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Competition Enforcement and Regulatory Alternatives – Note by the European Union

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More documents related to this discussion can be found at http://www.oecd.org/daf/competition/competition-enforcement-and-regulatory-alternatives.htm

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1. Summary

1. The European Commission ("Commission") agrees with the Chairman's statement that competition enforcement and regulation are interdependent tools that share common scopes.[1]

2. In principle, these two instruments present differences in terms of underlying rationale and approach. Conceptually, competition enforcement aims at strengthening the working of markets by prohibiting certain conducts, whereas regulation "limits" or corrects markets with interventions to achieve a set policy goal. In terms of practical approach, the following differences can also be noted.

- Regulation usually consists of a set of ex ante rules addressing behavior and conducts beforehand, whereas competition is mainly a form of ex post intervention[2].
- Competition enforcement operates on a case-by-case basis, whereas usually regulation sets common applicable rules to identified situations. In regulation, there is a policy choice to tackle upfront a conduct/issue, in competition enforcement there is a specific assessment of an identified conduct.
- Competition is horizontal and cross-sectoral, whereas regulation is often sector specific (although there can be forms of "horizontal" regulation applicable to various sectors).
- Finally, the objectives of competition enforcement and regulation may differ. Competition enforcement aims to ensure competitive markets, whereas regulation can pursue a broader set of objectives that are not necessarily those of competition (for instance, consumer protection in a narrow sense, environmental standards, data protection, etc.).

3. Notwithstanding, or rather thanks to, the above differences, the Commission considers that generally competition law and regulation are broadly complementary. In the European Union ("EU"), indeed competition enforcement and regulation are interconnected in a mutually complementary relationship. In fact, the above-mentioned differences mean that regulation and competition complete each other, by tackling problems together in complementary fashion.

4. In this respect, in the EU competition enforcement and regulation complement each other, much like communicating vessels.[3] This two-way relationship has various iterations. This submission discusses this relationship and its iterations.

[1] Letter dated 19 February 2021 from the Chairman of the Working Party on Regulation and Competition of the OECD Competition Committee to all delegates.

[2] A relevant exception is merger control, which is a form of ex-ante control in most jurisdictions.

[3] In this respect, it should be recalled that in the EU, competition law is one of the components for the achievement of the internal market, which "*includes a system ensuring that competition is not distorted*" (see Protocol 27 to the Treaty on the European Union). Accordingly, competition and regulation both serve the purpose of ensuring a well-functioning internal market.

5. First, competition law can contribute to informing and shaping regulation. Competition law applies on a case-by-case basis to specific facts and conducts. However, the enforcement of competition law can help detect general patterns or systemic issues in certain markets, which may warrant a broader intervention, by introducing specific rules. Competition law enforcement can thus be one of the sources informing policy choices to introduce regulation in various sectors.

6. Second, regulation can complement competition enforcement. While competition is a flexible and general tool, it remains an instrument of ex post intervention, for specific cases. The outcome of a competition case may act as a precedent, establishing a principle or guidance on certain conducts for the future: nevertheless, competition enforcement remains a case-by-case exercise.

7. Therefore, where there is knowledge and evidence that certain issues are systemic and widespread, beyond an individual competition case, it may make sense to regulate them upfront rather than doing several repeat competition cases. Regulation can tackle ex ante a systemic issue, giving clarity and business certainty on what is permitted or prohibited, based on a policy choice informed by evidence gathering. Furthermore, there may be issues that are outside the scope of competition rules: regulation may offer an alternative to using the competition tools to address issues beyond the remit of competition enforcement. As mentioned above, competition can inform regulation and contribute to setting up such rules. In this sense, regulation takes away part of the burden from competition enforcement upfront.

8. Finally, even when regulation is in place and a sector is subject to regulation, competition enforcement remains relevant and applicable. Competition law can still apply even in a regulated sector. In this sense, the flexibility of competition law allows enforcers potentially to intervene to tackle issues that have escaped the regulator or remain unaddressed by ex ante rules. In such cases, it is competition law that complements regulation. However, it can also occur that competition enforcement applies to conducts that are subject to regulation. In this case, a conduct is potentially subject to the application of two instruments. Whether this scenario could potentially raise issues of "ne bis in idem", is currently again being dealt with by the Court of Justice of the European Union ("CJEU").[4]

9. Section 2 below discusses the first two points, where competition enforcement informs or inspires regulation and the latter complements the former. It provides examples of situations and sectors where competition law enforcement and concepts have informed regulation, and where regulation has thus been introduced to address systemic issues, complementing competition enforcement. These two points are presented jointly, as they are closely connected. Section 3 discusses the situation where competition enforcement complements regulation, either by intervening to "fill in" gaps or addressing outstanding issues, or by applying "on top" of regulation. In the latter case, the submission explains the EU's framework for this double application, to avoid inconsistencies or tensions. Section 4 presents a conclusion.

[4] Case C-117/20, bpost SA v Autorité belge de la concurrence, request for a preliminary ruling from the Cour d'appel de Bruxelles (Belgium). The Advocate General is expected to adopt his Opinion in June 2021.

2. Competition informs regulation, regulation complements competition

10. This section will present examples of selected market sectors where the EU introduced regulation, following from or influenced by competition enforcement and/or competition law concepts. It will also illustrate how regulation, informed by competition law enforcement and concepts, has complemented competition enforcement in those sectors, by addressing issues in a systemic and ex ante manner, instead of a case-by-case ex post enforcement. The analysis is carried out with reference to specific market sectors, and aims at being illustrative, but is not exhaustive of all instances of interaction between competition and regulation in these (or other) sectors.

11. Repeatedly, the Commission's practical experience gained in individual competition cases or sector inquiries has led to the realisation that certain objectives can be better achieved by regulatory means. In particular, to achieve the goal of a truly single European market, the mere ex post investigation of competition law infringements requires being complemented by regulation to avoid fragmentation or diverging outcomes. This is especially the case in markets that present so-called "bottlenecks" for competition, such as the energy or telecommunications sectors, and, more recently, large digital gatekeepers.

12. Before providing a more granular analysis of the selected relevant sectors, it is important to emphasise the institutional set-up of the Commission, which contributes to the fact that competition enforcement in the EU feeds into regulation.

13. The EU competition rules are Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). Their enforcement at the EU level is entrusted to the Commission's Directorate General for competition ("DG COMP").[5] DG COMP is part of the larger organisation of the Commission. In the EU legislative process, the Commission is exclusively in charge of making legislative proposals to the EU's legislature ("right of initiative").[6] The technical knowledge and experience acquired by DG COMP through its competition enforcement can contribute and feed in the policy projects and initiatives of the Commission when preparing policy or regulation. It is important to stress that this does not mean that confidential information from specific competition cases is used for such purposes. This is prohibited by Regulation 1/2003, which establishes the framework of the EU's competition enforcement and forbids the disclosure of information acquired in a competition case for other purposes.[7]

[5] The Commission enforces Articles 101 and 102 TFEU pursuant to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1) ("Regulation 1/2003). In parallel to the Commission, the public enforcement of Articles 101 and 102 TFEU in the EU is carried out by the national competition authorities (NCAs) of the Member States. Together, the NCAs and the Commission form a network of public authorities that apply the Union competition rules in close cooperation (the "European Competition Network").

