EU Competition Law Summit

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Understanding How Regulatory Standards Influence Competition Law Standards of Review

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1. EU-Symbiotic interplay between *ex ante* and *ex post* frameworks

- Wave of liberalisations starting in the late 1990s:

*E.g., c*onvergence of telecoms, media and IT sectors made single EU-wide framework for electronic communications desirable → Adoption of 5 Directives and 1 Decision by 2002, in accord with Article 114 TFEU

- Asymmetric regulation: Gradual phasing out of sector-specific regulation until competition in relevant wholesale markets can be "mimicked"
- ***TeliaSonera (ECJ, 2011)***: Not necessary to rely on abusive refusal to supply (*e.g.,* no reliance on essential facilities doctrine) to establish an obligation to deal → Regulatory obligations to supply can be equivalent to antitrust obligations to supply
- Competition rules override regulatory principles (***Telefonica (ECJ, 2014)***, ***Deutsche Telekom (ECJ, 2010)***, ***Telekom Polska (ECJ, 2018)***, ***Slovak Telekom (GC, 2012)***)
- Divergent approach in the US (*e.g.*, ***Verizon (2004), Linkline (2009), Credit Suisse (2007)***), where *ex ante* remedies trump *ex post* liability (as in the case of India); Compare with ***AstraZeneca (ECJ, 2012)*** in EU, where an abuse of regulatory procedures can amount to an abuse under Article 102 TFEU

→ *Ex ante* principles of economic regulation coexist with *ex post* principles (*e.g.*, application of the "three-criteria" test/assumption that *ex ante* will not be required over time)

2. Regulatory ends & merger means...

- A long history of internal market principles being pursued in energy sector cases (*e.g.*, *VEBA/VIAG (2000)* – commitments to divest grid capacity to facilitate cross-border exports and to foster internal market policy; *Endesa/E.ON (2006)* – potentially first pan-European energy operator)
- Ignoring the fact that competition cannot take place until a monopoly right is rescinded (*EDP/GDP (2005)* – derogation to Portugal under the 2nd Gas Directive)
- A track record of telecommunications sector cases pre-empting liberalization initiatives (*e.g.*, *Vodafone/Vivendi/Canal+ (2000)* – commitments to prevent leveraging practices that would have harmed liberalisation goals; *Hutchison 3G UK / Telefonica Ireland (2014)* – commitments on network capacities for MVNOs, divestiture of spectrum, and cooperation agreements with fringe operator to ensure open market; *Telia/Telenor (1999)* – pre-emption of Unbundling Regulation; *Telia/Sonera (2002)* – withdrawal of fixed incumbent from cable network beyond requirements of Cable TV Directive)
- Is the increasing focus on high margins a reflection of the perceived role of high margins in regulated sectors (*i.e.*, inefficient monopoly profits)?

3. A particular application of the "essential facilities" doctrine in energy and ICT sectors...

Energy

- Capacity hoarding and mismanagement: Fell within the scope of traditional essential facilities doctrine, since TSO was obliged to make available booking slots which it did not use itself (*e.g.*, ***ENI (2003)***, ***RWE (2009)***)
- Strategic under-investment: Remedies imposed in terms of investment in "new capacity" to meet competitors' downstream demand, despite the fact that *ex post* essential facilities doctrine is limited to mandating access, but not pro-active investments (***ENI (2003)***, ***GDF (2009)***)
- Long-term capacity bookings: Most expansive notion of essential facilities doctrine, as it obliges TSO to transfer its proprietary rights to competitors in order to facilitate their market entry (***GDF (2009)***, ***E.ON (2010)***)

TMT

- No need for "indispensability" of output in telecoms margin squeeze cases (*e.g.*, ***Slovak Telekom (GC, 2012)***)
- No need for recourse to essential facilities doctrine in ***Google Shopping (2017)*** to substantiate discrimination allegations

4. Getting to the bottom of "costs"…

The pervasive use of the LRIC/ATC cost model in ex post enforcement:

- Predatory pricing (***AKZO - ECJ, 1991***)
- Selective Price Discounts (***Post Danmark I - ECJ, 2012***)
- Margin Squeezes (***Deutsche Telekom - ECJ, 2010***; ***TeliaSonera - ECJ, 2011***; ***Telefonica - ECJ, 2014***; ***Slovak Telecom – GC, 2012***)
- Exclusivity and fidelity rebates, where Commission choses to use "as efficient competitor test" under its Article 102 Guidance (***Post Danmark II – ECJ, 2015***, ***Intel – ECJ, 2017***; see also ***Qualcomm - 2018***)
- "Naked" LRIC standard progressively used in termination cases and international roaming analysis

