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Intersection of Competition and Regulation in Abuse of Dominance and Monopolization

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Abstract

As markets change due to new technologies, shifts in consumer preferences or other conditions, the legal and policy framework need to adjust, too. The dilemma legislators and policy makers face when such changes take place is whether and how to intervene in such market situations and if they intervene, what respective roles regulation and competition law should play.

There is a renewed interest in discussing and even reconceptualizing this relationship in light of current challenges such as the financial crisis, climate and health crisis, digitalization and rising corporate and political power. This chapter analyses how market power is controlled at the intersection between competition law and regulation in EU competition law and in US antitrust law. It traces back how this complex interplay has evolved in these two jurisdictions as well as look forward how this interface is changing in current law and policy making processes.

Keywords: EU law, competition law, regulation, antitrust law, market power, dominant firm conduct, digital markets.

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INTRODUCTION

When markets change due to new technologies, shifts in consumer preferences or other conditions, the legal and policy framework need to adjust, too. However, legislators and policy makers often face the problem of whether and how to intervene in such situations and if they intervene what respective roles regulation and competition law should play. Current concerns about rising levels of concentration and market power across various sectors of the economy cut deep into the dilemma of how competition law and regulation can address these challenges and whether they should apply simultaneously or exclusively from each other. Despite being two distinct legal instruments in terms of their goals, scope, timing and nature of enforcement, and the legal obligations they impose, competition law and regulation are closely related at their root: they seek to address shortcomings in the market mechanism and in particular, control the acquisition and exercise of market power.

Competition law is often seen as a weaker form of intervention that focuses on strengthening the market mechanism and hence, aims to protect the competitive process. However, where competition law is insufficient to tackle market failure, or where the problem simply cannot be addressed through the market mechanism, the state has to intervene in the form of more prescriptive regulation. In this way, regulation can address wider set of concerns than competition law, going beyond the narrowly confined goal of making markets more efficient. This, however, also carries the risk that regulation pursuing social goals of distributional justice, rights protection can displace competition law. Finding a reasonable balance between these two legal areas is a complex exercise that needs to be made under developing market conditions and policy frameworks that create shifts in the "division of labour" between competition law and regulation. Besides and also related to these "external" factors, the two legal instruments go through internal changes by internalizing concepts and analytical approaches of the other area. Such internalization has been especially visible in the regulatory measures taken in the course of liberalization, for example in the EU telecommunications market. More recently, the EU Commission' Proposal for the Digital Markets Act has been incorporating competition law doctrines and approaches. However, regulatory features have also been incorporated in the competition law framework and function as alternative and substitution for regulation. Such quasi-regulatory competition law instruments blend classic regulatory measures of rate-making and mandatory access obligations and often concern a firm holding significant market power.

Even though this intersection has already been subject to numerous scholarly and policy works[2] in the past, a renewed interest in discussing and even reconceptualizing this relationship is critical in light of

[2] Niamh Dunne, *Competition Law and Economic Regulation: Making and Managing Markets*. (2015) Cambridge University Press. Howard A. Shelanski, *Antitrust and Deregulation*, (2018) 127 Yale L.J. 1922-1960. Howard A. Shelanski, *The Case for Rebalancing Antitrust and Regulation,* (2011) 109 Mich. L. Rev. 683-732. Giorgio Monti, Managing theManaging the Intersection of Utilities Regulation and EC Competition Law (2008) LSE Law, Society and Economy Working Papers 8/2008. Pierre Larouche, Competition law and regulation in European telecommunications, (2000, Hart Publishing). Pablo Ibáñez Colomo, EU Competition Law in the Regulated Network in Jonathan Galloway (ed), Intersections of Antitrust: Policy and Regulation, (2016) Oxford University Press. Pablo Ibáñez Colomo, On the Application of Competition Law as Regulation: Elements for a Theory, (2010) *Yearbook of European Law*, Volume 29, Issue 1, 261–306.

current challenges such as the financial crisis, climate and health crisis, digitalization and rising corporate and political power. While the discussion in the past often concentrated at the interface between competition law and sector specific regulation, the current debate and discussion widens the scope towards more horizontal policies and even social regulation concerning health and safety issues, sustainability, data protection and consumer protection.

As a response to these societal challenges many governments put forward concrete regulatory measures that complement the existing competition law provisions. The EU's Proposal for Digital Markets Act is a case in point, however, this chapter will also illustrate how a broader regulatory space has emerged over the years on the basis of concerns related to power imbalances. Gatekeeper power, [3] platform power, [4] bargaining power[5] or data power[6] are increasingly calling for a new conceptualization of what amounts to problematic cases of power imbalances and whether and how to intervene in markets. *Ex post* competition law enforcement seems to be less effective in such cases of dependency, exploitation or other types of power imbalances.

The emerging global landscape show similarities and differences concerning why and how market power should be controlled and how the deep constitutional settings of different jurisdictions shape current responses to emerging concentration in the economy.

Against this background, this chapter analyses the intersection between competition law and regulation through the conceptual lens of controlling market power in EU competition law and in US antitrust law. It traces back how the multifaceted interplay between regulation and competition law in these two jurisdictions has influenced the way market power is being controlled today as well as look forward how this interface is changing in current law and policy making processes.

II. REGULATION AND COMPETITION LAW: COMPLEMENTS AND DIFFERENCES

Before engaging in a deeper analysis of the interface between competition law and regulation and its bearing in the assessment of unilateral conduct, for the better understanding of this relationship, it should be clarified what goals these institutional devices aim to achieve and which instruments they employ.[7] Both competition law and regulation aim at influencing market processes, however, within

[3] Commission Proposal for a Regulation of the European Parliament and the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM (2020) 842 final

[4] José van Dijck, David Nieborg and Thomas Poell. Reframing platform power, (2019) *Internet Policy Review* 8.2.

[5] The adaption of agriculture to market mechanisms and its integration into transnational value chains has resulted in growing individual and collective retailer power. A shift in the balance of power has been taking place between retailers and suppliers, and between national and transnational levels, thus raising concerns both about farmers' relative lack of market power and about decreasing local markets for EU retailers. Ioannis Lianos & Claudio Lombardi, Superior Bargaining Power and the Global Food Value Chain: The Wuthering Heights of Holistic Competition Law? CLES Research Paper series (2016). Katalin J. Cseres, Acceptable" Cartels at the Crossroads of EU Competition Law and the Common Agricultural Policy: A Legal Inquiry into the Political, Economic, and Social Dimensions of (Strengthening Farmers') Bargaining Power. *The Antitrust Bulletin* (2020).

[6] Orla Lynskey, Orla Grappling with "data power": normative nudges from data protection and privacy. (2019) *Theoretical Inquiries in Law*, 20 (1). 189 - 220.

[7] Christian Kirchner, Competition Policy versus Regulation: Administration versus Judiciary in: The International Handbook of Competition M. Neumann, J Weigand (eds.) (2004) Edward Elgar International, 2004.

this broad common framework they pursue different goals and aim to solve different market problems by using distinctive legal tools.

Competition law is the legal structuring of markets through laying down competition rules.[8] It is the legal instrument to oversee the market mechanism and to ensure that this valuable process is protected by focusing on removing unnecessary restrictions on competition. Competition law concerns private behaviour that causes inefficiency, such as monopoly power. Accordingly, competition law proscribes broad categories of what qualifies as anti-competitive conduct. As such it aims to prevent the unlawful acquisition of market power and, where market power already exists, to control its exercise.[9] However, there are limits to the effectiveness of competition law. Market imperfections such as public goods, externalities or 'natural monopolies' require regulation, for example to enact environmental, safety or employment standards, to challenge grossly unfair contractual terms in commercial transactions such as late payment[10] or to "achieve fair economic outcomes with regard to core platform services."[11]