[6] Article 17(2) of the Treaty on European Union.

[7] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 001 04/01/2003 P. 0001 – 0025. Article 28(1) of Regulation 1/2003 establishes that "*Without prejudice to Articles 12 and 15, information collected pursuant to Articles 17 to 22 shall be used only for the purpose for which it was acquired*" (emphasis added). Paragraph 2 adds that *"[w]ithout prejudice to the exchange and to the use of information foreseen in Articles 11, 12, 14, 15 and 27, the Commission and the competition authorities of the Member States, their officials, servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States shall not disclose information acquired or exchanged by them pursuant to this Regulation and of the kind covered by the obligation of professional secrecy*"."

14. Furthermore, Regulation 1/2003 provides for a specific monitoring instrument that the Commission can use precisely to detect broader, systemic issues in a market or sector, going beyond an individual competition case. Under Article 17 of Regulation 1/2003, the Commission can initiate sector inquiries into "*a particular sector of the economy or into a particular type of agreements across various sectors*". When carrying out such sector inquiries, the Commission enjoys the powers to request information from undertakings and carry out inspections.

15. The information obtained in a sector inquiry helps the Commission to understand better a particular market from the point of view of competition policy. While the Commission cannot remedy any of the competition issues it may detect during the inquiry, a sector inquiry can prompt a subsequent Commission intervention. Based on the findings of the inquiry, the Commission may – at a later stage – assess whether it needs to open specific competition investigations against certain conducts or practices. More generally, sector inquiries help "map out" a market or sector, and can bring to light general patterns or systemic issues affecting competition dynamics in a market. The information gathered in a sector inquiry can inform regulatory initiatives, where the Commission considers these necessary and more appropriate to address systemic issues than pursuing individual competition cases.

16. To date, the Commission has carried out sector inquiries into telecommunications (local loop, leased lines, roaming), energy, financial services, pharmaceuticals, and e-commerce. The Commission is currently carrying out a sector inquiry in the Internet of Things ("IoT").[8]

17. The sector inquiries into telecommunications and energy are illustrative of how the findings of a sector inquiry can pave the way to regulation in the EU, and are discussed in the respective sections on these sectors.

2.1. Energy

18. In the EU, before the extensive liberalisation interventions of the EU legislator, energy markets (gas and electricity) were mainly national. The EU has sought to gradually open up these markets to competition and create an integrated European energy market, removing national monopolies and the barriers to cross-border trade. This has been done through ex ante sector specific legislation, mainly consisting of EU directives, which have gradually liberalised these markets. Competition enforcement in specific cases has also contributed to this objective.

19. The first energy liberalisation directives (First Energy Package) were adopted in 1996 (electricity) and 1998 (gas), to be transposed into Member States' legal systems by 1998 and 2000 respectively. The Second Energy Package was adopted in 2003, its directives to be transposed into national law by Member States by 2004. The Third Energy Package was adopted in 2009, its directive to be transposed into national law by 2011, and the Fourth Energy Package in 2019, its directive to be transposed by 2020. These waves of regulation introduced ex ante rules aiming at "opening up" energy markets to competition.

20. For instance, the First Energy Package partially opened the gas and electricity markets to competition by allowing large users to choose their energy suppliers. Moreover, to address concerns that vertically-integrated incumbents could use their monopolies over the transmission networks to stifle the emergence of competition in the supply business, certain ex ante rules were established. These introduced a "Third Party Access" regime,

[8] See https://ec.europa.eu/competition/antitrust/sector_inquiries.html.

certain unbundling provisions, and protection mechanisms against discrimination, to ensure that vertically-integrated operators would not discriminate against new entrants or create other entry barriers. With the Second Energy Package, the unbundling provisions were reinforced, to introduce minimum rules on legal, operational, and informational unbundling, and a regulated Third Party Access regime was introduced. Furthermore, conditions for access to the network for cross-border exchanges in electricity and for access to the natural gas transmission network were introduced to encourage cross-border competition. The rules introduced by the Energy Packages draw on competition law concepts, such as theories of harm relating to vertical foreclosure and discrimination, and the need to ensure third parties' access to an incumbent's "essential facility" to ensure downstream competition.

21. Competition enforcement has also contributed to identifying issues in energy markets, informing regulation for instance by means of the Energy Sector Inquiry of 2005 - 2007. Following the Second Energy Package, energy markets still remained national and concentrated. The Commission therefore launched a sector inquiry in 2005 to identify the barriers preventing more competition in these markets.

22. In its Final Report on the Energy Sector Inquiry, published in 2007, the Commission identified as one of the main remaining obstacles to competition in energy markets the situation of continued vertical foreclosure, i.e. the obstacles to competition stemming from the vertical integration of companies active in energy supply and network business. The Final Report concluded that the EU's existing (legal and functional) unbundling regime was inadequate and that a conflict of interest persisted in vertically-integrated companies, with a continued risk that they use their control over the network to make market entry and expansion of their competitors in the supply markets difficult.[9] The findings of the Energy Sector Inquiry fed into the Commission's proposal for a Third Energy Package, which aimed at addressing the identified issues by introducing stricter forms of unbundling in the electricity and gas markets. In particular, the Commission proposed the implementation of more stringent unbundling rules designed to ensure effective independence of the network business from the rest of the vertically-integrated energy utilities. Under the new EU legislation, Member States could choose between three unbundling regimes: full ownership unbundling, independent system operator (ISO) and independent transmission operator (ITO).

23. Therefore, in the energy sector, EU regulation has opened up the Member States' gas and electricity markets to competition, by addressing "systemic" issues by means of rules ensuring access and non-discrimination and by "unbundling" vertically-integrated players. This was particularly important given the presence of "bottleneck" infrastructures upstream owned by national incumbents, to which third parties needed access in order to compete downstream. The regulatory approaches followed draw from competition law concepts of ensuring access to key infrastructure, non–discrimination and preventing potential anticompetitive behaviour by large vertically-integrated players. Notwithstanding the introduction of regulation, EU competition law has remained applicable, and has indeed been applied by the Commission in the electricity and gas markets, as will be illustrated in Section 3.2 below.

[9] For a more detailed analysis, see: https://ec.europa.eu/competition/publications/cpn/2007_1_23.pdf.

2.2. Telecommunications

24. Telecommunications services in the European Union were characterised by national monopolies until the 1990s. The EU comprehensively opened up these markets to competition, through a step-by-step approach introducing ex ante regulation. The EU gradually liberalised all the telecoms markets: terminal equipment, value-added services, satellite equipment and services, cable TV networks and mobile communications. This process culminated in 1998 with the liberalisation of voice telephony and infrastructures.

