The DSMS between competition law and regulation

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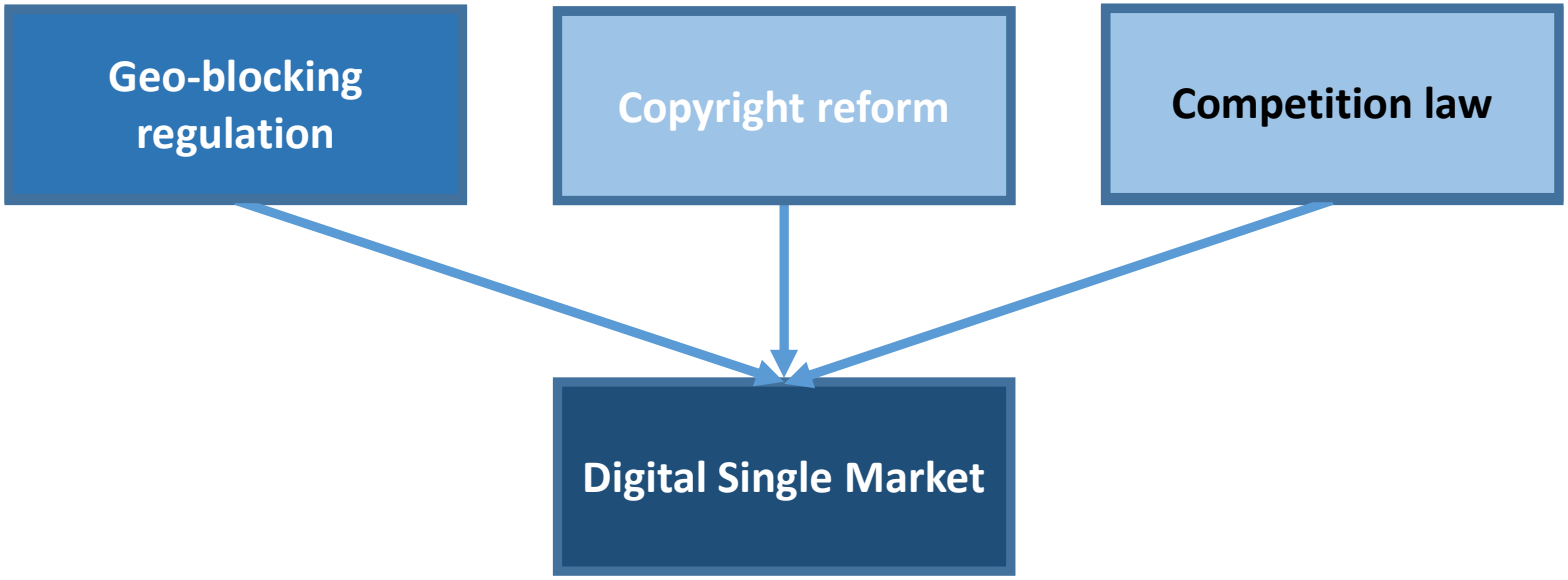
Between competition law and regulation



