAND licensing commitments by standard-essential patent-holders in the context of an industry-wide standard-setting exercise.[45]

In the specific case of refusal to deal, the justification for allowing a regulatory standard to override the regular competition law test is linked to the rationale for the initial default reticence under the competition rules. The heightened liability requirements were explained originally by the need to afford sufficient protection to the fundamental rights to own property and conduct a business, while preserving adequate incentives for investment and innovation by dominant firms *and* would-be rivals.[46] In its enforcement guidance on Article 102, however, the Commission suggested that these concerns are less compelling where sector-specific regulation already imposes an access duty irrespective of the infrastructure's status under competition law, and where "it is clear, from the considerations underlying such regulation, that the necessary balancing of incentives has already been made by the public authority when imposing such an obligation to supply."[47] This approach has now been endorsed by the Court of Justice.[48]

Refusal to deal is perhaps an unsurprising vehicle for this blurring of the boundary between regulatory and antitrust standards, as competition cases pursued under this theory of harm are regularly critiqued as quasi-regulatory in nature.[49] Yet the development raises more general questions for competition policy and its interaction with sector specific regulation. A duty to deal may be imposed under the latter for public interest reasons which extend far beyond the narrow justification for mandating access under Article 102 where a "dominant undertaking has a genuinely tight grip on the market concerned."[50] Despite an effort to connect the regulatory duty to deal in *Slovak Telekom* to "the objectives of development of effective competition on the telecommunications markets,"[51] ultimately the Court of Justice was concerned merely with the existence of a mandatory duty to grant access which the defendant "could not and did not actually refuse" to honour.[52] Having retained "decision-making autonomy"[53] over the conditions of access, the defendant's subsequent actions were considered fair game for scrutiny. The Court failed to explain, however, why the administration of a duty to deal imposed for reasons that might depart

---

[45] Cases AT.39985—*Motorola (Enforcement of GPRS Standard Essential Patents)* and AT.39939—*Samsung (Enforcement of UMTS Standard Essential Patents)*, Decisions of 29 April 2014, and Case C-170/13 *Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH* EU:C:2015:477.

[46] Opinion of Advocate General Jacobs in Case C-7/97 *Oscar Bronner* EU:C:1998:264, paras.56-58; reaffirmed in *Lietuvos geležinkeliai*, fn.36 above, para.90 and *Slovak Telekom*, paras.46-47.

[47] *Enforcement Priorities*, fn.37 above, para.82.

[48] In *Slovak Telekom*, para.57, the Court stated that

> "[i]n the context of the present case, while the obligation imposed on the appellant to give access to the local loop cannot relieve the Commission of the requirement of establishing that there is abuse within the meaning of Article 102 TFEU, by taking account in particular of the applicable case-law, the imposition of that obligation has the consequence that, during the entire infringement period taken into account in the present case, the appellant could not and did not actually refuse to give access to its local loop network."

[49] The classic treatment is Phillip Areeda, "Essential Facilities: An Epithet in Need of Limiting Principles" 58 *Antitrust Law Journal* 841 (1990).

[50] *Slovak Telekom*, para.48.

[51] *Slovak Telekom*, para.55.

[52] *Slovak Telekom*, para.57.

[53] *Slovak Telekom*, para.58.

quite markedly from the concerns of contemporary competition policy is an apt subject for scrutiny and fine-tuning through competition enforcement.

One may defend the Court's approach as a pragmatic one, to the extent that the concept of competition on the merits is taken to presume lawful behaviour and thus compliance with relevant regulatory requirements by dominant operators. Yet push this argument even a little and it risks approaching the absurd. To repurpose an example frequently used in English economic tort law, if a leading courier company gains a competitive advantage over rivals by requiring drivers to break the speed limit and ignore traffic lights, should this be construed as an unfair method of competition for the purposes of Article 102?[54] Indeed, at its most expansive, such an approach would allow any regulatory violation by a dominant firm to be reimagined as *abuse* of that dominance, simply by virtue of the combination of significant market power coupled with the fact of non-compliance. Such a conclusion is not precluded under Article 102, which crucially does not require that "the use of the economic power bestowed by a dominant position is the means whereby the abuse has been brought about,"[55] nor that the conduct constituting the abuse translates into actual harm to competition.[56] Yet such an approach is inconsistent with the core objective of Article 102 as a means to secure effective competition within the internal market, and also raises the possibility of almost limitless liability for firms unfortunate enough to attract the label of dominance.

