THE REGULATION/COMPETITION INTERACTION

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ABSTRACT

Government regulation in markets is ubiquitous and takes many forms. In this paper we are concerned with two forms of such intervention- economic regulation and competition law and policy- and their relationship within the context of EU regulated markets (i.e. energy, telecommunications, water, railways). During the last 30 years, these sectors have gone through a major transformation (conventionally, but mistakenly called ‘deregulation’) that has altered both structures and legal frameworks. The causes of this reform mix a number of legal, economic, political and technological rationales that we group in two dimensions: institutional and substantive. From an institutional perspective, the old centralised system of control, focused exclusively on the state and the firms, has given place to a new equilibrium characterized by a multiplicity of actors and a decentralised regulatory paradigm. From a substantive perspective, the system is characterised by the use of competition law enforcement as a means to ‘control’ the outcomes of decentralisation. Within this setting, competition law has been used in a ‘regulatory fashion’ more than in any other jurisdiction. After thoroughly exploring these developments, we demonstrate that competition is not the antithesis of regulation, but a form of control, and further call for attention to the increased reliance on ‘regulatory antitrust’ in Europe.
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I. INTRODUCTION

Government intervention in markets is ubiquitous and takes many forms. This chapter is concerned with two forms of such intervention — economic regulation and competition law and policy — and their relationship within the context of the EU ‘regulated markets.’

Traditionally, competition and regulation were seen as two discrete, opposed categories. An industry was either ‘regulated’ or ‘unregulated’, depending on how much firms were left unrestrained to operate in the market. The following general rule applied: the less the State intervenes in the working of markets, the more room for competition. This view was partially sustained in the common, but erroneous statement that sector-specific regulation is an ex ante mechanism for market intervention, whilst competition law applies ex post to cure observable impediments to competition or infringements of law.

Eventually, the boundaries between competition and regulation vanished. During the last 30 years, regulated markets have gone through major processes of reform that have altered both structures and legal frameworks. A common feature of these developments has been that markets have, to different levels, remained regulated. Both the recognition that markets are not the antithesis of regulation and (as we shall see) that regulation encompasses today a

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1 Economic regulation ‘typically refers to government-imposed restrictions on firms’ decisions over price, quantity, and entry and exit,’ see W. KIP VISCUSI, JOSEPH E. HARRINGTON & JOHN. M. VERNON, ECONOMICS OF REGULATION AND ANTITRUST (4th ed., MIT Press 2005) 357. They mention that on occasions governments control other variables such as quality and investment.

2 We acknowledge the terminology is somewhat ambiguous. However, a precise definition is of no concern here. We refer to sectors such as energy, telecommunications, water and railways.

3 In fact, the common belief that regulated markets were subject to a ‘deregulatory’ movement was wrong. As one author puts it, in the end freer markets meant more rules, see STEVEN K. VOGEL, FREER MARKETS, MORE RULES-REGULATORY REFORM IN ADVANCED INDUSTRIAL COUNTRIES (1st ed., Cornell Univ. Press 1996).
plurality of actors, have been well captured in contemporary political science literature. From the ‘rise of the regulatory state’\textsuperscript{4} to ‘decentred regulation’\textsuperscript{5} and ‘nodes of governance,’\textsuperscript{6} different characterisations have attempted to typify what is, largely, the same phenomenon – the presence of the State has not diminished. Recently, the idea has been summarised in the acute concept of ‘regulatory capitalism.’\textsuperscript{7} As it so precisely synthesises, markets are merely one regulatory mechanism that joins a plethora of State and non-State forms of regulation. Regulation is now diffuse and fragmented, and entails a wide set of control activities and policies that go beyond the direction of the State, but that reserve it a dominant place.

What varies is the degree of regulation, being competition merely the mildest form. This point is further stressed by the fact that most practical differences in terms of the timing of intervention appear blurred and non-substantial.\textsuperscript{8} In reality, both competition and regulation must be considered complements, not substitutes, with competition serving three main goals: ‘(1) to help endure that the regulatory regime achieves its economic goals, whatever those goals may be; (2) to make markets perform more competitively, given the regulatory regime that happens to control them; and (3) to scrutinize private conduct that is not effectively reviewed or controlled by the regulatory regime.’\textsuperscript{9} Therefore, the question is really one of limits: how much regulatory oversight is necessary to make a conduct immune from competition scrutiny?


\textsuperscript{8} Competition authorities may also intervene \textit{ex ante}, as occur in merger control or when sanctions are imposed over the basis of ‘likely effects.’ Likewise, regulators may act \textit{ex post}, as occur in dispute settlement process or when they exert powers in competition law (in the case of agencies with concurrent powers).

In the EU, the answer has been importantly shaped by the single market objective. The interplay between regulation and competition has followed a complex and heterogeneous path. Developments have encompassed three distinct but interrelated aspects: privatisation (i.e., the change in the ownership pattern of the industries from the State to private hands), liberalisation (i.e., the breaking up of former monopolies and the introduction of competition), and de- or re-regulation (i.e., the change in the traditional forms of regulation for less intrusive forms). Thus, whilst the early setting of regulated markets presented a rather homogeneous configuration characterised by State ownership, vertical integration and monopoly, the most recent movement has been towards privatisation, vertical disintegration and liberalisation. Within this setting, competition law has arguably been more ‘regulatory’ than in other jurisdiction. The causes mix a number of legal, economic, political and technological rationales that can be grouped in two dimensions – institutional and substantive.

From an institutional perspective, there has been a swing from a trend towards centralisation (with an increased legislative intervention at the EU level and intervention through competition law enforcement) to a new equilibrium characterized by a multiplicity of actors and a decentralised regulatory paradigm (with the notable exception of the still relatively minor – but increasing – role of EU regulatory agencies). The current system is characterized by some still feeble form of regulatory oversight at the EU level through the adoption of directives setting up a broad and general regulatory framework. All of this is explored in Section II.

From a substantive perspective, the system is characterized by the use of competition law enforcement as a means of control of the decentralised system. Competition law, used as a

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10 Helm and Jenkinson explain that ‘State ownership “resolved” the conflict of interests between the private and public good; vertical integration ensured that costumers bore the risk of upstream sunk investments; and monopoly prevented the destructive competition which was widely thought to have pervaded the industries in the 1920s and 1930s.’ See Dieter Helm & Tim Jenkinson, Introducing Competition into Regulated Industries, in DIETER HELM & TIM JENKINSON (eds.), COMPETITION IN REGULATED INDUSTRIES (1st ed., OUP 1998) 1.

'can opener',\textsuperscript{12} plays a vital role in shaping developments in regulated markets. In practice, the enforcement of competition law by the Commission and courts operates as a way to check and balance both the relative regulatory autonomy from which Member States still benefit and the relative freedom of firms to adopt their strategies in a liberalized market. An important implication is that the Commission has \textit{de facto} become the regulator of regulators, as it employs competition law to oversee national regulators when the latter perform their duties in a manner the Commission deems incorrect. These assertions are explained in Section III.

Section IV contains some concluding remarks.

II. \textbf{THE INSTITUTIONAL CONTEXT}

In the EU, the application of competition law to regulated markets has been shaped by complex institutional constraints. Overall, there has been an increasing recognition that the main regulatory interactions are not centred exclusively on the State and firms. The old centralised system of control through ministerial governmental departments has given rise to a new one where the importance of these traditional actors has been matched with that of ‘new’ actors (such as national regulatory authorities or NRAs, national competition authorities or NCAs, experts and interest groups). Therefore, rather than being a two-tier hierarchy, nowadays the regulatory activity encompasses a number of entities that interact strategically in specific domains. This means that the whole decision-making process has become more pluralistic. The ‘regulatory network’ is now broader, more sophisticated and more intricate for the firms, which now face, interact with, and are accountable to a number of entities at both national and supranational levels.\textsuperscript{13}


\textsuperscript{13} In fact, different types of authorities may be simultaneously competent for the same issue.
This section explains how this institutional evolvement has been crucially influenced by a continuous and profound involvement of the Commission in the liberalisation process\(^{14}\) (A), and that such involvement is linked to a situation of distrust towards NRAs (B).

A. Changes in the regulatory landscape

The opening of national monopolies to competition could not ensure that the newly created markets would become immediately competitive, primarily because of the temptation of incumbents to block new entrants through a variety of practices (e.g., refusal to access to essential inputs, abusive pricing for such inputs, or margin squeeze).\(^{15}\) Therefore, as explained in this section, the EU adopted a regulatory framework\(^{16}\) aiming at controlling the market power of incumbents and promoting a set of social objectives.\(^{17}\) The framework also provided for the establishment of NRAs in the EU Member States charged with implementing and enforcing this major regulatory reform.\(^{18}\) However, given the relative failure of this formal strategy at the beginning of the process, the movement advanced through more informal ways of regulation by cooperation. Only recently it has retaken the path toward more formal and centralised ways of regulation.

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\(^{14}\) The involvement is dissimilar across sectors. For instance, water (including sewerage or sanitisation) remains largely out of the purview of the EU, mostly because of its lack of or limited cross-border trade. The communitarian involvement in the sector responds mainly to health reasons, as the three main directives governing the sector shows: Council Directive 91/271, 1991 O.J. (L 135) 40 (EEC) (concerning discharges of municipal and some industrial waste waters); Council Directive 98/83, 1998 O.J. (L 330) 32 (EC) (concerning potable water quality); and Directive 2000/60, 2000 O.J. (L 327) 1 (EC) (the Water Framework Directive). No major effort has been put to open water markets to competition. On the contrary, the Commission has been very active in postal services, telecommunications, energy markets and transport.


\(^{16}\) That is, the various pieces of secondary legislation adopted by the EU institutions aiming at the progressive liberalization of network industries.

\(^{17}\) E.g., universal service obligations and interconnection. See DAMIEN GERADIN & MICHAEL KERF, CONTROLLING MARKET POWER IN TELECOMMUNICATIONS (1st ed., OUP 2003).

1. The legislative strategy and the creation of NRAs

The first timid communitarian efforts to liberalise regulated markets across the EU were given in 1987, with the Green Paper on the development of the common market for telecommunications.\(^\text{19}\) In 1988 the Commission launched its report on the ‘Internal Market for Energy’, which was soon followed by the Green Paper on The Development of the Single Market for Postal Services (1991) and the Guidelines for the Development of Community Postal Services (1993).\(^\text{20}\) It was only then that liberalisation was seen as a logical consequence of the internal market programme and hence a policy to pursue at a Community level. At the beginning the approach was largely \textit{ad-hoc}.\(^\text{21}\) But during the early 1990s, after the British privatisation programme was implemented and some timid steps towards liberalisation have been made in telecommunications and broadcasting, the process of liberalisation started to be marked by legislative intervention at the EU level and aggressive judicial intervention through competition law enforcement.\(^\text{22}\)


\(^{21}\) The approach was very a sum of tactics rather than a well-conceived strategy – i.e. it was sector-specific rather than a general liberalisation plan. As Pelkman explains, ‘This outburst of liberalization activities at EU level was not the result of an overall plan or of a fundamental discussion paper about the economic or other advantages of liberalization, or its adjustment costs, for that matter, the appropriate regulation that should be in place, the nature and implications of competition policy when applied to these sectors, or the optimal assignment of regulatory and competition policy powers between the EU and national governments. It very much looked like an \textit{ad-hoc} approach, on a sector-by-sector basis, and – in the absence of overall policy guidance – driven by the Competition Directorate-General.’ \textit{See} Jacques Pelkman, \textit{Making EU Network Markets Competitive}, 17 OXFORD REV. ECON. POL. 432, 435-6 (2001).

