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Competition Enforcement and Regulatory Alternatives – Background Note

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More documentation related to this discussion can be found at
<https://www.oecd.org/daf/competition/competition-enforcement-and-regulatory-alternatives.htm>

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*Competition Enforcement and Regulatory Alternatives**

1. Introduction

1. Economic regulation and competition policy are largely interdependent instruments of economic policy. However, they differ in aims and methods (Breyer, 1984, pp. 157-158^[1]). (Fels and Ergas, 2014, p. 3^[2]).
2. It may be said that both competition policy and economic regulation seek to achieve the benefits from workable competition, but go about it differently – with competition law seeking to strengthen the workings of markets by prohibiting certain forms of anticompetitive behaviour, while economic regulation entails the imposition of public constraints on business behaviour to address ‘market failures’.
3. However, the goals of competition policy and economic regulation are not necessarily aligned. Sometimes, economic regulations protect and promote competition; at other times, regulations limit competition for the sake of achieving other valuable public goals (Shelanski, 2019, p. 1923^[3]). Regulation can have the effect of stifling competition, and thereby deprive customers of its benefits, for example by raising barriers to entry. But regulation can also play an important role in supporting competition, for example by providing the legal and economic frameworks within which competition takes place. (Competition and Markets Authority, 2020, p. 2^[4]).
4. Ultimately, competition law and economic regulation are distinct but overlapping, largely complementary but occasionally in conflict (Dunne, 2015, p. 332^[5]).
5. The purpose of this Background Note is to explore this relationship from the angle of competition enforcement. In particular, this note will explore the role that regulation can play in competition enforcement – by constraining or influencing it –, and how regulation can both substitute and complement competition enforcement in practice.
6. In exploring this topic, this Background Note builds on a substantial amount of previous OECD work on the topic. First, there is a rich vein of OECD work concerning the interaction of competition law and regulation in specific sectors, too large to list here, dealing with sectors such as telecommunications, energy, transport, finance, and regulated professions. Second, OECD work on antitrust or merger control – e.g. concerning individual practices such as refusal to supply and margin squeeze, or concerning merger review in regulated sectors – very often addresses the interaction of regulation and competition enforcement. Third, there is work on the general principles governing potential conflicts between competition enforcement and regulation, most notably on the regulated conduct defence (OECD, 2011^[6]). Fourth, recent years have seen the Competition Committee explore the institutional design of competition authorities and sector regulators. Lastly, the OECD has worked on competition remedies and enforcement tools, exploring how they relate to alternative or similar regulatory measures.
7. As is made clear by the amount of OECD work just listed, the subject of this Background Note is a very wide one and has long been the subject of attention on the part of the Competition Committee. To avoid replicating prior OECD work, some issues will

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therefore not be addressed or will be dealt with only briefly. For example, this Background Note will not explore in detail the relationship between competition enforcement and the regulatory framework of any particular sector. Further, since the concurrent application of regulation and competition law has already been discussed in detail in the past from both substantive and institutional standpoints, this Background Note will limit itself to summarising past OECD Competition Committee work on these subjects.

8. For reasons of space, other subjects will not be discussed in this Background Note, or will only be mentioned in passing, despite meriting in-depth treatment. Examples of topics of undoubted interest and relevance that we are unable to cover in-depth here include the manipulation of regulatory schemes for anticompetitive ends (Lemley and Dogan, 2009^[7]), the competition assessment of regulatory barriers, and the importance of competition advocacy for the adoption of pro-competitive regulations, among others.

9. With these constraints, this Background Note will explore the relationship between regulation and competition enforcement as follows:

10. **Second 2** begins by providing an overview of debates on how regulation and competition law relate to one another.

11. **Sections 3** then explores how regulation and competition enforcement can overlap, and how such overlaps are managed in practice.

12. **Section 4** investigates how regulation and competition law affect and inspire each other. This will require us to look into how competition enforcement can lead to the adoption or removal of regulation; how the existence of regulation may inspire or constrain competition enforcement; and how the contents of competition law / regulation might influence the substantive content of the other.

13. **Section 5** provides examples of cross-pollination of regulation and competition law by discussing enforcement tools that combine elements of both.

2. The Competition Law/Economic Regulation Interface

14. The interaction of competition and regulation varies across jurisdictions, depending on the legal and institutional context. However, local choices regarding this interaction reflect wider views about regulation and competition law (Shelanski, 2019, p. 1925^[3]).

15. This section describes the main views on how competition law and policy relates to economic regulation. These views frame arguments about how competition law and regulation should interact in practice – e.g. what should be their respective scopes, what are the substantive rules governing their interaction, what is the appropriate institutional set-up, and how each discipline should influence the another.

16. This Background Note will explore these arguments at length later on. To understand them properly, however, we must first understand wider debates about the interaction of regulation and competition law, to which we now turn.

2.1. The Scope of Competition Law and of Economic Regulation

17. When addressing the interaction between competition law and economic regulation, one must begin by defining these terms. The challenge, as we shall see, is that while competition law and policy can be easily defined and identified, the same cannot be said of economic regulation.

18. One common way of looking at the economic regulation / competition law interaction is by considering the social problems they each seek to address. Competition law and regulation are often presented as alternative approaches to governing competition and addressing market failures (Shelanski, 2019, pp. 1925-1928_[3]). In effect, it has become common to see the need to correct market failures as the main justification for State action in the economic sphere (Nicolaidis, 2005, p. 25_[8]).

19. The concept of market failure is quite wide-ranging, and has multiple meanings.¹ Originally, the concept related to the ability of the market to generate a Pareto-efficient outcome in the presence of phenomena such as externalities and public goods (Marciano and Medema, 2015, pp. 10-11_[9]). The dominant definition within neoclassical economics relates to the inability of a market to reach an equilibrium on its own, or otherwise to reach only equilibria that exhibit unsatisfactory output and prices (Hovenkamp, 2019, p. 485_[10]). In practice, however, market failure is often used as shorthand for a large number of justifications for public intervention in the operation of markets. The main sources of market failure are often listed as: (1) market power; (2) public goods (and free riding); (3) externalities; (4) asymmetric or imperfect information; (5) factor immobility; and (6) lack of clear property rights (OECD, 2019, p. 27_[11]).² Recent research has increasingly focused on behavioural biases as another reason why markets might not operate well (Financial Conduct Authority, 2016, pp. 13-14_[12]).

20. Public authorities have two main tools to address market failures: price mechanisms – most notably through taxation – and regulatory mechanisms constraining market behaviour (Viscusi, Harrington and Sappington, 2018, p. 3_[13]). Both competition policy and economic regulation broadly fall under this latter set of tools.

21. An initial distinction between regulation and competition law concerns the type of market failures they seek to address. Competition law aims to prevent the illegitimate acquisition of market power and, where market power has already been accumulated, to control its exercise, so that the typical benefits of competition – lower prices, greater choice, higher quality – are realised fully (Dunne, 2015, pp. 14-18_[5]). Given that economic regulation also has a key role in mitigating market failures, including monopoly power, this distinction is not particularly useful (OECD, 2019, p. 6_[11]).³

22. However, regulation can address a much wider set of concerns than competition law, and often goes beyond simply addressing market failures narrowly understood as the inability of market to be as efficient as it could (Dunne, 2015, pp. 37-38_[5]). Even while regulation is often presented as justified because it rectifies market failures, alternative grounds for regulation, such as distributional justice, geographic consideration, rights' protection, *inter alia*, are widely recognised (Baldwin, Cave and Lodge, 2015, pp. 15, 22-23_[14]). As the author who coined the concept of market failure put it: '*Pareto efficiency as such may not be necessary for bliss*' (Bator, 1958, p. 378_[15]). As a result, justifications other than market failure often underpin the adoption of regulation, but not competition law (Breyer, 1984, pp. 7-8_[11]) (Feintuck, 2010_[16]).

23. In effect, regulation sometimes displaces the objectives of competition law altogether in the pursuit of other social goals (OECD, 1999, pp. 24-25_[17]) (Shelanski, 2019, p. 1950_[3]). When non-market values are prioritised, regulation can be deployed not because the market is not working well, but simply because other values are prioritised (Hovenkamp, 2005, pp. 229-230_[18]). Even if regulation is not directly inimical to competition, competition is frequently irrelevant to, or at best a minor consideration in, a regulator's agenda (Lemley and Dogan, 2009, pp. 696-697_[7]). The most straightforward example of this is how most regulated utilities are subject to universal service obligations unrelated to the problem of monopoly, but instead related to equity considerations (Dunne, 2015, p. 38_[5]).⁴

24. Despite these differences, it is not always straightforward to distinguish between regulation and competition law. The reason for this is that, as we shall see throughout this paper, regulation can overlap with competition law in terms of both goals and methods. As to goals, we have already established that both competition law and regulation can seek to control the acquisition and exercise of market power, even if regulation can *also* pursue other goals. Given this potential for overlap as regards common goals, competition and regulation are typically distinguished by reference to the means they deploy.

Box 1. The Different Methods of Regulation and Competition Law

A number of distinctions between competition law and regulation have been made as regards the means they adopt.¹

- Scope – It is often said that competition law is applicable across markets, while regulation is typically sector-specific. Competition interventions take place in markets whose structure and inherent characteristics can support effective competition, whereas (sector) regulators intervene mainly in sectors where effective competition is not possible and must be replaced by specialised regulatory intervention. As we will see below, this distinction reflects an understanding of economic regulation that may be too narrow.

- Timing – Regulation is supposedly imposed *ex ante* and in an ongoing manner, creating a structural framework to address market failures, while competition law applies *ex post* against anticompetitive behaviour in sporadic fashion.² Of course, competition authorities intervene *ex ante* in numerous situations (most notably in merger control) while regulators often act *ex post*, i.e. only once a problem has been identified.³

- Methods – Competition agencies’ primary job is to enforce a set of economy wide prohibitions designed to deter firms from suppressing competition. Sector specific regulation intervenes instead where markets are inherently imperfect and market mechanisms may have to be replaced with direct control.⁴ While it is true that the application of competition law is the simplest way to distinguish competition law and regulation, the distinction is not as clear-cut as one might expect. As we will see below, sector regulators may enforce competition law, and competition authorities may have regulatory duties. Further, regulation is not limited to sector regulation; it may also be market-wide and set economy-wide duties that, among other goals, seek to promote competition.

- Flexibility – Competition law is typically applied in individualised fashion to specific cases, while regulation is not case-bound. As a result, it is often said that regulation is less flexible than competition law.⁵ Against this, it has been noted that competition law is unable to address issues (e.g. tacit collusion) outside its legal remit, while independent regulators can be given a general set of responsibilities under primary legislation which they can implement through a principle-based approach that may involve easily changed secondary legislation (issued by the regulator) or guidance.⁶

- Type of Obligations Imposed – It is commonly observed that, while competition law merely imposes negative or reactive obligations but otherwise leaves the market to function unhindered, regulation imposes positive and proactive obligations on economic actors to perform certain conduct, and may even overreach market mechanisms and outcomes entirely.⁷ However, competition authorities have powers to impose ‘regulatory-type’ obligations in practice (see section 5 below), and some types of

regulation merely impose negative or reactive obligations that do not preclude market competition.

– Nature of Infringements – Regulatory breaches, even when they attract severe penalties, are not usually perceived as conduct that is wrong in itself,⁸ while competition law contains a significant moral element often absent in most regulatory infringements. The issue with this distinction is that a number of regulatory breaches are perceived as morally wrong (and punished as such), while it is debatable whether even the most serious competition infringements are morally reprehensible.⁹

¹ This broadly follows Niamh Dunne ‘Competition law and economic regulation’ (2015, CUP), pp. 43-48.

² OECD (1999) Relationship between Regulators and Competition Authorities DAF/CLP(99)8.

³ Vincent Smith ‘Competition Concurrency between the OFT and Sector Regulators’ (2004) Utilities Policy 61.

⁴ OECD (1999) Relationship between Regulators and Competition Authorities DAF/CLP(99)8.

⁵ Pierre Larrouche Competition Law and Regulation in European Telecommunications (2000, Hart), p. 124.

⁶ OECD (2019) Independent Sector Regulators DAF/COMP/WP2(2019)3.

⁷ OECD (2014) Institutional Design of Competition Authorities DAF/COMP/WD(2014).

⁸ Robert Baldwin, Martin Cave and Martin Lodge Understanding Regulation (2015, OUP), pp. 249-251.

⁹ OECD (2020) Criminalisation of cartels and bid rigging conspiracies DAF/COMP/WP3(2020)1.

25. In short, while it is often simple to distinguish competition law and regulation, it may not be possible to delimit them clearly in all instances – and, as a result, they may well overlap.

26. One source of difficulty in distinguishing competition law and policy and regulation is that the ‘regulation’ is not a well-defined concept.⁵ In the past, the OECD defined regulation broadly as ‘*the imposition of rules by government, backed by the use of penalties that are intended specifically to modify the economic behaviour of individuals and firms in the private sector.*’⁶ From this perspective, competition law and policy is merely a form of regulation.

27. This lack of definition extends to ‘economic regulation, which has been said to amount to ‘*state intervention in the economic decisions of companies*’ (Foster, 1992, p. 186_[19]) or ‘*government-imposed restrictions on firms’ decisions over price, quantity, and entry and exit*’ (Viscusi, Harrington and Sappington, 2018_[13]). Under such broad definitions, competition law and policy is often described as being a type of economic regulation, not autonomous from it.

28. Some authors have tried to narrow the scope of economic regulation by distinguishing it from other types of regulation, with uncertain implications for the place of competition law in these schemas. Such classifications include efforts at distinguishing economic regulation from social regulation dealing with matters such as consumer protection, health and environment (Ogus, 1994, pp. 4-5_[20]), or from regulation aimed at the protection of public interest objectives without an economic nature (De Streel, 2010, pp. 868-869_[21])⁷. In the past, the OECD also adopted a distinction along these lines (OECD, 1997, p. 6_[22]).⁸ Another possibility is to distinguish between sector regulation, limited to conventional forms of public utilities’ regulation that is sector specific and prescribes particular market behaviour, and horizontal economic regulation. (Khan, 1988, p. 3_[23]). Under these approaches, it is not uncommon for competition policy to be recognised as an additional category alongside economic and social/non-economic regulation (Prosser, 1997, pp. 5-6, 206_[24]).

29. To date, the focus has been predominantly on how competition law overlaps with sector-specific regulation. This focus, while simplifying the distinction between competition law and economic regulation, ignores many types of rules that can influence market competition and promote goals detrimental to economic welfare. Further, a focus on the interaction of competition law and sectoral regulation seems unsuited to a context where the interaction between competition law and horizontal policies, such as those concerning consumer protection, data protection and sustainability, have come increasingly to the fore (OECD, 2019, p. 5_[11]) – as is apparent from the evolution of the OECD’s work.

Box 2. The Evolution of the Competition/Regulation Interface at the OECD

Most OECD Competition Committee Roundtables devoted to regulation after the turn of the century focused almost exclusively on the interface between competition law and sector regulation.¹ Examples include roundtables on competition law and telecommunication regulation, energy regulation, transport regulation, and even universal service obligations.² This trend also made itself felt in the substantive topics addressed, which often reflected concerns about whether practices in certain industries should be subject to sector regulation at all,³ or looked into how to manage overlaps between sector regulation and competition law.⁴

The focus has changed noticeably in recent years. First, a longstanding workstream on how disruptive innovations were challenging regulatory schemes kick started about a decade ago.⁵ More importantly, over the last decade the OECD Competition Committee has looked at a number of topics concerning the interaction between competition law and horizontal regulations such as environmental⁶, consumer and data protection⁷, and even fair business and working practice rules⁸.