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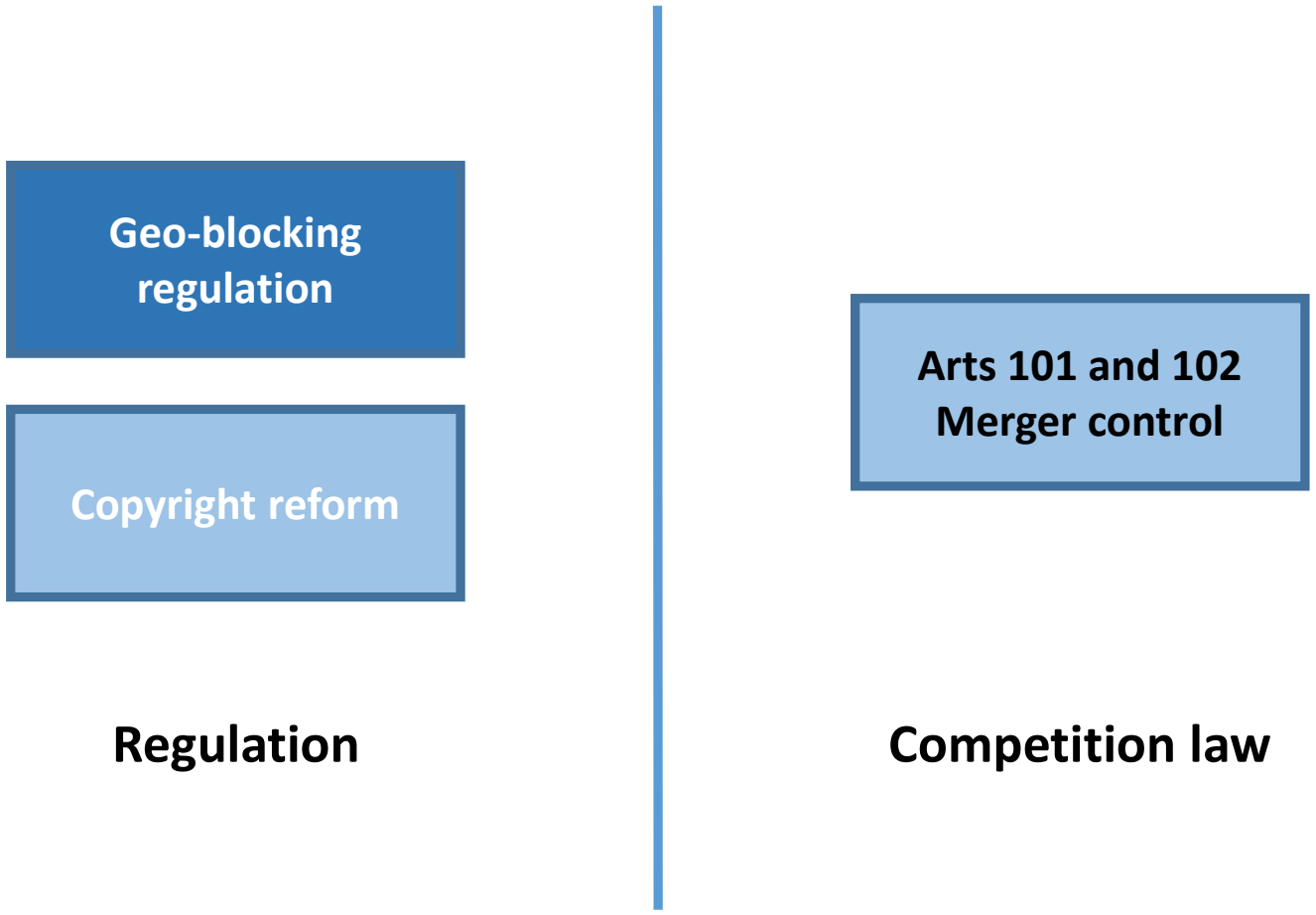

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Regulatory approaches	Competition law	Examples
***Ex ante* intervention**	Yes	*Premier League*
Positive obligations	Yes	*Microsoft*
General measures	Yes	*Guidelines standards*

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- What are, then, the limits to competition law enforcement? Competition law cannot ignore, or aspire to change:
  - Regulatory framework in which competition law applies
  - Economic features of the sector

→*Need, in other words, to consider the **'economic and legal context'***

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- **Question 1:** is there a restriction if what precludes competition is not the practice, but the underlying regulatory framework?
  - Is the practice ***capable*** of restricting competition in that legal context?
  - Can the object of a practice be anticompetitive in such circumstances?

Micro Leader: an agreement between Microsoft and its Canadian distributors could not have precluded the sale of exports to Europe. The intellectual property regime, not the practice, would have prevented distributors from selling in Europe.

E.On Ruhrgas: there is a de facto monopoly that would have prevented market entry irrespective of the terms of the agreement between the parties.

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- **Question 2:** is there a restriction if the practice is an adaptation to the features of the market?
  - What is the counterfactual in such circumstances?
  - Can the object of a practice be anticompetitive in such circumstances?

Cartes Bancaires: the market in which the co-operation agreement operated faced a free-riding problem and conceived a contractual device to bring balance to the two sides (issuing and acquiring) of the market.

Erauw-Jacquery: the value of the basic seed protected by plant breeders' rights depends on it being properly handled by licensees

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‘US film studios typically license audio-visual content, such as films, to a single pay-TV broadcaster in each Member State (or combined for a few Member States with a common language). The Commission's investigation, which was opened in January 2014, identified clauses in licensing agreements between the six film studios and Sky UK **which require Sky UK to block access to films through its online pay-TV services (so-called “geo-blocking”)** or through its satellite pay-TV services to consumers outside its licensed territory (UK and Ireland)’.

Commission sends Statement of Objections on cross-border provision of pay-TV services available in UK and Ireland (23 July 2015)