The Commission introduced legislative packages that implemented the measures anticipated by the papers. Nonetheless, the measures faced fierce political opposition of some Member States, especially when the liberalisation wave reached the energy and postal sectors. This opposition heavily influenced the approach of the Commission. On the one hand, it threatened to take legal actions against those Member States reluctant to open their markets. On the other hand, it opted for a legislative strategy of ‘negotiation’. Competition was injected in sectors regulated by national measures through directives and decisions adopted on the basis of Article 95 EC (currently Article 114 TFEU) and 86.3 EC (currently Article 106.3 TFEU) in the case of state owned industries and companies holding special and exclusive rights.

23 At first, the Commission made use of the special powers given by former Article 86.3 EC. The article allowed the Commission to issue directives without requiring the Council and the European Parliament. The first two (and crucial) telecommunications directives during the late 1980s and early 1990s were issued in use of these powers, which well served to open markets and avoid delays in the process – particularly delays due to political intervention. However, in other sectors – especially energy and post – the use of similar strategy crashed into even more pronounced political resistance of some Member States.

24 On this strategy, see infra Section III.

25 Most of the liberalisation initiatives were based upon former Article 95 EC (currently Article 114 TFEU). According to this article, the Commission can propose harmonisation measures for the ‘approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market’ (Case C-376/98, Germany v Parliament and Council (Tobacco advertising case), 2000 E.C.R. I-8419, at para. 84) – i.e. legislation under Article 95 EC (114 TFEU) is designed to improve the conditions for the establishment and functioning of the internal market. That means that national laws can be challenged if they are deemed to frustrate the internal market. To adopt the harmonisation measure, the European Parliament and a qualified majority of the Council must approve the legislative proposal – i.e. a high degree of political agreement is required.

26 The Commission relied on the lengthy administrative procedures of Article 114 TFEU (former Article 95 EC) in the area of energy and postal services liberalization.

27 Article 106.3 TFEU provides the Commission with a ‘trump card’ to issue directives. The Commission relied on this provision so as to dismantle exclusive rights in the telecommunications sector.

28 The definition of special rights has been determined by the Court of Justice of the European Union (hereinafter CJEU) following a series of challenges brought by Member States against directives issued by the Commission on the basis of what is currently Article 106.3 TFEU in the course of liberalizing the telecommunications sector. See cases C-202/88, France v Commission, 1991 E.C.R. I- 1223 and C-271, 281 and 289/90, Spain, Belgium and Italy v Commission, 1992 E.C.R. I-5833. The definition was set out in the Preamble to Directive 94/46 amending Directive 88/301 and 90/388 in particular with regard to satellite communications, 1994 O.J. (L 268) 15 (EC): ‘...rights that are granted by a Member State to a limited number of undertakings, through any legislative or regulatory or administrative instruments which, within a given geographical area, limits to two or more the number of such undertaking, otherwise than according to objective, proportional and non discriminatory criteria, or designates otherwise than according to such criteria, several competing undertakings, or confers on any undertaking or undertakings, otherwise than according to such criteria, legal or regulatory advantages which substantially affect the ability of any other undertaking to engage in any of the abovementioned activities in the same geographical area under substantially equivalent conditions.’
However, since Member States enjoyed a high degree of regulatory autonomy, directives merely set up a general framework and national legislation need to be enacted in order to implement their provisions. Although the transposition of the directives into internal legislation was compulsory, the regulatory oversight that EU institutions could exert was weak. Furthermore, regulation was essentially carried out through sector-specific rules that were applied by Member States with substantial leeway.

As a result, to a large extent the legislative strategy failed. There was no integrated and uniform regulatory framework. Whilst the Single Market implies a common regulatory framework across Member States, in practice the (centralised) communitarian efforts to liberalise regulated markets did not lead to the establishment of common rules. More fundamentally, despite the formal introduction of competition in most national markets, in many of them vertical integration and monopolistic structures remained in place.

The relative failure of the legislative strategy was, however, ‘compensated’ by the creation and spread of NRAs. Generally, with the main exception of the UK, there were no

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29 Exclusive rights exist where a monopoly has been granted by the State to one entity to engage in a particular economic activity on an exclusive basis. See e.g. Case C-155/73, Sacchi, 1974 2 C.M.L.R. 177 (broadcasting monopolies); Case C-41/90, Höfner v Macroton, 1991 E.C.R. I-1979 (employment recruitment services); Case C-66/86, Ahmed SaeedFlugreisen and Silver Line Reiseburo GmbH v Zentrale zur BékampfungUnlauterenWettwesbeV, 1989 E.C.R. 803 (monopoly over an air route); C-179/90, Merci Convenzionali v Porto di Genova, 1991 E.C.R. I-5889 (monopoly over uploading services at a port); Case C-323/93, Societé Civile Agricole du Centre d’ Insémination de la Crespelle, 1994 ECR I-5077 (monopoly over bovine insemination services). See, however, Case C-260/89, EllinikíRadiofíoníTíleorási (ERT) v DEP, 1991 ECR I-2925, where the rights granted to the Greek television duopoly, ERT, were designated as ‘special or exclusive.’

30 The duty of national courts to construe national rules in accordance with relevant directives was first referred by the CJEU in Case C-14/83, Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen, 1984 ECR 1891 and Case 79/83, Dorit Harz v Deutsche Tradax GmbH, 1984 ECR 1921. See also Case C-106/89, Marleasing SA v La Comercial Internacional de Alimentacion SA, 1990 ECR 4135, at para. 8, stressing that courts are only obliged to interpret domestic legislation in conformity with Community directive ‘in so far as it is possible to do so.’


independent regulators in most Member States circa 1990.\(^{33}\) Although NCAs had already made their way in some of them, NRAs were far less blessed by Governments – particularly in countries where firms were publicly owned and enjoyed a ‘national champion’ status. Central governments were the exclusive rule-setters and concentrated most regulatory powers. Soon after the first efforts to liberalise regulated markets, however, that structure was radically altered. NRAs spread widely through Member States. The reasons vary and combine both EU and internal pressures.\(^ {34}\) In general, they were linked to specialisation and expertise, ‘blame-shifting’, and credible commitments. In any event, a number of former central government powers were increasingly being delegated to the new agencies. NRAs became present in a variety of sectors and their existence increasingly formalized at the EU level.\(^ {35}\)

Crucially for the process, NRAs were mainly established as independent authorities.\(^ {36}\) In a context where some firms had been national incumbents for long periods of time and a fragmented market was the rule, the principal aim of the regulatory framework was to insulate NRAs from the influence of national governments – both formally and substantially. Formally, they were not subjected to governmental hierarchical control.\(^ {37}\) From a substantial perspective,

\(^{33}\) For most part of the 20\(^{th}\) century there were very few NRAs in European countries. The situation was only altered when Britain began to create new agencies along with the privatisation process occurred during the 1980s. Note, however, that similar semi-independent bodies (‘regulatory commissions’) had already been developed in the UK during the 19\(^{th}\) century, see CHRISTOPHER D. FOSTER, PRIVATIZATION, PUBLIC OWNERSHIP AND THE REGULATION OF NATURAL MONOPOLY ch. 2 (1st ed., Blackwell 1992).

\(^{34}\) For instance, it is largely recognised that in Britain, NRAs were created to deal with market power of dominant incumbents as well as enhance credible commitment. The EU was entirely absent in this process. In contrast, European reforms played a key part in the creation of French NRAs. There, the electricity regulator, the telecommunications regulator and the post regulator were all established in legislation aiming to transpose European directives (on third party access) into national law.


\(^{36}\) As Geradin et al. point out, there is no single definition of NRAs, and countries differ in terms and legal doctrines, see DAMIEN GERADIN, RODOLPHE MUNOZ & NICOLAS PETIT (eds.), REGULATORY AUTHORITIES IN THE EC: A NEW PARADIGM FOR EUROPEAN GOVERNANCE (1st ed., Edward-Elgar 2005). For instance, France includes in the category of autorités administrative indépendantes not only NRAs, but also other bodies with formal independence from the government.

\(^{37}\) Note that the first EU directives only required that regulation be undertaken by a body separated from market suppliers, but in many countries these provisions were used to justify the independence from governments.
independence was guaranteed by entrusting NRAs with specific tasks centrally designated in the directives – i.e. a strategy of ‘normative harmonisation’ was followed in order to avoid that central governments may circumscribe their powers.38

However, despite the spread of NRAs throughout Member States, and despite the homogeneous powers they were given, the outcomes were heterogeneous. Whilst generally most –if not all– NRAs had broad duties and extensive powers to oversee their respective markets, their strategies and behaviour heavily diverged.39 Their level of ‘politisation’ differed; the scope of their jurisdiction was dissimilar (e.g. some were created with concurrent jurisdiction with antitrust authorities); and their procedures to set tariffs were also very disparate. Overall, the degree of discretion varied, so mechanisms to control it were introduced. In the telecommunications sector, for example, the former ‘Framework Directive’ expressly provided for a mechanism of centralised control.40 By the same token, the adoption by the Commission of guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services also attempted to reduce the interpretative discretion of NRAs.41 As a consequence, in that sector competition law and sector-specific regulation came closer, with key concepts used

Nonetheless, across countries (and also amongst authors) the criteria to assess independence vary. Independence has been strongly supported by the CJEU. In RTT the CJEU suggests that the regulator’s independence from the regulated firms is a principle of EU law, see Case C-18/88, RTT v GB-INNO-BM SA, 1991 ECR I-5941.

38 See, for instance, Articles 6 and 7 of Directive 2003/54, supra note 35. The newest directives significantly enhance the independence of NRAs in Member States. In addition, they provide new objectives, duties and powers of NRAs. See e.g., Directive 2009/72 concerning common rules for the internal market in electricity and repealing Directive 2003/54, 2009 O.J. (L 211) 55 (EC), chapter IX (Articles 35-40).

39 In the same sense Mark Thatcher, Regulatory Agencies, the State and Markets: a Franco-British Comparison, 14 J.E.P.P. 1028. See also Mark Thatcher, From Industrial Policy to a regulatory State: Contrasting Institutional Change in Britain and France, in HAYWARD & MENON (eds.), supra note 32, ch. 18.