Resistance to such a conclusion is arguably implicit in the on-going appeal against the German competition authority's well-known *Facebook* ruling.[57] In this case, the Bundeskartellamt has found that the dominant social network's failure to abide by EU data protection norms in its consumer data collection and collation policies amounted to abuse of its market power contrary to domestic competition law.[58] A key objection to this

---

[54] See, e.g. *OBG v Allan* [2007] UKHL 21, para.160.

[55] *Hoffmann-La Roche*, fn.36 above, para.91.

[56] Despite shifting in the direction of the more economic approach, the Grand Chamber in C-413/14 P *Intel*, fn.17 above, for instance, continued to accept that the mere use of exclusive dealing by dominant firms constituted a *prima facie* abuse (para.137), and required only a demonstration of capacity to foreclose rather than anticompetitive effects in fact where a defendant raised plausible doubts about the harmful nature of its behaviour (paras.138-40).

[57] Bundeskartellamt Decision of 6 February 2019, B6-22/16—*Facebook*. While the approach of this case received favourable attention from many commentators (see, e.g., Maximilian N. Volmar & Katharina O. Helmdach, "Protecting consumers and their data through competition law? Rethinking abuse of dominance in light of the Federal Cartel Office's Facebook investigation" 14 *European Competition Journal* 195 (2018), Viktoria H.S.E. Robertson, "Excessive Data Collection: Privacy Considerations and Abuse of Dominance in the Era of Big Data" 57 *Common Market Law Review* 161 (2020), and slightly more ambivalently, Anne Witt, "Excessive Data Collection as a Form of Anticompetitive Conduct—The German Facebook Case," 66 *The Antitrust Bulletin* 276 (2021)), others are more sceptical of the repackaging of a data protection violation as a competition abuse (see, e.g., Giuseppe Colangelo & Mariateresa Maggiolino, "Antitrust *Über Alles*. Whither Competition Law After *Facebook*?" 42 World Competition 355 (2019), and Roger Van den Bergh & Franziska Weber, "The German Facebook Saga: Abuse of Dominance or Abuse of Competition Law?" 44 World Competition 29 (2021)).

[58] The failure to apply Article 102 to the conduct of the world's largest social network in the EU's largest Member State has long been controversial as a potential breach of Article 3(1) of Regulation 1/2003 (OJ L 1/1, 4.1.2003): see, e.g., Wouter Wils, "The Obligation for the Competition Authorities of the EU Member States to Apply EU Antitrust Law and the Facebook Decision of the Bundeskartellamt," *Concurrences* N° 3-2019. In its request for a preliminary ruling by the Court of Justice in the *Facebook* case, the Dusseldorf Regional Court described the earlier decision as "formally unlawful' on this basis: see reference of the text available online at https://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2021/Kart_2_19_V_Beschluss_20210324.html (last accessed 17 May 2021).

approach, however, is that EU data privacy law reflects and protects values that extend far beyond the ordinary scope of the competition rules, to the extent that "protection of personal data" is recognised as a distinct human right within the EU's Charter of Fundamental Rights.[59] Indeed, the essentially paternalistic and dissuasive attitude adopted by the data protection rules to the prospect of a consumer's use of her personal data as consideration within the marketplace stands in notable contrast to the tenor of contemporary competition law. The latter would surely seek to ensure that she has full freedom of choice and gets best "value for money," but raises no principled objection to the transaction as such.