Hence, competition law and regulation often apply in different settings and function as complementary to each other. Larouche has argued that a hard distinction between competition and regulation may not be possible to make: they are, in fact both "species of economic regulation".[12] Accordingly, competition law and regulation form part of the broader category of state intervention in order to steer the economy. Others regard them as two distinct mechanisms with different aspects and degrees of intensity of state intervention in the free market.[13] They emphasize significant differences in terms of the timing (*ex ante* and *ex post*), scope and precision of intervention (narrow, detailed complex for regulation; general, broad and simple for competition law) their scope of application (sector by sector and across all markets), the nature of legal obligations (prescriptive-positive and proscriptive-negative) imposed and the goals they pursue (distributional justice an efficiency) differ.[14] Regulation is broader in scope and can "overreach" markets by addressing market failures such as information asymmetries and externalities and concerns of health, safety, environment or social and consumer protection. It can permanently address structural market power when characteristics of a given sector prevent effective competition or temporarily tackle market power when, for example, a sector is being liberalized but the application of competition rules is not sufficient to ensure competitive markets.[15] Regulation can have distributional concerns while competition law is mainly concerned with economic efficiency. Regulation is diffuse and fragmented[16] and is often characterized as being more intrusive by intervening more deeply in market mechanisms than competition law. These differences have been aptly captured

[8] Tony Prosser, The Limits of Competition Law: Markets and Public Services, (2005) Oxford University Press.
[9] Dunne (n 2) 7.
[10] Directive 2011/7/EU on combating late payment in commercial transactions.
[11] Recital 5 DMA Proposal, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842 final
[12] Larouche (n 2) 64-65.
[13] Dunne (n 2) 54,56.
[14] Paul Nihoul and Peter Rodford, EU electronic communications law, (OUP 2001).
[15] OECD, The regulated conduct defence, DAF/COMP(2011)3. p.23
[16] Javier Tapia, Despoina Mantzari, 'The Regulation/Competition Interaction' in I Lianos and D Geradin (eds) Handbook on European Competition Law-Substantive Aspects (2013, Edward-Elgar Publishing). 2.

by Dunne claiming that competition law operates *within* the market mechanism by strengthening its functioning, while regulation takes place *outside* of the market mechanism and in fact, overreaches its operation.[17]

III. CHARACTERIZING THE INTERFACE

There are complex interdependence and substitution processes between competition law and regulation.[18] As mentioned above, over time, rivalry or even contradictions between competition law and regulation may emerge in markets and depending on policy choices made, their relationship has been evolving towards new balances in different time periods and different jurisdictions. For example, the liberalization of network industries and deregulation in the 1980s and 90s increased the space for competition and competition law enforcement. However, the financial crisis of 2008, the current health crisis and its ensuing economic crisis call for more regulatory intervention. In these periods the relative weights given to regulation and competition policy are shifting towards new equilibriums.[19]

This relationship has often been considered through two main understandings present in the academic literature and policy making.[20] The "complementarity hypothesis" considers competition policy and regulation as complementary and non-competing devices. This implies a mutually reinforcing relationship where both devices can be applied (consecutively or simultaneously) in order to achieve the most effective market outcome.[21] As mentioned above, competition law is aimed at preserving the market mechanism and preventing constraints on the competitive process.[22] However, competition law cannot create competition, it merely proscribes certain categories of anti-competitive exercise of market power but leaves the market mechanism otherwise unhindered.[23] Regulation on the other hand, acknowledges that the market mechanism cannot remedy a particular market failure and thus intervention is indispensable. Regulation prescribes the desired outcome for the market, and, to that extent, over-steps the market mechanism entirely.[24]

However, others view them as competing institutional devices that exist in an exclusionary and substitutionary relationship.[25] Those who conceive competition law and regulation as substitute instruments of market control that dismisses the application of the other device, argue that these devices each have their own domain, exclusive of the other. This view, however, requires the proper classification of concrete issues in each area,[26] which will be elaborated on more in detail in Sections 6

[17] Dunne (n 2) 49.
[18] Kirchner (n 7) 310.
[19] Kirchner (n 7) 310.
[20] Dunne (n 2) 49. Kirchner (n 7) 308
[21] Kirchner,(n 7) p.308.
[22] Kirchner (n 7) p.308.
[23] Dunne, N. (n 2).
[24] Anthony Ogus, Regulation, Legal form and economic theory, (2004, Hart Publishing)
[25] Kirchner (n 7) p.309.
[26] Kirchner (n 7)

and 7. For example, competition law can control the exercise of market power, but it is regulation that can influence the creation or reduction of market power in a structural sense.

At the same time, their relationship is not static. Considerable shifts are taking place within the legal and conceptual boundaries of these devices through "internal" changes that can have an impact on how assessments of market power are conducted. Competition law may be shifted away from its core market mechanism-based concept and by incorporating regulatory characteristics and become quasi-regulatory. This form of regulatory competition law emerges as an alternative for sector regulation but moves the core concept of competition law from proscriptive norms, *ex post*, conduct-focused instrument of general market control towards a more interventionist device often filling a gap in the regulatory framework. While the use of quasi-regulatory competition norms has been seen as beneficial, for example, in order to control exploitative types of abuses or natural monopolies, it has also been criticized due to overstepping the traditional core concept of competition law.[27]

The different views and conceptualizations have been translated into concrete policies, administrative and judicial decisions both in the US and in the EU. In both jurisdictions, the past 15 years has signaled a move towards more regulatory approach, which is perhaps more novel in the US than in the EU.[28] This shift is especially discernible with regard to unilateral conduct, where EU law has been incorporating more regulatory characteristics in competition law assessments, while US law moved towards more deference to regulatory structures.

In the US, antitrust law evolved from a tradition of inhospitality to concentration and a strong preference for competition over government regulation of performance.[29] Hence, regulation has been seen as a substitute to antitrust law, and leading case-law tends to consider antitrust and regulation as exclusive of one another.[30] Accordingly, US law and decision making has been much less open to regulatory shifts within antitrust law, also due to its historic focus on "letting markets work" on their own without as little government intervention as possible.[31] Even though antitrust enforcement objectives have shifted over time, none of the U.S. antitrust statutes are regulatory in the sense of authorizing government intervention to fix price or output, control entry or exit, or determine the fairness of the terms of a bargain.[32]

IV. ASSESSING MARKET POWER AT THE INTERSECTION

[27] Dunne ((n 2) 70.

[28] Dunne (n 2) 70.

[29] Eleanor M. Fox, Monopolization and Dominance in the United States and the European Community: Efficiency Opportunity and Fairness, (1986) 61 Notre Dame L. Rev. 981.

[30] Verizon Communications v Trinko 540 US 398 (2004).

[31] Eleanor M. Fox, Monopolization and Abuse of Dominance: Why Europe is Different. (2014) *The Antitrust Bulletin*. 59(1).132.

[32] Fox (n 29) 986.

In their inception, the U.S. antitrust laws reflected a pervasive distrust of concentrated economic power and an aspiration to assure economic opportunity to all. The less regulatory character of the US system is also due to its mostly judicial enforcement with both private and DOJ enforcement occurring through the courts, supplemented by the administrative FTC procedure while the EU has been historically based on a centrally managed administrative enforcement system, though incorporating an adversarial decision-making process. Dunne (n 2) 86

The control of market power is a concern for both competition law and regulation, however firms with market power may be differently assessed in the two different settings. Arguably competition law can be a powerful instrument to control market power – and maybe bottlenecks– in existing markets, however, it is unworkable in a situation in which the market has to be created. It has also been argued that competition law is less effective in addressing structural market problems and exploitative abuses.[33] These arguments can be captured by the transformation of former state monopolies in network industries such as electricity, natural gas, telecommunication, where policy makers often relied on regulation as it could provide the necessary *ex ante* instruments to create and "grow" competition and a competitive market structure.[34] During the transformation process the relative weights of regulation and competition policy have been changing. In the initial stage of liberalization the network infrastructure remained in the hands of a monopolist, while services and product markets were opened up. This meant that access to such networks had to be regulated, so that the introduction of competition on markets could be achieved by regulatory devices. While regulating access markets seemed to prove no major concern, a second concern has been more contentious as regulation and competition law could operate as viable alternatives.[35] Once access problems and bottlenecks have been addressed, market power in downstream markets is not sector or network industry specific and thus the choice between competition law and regulation becomes a question of which device is perceived to be more effective. For example, direct price regulation or rate-making or the application of unfair/excessive price doctrine as an abuse of dominance, which is an accepted form of abuse in EU law[36] but not in the US where monopoly prices are not prohibited.[37] Regulatory instruments are generally considered better equipped to directly control and influence firm behaviour when competition cannot be relied upon to reduce market power. By directly controlling, for example, prices and quality of services, it does reduce concentration and control market power. Regulation can permanently address structural market power when characteristics of a given sector prevent effective competition (natural monopoly). It may also temporarily address market power when, for example, the sector is being liberalized but the application of competition rules is not sufficient to ensure competitive markets and thus regulation may be necessary to steer the sector towards effective competition through structural or behavioural obligations.[38] Such structural obligations were, for example, in the telecommunications markets the vertical separation of different activities in order to reduce the risk of anti-competitive conduct and facilitate access to essential facilities[39] or the preventing of vertically integrated electricity or gas system