25. In 1999, the Commission published a report,[10] which resulted in the 2002 telecoms regulatory package, subsequently revised in 2009 and 2018. The 2002 package consisted of six directives. In particular, the Framework Directive[11] outlined general principles, objectives and procedures. It assigned responsibilities, powers and obligations to National Regulatory Authorities ("NRAs") within a framework of review by the Commission and national courts. The Access and Interconnection Directive[12] set out rules for a multi–carrier marketplace, ensuring openness and interoperability. It gave a duty to NRAs to intervene whenever market forces cannot ensure the fulfilment of the objectives set out in the Framework Directive. The package was modified in 2009 in order to address the growth of broadband Internet access services.[13]. The adoption in 2018 of the European Electronic Communications Code[14] (the "Code") introduced a number of important changes to the system as regards in particular symmetric regulation and co-investment. However, the basic architecture of the 2002 package has remained in place to date.[15].

26. It is important to recall that the EU's telecommunications rules were developed to address a specific historical situation in the EU, whereby a Member State or former state-owned telecoms operator held an effective monopoly in markets. It was deemed that most of these markets were susceptible to competition and that they would have indeed displayed effective competition, had it not been for the historical contingency of the market structure. Rather than running individual competition cases to address these issues of lack of access to key infrastructure for competition in each market, the Commission made legislative proposals to introduce ex ante rules that would ensure access and "open up" telecommunications markets to competition. The goal was ultimately to regulate markets to inject competition into them; once competition would have taken hold, regulation could be lifted.

27. One of the main features of the regulatory framework is *ex ante* access regulation, the so-called "Article 7 procedure" (now Article 32 of the Code). This procedure is used to identify competitive bottlenecks in telecoms markets (typically in fixed markets) and to impose remedies to address such bottlenecks, following competition law principles and

[10] Towards a new framework for electronic communications infrastructure and associated services (European Commission, 1999).

[11] Directive 2002/21/EC of 7 March 2002.

[12] Directive 2002/19/EC.

[13] The 2009 package also created the Body of European Regulators of Electronic Communications (BEREC) which is made up of NRAs and the task of which is to support the Commission in implementing the Framework Regulation (EC) No 1211/2009

[14] Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code. The Code should have been transposed into national law in all 27 Member States by 21 December 2020.

[15] See https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2482 and https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32018L1972

methodologies. The procedure gives NRAs powers to impose access and cost accounting remedies on telecommunications operators found to have "Significant Market Power" ("SMP") on certain markets, which must be defined according to competition law principles. The notion of SMP is aligned with that of dominance under competition law.[16]

28. Under the Article 7 procedure, NRAs can introduce ex-ante access obligations following a national market review and subject to a national stakeholder consultation. The remedies adopted by NRAs are subject to a review procedure by the Commission, which can comment and in some cases veto the proposed measures.[17]

29. The Article 7 procedure makes use of a so-called three criteria test to determine markets susceptible to ex ante regulation. These criteria are set out in the Recommendation on Relevant Markets ("the Recommendation"), which also contains a list of markets that in principle satisfy the three criteria in most or all Member States.[18] The Recommendation describes these markets as those that present three features. First, they must display high and non-transitory barriers to entry, which may be of a structural, legal or regulatory nature. Second, they must not, in the absence of regulation, tend towards effective competition within the relevant time horizon of the market review procedure (three years, extended to five under the Code). Finally, the application of competition law alone should not be sufficient to adequately address the market failure(s) concerned.

30. In parallel to ex ante regulation, the Commission also carried out sector inquiries in specific parts of telecoms markets, such as access to the local loop, leased lines and roaming.[19] The sector inquiry into roaming offers another illustration of how competition enforcement can feed into ex ante regulation. Following the sector inquiry, which established serious competition concerns regarding pricing practices for mobile roaming, the Commission started preliminary investigations into roaming practices, in particular in

[16] Article 8(2) of the Framework Directive also emphasises competition law concepts by stating as goals that NRAs "*shall promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services by inter alia: (a) ensuring that users, including disabled users, derive maximum benefit in terms of choice, price, and quality; (b) ensuring that there is no distortion or restriction of competition in the electronic communications sector; (c) encouraging efficient investment in infrastructure, and promoting innovation; and (d) encouraging efficient use and ensuring the effective management of radio frequencies and numbering resources.*"

[17] In addition, national market reviews are also subject in certain instances to BEREC consultation, and can be appealed before national courts (which may refer questions of EU law to the European Court of Justice). In this way, the procedural rights of regulated undertakings and other interested stakeholders are protected. Market reviews typically take 12-18 months from initiation to adoption of a final decision imposing remedies.

[18] The Recommendation initially defined 18 telecoms markets as susceptible to ex ante regulation. Over time, this number has been reduced to five and, most recently, two. This is in line with the underlying philosophy to remove regulation insofar as competition has been successfully injected into telecommunications markets.

[19] See https://ec.europa.eu/competition/sectors/telecommunications/archive/inquiries/local_loop/index.html, https://ec.europa.eu/competition/sectors/telecommunications/archive/inquiries/leased_lines/index.html and https://ec.europa.eu/competition/sectors/telecommunications/archive/inquiries/roaming/index.html respectively.

the UK and Germany.[20] Subsequently the Commission proceeded to adopt a proposal for a regulation on roaming fees, to address these issues in a more systemic manner, beyond individual competition cases.[21] Roaming fees are now fully regulated in the EU.[22]

31. Therefore, concepts and tools previously established in EU competition law have played a major role in the regulation of the telecommunications sector. As for the energy sector, it should be noted that regulation did not obviate the need for competition enforcement in the sector, which continued in a complementary fashion (see Section 3.2 below).

2.3. Banking and payments

32. The EU's financial and payments markets offer another example of the interplay between competition and regulation, and of how the former influences the latter, which in turn complements competition enforcement by addressing systemic issues ex ante. The Commission has used both instruments jointly to build an Internal Market for financial services.

33. Following a sector inquiry into retail banking, which identified several barriers to competition (high payment card fees, including merchant and interchange fees across the EU, practices by incumbents limiting competition, barriers to entry and discriminatory rules in payment cards and payment systems),[23] the Commission started several competition investigations. In particular, the Commission ran parallel cases into the practices of Visa and Mastercard concerning multilateral interchange fees ("MIFs") for transactions with consumer credit and debit cards.[24] Following these investigations, in December 2007, the Commission found that MasterCard's interchange fees on cross-border transactions in the European Economic Area ("EEA") restricted competition between banks.[25] In 2009, to comply with the Commission's decision, MasterCard reduced the intra-EEA cross-border interchange fees applied by its member banks to maximum weighted averages of 0.2% for debit cards and 0.3% for credit cards. Furthermore, in December 2010 and February 2014 respectively, the Commission adopted decisions making legally binding

[20] See https://ec.europa.eu/commission/presscorner/detail/en/MEMO_01_262 .