40 In brief, Article 7 of the Directive 2002/21, 2002 O.J. (L 108) 33 (EC) (‘Framework Directive’) provided that all NRAs market definitions different from those identified in the ‘Commission recommendation on the relevant product and service markets within electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC,’ 2007 (L 344) 65 and all ‘Significant Market Power’ designations, were subject to a possible Commission veto.

41 Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, 2002 O.J. (C 156) 6.
indistinctly in both areas. However, in no other sector it was possible to introduce similar type of control.

Most importantly, diverse principles were emphasised in different countries. Thus, while the opening of markets to competition and the control of market power was the main concern in the UK, the administrative theory of the ‘public service’ gained momentum in France, Italy and other continental countries. These diverse principles translated in a plurality of policy objectives that go beyond economic goals. For example, the concept of service public gives stronger weight to social concerns such as universal service. Ultimately, the variety of policy goals translated in wider, complex and not-so-clear tasks for NRAs.

In practice, the expansion of the NRAs occurred in a highly decentralised manner. The lack of hierarchical coordination and the decentralised implementation of heterogeneous regulatory policies threatened to undermine the integration of the market. This led to the development of a new policy ‘strategy’: regulation by coordination.

2. Regulation by coordination

On top of the variety of national approaches to regulation, by mid-1990s there were no Community mechanisms in place that could lead them towards synchronisation. Since the lack

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44 Some commentators have welcomed this approach. For example, Prosser indicates that ‘both legal mandates and the operational practice suggest that regulation is a complex task, irreducible to a single goal of efficiency maximization. In particular, three different regulatory tasks should be recognized; regulating monopoly, regulation for competition, and social regulation, especially in the form of universal service,’ see TONY PROSSER, LAW AND THE REGULATORS (1st ed., OUP 1997) 268. See also TONY PROSSER, THE LIMITS OF COMPETITION LAW-MARKETS AND PUBLIC SERVICES (1st ed., OUP 2005).
45 An example of the enlargement of the regulatory duties to areas remotely related with the traditional ones is provided by energy policies. Objectives such as climate change and security of supply have (arguably) even surpassed in importance the long-standing aim of introducing competition for the benefit of consumers.
46 For instance, the first telecommunications liberalisation directives did require the Commission to investigate the necessity of having a European regulator. However, after two consultations, the second package did not provide for
of political willingness and concerns of suppliers impeded the early creation of EU regulators, cooperation was mainly sought through informal agreements and relied upon voluntary participation in EU working groups. Despite the fact that coordination was encouraged, the Commission generally failed to harmonise regulatory norms and practices. Hence, it decided to implement more institutionalised avenues of cooperation and coordination between NRAs, stakeholders and Community institutions. 47 These were eventually achieved through transnational networks of regulators.

The creation of the networks of regulators was a novel approach that required a double delegation of powers and functions: ‘upwards’ from NRAs and ‘downwards’ from the Commission. 48 However, at first their establishment was merely informal. The common characteristic of various ‘groups of regulators’ created since the late-1990s was their lack of formal powers and attributions. 49 Despite this fact, in time their role proved crucial for cooperation. Their explicit objective was to promote the development of the internal market and achieving consistent application of the provisions set out in the respective EU legislation. Also implicitly, the system ensured that the work of NRAs was peer reviewed, therefore fostering regulatory competition.


47 As Scott has described, ‘By the mid-1990s…it was arguable that Community utilities law and policy was entering a new phase in which concerns about integration of utilities markets through liberalization were being balanced by more co-ordinative and co-operative concerns, notably in respect of the protection and development of public service obligations and the co-ordination of trans-European networks.’ See Colin Scott, Changing Patterns of European Community Utilities Law and Policy: An Institutional Hypothesis, in JO SHAW & GILLIAN MORE (eds.) NEW LEGAL DYNAMICS OF EUROPEAN UNION (1st ed., OUP 1996), at p. 193.

48 See DAVID COEN & MARK THATCHER, Network Governance and Multi-level Delegation: European Networks of Regulatory Agencies, 28 J. PUB. POL’Y. 49 (2008) (arguing that the networks represent a new round of ‘double delegations’, although one highly constrained by existing actors – particularly the Commission). Contrast this approach with the common perspective on delegation, supra note 32.

49 Two fora were first created almost simultaneously – the Electricity Regulatory Forum of Florence, established in 1998, which was closely followed by the Gas Regulatory Forum of Madrid established in 1999. Thereafter, groups of regulators were also created in other sectors. E.g., the Council of European Energy Regulators (CEER), and the Independent Regulators Group (IRG) in telecommunications. For an illuminating discussion of regulation by cooperation as an hybrid method of governance, with particular emphasis on the Florence Forum, see BURKARD EBERLEIN, Regulation by Cooperation: The ‘Third Way’ in Making Rules for the Internal Energy Market, in PETER CAMERON (ed.) LEGAL ASPECTS OF EU ENERGY REGULATION (1st ed., OUP 2005), at p. 59.
The success of these groups strengthened the argument for developing more formal ways of coordination and cooperation, parallel to informal groups. A number of new networks were established by EU legislation (normally a decision), which set out their composition, powers, and main functions. They typically included public officials, and the Commission itself had the right to attend meetings. Thus, in the field of electronic communications, the Commission established the ‘European Regulators Group’ (ERG) in 2002. Likewise, in the energy sector, the ‘European Regulators’ Group for Electricity and Gas’ (ERGEG) was established in 2003 as the Commission’s formal advisory group of energy regulators. The emergence of these and other formal forums created more pressure for harmonization (at least of regulatory practices). At the same time, however, the Commission generally gained more supervision powers over NRAs regulations.

In time, discussions on the modernisation of regulatory frameworks and the introduction of Euro-regulators revitalized. Thus, in the energy sector, the so-called ‘Third Package’ was approved with the purpose of further opening up the gas and electricity markets. The package created the ‘Agency for the Cooperation of Energy Regulators’ (ACER), in charge of regulatory cross border issues and coordinating the work of NRAs. Similarly, in the telecommunications sector, in November 2007 the Commission launched a review of the regulatory rules that were in force since 2002. Amongst other changes, the reform introduced the ‘Body of European Regulators for Electronic Communications’ (BEREC), which became a centralised forum of

52 The package was proposed in September 2007, and adopted in July 2009. It entered into force on 3 September 2009.
54 The Council and European Parliament adopted the package of amendments to the 2002 regulatory framework in November 2009. The new rules were published on 18 December 2009 and were to be transposed into the Member States’ national laws by 25 May 2011. All the information is available at <http://ec.europa.eu/information_society/policy/ecomm/index_en.htm> (last accessed: 3 November 2011).
interaction for NRAs and the Commission, in charge of issuing opinions on market definitions and remedies proposed by these bodies.\textsuperscript{55}

The creation of these new agencies at the EU level aimed to improve the consistency in the implementation of the EU regulatory framework. Nonetheless, their practical impact, along with that of the new, integrated institutional frameworks, on the decision-making process and the control exercised on the NRAs remains to be seen. Of particular importance will be the degree of intervention of the Commission and how much its hierarchical powers will be needed to ensure compliance with communitarian objectives.\textsuperscript{56}

\textbf{B. Distrust and mistrust}

Two important consequences of the traditional institutional features of the EU regulatory framework are that national, sector-specific legislation may be in contrast to competition law, and that NRAs could arguably behave ‘too independently’. This situation, which may have a negative impact for the single market, has led to a situation of distrust towards NRAs on the part of the Commission.\textsuperscript{57}

The distrust is reflected, for example, in the fact that NRAs are to some extent ‘ranked’, with some of them considered ‘weaker’ than others.\textsuperscript{58} Alas, this depends fundamentally on their

\textsuperscript{55} See Regulation 1211/2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office, 2009 O.J. (L 337) 1 (EC). The initial proposals for reform included the establishment of a European agency (the ‘Electronic Communications Market Authority’, EECMA) with powers to act centrally and coordinate actions of NRAs. However, it was essentially a consultative body for the Commission. Eventually, BEREC replaced the ERG, which has been established in 2002 as informal avenue for cooperation.

\textsuperscript{56} For example, it is likely that the ACER will play an important role in setting up the objectives of legally binding EU network codes for cross border issues, and in approving them, but Commission’s intervention will be necessary for the approval. However, as Eberlein has correctly highlighted, regulation by cooperation, as hybrid mode of governance, has always operated ‘in the shadow of hierarchy,’ see supra note 49, at p. 79.

\textsuperscript{57} In sharp contrast, the relation between the Commission and NCAs has been characterised by trust. The reason may be found in the process of harmonisation. The Modernisation Regulation requires that Member States designate independent bodies to apply the competition provisions. However, substantive rules are harmonised throughout Europe, see Article 35(1) Council Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1 (EC). The absence of an integrated and uniform European regulatory framework only contributes to the distrust.

\textsuperscript{58} This situation happened in the telecommunication sector, where the UK agency (Ofcom) traditionally exerted a position of leadership (although recently challenged by the French regulator, ARCEP). See Pierre Larouche &
resources and capabilities, which allow each NRA to handle their multiple tasks with more or less proficiency. In practice, there is a sort of ‘follow the leader’ approach, where some agencies simply wait until most powerful ones develop certain solution, at risk of sluggish innovation and regulatory competition.

Most important, however, is that distrust has turned into mistrust. The reason is related to the level of influence that governments may exert on regulators. There have been important indications that national governments have intervened and tried to influence the position of some NRAs in favour of national incumbents. For instance, in Germany the telecom regulator (‘RegTP’) has in occasions been severely restricted by firms, courts, the German cartel office (‘KKartA’) and the government interventions, to an extent that has limited its autonomy.\footnote{COEN & HERITIER, supra note 31.}

Therefore, the objective of insulating NRAs from national governments, and the importance of the entity that aims to ‘capture’ the regulator (the State, not private parties), has become the base of a more intrusive approach to regulated markets adopted by the Commission. As we highlight in the next part, the Commission has taken a very active role in such markets, increasingly relying upon competition law enforcement as a means of controlling the fragmented regulatory system, imposing certain common policy objectives uniformly, and ultimately achieving market liberalisation.

III. SUBSTANTIVE LAW

From a substantive viewpoint, a potential normative tension between competition law provisions and national sector-specific regulation may arise because ‘different authorities can simultaneously be competent in respect of the same case (i.e., the Commission, NRAs, NCAs, and national courts).’\footnote{See also Damien Geradin & Robert O’ Donoghue, The Concurrent Application of Competition Law and Regulation: The Case of Margin Squeeze Abuses in the Telecommunications Sector, 1 J.C.L. &E. 355, 409 (2005).} Either two or more contradictory norms can be applied to the same matter, or the same norm may be interpreted differently. The conflict is solved in two ways.

First, there is a constitutional prevalence of the principle of competition (A). Second, tensions have been centrally controlled by the use of competition law as a key tool to open markets. This is what has been called ‘regulatory antitrust’ (B).