[33] OECD, Competition enforcement and regulatory alternatives, OECD Competition Committee, Discussion Paper (2021) 11
[34] Kirchner (n 7) p.315-317.
[35] Regulation of access appeared to be indispensable for transforming former state monopolies into competitive markets. Kirchner (n 7) 315-316.
[36] C-27/76 United Brands. ECLI:EU:C:1978:22
[37] As the possession of monopoly power is not prohibited only its anti-competitive acquisition and maintenance, the exercise of such power ie through high prices is also not prohibited. M.Gal (2004). EU law cannot escape ufair prices as the text of Article 102 TFEU explicitly refers to such practices.
[38] OECD, The regulated conduct defence, DAF/COMP (2011)3. 23.
[39] Controlling market power in telecommunications, p.8-10

operators, through discriminatory measures, to effectively thwart new players from accessing the energy market.[40] Considering these differences in assessing unilateral conduct, the crucial question is: how these two instruments exclusively, or simultaneously address and control market power and what implications the different relational solutions have.

By being more interventionist, regulation may affect the enforcement of competition law and in particular the assessment of market power in significant ways. Regulation can alter the framework within which the competitive process take place or constrain undertakings' autonomous conduct and thus also the framework within which liability for anticompetitive behaviour is to be established. More specifically, establishing whether an undertaking has market power and thus whether the rules on unilateral conduct can be enforced requires that the undertakings act independently and autonomously in the market. However, regulation can limit this ability.[41]

Importantly, regulation can grant special or exclusive (monopoly) powers to undertakings and thus simplify the exercise to find such undertakings in a significant market power position. For example, by holding a legal monopoly of providing services can influence the finding of a dominant position in EU law.[42] Regulation can in fact restrict undertakings' freedom to engage in competitive or anti-competitive behaviour and thus reduce their scope for independent conduct. Regulation can directly control their actions, so that responsibility for allegedly anti-competitive behaviour is in fact due to regulation rather than to the firm.[43] Importantly, the question is whether the regulatory environment wherein firms operate may have the outcome that competition law does not attach liability to private firm behaviour, either because the firm's conduct does not have actual anticompetitive effects or because the respective regulatory context impacts the market autonomy of firms to such an extent that responsibility for firms' actions cannot be attributed to the firm.[44] This question is clearly reflected in the recurrent technical difficulties of competition enforcers to establish monopoly power or market dominance in regulated markets in order to activate the application of unilateral conduct rules. While US law, the Sherman Act comprises both the monopolization and the attempt to monopolize a market, EU law, Article 102 TFEU requires the finding of a dominant position before the rules of prohibition could apply. Still, both the

[40] Kim Talus, Introduction to EU Energy Law, (2016) Oxford University Press. 20,22-23
As natural gas and electricity markets are dependent on infrastructure, access to infrastructure is essential for competition in these markets and hence non-discriminatory third-party access is an indispensable component of competitive markets. The legal framework on competition concerning both sector-specific regulation and third-party access is based on the doctrine of essential facilities. The Commission has applied sector-specific regulation concerning third-party access; obligations to utilize existing capacity; and obligations to invest in new, cross-border interconnectors.
[41] William E. Kovacic. Accounting for Regulation in Determining the Application of Antitrust Rules to Firms Subject to Public Utility Oversight. (1995) *The Antitrust Bulletin*. 40(3):483-499.
[42] Case C-177/16 AKKA/LAA ECLI:EU:C:2017:689 para 34. In this case, AKKA/LAA, held the monopoly on the provision of collection of the fees from which authors of musical works are remunerated, meant in the Court's view to holding dominant position in a substantial part of the internal market within the meaning of Article 102 TFEU.
[43] Dunne (n 2) 229-230
[44] Dunne (n 2) 229

US and EU law concepts of market power[45] imply that defendant firms can act autonomously and decide about the course of their actions, the regulatory environment can and usually does reduce firms' ability to act independently and may require other benchmarks to measure market power.[46] The next section moves on to analyze the interface between these two devices in EU law and its implications for the assessment of dominant firm behaviour.

V. THE INTERFACE IN EU LAW

In EU law, the complementarity between regulation and competition law is well established. EU competition rules apply *ex post* in regulated markets in the same way as they would apply in any other context. This premise rests on the interpretation of the CJEU concerning the application of competition law rules in various cases. Most notably, in *Deutsche Telekom*,[47] where the Commission established that *Deutsche Telekom* abused its dominant position by engaging in margin squeeze, the Court of Justice confirmed that it is only if anti-competitive conduct is required of undertakings by national legislation, or if the latter creates a legal framework which itself eliminates *any* [emphasis added] possibility of competitive activity on their part, that the EU competition rules do not apply.[48] The reason, as discussed above, is that in such cases, the restriction of competition would not be attributable to the undertakings because EU competition law implicitly requires autonomous conduct of the undertakings.[49] The requirement of independent market behaviour in establishing liability under EU competition law is a central premise of EU law.[50] The undertaking can, however, bring a so-called *state action* defence claiming that their conduct falls outside the scope of those rules where it was required by national legislation or where the national legal framework itself eliminated any possibility of competitive activity on their fault.[51]

In *Deutsche Telekom*, the Court has also explained the complementary nature of the relationship, explainng that the EU competition rules supplement, by an *ex post* review, the legislative framework adopted by the Union legislature for *ex ante* regulation, in this case of the telecommunications markets.[52] *Ex ante* regulation, as the Court explained in *Deutsche Telekom*, is a "relevant factor" in the

[45] Under Sherman Act, §2, '[m]onopoly power is the power to control prices or exclude competition'.
In Article 102 TFEU, dominance is 'a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers'. Case 27/76 United

[46] Dunne (n 2) 229-230.

[47] C-280/08P Deutsche Telekom v. Commission, EU:C:2010:603

[48] In such cases, the restriction of competition would not be attributable to the companies because EU provisions on competition law implicitly require the autonomous conduct of the undertakings. By contrast, these provisions are applicable if it is found that the national legislation leaves open the possibility of competition that may be prevented, restricted or distorted by the autonomous conduct of undertakings. C-280/08 Deutsche Telekom AG v European Commission, ECLI:EU:C:2010:603. paras.80-84.

[49] Case C-280/08P Deutsche Telekom v. Commission, EU:C:2010:603 para 81-84.

[50] Joined Cases C-359/95 & C-379/95 P Commission v. Ladbroke Racing Ltd, EU:C:1997:531. Para 33.

[51] However, the Court has held that if a national law merely encourages or makes it easier for undertakings to engage in autonomous anti-competitive conduct, those undertakings remain subject to Articles 81 EC and 82 EC (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 36 to 73, and *CIF*, paragraph 56)

[52] Case C-280/08P Deutsche Telekom para 92

determination of the competitive conditions under which an undertaking carries on its business in the relevant markets, and in applying the competition rules to the conduct of that undertaking, whether for the purposes of defining the relevant markets, assessing the abusive nature of such conduct or setting the amount of the fines.[53] In another case of margin squeeze in *Telefonica*, the Court again clarified that the fact that an undertaking's conduct complies with a regulatory framework does not mean that such conduct complies with Article 102 TFEU.[54] These two cases exemplify that EU competition law is applicable also to conducts that are put in place in sector specific regulatory regimes and within the boundaries and the limits of such regulatory provisions. In this respect, the enforcer, the European Commission is solely bound by the provisions of the EU Treaties.[55]

Accordingly, in sectors where regulation applies *ex ante*, EU competition law can be applied *ex post* to the conduct of single firms. Few limited exceptions apply to this concurrency principle. EU competition law does not apply in regulated markets that were explicitly excluded from the full or partial coverage of EU competition law, such as the agricultural sector, which enjoys a specific constitutional constellation in the framework the Common Agriculture Policy of the EU.[56] Furthermore, EU competition law will not apply where the regulatory framework overrides the competition law framework with the result that a whole the sector is not open to competition: for example, where it results in legal or *de facto* monopoly.[57] In such markets where there is no possibility of effective competition, the disputed behaviour cannot have a negative impact on competition.