On the one hand, these recent workstreams continue to devote great attention to the need for competition authorities to participate in the design of regulations to ensure they do not unnecessarily restrict competition. However, discussions before the Committee have also repeatedly concluded that there may be a need to complement antitrust enforcement with additional regulatory tools to address specific issues, instead of focusing as before almost exclusively on how regulation creates barriers to entry that limit competition. Discussions have also begun to consider what impact these regulatory schemes and their goals should have on the application of competition law, reflecting market developments that have catalysed a debate on the sufficiency of antitrust and its articulation with other regulatory schemes to protect consumers and market structures.⁹

¹ Roundtables might also address antitrust immunities set out in regulatory instruments – OECD *Competition and Regulation in Agriculture* DAF/COMP(2005)44; OECD *The Regulated Conduct Defence* DAF/COMP(2011)3 –, or the removal of regulatory barriers to entry – OECD *Competition and Regulation in Retail Banking* DAF/COMP(2006)33; OECD *Competitive Restrictions in Legal Professions* DAF/COMP(2007)39; OECD *Competition and Regulation in Auditing and Related Professions* DAF/COMP(2009)19.

² E.g. OECD *Competition and Regulation Issues in Telecommunications* DAF/COMP(2002)6; OECD *Competition Policy in the Electricity Sector* DAF/COMP(2003)14; OECD *Energy Security and Competition Policy* DAF/COMP(2007)35; OECD *Structural Reform in the Rail Industry* DAF/COMP(2005)46; OECD *Recent Developments in Rail Transportation Services* DAF/COMP(2013)24; OECD *Competition in Ports and Port Services* DAF/COMP(2011)14; OECD *Universal Service Obligations* DAF/COMP(2010)13.

³ E.g. OECD *Refusals to Deal* DAF/COMP(2007)46; OECD *Margin Squeeze* DAF/COMP(2009)36.

⁴ OECD *The Regulated Conduct Defence* DAF/COMP(2011)3.

⁵ Even if this could be said to amount to a natural evolution of previous work on the removal of regulatory barriers to entry in certain economic sectors. Compare OECD *The Impact of Substitute Services on Regulation* DAF/COMP(2006)18 with OECD *Disruptive Innovation* DAF/COMP/M(2015)1, OECD *Disruptive Innovation in the Financial Sector* DAF/COMP/WP2(2015)9, OECD *Disruptive Innovation in Legal Services* DAF/COMP/WP2(2016)1, OECD *Competition and Innovation in Land Transport* DAF/COMP/WP2(2016)6, OECD *Radical Innovation in the Electricity Sector* DAF/COMP/WP2/M(2017)1;

⁶ E.g. OECD *Horizontal Agreements in the Environmental Context* DAF/COMP(2010)39; OECD *Pro-active Policies for Green Growth and the Market Economy* DAF/COMP(2010)34; OECD (2020) *Sustainability and Competition*. Compare with OECD *Competition and Environmental Regulation* DAF/COMP(2006)30, which was mainly devoted to how to minimise regulatory barriers created by environmental rules.

⁷ OECD *Price Discrimination* DAF/COMP/M(2016)2; OECD *Personalised Pricing in the Digital Era* DAF/COMP/M(2018)2; OECD *Non-Price Effects of Mergers* DAF/COMP/M(2018)1; OECD (2020) *Abuse of dominance in digital markets*; OECD (2020) *Consumer Data Rights and Competition* DAF/COMP(2020)1.

⁸ OECD *Implications of E-commerce for Competition Policy* DAF/COMP/M(2018)1; OECD (2018) *How can competition contribute to fairer societies?*

⁹ OECD (2019) *Competition Under Fire*; OECD (2020) *Competition Policy: Time for a Reset?*

30. Ultimately, the concept of economic regulation is too vague to be pinned down. Given this, we will define economic regulation as those instances where public regulation and intervention is likely to overlap with the operation of competition law (Dunne, 2015, pp. 33-34, 39_[5]).

2.2. How Competition Law and Economic Regulation Relate to One Another

31. In addition to uncertainty regarding the distinction between them, there is also a longstanding debate about the nature of the relationship between competition law and economic regulation. One might identify two dimensions to this discussion. The first is about the choice of market monitoring regime: when should one rely on economic regulation instead of on competition law to address specific market issues? The second is mainly about enforcement: if they are both potentially applicable, what rules should govern the overlap of economic regulation and competition enforcement?

32. Regarding the choice of applicable market monitoring regimes, the classical position is that competition enforcement should be preferred where possible (Breyer, 1984, p. 158_[1]) (Shelanski, 2019, p. 1953_[3]). This reflects the view that the limitations of regulation, particularly when compared to alternative market mechanisms, are significant (Rose, 2012, p. 378_[25]) (Competition and Markets Authority, 2020_[4]). In effect, market imperfections only provide an economic rationale for economic regulation where market responses do not remedy them effectively (or even exacerbate them), and where there exist feasible interventions that, at least in principle, can achieve net welfare improvements (Financial Conduct Authority, 2016, p. 15_[12]).

33. Nonetheless, competition law cannot be preferred to regulation in all instances. First, as we saw above, regulation can pursue goals other than pure market efficiency, and can tackle challenges other than market power, such as health concerns and safety standards (OECD, 2011, p. 22_[6]) (Competition and Markets Authority, 2020, p. 2_[4]). Second, even within concerns about market power, regulation may be better placed than competition law to address the relevant problems. Competition law has limited effectiveness against structural market issues, including those that involve the mere existence of a monopoly or oligopoly, exploitative behaviour, or issues that require ongoing implementation or monitoring (Breyer, 1984_[1]) (OECD, 2011, p. 23_[6]). Proceeding directly via specifically

enacted regulation may provide a more comprehensive and effective means by which to remedy ongoing market failures than episodic antitrust enforcement (Hellwig, 2009, p. 212_[26]) (Dunne, 2015, p. 176_[5])

34. The second question outlined above, about the joint enforcement of economic regulation and competition law, goes more clearly to the nature of the relationship between these disciplines – are they alternatives or complements?

35. Some view competition law and regulation as alternatives. This view starts from the premise that, while competition law reinforces market operations, regulation seeks to overreach the market and replace its outcomes (Breyer, 1984, pp. 157-58_[11]). From this perspective, regulation is the result of a public decision to remove a sector from the purview of market mechanisms and, thus, competition law. As put by Easterbrook: ‘*regulation displaces competition. Displacement is the purpose, indeed the definition, of regulation*’ (Easterbrook, 1983, p. 23_[27]).⁹ It follows that “*the antitrust laws are not just another form of regulation but an alternative to it—indeed, its very opposite.*” (Khan, 1987, p. 1059_[28]) It has been similarly stated that “*antitrust is not another form of regulation. Antitrust is an alternative to regulation and, where feasible, a better alternative*” (Breyer, 1987, p. 1007_[29]).

36. This view has some force as regards instances where regulation effectively replaces (and displaces) competition law. After all, regulation can expressly or implicitly limit the scope of application of competition laws; make enforcement more difficult, e.g. by creating market structures not conducive to competition or giving rise to jurisdictional difficulties; preclude sanctions even where antitrust infringements are found; or simply prescribe market outcomes, e.g. by directly regulating monopolist’s prices (Evenett and Michal, 2004, pp. 20-25_[30]).

37. There can be good reasons for regulation displacing competition law. Regulators have more technical expertise in sectors under their purview; can provide greater legal certainty than competition law, potentially incentivising investment; may be able to reach and implement decision faster than competition authorities; may be able address a broader array of topics than competition authorities; and are better suited to develop and administer price regulation and other standardisation schemes (OECD, 2019, p. 7_[11]).

38. Another view is that competition law and regulation are complements. Well-functioning markets can often best be achieved by the combination of timely, targeted competition enforcement and *ex ante* regulation that draws on a breadth of market experience (Coscelli, 2018_[31]).

39. Complementary roles for economic regulation and competition law arise mainly in two instances: where the sectoral law and competition law have the same goal, i.e. the promotion of competition; or where sectoral regulations have goals broader than the promotion of competition that are nevertheless consistent with competition law (ICN, 2004, pp. 4-8_[32]).¹⁰ In these circumstances, competition and regulation are not mutually exclusive. They operate in the same sphere of economic activity, address the same problems, and the use of one mechanism does not preclude the application of the other (Dunne, 2015, p. 56_[5]).

40. There are numerous examples of how competition enforcement can complement sector-regulation. In regulated sectors, the sector regulator has sometimes been considered the *ex ante* controller of market power, via price, revenue and investment oversight, while the competition authority is considered the *ex post* controller of market power, via abuse of dominance and cartel enforcement (OECD, 2019, p. 7_[11]). Competition law can help ensure that the regulatory regime achieves its economic goals, particularly those related to economic welfare; make markets perform more competitively, given the regulatory regime

that happens to control them; and scrutinise private conduct that is not effectively reviewed or controlled by the regulatory regime (Hovenkamp, 2020, p. 899^[33]).

41. Complementarity is not restricted to sector regulation and competition law – it also arises as regards horizontal regulation. For an example, consumer protection measures that seek to reduce the uncertainty faced by consumers as to the quality of a good can raise the sensitivity of consumer demand to prices, which, in turn, reduces the market power of suppliers (Evenett and Michal, 2004, p. 17^[30]).

42. While competition enforcement can complement economic regulation, economic regulation can also complement competition enforcement. Many regulators have a role in encouraging competition (e.g. by providing for access to monopoly infrastructure) and in preventing the use of market power by monopolies in their sector, which means that the operation of regulators can be highly complementary to the work of competition authorities (OECD, 2019, p. 7^[11]).

43. However, regulation and competition law can also be in tension. Examples of this abound, as will be apparent from the discussion in section 3.1. Most instances of such tensions are typically found when competition enforcement overlaps with sector regulation, giving rise to potential jurisdictional (which regulator should govern the situation at issue?) and substantive conflicts (should sector regulation or competition law apply? If both, how to ensure that their intervention is coherent?). Such tensions can also arise between competition enforcement and horizontal regulation. For example, competition agencies may think they are the best-placed authority to tackle directly a specific data practice as an anti-competitive conduct, while privacy and/or consumer protection authorities may well disagree.

44. Ultimately, the relationship between regulation and competition law is more complex than a simple alternatives-complements distinction allows. Regulation and competition enforcement may be complementary even if they have different goals, and they may sometimes contradict one another even when they pursue the same goal (ICN, 2004, p. 3^[32]).

45. Unsurprisingly, more nuanced views of the relationship between competition law and economic regulation have been advanced. Competition law has been said to provide a beneficial supplement, even if not a full substitute for regulation (Shelanski, 2011, p. 719^[34]). Some have conceptualised competition law and regulation as substitutes in non-regulated markets, and complements in partly deregulated markets or even in regulated markets in some contexts (e.g. double veto by competition authorities and sector regulators over mergers in some sectors such as telecommunications and the financial sector) (Carlton and Picker, 2014, pp. 43-45^[35]). It has even been suggested that the relationship between regulation and competition may vary, as markets are regulated, deregulated and regulated again, with each tool playing different roles, or even with hybrid tools being deployed, to face specific challenges (Dunne, 2015, p. 66^[5]).

46. The alternatives-complements' debate can have serious practical effects, e.g. regarding the application of competition law in regulated sectors, the institutional design of regulators and competition authorities, or the practical influence of regulatory tools and concepts in competition enforcement. We now turn to these questions.

3. The Application of Competition Law in Regulated Fields

47. Legal approaches to the interaction between regulation and competition law are significantly influenced by the debate outlined above. Naturally, those who view regulation

and competition law as substitutes will favour exclusive areas of application for regulation and competition law, and tend to set up separate bodies to enforce each set of rules. On the other hand, those perceiving regulation and competition law to be complements may allow their concurrent application in some circumstances, and are likely to prove more open to the assignment of responsibilities to the same set of entities over both competition law and economic regulation.

48. This section will explore the various means through which the relationship between regulation and competition enforcement is governed in practice *from a legal and institutional standpoint*. These topics have been the subject of a number of OECD roundtables in recent years. To avoid repetition, this section will synthesise the conclusions of those roundtables, to which you can refer should you wish more in-depth discussions.

3.1. Rules governing competition enforcement when economic regulation also applies

49. This sub-section maps the main legal approaches to the interaction between regulation and competition law, and their impact on competition enforcement. It overlaps significantly with the OECD's 2011 roundtable on the 'Regulated Defence' (OECD, 2011, p. 10_[6]), to which you can refer for an in-depth discussion that remains broadly up-to-date.

50. A preliminary issue concerns the particular challenges of articulating regulation and competition policy in multi-level governance settings, where constitutional concerns can come into play. In multi-level governance systems – such as federal states or supranational bodies like the EU – there is usually a hierarchy of norms under which federal competition law prevails over state regulation. It often happens that competition law is a federal-level statute, which can have the effect of displacing state-level regulation. However, courts typically allow regulation adopted at the state level to exempt some business conduct that would otherwise be subject to competition law adopted at the federal level. Moreover, courts have often also decided that undertakings abiding by state regulation that is contrary to a superior competition law norm should not be sanctioned (OECD, 2011, p. 32_[6]).

Box 3. Examples of Federal Competition Laws and State Regulation

In Australia, state law can exempt business conduct from competition law adopted by the Commonwealth in certain circumstances.¹ A Commonwealth-State intergovernmental agreement, the Conduct Code Agreement, sets the basis on which States can adopt these exemptions.² In particular, the exempting State must notify the Commonwealth of any exempting legislation; and the Commonwealth can invalidate the exemption unless the benefits to the community from the exemption outweigh its costs, and the objectives achieved by restricting competition by means of the exemption can only be achieved by restricting competition. The Australian Competition and Consumer Commission must maintain a cumulative list of these exemptions, and include it each year in its annual report.

In Canada, federal competition law will override provincial regulation where they conflict.³ However, a regulated conduct defence is available for criminal infringements where there is a clear operational conflict between a provincial regulation and the federal Competition Act, i.e. where a validly enacted provincial law authorises (expressly or impliedly) or requires the conduct impugned as contrary to federal competition law.⁴ It seems this defence may only be available when the federal act contains language that

either expressly or by necessary implication contemplates that there might be exceptions to its application.⁵

In the European Union, EU law – including EU competition law – has primacy over Member State laws. This primacy is apparent in a number of cases where competition infringements were established despite the sanctioned conduct having been authorised by national regulators.⁶ In addition, Member States may not adopt regulations that would deprive EU competition rules of their effectiveness – which extends as far as adopting rules that would encourage or force undertakings to violate EU competition law.⁷

In the United States, federal antitrust law prevails over state laws pursuant to the supremacy clause of the U.S. Constitution. As a result, state action cannot immunise conduct that amounts to an infringement of federal antitrust – which means that, as a rule, state regulation cannot compel *per se* infringements of US antitrust law by private entities.⁸ However, even state regulation that would normally be pre-empted can avoid invalidation for being contrary to federal antitrust laws if it amounts to a state regulatory programme. As a rule, when the state, acting through its legislature or an agency of state-wide authority, makes a conscious decision to replace competition with regulation, that decision will not be subjected to antitrust scrutiny, provided that some state agency actively supervises the implementation of the state's policy.⁹

¹ Section 51 of the Competition and Consumer Act (2010).

² Clause 2 of the Code, “Exemptions from the Competition Law”,

² E.g. *Rothman, Benson & Hedges v. Saskatchewan* [2005] 1 S.C.R. 188.

⁴ *Attorney-General of Canada v. Law Society of British Columbia (“Jabour”)* [1982] 2 S.C.R. 307.

⁵ *Garland v. Consumers Gas Co.* [2004] 1 S.C.R. 629.

⁶ Case C-280/08 P *Deutsche Telekom AG v Commission* EU:C:2010:603.