[21] The Explanatory Memorandum to the Commission's proposal noted that "*competition law instruments address the activities of individual undertakings and therefore cannot provide a solution that safeguards the interests of all e-communications users and market players within the Community*". See https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52006PC0382&from=EN

[22] Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union (OJ 2012 L 172/10), last amended by Regulation (EU) 2017/920 of the European Parliament and of the Council of 17 May 2017 (OJ 2017 L 147/1).

[23] The final report on the sector inquiry was published on 31 January 2007, see https://ec.europa.eu/commission/presscorner/detail/en/IP_07_114 and https://ec.europa.eu/commission/presscorner/detail/en/MEMO_07_40 .

[24] Each time a consumer uses a credit, debit or prepaid card to buy something in a shop or online, the bank serving the retailer (acquiring bank) pays a fee called "interchange fee" to the bank that issued the card to the customer (issuing bank). As the retailer generally incorporates the interchange fees in the price charged to consumers, the fees increase retail prices of goods and services.

[25] See https://ec.europa.eu/commission/presscorner/detail/en/IP_07_1959. The EU courts confirmed the Commission's findings, see https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_528.

commitments offered by Visa Europe (the former Visa scheme association of banks in Europe) to cap at the same levels (0.2% and 0.3%) the interchange fees for all intra-EEA debit and credit card transactions.[26]

34. These cases capped MIFs for the individual payment schemes that were subject to the Commission's investigations. However, this competition intervention was not sufficient to address the general market fragmentation of payment card schemes and banks and provide a level playing field for all market players. The Commission therefore found that regulatory intervention could address the patchwork of solutions of individual payment schemes, and made the proposal for the interchange fees regulation, which aimed at generally addressing the widely varying and excessive hidden interchange fees, going beyond competition enforcement in specific cases.[27] The regulation was adopted by the European Parliament and the Council in April 2015.[28]

35. The interchange fee regulation set caps, as of December 2015, for interchange fees for cards issued and used in Europe of maximum of 0.2% for debit cards and 0.3% for credit cards. Furthermore, the regulation imposed transparency obligations on banks and retailers to improve the functioning of payment markets for all cards. Finally, the regulation introduced other provisions to enhance competition and remove practices that created market barriers. For instance, the regulation established a prohibition of territorial restrictions in licenses,[29] freedom of choice of payment brand or payment application by merchants and consumers, and the separation of payment schemes and processing entities.[30]

36. The interchange fee regulation therefore clearly illustrates the reciprocal interplay between competition and regulation in the EU. Competition enforcement detected

[26] See https://ec.europa.eu/commission/presscorner/detail/en/IP_10_1684 (debit cards) and https://ec.europa.eu/commission/presscorner/detail/en/IP_14_197 (credit cards).

[27] See https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52013PC0550&from=EN. The explanatory memorandum to the proposal notes that "*[i]n spite of the General Court judgement confirming the Commission's assessment that MIFs as applied within the MasterCard system restricted competition and did not lead to efficiencies outweighing their harm to merchants and consumers, international and national card schemes operating in the EU currently do not seem willing pro-actively to adjust their practices to comply with the European and national competition rules. Although National Competition Authorities, in close cooperation with the Commission, are addressing this situation, competition enforcement according to different timelines and procedures may not lead to sufficiently comprehensive and timely results to unlock the market integration and innovation that are necessary to ensure the competitiveness of the European payments market at a global level. Taking into account the EU competition rules and the Commission's experience in competition cases in payments, the present proposal therefore aims at providing legal clarity to ensure effective integration and competition, thereby improving economic welfare for all relevant stakeholders and in particular consumers*".

[28] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL_2015_123_R_0001&rid=1

[29] I.e., companies that are licensed to issue cards or acquire card transactions cannot be subject to territorial restrictions and are allowed to extend their activities to the whole of the European Union.

[30] Processing refers to the communication and IT process needed to make a card payment. Card schemes often have their own subsidiary for the processing of payment transactions but there are many other independent companies that provide processing services. The Regulation requires independence between card schemes and their processing entities. This prevents card schemes from favouring their subsidiaries over competing processing entities and from bundling the services of their processing entity with other services that the card schemes offers. The purpose of this part of the Regulation was to make the processing market more competitive and to enable banks and retailers to choose the best processor for their card transactions.

problems and tackled them through individual cases. Beyond these discrete interventions, once it was established that the issue at stake was systemic and widespread, the Commission decided to introduce ex ante regulation, which drew from the learnings of the competition cases.[31] For instance, the caps to MIFs introduced in the regulation were the same as those imposed on Visa and Mastercard in the respective antitrust investigations.[32]

37. Finally, it should be noted that the introduction of the interchange fees regulation, while systematically addressing certain issues on payments, has not entirely precluded competition enforcement in the field. As will be explained in section 3.2 below, the Commission has in fact continued using its competition powers to address other issues that were not addressed by the regulation.

2.4. Digital sector

38. The Commission has consistently applied the EU competition rules in the so-called "digital sector" over the years. The Commission has enforced both Articles 101 and 102 to tackle anticompetitive conducts in relation to a variety of services and markets, including general search, online advertising, mobile operating systems, online distribution, online marketplaces, and app stores.[33]

39. Notwithstanding this strong track record of competition enforcement, the digital sector offers another, more recent, illustration of the interplay between competition and regulation in the EU. In fact, the EU has introduced regulation to address certain conducts in the digital sector, to complement competition enforcement and achieve the goal of a "digital single market". This regulatory effort has been informed by competition practice and experience.

40. One example in this regard is the so-called "Geo-blocking Regulation".[34] The Geo-Blocking Regulation addresses the problem of customers not being able to buy goods and services from traders located in a different Member State for reasons related to their

[31] The factsheet explaining the Commission proposal explains that "*[t]he proposal builds on 20 years of experience in competition cases*", see https://ec.europa.eu/competition/publications/factsheet_interchange_fees_en.pdf. The Competition Policy Brief accompanying the adoption of the regulation also noted that "*By its nature, competition enforcement is backward-looking. It can punish past behaviour, but it cannot establish rules for the future. Moreover, enforcers cannot address all companies at once, but must target specific companies or groups of companies […] Despite competition enforcement and national regulation the European cards market has remained fragmented and interchange fees vary widely. So the Commission concluded that competition enforcement by itself would not create an EU-wide level playing field. Only regulation would enable the EU payments industry to move together from the old anti-competitive system to a new system that minimises the fragmentation between Member States, promotes competition and innovation, and allows consumers and merchants to benefit from the efficiencies created by card payments*". See https://ec.europa.eu/competition/publications/cpb/2015/003_en.pdf .

[32] "*The proposed cap is 0.2% and 0.3% per transaction for consumer debit and credit cards, respectively. In the framework of competition commitments, Visa Europe, MasterCard and Groupement des Cartes Bancaires have already accepted equivalent caps. Fees at these levels have been in place since 2009 in some cases and they have not threatened anyone's viability*", see the factsheet explaining the Commission proposal.