This EU law framework underlying the interface between regulation and competition law needs to be seen in the broader EU constitutional setting of competition law and regulation.

A. The interface within the constitutional architecture of EU law

Competition law has a constitutional value in the EU's legal order. It is a fundamental institution of a democratic legal and political system that has been a core part of the foundational Rome Treaty already back in 1957.[58] In the architecture of EU law, all instruments of EU law are meant to pursue the overall objectives listed in Article 3 TEU (and Protocol 27), including the establishment of an internal market where competition is not distorted. The competition rules form part of primary EU law and enjoy precedence above other sources of EU law, such as secondary legislation which is the main form of the sector specific regulation. Regulatory measures can be taken either at the EU or national level and, hence, EU competition law has priority over both EU and national regulatory measures. Under the so-

[53] Case C-280/08P Deutsche Telekom para 224.
[54] Case C-295/12, *Telefonica v. Commission*, ECLI:EU:C:2014:2062. para. 133.
[55] OECD (n 34) 20.
[56] As the Court of Justice has recognized, the CAP enjoys precedence over the objectives of the Treaty's competition rules. The CAP is not a competition-free zone, however, and the agriculture sector has been increasingly subject to market mechanisms. Nonetheless, the CAP incorporates both general and specific derogations from application of the EU competition rules. Case C-671/15, *APVE and Others*, EU:C:2017:860, para 37
[57] Case T-360/09 E.ON Ruhrgas AG and E.ON AG v. Commission, EU:T:2012:332.
[58] Katalin J. Cseres, K. J. Rule of Law Challenges and the enforcement of EU competition law: A case-study of Hungary and its implications for EU law. (2019). *Competition Law Review*, *14*(1).75-101.

called *useful effect* doctrine, EU law takes precedence over national law and Member States are under an obligation to disapply domestic law when it conflicts with EU competition law, or refrain from enacting conflicting national law pursuant to the principle of loyal cooperation as enshrined in Article 4 (3) TEU.[59] EU Member States enjoy a high degree of regulatory autonomy, as EU legislation is mainly in the form of Directives that create a general framework, which still needs to be implemented through national legislation. Consequently, much of EU regulation had been laid down in sector-specific rules that were applied by Member States with substantial leeway.[60] Seen in this context, secondary EU law, i.e. regulatory measures, whether from EU or national sources, are to contribute to the realization of the overarching objectives of the EU such as the competition rules. Hence, this architecture of EU law connects all these regimes and the normative tension between competition law and regulation is thus mediated by this constitutional setting. It is according Larouche and De Streel not only possible, but desirable to conceive competition law and regulation as components of a coherent whole, i.e. an EU body of economic regulation.[61]

One exception to this constitutional setting is the above mentioned state action doctrine enshrined in the case law of the Court. In case sector-specific regulation creates a legal framework which itself eliminates any possibility of competitive activity on the part of the undertakings, then the competition rules do not apply due to the lack of independent anticompetitive behaviour of the undertaking.[62] This doctrine has, however been applied restrictively and even in cases, where the anti-competitive conduct was encouraged or facilitated by regulation, the competition rules will be applied except if the regulatory regime must remove all scope for autonomous market conduct.[63]

In sum, this framework as a "two barriers regime," within which single firms have to comply with both the provisions of regulation and those of Article 102 TFEU.[64]

B. Risks of strict EU concurrency

This deeply anchored concurrent application of the two regimes in EU law, however, carries also substantial risks. First, when regulation seeks to curb market power, competition law enforcement can help to achieve this goal. However, when the application of competition law is expanded to use it to absorb regulatory duties then its application departs from the non-interventionist, market mechanism focused character of competition law raising fundamental issues of legal certainty and legitimacy.[65]

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[59] C-6/64, *Flaminio Costa v. E.N.E.L.*, ECLI:EU:C:1964:66. In Arduino, the CJEU made specific reference to EU competition law stating that Article 101 TFEU, read in conjunction with Article 4(3) TEU, requires Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings. C-35/99, *Arduino*, ECLI:EU:C:2002:97, para. 34.

[60] Tapia and Mantzari (n 16).

[61] Pierre Larouche, Alexandre de Streel, The European Digital Markets Act: A Revolution Grounded on Traditions, (2021) *Journal of European Competition Law & Practice*, Volume 12, Issue 7,.542–544

[62] Joined Cases C-359/95 & C-379/95 P Commission v. Ladbroke Racing Ltd, EU:C:1997:531.para 33.

[63] Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commis- sion* [1975] ECR 1663, paragraphs 36 to 73, and *CIF*, paragraph 56

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

[65] Dunne (n 2) 132.

More importantly, such a doctrinal shift questions the important proposition under EU law that acknowledges the freedom of dominant undertakings to choose their own trading partners and thus endangers to violate the basic premise that competition law is to safeguard the competitive process.[66]
The Commission's practice in the relative recent past shows that it has not shied away from using its competition law powers in heavily regulated industries such as gas and electricity markets and condemning firm conduct on the basis of an allegedly abusive regulatory-type function.[67]
In a number of prominent cases on refusal to deal and margin squeeze in the telecommunications sector (as discussed above) the Commission set out the relationship between competition law and sector-specific regulation,[68] while it has also been pursuing a concurrency based agenda in other sectors, such as the postal sector[69] and the energy sector, where the application of Article 102 TFEU against large network operators revitalized the unbundling of networks (transmission and distribution) from production, as provided in the respective Energy Directives.[70]
In many of such network industries after liberalization, sector-specific regulation created a setting in which effective competition can emerge and be sustained and thus made the effective application of EU competition law possible. In this process, the Commission has focused on leveraging abuses resulting in the extension of a dominant position from the bottleneck segment to those open to competition. These practices included 'margin squeeze', whereby the conditions of access to the bottleneck segment do not allow new entrants to compete on a related market.
One prominent case is *Telekommunikacija Polska* where the Commission held that the strategy by the incumbent firm to limit access to its telephone network distorted competition and thus qualified as an abuse of dominant position under Article 102 TFEU. The fact that the firm failed to comply with its regulatory duties under national and EU regulation, namely refused to supply services through delaying tactics and applying unfair contractual terms served the basis for qualifying its conduct as an abuse of dominance.[71] In a similar vein, in recent cases of refusal to deal, such as *Slovak Telekom*,[72] the mandatory duty to provide access under the sector specific regime is, in fact, taken to displace the criteria of Article 102, such as that a conduct is abusive only in "exceptional circumstances" and that it is necessary to prove that access to the input or facility is "indispensable" to competition in an adjacent market.[73] Proof of indispensability is no longer a standalone requirement, but it is the pre-existing

[66] Dunne (n 2) 133.
[67] Case 39351—Swedish Interconnectors, Decision of 14 April 2010; RWE Gas Foreclosure (OJ C133/10, 12.6.2009); Swedish Interconnectors (OJ C142/28, 1.6.2010).
[68] Case C-280/08P Deutsche Telekom v. Commission, EU:C:2010:603; Case C-52/9 Konkurrensverket v. TeliaSonera, EU:C:2011:83; Case C-295/12P Telefonica v. Commission, EU:C:2014:2062. Case C-165/19P, Slovak Telekom v. Commission, EU:C:2021:239
[69] Postal Services Directive: Directive 97/67, amended by Directives 2002/39/EC and 2008/6/EC
[70] Directive 96/92/EC, Directive 2003/54/EC, Directive 2009/72, Directive 2019/944 on common rules for the internal market for electricity OJ [2019] L158/125. Leigh Hancher, Pierre Larouche, 'The coming of age of EU regulation of network industries and services of general economic interest', in: Paul Craig and Gráinne de Búrca (eds), The Evolution of EU Law (2011) Oxford University Press.
[71] Case COMP/39.525 – Telekomunikacja Polska (OJ C324/7, 9.11.2011)
[72] C-165/19 P Slovak Telekom, para 57.
[73] C-165/19 P *Slovak Telekom*, para.39.

regulatory obligation that provides sufficient reason to examine whether the failure to provide access has likely or potential anticompetitive effects.[74]