⁷ Case C-163/96 *Silvano Raso* ECLI:EU:C:1998:54; Case C-198/01 *Fiammiferi* ECLI:EU:C:2003:430; Case C-553/12 P *Dimosia Epicheirisi Ilektrismou AE (DEI)* ECLI:EU:C:2014:2083.

⁸ *Rice v Williams* 458 US 654 (1982).

⁹ *Parker v Brown* 317 US 341 (1943); *Goldfarb v. Virginia State Bar* 421 U.S. 773 (1975); *California Retail Liquor Dealers Assn. v. Midcal Aluminium* 445 U.S. 97 (1986).

3.1.1. Arguments for and against the joint application of regulation and competition law

51. The joint and overlapping enforcement of regulation and competition rules has been the subject of a number of critiques. It has been argued that, inasmuch as they are constrained by regulation, competition offences in regulated markets may not meet the requirements for substantive liability– or, if such requirements are met, this may infringe upon basic principles of fairness and rule of law (Dunne, 2015, p. 238_[5]). A related concern is that the overlapping enforcement of regulation and competition law leads to the duplication of market supervisory functions and enforcement costs, and to other costs related to the legal uncertainty of seeing the same conduct subject to two distinct sets of rules (Geradin and O’Donoghue, 2005, pp. 409-411_[36]) (Hellwig, 2009, pp. 232-233_[26]).

52. It has also been said that conventional antitrust analysis fails to take account of the special characteristics of regulated sectors, since what is optimal in an unregulated market may not be ideal in regulated sectors. This may not only create risks of mistaken enforcement, but can also compound the effects of such mistakes (Breyer, 1987, p. 101_[29]) (Kovacic, 1995, pp. 495, 498_[37]). Competition enforcement may also upset the delicate balance struck by the regulatory scheme between promoting competition and achieving other goals.¹¹ Further, the prospect of false positives can lead to the chilling of conduct otherwise allowed or promoted by a regulatory scheme (Dunne, 2015, pp. 232-233_[5]).

53. A particular concern relates to the risk that competition law will be used to address failures in regulatory schemes. Using competition law to co-opt regulatory duties leads to the indirect extension of competition law, since regulatory duties are typically more specific than competition rules. Such practices can also detrimentally affect legal certainty and lead to the discretionary application of regulatory powers, while evading the controls and strictures to which sector regulators are subject to (Monti, 2008, pp. 130, 140_[38]).

54. These critiques have been answered with arguments that competition enforcement can be particularly valuable in regulated sectors, which are typically partially competitive markets where regulatory errors are most likely. Where regulation seeks to curtail market power, competition law can assist by complementing or reinforcing the regulatory scheme (Shelanski, 2011, pp. 727-729_[34]). Competition enforcement can also address company incentives to game the regulatory framework. It has even been argued that the presence of regulation, which can shield conduct from antitrust scrutiny, makes false positives arising from competition enforcement less likely in regulated sectors (Lemley and Dogan, 2009, p. 703_[7]).

55. Concerns about the duplication of enforcement have also been challenged. Where a sector is regulated, the existence of competition problems is indicative of either regulatory failure or of a regulatory scheme that does not promote competition, so there is no duplication in reality (Lemley and Dogan, 2009, pp. 704-706_[7]). Given this, competition law can operate as a fall-back mechanism of market control, reflecting a commitment to competition as a societal value (Hovenkamp, 2005, p. 10_[18]).

3.1.2. The Joint Application of Regulation and Competition Law in Practice

56. Policy arguments for and against the joint application of regulation and competition laws apply with different intensities in different sectors and in the face of different types of economic regulation. Hence, it should not surprise us that the extent to which *ex ante* regulation implicitly limits the application of competition law varies across jurisdictions, and even between different types of regulation (Dunne, 2015, pp. 228, 251_[5]).

57. Once it is determined that the introduction of regulation does not exclude the application of competition law, the question then becomes how to manage overlaps between economic regulation and competition law in practice. Typically, this is addressed from the point of view of the extent to which competition law can reach business conduct in regulated sectors – i.e. the regulated conduct defence.

58. The core principles, conditions and underlying legal doctrines governing potential overlaps between regulation and competition enforcement are similar across OECD jurisdictions (OECD, 2011, p. 10_[6]). In principle, antitrust authorities cannot intervene, and the regulated conduct defence applies, when firm behaviour has been mandated or dictated by regulation. When the firm was merely induced to violate competition rules, e.g. by administrative guidance, this could at least be taken into account as a mitigating factor to reduce, without necessarily suppressing, a penalty. Further, the greater the extent, complexity and precision of regulatory duties, the smaller the scope for competition enforcement (Hovenkamp, 2005, p. 230_[18]) (Monti, 2008, p. 144_[38]).

59. Yet, the particulars and scope of the regulated conduct defence vary across jurisdictions. One can place possible approaches to the regulated conduct defence along a continuum that starts from complete immunity from competition enforcement in regulated sectors to full joint application of competition law and regulation. In practice, most approaches to the regulated conduct defence fall somewhere along this spectrum.

a. Regulation Pre-empts Competition Enforcement

60. Reflecting the concerns reviewed above about the cumulative application of economic regulation and competition law to the same situations, a number of sectors which are subject to *ex ante* regulatory regimes have been expressly removed from the purview of competition law – typically by means of express exemptions from the scope of competition rules, contained either in competition laws or in the statutes adopting sectoral regulation (OECD, 2011, p. 10_[6]). Typically, the main issue concerning express exemptions from competition law is the scope of the immunity—and how narrowly it should be construed.¹²

61. However, regulation can also implicitly preclude the application of competition law. The determination of whether regulation grants implied antitrust immunity varies across regimes and will depend on the relationship between the investigated conduct and the regulated scheme.¹³

62. A good example is provided by certain sector regulations under US federal law, regarding which the possibility of enforcing antitrust rules depends on whether the benefits of antitrust enforcement, in light of the regulatory framework, exceed its “sometimes considerable disadvantages”.¹⁴ Under this balancing approach, the application of antitrust enforcement will be precluded when: (i) there is a sector-specific regulator that supervises the relevant activity; (ii) there is evidence that the regulator exercised its powers to regulate the relevant activity; (iii) the potential conflict affects practices within the jurisdiction of the regulator; (iv) there is a risk of conflict between the regulatory scheme and antitrust rules, if applied concurrently (OECD, 2011, pp. 30-31_[6]).¹⁵

63. While nominally neutral as to whether competition enforcement can occur in regulated sectors, in practice this approach seems to start from a sceptical standpoint. The US Supreme Court explained that “*the existence of a regulatory structure designed to deter and remedy anticompetitive harm*” means that “*the additional benefit to competition provided by antitrust enforcement will tend to be small*”.¹⁶ In effect, it seems to be presumed that ‘*when a regulatory structure exists to deter and remedy anticompetitive harm, the costs of antitrust are likely to be greater than the benefit*’.¹⁷

64. It should be noted that this approach is an evolution from an older, more expansive line of case law, and is open to limiting interpretations that would permit U.S. courts to follow a less expansive implied immunity defence (OECD, 2011, p. 243_[6]). Technically, the case law continues to endorse the ‘plain repugnancy’ formula¹⁸, which will be discussed next.

65. Many authors have concluded, however, that this approach has the effect of precluding antitrust enforcement in a number of regulated sectors. This approach is said to focus on whether competition law provides added-value to regulations, while starting from the premise that the benefits of competition will be small when a pro-competitive regulatory scheme is already in place (Shelanski, 2011, p. 701_[34]).¹⁹ As a result, even if one could plead an antitrust claim that does not conflict with a regulatory scheme, that claim would still be precluded because there is already a regulatory scheme in place to address the alleged harm. The effect is that antitrust is less able to act in parallel or as a complement to regulation (Shelanski, 2019, p. 1942_[31])

b. Joint Enforcement of Regulation and Competition Law is Possible Unless They Conflict in the Case at Hand

66. Traditionally, the interaction between federal competition rules and economic regulation in the US was governed by a more favourable rule for the joint application of

competition law and regulation, starting from the premise that ‘*when there are two acts upon the same subject, the rule is to give effect to both if possible*’.²⁰ This premise was the “guiding principle” for resolving claims of implied antitrust immunity.²¹ The “proper approach” to a claim that a federal regulatory statute impliedly repeals the antitrust laws with regard to challenged conduct “*is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted.*”²²

67. From this perspective, antitrust enforcement is a complement to regulation that could come into play as long as it does not come into conflict with regulatory objectives in the individual case under review (OECD, 2011, p. 186_[6]). There was therefore a presumption in favour of concurrency unless there is ‘*plain repugnancy*’ between competition enforcement and economic regulation in individual cases,²³ with exemptions being implied ‘*only if necessary to make the [regulation] work and even then only to the minimum extent necessary*’²⁴ (FTC, 2010, p. 4_[39]).

c. Competition Enforcement is Only Precluded in Limited Circumstances

68. This position adopts a very favourable view of the concurrent application of regulation and competition enforcement, and can be found in the European Union. EU-level sector regulation and competition law are complementary, with the latter complementing *ex post* the market supervisory role enacted by economic regulation *ex ante*.²⁵ It follows that competition law is applicable *ex post* to any regulated market, including to firm behaviour that has been modified or directed by the regulatory scheme, provided that the firm retains some scope for autonomous market behaviour.²⁶

69. Only in some limited circumstances is competition enforcement not possible (OECD, 2011, p. 195_[6]). First, competition law does not apply where there is an express derogation from its application in the regulatory scheme.²⁷ Second, competition law does not apply if the regulatory framework means that the sector is not open to competition, e.g. it creates situations of *de facto* or legal monopoly.²⁸ Third, where sector-specific regulation removes all scope for autonomous business activity, no independent behaviour can arise and there is thus no scope to apply competition law against the regulated firm.²⁹ This last exception has been applied restrictively, since EU law starts from the assumption that regulation must remove all scope for autonomous market conduct.³⁰ As a result, liability can be incurred even if national legislation “*encourages, or makes it easier for undertakings to engage in autonomous anti-competitive conduct*”.³¹

70. The presence of regulation may, however, provide a mitigating factor when setting the sanction. The European Commission Guidelines on setting fines state that, “*where the anti-competitive conduct of the undertaking has been authorized or encouraged by public authorities or by legislation*”, this will be a mitigating factor, a view endorsed by the courts in several cases (OECD, 2011, pp. 35-37_[6]).³²

71. One issue with such a favourable approach to the enforcement of competition law is that it opens the door to the cumulative application of regulation and competition rules to the same conduct, with concomitant concerns about due process and double jeopardy.

Box 4. Ne bis in idem

In Belgium, bpost is the historical postal service provider in charge of the collection, sorting, transport and delivery of postal items to addressees. For 2010, bpost informed the *Institut belge des services postaux and des télécommunications* (the national regulatory authority for postal services in Belgium, ‘IBPT’) of a change to its rebate

system for contractual tariffs relating to services distributing addressed advertising material and administrative mail items. By decision of 20 July 2011, IBPT fined bpost EUR 2.3 million on the ground that it had adopted a discriminatory tariff system in contravention to European Directive 97/67. In particular, bpost was said to have adopted a selective discount based on an unjustified difference in treatment as between senders and consolidators. In 2015, the Court of Justice of the European Union ('CJEU') held that bulk mailers and consolidators are not in comparable situations, and bpost's rebate did not amount to discrimination prohibited under Article 12 of Directive 97/67 (Case C-340/13 *bpost* EU:C:2015:77). As a result, the Court of Appeal annulled IBPT's decision.

In the meantime, the *Autorité Belge de la Concurrence* (Belgian Competition Authority) found that the adoption of different quantity discounts by bpost was an abuse insofar as it encouraged major clients to contract directly with bpost and placed consolidators at a competitive disadvantage. The Belgian Competition Authority fined bpost EUR 37,399,786, taking into account the fine previously imposed by IBPT.

On appeal, the Court of Appeal quashed the decision for breaching the principle of *ne bis in idem*. The Cour de Cassation then set aside this judgment, finding that criminal proceedings based on the same facts do not infringe *non bis in idem* when those proceedings have additional complementary objectives, covering different aspects of the same unlawful conduct. The case was referred back to the Court of Appeal, which made a preliminary reference to the CJEU concerning the interpretation to be given to the principle of *non bis in idem* in relation to competition (Case C-117/20 *bpost*).

3.2. Institutional Frameworks

72. While no institutional framework can guarantee the elimination of all inconsistencies between regulation and competition enforcement (Petit, 2005, p. 202^[40]), institutional design is important for the management of the regulation/competition law interface. Organisational structures for ensuring consistency across competition and regulatory approaches take a variety of forms, which sit astride the different substantive approaches to the joint application of competition enforcement and regulation (or lack thereof) described above.

73. This section will briefly review the main institutional models governing the relationship between regulation and competition law. The OECD has pursued a significant amount of work in this area recently – see, particularly, (OECD, 2015^[41]), (OECD, 2016^[42]) and (OECD, 2019^[11]) – which you are advised to refer to for more in-depth discussions.

3.2.1. Competition Authorities and Regulators enjoy exclusive competences under their remit

74. The most straightforward and common approach is to clearly separate competition authorities from regulators (Jenny, 2013, p. 169^[43]). This approach reflects the alternative roles that competition law and regulation play by aligning institutional design with substantive rules and ensuring that competition enforcement and the exercise of regulatory powers are pursued independently from one another.

75. The main challenge to competition enforcement under this institutional model concerns conflicts as to which body has jurisdiction. As we saw above, the same problem may be subject to antitrust and regulation. The question then becomes which institution should act when parallel enforcement is possible.

76. Jurisdictional conflicts may be addressed by hard rules or through informal means. Formal legal mechanisms put in place for resolving potential jurisdictional conflicts between competition authorities and sector regulators include not only substantive rules such as the ones reviewed in section 3.1 above, but also rules concerning the relative priority of regulation and competition enforcement (e.g. a rule requiring competition enforcement to wait until regulatory action concludes). An alternative is informal cooperation, which is common between competition agencies and sector regulators (Stern, 2015, p. 896^[44]). Such cooperation can take the form of informal information exchanges, requirements on regulators to inform competition authorities of suspected practices in regulated sectors and vice-versa, bilateral and multilateral exchanges between competition enforcers and regulators, staff secondments, and even joint projects. Such informal arrangements may be formalised, e.g. through Memoranda of Understanding or even in law (Petit, 2005, p. 191^[40]), (OECD, 2019, pp. 24-25^[11]).

3.2.2. The same institution is responsible for regulation and competition enforcement

77. At the other extreme from the institutional model just described, one finds the empowerment of a single authority to enforce both regulation and competition law. This is relatively rare. Regulatory integration occurs only in four OECD jurisdictions – Australia, Estonia, the Netherlands and Spain – even if other countries have mooted the possibility of greater integration.³³ However, integration regarding one specific type of horizontal regulation – consumer protection – occurs in about 36% of OECD jurisdictions (OECD, 2019, pp. 20, 22^[11]).

Box 5. Integrated Regulators and Competition Authorities

In Australia, the ACCC not only enjoys primacy in terms of federal antitrust enforcement but also has significant economic regulatory powers. The ACCC's regulatory functions extend to telecommunications, energy, transport and postal services, and water.

In Estonia, the competition authority has had a Competition Division and a Regulatory Division since 2010. The Regulatory Division holds regulatory responsibilities for energy, water, post, communications and railways.

In the Netherlands, the Authority for Consumers and Markets (ACM) was created on 1 April 2013 by combining the Consumer Authority, the Competition Authority and the Independent Post and Telecommunications Authority (OPTA). The ACM also has powers to promote competition in transport and healthcare.

In Spain, the Spanish National Markets and Competition Commission merged the competition authority with the sector regulators responsible for telecom, energy, railways, airports and the audio-visual sector.