[33] See, *inter alia*, Commission decisions of 27 June 2017, *Google Search (Shopping)*, case COMP AT.39740; of 18 July 2018, *Google Android*, case COMP AT.40099; of 20 March 2019, *Google Search (AdSense)*, case AT. 40411.

[34] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32018R0302&from=EN

nationality, place of residence or place of establishment. The Regulation prohibits unjustified geo-blocking and other geographically-based restrictions which undermine physical and online shopping and cross-border sales by limiting the possibility for consumers and businesses to benefit from the advantages of online commerce.[35] Specifically, the regulation applies to physical and digital business-to-consumer transactions of a cross-border nature, in a wide range of sectors: sale of goods, travel agencies, tourism, tour guides, leisure services, sports centres and amusement parks, services requiring travel by the recipient or the provider and services that may be provided at a distance, including via the Internet.[36] The Regulation prohibits discrimination against consumers and, in limited cases, against businesses, based on their nationality, place of residence or establishment when they buy goods or services.

41. The Regulation imposes obligations to allow customers from other EU countries to buy goods under the same terms as local customers and prohibits requirements like a local place of residence, local bank account or payment methods, and online redirection or IP address blocking. To that end, the Geo-Blocking Regulation prohibits certain forms of discrimination of consumers (e.g., prohibition against denying a consumer access to websites or apps based on their IP address or other factors connected to the customer's nationality or geographical location, requirement of customer consent for rerouting to country-specific websites, no discrimination during payment). The Regulation however does not oblige online traders to deliver goods or services in other countries.

42. The Geo-Blocking Regulation therefore complements competition law by addressing ex ante certain unjustified unilateral conducts by online businesses, which limit cross-border trade through discriminatory conducts and which would fall outside the scope of Article 102 TFEU in the absence of dominance.[37]

43. In addition, while the Geo-blocking Regulation covers unilateral conducts, Article 6 of the Regulation makes specific reference to agreements restricting active and passive sales within the meaning of VBER.[38] In particular, Article 6(2) of the Regulation specifically addresses vertical contractual agreements that impose on traders passive sale restrictions. Those agreements, insofar as they impose conditions that contradict the other prohibitions laid down in the Regulation, are considered void without the need to proceed with an assessment pursuant to EU competition law.[39] This is because, as explained in

[35] Geo-blocking refers to business practices, whereby retailers and service providers prevent online shoppers from purchasing consumer goods or accessing digital content services because of the shopper's location or country of residence.

[36] Audio-visual Content is excluded from the scope of the Geo-blocking Regulation (Recital 8). The provision of (non-audio-visual) copyright protected content services (such as e-books, online music, software and videogames) is not subject to the Regulation's prohibition of applying different general conditions of access on the basis of a customer's nationality, residence or establishment, including the refusal to provide such services to customers from other Member States in the specific cases listed in Article 4. These services, moreover, remain subject to all other than Article 4 provisions of the Geo-blocking Regulation, including the prohibition to block or limit access to online interfaces on the basis of the customer's nationality, residence or establishment of the customer.

[37] EU competition law does not prevent a non-dominant online retailer from unilaterally choosing not to sell/deliver goods in a specific Member State.

[38]The Geo-Blocking Regulation does not contain a definition of active and passive sales and refers back to EU competition law for such concepts.

[39] Article 6(1) of the Geo-blocking Regulation specifies that it is without prejudice to the application of competition rules to all forms of active sales and those forms of passive sales that concern

recital 34 of the Geo-blocking Regulation, while agreements imposing obligations on traders not to engage in passive sales are generally considered to restrict competition and cannot normally be exempted from the prohibition laid down in Article 101(1) TFEU, where such an exemption applies, or where contractual restrictions are not covered by Article 101 TFEU, there is a risk that they could be used to circumvent the provisions of the Geo-blocking Regulation.

44. The Geo-Blocking Regulation is an internal market regulation that is without prejudice to competition law. Its Article 6 is based on a traditional EU competition law concept, namely that of passive sales restrictions. By prohibiting passive sales restrictions, the Regulation trumps in this respect EU competition law enforcement – only with respect to the specific situations covered by the Regulation. The Regulation is also another example of competition enforcement detecting an issue and informing regulation. The Commission had identified geo-blocking issues within its 2015 – 2017 e-commerce sector inquiry.[40] Those findings led to the adoption of general ex ante rules to tackle these conducts, which hinder the completion of the digital single market.

45. The most recent example of the interplay of competition and regulation in the digital sector is the Commission's proposal for a Digital Markets Act ("DMA") of 15 December 2020.[41] The DMA is the outcome of a broad policy reflection within the EU on the need to tackle issues of fairness and contestability in digital markets.[42]

46. The DMA does so by introducing rules applicable to certain "core platform services" in the digital sector, including search engines, social networks, online intermediation (i.e., app stores and marketplaces).[43] Undertakings that provide these core services and that are identified as "digital gatekeepers" need to comply with a set of obligations and prohibitions established in the DMA. Digital gatekeepers will be identified based on certain quantitative criteria,[44] or following a qualitative assessment, carried out through an investigation by the Commission.

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transactions falling outside the scope of the prohibitions laid down in the Geo-blocking Regulation (in Articles 3, 4 and 5 specifically).

[40] See https://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html. In March 2016, the Commission published initial findings on geo-blocking in an issues paper on the topic. One of the key findings of the sector inquiry was that almost 60% of digital content providers who participated in the inquiry had contractually agreed with right holders to "geo-block" goods or content.

[41] Commission Proposal for a Regulation of the European Parliament and the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020PC0842&from=EN

[42] Policy reflections on how to address the issues of digital markets have also taken place in some of the EU's major trading partners (US, Japan, the UK, Australia and China). These reflections include calls for a new regulatory framework for platforms with "significant and durable market power" (US House of Representatives Majority Staff report), "substantial market power" (Australian ACCC report), "strategic market status" (UK Furman report) and "bottleneck power" (US Stigler Center report).

[43] Article 2(1) of the DMA proposal contains the full list of "core platform services".

[44] Specifically, three quantitative thresholds serve as presumptive indicators of three features that qualify a gatekeeper: (i) A significant impact on the internal market - The presumption kicks in at an annual turnover in the EEA at €6.5 billion or a market capitalisation/fair market value of €65 billion. In order to be a "European" gatekeeper, the presumption also requires offering the core services also in at least three Member States. (ii) Important gateway for business users - A provider of core platform services is presumed to be an important gateway where it has more than 45 million

47. The purpose of the DMA's obligations and prohibitions is to tackle in a clear-cut and upfront manner the practices by gatekeeper platforms that are considered to be recurrent and systemically harmful. In particular, the DMA focuses on (i) gatekeeper conduct that limits contestability on certain markets, by impeding competition on a platform or between platforms; and (ii) gatekeeper conduct that negatively affects business users.