These cases illustrate the "blurring of the boundary" between competition law and regulatory criteria and as such have been criticized as quasi-regulatory competition law.[75] The regulatory use of competition law creates obligations that are taken to shape theories of harm in competition law, for example in cases concerning margin squeeze,[76] refusal to deal[77] and excessive pricing.[78] Even though such regulatory application of competition law can have the benefit to address market failures such as exploitative abuses, it does raise concerns as more intensive forms of intervention into the functioning of markets as well as into single firm behaviour than the democratic mandate competition law and its enforcers have been given.[79] Such an "instrumentalization" of competition law[80] may lead to promote regulatory purposes and objectives that lie outside of the purview of competition law. Under such a persistent application of competition law broadens the so-called "special responsibility"[81] of dominant undertakings commanding them how to conduct their business.[82]

Overall, the risk is that under such an approach competition law is transferred into the regulatory space and is applied to market problems that sit uneasily with the core principles of competition law, which is a general, *ex post*, last resort mechanism of state intervention aimed at the protection of effective competition and not broader societal goals. This undermines the legitimacy of competition law enforcement and creates legal uncertainty for regulated firms concerning the prerequisite standard of intervention.[83] Larouche has argued that such an extension of EU competition law to cover various regulatory issues created a substantive overlap between competition law and regulation and as such served as an explanation for greater willingness of the Commission and the EU Courts to apply competition law on top of regulatory measures in cases such *Deutsche Telekom*.[84]

C. Rewriting abuse of dominance

This approach is especially controversial concerning the fact that violation a regulatory measure by a dominant firm can be rewritten as abuse of a dominant position. Undertakings with significant market power who do not comply with regulatory duties could violate Article 102 TFEU, even though such an

[74] C-165/19 P *Slovak Telekom*, para.42, Competition Enforcement and Regulatory Alternatives – Note by Niamh Dunne, DAF/COMP/WP2/WD(2021)22
[75] Dunne (n 74) 22.
[76] Case COMP/39.525 – Telekomunikacja Polska (OJ C324/7, 9.11.2011)
[77] C-165/19 P *Slovak Telekom*.
[78] Case C-177/16 *AKKA v Latvia Competition Authority*
[79] Dunne (n 2) 92, Geradin, Damien and O'Donoghue, Robert, The Concurrent Application of Competition Law and Regulation: The Case of Margin Squeeze Abuses in the Telecommunications Sector (2005). GCLC Working Paper No. 04/05, 395.
[80] Larouche (n 2) 353-6
[81] Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission ('Michelin I'),* EU:C:1983:313, para 57.
[82] Pierre Larouche Contrasting legal solutions and the comparability of EU and US experiences. In F. Leveque, & H. Shelanski (Eds.), Antitrust and regulation in the EU and US: legal and economic perspectives (2009 Edward Elgar) 12.
[83] Dunne (n 2) 92, Larouche (n 2) 353-6.
[84] Larouche (n 84).

approach seems inconsistent with the main objective of Article 102 as a means to safeguard effective competition within the internal market.[85] The German competition authority, the *Bundeskartellamt*'s Facebook decision could illustrate this point. In its decision the *Bundeskartellamt* has found that Facebook, as a dominant social network violated the EU's data protection rules (GDPR) by collecting its users' personal data from outside Facebook's social network and the ordering policies of data amounted to the abuse of its market power contrary to German competition law.[86] Important to note is that the *Bundeskartellamt* relied on German law in this case, however, the case does have implications for the course EU law may take in the coming years. The *Bundeskartellamt* relied on German case law[87] which combines the German rules on standard contract terms in Article 310 (3) of the German Civil Code[88] with the rules on abuse of dominant position, Article 19 (2,2.) German Competition Act GWB.[89] This decision has been questioned on appeal on this specific legal basis. The Appeal Court of Düsseldorf argued that there was no causal link between a dominant position and the relevant anti-competitive effect, in the form of abusive terms and conditions. The Düsseldorf Court held that the *Bundeskartellamt* had not proven causation between Facebook's dominance and an abuse of terms and conditions.[90] Next, in June 2020 the German Federal Supreme Court upheld the 2019 decision of the *Bundeskartellamt* confirming the abuse of a dominant position by Facebook on the (national) market for social networks for private users to the detriment of its users.[91] The case then went back to the Düsseldorf Court that decided now that "[th]e question of whether Facebook is abusing its dominant position ... cannot be decided without referring it to the European Court." In its reference the Düsseldorf Court has questions that all relate to the compatibility of Facebook's conduct with the provisions of GDPR, the EU data protection law.[92] The main issue in this case is exactly on agreeing or disagreeing with the *Bundeskartellemt* who applied competition law as an indirect means of enforcement to remedy institutional inaction on the side of the Irish DPA and applied data protection law obligations to build its theory of harm under competition law. Such situations where competition law enforcement has been addressing regulatory issues or even filling in regulatory gaps have often developed towards the actual shaping regulation, an issue the next section turns to.

[85] Dunne (n 74) 19.
[86] Case B6-22/16 Facebook, 6 February 2019.
[87] German case law has earlier established that imposing contract terms that infringed mandatory rules on general contract terms in the German Civil Code can infringe German competition law. More specifically. BGH, Urteil vom 06.11.2013, Az. KZR 61/11, „VBL-Gegenwert", Rn. 68. KG Berlin, Urteil vom 24.01.2014, Az. 5 U 42/12.
[88] German Civil Code, https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0934
[89] Act against Restraints of last amended by Art. 5 of the law of 21 July 2014
Article 19 (2) 2.: An abuse exists in particular if a dominant undertaking as a supplier or purchaser of a certain type of goods or commercial services
2. demands payment or other business terms which differ from those which would very likely arise if effective competition existed; in this context, particularly the conduct of undertakings in comparable markets where effective competition exists shall be taken into account;
[90] Facebook ./ Bundeskartellamt, The Decision of the Higher Regional Court of Düsseldorf (Oberlandesgericht Düsseldorf) in interim proceedings, 26 August 2019, Case VI-Kart 1/19 (V)
[91] Case KVR 69/19, Facebook, 23 June 2020, ECLI:DE:BGH:2020:230620BKVR69.19.0.
[92] Request for a preliminary ruling from the Oberlandesgericht Düsseldorf (Germany) lodged on 22 April 2021 — Facebook Inc. and Others v Bundeskartellamt. Case C-252/21.

D. Shaping regulatory framework

EU law has a long tradition of relying on complementary sector regulation when competition law has proven to be ineffective in solving structural competition problems. This has happened in the telecommunications sector with the regulation of international roaming charges or in the financial sector with the regulation of credit card interchange fees.[93] In the EU law framework competition law has been seen as a regulatory instrument that also informs and shapes regulation. The enforcement of competition law takes place on a case-by-case basis, applies to specific facts and conducts and, hence, can help to detect general patterns or systemic issues in certain markets, which may require specific state intervention, by introducing particular rules. Competition law enforcement has been informing policy choices in the energy markets, financial regulation, e-commerce or pharmaceutical sector.[94]

In the EU, the European Commission and more precisely its Directorate General for Competition is entrusted with enforcing the competition rules but, the Commission is also responsible to make legislative initiatives within the EU's legislative process.[95] In this way, the technical knowledge and experience acquired by DG COMP through its competition enforcement can influence and feed into the legislative initiatives of the Commission when preparing policy or regulation.[96] For example, information obtained during sector inquiries helps the Commission to better understand a particular market and it can prompt a subsequent Commission intervention. Sector inquiries can bring to light systemic issues affecting competition dynamics in a market and by gathering information during sector inquiries, the Commission can feed information into its regulatory initiatives where it considers these more appropriate to address systemic issues than pursuing individual competition cases.[97]

1. REMIT

For example, in the energy sector concerns emerged about specific market abuses in wholesale energy markets, such as withholding generation plant, with the intention of causing prices to increase, and cross-market manipulation. Regulators had tried to use competition law – specifically Article 102 TFEU and its national counterparts – to tackle this behaviour. The practice of capacity withholding came to mainstream attention through the European Commission's investigation into E.ON. The Commission suspected E.ON of withholding plant that would have been economic to run, in order to drive up prices. In order to close its investigation, it accepted commitments from E.ON to divest a significant proportion of its generation fleet. However, the Commission's concern about its ability to establish dominance in