Source: (OECD, 2015^[41]) and (OECD, 2019, p. 22^[11])

3.2.3. Competition Authorities and Regulators have concurrent jurisdiction

78. Finally, some jurisdictions have set up independent regulators and competition authorities, but granted them concurrent jurisdictions in respect of certain rules or economic sectors. Some jurisdictions grant antitrust powers to regulators, while in other jurisdictions competition agencies have regulatory powers.

79. As regards competition enforcement, this model typically entails sector regulators having competition enforcement powers, alone or in addition to the competition authority. Such concurrent jurisdiction is relatively rare in OECD countries, but it does occur (OECD, 2019, p. 23^[11]).

Box 6. Regulators with competition enforcement powers

The most prominent example of concurrent enforcement is the UK, where competition enforcement is pursued ‘concurrently’ by the CMA and by designated sector regulators.¹ These are the Office of Communications, the Water Services Regulation Authority, the Office of Rail Regulation, the Gas and Electricity Markets Authority, the Northern Ireland Authority for Utility Regulation, the Civil Aviation Authority, the Financial Conduct Authority and Monitor. A UK Competition Network (UKCN) allows the CMA and the sector regulators to coordinate on matters related to concurrency.² The CMA will adjudicate should consensus on who should enforce competition law not be reached, and may also decide to take over a competition case from a designated sector regulator.³

In some instances, sector regulators may be solely empowered to pursue competition enforcement in their sector. Examples of this can be found in Costa Rica, Mexico and Greece as regards the telecommunications sector.

In Costa Rica, the Telecommunications Regulatory Authority (SUTEL) has exclusive jurisdiction to oversee competition policies in the telecommunication sector. However, SUTEL must require a non-binding opinion from the competition authority prior to starting the enforcement procedures and before taking a final decision.⁴ A recent legal reform explicitly adopted a single substantive and procedural competition framework applicable to all competition procedures, and provides for a number of additional coordination mechanisms.

In Mexico, the Instituto Federal de Telecomunicaciones (IFT) is the sole competition authority in charge of enforcing competition law in the telecommunication and broadcasting sectors, in addition to being the *ex ante* regulator. Both the IFT and Mexico’s competition authority, COFECE, were established in 2013. One of the objectives of this reform was to strengthen regulation and competition enforcement in the highly technical and complex telecommunications and broadcasting sectors, and to deal with powerful private interests and players.⁵

In Greece, the Hellenic Telecommunications and Post Commission (EETT) is responsible for competition enforcement in the electronic communications market and in the postal services market. The Hellenic Competition Commission has the power to carry out industry-specific sector investigations and inquiries and to publish analyses and recommendations concerning competition in those sectors. Cooperation between EETT and HCC occurs under general provisions concerning their co-operation.⁶

¹ Section 54 of the Competition Act.

² CMA (2014) Regulated industries: Guidance on concurrent application of competition law to regulated industries

³ S. 51(1) ERR(2013).

⁴ Articles 55 and 56 of the General Telecommunications Law.

⁵ OECD (2020) Peer Reviews of Competition Law and Policy in Mexico, p. 32-33.

⁶ OECD (2018) Peer Reviews of Competition Law and Policy in Greece, p. 160-162.

3.2.4. *Other Coordination Mechanisms*

80. In practice, all institutional models involve some level of concurrency and coordination in enforcing regulation and competition law. Even in jurisdictions where there is a clear division of labour between competition agencies and sector regulators, sector regulators may exercise certain antitrust functions – e.g. in the US, the Federal Communications Commission is responsible for merger reviews that involve the transfer of assets or corporate control by telecommunications carriers. Other countries, such as Austria, Belgium, Costa Rica and France, have a degree of what might be termed systematised informal concurrency. For example, regulators may have a duty to refer competition cases to the competition agency even if they do not have competition powers themselves. Further, both regulators and competition authorities may be empowered to conduct market studies or to provide opinions on each other’s work (OECD, 2019, p. 23^[11]).

81. Common appellate procedures can also contribute to coherence in regulation and competition enforcement. This can be achieved in a number of different ways. One may adopt common court procedures applicable to all public activities overseen by the government (as in the EU or the US); specialist courts may be in place to deal with both competition and economic regulatory matters (as in the UK); or a jurisdiction may have a common judicial appeal mechanism to supervise lower courts and ensure consistency in their approaches (OECD, 2011, p. 48^[6]) (OECD, 2020, pp. 23-24^[45]).

4. Mutual Influences between Regulation and Competition Enforcement

82. Regulation and competition law not only overlap, they also influence each other. Competition enforcement can affect whether regulation is adopted and how it is applied. On the other hand, the existence of regulation typically has an impact not only on whether competition enforcement can occur at all, but, where competition enforcement is possible, also on the types of cases that are brought and the concerns they address. Further, regulation law and competition often borrow from one another.

83. Section 4 and 5 will discuss the mutual influences between regulation and competition. The present section will focus on how regulation and competition enforcement can influence the scope and content of each other, while section 5 will explore how the cross-pollination of regulation and competition law has led to the development of enforcement tools combining elements of each discipline.

84. In exploring how regulation and competition enforcement influence each other, two different dimensions can be identified. The first dimension concerns the influence that the enforcement of one of these disciplines can have on decisions to adopt the other market supervision mechanism. Experiences with competition enforcement can influence decisions on whether to adopt or remove regulation, while the adoption or removal of regulation can affect competition enforcement levels. The second dimension concerns the substantive content of regulation and competition enforcement. Competition enforcement can influence the content of regulation that is adopted in its wake, while the content of regulation can influence the types of competition cases that are brought and the theories of harm they adopt. We will review each of these possibilities in turn.

4.1. Competition Enforcement can play a role in the adoption of Regulation

85. Regulation can and often follows from competition intervention. In effect, it has even been argued that some types of competition enforcement amount to strategic actions

designed to stimulate other regulatory responses (Monti, 2019, p. 2_[46]). A good example of this are competition interventions against business practices that take advantage of regulatory gaps (Monti, 2019, p. 16_[46]).

Box 7. The UK's Pfizer/Flynn case and the closing of regulatory loopholes

In December 2016, the UK's Competition and Markets Authority (CMA) adopted an excessive pricing decision regarding phenytoin sodium capsules, an out-of-patent anti-epileptic drug whose cost is reimbursed by the UK's National Health Service (NHS). The sanctioned practice was only possible because the pharmaceutical companies exploited a regulatory loophole that allowed them to subtract phenytoin sodium capsules from the scope of price regulation and increase their price significantly.

Until 2012, Pfizer sold phenytoin sodium capsules as a branded drug (Epanutin) under the Pharmaceutical Price Regulation Scheme ("PPRS"), which controls the overall profit that its members can make on the sales of branded licensed medicines to the NHS on a portfolio basis (i.e. their entire branded medicine portfolio). In 2009 and 2014, the target profit rates were 6% return on sales ("RoS") and 21% return on capital ("RoC").

The PPRS does not apply to generic medicines. Following its purchase of the marketing authorisation for Epanutin from Pfizer, Flynn obtained approval in the UK to sell the product as a generic, thereby removing it from the PPRS' price controls. Flynn then applied for a change in price of the genericised version of phenytoin sodium capsules.

The Department of Health believed that, since Pfizer and Flynn were members of the PPRS voluntary scheme, all the products they sold were exempt from statutory price controls. Given that the capsules were now generics not subject to the PPRS, the Department of Health concluded it had no powers to prevent the proposed price increase of Flynn's phenytoin sodium capsules. Instead, when Flynn increased the price of the phenytoin sodium capsules by many multiples, the Department of Health complained to the UK competition authority, that investigated and eventually sanctioned Pfizer and Flynn under competition law.

In the meantime, the regulatory loophole that allowed the sanctioned practice was closed by s. 4 of Health Service Medical Supplies (Costs) Act 2017, which allows for the price regulation of generics. When introducing the relevant Bill to Parliament on its second reading on 24 October 2016, the Secretary of State stated that: *"Our concern is that companies have been exploiting the differences between the voluntary and statutory schemes, particularly the loophole, which the Bill seeks to close, that if companies have drugs in both schemes, we are unable to regulate at all the prices of the drugs that would ordinarily fall under the statutory scheme."*

86. Recurring competition law complaints or investigations may also highlight the existence of market-wide problems that are better addressed through systemic, market-wide intervention. Specifically enacted regulation may provide a more comprehensive and effective means by which to remedy ongoing market failures than episodic antitrust enforcement (Hellwig, 2009, p. 212_[26]) (OECD, 2011, p. 23_[6]).

87. One can find numerous examples of how recurring competition law enforcement can lead to the adoption of regulation.

Box 8. Competition enforcement can lead to the adoption of regulation

One of the earliest examples of competition enforcement leading to regulation is also one of the most famous, in an area of perennial tension between regulation and competition enforcement – telecommunications. Shortly after the adoption of the Sherman Act, the US federal government brought numerous antitrust actions against AT&T's efforts to achieve a single telephony monopoly. These eventually led to the adoption of the *Kingsbury* antitrust commitment in 1913, whereby AT&T agreed to allow independent local telephone companies to interconnect with AT&T's long distance network, divest Western Union, and refrain from purchasing other companies if the Interstate Commerce Commission objected. However, competition concerns, and antitrust cases, continued to arise, and eventually the US decided to adopt a number of regulatory instruments in this sector – including, most notably, the Communications Act of 1934.¹

A more recent example relates to payments systems, most of which are owned by consortia of large credit institutions. Concerns arose regarding the ability of these consortia to deny rivals access to their payment systems' infrastructure, and to exploit customers by setting excessively high multilateral interchange fees. These concerns triggered antitrust enforcement all over the world. Eventually, regulation was adopted concerning such payment systems, in terms that often mirror the result of earlier competition enforcement actions.²

Further, competition enforcement in deregulated markets can at times spur (re-)regulation, as exemplified by the development of ground handling and airport charges regulation. In Europe, ground handling was originally provided solely by airport operators or designated providers. In the absence of regulation, customers resorted to antitrust complaints to address a number of concerns that arose following market liberalisation, leading to 10 investigations in the sector in 1993 and a number of enforcement decisions. Regarding airport charges, the measures liberalising air travel in Europe did not ensure equal treatment of airlines by airports. Discriminatory airport charges in favour of national airlines triggered a spate of enforcement cases. In both cases, the EU eventually adopted Directives requiring the opening of airport services to third-parties subject to non-discrimination, transparency and quality requirements.³

¹ Tim Wu A Brief History of American Telecommunications Regulation in Oxford International Encyclopaedia of Legal History (2009) Vol. 5 95.

² OECD *Competition and Payment Systems* DAF/COMP(2012)24 and OECD *Line of Business Restrictions* DAF/COMP/WP2(2020)1.

³ OECD *Competition Policy and International Airport Services* DAF/CLP(98)3 and OECD (2014) *Airline Competition*.

88. We are currently in the midst of a transition from relying solely on competition enforcement to also adopting regulation in the digital sphere. Following a decade of efforts to enforce competition laws in this sector, the last couple of years have seen competition agencies take the lead in debates about whether and how to regulate business conduct by digital platforms. Underlying this is a developing view that competition enforcement may not be sufficiently effective and timely. In addition, a number of digital platforms create their own ecosystems, in which they are *de facto* regulators as well as market players. Given this, authorities are currently exploring whether to subject platforms to a number of regulatory duties to ensure level playing fields and protect competition within (and between) these ecosystems (Lundqvist, 2019, pp. 27-28_[47]).

Box 9. Regulating the Digital Realm

At the time of writing, a number of jurisdictions are exploring the possibility of adopting regulation following competition investigations into the business practices of digital businesses. These proposals often borrow from existing competition law principles (and cases), but expand on them by setting positive behavioural duties applicable without the need to establish anticompetitive effects.

Germany recently amended its competition act to enable it better to address the conduct of large digital companies. The newly introduced Section 19a empowers the *Bundeskartellamt* to intervene at an early stage in cases where certain large digital companies threaten competition. As a preventive measure, the *Bundeskartellamt* can prohibit certain types of conduct by companies which, due to their strategic position and their resources, are of paramount significance for competition across markets. Such conduct includes e.g. self-preferencing a group's own services, or impeding third companies from entering the market by precluding access to data relevant for competition.

In Japan, a Headquarters for Digital Market Competition ("Digital Headquarters") was established under the Cabinet – with the participation of the JFTC – to promote competition and innovation in digital markets. In addition, an Act on Improving Transparency and Fairness of Specified Digital Platforms ("DP Act") entered into force early in 2021. The DP Act applies to digital platform operators to be designated by the Ministry of Economy, Trade and Industry (METI) among those that meet a set of thresholds. Designated platform operators will be under a duty to disclose certain information, such as providing their transactions' terms and conditions, maintaining appropriate operations and systems in accordance with conduct guidelines to be set by METI, and reporting annually on their compliance with these requirements, subject to criminal penalties.

In the United Kingdom, an independent review by a Digital Competition Expert Panel on 'Unlocking Digital Competition' (commonly referred to as the 'Furman Report') and a CMA market study into online platforms and digital advertising identified a number of competition issues in the digital sector, and proposed a number of reforms to address them. Among these proposals is the creation of a Digital Markets Unit (DMU) within the CMA to oversee a new regulatory regime for the most powerful digital firms, which will be subject to an enforceable code of conduct. The DMU has been set up on an interim basis to focus on operationalising and preparing for the new regime, which will require a statutory basis. The code of conduct, yet to be adopted, is expected to entail: (i) high level overarching objectives to be set in legislation, including, potentially, fair trading, open choices, trust and transparency; and (ii) supporting principles and guidance, which will be determined by the DMU.

4.2. Regulatory reform can influence Competition Enforcement

89. Regulatory reform can significantly affect competition enforcement. A clear example of this, already discussed in section 3.1.2 above, occurs where the introduction of regulation introduces antitrust exemptions or otherwise limits the scope for competition enforcement in the regulated sector.

90. The other common instance of regulatory reform having an impact on levels of competition enforcement are major deregulatory reforms, such as the ones adopted across the world in past decades in sectors such as communications, electricity, natural gas, water/sewerage, transportation, financial services, professional services and agriculture. Such reforms generally included: market opening; privatisation; rethinking universal service obligations; liberalising restrictions on entry, prices and normal business practices; and taking measures to ensure consumers are properly informed and protected (OECD, 1999, pp. 7, 17_[17]).

91. Deregulation is a lengthy process, and has rarely consisted simply of abolishing regulations and leaving everything up to market forces subject solely to competition law. Instead, it typically involves interim regulatory steps during the transition from regulation to governance by market forces (OECD, 1999, pp. 7, 17_[17]) (Shelanski, 2012, p. 493_[48]). Deregulation is thus usually achieved through the adoption of new regulatory controls to restructure monopolies and create competitive markets that can eventually be governed by market forces rather than regulatory strictures (Hellwig, 2009, pp. 205-208_[26]) (Dunne, 2015, pp. 148-149_[5]).

92. Deregulatory efforts often open the field for competition enforcement (Khan, 1987, p. 1059_[28]). First, deregulation typically involves the removal of express or implied antitrust immunity (Jenny, 2013, p. 172_[43]). Second, deregulation raises the prospect that competition-oriented rules included in the regulatory scheme will be removed from the books. As a result, the likelihood of gaps in competition enforcement can become higher as the government aggressively pursues deregulation (Shelanski, 2019, pp. 1928-1929_[3]).

93. Further, heightened regulatory and antitrust scrutiny may be required during liberalisation processes (Kahn, 1990, p. 329_[49]) (Armstrong and Sappington, 2006, p. 327_[50]). Once-regulated industries are prone to anticompetitive practices in the aftermath of deregulation (Carlton and Picker, 2014, p. 42_[35]). Increased antitrust enforcement and regulatory oversight may both be necessary temporarily to ensure that market competition has the opportunity to develop to the point where it can eventually replace regulation as the key source of discipline on the incumbent firm (Armstrong and Sappington, 2006, p. 359_[50]).