48. The DMA proposal imposes two types of obligations on a core platform service provider designated as gatekeeper. On the one hand, Article 5 includes obligations for which there is no doubt for a gatekeeper how to implement. For instance, Article 5(b) prohibits parity clauses, i.e. business users cannot be prevented from offering their product at a different price through another intermediation service; Article 5(c) imposes an anti-steering rule that prohibits the gatekeeper from not allowing business users to conclude contracts outside of the gatekeeper's platform. On the other hand, Article 6 includes obligations whose implementation may need to be tailored to the specific situation of the particular gatekeeper. Examples of such obligations include the prohibition of preferential ranking of downstream products; and various data-related and interoperability obligations. Gatekeepers will have the possibility to ask the Commission for an "implementation dialogue", for example about the format of the data and the way of transmitting it.

49. While the DMA is an internal market tool aimed at the harmonisation of the rules throughout the EU, similar to the regulation of specific sectors, such as telecommunications, energy or finance, the Commission's competition law experience, and that of other competition authorities around the world, influenced the DMA. This is the case both as regards the content of some of the obligations and the powers that the Commission will have to monitor and enforce the DMA (such as requests for information or inspections). However, the DMA also contains obligations on unfair practices that cannot be tackled under competition law. Moreover, the DMA is complementary to the EU competition rules and those of the Member States, which remain fully applicable.[45]

50. The DMA proposal is subject to the legislative process with the Council of the European Union and the European Parliament: the Union's co-legislators might therefore introduce modifications to the proposal before it eventually enters into force. Nevertheless, the DMA is another illustration of how the experience and learnings of competition enforcement can inform ex ante rules for the digital sector.

3. Interplay between competition enforcement and regulation

51. The debate on the interplay between competition and regulation has not remained purely theoretical in the EU. The Commission has adopted a series of competition decisions under Article 102 TFEU in cases where the conducts under scrutiny occurred in regulated sectors, in particular in the telecommunications and the energy sectors. Some of those

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end users, which are served by more than 10,000 business users. (iii) Entrenched and durable position - A gatekeeper is presumed to have an entrenched and durable position if has been an important gateway for at least 3 years (i.e., it has met the thresholds in terms of end users and business users in the last 3 years).

[45] Article 1(6) of the DMA proposal states that "*This Regulation is without prejudice to the application of Articles 101 and 102 TFEU and of national rules prohibiting anticompetitive agreements, decisions by associations of undertakings, concerted practices and abuses of dominant positions; of Council Regulation (EC) No 139/2004 and of national rules concerning merger control; of Regulation (EU) 2019/1150 of the European Parliament and of the Council ("P2B Regulation")…*"

decisions have been reviewed by the EU Courts. The CJEU has also issued preliminary rulings in this respect. Therefore, the basic principles on this subject can be considered as part of the "*acquis communautaire*".

52. Before discussing the specific cases, it is worth recalling the hierarchy of norms in the EU legal system: Articles 101 and 102 TFEU belong to the so-called primary law, while sector-specific regulation constitutes so-called secondary law. Consequently, EU competition law has generally priority over EU regulatory measures (exceptions have to be provided for by primary law itself). Furthermore, as regards national regulatory measures, EU law takes precedence over national law, pursuant to the principle of primacy of EU law.[46] The case law discussed below has to be read with this framework in mind.

53. Two distinct situations can arise, where the EU competition rules apply in a regulated sector. In the first case, a certain conduct may already be subject to regulation. This nevertheless does not necessarily prevent a competition infringement to arise. This scenario could potentially result in the parallel application of competition law and regulatory tools to the same conduct and raise questions of "*ne bis in idem*". In the second case, competition enforcement may intervene to address a conduct that is not caught by regulation, i.e. a regulatory gap, or when regulation did not go as far as necessary to prevent problems on the market.

54. The first section below explains the limits to the simultaneous application of competition law and regulatory tools to the same conduct at the EU level. The second section provides concrete examples of cases where the Commission intervened in a regulated sector, tackling a conduct already subject to regulation or addressing a gap in regulation.

3.1. The principle of *ne bis in idem* as a potential limit to the simultaneous application of competition law and regulation

55. The CJEU has consistently held that the *ne bis in idem* principle is a general principle of EU law that must be observed in all proceedings, including those for the imposition of fines pursuant to EU competition law. This principle precludes an undertaking being found liable or proceedings being brought against it afresh regarding anticompetitive conduct for which it has been penalised or declared not liable by an earlier decision that can no longer be challenged.[47]

56. The *ne bis in idem* principle is expressed in Article 50 of the Charter of Fundamental Rights of the European Union:[48] "*No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.*"

57. In competition law cases, the CJEU has held that the application of this principle is subject to the following three conditions: first, the facts in the two cases must be the same,

[46] Court of Justice, 15 July 1964, case 6/64, *Flaminio Costa v. E.N.E.L.*, ECLI:EU:C:1964:66. With specific reference to EU competition law, the Court of Justice stated that (current) Article 101 TFEU, read in conjunction with (current) Article 4(3) TEU, requires Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings (19 February 2002, case C-35/99, *Arduino*, ECLI:EU:C:2002:97, para. 34).

[47] Case C-17/10, *Toshiba Corporation and Others*, EU:C:2012:72, paragraph 94 and the case-law cited.

[48] OJ C 326, 26.10.2012, p. 391–407.

second, the offender must be the same, and third, the legal interest protected must be the same.[49]

58. As already explained, the enforcement of competition law often overlaps with enforcement by other administrative authorities or courts, in particular because it may cover markets for which (national) sector-specific regulatory authorities have complementary enforcement powers, for instance in the field of telecommunications, banking and securities, postal services, energy, transport, consumer protection, data protection, etc. The sector-specific authorities often exercise ex ante control, whereas competition authorities exercise ex post control.

59. The third condition for the application of the *ne bis in idem* principle in EU competition law (the unity of the protected legal interest) safeguards the competence of the Commission or of the national competition authorities to apply the EU competition rules in situations where another regulatory body or court in any Member State enforcing rules with a complementary purpose, takes a prior decision covering the same facts and offender.

60. The origin of the application of the *ne bis in idem* principle in the field of EU competition can be traced back to the case *Walt Wilhelm and Others*.[50] In that case, the CJEU was asked whether a national competition authority could pursue the infringement of competition law while the examination of that conduct was pending before the Commission. The Court accepted that such a possibility was indeed open to the national competition authority given that national competition law and EU competition law consider anticompetitive behaviour from *different points of view*. Thus, the Court effectively rejected the applicability of the *ne bis in idem* principle in such a context.[51]

61. In Bpost,[52] the CJEU is consulted for the first time on the application of the *ne bis in idem* principle in the specific scenario of competition law enforcement and an intervention by a national regulatory authority. The proceedings in this case are ongoing, and the Advocate General's Opinion is expected in June 2021.

62. The context of the dispute concerns two separate proceedings against Bpost, Belgium's postal operator, for the imposition of two administrative penalties, one by the national regulatory authority for postal services in Belgium ("IBPT") and a second by the Belgian Competition Authority.