These contrasting perspectives—of competition law as a vehicle intended solely to prevent antitrust harm to consumers or exclusion of competitors, versus a more expansive understanding as a means to curb *any* unacceptable behaviour by large powerful firms—have played out in the respective judgments of the Dusseldorf Regional Court[60] and Federal Supreme Court.[61] Of course, perhaps the most significant question is why, given the existence of a complex and specific statutory regime to regulate collection and use of consumer data,[62] the Bundeskartellamt considered it necessary to resort to competition law as an indirect means of enforcement. This brings us to the difficult question of what happens when an antagonistic relationship arises between a competition authority and the underlying regulatory regime, which is the subject of the final subsection.

Conversely, it is clear that the fact that anticompetitive behaviour is motivated by a desire to uphold existing regulatory standards does not provide a *defence* to liability, where it is established that the behaviour concerned amounts to a breach of the competition rules in substance. This point was established in *Slovakian Banks*, where a collective boycott aimed at ousting a competitor was held to violate Article 101, regardless of the defendants' argument that the rival itself operated illegally in the market.[63] The Court explicitly disclaimed any space within the competition rules for regulatory vigilantism, holding that "it is for public authorities and not private undertakings or associations of undertakings to ensure compliance with statutory requirements."[64] This coincides with the Commission's view that "protection of fair conditions of competition is a task for the legislator in compliance with [EU] law obligations and not for undertakings to regulate themselves."[65]

(III) COMPETITION ENFORCEMENT AS AN ANTIDOTE TO REGULATORY INTERVENTION

A third category of cases involves the use of competition law as a means of course correction for regulated market outcomes that sit at odds with the proclaimed objective of the competition rules to achieve effective competition. The use of competition

[59] Article 8. This is moreover distinct from the right to "respect for private and family life" provided by Article 7.
[60] Case VI-Kart 1/19 (V), *Facebook*, 26 August 2019, ECLI:DE:OLGD:2019:0826.VIKART1.19V.0A.
[61] Case KVR 69/19, *Facebook*, 23 June 2020, ECLI:DE:BGH:2020:230620BKVR69.19.0.
[62] On which, see the Commission's website, "Data protection in the EU," available online at https://ec.europa.eu/info/law/law-topic/data-protection/data-protection-eu_en (last accessed 17 May 2021).
[63] Case C-68/12 *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa a.s.* EU:C:2013:71, para.19.
[64] Ibid, para.20.
[65] *Guidelines on the application of Article 81(3) of the Treaty* (OJ C 101/97, 27.4.2004), para.47.

enforcement as an *antidote* to regulatory intervention can arise in a number of ways, some of which are rather more contentious from a rule of law perspective than others.

First up, "regulatory gaming," which is loosely defined as private behaviour that harnesses pro-competitive or neutral regulations and uses them for exclusionary purposes.[66] Regulatory gaming typically involves conduct that is plausibly within *the letter* of the formal requirements of a regulatory regime; yet aims at results that are at odds with *the spirit* of the underlying legal framework. Perhaps the most renowned example within EU competition jurisprudence is the *AstraZeneca* case.[67] Here, a dominant pharmaceutical company, faced with the prospect of a "blockbuster" medicine coming off-patent in its capsule form, sought *inter alia* to migrate existing customers to a tablet-based drug, and then strategically to withdrew its marketing authorisation (MA) for the capsule version to frustrate generic entry. Withdrawal of a company's MA was expressly foreseen within the relevant EU-level legislation governing the licensing of pharmaceutical products,[68] and thus the conduct was not outwardly incompatible with normal methods of competition.[69] The case instead turned, somewhat unusually under the EU competition rules, on significant evidence of anticompetitive intention on the part of the defendant, which functioned to separate deliberately restrictive from otherwise innocuous conduct.[70]

The phenomenon of regulatory gaming illustrates how the "two barriers" analogy provides a shallow account of the complex relationship between competition law and existing regulation in a market. The preceding subsection described cases where, in effect, compliance with the legal obligations imposed by one barrier is outsourced to the legal standard imposed by the other; so that the requirements of competition law and sector-specific regulation are consistent and mutually reinforcing. Regulatory gaming as a theory of harm, by contrast, suggests that full compliance (at least formally) with one barrier may not only leave one exposed to liability under the other; but may indeed be conceptualised as part of a pattern of strategic behaviour that, coupled with evidence of anticompetitive intent, comes to constitute the very substance of a competition law violation.