94. There are numerous examples of the importance of competition enforcement for successful liberalisation. For example, some authors have remarked on how competition law was successfully deployed to supplement or fill gaps in energy and telecommunications regulation (Diathesopoulos, 2012_[51]) (Dunne, 2015, pp. 114-115_[5]). Unable to address key issues of market structure fully in its deregulatory reforms³⁴, the EU nonetheless managed to obtain ownership unbundling through competition enforcement decisions in the energy sector³⁵ and ensure the effectiveness of access regulation in the telecommunications' sector through antitrust competition enforcement and merger control.³⁶

95. In some instances, governments have even decided to rely solely on competition enforcement as a substitute for regulation in the context of liberalisation processes. This approach builds from an assumption that a country's competition laws contain sufficiently strong prohibitions of abuse of dominance and anticompetitive agreements to address whatever issues may arise in network industries following their deregulation (OECD, 1999, p. 21_[17]).

Box 10. Substituting Competition Enforcement for Sector Regulation

When the electricity market was liberalised in Germany in 1998, it was decided to open up the market from the outset instead of pursuing gradual liberalisation. The reform

introduced negotiated third party access, and replaced access regulations with negotiated access agreements between market participants supervised by the competition authority. The competition law was also reformed to introduce a provision setting out that a refusal to grant access to the electricity network amounted to an abuse. Under this provision, a monopolistic network operator would act abusively if it denied non-discriminatory access to its networks.¹ This competition-focused regime was later complemented by the introduction of regulated third party access based on approved and published tariffs applicable to all customers, and applied objectively and without discrimination between network users; and by the creation of the Federal Network Agency (*Bundesnetzagentur*) which currently provides the template for network access agreements in the electricity sector and to whom all refusals to grant network access must be notified.

In New Zealand, market liberalisation in the 1980s relied almost exclusively on market mechanisms under the supervision of generic competition provisions. Competition enforcement was backed by the possibility, provided in Part 4 of the Commerce Act 1986, of the Government introducing regulation as a backstop should competition enforcement not suffice to ensure competitive prices and quality of goods or services in markets with monopoly characteristics. A number of such regulatory schemes have been added over time. For example, in 2001 the competition authority was empowered to enforce regulation in the dairy and telecommunications markets. Electricity transmission and distribution businesses also became subject to regulation because there was little or no competition in the markets for these services. In 2008, specific services in New Zealand's three major international airports (Auckland, Wellington, and Christchurch) also became subject to regulatory requirements.

1 OECD Competition Policy in the Electricity Sector DAF/COMP(2003)14

96. Even when reforms do not go as far as fully to replace competition enforcement for regulation, there often remains a need for antitrust intervention once the new regulatory regime is in place. It has long been recognised in theory – which is reflected in practice³⁷ – that, once a market has been deregulated, this may entail greater scope for competition enforcement (OECD, 2011, p. 244_[61])

97. Newly deregulated markets are rarely perfectly competitive, and require continuous supervision, be that due to remaining structural or legal barriers, lingering (absence of) market dynamics, or strategic resistance by the former incumbent. Partial deregulation may result in asymmetries and distortions between regulated and unregulated market segments (Kahn, 1990, pp. 333-334_[49]). In effect, bottlenecks that hinder the development of competition in competitive segments are a recurring problem in partly deregulated industries (Breyer, 1987, p. 1032_[29]).

98. These challenges can justify heightened antitrust scrutiny of newly liberalised markets (Armstrong and Sappington, 2006, p. 359_[50]). It has even been argued that antitrust enforcement should run countercyclical to regulation, especially during strongly deregulatory cycles. The comparative importance of countering deregulatory shifts arises because, while increased regulation can trigger barriers that keep competition enforcement out of regulated markets, reduced regulation triggers no such mechanism for pushing competition enforcement back into deregulated markets (Shelanski, 2019, p. 1924_[31]).

4.3. Competition Enforcement can influence the substance of Regulation

99. Competition enforcement can lead not only to the adoption or to reform of competition law, but can also influence its content. Reliance on competition law can reflect

a deliberate policy choice to favour market-oriented solutions. This can be reflected in the adoption competition enforcement as a tool to address problems left by the removal of sector-specific regulation, as we just saw, but can also lead to the adoption of new, lighter-touch regulation with content inspired by competition law (Dunne, 2015, pp. 71-72_[51]).

100. It is commonly recognised that regulation is not only generically necessary for the functioning of the market economy, but remains essential in certain markets e.g. when monopolistic elements are present (Baldwin, Cave and Lodge, 2015, pp. 9-10_[14]). In these circumstances, regulation and competition are alternative ways of addressing the challenges posed by market power.

101. In such contexts, regulation can and often adopts competition law concepts and approaches, particularly when it seeks to achieve more efficient, quasi-market outcomes (Dunne, 2015, p. 169_[51]). Competition analysis can be useful to diagnose market power problems and identify remedies in such scenarios (Moodalyar and Weeks, 2012, p. 19_[52]). A good examples of this can be found as regards payment cards, where sector-specific regulation³⁸ broadly mirrors the approach taken in earlier commitment decisions adopted against payment service operators (Monti, 2019, p. 4_[46])

102. Competition law's influence on the content of regulation arises not only when it replaces competition, but also when regulation is adopted as its complement. For example, EU rules on online intermediation services³⁹ adopted a number of measures expressly identified as complementing EU competition law.⁴⁰ Some of these measures – e.g. prohibitions of certain most-favoured-nation clauses; transparency requirements concerning self-preferencing; prohibition of the unlawful restriction, suspension or termination of users' accounts amounting to product and service delisting – have been described as being inspired by competition law theories of harm, without necessarily having them scoped to specific market power criteria and the economics of dominance (Roman, 2021_[53]).

103. A very clear example of competition law influencing the content of regulation can be found in the EU's electronic communication initiatives, which expressly adopted analytical tools deployed in competition law in order to determine whether specific markets merited sector-specific regulation (Moodalyar and Weeks, 2012, p. 19_[52]).

Box 11. The EU Electronic Communications' Regime

One of the objectives of the EU's electronic communication regime, when it was first adopted was the promotion of effective competition by favouring a competitive market structure or by mimicking the results of a competitive market structure.¹ As a result, the regime required a regulatory authority to follow three steps before imposing obligations on operators. First, the authority had to select markets where antitrust would be inefficient to solve possible competitive problems. This was interpreted as markets fulfilling three cumulative criteria: high permanent and non-strategic entry barriers, no competitive dynamics behind these barriers, and inefficiency of antitrust remedies to solve the competitive problems. The boundaries of the selected markets were delineated according to antitrust methodologies (e.g. the SSNIP test). Second, an authority had to determine whether an operator enjoyed a single or collective dominant position or could leverage a dominant position from a closely related market. If it were the case, the regulator could then impose a number of proportionate regulatory remedies.²

As is apparent, the regulatory framework expressly deployed analytical tools used in competition enforcement in order to determine whether specific markets merit sector-

specific regulation.³ Further, regulators were required to conduct a market analysis – using concepts of market definition and dominance as in competition law – to determine whether an operator, solely or jointly, holds ‘significant market power’.⁴ The alignment of regulation with antitrust methodologies was intended to meet good governance principles, make the regime more flexible and ensure it was based on solidly grounded economic principles that ensured that regulatory decisions were closer to the reality of the market.⁵

¹ The original regulatory regime was put in place in 2002. The regime has been recently updated by means of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) OJ L 321, 17.12.2018, p. 36–214, but its substance remains broadly the same as regards our discussion here.

² Alexandre de Streele ‘The relationship between competition law and sector specific regulation: The case of electronic communications’ (2008) *Reflets et Perspectives de la Vie Economique* 47(1) 55, p. 57–63.

³ Martin Cave and Peter Crowther ‘Co-ordinating regulation and competition law ex ante and ex post’ in *Co-ordinating regulation and competition law ex ante and ex post* (2004, Konkurrentverket), p. 12.

⁴ The definition of Significant Market Power was identical to the standard definition of dominance – id., p. 15 –, while market definition was broadly pursued in similar manners under both competition law and sectoral regulation – Alexandre de Streele ‘Interaction between the Competition Rules and Sector Specific Regulation’ in (eds. L. Garzaniti, L. M. O’Regan) *Telecommunications, Broadcasting and the Internet - EU Competition Law & Regulation* (2010, Sweet & Maxwell), p. 871.

⁵ Alexandre de Streele ‘The relationship between competition law and sector specific regulation: The case of electronic communications’ (2008) *Reflets et Perspectives de la Vie Economique* 47(1) 55, p. 59.

104. With governments around the world exploring how to implement regulatory oversight over digital platforms, competition enforcement has been a source of inspiration for many of the proposals published thus far. As we saw above, a decade of efforts have highlighted the limitations of competition enforcement in this area. As a result, debates have sprung as to how to regulate digital platforms, with competition authorities often taking the lead. This has led to a number of proposals (see Box 9 above), many of which are influenced by prior competition enforcement.

Box 12. Competition Influences in the EU’s proposed Digital Markets Act

On 15 December 2020, the European Commission adopted a proposal for the Digital Markets Act (DMA). This instrument has as one of its goals to cover the gaps of competition law; and intervene when competition law cannot act, or can only act ineffectively, particularly as regards the achievement of market contestability and intra-platform competition.¹ In light of this, it is unsurprising that competition enforcement has informed the proposal.

The DMA applies to providers of core platform services who are designated gatekeepers. Such designation does not adopt the concept of dominance, but instead requires the fulfilment of three cumulative criteria. While the test does not explicitly mention market power, and no relevant market needs to be defined in the designation process, some of the criteria for identifying a gatekeeper – particularly those requiring entrenched and durable control of an important gateway for business users to reach end users – implicitly refer to market power. Further, an initial designation as a gatekeeper can be rebutted based on a number of indicators linked to market power and the assessment of a dominant position under competition law.²

Further, a designated gatekeeper is subject to a number of obligations, many of which are inspired by past and current antitrust cases.³ The Commission explained that those

obligations were selected because they “*are considered unfair by taking into account the features of the digital sector and where experience gained, for example in the enforcement of the EU competition rules, shows that they have a particularly negative direct impact on the business users and end-users*”.⁴ These duties include:

- refraining from combining personal data sourced from the gatekeeper with other data absent user consent (such practices have been condemned under competition law by the German competition authority in the 2019 *Facebook* case, and under consumer protection law by the by Italian Competition and Consumer Authority);
- allowing business users to offer the same services to end-users through third-party intermediation services at different conditions than those offered through gatekeeper intermediation (clauses preventing this were condemned in Case 40.153 *Amazon eBooks*, and in online hotel booking cases);
- allowing business users to enter into contracts directly with end-users acquired via the platform (anti-steering), and allowing end-users to access business apps through the platform to obtain items acquired by end-users from the relevant business user without using the gatekeeper platform (the legality of such clauses is currently being reviewed under competition law in Case 40.437 *Apple - App Store Practices (music streaming)*);
- not to bundle several core platform services offered by the platform (a practice prohibited in Case 40.099 *Google Android*);
- providing advertisers and publishers with information concerning the price paid by the advertiser and the remuneration paid to the publisher (lack of transparency in this market is currently being investigated in Cases AT. 40.660 and 40.670 *Google AdTech*);
- refraining from using, in competition with business users, any non-public data provided by such users to the platform or generated by such user’s activities through the core platform service (such practices are currently analysed in Case 40.462 *Amazon Marketplace*);
- allowing end-users to uninstall pre-installed apps (preventing uninstallation was prohibited in Case 39.530 *Microsoft Explorer* and Case 40.099 *Google Android*);
- allowing the use of third-party apps and app stores using or interoperating with the gatekeeper’s operating system, and allowing these apps and app stores to be accessed by means other than the gatekeeper’s core platform service (side loading) (restrictions on which are currently under review in Case 40.716 *Apple - App Store Practices*).
- refraining from ranking services offered by the gatekeeper more favourably when compared to similar third party services, and apply FRAND conditions to such ranking (such practices were prohibited in Case 39.740 *Google Search (Shopping)* and are being reviewed in Case 40.703 *Amazon - Buy Box*)
- providing business users and providers of ancillary services access to and interoperability with the same operating system, hardware or software features that are used in the provision of any ancillary services by the gatekeeper

(engaging in this type of internal discrimination is being analysed in Case 40.452 *Apple - Mobile payments*).

1 Commission Proposal, Recitals.9 and 10. See also Impact Assessment, paras 119-124.

2 CERRE (2021) ‘The European proposal for a Digital Markets Act: A first assessment’, p. 15.

3 Id., p. 16-18; Impact Assessment, p. 54-61.

4 Impact Assessment, para.153.

4.4. How Regulation influences the substance of Competition Enforcement

105. A last question for us to consider – but surely not the least important – concerns how regulation can influence the substance of competition law and its enforcement. This influence can take a number of forms, e.g. competitive assessments must address differences between regulated and unregulated markets; regulation can influence the content of individual competition law concepts, methodologies and theories of harm; and regulation may even provide a trigger for competition liability.

4.4.1. Competition assessments must address the specificities of regulated markets

106. The effects of alleged anticompetitive conduct can be significantly different in regulated sectors when compared with the assessment of similar behaviour in unregulated markets.⁴¹ There is a risk that conventional antitrust analysis fails to take account of the special characteristics of regulated markets, reflecting the fact that what is optimal in an unregulated market may not be ideal in regulated sectors. (Breyer, 1987, p. 1011_[29]) (Kovacic, 1995, p. 498_[37])

107. Regulation's influence on the economic structure of an industry, and on business conduct within that industry, might make it harder for antitrust enforcers to link particular competitive effects to the defendant's conduct. Because economic regulation usually changes the terms on which market participants interact, the competitive effects and justifications relevant to a competition inquiry are likely to change depending on whether or not regulation is taken into account (Shelanski, 2011, p. 700_[34]).

108. At the same time, it is clear that competition law is sufficiently adaptable to deal with the complexities of competition in regulated markets (Dunne, 2015, pp. 229-230_[5]). For example, *ex ante* regulation is typically deemed a relevant factor when applying competition law to the behaviour of regulated undertakings, including when defining markets, assessing the abusive nature of corporate conduct and when setting fines.⁴²

109. Regulation is also relevant for competition assessments in merger control. The regulatory framework is part of the facts that need to be assessed in the context of a merger and can be taken into account for the competitive assessment. For example, the role of wholesale regulation has often been taken into account when assessing the ability of broadband service providers to compete in retail markets,⁴³ and the fixing of termination fees by a national regulator has been relevant to determine that anticompetitive price discrimination was not possible⁴⁴ (OECD, 2011, p. 201_[6]; De Streel, 2010, p. 878_[21]). Similarly, sectoral regulation has been taken into account when allowing mergers in the electricity sector (OECD, 2011, pp. 41-42_[6]).

4.4.2. Substantive competition law can be inspired by regulation

110. Regulated markets also pose challenges for the application of individual competition concepts. For example, typically the concepts of ‘dominance’ or ‘monopoly’ required to trigger liability for unilateral conduct imply that a company can act independently and autonomously in the market. The existence of regulatory controls, however, can seriously limit this ability to act independently (Kovacic, 1995, pp. 490-491^[37]).

111. Further, it has been said that regulatory duties inspired the development of competition theories of harm with marked regulatory leanings, such as margin squeeze and access to essential facilities (De Streel, 2010, p. 875^[21]). It has also been said that certain antitrust doctrines involve the imposition of affirmative obligations more akin to regulatory measures – such as those related to refusal to supply or excessive pricing. Unsurprisingly, such doctrines are amongst the most controversial in competition law (Dunne, 2015, p. 83^[5]).