63. On 20 July 2011, the IBPT took the view that Bpost's new pricing model was discriminatory and ordered Bpost to pay a fine for breach of the non-discrimination

[49] Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland and Others v Commission*, EU:C:2004:6, paragraph 338.

[50] Case 14/68, judgment of the Court of 13 February 1969, EU: C: 1969: 4.

[51] The Court has also examined the applicability of the *ne bis in idem principle* where the same anti-competitive conduct is prosecuted or punished both within and outside the European Union. See, for example, Case C-289/04 P, Showa Denko, EU: C: 2006: 431, paras 52-56; and Case C-308/04 P, SGL Carbon, EU: C: 2006: 433, paras 29 and 31. For arguments as to why the *ne bis in idem* principle cannot in any event apply where the duplication of proceedings takes place in different territories unless an international agreement provides that that principle must apply, see Opinion of Advocate General Tizzano in Case C-397/03 P, Archer Daniels Midland and Archer Daniels Midland Ingredients, EU: C: 2005: 363, paras 94-99.

[52] Case C-117/20, bpost SA v Autorité belge de la concurrence, request for a preliminary ruling from the Cour d'appel de Bruxelles (Belgium).

obligation laid down in Belgian legislation.[53] That infringement consisted in the establishment by Bpost, for 2010, of a pricing system, and in particular selective rebates, based on a difference in treatment between intermediaries and direct customers. That procedure did not relate to the existence of possible anti-competitive practices.

64. On 10 December 2012, the Belgian Competition Authority found that Bpost had abused a dominant position and, therefore, infringed Article 102 TFEU and the equivalent national law provision from January 2010 to July 2011, following the adoption and implementation of its new pricing system. The Belgian Competition Authority imposed a fine on Bpost taking into account the fine previously imposed by IBPT. That procedure did not relate to the existence of possible discriminatory practices.[54]

65. The referring Belgian Court is asking two questions. First, the Belgian Court is asking whether it must apply the criterion of the same legal interest in order to determine whether there has been a breach of the principle *ne bis in idem* because the case at issue relates to two different infringements of different legislation applicable in two separate fields of law. Second, should the CJEU find that the criterion of the legal interest protected does not preclude the application of the *ne bis in idem* principle in this case, the Belgian Court is asking whether a limitation to the principle of *ne bis in idem* would be justified because competition legislation pursues a complementary general interest objective and does not go beyond what is appropriate and necessary in order to achieve this objective and/or in order to protect the right and freedom to conduct business of other operators on the market under Article 16 of the Charter of Fundamental Rights of the European Union.

66. The proceedings are ongoing and the judgment will provide more clarity regarding the potential limit to the parallel application of competition law and regulation in the EU. As explained below, there are at least two examples, the Telefonica and the Deutsche Telekom cases, where the EU Courts considered that an overlap between competition law and sector-specific regulations was lawful.

3.2. The practice of the Commission and the Court of Justice

3.2.1. Telecommunications: the Deutsche Telekom and Telefonica cases

67. In the telecommunication sector, the Commission has adopted two decisions in cases of abuse of dominant position that were subsequently scrutinised by the EU judicature.

68. In 2003, the Commission imposed a fine of EUR 12.6 million on the German telecommunication company, Deutsche Telekom (DT) for abusing its dominant position by way of margin squeeze.[55] DT was found to be dominant in the provision of both

[53] Articles 144a and 144b of the Law of 21 March 1991 reforming certain economic public undertakings.

[54] Bpost lodged separate appeals against both decisions to the Cour d'appel of Brussels. By judgement of that Cour d'appel of 10 March 2016, the IBPT's decision was annulled. The IBPT did not appeal that judgment. On 10 November 2016, the Cour d'appel also annulled the BCA's decision. It held that the ne bis in idem principle was violated, as the facts on which the BCA based its fine were the same for which bpost was acquitted in the case relating to the IBPT's decision. The BCA appealed that judgment before the Cour de Cassation. On 22 November 2018, the Cour de Cassation annulled the contested judgment and referred the case back to the Cour d'appel for a new examination.

[55] Commission Decision of 14 October 2003, *Deutsche Telekom AG*, Case COMP/C-1/37.451, 37.578, 37.579, in [2003] OJ L263/9.

wholesale fixed telephony network access and in the downstream market for the provision of retail services to end customers.

69. Both during the administrative proceedings and in the subsequent appeal, DT argued that its wholesale access prices had been set by the German telecommunications regulatory authority. DT maintained that the company had no discretion in setting its prices: under the German regulatory regime, the NRA established a "price-cap" for local loop interconnection rates. Starting from the cost-orientation principle, the incumbent had a margin to fix the price only within the threshold of that price cap. Therefore, the Commission should not have intervened to assess whether this "margin" was infringing (current) Article 102 TFEU, because the price cap had been set by the regulator and consequently DT's pricing policy could not be considered abusive.

70. In its decision, the Commission acknowledged that for the provision of network access and related services, DT was subject to sector-specific regulation under EU law and the national implementing measures. However, it recalled that the EU judicature had consistently held that the competition rules may apply where the sector-specific legislation does not preclude the undertakings it governs from engaging in autonomous conduct that prevents, restricts or distorts competition. In the specific case, the decision concerned abuse by DT in the form of a margin squeeze generated by a disproportion between wholesale charges and retail charges for access to the local network. The charges in both cases were subject to sector-specific regulation, but DT had a commercial discretion that allowed it to restructure its tariffs so as to reduce or indeed to put an end to the margin squeeze. The margin squeeze therefore constituted the imposition of unfair selling prices within the meaning the provision of the Treaty on abuse of dominant position.[56]

71. On appeal, both the Court of First Instance (now General Court) and the Court of Justice upheld the decision in its entirety.[57] The Court of Justice, in particular, confirmed that it is only if anti-competitive conduct is required of undertakings by national legislation, or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, that the EU provisions on competition law do not apply. In such cases, the restriction of competition would not be attributable to the companies because EU provisions on competition law implicitly require the autonomous conduct of the undertakings. By contrast, these provisions are applicable if it is found that the national legislation leaves open the possibility of competition that may be prevented, restricted or distorted by the autonomous conduct of undertakings. Thus, if a national law merely encourages or makes it easier for undertakings to engage in autonomous anti-competitive conduct, those undertakings remain subject to EU provisions on competition law. It followed from this that the mere fact that DT was encouraged by the intervention of a national regulatory authority to maintain the pricing practices which led to the margin squeeze of competitors who were at least as efficient as the appellant could not, as such, in any way absolve DT.[58]

72. The Court of Justice also provided some interesting clarifications on the relation between the Commission and the national regulators. The Court confirmed that the Commission could not be bound by a decision taken by a national body pursuant to Article 82 EC (current Article 102 TFEU). Even assuming that the national regulatory authorities

[56] Decision of 14 October 2003, *Deutsche Telekom AG*, paras. 53-57.