Yet properly understood—and, crucially, in the presence of adequate and proper evidence—regulatory gaming raises comparatively few concerns about unfairness to defendants. The crux of such cases is not the supposed inconsistency between competition law requirements and the rights and duties imposed by a regulatory framework. Instead, it hinges on the discrepancy between what a regulatory regime is intended to achieve in public interest terms, and how it is instead manipulated and (ab)used by a defendant to its own private advantage. Accordingly, regulatory gaming is ultimately about corruption of the underlying regulatory regime, hence why intention becomes such a critical component

---

[66] Stacey L. Dogan & Mark A. Lemley, "Antitrust Law and Regulatory Gaming" 87 *Texas Law Review* 685 (2009).

[67] Case COMP/37507—*Generics/Astra Zeneca*, Decision of 15 June 2005. Upheld on appeal in Cases T-321/05 *AstraZeneca* EU:T:2010:266 and C-457/10 P *AstraZeneca* EU:C:2012:770.

[68] At the time, Council Directive 65/65/EEC of 26 January 1965 on the approximation of provisions laid down by Law, Regulation or Administrative Action relating to proprietary medicinal products (OJ 22/369, 9.2.1965).

[69] The Court of Justice accepted that "the preparation by an undertaking, even in a dominant position, of a strategy whose object it is to minimise the erosion of its sales and to enable it to deal with competition from generic products is legitimate and is part of the normal competitive process, provided that the conduct envisaged does not depart from practices coming within the scope of competition on the merits": see Case C-457/10 P *AstraZeneca*, para.129.

[70] Case T-321/05 *AstraZeneca*, para.359.

of the theory of harm. One may of course be wary of *mens rea* requirements to demonstrate the guilty mind of a large corporation, and all the more so because it is normal and legitimate for even dominant firms to intend to maintain or increase their market shares.[71] Moreover, where regulation is not working well in practice, the more preferable solution is arguably to close the regulatory loopholes through regulatory reform rather than to patch the inadvertent gaps through *ad hoc* competition enforcement. Yet assuming that the requisite evidence of a harmful gaming strategy can be assembled, this theory of harm raises no inherent concerns about concurrent application.

Considerations are different where the claim instead is that the regulatory regime is inadequate to the task of market supervision. The regulator may fail to act against anticompetitive behaviour because it lacks the necessary resources or faces lobbying efforts or top-down political pressure for non-intervention. Alternatively, it may lack effective enforcement powers, so that any sanction imposed has insufficient bite to counter on-going harmful behaviour. Such cases can be distinguished from situations where coverage of the regulatory regime does not extend to or envisage control of the behaviour at issue, meaning that there is nothing within the regulatory regime that even nominally "performs the antitrust function"[72] in that area. The latter circumstance is best understood as an example of our first category of cases, whereby the background regulatory regime forms part of the broader legal and economic context. This is quite distinct, however, from claims of regulatory failure.