112. Two particular instances come up routinely in discussions of the regulatory nature of some competition theories of harm: margin squeeze and refusal to supply/essential facilities.

113. Margin squeeze typically occurs in markets where a vertically integrated firm controls access to a bottleneck at one level of the production chain. For margin squeeze to occur, this vertically integrated firm must grant access to rivals through the bottleneck, but then manipulate the price of access in order to squeeze the rivals’ profits and ultimately foreclose them from the market. A margin squeeze occurs when there is such a narrow margin between an integrated provider’s price for selling essential inputs to a rival and its downstream price that the rival cannot survive or effectively compete.

114. Margin squeeze cases are relatively common, and often arise in newly liberalised industries where incumbent firms have a regulatory obligation to provide certain essential inputs to downstream rivals. Many competition authorities have examined at least a few complaints involving potentially illegal margin squeezes (OECD, 2009, p. 8^[54]).

115. Since margin squeeze can be addressed either via *ex ante* specific regulation or by *ex post* competition enforcement, it often raises questions concerning the appropriate role of competition law/ competition authorities and sectoral law / regulators. In particular, the presence of regulatory obligations raises the question of the appropriate role of competition law in prosecuting such practices.

116. Further, the subsistence of stand-alone forms of margin squeeze under competition law has been disputed. Within competition law, there is some debate about whether anticompetitive price differentials can amount to a stand-alone offence, or whether they are better conceptualised as forms of predation or refusal to deal (OECD, 2009, pp. 8-9^[54]) (Dunne, 2015, p. 192^[5]). In practice, margin squeeze is now a recognised form of competition infringement in many jurisdictions, despite arguments that a price squeeze is a regulatory issue that only arises where there is price regulation in an industry already subject to duties to deal and under the control of institutionally competent regulators (OECD, 2009, pp. 21, 32^[54]).

117. Another competition law doctrine with clear regulatory leanings is refusal to deal – in both its essential facilities and refusal to supply guises. It is commonly recognised that refusal to deal cases sometimes raise policy issues that overlap with traditional public utility regulation. All refusal to deal cases have the potential to require consideration of the terms and conditions under which the product or service in question must be provided. Many courts and competition authorities feel uncomfortable taking on the inherent regulatory role

that setting the terms and conditions at which one firm should deal with another entails (OECD, 2007, p. 10_[55]).

118. The regulatory nature of refusals to deal is reflected by high thresholds for a competition infringement to be found, and in particular surrounding the existence of a duty to supply. Typically, such a duty may only arise if the input is ‘indispensable’, or in exceptional circumstances that create an exception to the default rule that firms are not under a duty to deal with third-parties (e.g. when a firm discontinues a pattern of dealing, sacrificing profits, with the intent of excluding a competitor to the detriment of consumers) (OECD, 2007, pp. 35-56_[55]).

119. If a refusal to deal takes place in a regulated industry, regulation may supersede the competition statute, and thereby assign analysis of the refusal to deal to a regulatory agency rather than the competition authority. In fact, even if the applicable regulations do not supersede the competition statute, courts may still decide to leave the matter in the hands of the regulatory agency (OECD, 2007, p. 29_[55]).

120. Another way in which regulation can influence this competition doctrine is by replacing or providing a proxy for one of its elements. In Europe, the existence of a regulatory duty to deal can serve as a proxy for the indispensability requirement in competition cases, thus dispensing with the need to establish any freestanding objective necessity of access before examining the effects of a refusal to supply (Dunne, 2020, pp. 85-92_[56]).

121. The main rationale for this differentiated treatment of regulated and unregulated conduct is that the effects of the antitrust intervention imposing a duty to deal on investment incentives are already taken into account by regulation. Another rationale is that the impact of such a duty to deal on investment incentives is less relevant when the infrastructure concerned has been developed under conditions sheltered from normal market forces, as is often the case in regulated sectors subject to duties to deal (De Streel, 2014, p. 202_[57]). In effect, where there is a legal duty to supply under a regulatory scheme, it is assumed that the necessary balancing of economic incentives to invest on the part of the dominant company against the interests of allowing competition in a related market by means of mandated market access has already been carried out.⁴⁵

122. Further, the existence of a regulatory duty to deal may even allow authorities to avoid having to engage with the stringent requirements of the refusal to supply doctrine. For example, the provision of access to an infrastructure on unfair terms could be construed as a (constructive) refusal to deal. Under EU law, however, whenever a company grants access to its infrastructure under unfair conditions, such conduct will not be assessed under the refusal to deal doctrine as long as there is a regulatory duty to deal in place. Imposing access duties in such a context will be less detrimental to the freedom of contract of the dominant undertaking and to its right to property than forcing it to give access to its infrastructure where it has reserved that infrastructure for the needs of its own business.⁴⁶ As a result, competition enforcement need not meet the stringent thresholds of the refusal to supply doctrine, since it is merely the exercise of the company’s autonomy in granting access to the infrastructure that will be subject to competition law scrutiny.⁴⁷

123. Yet another example of how regulation can influence competition doctrines can be found in some cases on excessive pricing. It is well known that one of the main challenges of such cases is to determine the point at which a price becomes too high, i.e. excessive and unfair, and hence infringes competition law. Given this, authorities may rely on the prior assessment of regulators, particularly when the investigation concerns a regulated sector.

Box 13. Regulated Prices and Exploitative Practices in Pfizer/Flynn

In Box 7 above, it was described how the UK's Competition and Markets Authority (CMA) adopted an excessive pricing decision regarding phenytoin sodium capsules, an out-of-patent anti-epileptic drug, and how this led to the closing of a regulatory loophole. This decision also provides a prime example of how regulated prices can play a role in determining whether prices are excessive for the purposes of establishing a competition infringement.

Prior to the debranding of the medicine, turning it into a generic, the phenytoin sodium capsules were subject to regulatory pricing control under the Pharmaceutical Price Regulation Scheme ("PPRS"), which controls the overall profit that its members can make on the sales of branded licensed medicines to the NHS on a portfolio basis (i.e. their entire branded medicine portfolio). In 2009 and 2014, the target rates were 6% return on sales ("RoS") and 21% return on capital ("RoC").

In its infringement decision, the CMA found that the proper approach to determining whether the prices of phenytoin sodium capsules were excessive was a cost-plus approach which provided for a RoS of no more than 6% (i.e. the regulated profit margin). This was thought to provide a reasonable rate of return according to industry standards. It was higher than Pfizer's average annual profit margins across its UK business as a whole (which included innovative products bound to have higher RoS than an old drug). It struck a balance between the sellers' and the customers' interests. It was similar to the price at which the branded product had been sold under the PPRS. Finally, *'using the PPRS ROS rate allowed the CMA to calculate a rate of return for Pfizer that preserved its overall financial position; and a ROS of 6% was equivalent to an overall contribution margin more than four times greater than the internal target rate below which Pfizer puts a product under review'* (Flynn/Pfizer [2018] CAT 11, paras. 250-256).

On appeal, the Competition Appeal Tribunal (CAT) found that the CMA had erred in its determination of whether the price was excessive by relying solely on a cost-plus approach to the exclusion of other methodologies. Instead, the CMA should have established a benchmark price (or range) that would have pertained in circumstances of normal and sufficiently effective competition (Flynn/Pfizer [2018] CAT 11, para. 310). In particular, the CAT did *"not think the CMA was right to place such reliance on the PPRS' 6% rate of return (...) as in itself confirming, far less determining, what was a reasonable rate of return for Flynn and Pfizer in this case"*. The regulated price was clearly *"a relevant factor to be examined, as an indicator, which, with other indicators, might establish whether the CMA was looking in the right range of percentage figures as appropriate or reasonable rates of return applying a ROS measure, all in the context of seeking to set a benchmark price"* (para. 339).

On further appeal, the Court of Appeal reversed. It found that the CAT had been wrong to suggest that the CMA was required to establish a benchmark price, or a range of prices, beyond a cost plus calculation, in order to determine whether the prices charged by Pfizer and Flynn were excessive (CMA v Flynn Pharma Ltd & Anor (Rev 3) [2020] EWCA Civ 339, para. 254). There is no rule of law requiring competition authorities to use more than one test or method in all cases, because the authorities have a margin of manoeuvre or appreciation in deciding which methodology to use, even if the authority

must fairly evaluate economic methods or types of evidence offered by an undertaking in its defence (paras. 97, 125).

4.4.3. Regulation as a source of antitrust liability

124. In addition to the impact that regulation may have on competition law doctrines and analysis, the breach and manipulation of regulatory schemes can also provide a basis for competition liability. In practice, such cases are usually framed as being purely about breaching competition rules, with any breaches of regulatory duties being classified as something that happened in parallel but that did not alone entail antitrust liability.

125. Examples of this include practices that simultaneously breach competition law and sector regulation, where each authority brings its own case. For example, the breach of regulatory non-discrimination duties on the part of incumbents may also amount to a competition infringement, e.g. if the discriminatory pricing forecloses downstream competitors of a vertically integrated regulated provider. In such cases, two different sets of rules can be said to apply simultaneously to the same conduct, which can give rise to questions concerning the *non bis in idem* principle (see Box 4 above).⁴⁸

126. Practices involving the gaming of regulatory regimes, including selective breaches of regulatory duties, can also amount to competition infringements (Lemley and Dogan, 2009^[7]). The pharmaceutical industry seems particularly prone to such behaviours, going by the number of cases brought against companies in this sector for practices such as product-hopping, manipulation of patent and IP systems, and even excessive pricing (such as the *Pfizer/Flynn* case discussed just above). However, while such practices may involve repeated failures to comply with regulatory duties,⁴⁹ a competition infringement is not necessarily a mere consequence of such breaches. In effect, an infringement might be established even if no regulatory breach occurs, as long as the gaming of the regulatory system can lead to anticompetitive outcomes.⁵⁰

127. It has been argued that, where private entities have quasi-regulatory powers, bias in the exercise of those powers can amount to an infringement of competition law. Examples of this include incumbents with regulatory duties favouring certain downstream producers⁵¹; quasi-regulatory bodies charged with oversight of a specific market segment adopting restrictive, discriminatory, or otherwise unfair practices⁵²; and companies participating in a self-regulation exercise and subsequently trying to opt out from regulatory constraints to further their own interests⁵³. These cases demonstrate a range of circumstances in which dominant undertakings that exercise regulatory-type (or ‘rule-setting’) functions may be obliged to desist from conduct that is either inherently unfair or which in some way distorts the playing field administered by the dominant firm (Dunne, 2020, pp. 12-16^[58]).

128. All the practices above require an autonomous finding of competitive harm, i.e. for a competition infringement to be established it does not suffice to establish that a regulatory breach occurred. However, a recent case in Germany concerning the data practices of a dominant digital platform raises the possibility of a regulatory infringement also infringing competition law without more.

Box 14. The Facebook case in Germany

In February 2019, the *Bundeskartellamt* found that Facebook was dominant in the market for social networks, and had abused this position by imposing terms of service

allowing it: (i) to collect its users' personal data (and data related to their terminal devices) from outside Facebook's social network, and (ii) to assign these data to individual user accounts.¹ The decision only targeted the collection of what the *Bundeskartellamt* coined "Off-Facebook" data, i.e. those data collected on websites and apps outside Facebook's social network, including services owned by Facebook (Instagram, WhatsApp, etc.) and third-party websites.

One facet of the case that drew particular attention was the *Bundeskartellamt*'s reliance on alleged infringements of the General Data Protection Regulation (GDPR) as a basis for establishing a competition infringement. The decision held that Facebook's conduct did not comply with the GDPR, since users were not fully aware of the collection and processing of their "Off-Facebook" data and therefore could not genuinely consent to it. Relying on national case law establishing that the imposition of contractual terms infringing mandatory rules on general contractual conditions can infringe competition law when those terms are the result of the firm's market dominance, the *Bundeskartellamt* concluded that Facebook's failure to comply with the GDPR in its terms and conditions was abusive and infringed competition rules. By taking advantage of its dominant position, Facebook made use of its social networking service conditional upon users granting permission to the limitless harvesting of their data; this take-it-or-leave-it offer led to a lock-in effect for users and to competitors being at a disadvantage.²

The decision met with different reactions by the courts in the context of an appeal against the interim measure imposed by the *Bundeskartellamt* on Facebook.

The Düsseldorf Court of Appeal granted interim relief to Facebook, clearly indicating that the infringement decision would likely be annulled in the main appeal (Case VI-Kart 1/19 (V) *Facebook*). Among other findings, the Düsseldorf court held that there was no causal link between Facebook's market dominance and its contractual terms; and that no exploitative abuse arose, since users freely and willingly agreed to the terms of service, and were free to abstain from using Facebook's social network altogether. The Court of Appeal did not elaborate on the alleged violation of GDPR requirements, arguing that this was not relevant for the case at hand.

On further appeal, the Federal Supreme Court overruled the decision of the Düsseldorf court, but without relying on the GDPR (Case KVR 69/19 *Facebook*). Instead, the Federal Supreme Court concluded that Facebook abused its market dominance by making all (private) users agree to terms of service that allow Facebook to collect "Off-Facebook" data and merge that data with user accounts without their further consent. This leads to two harms to competition: users lack choice and are forced to supply more data than they would wish, while being forced to use a product they may not want in its entirety; and it becomes more difficult for (potential) Facebook competitors to compete for advertising contracts.³

Subsequently, the main appeal was heard by the Düsseldorf Court of Appeal, which at the time of writing had made a preliminary reference to the Court of Justice of the European Union.

¹ Case B6–22/16 Facebook, 6 February 2019.

² Rachel Scheele 'Facebook: From Data Privacy to a Concept of Abuse by Restriction of Choice' (2021) *Journal of European Competition Law & Practice* 12(1) 34.

³ Klaus Wiedemann 'A Matter of Choice: The German Federal Supreme Court's Interim Decision in the Abuse-of-Dominance Proceedings *Bundeskartellamt v. Facebook* (Case KVR 69/19)' (2020) *IIC – International Review of Intellectual Property and Competition Law* volume 51 1168.

5. The Rise of Competition-Regulatory Hybrids

129. It has long been observed that there are several areas where competition agencies' actions contain regulatory aspects (OECD, 1999, p. 25_[17]). This section discusses a number of tools and methods deployed by competition authorities that borrow from the regulatory sphere. The discussion of each will be short – the objective is merely to highlight the regulatory nature of these tools, and how they add a regulatory dimension to competition enforcement.

130. The inclusion of regulatory elements into competition law can be seen as a positive. Often, such elements provide the most effective means to address problems that affect market competition. The potential benefits primarily concern increases in the short-range effectiveness of competition supervision by improving competition enforcement's ability to correct and deter socially harmful market arrangements.

131. Yet, regulatory competition law finds few defenders among the antitrust scholarship. Four main objections have been advanced in this regard, which express concern about the legitimacy of such approaches and their impact on the long-term effectiveness of competition enforcement (Dunne, 2015, pp. 89-97_[5]).

132. The first objection revolves around the way these developments breach the separation of powers. The determination of whether an antitrust infringement occurred belongs to adjudicative entities that apply the law, whereas the enactment of regulation is typically a legislative endeavour involving policy choices. By adopting quasi-regulatory tools and methods, competition authorities are able to govern certain economic activities without any political decision to that effect having been adopted. What is more, such quasi-regulatory tools typically allow competition authorities to act with few fetters to their discretion, and may even go beyond the scope of their formally assigned powers (Larouche, 2000, pp. 356-358_[59]); (Monti, 2008, p. 141_[38]).