A. The constitutional and legal dimension

A key factor that has made possible the Commission’s intervention in regulated markets is its unique powers in the area of competition law enforcement. Unlike the method whereby EU legislation is imposed and implemented, the Commission is allowed to act on competition policy matters with greater independence from the Council and Member States. It may also impose severe penalties and remedies directly on firms for breaches of competition rules. The supremacy of competition law operates as the cornerstone of the system.

1. The supremacy of competition law

Notwithstanding the fact that regulation can reduce to a considerable extent the risk of abusive behaviour, the application of article 102 TFEU and equivalent national competition rules may be needed to redress such behaviour and to maintain a level playing field between incumbents and new entrants. Article 101 TFEU is also called to play an important role in the event of collusion. Finally, the rules on merger control are also applicable so as to ensure that mergers triggered by liberalisation will not impede competition in the newly created markets.

The potential applicability of both a general regulatory framework (competition rules) and a specific one (national laws implementing EU legislation) to the same market conduct

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61 Firms operating in regulated markets constitute undertakings within the meaning of Articles 101 and 102 TFEU as they are engaged in economic activity. The ‘solidarity’ exception crafted in cases such as *Albany International* and *AOK Bundesverband* does not apply to them, see Case C-67/96, Albany International BV v StichtingBedrijfspensioenfondsTextielindustrie, 1999 ECR I-5751, paras. 388-439; and Joined Cases C-264/01, C-306/01, AOK Bundesverband and Others v Ichthyol- GesellscaftCordes, Hermani & Co., 2004 ECR I- 2493. See also Case T-319/99, Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental (FENIN) v Commission, 2003 ECR II -357. The fact that firms might fall in the ambit of Article 106.1 or Article 106.2 TFEU does not alter their characterization as undertakings.
raises the issue of the hierarchy between the two sets of norms. On this, the superiority of competition is normally stressed, notwithstanding the Commission carefully declaring its work as *complementary* with that of NRAs. That is, regulatory intervention does not affect the authority of the Commission to find competition law infringements.\(^\text{62}\) The Commission’s decision in the *O2* case provides a strong statement regarding the supremacy of EU competition law over national legislation:

Subject to the primacy of Community law, the national regulatory framework and the EU competition rules are of parallel and cumulative application. National rules may neither conflict with the EU competition rules nor can compatibility with national rules and regulations prejudice the outcome of an assessment under the EU competition rules.\(^\text{63}\)

The supremacy of competition law is justified from both a constitutional and a legal standpoint.\(^\text{64}\) Competition law has a constitutional value. It is granted a special role in the EU Treaty being at the same time part of the ‘primary EU law’. In the absence of exceptions in the Treaty itself, such as those provided for firms entrusted with services of general economic interest (Article 106.2 TFEU), nor can the CJEU or the Council and the Commission allow any industry to claim an exemption from EU Competition rules.\(^\text{65}\) The legal justification for the supremacy of EU law is related to the hierarchy of norms within the EU law, where primary law prevails over secondary law enacted on the basis of articles 106.3 TFEU and 114 TFEU.

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\(^{62}\) The *Telefónica* case provides a good example. The Commission first assured that its decision did not undermine the authority of the sector regulator, since the decision was not against the findings thereof. But in addition it explained that ‘regulators put in place ex ante regulatory mechanisms allowing competition to develop, but can only do this on the basis of market and cost forecasts. In doing so regulators lessen, but cannot entirely eliminate the risk of anti-competitive behaviour. Competition authorities act ex post, using historical data on effectively incurred costs’ (*Antitrust: Commission decision against Telefónica – frequently asked questions, (Memo/07/274)*, 2007, at 4). Somewhat contradictorily, though, in the next paragraph it is also stated that due to the ‘efficient intervention’ of the Spanish regulator, the Commission is ‘put[ting] an end’ to a previous margin squeeze allegation. See case COMP/38.784- WanadooEspaña v Telefónica, 2008 O.J. (C 83) 5.


\(^{64}\) For a constitutional justification of the supremacy of EU Competition law see Pierre Larouche, *Contrasting Legal Solutions and the Comparability of U and US experiences*, TILEC DISCUSSION PAPER (DP 2006/028), at p. 10.

\(^{65}\) See Case C-41/83, Italy v Commission, 1985 ECR 87/3.
Consequently, Articles 101 and 102 TFEU cannot be set aside by secondary legislation adopted by the EU institutions or by the CJEU’s case-law.

The implications flowing from the supremacy of EU competition law are threefold. First, a regulatory authority may not authorize a breach of EU competition law. Regulatory, thus approval does not qualify for a competition law defence.\(^66\) This principle helps to prevent the ‘capture’ of the regulator by the regulated firms. Second, the Commission or a NCA may at any time intervene and check the performance of the NRA. Last, but not least, the primacy of EU competition law connotes that the often conflicting and varying policy objectives enshrined in the EU regulatory framework should be achieved within the framework of competitive markets.\(^67\) Competition law values trump non-competition objectives that may be pursued by the state or by the NRA, subject, however, to the derogations of Article 106.2 TFEU in the case of undertakings providing services of general economic interest, as well as to efficiency considerations, or to the existence of an objective justification under Article 101.3 TFEU and Article 102 TFEU, respectively.

2. The combined reading of Articles 102 and 106.1 TFEU

Anticompetitive practices are not pursued solely by undertakings. Member States may also be found in breach of competition rules in the case of maintaining anticompetitive measures \(\text{vis- à-vis}\) holders of special or exclusive rights (Articles 106.1 and 101, 102 TFEU); when protecting national companies against competition from new entrants through state aid measures (Articles 107 et seq. TFEU); and, finally, when violating their duty of loyal cooperation\(^68\) embodied in Article 4.3 TEU (former Article 10 EC).\(^69\) In the latter case, when

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\(^{66}\) See the Deutsche Telekom case, infra section III.

\(^{67}\) For a discussion, see Giorgio Monti, Managing the Intersection of Utilities Regulation and EC Competition Law, 4 C.L.R. 123, 128 (2008).

\(^{68}\) The duty of loyal cooperation ‘requires Member States to introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings.’

\(^{69}\) In assessing the legality of state measures restricting competition, the CJEU considers that the principle of loyal cooperation, read in conjunction with the rules on competition, is violated when: ‘a Member State requires or favours the adoption of agreements decisions or concerted practices contrary to Article [101 TFEU] or reinforces
national legislation authorises or requires anticompetitive behaviour, the undertaking can raise an ‘act of state’ defence, whereas the competition authority is obliged to disapply national law. The Commission can also challenge anticompetitive national legislation by initiating infringement proceedings under Article 258 TFEU against the Member State in question.

The Commission’s policy objective of creating competitive markets in the EU often sits uneasily with the Member States’ sovereign rights to restrict competition in certain sectors (crucial to the national economy) for reasons of public interest. The CJEU, mindful of the politically sensitive dimension of public utilities’ liberalisation and respectful of state sovereignty, has repeatedly held that the creation of a monopoly by the grant of an exclusive right is not as such contrary to Article 102 TFEU. However, a Member State may be found in breach of Article 106.1 TFEU (and thus have its sovereign rights restricted) when national legislation deprives competition rules of their effectiveness.

Summarizing the set of cases decided in the early 1990s, the grant of special or exclusive rights may undermine competition in the three following ways. First, the grant of an exclusive right is unlawful, when the privileged firm is manifestly incapable of meeting demand in the reserved sector. In the leading case Höfner, the Bundesanstalt für Arbeit (Federal Employment Office) in Germany was granted a monopoly over executive recruitment services, the demand for which was unable of satisfying. By a combined reading of Articles 106.1 and 102 TFEU, Germany was found in breach of Article 106.1 TFEU, as such limitation of the recruitment
services made unavoidable the monopolist’s abuse of its dominant position under Article 102.2 TFEU.\textsuperscript{75}

Second, a grant of an exclusive right violates competition rules when it creates a conflict of interest situation that the privileged firm may take advantage of to exclude competitors. As the case-law suggests, such a conflict of interest is most likely to arise when a regulatory function is granted to a vertically integrated network industry. In the \textit{RTT}\textsuperscript{76} case, the Belgium state extended RTT’s pre-existing monopoly over the establishment and operation of the public telecommunications network to the neighbouring market of telephone equipment by granting to the latter the exclusive right to promulgate standards for telephone equipment and to further authorize suppliers of equipment meeting those standards. As RTT was also active in the market of telephone equipment, the grant of such a regulatory function could potentially lead the monopolist to abuse its dominant position by raising entry barriers to its competitors.\textsuperscript{77}

Third, Article 106.1 TFEU is violated by the grant of wide monopoly rights to one firm, unless such rights can be objectively justified or fulfil the criteria set out in Article 106.2 TFEU. In the leading case, \textit{Corbeau},\textsuperscript{78} the Court was faced with the question whether the inclusion of ancillary services, such as express postal service in the city of Liège, within the postal monopoly granted by Belgium to the \textit{Régie des Postes} (Belgian Post Office) was compatible with the competition rules of the Treaty. The Court held that the grant of excessive monopoly rights could be justified if it could guarantee the universal postal service.\textsuperscript{79} Contrary to the Höfner and \textit{RTT} cases, where the establishment of a monopoly was considered \textit{prima facie} legal, in the \textit{Corbeau} case the Court started from the presumption that the grant of a monopoly is \textit{prima facie} illegal, unless it can be objectively justified and limited to what is necessary to finance the provision of a public service. The \textit{onus} is, therefore, placed on the Member State to prove that

\textsuperscript{75} Höfner, \textit{id.}, at para. 27. See also Merci Convenzionali, \textit{supra} note 73, where the Court held that Article 106.1 is infringed where the monopolist is enabled to behave inefficiently, exploit customers, and not modernize.

\textsuperscript{76} See \textit{RTT}, \textit{supra} note 37.

\textsuperscript{77} \textit{Id.}, at paras. 20-8. See also \textit{ERT}, \textit{supra} note 29; Case C-163/96, SilavoRaso, 1998 ECR I-533; and Telecommunications Directive Terminal Equipment, 1991 ECR I-1223, at para. 51.

\textsuperscript{78} Case C-320/91, Corbeau, 1993 ECR I-2533.

\textsuperscript{79} \textit{Id.}, at paras. 13-4.
the restriction of competition should be tolerated so as to achieve the abovementioned objective.\textsuperscript{80}

Concluding, the case-law suggests that the grant of an exclusive right may be declared unlawful even if the monopolist has not abused its dominant position. The mere existence of anticompetitive effects or the probability thereof suffices to establish a violation of Article 106.1 TFEU. The promulgation of the abovementioned standards in testing the legality of state monopolies ‘legitimated and strengthened’ the Commission’s liberalization strategy.\textsuperscript{81}

B. The emergence of ‘regulatory antitrust’

In many cases, however, the threat of employing competition enforcement has been used without even requiring a breach of the competition laws. Instead, the Commission has directed a given course of behaviour.\textsuperscript{82} In order to deter anticompetitive practices, it is not enough to impose a penalty on the offender and/or a prohibition to carry out certain conduct. In most cases a mandatory remedy is imposed, and it is also necessary to supervise the compliance with any behavioural remedy imposed on the undertaking on a regular basis.\textsuperscript{83}

This approach resembles sector-specific regulation. Implicitly, then, the meaning of competition has changed. When applied to regulated markets, it specifically refers to the creation of more competitive markets where the competitive process does not exist (or has


\textsuperscript{81} GIORGIO MONTI, EC COMPETITION LAW (1st ed., Cambridge Univ. Press, 2007) 448.