In *Telekomunikacja Polska*,[73] for example, the Commission brought an Article 102 case against a constructive refusal to deal involving failure to grant access to telecommunications infrastructure under fair terms and conditions, despite the prior existence of a sector-specific regulatory sharing obligation. Non-compliance with this access duty had been investigated and punished repeated by the domestic regulator, but its powers were weak and the sanctions it could impose were inadequate to discipline the defiant incumbent. The case is notable insofar as the substance of the antitrust refusal to deal was *precisely* the conduct comprising the regulatory violation. The defendant, unsurprisingly, questioned the Commission's competence and conformity with the *ne bis in idem* principle in taking a second bite of the cherry through competition enforcement. The Commission dismissed these concerns by reference to the orthodoxy that EU competition law and domestic regulation protect different interests and thus are not mutually exclusive in their application, an issue unchallenged on appeal.[74] It nonetheless subtracted the amount of the regulatory penalties from the fine imposed under Article 102: an exercise which served primarily to highlight the insignificance of the former.[75]

---

[71] Although dominant firms have a special responsibility to act in a manner that protects the competition process, effective competition on the merits by dominant firms is by no means prohibited: *Michelin I*, para.57.

[72] Again, echoing the language of the US Supreme Court in *Verizon v Trinko*.

[73] Case COMP/39.525—*Telekomunikacja Polska*, Decision of 22 June 2011. Similarly, in the energy sector, see Case AT.39849—*BEH gas*, Decision of 17 December 2018.

[74] The Commission's decision was upheld on appeal in Cases T-486/11 *Orange Polska* EU:T:2015:1002, and C-123/16 P *Orange Polska* EU:C:2018:590.

[75] The Polish telecommunications regulator had imposed fines totalling €8.45 million for two consecutive violations, which still left an overall fine of €127.5 million for the Article 102 violation.

The issue, alternatively, may be that decision-making by the domestic regulator is poor in quality—at least in the eyes of the competition enforcer. This concern is discernible in certain jurisprudence involving pharmaceutical patents. A second strand to the *AstraZeneca* case involved misrepresentations by the defendant to national patents authorities, which enabled it to obtain "supplementary patent certificates" (SPCs) to extend patent life. This conduct was implicitly facilitated by the working practices of domestic patents offices, which were not required to, and typically did not, verify information submitted by applicants to obtain SPCs. In *Lundbeck*,[76] which concerned "pay-to-delay" agreements between an originator drug company and its would-be generic competitors, the defendant originator held process patents which plausibly allowed it to lawfully exclude the potential generic entrants. Yet the Commission similarly questioned the strength and validity of these patents, and the General Court agreed that "'it is in the public interest to eliminate any obstacle to economic activity which may arise where a patent was granted in error".[77]

The *German Facebook* case is a clear and contentious example of competition enforcement in the face of claimed regulatory *in*action and not merely *inadequate* action. Implementation of the data protection rules in the EU is delegated to national data protection supervisors. The activities of Facebook are primarily within the purview of the Irish authority under a "one stop shop" supervisory mechanism, as the company has its European headquarters in Dublin. Enforcement by the Irish authority was slow, to the point where it has been suggested that the innovative theory of competition harm developed by the Bundeskartellamt in *Facebook* was motivated primarily by a rather desperate need to plug a regulatory gap on the data protection side which could not be filled by the relevant sector-specific regulators in Germany.[78] The propriety of this approach, both as a matter of EU data protection law and in light of the duty of sincere cooperation between Member States,[79] has been raised in a pending preliminary ruling sent to the European Court of Justice by the Dusseldorf Regional Court in the on-going *Facebook* appeal.[80] One can certainly sympathise with a Member State that takes the view that vital welfare interests of its citizens remain unprotected by a regulatory agency over which it has no control, and in which it may have even less confidence. At the same time, the strategic use of competition law to evade lawful limitations built into the fabric of a regulatory regime—coming dangerously close to a variety of regulatory gaming *by that public authority*—raises difficult questions from a fairness and rule of law perspective.