[93] Larouche, De Streel (n 61) 544.
[94] Competition Enforcement and Regulatory Alternatives – Note by the European Union DAF/COMP/WP2/WD(2021)13
[95] Article 17(2) of the Treaty on European Union.
[96] Tapia and Mantzari (n 16)
[97] The Commission has carried out sector inquiries in the telecommunications (local loop, leased lines, roaming), energy, financial services, pharmaceuticals, and e- commerce.
Alternatives – Note by the European Union. DAF/COMP/WP2/WD(2021)13p..5.

that case was one of the factors that led to the development of a tailor-made abuse regime.[98] The Commission was thus keen to introduce a dedicated set of rules on energy market manipulation and therefore proposed, and the EU legislators adopted, the Regulation on Wholesale Energy Market Integrity and Transparency, Regulation 1227/2011 (REMIT).[99] The market abuse prohibition under REMIT applies to all market participants, even those which are non-dominant. REMIT increases the scope of competition to integrity and transparency and prohibits abusive practices in wholesale energy markets, such as insider trading, and requires market participants to publicly disclose inside information. REMIT also prohibits market manipulation that takes place through false or misleading transactions, price positioning, transactions involving fictitious devices/deception, and disseminating false or misleading information. CREMIT illustrates that competition law enforcement might be seen as a pathway that facilitates regulation: by revealing how intractable a problem is under competition law, this creates space for other kinds of intervention that may be more effective. [100]

2. DMA

The most recent example of the interplay of competition and regulation concerns the digital sector: the Commission's proposal for a Digital Markets Act ("DMA").[101] In short, the DMA introduces *ex ante* regulatory rules that aim to increase fairness and contestability in digital markets. It has as one of its goals to complement competition law and intervene when competition law cannot act, or can only act ineffectively. The DMA introduces rules applicable to certain "core platform services" including search engines, social networks, online intermediation (i.e., app stores and marketplaces). Undertakings that provide these core services and that are identified as "digital gatekeepers" need to comply with a set of obligations and prohibitions established in the DMA. Digital gatekeepers will be identified based on certain quantitative criteria, or following a qualitative assessment, carried out through an investigation by the Commission.

The DMA introduces an *ad hoc* regulatory regime that enables the Commission to intervene fast and in an anticipatory manner without having to prove the presence of a dominant position as pre-condition for enforcement and the negative impact on the competitive process, i.e anti-competitive effect or object of a certain practice.[102] By addressing the strengthening, leveraging and exploitation of market power,[103] the DMA aims to complement the EU competition rules which seem to be difficult to apply in a fast and effective way in digital markets due to various constraints that structure and precondition its

[98] Leigh Hancher, A. De Hauteclocque, M. Sadowska, Capacity mechanisms in the EU energy markets : Law, policy and economics. (2015) Oxford : Oxford University Press, 195.
[99] Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency
[100] Giorgio Monti, Excessive pricing: Competition Law in Shared Regulatory Space (2019) 16. https://www.tilburguniversity.edu/sites/tiu/files/download/Monti%20Excessive%20pricing.pdf
[101] Commission Proposal for a Regulation of the European Parliament and the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final
[102] Recital 9 DMA Proposal
[103] Article 6 obligations DMA Proposal

enforcement.[104] The DMA in its proposed form, fits reasonably well, but not spotlessly, within the overall framework of EU economic regulation.[105] DMA lacks an openly sectorial focus as its concerns related to 'core platform services' and 'gatekeepers' cannot really be seen as a separate economic sector. However, it resembles some of the more horizontal regulations, most importantly unfair trading legislation such as the Directive on unfair trading practices in business-to-business relationships[106] P2B Regulation[107] or the currently proposed DSA.[108] These legal instruments are at a greater distance from competition law structured around a set of specific policy goals and they are also symmetrical in that they apply across the board to all firms. The proposed DMA, in contrast, would introduce an asymmetrical framework, whose policy goals come closer to those of competition law.[109]

As the DMA is a complement to the competition rules it may not come as a surprise that competition enforcement has informed its proposal. For example, the designation of gatekeepers does not adopt the concept of dominance, but requires the fulfilment of three cumulative criteria.[110] While these criteria do not explicitly mention market power, some of the criteria do implicitly refer to market power such as those requiring entrenched and durable control of an important gateway for business users to reach end users.[111] Additionally, a designated gatekeeper is subject to a number of obligations, many of which are inspired by past and current competition law decisions.[112]

Most importantly, it aims at addressing significant market power through setting various obligations on gatekeepers without addressing the legal constraints of Article 102 TFEU, such as proof of dominance and anti-competitive effect. The Preamble to the Draft DMA makes it explicit that the duties imposed by virtue of Articles 5 and 6 do not depend on their impact on competition in a given market. Thus, the Draft DMA seems to allow the Commission to control substantial market power as such, and is not constrained by having to prove the abuse thereof. Fairness and contestability of core platform services is without reference to and obligations proposed do not depend on the protection of the competitive process as laid down under Article 102 TFEU.[113]

It has been argued that the Proposal displays a new and expansive vision of the notion of fairness and that the DMA seeks to neutralise the competitive advantages enjoyed by gatekeepers and restructure

[104] Pablo Ibáñez Colomo, The Draft Digital Markets Act: A Legal and Institutional Analysis, 2021Journal of European Competition Law & Practice, Volume 12, Issue 7. 566.
[105] Larouche, De Streel, (n 61) 544.
[106] Directive 2019/633 on unfair trading practices in business-to-business relationships in the food supply chain (OJ L 111/59, 25.4.2019).
[107] Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services
[108] Proposal for a Regulation on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC
[109] Larouche, De Streel (n 61) 544.
[110] Article 3 DMA Proposal
[111] Article 3 (1) c. DMA Proposal
[112] The Commission explained that those obligations were selected because they "are considered unfair by taking into account the features of the digital sector and where experience gained, for example in the enforcement of the EU competition rules, shows that they have a particularly negative direct impact on the business users and end-users'. Impact Assessment Brussels, 15.12.2020 SWD(2020) 363 final 54-61.
[113] Ibáñez Colomo (n 104) 568-9

activities in the digital value chain to conform to a particular vision of fairness.[114] Fairness appears to be driven by an attempt to rebalance the conditions of competition so that gatekeepers and third parties can compete with similar forces.[115] However, one may want to compare the way fairness is conceptualized in the Draft DMA with other existing EU legislations concerning unfair trading practices in business-to-business relations in food supply chains.[116] Directive 2019/633, which was adopted to improve the bargaining power of agricultural producers *vis-à-vis* other market participants by prohibiting specific types of unfair trading practices.[117] Interesting parallels can be seen in various elements of the two legislations. For example, the Directive 2019/633 is primarily focused on exploitative abuses that arise in the absence of actual dominance, it aims to complement competition law, by covering situations of unequal bargaining power. While the Directive addresses dependence and superior bargaining power, it does not, however, establish clear criteria to operationalize these concepts. For the approximation of relative bargaining power, the Directive sets the annual turnover of the different market operators. In this way, the Directive establishes turnover-based categories of operators according to which protection is afforded.[118] Even though the Directive has emerged from a political reflection of the unresolved tension between EU agriculture policy and competition law, it may already offer answers to similar questions as raised with regard to the proposal of the DMA.

VI. THE INTERFACE IN US LAW

Conceivably more in the US than in Europe, the two areas are often seen as essentially substitutionary and function as alternative legal instruments rather than complements. However, this has not always been the case. Recent case law shows that antitrust enforcement deferred to regulatory policies and enforcement and the Supreme Court defined new balances limiting the role of antitrust in regulated markets.