\textsuperscript{82} Monti, \textit{supra} note 67, at p. 20. \textit{See} also Arndt Christiansen, \textit{Regulation and EU merger control in the liberalised electricity sector}, in FRANK FICHERT, JUSTUS HAUCAP & KAI ROMMEL (eds.) \textit{COMPETITION POLICY IN NETWORK INDUSTRIES} (1st ed., Lit Verlag Münster 2007); and MONTI, \textit{supra} note 81, esp. ch. 7.

\textsuperscript{83} Remedies are generally divided into structural and behavioural. Structural remedies ‘... prevent once and for all, or at least for some time, the emergence or strengthening of the dominant position previously identified by the Commission and do not, moreover, require medium or long-term monitoring measures’ (Case T-102/96, Gencor v Commission, 1999 ECR II-753, para. 319). In contrast, behavioural remedies do require medium- or long-term monitoring measures. \textit{See} DAMIEN GERADIN (ed.), \textit{REMEDIES IN NETWORK INDUSTRIES: EC COMPETITION LAW VS. SECTOR SPECIFIC REGULATION} (1st ed., Intersentia 2004); Hubertus Von Rosenberg, \textit{Unbundling through the Back Door... The Case of Network Divestiture as Remedy in the Energy Sector}, 30 E.C.L.R. 237 (2009); David Went, \textit{The Acceptability of Remedies under the EC Merger Regulation: Structural versus Behavioural} 27 E.C.L.R. 455 (2006).
ceased to exist). That is, competition law aims to improve the market conditions, forcing firms to perform ‘as if’ they were in a competitive environment. This phenomenon has been labelled ‘regulatory antitrust.’

1. **Early Antitrust Settlements**

Between 2001 and 2003, territorial sales restrictions imposed by non-EU gas producers on EU wholesalers or importers came under increased scrutiny of the Commission. In particular, such restrictions were included in supply contracts concluded between the Russian gas producer Gazprom and some of its EU trading parties, in agreements with Norwegian gas producers, as well as in contracts involving the Algerian Sonatrach and the Nigerian national

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84 The first attempt to use the ‘competition menace’ (at least in our knowledge) was *Atlas*, where the Commission granted an exception under former Article 81.3 to a joint venture between *Deutsche Telekom* and *France Telecom*, but ‘persuaded’ Germany and France to open infrastructure to competition. See Case IV/35.617 *Phoenix/Global One*, O.J. 1996 (L 239) 23. For an analysis see ANTONIO BAVASSO, COMMUNICATIONS IN EU ANTITRUST LAW: MARKET POWER AND PUBLIC INTEREST (1st ed., Kluwer Law Int’l 2003) 328.

85 See e.g. Commission Recommendation on Relevant Product and Service Markets, 2003 O.J. L (114) 45, recital 1: ‘The aim is to reduce *ex ante* sector-specific rules progressively as competition in the market develops’. See also, recital 5, Directive 2009/73 concerning common rules for the internal market in natural gas and repealing Directive 2003/55, 2009 (L 211) 94 (EC): ‘The aim is progressively to reduce *ex-ante* sector specific rules as competition in the markets develops and, ultimately, for electronic communications to be governed by competition law only. Considering that the markets for electronic communications have shown strong competitive dynamics in recent years, it is essential that *ex-ante* regulatory obligations only be imposed where there is no effective and sustainable competition.’ This does not impede the Community legislator to note the importance of facility sharing for competition (recital 43) and the centrality of leveraging as one of the main anticompetitive concerns (recital 47).

86 See Monti, *supra* note 67.


89 See case COMP/36.072-GFU-Norwegian Gas Negotiation Committee; and Commission Press Release, ‘Commission successfully settles GFU Case with Norwegian gas producers’ (IP/02/1084), 17 July 2002.

LNG supplier. These so-called ‘destination clauses’ prohibit the buyer from reselling gas into other countries, enabling, therefore, the supplier to maintain different price areas for the same product. The Commission classified them as hard-core restrictions in the vertical agreements concluded between the gas wholesalers and the producers.

Mindful of the transitory phase from monopolised to liberalised energy markets, the Commission chose not to initiate formal antitrust proceedings on the basis of Article 101 TFEU, but rather persuaded the parties to ‘find a commercial solution for the competition problem identified.’

A commercial solution of this kind was reached in October 2003 following an investigation of gas supply contracts between the Russian gas producer Gazprom and the Italian oil and gas company ENI. The gas supply contract between Gazprom and ENI contained two restrictive clauses: a) a territorial sales restrictive clause preventing ENI from exporting gas it purchased from Gazprom and b) a consent clause obliging Gazprom to obtain ENI’s approval for any sales to other wholesalers in Italy. The settlement not only resulted in the deletion of the abovementioned clauses, but it also extended into a series of accompanying non-contractual commitments. In particular, ENI undertook: a) to offer significant gas volumes to customers located outside Italy for a period of five years, using auctions where ENI failed to meet the targets; b) to increase the capacity of its TAG pipeline used to transport Russian gas to the Italian market via Austria and c) to promote improved Third Party Access (TPA) to the transit pipeline.

In fact, the commitments sought to enable competition in the Austrian and German markets (commitment related to the TAG Pipeline) and in other Member States (commitment related to the TPA regime). Admittedly, such an improvement in the market structure could not have been achieved under Article 101 TFEU. As G. Monti highlights, the commitments ‘are not

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92 For a discussion of ‘destination clauses’ see Talus, supra note 87, at pp. 286-7.
even closely related to the infringement that triggered the investigation,’ and ‘the commission is using competition law settlements to resolve a series of structural issues designed to create competitive markets.’

2. Commitment Decisions pursuant to Article 9 of Regulation No 1/2003

The informal nature of antitrust enforcement was further refined in the new legal framework for antitrust settlements enshrined in Article 9 of Regulation No 1/2003. With this, competition policy is been used as a means of exerting pressure for the adoption of commitments and/or to force the opening of markets – i.e. the adoption of structural remedies.

Article 9 procedures allow the Commission to terminate the investigation without the finding of infringement and the subsequent imposition of a fine. The standard of proof is thus significantly low. The parties may propose remedies to remove the Commission’s concerns embodied into legally binding commitment decisions. In essence, ‘commitment decisions are a bargain between the Commission and the undertaking concerned.’ By contrast, antitrust procedures under Article 7 of the same regulation, may lead to the establishment of an infringement and levy significant fines. Damages before national courts may be also triggered.

The parties are, therefore, incentivised to propose remedies in an effort to avoid the costs of negative publicity and of private damages claims if found in breach of competition rules. Given the speed of the procedure as well as the consensual nature of the commitment decisions, the Commission is also keen in relying on Article 9 decisions to obtain quick structural changes in the market.

95 Monti, supra note 67, at p. 140.
96 Regulation (EC) No 1/2003, see supra note 57.
97 Penalties imposed for breach of commitments may reach up to 10% of the total turnover of the undertaking in the preceding year, see Article 23.2 of Regulation (EC) No 1/2003.
98 Von Rosenberg, supra note 83, at p. 245.
99 In the E.ON and RWE cases analyzed infra 3 the initiative of the proposal of the divestiture commitments came by the companies themselves in an effort to avoid the imposition of a high fine.
In the aftermath of the Commission’s energy sector inquiry, a significant number of antitrust investigations based on Article 102 TFEU were closed by means of commitment decisions. The sector inquiry revealed a vast array of barriers to the creation of competitive energy markets such as: a) market foreclosure caused by the incumbents’ control over access to network infrastructure and their ability to reserve energy capacity and b) vertical foreclosure caused by long-term contracts, both at wholesale and retail level. Long-term energy contracts, though crucial in guaranteeing, among others, security of supply, often contain clauses that impede entry by new firms. Such clauses include territorial sales restriction or destination clauses, de facto or de jure exclusivity and tacit renewal clauses.

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100 The European Commission may undertake a sector inquiry under Article 17 of Regulation (EC) 1/2003, where ‘the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market.’ Commission, ‘Communication from the Commission-Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report)’ (10 January 2007) COM (2006) 851 Final. DG Competition report on energy sector inquiry, SEC (2006) 1724, 10 January 2007.

101 Prior to the publishing of the final report the Commission initiated investigations against several incumbent undertakings in the energy sector, especially in Germany, France, Belgium, Italy and Austria. See Commission (EC), ‘Competition: Commission has carried out inspections in the EU gas sector in five Member States’ MEMO/06/205, 17 May 2006.

102 See, however, Case COMP/39.401-E.ON/GDF, 2009 O.J. (C 248) 5, where the Commission investigated one case of collusion under Article 101 TFEU between E.ON and GDF and Case COMP/38.700- Greek lignite and electricity markets, 2008 O.J. (C 93) 3.

103 For an analysis of long-term energy contracts in the European Union see Andrien De Hauteclocque and Jean-Michel Glachant, Long-Term energy supply contracts in European Competition Policy: Fuzzy not Crazy, 37 ENERGY POLICY 5399 (2009); and Andrien De Hauteclocque, Legal Uncertainty and Competition Policy in European Deregulated Electricity Markets: The Case of Long-Term Exclusive Supply Contracts 32 WORLD COMPETITION 91 (2009).

104 See supra note 94.

105 De jure exclusivity requires the buyer to purchase all or a very high portion of his demand from a single supplier. De facto exclusivity arises from fidelity rebates or minimum purchase obligations calculated on the basis of historical demand. See Commission Decision in Case COMP/ 37.542- Gas Natural/Endesa, where the Commission held that the long-term supply contract concluded between Gas Natural and the Spanish electricity generator Endesa was an exclusivity contract as it covered almost the entire demand of Endesa. See also Commission Press Release, ‘Commission closes investigation on Spanish Company Gas Natural,’ 2 COMPETITION POLICY NEWSLETTER 55 (2000).