4. Getting to the bottom of "costs"... *(continued)*

Commission's effort to harmonise ex ante approach to cost

- Commission prescribes mandated cost formulae through "soft law" instruments (*e.g.*, ***Recommendations on fixed and mobile termination rates (2009) and broadband costing methodologies (2013)***)
- Complete disregard of the principles espoused in ***ARCOR (ECJ, 2008)*** regarding right of Member States to choose an appropriate costing formulae of their choice
- Compare to traditional Article 102 TFEU approach in cases such as ***United Brands (ECJ, 1978)*** (the excessive price might have "no reasonable relation to the economic value of the product supplied"), ***General Motors (ECJ, 1975)***, ***British Leyland (ECJ, 1986)*** and ***Tourniere (ECJ, 1989)*** (actual costs and "benchmark" tests)
- Increased intervention for excessive pricing (*e.g.*, Commission's ***Aspen (2017)*** investigation following Italy; ***Concordia (2017)*** case in UK)

4. Getting to the bottom of "costs"... *(continued)*

Costs expected from an "efficient operator"

- *E.g.,* 3rd Energy Package: TSO's charges for access to its networks must "reflect the actual costs incurred, insofar as such costs correspond to those of an efficient and structurally comparable network operator" (***Article 13 Gas Regulation 714/2009; Article 14 Electricity Regulation 715/2009***)

➢ As an *ex ante* principle, incumbents should not recover costs related to the grant of access, where such costs would not have been incurred from an efficient operator. In determining the costs of an efficient operator, regulators enjoy a margin of discretion (see, *e.g.,* Judgment of 17 August 2016, ***BVerwG – 6 C 50/15 (VG Köln)***)

5. Dealing with "online platforms and social networks"…

- Intrusion of concepts of "neutrality" and "fairness" into analysis, given that the competitive dynamics of platforms turns on the striking of the appropriate balance between the different sides of the market being affected in particular platforms.
- Fundamental 'conflict of interest' principles in *ex ante* world find common ground with Article 106 jurisprudence which lend themselves to addressing bottleneck situations.
- Particular application of the non-discrimination principle in such an environment.
- Increased vigilance regarding "transparency" allowing end-users to self-police potentially abusive behaviour.
- The special case of data protection infringements viewed through an antitrust lens.
- The potential use of margin squeeze as the prism through which certain platform abuses might be assessed.

5. Dealing with "online platforms and social networks"... (continued)

- *Facebook* investigation by Bundeskartellamt (*2017*) – assessment to what extent non-compliance with data protection rules may amount to an exploitative abuse of dominance → German Supreme Court (BGH) has acknowledged this possibility in connection with imposing unlawful general terms (*VBL-Gegenwert, 2013*)
- Actions against *Amazon* in France (*2017*) and Germany (*2018*) in relation to the online platform's "unbalanced relationship with its sellers" driven by its dual role as a platform and as a seller → equivalent to vertical integration concerns in physical network industries
- Reform of German and Austrian merger thresholds (*2018* and *2017*): Notification required where target company (still) only achieves a low turnover but where economic significance of merger is reflected in a high transaction value

6. Institutional issues

- Increasing tendency towards converged regulators (*e.g.*, Netherlands, Spain)
- Adoption of hybrid *ex post/ex ante* approaches both institutionally (*e.g.*, Australia, United Kingdom) and in terms of remedies (*e.g.*, United Kingdom)
- Sector-specific regulators with discrete competition powers (*e.g.*, Greece)
- Conflict between efficiency and experience vs potential for regulatory capture and greater likelihood of "Type 1" errors

7. Reverse engineering (*ex post* affecting *ex ante*)

- Competition law principles overridden by national regulation in the field of MFNs in context of hotel reservations (*e.g.*, ***Macron Act 2015*** in France)
- Under ***Net Neutrality Regulation 2015/2120***, certain normative abusive behaviour, *e.g.*, certain types of zero-rating, are restricted under the guise of symmetric regulation
- Application of collective dominance principles under the ***SMP Guidelines (2018)***
- Future regulation of certain aspects of online platforms (*e.g.*, at EU level, in Germany)
- Possibility of approach on unilateral practices diverging even further as between the US and the EU, given the US tendency to keep *ex ante* and *ex post* disciplines in distinct enforcement silos