In US law, two doctrines govern the relationship between federal antitrust law and state regulation: pre-emption and state action. Pre-emption stands for the disapplication of state law in case it is conflicting with federal antitrust. State action provides immunity from federal antitrust for activity within the domain of a state regulatory scheme.[119] Based on the US Constitution's Supremacy Clause, the pre-emption doctrine has a narrow scope and thus the doctrine applies only where a grave restriction of

[114] Ibáñez Colomo (n 104) 571.
[115] Ibáñez Colomo (n 104) 568-9
[116] Directive 2019/633 on unfair trading practices in business-to-business relationships in the food supply chain (OJ L 111/59, 25.4.2019). The Directive defines unfair trading practices as business-to-business practices that deviate from good commercial conduct, that are contrary to good faith and fair dealing, and that are unilaterally imposed by one trading partner on another. For a detailed analysis see: Cseres, (n 5).
[117] Fabrizio Cafaggi and Pola Iamicelli, Unfair Trading Practices in the business-to-business retail supply chain (2018). Publications Office of the European Union, Luxembourg.
[118] The Directive argues that while being an approximation, this criterion gives operators predictability concerning their rights and obligations under this Directive. An upper limit should prevent protection from being afforded to operators who are not vulnerable or are significantly less vulnerable than their smaller partners or competitors. Preamble of the Directive para 14.
[119] On the basis of "principles of federalism and state sovereignty," the Supreme Court has long held that the Sherman Act does not apply to "anticompetitive restraints imposed by the States 'as an act of government

competition is the inevitable consequence of state law. In other words, the Sherman Act pre-empts state statutes only where there is an irreconcilable conflict between the state scheme and federal antitrust policy. The core of both the pre-emption and state action doctrines is the requirement to reconcile state sovereignty in relation to economic regulation with the competition-focused goals of federal antitrust law. However, federal regulation and antitrust law stand on equal basis.[120]

Federal regulation may explicitly or in an implied manner exempt certain industries from the application of antitrust law. Accordingly, the US Congress may give an express statutory exemption when it concludes that a certain conduct that would otherwise be prohibited by the antitrust laws should be allowed to further non-antitrust goals.[121] It may also do so, in case competition should be "balanced" with other values that can best be evaluated by a specialized expert agency.[122]

The aim of the implied immunity doctrine is to avoid regulatory decisions being frustrated by conflicting decisions under antitrust law. With regard to implied immunity, US courts used to treat antitrust law and regulation as complements and as long as they did not stand in clear conflict with each other courts had the obligation to try to "reconcile the [] operation of both".[123] This approach also embraced the possibility for antitrust agencies to apply antitrust rules even in cases, where the regulatory authority had already challenged the same behaviour on the basis of regulation[124] and that only in case of "plain repugnancy" would this doctrinal acceptance of complementary application be dispensed.[125]

However, two cases of the past two decades have considerably diluted the "plain repugnancy" doctrine.

A. Trinko and Credite Suisse

In 2004, the Supreme Court in *Trinko*[126] investigated whether the regulatory duties introduced by the Telecommunications Act of 1996 can support a claim under antitrust law. More specifically, whether Trinko's exclusionary practice to share its network with its competitors (qualified by the Court as refusal to deal) was a violation of the Sherman Act. This case is not so much relevant in terms of its particular outcome, but due to the Court's broad reasoning through which it reached its decision and which laid down an interpretation that reduced the reach of antitrust law in regulated industries.[127] The specific facts of the case are in that respect important. Most notably the fact that the Telecommunications Act

[120] Dunne (n 2) 200-203.

[121] Accordingly, federal regulation has been adopted to address perceived market failures, such as industries assumed to be prone to natural monopolies. To protect consumers, sector-specific regulators often are authorized to regulate rates, terms of service, and entry (i.e., licensing) and to prevent the exercise of monopoly power.
They are also typically charged with advancing broader social goals, such as promoting universal access to services or providing for environmental and safety regulations. Competition Enforcement and Regulatory Alternatives – Note by the United States, DAF/COMP/WP2/WD(2021)12

[122] *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 370 (1991).
Competition Enforcement and Regulatory Alternatives – Note by the United States, DAF/COMP/WP2/WD(2021)12

[123] Shelanski (2011, n 2) 686-687. Shelanski (n 2, 2018). Silver v. N.Y. StockExch., 373 U.S. 341, 357 (1963).

[124] Otter Tail Power Co. v. United States, 410 U.S. 366, 372-75 (1973).

[125] United States v. Phila. Nat'l Bank, 374 U.S. 321, 350 (1963) Gordon v. N.Y. Stock Exch., Inc., 422 U.S. 659, 682 (1975). This acceptance allowed the US DOJ to file an antitrust case against regulated firms such as AT&T and break up their well established monopoly. Shelanski (n 2) 1941.

[126] *Verizon Communications v Trinko* 540 US 398 (2004)

[127] Shelanski (n 2, 2011) 692.

and the FCC's implementation act contained likely much stronger duties to deal on incumbent firms than Section 2 of the Sherman Act. According to the Supreme Court, the Telecommunications Act seeks to eliminate legally established monopolies while the Sherman Act only attempts to prevent illegal monopolization.[128] That meant that a firm's refusal to deal could easily violate the Telecommunications Act without violating the Sherman Act and thus put the antitrust claim brought by Trinko into a weak position.[129]

A case which is often paired and compared with *Trinko* is as discussed above, *Deutsche Telekom*, showing their similarities and analyzing their contrasting judgments.[130] Unlike the Commission and the EU Courts, the Court in *Trinko* considered the impact of the regulation on the antitrust rules, and concluded that existence of the sector-specific regime excluded application of antitrust rules as "the existence of a regulatory structure designed to deter and remedy anticompetitive harm" because " [w] here such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small."[131] It is thus 'less plausible that the antitrust laws contemplate such additional scrutiny'.[132] The Court thus based its analysis on the costs and benefits of additional antitrust law enforcement and concluded that in regulated industries that enforcement should modest in order to avoid false positives. With this judgment the Court in fact, diluted the long-standing doctrine considering antitrust enforcement as a complement to regulatory measures.[133] It was clear that the Supreme Court in *Trinko* wanted to avoid the simultaneous application of both regimes for the specific facts of the case explained above. The assumption underlying the opinion of the Court is that sector-specific regulatory regimes are usually so complete that they take care of the whole of market regulation for the sector in question and thus also perform the "antitrust function".[134] As noted above, in *Deutsche Telekom*, the European Commission purposefully applied competition law while the case has been already dealt with under German telecom regulation. However, this contrast can be explained by referring back to the fact that US antitrust law is not regulatory in nature and refrains from imposing direct regulation of price and output but rather concentrates on preserving the conditions of free market forces.[135] The restrictive attitude of US law towards the use of competition law to impose duties to deal upon dominant firms, has been a standard feature of US law ever since the Colgate decision in 1919.[136]

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[128] Trinko at 415.
[129] Shelanski (n 2, 2011) 694.
[130] Eleanor M. Fox Monopolization and Abuse of Dominance: Why Europe is Different. (2014) *The Antitrust Bulletin*. 59(1):129-152. Margharita ColangeloThe Interface between Competition Rules and Sector-Specific Regulation in the Telecommunications Sector: Evidence from Recent EU Margin Squeeze Cases. (2013). *Competition and Regulation in Network Industries*, *14*(3).
[131] Trinko at 412.
[132] Trinko at 412.
[133] Shelanski (n 2, 2018) 1942.
[134] Trinko at 212. Larouche (n 82) 7.
[135] Therefore, there exists no analogue of unfair pricing or other unfair trading practices in US law that could form the basis of antitrust monopolization cases. . If a firm attains monopoly on its competitive merits and if the firm prices at monopoly levels, the high price itself may invite new entry and expanded com- petition, and market forces would gradually wear away the monopolypower. Fox (n 133)
[136] United States v. Colgate & Co., 250 U. S. 300 (1919). Fox (n 29).