133. These developments can impact the legitimacy of competition enforcement. Regulatory mandates are the result of political processes that empower regulators to adopt decisions affecting firm behaviour only in specific circumstances and following certain procedures. Regulatory intervention is also typically backed up by sector-specific expertise. Regulatory antitrust is not subject to these disciplining factors. Competition authorities do not benefit from sector-specific expertise, nor are they legitimated to impose wide-ranging remedies beyond the facts of a case. Instead, competition enforcement archetypically involves an adjudicative procedure with strong rights of defence and subject to judicial control – which can often be avoided when competition authorities have resource to quasi-regulatory tools and methods (Larouche, 2000, p. 124_[59]) (Monti, 2008, p. 141_[38]).

134. This, in turn, creates a risk of instrumentalisation and politicisation of competition law. There are concerns that an ability to go beyond their traditional remit renders competition authorities more vulnerable to political pressure and influence, and even to regulatory capture (Spencer Weber Waller, 1998, p. 1448_[60]) (Larouche, 2000, pp. 353-356_[59]).

135. A final criticism is that over-expansive theories of competition harm underpinning quasi-regulatory intervention by competition authorities may lead to sub-optimal market arrangements. In addition to traditional concerns about mistaken intervention having detrimental effects on dynamic competition and innovation, and the potential for bad law that is not subject to proper scrutiny crystallising, there is a risk that firms will commit to arrangements that are not to the benefit of markets (Melamed, 1995, p. 14_[61]).

136. Despite such longstanding criticisms, reliance on competition tools with regulatory elements continues unabated. This may be related to the effectiveness of such tools in

addressing competition problems, and does not seem to have detrimentally affected perceptions of the legitimacy of competition law thus far. The fact that these concerns have not materialised may be related to a continued focus on the need for independence of competition authorities and for competition enforcement to focus solely on competition matters (OECD, 2016_[42]). It may also have something to do with the acquisition of sector expertise by competition authorities, e.g. as a result of the institutional developments discussed in section 3.2 above, and with more effective judicial scrutiny of competition enforcement, and underlying theories of harm, than what those authors formulating these criticisms anticipated (OECD, 2018_[62]).

5.1. Negotiated Procedures and Forward Guidance

137. Competition enforcement acquires a regulatory bent when it incorporates certain procedures or substantive characteristics more typically associated with regulation. Such characteristics include pursuing administrative actions that avoid strict judicial scrutiny, engaging in *ex ante* enforcement, imposing detailed positive obligations on firms, and adopting regulatory-type remedies that require ongoing monitoring and go beyond merely preventing anticompetitive behaviour (Dunne, 2015, pp. 79-87_[5]).

138. One procedure that can often take this form is the issuance of negotiated procedures (including merger commitments). Negotiated procedures allow competition authorities to terminate an investigation by accepting remedies or commitments voluntarily proposed by the parties to address the initial concerns identified by the agency. They typically involve consensual agreements between public authorities and firms concerning a modification of the latter's behaviour, typically without any admission or finding of liability; or commitments accepted by the parties to obtain merger approval (OECD, 2016_[63]).

139. Case resolution by way of a negotiated procedure has benefits for competition authorities, the parties and the public. The absence of fines, and of a finding of infringement, are attractive features for companies subject to investigation, as is the approval of a merger subject to conditions. For competition authorities, negotiated procedures enable them to save resources and lead to swifter resolution of cases. Limited, light-touch judicial review of such arrangements allows competition authorities to achieve 'finality' in procedures faster than the adoption of infringement decisions which are more prone to appeals by the parties. Speedier restoration of effective competition is welcomed by the public as well (OECD, 2016, p. 3_[63]).

140. However, there are commonly acknowledged risks associated with reliance on negotiated procedures. Under a negotiated procedure, remedies can go beyond what agencies would be able to obtain in an infringement decision. In particular, competition authorities may obtain structural remedies and various kinds of proactive and tailor-made behavioural remedies, while imposing government supervision on whether company conduct complies with the negotiated arrangement. It follows that an extensive use of commitment decisions could shift competition enforcement from the classic *ex post* review of past behaviour through infringement decisions to a forward-looking *ex ante* regulatory control of specified company behaviour (OECD, 2016, p. 3_[63]).

141. A common concern is with the way negotiated procedures allow the deployment of competition law beyond its core function of prohibiting and sanctioning business conduct. In effect, negotiated procedures open the way for the imposition of remedies that are not closely related to the infringement or transaction that triggered the investigation, and for addressing issues other than the anticompetitive effects of private conduct (Monti, 2008, pp. 140-141_[38]).⁵⁴ (Cave and Crowther, 2004, pp. 21-25_[64]) identified a number of instances where a competition authority reached private agreement with an incumbent

under investigation in such a way as to influence the fundamental structure of an industry according to competition policy (not regulatory) prescriptions. As a result, the deployment of negotiated procedures under competition law has been perceived to act as an alternative to, or substitute for, sector-specific regulation (Spencer Weber Waller, 1998, pp. 1413, 1415_[60]) (Melamed, 1995, p. 13_[61]) (Dunne, 2015, p. 80_[5]).

142. This, in turn, creates a risk of instrumentalisation and politicisation of competition law. The ability to adopt a regulatory role can make competition law and authorities a target of political pressure, and even of attempts at regulatory capture (Spencer Weber Waller, 1998, p. 1448_[60]) (Larouche, 2000, pp. 353-356_[59]).

143. Finally, because negotiated procedures aim at achieving procedural economies, they raise concerns about weakening due process and the procedural rights of the parties (OECD, 2016, p. 3_[63]). It might be said that negotiated decisions are subject to judicial control that limits these risks.⁵⁵ In practice, however, such decisions will typically exclude judicial scrutiny altogether, or be subject to superficial review (Monti, 2008, p. 143_[38]).

144. The OECD Competition Committee recommended in the past that competition authorities should be mindful of the benefits and risks of negotiated procedures when deciding whether to adopt them. One of the ways in which competition authorities have tried to achieve such a balance is through the publication of self-binding guidelines or guidance to enhance transparency and predictability of such procedures (OECD, 2016, p. 4_[63]).

145. However, such guidance instruments raise concerns of their own. The publication by competition authorities of guidelines can have a significant impact on the general understanding of competition rules. Firms often tailor their behaviour to act in conformity with such guidance because compliance may avoid public enforcement or provide plausible defences (Spencer Weber Waller, 1998, pp. 1404-1408_[60]) (Dunne, 2015, p. 81_[5]). As a result, guidance instruments have been said to change the nature of enforcement from *ex post* to *ex ante* (Cave and Crowther, 2004, p. 25_[64]).

146. Ultimately, however, guidance instruments provide significant advantages. They help clarify the law and procedures, significantly increasing legal certainty. They are useful as a means of obtaining clarity regarding competition authorities' priorities and administrative behaviour, and often restrain their discretion. Further, guidance instruments are typically not binding on courts, which remain competent to interpret competition law – i.e. guidance instruments cannot on their own change the content of competition law. In effect, courts have jurisdiction to scrutinise competition enforcement actions even when these actions follow published guidance.

5.2. Market Studies

147. Nearly all competition authorities in the OECD use market studies in some form, ranging from short, informal assessments to lengthy, formal processes involving multiple rounds of stakeholder input and empirical analysis. While the objectives of market studies are broad and vary across jurisdictions, there is a consensus that they have a wider scope than competition enforcement actions (OECD, 2016, p. 5_[65]).

148. Competition enforcement focuses on specific enterprises which have allegedly infringed competition law, while market studies take a broader view and analyse the structure of markets or economic sectors. Market studies are used to identify restraints to competition which are not limited to behaviours prohibited by competition laws (OECD, 2016, p. 5_[65]). As a result, market studies can take a proactive role in promoting competition, by comparison to competition enforcement's narrower efforts to ensure that

competition is not prejudiced by circumscribed types of conduct in particular instances (Fletcher, 2021, p. 44_[66]). In addition, for market studies it is irrelevant whether conduct is deliberately anti-competitive or whether firms are otherwise culpable for harm, and only limited consideration is given to wider deterrence and precedence (Indig and Gal, 2015, p. 3_[67]) (Fletcher, 2021, pp. 46-47_[66]).

149. In addition, market studies are well suited to carry out holistic analyses of markets where there are interlinked factors creating competition concerns in ways that elude enforcement actions. On the supply side, for example, market studies can examine subtle complexities in the nature of strategic interdependence between firms, including the potential for tacit coordination. On the demand side, market studies can consider firm conduct that might dampen or distort competition e.g. by making consumer decisions more difficult. Market studies are also better able than competition enforcement at taking into account the interplay between competition and other policy areas, such as consumer policy, privacy, environmental and wider sustainability policies. As such, market studies can clarify what options there are to address issues from a competition policy, competition enforcement, regulatory or other policy perspective (OECD, 2020, p. 20_[68]; Fletcher, 2021, pp. 44-45_[66]).

150. Market studies share characteristics with regulation, in that they often play a proactive role in promoting increased competition. Unlike competition enforcement, market studies' recommendations can be forward looking, with proposed solutions frequently applying across the market irrespective of individual firms (OECD, 2020, pp. 20-21_[68]). Market studies enable competition agencies to most effectively address competition problems – through enforcement, advocacy and, on instance, through the adoption of regulatory mechanisms (Dunne, 2015, pp. 280, 293-294_[5]).

151. Market studies thus cross some of the traditional lines between *ex post* and *ex ante* regulation, and broaden competition agencies' powers significantly, to the point where some see it as empowering them to engage in market engineering (Indig and Gal, 2015, p. 9_[67]).

152. Similarities with regulation become particularly pointed when market studies can lead to the imposition of remedies. While market studies mostly lead to purely advisory outcomes – where results are presented to government alongside non-binding recommendations –, in a limited number of jurisdictions competition agencies are empowered to take further legal steps to implement recommendations, e.g. by adopting remedies (OECD, 2016, pp. 5, 17-18_[65]). This creates an overlap between market studies and competition enforcement, and, particularly where remedies are market-wide, can blur the line between competition law and regulation (Dunne, 2015, p. 286_[5]) (Fletcher, 2021, pp. 47-48_[66]).

153. Further, where a market study concludes with the imposition of behavioural remedies, this effectively constitutes a form of *ex ante* regulation that governs future firms' behaviour. This is true for both supply-side remedies such as transparency requirements, and demand-side remedies such as disclosure requirements (Fletcher, 2021, p. 48_[66]).

154. Insofar as market studies typically lead to remedies only where the application of antitrust law is inadequate,⁵⁶ the power to conduct market studies and impose such remedies comes closer to ideas of regulation and the overturning of market mechanisms than to competition enforcement. This is so even when such market studies are pursued, and remedies are adopted, by a competition enforcer (Indig and Gal, 2015, p. 5_[67]) (Dunne, 2015, p. 289_[5]).

155. Yet, market studies are distinct from conventional regulation even when they allow for the imposition of remedies, both in terms of the targeted nature of those remedies and

the (arguably) less politically accountable nature of decisions to intervene (Indig and Gal, 2015, p. 11^[67]) (Dunne, 2015, p. 292^[5]).

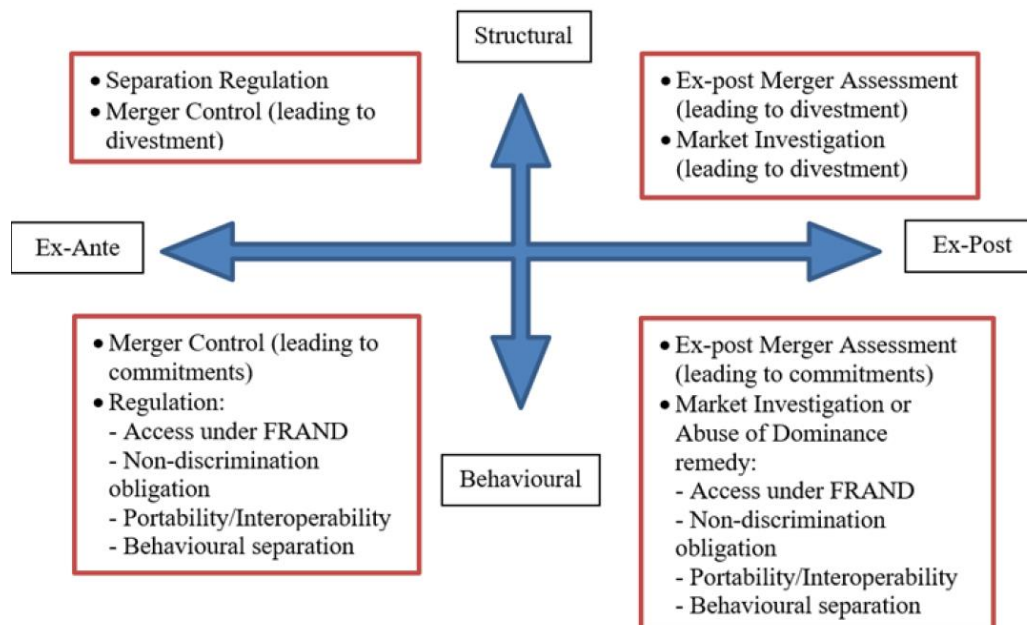
5.3. Remedies with regulatory characteristics

156. The increasing application of prescriptive remedies that require ongoing implementation or monitoring, which are particularly common in regulated sectors, is another recurring subject of claims that competition law has acquired a regulatory bent (Dunne, 2015, p. 84^[5]). Such remedies are often attempts to compel firms to adopt competition-enhancing behaviour, rather than merely to stop or address their anticompetitive conduct (Spencer Weber Waller, 1998, pp. 1414-1415^[60])

157. The regulatory nature of some competition remedies is apparent in how competition authorities sometimes find it unnecessary to impose merger remedies because sector regulation is sufficient to prevent anti-competitive behaviour or effects.⁵⁷ On the other hand, competition authorities have found that merger remedies may be necessary where sector-specific regulation is insufficient⁵⁸ (De Streef, 2010, pp. 879-880^[21]) (OECD, 2011, pp. 41-42^[6]).

158. A type of competition remedy with clear regulatory leanings is line of business restrictions – remedies that can be used to limit the range of activities that a firm can undertake. They include separation requirements ranging from structural to behavioural separation (accounting, functional or legal), which, while typically reserved for *ex ante* regulation, have been known to be used by antitrust enforcers.⁵⁹ Line of business restrictions also include behavioural restrictions such as mandated access, non-discrimination obligations, and mandatory standards on portability and interoperability (OECD, 2020, pp. 25-27^[69]).

Figure.1. Types of Line of Business Restriction



Source: (OECD, 2020, p. 4^[69]).

159. While typically viewed as a form of *ex ante* regulation, line of business restrictions can be used by both regulators and competition agencies to address concerns related to a firm's market power. For example, line of business restrictions can be used to address situations where an upstream essential facility refuses to supply its rivals in downstream markets, or excludes such downstream rivals by engaging in 'self-preferencing' that raises rivals' costs and squeezes their margins. Each of these concerns might arise within the context of a regulatory proposal, an alleged abuse of dominance or a proposed merger – and line of business restriction remedies would be equally applicable in each scenario (OECD, 2020, pp. 4-7^[69]).

160. In short, competition remedies often have regulatory characteristics – and may indeed be required to have such characteristics to address competitive harms effectively. At the same time, antitrust remedies are not well suited to address all market problems, and sometimes other policy instruments will have to be deployed (Wheeler, Verveer and Kimmelman, 2020, p. 25^[70]). Doubts have been raised about the ability of competition agencies to adopt and monitor detailed regulatory obligations, and hence about the wisdom of imposing antitrust liability when this requires adjudicators to act as regulators, or police detailed conditions or contractual terms, particularly when a sector-regulator is already in place (Speta, 2003, p. 101^[71]).

6. Conclusion

161. This Background Note sought to provide a high-level overview of how competition enforcement and economic regulation can act in parallel, address similar problems and influence one another.