106 See COMP/B-1/38348-REPSOL CCP, 2004 O.J. (C 258) 7.
The following antitrust investigations reveal the Commission’s extensive reliance on commitment decisions in an effort to target abusive behaviour and ultimately build an internal market for energy.\textsuperscript{107}

\textit{Distrigaz.} In the \textit{Distrigaz} case,\textsuperscript{108} the Commission voiced concerns that Distrigaz, the largest gas supplier and importer in Belgium, was foreclosing downstream natural gas markets in Belgium through long-term supply contracts concluded with a large number of industrial customers. Competitors were prevented from entering the market, as the total demand of these customers was tied to Distrigaz. To remedy competition concerns Distrigaz offered commitments that it would refrain from concluding any gas supply agreements with resellers for a period of two years and with industrial users and electricity producers for a period of five years. Furthermore, Distrigaz committed itself to ensure that 70\% of the gas volumes that it supplied would return in the market each and every year.\textsuperscript{109}

Most notably, the Commission ceased the opportunity to lay down a methodology for assessing the compatibility of long-term contracts with competition which focuses on the following five elements: (i) the market position of the supplier; (ii) the share of the customer’s demand tied under the contracts; (iii) the duration of the contracts; (iv) the overall share of the market covered by contracts containing such ties; and (v) efficiencies.\textsuperscript{110}

\footnotetext{107}{The approach markedly contrast with the position adopted in previous cases also related with long-term contracting in the energy sector. \textit{See e.g.} Transgás/Turbogás (XXVI\textsuperscript{st} Competition Report, 1996) approving a long-term take-or-pay agreement for the supply of natural gas from Algeria to Portugal; \textit{BG Network Code} (XXVI\textsuperscript{st} Competition Report, 1996) approving arrangements for the use of the gas transport network in the UK; and \textit{REN/Turbogás and ISAB Energy} (XXVI\textsuperscript{st} Competition Report, 1996) approving long-term agreements for the supply of electricity; and \textit{Scottish Nuclear, Nuclear Energy Agreement}, 1991 O.J. (L 178) 31 stating that the criteria of former Art. 81.3 EC were satisfied).}

\footnotetext{108}{The Commission’s investigation into Distrigaz practices predated the sector inquiry. \textit{See} case COMP/37.966-Distrigaz, 2008 O.J. (C 9) 8.}

**GDF Suez.** The GDF investigation concerned the alleged foreclosure of downstream supply markets for natural gas in France by GDF Suez, by way of the latter’s long-term capacity reservations in gas network, covering most of France’s gas import capacities and by strategic underinvestment in the development of the LNG-Terminals. The commitments proposed by GDF consisted in an immediate release of significant amounts of long-term input capacity at a mix of entry points to the French gas network as well as in the obligation to bring GDF’s long-term reservations below 50% of the total French import capacity by 2014.

**Svk (Svenska–Kraft-nät).** The Commission’s investigation of the Swedish electricity Transmission Operator (TSO) SvK (Svenska–Kraft-nät), was carried out under the suspicion that the company might have curtailed the available transmission capacity to neighbouring EU and EEA countries, thus reserving domestically produced electricity for domestic consumption. SvK, however, argued that the export restraints were necessary to relieve internal congestion on its electricity distribution network. The Commission considered that the company’s practice amounted to discrimination between transmission to consumers located inside and outside the network of Sweden without objective justification. Furthermore, it led to segmentation of the internal market and distorted generation and network investment signals. SvK offered to subdivide the Swedish transmission system network in two or more bidding zones, to manage

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112 Strategic underinvestment as an abuse of dominance stems from the failure of the dominant undertaking in expanding existing facilities or constructing new ones so as to accommodate the new or expanding competitor. See Commission Decision of 4 May 2010 in Case COMP/39.317 – E.ON Gas, para. 40 and 46: ‘...the mere fact that the current capacities may have been actually used by the essential facility holder for its supply business is not sufficient to exclude an abuse under article 102 TFEU [...] a dominant essential facility holder is under the obligation to take all possible measures to remove the constraints imposed by the lack of capacity (e.g. by limiting the duration and volume of its own bookings or by expanding its capacities...).’ See prior Commission Decisions involving the granting of access to an essential facility: Sea Containers Ltd/ Stena Sealink, 1994 O.J. (L 15) 8; Frankfurt Airport, 1998 O.J. (L 72) 30; Port of Rødby, 1994 O.J. (L 55) 52. The essential facility owner, however, still retained ownership of the assets. For a discussion of the case-law see Peter Willis & Paul Hughes, Structural Remedies in Article 82 Energy Cases, 4 C.L.R. 147, 153-7 (2008).
113 See also the investigation of Suez/ Electrabel MEMO/07/313. See further Case C-17/03, VerenigingvoorEnergie, Milieu en Water, Amsterdam Power Exchange Spotmarket BV, EnecoNV v Directeur van de Dienstuitvoering en toezichtenergie, 2005 ECR I- 4983, where the CJEU held that priority access to a portion of capacity for the cross-border transmission of electricity in favour of the Dutch network operator is discriminatory.
congestions without curtailing trading capacity on interconnectors, and to invest in a new transmission line.\footnote{Commission Decision of 17 March 2010 in Case COMP 39.386 – Long-term Contracts, France, 2010 O.J. (C 133) 5.}

\textit{ENI SpA}. In the ENI SpA investigation case\footnote{Case COMP/39.315– ENI; IP/10/1197} the Commission was of the view that ENI may have abused its dominant position by refusing to grant competitors access to unused capacity on the transmission network (capacity hoarding),\footnote{The Commission found that all international gas import infrastructure to and into Italy (the TENP and Transitgas importing North European gas and the TAG importing gas from Russia) constituted an ‘essential facility’ that no competitor could duplicate.} by granting access in a less useful manner (capacity degradation) and by failing to invest in ENI’s international transmission pipelines (strategic underinvestment).\footnote{See infra, note 140, GDF/SUEZ. For a similar set of concerns see case COMP/B-1/39727, CEZ & others; IP/11/891.} As ENI controlled both the transmission and the supply of gas it found itself in an ‘inherent conflict of interest’ situation that resulted in the foreclosure of gas supply markets in Italy.\footnote{The term ‘inherent conflict of interest’ was also employed by the Commission in its proposal for the Third Energy Package. See Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/54 concerning common rules for the internal market in electricity, COM (2007) 529 final (EC), p. 4 et seq.} To address these concerns ENI agreed to divest its share in three international transmission pipelines.\footnote{RWE offered a set of similar remedies to address the Commission’s concerns related to primary capacity hoarding, inadequate capacity management and margin squeeze. See Case COMP 39.402 – RWE Gas Foreclosure, 2009 O.J. (C 133) 10, where RWE offered to divest its high transmission network in Germany.}

\textit{E.ON.} \footnote{The case is analysed (by Commission officials) in Philippe Chauve et al., \textit{The E.ON Electricity Cases: An Antitrust Decision with Structural Remedies}, 1 \textit{COMPETITION POLICY NEWSLETER} 51 (2009).} The structural remedy of network divestiture was also voluntarily offered by E.ON in an effort to settle two different cases\footnote{See Case COMP/30.388– German electricity wholesale market and case COMP/39.389 German electricity balancing market, 2009 O.J. (C 36) 8. See also supra note 121.} launched against the company in 2006. The first case related to the German electricity wholesale market. The Commission’s concern was that E.ON abused its allegedly dominant position by withholding available generation capacity offered on the short-term market with a view to raising prices above competitive levels. The second case related to the German electricity balancing market. The Commission’s concern, this time, was that E.ON might have granted a preferential treatment to its generation affiliates in the access to the German electricity transmission network, by purchasing secondary balancing power rather than tertiary balancing power. Furthermore, it was alleged that E.ON Transmission
System Operator (TSO) might have prevented new entry for balancing services, thereby raising costs for the final consumer. E.ON committed itself to divest 5,000 MW of its generation capacity in Germany as well its high voltage transmission grid for the transport of electricity.\(^{123}\)

A recent study casts doubts on whether the E.ON’s divestment of power plants were, indeed, the best-suited remedy to address the abuse of strategic capacity withdrawal.\(^{124}\) Additionally, the sale of E.ON’s transmission network could be criticised as disproportionate to the alleged abuse. Considering that E.ON did not deny TPA to the network, but offered preferential treatment to its own electricity generator with regard to balancing energy ‘less invasive behavioural remedies come to mind, for example auctioning procedures for said balancing energy.’\(^{125}\) Moreover, competition authorities are deprived of the steady flow of sector-specific information which is necessary in monitoring market-building exercises. The latter also inevitably entail the balancing of efficiency criteria with non-economic objectives, such as security of supply and universal service obligations, an inherently regulatory task.

Network divestiture is certainly in line with the Commission’s preference for full ownership unbundling of transmission networks as a means for guaranteeing the independence of network operators.\(^{126}\) However, it is noteworthy that network divestiture is ‘the most invasive form of unbundling as it requires a change in the property rights of the network operator.’\(^{127}\) Furthermore, it goes beyond natural gas Directive 2009/73 EC and electricity Directive 2009/72 EC,\(^ {128}\) both allowing EU Member States to choose between three unbundling regimes in order to ensure that the vertically integrated company will not be involved in both transmission and supply/generation.\(^ {129}\)

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\(^{127}\) Talus, *supra* note 87, at p. 267.
\(^{129}\) The unbundling models offered are: full Ownership Unbundling (OU) (Electricity Directive 2009/72, art. 9 and Gas Directive 2009/73, art. 9); Independent System Operator (ISO) (Electricity Directive 2009/72, arts. 13-14 and
In addition, the use of commitment decisions can be criticised with regards to proportionality. Although an express reference to a fully-fledged proportionality assessment is absent from Article 9 of Regulation No 1/2003, it could be deduced by recourse to the general principles of EU law.\(^{130}\) Hence, commitments should not exceed what is appropriate and necessary for putting the infringement to an end. This view was shared by the General Court (hereinafter GC) in the *Alrosa* case, which concerned an annulment request against a commitment decision of the Commission.\(^{131}\) The GC stressed the Commission's obligation to observe fundamental due process requirements in the commitment decisions procedure as well as to apply a strict proportionality test. Nonetheless, in June 2010 the CJEU overruled the GC's judgment and gave interesting guidance on the scope and nature of Article 9 procedures.\(^{132}\)

According to the Court, Article 9:

\([D]oes not require the Commission to make a finding of an infringement, its task being confined to examining, and possibly accepting, the commitments offered by the undertakings concerned in the light of the problems identified by it in its preliminary assessment and having regard to the aims pursued [...] Application of the principle of proportionality by the Commission in the context of Article 9 of Regulation No 1/2003 is confined to verifying that the commitments in question\)

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\(^{130}\) See TAKIS TRIDIMAS, THE GENERAL PRINCIPLES OF EU LAW (2nd ed., OUP 2006) 139; and Case C-331/88, The Queen v. Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others, 1990 ECR I-4023, para. 13. Note that when the Commission chooses to impose a structural or behavioural remedy pursuant to Article 7 of Regulation (EC) No 1/2003 it has to ensure that the remedy is proportionate to the infringement committed, necessary and effective to bring the infringement to the end. Specific reference is made to structural remedies, which ‘...can only be imposed either where there is no equally effective behavioural remedy or where any equally effective remedy would be more burdensome for the undertaking concerned than the structural remedy.’ See Article 7, recital 12 of Regulation (EC) No 1/2003.