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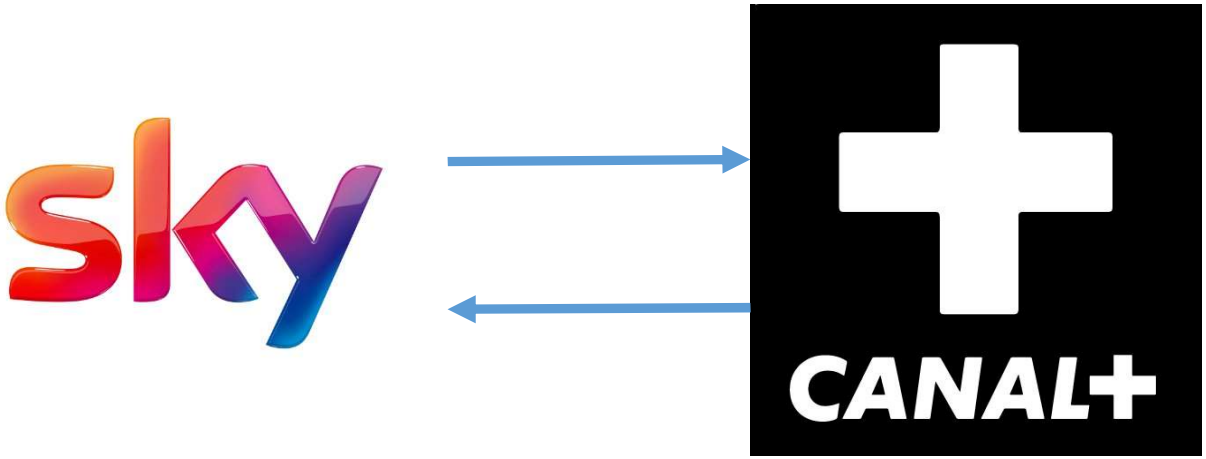

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‘14. […] the fact that the right of a copyright owner and his assigns to require fees for any showing of a film is part of the essential function of copyright in this type of literary and artistic work […]

[…]

16. The effect of this is that, whilst copyright entails the right to demand fees for any showing or performance, the rules of the Treaty cannot in principle constitute an obstacle to the geographical limits which the parties to a contract of assignment have agreed upon in order to protect the author and his assigns in this regard […]’

Case 62/79, *Coditel I*

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- Article 3(1) of the InfoSoc Directive reads:

  ‘Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them’

- Article 3(3) of the InfoSoc Directive reads:

  ‘The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article’

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‘86. In order to determine whether an undertaking is a potential competitor in a market, the Commission is required to determine whether, ***if the agreement at issue had not applied***, there would have been ***real concrete possibilities*** for it to enter that market and to compete with established undertakings. Such a demonstration must not be based on a mere hypothesis, but must be supported by evidence or an analysis of the structures of the relevant market. Accordingly, an undertaking cannot be described as a potential competitor if its entry into a market is not an economically viable strategy […]’

Case T-360/09, *E.ON Ruhrgas AG v Commission*

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‘Settlement agreements in the context of technology disputes are, as in many other areas of commercial disputes, in principle a legitimate way to find a mutually acceptable compromise to a bona fide legal disagreement. The parties may prefer to discontinue the dispute or litigation because it proves to be too costly, time-consuming and/or uncertain as regards its outcome. **Settlements can also save courts and/or competent administrative bodies effort in deciding on the matter and can therefore give rise to welfare enhancing benefits** […]’

Guidelines on technology transfer agreements

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- If the agreement does not restrict competition that would have existed in its absence:
  - Would a finding of infringement be directed against the agreement or against the underlying regulatory framework (e.g. copyright regime)?
  - If the analysis under Article 101(3) TFEU not tantamount to establishing whether the regulatory regime is acceptable?
    - It is difficult to think of precedents for this approach
    - There is a long-standing principle whereby competition law does not question the existence of intellectual property rights but only their exercise (*Consten-Grundig*)

Limits to competition law enforcement

asics

amazon.com
marketplace

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‘Does it constitute an aspect of competition that is compatible with Article 101(1) TFEU if the members of a selective distribution system operating at the retail level of trade are prohibited generally from engaging third-party undertakings discernible to the public to handle internet sales, irrespective of whether the manufacturer’s legitimate quality standards are contravened in the specific case?’

Case C-230/16, *Coty* (pending)

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‘37. In the light of those considerations, the answer to the first question is that Article 8(2) of the Directive is to be interpreted as meaning that the proprietor of a trade mark can invoke the rights conferred by that trade mark against a licensee who contravenes a provision in a licence agreement prohibiting, on grounds of the trade mark’s prestige, sales to discount stores such as the ones at issue in the main proceedings, provided it has been established that that contravention, by reason of the situation in the main proceedings, damages the allure and prestigious image which bestows on them an aura of luxury’.

Case C-59/08, *Copad*

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‘74. Having therefore found, in paragraph 104 of the judgment under appeal, that there were ‘interactions’ between the issuing and acquisition activities of a payment system and that those activities produced ‘indirect network effects’, since the extent of merchants’ acceptance of cards and the number of cards in circulation each affects the other, the General Court could not, without erring in law, conclude that the measures at issue had as their object the restriction of competition within the meaning of Article [101(1) TFEU]’.

Case C-67/13 P, *Cartes Bancaires*