The regulatory failure cases, together, raise a number of common concerns. There is, first, the question of potential individual unfairness to defendants, who may be required to justify the same behaviour before multiple competing regulators, and who face concurrent sanctions under distinct regimes for the same objectionable conduct. As noted, the rather technical and narrow understanding of the *ne bis in idem* principle deployed

[76] Case AT.39226—*Lundbeck*, Decision of 19 June 2013.
[77] Case T-472/13 *Lundbeck* EU:T:2016:449, paras.119, 390 & 487. See also Case C-591/16 P *Lundbeck* EU:C:2021:243, para.123.
[78] Rupprecht Podszun, "Facebook: Next Stop Europe," *D'Kart Blog*, 25 March 2021, available online at https://www.d-kart.de/en/blog/2021/03/25/facebook-next-stop-europe/ (last accessed 17 May 2021).
[79] Contained in Article 4(3) TEU.
[80] See fn.58 above.

specifically in the EU competition law context provides limited protection for defendants at present.[81] There is also a question of institutional fairness, and more specifically, the appropriateness of a competition authority second-guessing the choices made by a sector-specific regulator within its particular area of expertise. One should not ignore the very real possibility that an agency may be captured by public or private interests, or that it suffers from resourcing limitations that make even the best of regulatory intentions impossible to realise in practice.[82] But, equally, non-intervention or "light touch" intervention may reflect a deliberate strategy by a regulator, motivated by its detailed understanding of the particular market circumstances, and designed to achieve the most socially beneficial outcome overall. There is an uncomfortable arrogance to the assumption that competition authorities can understand a regulator's job better than the regulator itself. This is particularly where the justification for such a belief is that the competition authority would have come to a different decision when approaching the question *solely* from the perspective of good competition policy.

This brings us neatly to our final, and arguably most problematic, category of cases involving antagonistic concurrent application, namely, the use of competition enforcement to correct regulatory interventions that are deliberately at odds with competition policy. Contemporary competition law, it has been suggested, "aims, in the final analysis, to enhance efficiency."[83] Yet efficiency-maximisation, as an approach that is largely compatible with exclusion of inefficient competitors, neglect of precarious consumers and short-termism in working practices, is far from the only socially important goal that might be envisaged within a market. Sector-specific regulation may indeed opt for an objectively *in*efficient market structure, on the basis that it better serves welfare objectives overall instead of a narrower focus on the development of effective competition. One may reasonably disagree with the essentially political calculation that has been made in that instance. What is considerably more contentious, however, would be to prosecute the ensuing inefficiency as an example of anticompetitive behaviour by individual market actors.

This was arguably the approach of the Commission in *Deutsche Telekom*,[84] where Germany had failed to implement EU-level requirements of tariff rebalancing in the telecommunications sector. The failure was deliberate, motivated by a social policy choice to maximise access to telephone lines for poor consumers, who were effectively subsidised by higher call costs for heavy users.[85] The Commission conceptualised the resulting price structure in the market for fixed line access—comprising high wholesale costs and disproportionately lower retail costs—as an abusive margin squeeze by the dominant

[81] See text accompanying fn.11 and criticisms contained in fn.13 above.

[82] In his Opinion in Case C-177/16 *AKKA*, para.49, Advocate General Wahl argued that "[s]ectoral authorities are clearly better-equipped than competition authorities to oversee prices and, where necessary, act to remedy possible abuses. It would seem, therefore, that antitrust infringements in those situations should be mainly confined to cases of error or, more generally, *to regulatory failures*: cases where the sectoral authority should have intervened and erroneously failed to do so." (Emphasis added.)

[83] Opinion of Advocate General Wahl in Case C-413/14 P *Intel* EU:C:2016:788, para.41.

[84] Case COMP.C-1/37451—*Price squeeze local loop Germany*, Decision of 21 May 2003. Upheld on appeal in Cases T-271/03 *Deutsche Telekom* EU:T:2008:101 and C-280/08 P *Deutsche Telekom* EU:C:2010:603.