\(^{131}\) Case T-170/06, Alrosa Company Ltd v Commission of the European Communities, 2007 ECR II-0260.

\(^{132}\) The GC had quashed the Commission’s decision in the *Alrosa* case on the grounds that the accepted commitments were disproportionate to the alleged abuse, obliging therefore the Commission to observe fundamental due process requirements in the commitments decision procedure. Advocate General Kokott, siding with the Commission, stressed that the commitments decisions are characterized by a concern of procedural economy and thus do not require the same detailed test of proportionality as decisions pursuant to Article 7 of Regulation (EC) No 1/2003. See Opinion of Advocate General Kokott delivered on 17 September 2009 in case C-441/07 P Commission v Alrosa, para 50 and 58.
address the concerns it expressed to the undertakings concerned and that they have not offered less onerous commitments that also address those concerns adequately.\textsuperscript{133}

Furthermore, the CJEU confirmed that judicial review of the Commission’s commitment decisions must take place under the manifest error standard\textsuperscript{134}, affording thus to the latter a wide margin of discretion under Article 9.\textsuperscript{135} Overall, the Court seems to have offered the Commission its outmost support in its liberalisation strategy through informal antitrust enforcement.

3. \textit{Structural Remedies under the EC Merger Regulation}

Merger control\textsuperscript{136} has also featured prominently in the Commission’s efforts to create conditions for competition in the energy market.\textsuperscript{137} To achieve such objective, in some cases the Commission has imposed conditions to approve mergers that do not have any relation with the protection of competition.\textsuperscript{138} In such cases it has openly favoured structural remedies (in particular that of divestiture) over behavioural ones.\textsuperscript{139}

\textsuperscript{133} Case C-441/07 P, European Commission v Alrosa Company Ltd., 29 June 2010 (not yet published), paras. 40 and 41.

\textsuperscript{134} Id., at para. 42.

\textsuperscript{135} For a criticism of the Alrosa Judgment as falling short of protecting the rule of law see Firat Cengiz, \textit{Judicial Review and the Rule of Law in the EU Competition Law Regime after Alrosa}, 7 E.C.L.J. 127 (2011).

\textsuperscript{136} Council Regulation No 139/2004 on the control of concentrations between undertakings, 2004 O.J. (L 24) 1 (EC).

\textsuperscript{137} Since 2004, the Commission has examined eight significant energy mergers. For an analysis see Giulio Federico, \textit{The Economic Analysis of Energy Mergers in Europe and in Spain}, 7 J.C.L. &E. 603 (2011).

\textsuperscript{138} See Cases M.1673 VEBA/VIAG, 2001 O.J. (L 118) 1 (imposing as a remedy the condition that the merger entity agrees to release some capacity to facilitate exports from Scandinavia, which has lower prices, into Germany) and Case M.2684 EnBW/EDP/Cajastur/Hidrocan \textsuperscript{139} The preference towards structural remedies has also been expressed in the revised Notice on Merger Remedies, issued in October 2008: Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, 2004 O.J. (L 24) 1 (EC). For a general discussion, see Georges Kratsas, \textit{Structural or Not? A Critical Analysis of the Commission’s New Notice on Remedies}, 15 COLUM. J. EUR. L. 549 (2009). The ultimate burden of proof rests with the Commission to prove that remedies validly submitted by the parties do not, in the end, render the concentration compatible with the common market. This was confirmed by the GC in Case T-87/05, EDP-Energias de Portugal, SA v Commission, 2005 ECR II- 03745 paras. 60-74. Note that
An example is the GDF/Suez merger, which involved the acquisition of Suez by state-owned GDF. The GDF energy group was active across the gas chain, in electricity generation and retail and in other energy related services in France as well as in a number of other Member States including the United Kingdom, Germany and Belgium. Through its stake in the SPE, the second biggest player in the Belgian electricity and gas market, GDF successfully entered the electricity generation market in Belgium. Suez, in turn, was active in the gas and electricity market in Belgium and France. Suez main subsidiaries were Electrabel, Distrigaz and Fluxys. The proposed merger raised Commission’s concerns for both horizontal and non-horizontal unilateral effects that could significantly impede effective competition. Potential horizontal unilateral effects were identified in the wholesale energy market as well as in the retail market because of complementarities between gas and electricity retail supply. The non-horizontal effects identified by the Commission concerned possible input foreclosure, flowing from the increased use of gas for electricity generation. The Commission accepted an extensive and demanding package of remedies including the divestment of the subsidiary of Suez Distrigaz and the partly controlled by GDF company SPE.

A similar set of structural remedies was offered in the E.ON/MOL and the DONG/Elsam/Energi E2 cases, following in-depth Phase II investigations. EDF/British Energy, RWE/Essent, Vattenfall/Nyon and EDF/Segebel were approved with remedies following Phase I investigations.

the EDP/ENI/GDP merger was the only one to be prohibited. See Case COMP/M.3440-EDP/ENI/GDP, 2005 O.J. (L 302) 69.

140 See Case COMP/M.4180- Gaz de France/Suez, 2007 O.J. (L 88) 47.
141 The input foreclosure concern was also raised in EDP/ENI/GDP and E.ON/MOL cases.
142 See GDF/SUEZ, supra note 140, at pp. 876-931. For an analysis see Federico, supra note 137, at p. 608.
144 Case COMP/M. 3868, DONG/Elsam/Energi E2, 2007 O.J. (L 133) 24, where the Commission granted clearance to the acquisition by DONG of Elsam and Ebergi E2 subject to the ownership unbundling of DONG’s gas storage facilities.
145 Commission Decision, Non-Opposition to a Notified Concentration (Case COMP/M. 5224- EDF/British Energy, 2009 O.J. (C 38) 8.
146 Case COMP/M.5496- RWE/Essent, 2009 O.J. (C 222) 1, where RWE offered to divest Essent’s controlling stake in SWB to an independent third party.
147 Case COMP/M. 5496-Vattenfal/Nuon Energy, 2009 O.J. (C 212) 16. Vattenfal, a Swedish vertically integrated incumbent offered to divest Nyon’s electricity retail business in Germany.
The Commission’s margin of discretion is arguably wider when acting under the EC Merger Regulation. Nevertheless, it is still bound to a full proportionality assessment in order to determine whether there is a less onerous, but equally effective alternative to a structural remedy.\footnote{Case T-192/96, Gencor Ltd v Commission, 1999 ECR 11-753. See also cases T-342/99, Airtours Plc v Commission of the European Communities, 2002 E.C.R. II-2585; T-310/01, Schneider Electric SA v Commission of the European Communities, 2002 E.C.R. II. 4071; and T-5/02, Tetra Laval BV v Commission of the European Communities, 2002 E.C.R. II-4381.}

4. \textit{Deutsche Telekom and TeliaSonera}

The Deutsche Telecom case (DT)\footnote{Case C-280/08, P Deutsche Telekom AG v European Commission, Judgment of 14 October 2010 (not yet reported) (hereinafter Deutsche Telekom).} is considered the guiding authority on the topic of regulatory antitrust in the telecommunications sector. The case originated from the EU efforts to introduce retail competition in that market. In brief, DT, the former state-owned incumbent telecommunications operator in Germany was mandated by national legislation implementing the EU Telecommunication Directives to provide new entrants in the market with access to the local loop. In addition, DT was subject to a dual level price regulation, as its wholesale prices were set by the German NRA, whilst its retail prices were subject to a price cap for a basket of services.\footnote{See Geradin & O’ Donoghue, supra note 60, at 377.} The latter regulatory scheme gave DT discretion with regards the pricing of services included in the basket, although any adjustment required approval by the NRA.\footnote{Similar facts were addressed by the Commission in the decision against Telefónica, the incumbent telecommunications operator in Spain. See Case COMP/38.784- WanadooEspaña v Telefónica, 2008 O.J. (C 83) 5.}

The Commission’s Decision,\footnote{See Case COMP/C-1/37.451, 37.578, 37.579-Deutsche Telekom AG, 2003 O.J. (C 263) 9.} following proceedings against DT, found that the margin between the prices charged by DT for wholesale access to the local loop and its retail prices for
end-users amounted to an abusive margin squeeze\textsuperscript{154} contrary to article 102 TFEU, as it would exclude as-efficient competitors from the downstream market.\textsuperscript{155} DT was considered dominant in both wholesale and retail markets. Given that DT had sufficient scope to avoid squeezing competitors by adjusting its retail prices within the basket of services, its failure to do so, in the absence of any objective justification, violated Article 102 TFEU, despite the fact that its wholesale prices had been approved by the German NRA.

DT appealed the Commission’s Decision to the GC\textsuperscript{156} and further to the CJEU which largely upheld the GC’s position and dismissed DT’s action in its entirety. The Court’s ruling offered important guidance on the conditions required for the establishment of an abusive margin squeeze, by accepting that it can constitute a freestanding abuse of dominance subjected to as-efficient competitor test.\textsuperscript{157} Therefore, evidence of excessive pricing at the wholesale level\textsuperscript{158} (that would amount to a refusal to deal) or predation\textsuperscript{159} at the retail level is not additionally required.\textsuperscript{160} Instead, the emphasis is placed on the spread between retail and

\textsuperscript{154} A margin squeeze ‘refers to situations in which a vertically integrated dominant firm uses its control over an input supplied to downstream rivals to prevent them from making a profit on a downstream market in which the dominant firm is also active’ see Geradin & O’Donoghue, supra note 60, at p. 357. See also Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector, 1998 O.J. (C 265) 2, at para. 117-118. The concept of margin squeeze as an abuse of dominant position was first applied by the Commission in its 1998 Napier Brown—British Sugar Decision, see Case No IV/30.178 Napier Brown-British Sugar, 1998 O.J. (L 284) 41. It is interesting to note that the Commission did not address the fairness of the wholesale prices set by the German NRA by bringing infringement proceedings against Germany under Article 258 TFEU or under article 102 and 106 TFEU, but chose, instead, to pursue an abuse of dominance case against DT.

\textsuperscript{155} The as efficient competitor standard is used to determine the existence of an anticompetitive margin squeeze by using the costs of dominant firms, rather than the costs of a hypothetical reasonably efficient competitor of the dominant firm. See the Deutsche Telekom Decision at paras. 107-108: ‘...there is an abusive margin squeeze if the difference between the retail prices charged by a dominant undertaking and the wholesale prices it charges to its competitors for comparable services is negative or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the downstream market [...] An insufficient spread between a vertically integrated dominant operator’s wholesale and retail charges constitutes anticompetitive conduct especially where other providers are excluded from competition on the downstream market even if they are at least as efficient as the established operator.’

\textsuperscript{156} Case T-271/03, Deutsche Telekom AG v Commission of the European Communities, 2008 ECR II-477.

\textsuperscript{157} Id., paras. 196-202.

\textsuperscript{158} See Steven C. Salop, Refusals to Deal and Price Squeezes by an Unregulated, Vertically Integrated Monopolist 76 Antitrust L.J. 709 (2010).