162. It began, in section 2, by describing how, despite generally addressing different concerns and adopting different methods, competition law and regulation share a number of characteristics and can be called upon to deal with the same problems on occasion. Section 3 was devoted to the legal doctrines and institutional mechanisms whereby overlaps between economic regulation and competition enforcement are avoided or managed in practice. Despite the existence of such mechanisms, the overlap between economic regulation and competition law in terms of both objectives and methods opens the gate to mutual influences arising. This was the focus of section 4, which discussed how the application of each of these market-monitoring mechanisms affected how public authorities relied on the other, and how their respective contents have been enriched by learning from each other's experience. Finally, section 5 explored how these mutual influences contributed to the development of tools for competition intervention with regulatory inclinations.

163. A conclusion to be taken from this analysis is that market problems often can be addressed by means of competition enforcement or of a regulatory alternative – or by a form of public intervention that combines elements of both. Depending on the circumstances, regulation and competition enforcement can be alternative solutions, or they may complement each other. What is more, often the solution that will be adopted in practice will contain elements of both regulation and competition law, even if only one of these market supervision tools is formally being relied upon.

164. This dual nature of public intervention is not limited to enforcement – in effect, a number of legal instruments expressly adopt a 'hybrid' nature, reflecting both competition and regulatory characteristics. Such legal instruments are typically adopted to address limitations of competition and regulatory approaches, and combine the virtues of each –

something that, as this background paper makes clear, competition and regulatory enforcement also seek to achieve in practice.

¹ The initial definition of market failure was ‘*the failure of a more or less idealised system of price-market institutions to sustain ‘desirable’ activities or to estop ‘undesirable’ activities*, typically measured by reference to some measure of welfare (Bator, 1958, p. 351_[15]).

² There are other types of market failure that are sometimes invoked to justify regulation. These include, but are not limited to, unequal bargaining power, industry rationalisation and coordination, moral hazard, scarcity and allocation, and paternalistic reasons (Breyer, 1984, pp. 33-34_[11]), windfall profits or lack of continuity of service (Baldwin, Cave and Lodge, 2015, pp. 15-23_[14]).

³ It goes without saying that market power does not necessarily equate with a market failure, inasmuch as it may be welfare maximising; and that its acquisition can be perfectly legitimate.

⁴ This, in turn, typically requires detailed regulation to prevent cream-skimming from more profitable segments and to cross-subsidise loss-making customers.

⁵ It is beyond the scope of this paper to address this difficulty, particularly as it focuses on economic regulation. However, it is worth mentioning that definitions of regulation range from references to: a specific set of commands; to deliberate state influence; to all forms of social control. (Breyer, 1984, p. 7_[11]) (Baldwin, 2010, pp. 12-13_[83]) (Dunne, 2020, p. 4_[58]) (Baldwin, Cave and Lodge, 2015, pp. 2-3_[14]) (Prosser, 1997, p. 5_[24]).

Another source of difficulties in this respect is the ‘regulatory turn’ in competition law, which will be explored in Section 5 of this paper.

⁶ Glossary of Industrial Organisation Economics and Competition Law, compiled by R. S. Khemani and D. M. Shapiro, commissioned by the Directorate for Financial, Fiscal and Enterprise Affairs, OECD, 1993.

⁷ This would include matters such as universal service, consumer protection, privacy, public safety, protecting the environment, promoting media pluralism and diversity, or the protection of minors. Economic regulation is, in this particular case, understood mainly as sector specific regulation aiming to correct market failures by means of ex ante regulation of matters such as network access, interconnection obligations, and price and tariff control.

⁸ The distinction was between economic regulations that intervene directly in market decisions such as pricing, competition, market entry, or exit; social regulations that protect public interests such as health, safety, the environment, and social cohesion; and administrative regulations are paperwork and administrative formalities -- so-called "red tape" -- through which governments collect information and intervene in individual economic decisions

⁹ It is perhaps of note that this seems to have said as a criticism - it was followed by the observation that ‘*many scholars believe, and much evidence shows, that regulatory laws owe more to interest group politics than to legislators’ concern for the welfare of society at large. (...) The antitrust laws, in contrast, are designed to preserve the functioning of competitive markets that, at least presumptively, produce allocative efficiency*’ (Easterbrook, 1983, pp. 23-24_[27]).

¹⁰ In addition, there are cases where the sectoral regulation, although not designed to promote competition, is a useful complement to competition law. At least three sets of cases fall in this category: cases where competition cannot function unless a sector specific regulation is in place; cases where competition law does not allow the competition authority to exempt practices which should be exempted (e.g. to promote sustainability), and cases where competition law does not allow the competition authority to sanction some anticompetitive practices. See (ICN, 2004, pp. 8-13_[32])

¹¹ Providing an example regarding the impact that awards for antitrust damages could have on the functioning of the US 1996 Telecommunications Act, see (Speta, 2003, pp. 129-123_[71]).

¹² See, for example, *United States v Borden* 308 US 188 (1939), 196-203 arguing for a narrow construction of antitrust exemptions.

¹³ *Credit Suisse Securities v Billing et al.* 127 S.Ct. 2383 (2007), 2389.

¹⁴ *Verizon Commc’ns Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 412 (2004).

¹⁵ *Credit Suisse Securities v Billing et al.* 127 S.Ct. 2383 (2007), 2392-2395.

- ¹⁶ *Verizon Commc'ns Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 412 (2004).
- ¹⁷ *Pacific Bell Telephone Co., d/b/a AT&T California et al. v Linkline Communications Inc* 555 US 438 (2009) ,1124 Breyer J (concurring)
- ¹⁸ *Credit Suisse Securities v Billing et al.* 127 S.Ct. 2383 (2007), 2387.
- ¹⁹ See *Trinko*, 540 U.S. at 412.
- ²⁰ *United States v Borden* 308 US 188 (1939).
- ²¹ *National Gerimed. Hosp. & Gerontology Ctr. v. Blue Cross*, 452 U.S. 378, 392 (1981) (National Gerimed.).
- ²² *Silver v. NYSE*, 373 U.S. 341, 357 (1963)
- ²³ *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 682 (1975) (quoting *US v Philadelphia National Bank* 374 US 321 (1963), 350-1.
- ²⁴ *Silver d/b/a Municipal Securities v New York Stock Exchange* 373 US 341 (1963), 357.
- ²⁵ Case C-280/08 P *Deutsche Telekom AG v Commission* EU:C:2010:603, para. 94, without prejudice to regulation and competition having ‘distinct purposes and objectives’ – Case T-398/07 *Spain v Commission* EU:T:2012:713, para. 56.
- ²⁶ Case C-280/08 P *Deutsche Telekom AG v Commission* EU:C:2010:603. In effect, the EU courts have gone as far as to say that EU competition law should take precedence over national regulation and EU secondary rules – see Case T-398/07 *Spain v Commission* EU:T:2012:713, para. 55.
- ²⁷ Case T-398/07 *Spain v Commission* EU:T:2012:713, para. 50. However, when such exemption is adopted at the national level, questions may arise concerning State compliance with EU law.
- ²⁸ Case T-360/09 *E.ON Ruhrgas AG and E.ON AG v Commission* EU:C:T:2012:332, paras. 84-86.
- ²⁹ Joined Cases 40/73 *Suiker Unie and Others v Commission* EU:C:2012:23; Joined Cases C-359/95 and C-379/95 P *Commission v Ladbroke Racing* EU:C:1997:531, para. 331; Case C-280/08 *Deutsche Telekom*, paras. 80-84.
- ³⁰ Case C-280/08 P *Deutsche Telekom AG v Commission* EU:C:2010:603, paras. 80.
- ³¹ Case C-198/01 *Fiammiferi* ECLI:EU:C:2003:430, para. 56
- ³² *Id.*, para. 57, Case C-280/08 P *Deutsche Telekom AG v Commission* EU:C:2010:603 at para. 279.
- ³³ The UK’s National Audit Office suggested that “the government could consider greater pooling of competition enforcement resources across the concurrent regulators” – see NAO (2016) “The UK Competition Regime” at <https://www.nao.org.uk/wpcontent/uploads/2016/02/The-UK-Competition-regime.pdf>.
- ³⁴ Following the 2007 DG Competition Report on Energy Sector Inquiry (SEC(2006)1724), and the Third Energy Package on Gas and Electricity.
- ³⁵ See a number of cases such as *RWE gas foreclosure* (Case COMP/39.402) [2009] OJ C133/8; *ENI foreclosure* (Case COMP 39.315); *Distrigaz* (Case COMP/37.966) 2007 [2007] OJ C9/5; *Long-term electricity contracts in France* Case COMP/39.386; ‘Antitrust: Commission market tests commitments by GDF Suez to boost competition in French gas market’ IP/09/1097, 8 July 2009; Commission (EC), Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003; *E.ON gas* (Case COMP/B-1/39.317); *Svenska Kraftnät* (Case COMP 39.351). *German electricity wholesale market* (Case COMP 30.388); *German electricity balancing market* (Case 39.389) [2009] OJ C36.
- ³⁶ In the mid-90s, the European Commission subjected the clearance of a number of joint ventures in the telecommunications sector to the adoption of additional liberalisation measures, such as requirements to license alternative operators in the market despite pre-existing legal requirements for the companies or Member States to do so – e.g. Case 35.337 *Atlas*; Case 35.617 *Phoenix/Global One*. Some merger remedies were said to have effects equivalent to sector regulation, e.g. by requiring a leading European telecommunications operator to grant non-discriminatory access to third-party operators to its pan-European network, in order to protect competition in the emerging market for seamless pan-European mobile services, e.g. Case M.1795 *Vodafone Airtouch/Manesmann*; Case M.2305 *Vodafone/Eircell*; Case M.2469 *Vodafone/Airtel* – see (De Streef, 2010, pp. 877-878^[21])

³⁷ See EU intervention in deregulated sectors such as energy, telecommunications, rail and post. In the US, in the telecommunications sector, see the divestiture consent order against AT&T in 1982.

³⁸ Commission, Proposal for a regulation on Interchange fees for card-based payment transactions COM(2013) 550 Final 2, p. 6. See also Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions OJ L123/1,

³⁹ Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186, 11.7.2019, p. 57–79

⁴⁰ Commission, Staff Working Document Impact Assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services, SWD(2018) 138 final, p. 3.

⁴¹ *Town of Concord* 28.

⁴² Case C-280/08 *Deutsche Telekom*, paras. 81-84 In Europe, the Commission even indicated that, when applying competition to telecommunication markets, it aims to build as far as possible on regulatory principles – see European Commission *Notice on the application of competition rules to access agreements in the telecommunications sector* (OJ C265/2), para. 58.

⁴³ Case COMP/M.5532 *Carphone Warehouse/Tiscali UK*.

⁴⁴ Cases COMP/M.5148 *Deutsche Telekom/OTE* or COMP/M.5730 *Telefónica/Hansenet*

⁴⁵ Case T-851/14 *Slovak Telekom v Commission* EU:T:2018:929, paragraph 118, affirmed on appeal by Case C-165/19 P *Slovak Telekom* ECLI:EU:C:2021:239, paras. 54-59; Case T-814/17 *Lietuvos geležinkeliai AB v Commission* ECLI:EU:T:2020:545, para. 92. This follows from Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings OJ C 45, 24.2.2009, para. 82 – which also sets out that this could also be the case where the upstream market position of the dominant undertaking has been developed under the protection of special or exclusive rights or has been financed by state resources.

⁴⁶ Case C-152/19 P *Deutsche Telekom* ECLI:EU:C:2021:238, para. 50-53, Case C-165/19 P *Slovak Telekom* ECLI:EU:C:2021:239, paras. 50-53, building on dicta in Case C-52/09 *TeliaSonera* EU:C:2011:83, para. 72.

⁴⁷ Case C-152/19 P *Deutsche Telekom* ECLI:EU:C:2021:238, paras. 54-59; Case C-165/19 P *Slovak Telekom* ECLI:EU:C:2021:239, paras. 54-59.

⁴⁸ E.g. the circumstances surrounding Case C-117/20 *bpost*, which involved infringement decisions and penalties imposed in parallel by the Belgium postal services regulator and competition authority as regards the same rebate system for contractual tariffs relating to services distributing addressed advertising material and administrative mail items.

⁴⁹ Case COMP/ /39.525 *Telekomunikacja Polska*, para. 150 (where the exclusionary practice involved a refusal to comply with regulatory obligations). This decision was subject to appeal, under Case T-533/08, but the applicant desisted before a decision was reached.

⁵⁰ In Case C-457/10 P *AstraZeneca* ECLI:EU:C:2012:770, where the misuse of the patent systems to obtain supplementary protection certificates (SPCs) and the misuse of the pharmaceutical regulatory system by selective withdrawal of certain marketing authorisations amounted to an infringement. While the second selective withdrawal of certain marketing authorisations was lawful, it was nonetheless found to be anticompetitive as it took place in the context of an anti-competitive strategy of excluding new entrants from the market

⁵¹ See, e.g. Case 39351—*Swedish Interconnectors*, Decision of 14 April 2010; Case AT.40461—*DE/DK Interconnector*, Decision of 7 December 2018. These commitment decisions were framed under the duty of non-discrimination solely in terms of Article 102 TFEU, despite the existence of parallel sector-specific obligations - Directive 2009/72/EC concerning common rules for the internal market in electricity (2009) OJ L211/, Article 12(f).

⁵² Case C-127/73 *BRT v SABAM* (1974) EU:C:1974:25; Case C-395/87 *Tournier* (1989) EU:C:1989:319; Case C-177/16 *AKKA* (2017) EU:C:2017:689; Case C-525/16 *Meo—Serviccos de Comunicacões e Multimedia* (2018) EU:C:2018:270.

⁵³ This is particularly the case with SEP cases – see, in Europe, Case AT.38636—*Rambus*; Case AT.39985—*Motorola*; Case AT.39939—*Samsung*; and Case C-170/13 *Huawei Technologies* (2015) EU:C:2015:4779.

⁵⁴ Using as examples conditions imposed on ENI to improve market structure in the context of an investigation into an anticompetitive agreement with Gazprom (Commission reaches breakthrough with Gazprom and ENI on territorial restriction clauses 6 October 2003 (IP/03/1345); and the perceived replacement of the German regulator’s price choices in *Deutsche Telekom*.

⁵⁵ In Europe, under Article 9 of Regulation 1/2003 commitments must be proportionate, that is they do not go beyond that which is necessary to remedy the anticompetitive risk – see Case T-170/06 *Alrosa v Commission*, judgment of 11 July 2007. In the US, under the Tunney Act consent decrees adopted by the DOJ must be approved by a judge as being ‘within the reaches of the public interest’ - *US v Microsoft I* at 1460.

⁵⁶ See OFT Market Investigation Guidance, para. 2.1-2.3.

⁵⁷ Examples of telecommunication mergers where regulation was taken into account in this manner by the European Commission include Commission Decision of 7 October 2005, Case M.3752, *Verizon/MCI*; 6 Commission Decision of 2 October 2008, Case M.5148, *Deutsche Telekom/OTE*, paras.26, 89 and 115; Commission Decision of 27 November 2007, Case M.4947, *Vodafone/Tele2 Italy/Tele2 Spain*, paras.22–27; Commission Decision of 20 August 2007, Case M. 4748 *T-Mobile/Orange Netherlands*, para.49, where the Commission took into account in its competition assessment the fact that the Dutch regulator found that no undertaking possessed SMP on the wholesale mobile market for access and call origination.

⁵⁸ See, also for telecommunication mergers in Europe, Commission Decision of 13 October 1999, Case M.1439 *Telia/Telenor*; Commission Decision of 10 July 2002, Case M.2803, *Telia/Sonera*.

⁵⁹ E.g., the AT&T consent order in the US – see *United States v. American Tel. and Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1983).

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