In *Trinko* the Court has also emphasized that considering the fact that US law has not acknowledged claims to impose duty to deal on firms, it could not accommodate a claim under the Sherman Act.[137] What the Court did not explain in Trinko, however, was how closely a competition oriented regulation has to correspond to the conduct at hand and whether active enforcement of the regulation or mere passive existence suffices. In other words, what qualifies as a regulated firm in order to bar aggressive and unnecessary antitrust claims.[138]

Three years later in *Credit Suisse* [139] the Supreme Court examined the interaction of the antitrust laws with certain regulations of the Security and Exchange Commission. The case concerned the potential application of antitrust in securities markets to address allegations of excessive commissions, tying and similar activities in breach of the Sherman Act. Based on the extensive regulatory authority exercised by the Securities and Exchange Commission over the alleged activity, the Court found that even assuming that the SEC had disapproved the alleged conduct, the private antitrust litigation was "likely to prove practically incompatible with the SEC's administration of the Nation's securities laws." Such a "serious conflict" between "application of the antitrust laws" and "proper enforcement of the securities law," the Court held, requires implied antitrust immunity.[140] The Court's ruling went beyond the restrictive approach adopted in *Trinko* and a broader rule emerged that stated that even in implied immunity cases the application of antitrust rules becomes more unlikely due to the extensive coverage of regulatory schemes. In both judgments one central concern the Court voiced in its ruling precluding antitrust enforcement was the costs of false positives in enforcement. As a consequence the Court's reasoning in *Trinko* in its later judgment in *Pacific Bell v. Linkline*, the Court practically abolished "price squeezes" as standalone claims under the Sherman Act.[141]

B. Implications of Trinko and Credit Suisse

The effect of *Trinko* and *Credit Suisse* was to render antitrust and regulation more like substitutes and less like complements. Even though courts before these decisions grappled with reconciling the enforcement of antitrust rules and regulation, the focus now been clearly shifted towards costs of overenforcement and what the additional benefit of antitrust enforcement is in regulated markets.[142] Antitrust law has been "sidelined as an available complement" to regulation.[143] Trinko and Credit Suisse represent a significant shift rendering concurrent antitrust enforcement considerably more difficult in regulated sectors. Most importantly as noted by Shelanski, these decisions remain open to diverging

It is not illegal for a U.S. firm, acting alone, to restrict its output and to charge monopoly prices. This is because the U.S. law is not regulatory.

[137] Colgate case law.

[138] Shelanski (n 2 2011) 702.

[139] *Credit Suisse v Billing* 551 US 264 (2007)

[140] *Credit Suisse v Billing* 551 US 264 (2007) 279.

[141] Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 129 S. Ct. 1109 (2009).

[142] Colangelo (n 130) 235.

[143] Shelanski (n 2 2018) 1943.

interpretations allowing future court decisions to block antitrust claims if they may conflict in some way with regulation.[144]

Most notably, the *Credit Suisse* Court did not address the questions how similar should a conduct which is subject to an antitrust complaint be to the conduct permitted under regulation in order for lower courts to bar the antitrust claim.[145] This carries the risk that when antitrust claims are barred that leaves firms in the sector without oversight from either regulators or antitrust authorities. *Trinko* is likewise open to both broad and narrow interpretations as it left open the possibility to bar legitimate antitrust claims on the presumption that antitrust has little added value where a regulatory structure already addresses competition. However, such a conclusion strongly rests on the facts of *Trinko*, that might be absent in other regulatory contexts.[146] The Court, however, did not identify any of these factors as necessary either to its ruling in *Trinko* or its future application, opening the door to varying interpretations of the Court's opinion.[147]

Moreover, the deferential approach towards antitrust and monopolization claims emerging from these cases imposed significant barriers to antitrust enforcement in regulated sectors.[148]

C. Revitalizing US antitrust enforcement

Concerns about weak antitrust enforcement has been voiced on numerous occasions in the past in US scholarship, but a more recent surge of criticism emerged in relation with the rising corporate power of digital platforms and Big Tech companies.[149] Criticism has been voiced arguing that the Supreme Court has shaped and shrunk antitrust enforcement which today cannot meet the challenges of entrenched and durable economic power in digital markets. Most importantly, the case law of the US Supreme Court has considerably shrunk the application of Section 2 of the Sherman Act since *Trinko*, which would serve as the most natural ground to challenge current dominant firm conduct and most importantly the concerns attached to platform power.[150] In fact, it seems that under US law dominant firm conduct is almost always efficient and procompetitive as long as it is the result of independent conduct and except under very narrow circumstances, US law does not recognize a monopolist's duty to deal fairly. Certainly, Section 2 Sherman Act monopolization cases, will remain challenging and may even become more difficult also due to the fact that federal courts raised disproportionately substantive bars to

[144] Shelanski (n 2 2018) 1955.
[145] Shelanski (n 2 2018) 1954.
[146] These facts are: the competition rules under the 1996 Act imposed stronger monopoly constraints than did Section 2 of the Sherman Act.' Second, the FCC had issued a set of rules that directly regulated the anticompetitive misconduct alleged in the case. Finally, the FCC actively administered these duty-to-deal regulations under the1996 Act. Shelanski (n2 2011) Shelanski (n 2 2018) 1955.
[147] Colangelo (n 130). 236.
[148] Dunne (n 2) 208. Shelanski (n 2, 2018) 1943.
[149] For a detailed overview see Alison Jones William E Kovacic Antitrust's Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy. (2020) *The Antitrust Bulletin*. 65(2):227-255.
[150] Harry First and Eleanor M. Fox, Big Tech and Antitrust – Calling Big Tech to Account Under U.S. Law (2020). NYU Law and Economics Research Paper No. 20-53.

antitrust actions and gone too far in loosening antitrust restrictions governing dominant firm behaviour.[151] The issues raised cut deep into some of the questions discussed in the previous section on what the relationship between antitrust law and regulation is, should be and how enforcement should take place in the US.

The proposals for reform diverge both in terms of their form and degree, and some are put forward to work within the current antitrust enforcement framework while others call for a serious reconfiguration of this framework or for increased regulatory approach in certain industries, most notably digital platforms.[152] While in the voiced critiques, weak antitrust enforcement is one main element of a larger failure of the government to promote competition, many also consider new regulatory approaches that would go beyond current institutional and statutory confines of the existing antitrust system.[153]

While a statuary reform and new regulation seems unlikely in the US, where antitrust law has relied more on commonlaw development than legislative change in the past. Litigation has already started, but will be slow with first court cases schedule for mid-2023.[154] Other proposals could be more feasible, such as the more active use of Section 5 of the FTC Act to reprehend "unfair methods of competition"[155], "light-handed, pro-competitive" regulation going beyond antitrust adjudication suggested by Shelanski or an institutional revitalization through joined-up, and consensual enforcement by the public enforcement agencies and explicit priority setting straightforward self-assessment of existing operations and capabilities as suggested by Jones and Kovacic.

CONCLUSIONS

The question whether and how to address the presence, the use and abuse of market power remains a concern both for EU and US legislators, enforcement agencies and policy makers. More specifically, the way competition law can be or should be applied to dominant firm behaviour in regulated industries continues to be a central and contentious theme as policy and law makers design their strategies to meet the challenges of increasing corporate concentration. In the design of such strategies the optimal interplay between competition law enforcement and regulation takes a central place. This chapter demonstrates that the interplay in the EU has been developing towards a more regulatory approach, both *within* the competition law framework through increased use of quasi-regulatory competition law doctrines such as margin squeezes, refusal to deal and excessive prices, but also *outside* by moving

[151] Moreover, courts' concerns about the hazards of overenforcement, confidence in the ability of markets to renew themselves remains. Jones and Kovacic (n 149)

[152] Shelanski (n 2, 2018) 1956. As summarized by Jones and Kovacic: "Broadly, advocates for change can be group into three categories: (i) do substantially more with the existing antitrust system; (ii) do more with the existing system and enact additional regulatory mechanisms; and (iii) undertake a "root-and-branch" transformation of the U.S. competition policy system."

[153] For example, the creation of a new regulatory body to oversee digital technology giants. As proposed by the Stigler Center report on competition in digital markets. Stigler Centre Committee on Digital Platforms, Final Report, 2019

[154] Harry First and Eleanor M. Fox, Biden Antitrust: The Middle Way (2020). Concurrences N° 1-2021.

[155] First and Fox (n 150); Eleanor M., Fox, Platforms, Power and the Antitrust Challenge: A Modest Proposal to Narrow the U.S.–Europe Divide (2019). Nebraska Law Review Issue 98:2.

towards new regulation in the field of digital markets with regard to digital platforms. While various aspects of the new regulatory approach has not yet been clarified, the Commission could rely on experience various other regulatory initiatives it

In the US, the firm foundation and preference for antitrust law enforcement and non-intervention in markets makes the path towards more regulatory approach unlikely. However, the question whether the current regulatory structure, where available, can provide the "antitrust function" is since the decisions the Supreme Court in *Trinko* and *Credit Suisse* also confusing. What seems more feasible is to make use of the current enforcement antitrust enforcement system by relying on power of the FTC under Section 5 of the FTC Act and a rejuvenation of the institutional system by engaging in interagency cooperation and enforcement by the public enforcement agencies and formulating unambiguous priorities and straightforward impact assessments of existing operations and capabilities.