\textsuperscript{159} See J. Gregory Sidak, Abolishing the Price Squeeze as a Theory of Antitrust Liability, 4 J.C.L. &E. 279 (2008).

\textsuperscript{160} Deutsche Telekom, at para. 182.
wholesale prices. Furthermore, the Court expressly permitted the increase of retail prices as a remedy to an abusive margin squeeze. Finally, the Court, contrary to the Commission’s view, held that the mere existence of a *prima facie* margin squeeze of as efficient competitors does not suffice to establish an infringement of Article 102 TFEU. Anticompetitive effects need also to be proven, such as the effect of margin squeeze on the degree of competition on the downstream market.

The abovementioned principles were confirmed and further refined in the *TeliaSonera* judgement of the CJEU, a preliminary ruling under article 267 TFEU originating from a margin squeeze case in Sweden. In particular the Court clarified that the *Oscar Bronner* requirements do not need to be satisfied in order to establish margin squeeze liability. Refusal to supply and margin squeeze are thus treated as two distinct infringements, with the latter requiring a less demanding test. The Court, instead, held that where a dominant firm fixes the ‘terms of trade’ with its downstream competitors, it might be found to abuse its dominant position, when the terms of dealing are ‘disadvantageous’ for the new entrants.

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162 Deutsche Telekom, at paras. 181-2.
163 *Id.*, at paras. 250-4.
164 Case C-52/09, Konkurrensverket v TeliaSoneraSverige AB, judgment of 17 February 2011 (not yet reported) (hereinafter *TeliaSonera*).
165 *TeliaSonera*, paras. 54-8. In Oscar Bronner, the CJEU spelled out three conditions that must be met before a refusal to supply an input by the dominant firm can be considered abusive: (i) the refusal must be likely to eliminate all competition in the secondary market on the part of the person requesting access; (ii) there is no objective justification for the refusal; and (iii) the service in itself is indispensable to carrying on that person’s business, inasmuch as there is no actual or potential substitute in existence (Case C-7/97, Oscar Bronner GmbH & co. KG v MediaprintZeitungs –und Zeitschriftenverlag GmbH & Co. KG, 1998 ECR I-7791, at para. 41). See also Communication from the Commission, Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009 O.J. (C 45) 7, at para. 80, where the conditions that must be met for the establishment of a refusal to deal or margin squeeze set out by the Commission are essentially identical to those established by the CJEU in Bronner.
166 Oscar Bronner, at para. 55. The Court diverged from the opinion of Advocate General Mazák who had argued that absent a duty to deal, either imposed by sector specific regulation or because the *Oscar Bronner* conditions were satisfied, there is ‘no independent competitive harm caused by the margin squeeze above and beyond the harm which would result from a duty –to deal violation at the wholesale level. See Opinion of Advocate General Mazák in Case C-52/09 Konkurrensverket v TeliaSonera AB, delivered on 2 September, paras. 11-20. See also Damien Geradin, *Refusal to Supply and Margin Squeeze: A Discussion of Why The ‘Telefonica Exemptions are Wrong*, TILEC DISCUSSION PAPER No. 2011-009.
wholesale input is not, therefore, required for liability, although it ‘might be relevant’ when assessing the effects of the margin squeeze.\textsuperscript{167}

Notwithstanding the technical importance of these considerations, the DT case is important for its far-reaching policy statement regarding the concurrent application of competition law in sectors already subject to sector-specific regulation – a position which is in line with the Commission’s earlier view that competition rules and sector-specific regulation form ‘a coherent regulatory framework’\textsuperscript{168} with ‘mutually reinforcing’\textsuperscript{169} effect.

In particular, the Court held that ‘...the competition rules laid down by the EC Treaty supplement... by an \textit{ex post} review, the legislative framework adopted by the Union legislature for \textit{ex ante} regulation of the telecommunications markets’.\textsuperscript{170} Regulation and competition are, however, not only complementary, but also substitutable as regulation is gradually replaced by competition in markets that become competitive.

According to the Court, the presence of \textit{ex ante} intervention by the NRA does not prevent \textit{ex post} intervention by the Commission.\textsuperscript{171} On the contrary, the application of competition rules is directly related to the degree of \textit{ex ante} intervention in the market. The CJEU distinguished between cases where the restriction of competition is attributable to anticompetitive national legislation and cases where it is ‘merely encouraged or made easier’\textsuperscript{172} by the latter,\textsuperscript{173} allowing some scope for autonomous conduct by the regulated firm.\textsuperscript{174} In the first case, the undertaking is absolved from responsibility under competition rules and can, thus,

\begin{itemize}
\item \textsuperscript{167} \textit{Id.}, paras. 69 and 70-71: ‘when access to the wholesale input is indispensable potential anticompetitive effects are probable.’
\item \textsuperscript{168} \textit{See supra} note 154, at para. 57.
\item \textsuperscript{169} \textit{Id.} at para. 58.
\item \textsuperscript{170} Deutsche Telekom, at para. 92.
\item \textsuperscript{171} The Court, nonetheless, approved the Commission’ practice of granting a 10% reduction in fines, where sector-specific regulation was found to be a contributing factor to the breach of competition rules. \textit{See} Deutsche Telekom, at para. 279 and Case COMP/38.784- \textit{WanadooEspaña v. Telefónica}, By contrast, in some recent cases the US Supreme Court seems to have taken the position that \textit{ex ante} economic regulation immunizes the firm from antitrust liability \textit{[e.g.} Verizon Communications, Inc v Law Offices of Curtis v. Trinko, LLP, 540 US 398 (2004); and Pacific Bell Telephone Co. v Inktel Communications, Inc., 129 S. Ct 1109 (2009)].
\item \textsuperscript{172} Deutsche Telekom, at para. 82.
\item \textsuperscript{173} \textit{Id.} at para. 80-5.
\item \textsuperscript{174} \textit{Id.}, at para. 80: ‘national legislation leaves open the possibility of competition which may be prevented, restricted or distorted by the autonomous conduct of undertakings.’
\end{itemize}
raise a state or regulatory compulsion defence. In the second case, the ‘scope’ of autonomous conduct is examined in order to establish the firm’s liability under competition law. The fact that the dominant DT enjoyed ‘commercial discretion’ to adjust its retail prices and, by this way, remedy the abusive margin squeeze was considered sufficient to establish a margin squeeze liability. This ‘special responsibility’ of dominant firms ‘not to allow their conduct to impair genuine or undistorted competition on the common market’ was also confirmed in the TeliaSonera case which expressly referred to the conduct, by ‘commission or omission,’ which the ‘undertaking decides on its own initiative to adopt.’

Overall, the complementary relationship between sector-specific regulation and competition law gives rise to a triangular relationship between the Commission, the NRAs and the regulated firms. The Commission is called upon to check the performance of the NRA and correct imperfect national regulation by the imposition of competition rules, whereas the regulated firms are requested to inform the regulator in the likely event where the implementation of regulation will allow them to infringe competition law.

However, the fact that a dominant firm, while subjected to detailed regulatory access and pricing requirements, might be held liable for its ‘omission’ to protect its competitors’ profit margins seems problematic from an EU competition law standpoint. First, it is difficult to maintain that an undertaking has sufficient scope for autonomous conduct, when it is subjected to ex ante regulation. Second, the rule requiring the dominant firm to intervene in the regulatory process and protect the market position of its competitors by adjusting or negotiating its retail prices with the regulator, runs contrary to the fundamental premise of EU competition law, which is concerned with the protection of the competitive process and not of the competitors. It further connotes an affirmative duty of the dominant firm which cannot, however, be imposed under competition law.

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175 Id., at para. 83.
176 TeliaSonera, at para. 53.
177 As Monti puts it: ‘The regulator is regulated by the regulated firms’ and ‘the Commission regulates the regulators’ in Monti, supra note 67 above, at p. 125.
178 See Communication from the Commission, supra note 165, at para. 6.
179 See Geradin & O’ Donoghue, supra note 60, at p. 362.
IV. CONCLUDING REMARKS

Competition is not the antithesis of regulation, but a form of control. However, in the EU competition has been used in a ‘regulatory fashion’ more than in any other jurisdiction. This particular way of applying competition law is increasingly taking the lead over formal antitrust enforcement. Although the reasons are not entirely clear, an important drive for this development has been the relative failure to establish a centralised and uniform agenda in regulated markets. Also, institutional developments may have paved the way for regulatory antitrust.

However, it is at least doubtful whether competition is the most suitable policy tool for the objectives envisaged by the Commission. Furthermore, the application of a case-by-case approach may undermine the legal certainty of the regulatory framework and ultimately cause distortions in the markets. Finally, given the latitude enjoyed by the Commission in imposing far-reaching remedies, it is at least questionable whether there is a real constraint (such as the principle of proportionality) to its wide discretionary powers.

All in all, the use of competition in regulated markets has a profound impact on the importance granted to competition objectives vis-a-vis a range of other possible regulatory

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180 Scholars have expressed several concerns with regards to the effectiveness and appropriateness of regulatory antitrust as a policy tool. See e.g. Giorgio Monti, supra note 67; Martin Cave and Peter Crowther, Co-ordinating Regulation and Competition Law – ex ante and ex post, in Swedish Competition Authority The Pros and Cons of Antitrust in Deregulated Markets (2004); Ulrich Scholz & Stephan Purps, supra note 125; John Temple-Lang, European Competition Policy and Regulation: Differences, Overlaps and Constraints, in FRANCOIS LEVEQUE & HOWARD SHERANSKI (eds) ANTITRUST AND REGULATION IN THE EU AND US (1st ed., Edward-Elgar 2009), at p. 20; Helder Vasconcelos, Efficiency Gains and Structural Remedies in Merger Control, 58 J. IND. ECON. 742 (2010). See also Penelope Papandropoulos & Alessandro Tajana, The Merger Remedies Study- In Divestiture we Trust? 8 E.C.L.R. 443 (2006).


goals. There should be a more careful assessment of the advantages and risks of using antitrust enforcement in regulated markets. However, considering recent developments, it seems that in the coming years the Commission will be less likely to rely on Article 7 procedures, or on merger rules (which require a more stringent proportionality assessment). Regulatory antitrust allows circumventing lengthy legislative procedures and opposition from Member States on controversial political issues. Notwithstanding the effectiveness of the recent efforts to centralise regulation, the widespread of this trend signals that competition law will remain an important ‘can opener’ in cases where Member States are reluctant to open their markets.

183 See Von Rosenberg, supra note 83, at p. 253. Perhaps merger control may play a complementary role to the commitment decisions involving ownership unbundling, in the sense of guaranteeing that the unbundled networks will be able to establish themselves as independent companies and will not be taken over by third parties.

184 This is especially evident in the E.ON case, where E.ON voluntarily offered the structural remedy of divestiture, at a time when the German government fiercely opposed ownership unbundling during the negotiations of the Third Legislative Package.