[85] See limited discussion in COMP.C1/37452, paras. 172 & 195-98.

telecommunications incumbent. Yet it failed to recognise that not only did the incumbent subsidise its fixed line market with profits from calls, so too did its downstream rivals.[86] The case is also notable for the narrow approach to the State action defence endorsed by the Commission and Union Courts. Despite the fact that the defendant was price-regulated in both its wholesale and retail fixed line markets, it was held to have sufficient wiggle room to avoid the squeeze, essentially by petitioning the domestic regulator to raise retail prices.[87] Yet not only is this supposed solution rather curious from a competition policy perspective; it is also at odds with the underlying domestic policy choice to favour vulnerable consumers effectively at the expense of wider market efficiency.

Again, it is perfectly possible to disagree with the policy calculation that has been made here, or to argue that the underlying goals can be realised in a less distortive manner (such as through public subvention). It is quite a leap, however, to conclude that the deliberate inefficiency reflected in this policy choice ought to be remedied by pursuing the regulated incumbent for its failure to actively fight against governmental policy. As a matter of EU law, the failure to respect tariff rebalancing obligations almost certainly amounted to a failure to fulfil its obligations by the Member State concerned, and the Commission indeed chose to pursue the same violation in a different context under Article 258 TFEU.[88] Though competition authorities should not be reluctant to take enforcement action in regulated markets, it is difficult to defend the use of competition law as a means to reverse legitimate political decisions to prioritise socially important values other than effective competition. To the extent that the regulatory outcome is suboptimal from a competition policy perspective, advocacy efforts may be the more effective and appropriate solution in such circumstances.

IV. CONCLUSION

Regulation is a pervasive feature of modern markets. If competition law is to achieve its stated objective of ensuring effective competition across a variety of market circumstances, it is imperative to accommodate the impact of regulatory requirements and constraints within the competition law assessment exercise. Shelanski moreover emphasised the "countercyclical" nature of competition law compared with other regulation: where regulation restricts competition, the competition rules can strengthen competitive dynamics; where deregulation leads to inadequate supervision, competition law fills the gaps.[89] Accordingly, competition law and regulation are complementary tools in many

[86] The Commission maintained that "[s]eparate consideration of access charges and call charges is in fact required by the [EU]-law principle of tariff rebalancing" (COMP.37452, para.120), without acknowledging the underlying role of domestic policymaking in this regard.

[87] COMP.37452, para.169.

[88] See Case C-500/01 *Commission v Spain* EU:C:2004:8. Article 258 TFEU enables the Commission to bring defaulting Member States before the Court of Justice, to get a formal finding that the State has violated EU law.

[89] Shelanski, fn.1 above, 1924.

instances; at the very least, enforcers should strive for a relationship of peaceful coexistence.

Our discussion illustrated, most basically, how any strict rule of competition law ouster is both unnecessary and may too readily assume that the pre-existing regulatory framework intends to and can perform the task of effective market supervision in its stead. As the contribution described, consideration of the impact of regulation has a natural home within the context-specific assessment of suspect practices required by the more economic approach to EU competition law. Regulation may enhance market power or enable firms to engage more effectively in collusive or abusive practices. Conversely, regulation may leach the marketplace of its potential for competitive dynamics, and thus weaken the conclusion that an absence of competition is attributable to independent firm conduct.

The article also sounded several notes of caution when applying competition law in regulated markets. The first is against the notion that any regulatory violation can also be conceptualised as a competition law infringement simply because market power exists, particularly if the relevant regulatory obligation is motivated by contrasting values like solidarity or dignity. The second arises where competition enforcement takes aim, at least obliquely, at the policy choices reflected in the regulatory framework, in particular a tolerance of inefficiency as a trade-off for the pursuit of other socially important values. The effectiveness of competition law, and its scope to complement regulatory supervision in many instances, provide support for EU law's generous approach to the concurrent application of the competition rules in regulated sectors. Yet risks of conflict—whether due to the distortive effect of regulation on market conditions, the danger of unfairness to defendants, or competition law's potential for misuse when applied by enforcement agencies simply as a "regulator's regulator"[90]—must be borne in mind when considering the appropriate role of regulation in competition law assessment.

[90] Giorgio Monti, *EC Competition Law*, Cambridge University Press (2007), 496.