[57] Court of First Instance, 10 April 2008, case T-271/03 Deutsche Telekom AG v. Commission, ECLI:EU:T:2008:101; Court of Justice, 14 October 2010, case C-280/08 Deutsche Telekom AG v European Commission, ECLI:EU:C:2010:603.

[58] Court of Justice, 14 October 2010, case C-280/08, paras. 80-84.

might themselves have infringed Article 82 EC in conjunction with (then) Article 10 EC, and therefore that the Commission could have brought an action for failure to fulfil obligations against the Member State concerned, that circumstance would not affect the scope that DT had to adjust its retail prices and, accordingly, it was ineffective for the purpose of challenging the conclusion as to whether the infringement could be attributed to DT.[59]

73. Similarly irrelevant was the circumstance that the purpose of national regulation was to open the relevant markets up to competition, as national regulation did not deny the possibility for DT of engaging in autonomous conduct that was subject to competition law. The Court clarified that EU competition rules supplement, by an ex post review, the legislative framework adopted by the Union legislature for ex ante regulation of the telecommunications markets. [60]

74. While the judicial review of the DT case was still ongoing, the Commission imposed a fine of EUR 151 million on the Spanish telecommunication company, Telefonica, in another case of abuse of dominant position by way of margin squeeze.[61] The Commission found that Telefónica had imposed unfair prices in the form of a margin squeeze between the wholesale prices it charged to competitors and the retail prices it charged to its own customers.

75. On appeal, Telefonica argued that the Commission had encroached upon the powers of the national regulatory authority and referred to concepts of a regulatory nature. Moreover, the Commission had at its disposal an ad hoc formal instrument of intervention resulting from Article 7 of the Framework Directive, which enabled it to intervene in such a situation. Both the General Court and the Court of Justice dismissed the appeal brought by Telefónica, confirming in substance the approach followed in the DT case.[62] In particular, the General Court clarified that it is correct that the EU legislature wished to give the NRAs a central role in achieving the objectives sought by the Framework Directive, but that the same act aims to ensure that decisions at national level do not have an adverse effect on the single market or other Treaty objectives. Therefore, the existence of that act has no effect whatsoever on the powers that the Commission derives directly from the Treaty and from regulations on competition law. Thus, the competition rules laid down in the Treaty supplement, by ex post review, the regulatory framework adopted by the EU legislature for ex ante regulation of the telecommunications markets.[63]

76. The General Court also dismissed the argument brought forward by Telefónica that the Commission's intervention ran counter to the principles of subsidiarity, proportionality and legal certainty, since it interfered without good reason in the exercise of the powers of the NRA. The General Court clarified that the principle of subsidiarity did not call in question the powers conferred on the Commission by the Treaty, which included the application of the competition rules necessary for the functioning of the internal market. Moreover, Telefónica could not be unaware that compliance with the Spanish regulations on telecommunications did not protect it against an action by the Commission on the basis

[59] Court of Justice, 14 October 2010, case C-280/08, paras. 90-91. See in this respect also Court of Justice, 9 September 2003, case C-198/01, CIF, ECLI:EU:C:2003:430, in particular para. 58.

[60] Court of Justice, 14 October 2010, case C-280/08, paras. 92.

[61] Commission Decision of 4 July 2007, *Wanadoo España v Telefónica*, Case COMP/38.784.

[62] General Court, 29 March 20128, case T-336/07, *Telefonica v. Commission*, ECLI:EU:T:2012:172; Court of Justice, 10 July 2014, case C-295/12, *Telefonica v. Commission*, ECLI:EU:C:2014:2062.

[63] General Court, 29 March 20128, case T-336/07, paras. 290-293.

of competition law. It followed that any decisions adopted by the NRAs on the basis of the regulatory framework did not deprive the Commission of its powers to take action at a later stage in order to apply competition law. The General Court also confirmed that the cost model used by the national regulation authority in its ex ante decisions was not appropriate for the purposes of applying the provision of competition law.[64] The Court of Justice confirmed the General Court's judgment, clarifying again that the fact that an undertaking's conduct complies with a regulatory framework does not mean that such conduct complies with Article 102 TFEU.[65]

77. In conclusion, the two cases are particularly significant since they clarified that EU competition law is applicable to conducts put in place within the boundaries and the limits of regulatory provisions. In this respect, the Commission is exclusively bound by the provisions of the TFEU, and ex ante remedies (such as price interventions) imposed at a regulatory level are not relevant in cases where the undertakings concerned behave autonomously on the market.

3.2.2. Energy: Commitment Decisions

78. In the energy sector, competition policy's goals of opening and integrating existing national markets co-exist with other considerations. In particular, national energy policies are strategic and there is the need to ensure security of supply. This justifies a strong public oversight at national level. Moreover, national environmental policies lead to different regulatory frameworks and are often nationally funded. Furthermore, in some Member States former state monopolies still operate as incumbents with few incentives to allow for market opening. Repeated attempts at liberalisation have met with uneven success and competition has been slow to take off.

79. In this scenario, the Commission intervened in a series of cases, to support and complement regulatory action via the introduction of structural measures that went beyond the scope of European and national regulation that imposed mere behavioural remedies to promote competition.

80. In 2006, the Commission initiated investigations into the German electricity market and came to the preliminary view that E.ON, a German company active in the electricity and gas sector, could be abusing its dominant position in two ways: (i) as a wholesaler on the electricity market, by deliberately not offering for sale the production of certain power plants that was available and that it would have been economically rational to sell, with a view to raising prices; and (ii) as a transmission system operator, on the secondary electricity balancing market, by favouring its own production affiliate, even if it charged higher prices, passing on the increased costs to the final customer. To address these concerns, E.ON proposed (i) to divest a relevant amount of generation capacity from different types of technologies and fuels, and (ii) to divest its transmission system business consisting of an Extra-High-Voltage line network and system operations. The Commission then adopted a decision that rendered legally binding the commitments offered by E.ON.[66]

81. In the same period, the Commission gathered evidence that RWE, a German-based energy and utility company, was abusing its dominant position on the gas transmission market in Germany, by way of a refusal to supply gas transmission services to third parties

[64] General Court, 29 March 20128, case T-336/07, paras. 296-305.

[65] Court of Justice, 10 July 2014, case C-295/12, para. 133.

[66] Commission Decision of 26 November 2008, *German Electricity Wholesale Market* and *German Electricity Balancing Market*, cases COMP/389.388 and 39.389.

and by intentionally setting its transmission tariffs at an artificially high level in order to squeeze RWE's downstream competitors' margins. To address the Commission's competition concerns, RWE committed to divest its existing Western German high-pressure gas transmission network, including the necessary personnel and ancillary assets and services. The Commission then adopted a decision that rendered legally binding the commitments offered by RWE.[67]

82. A similar case involved ENI, the former Italian incumbent in the gas sector. In 2009, the Commission informed ENI of its preliminary view that it may be abusing its dominant position on the gas transport markets by refusing to grant competitors access to capacity available on the network, by granting access in an impractical manner, and by strategically limiting investment in ENI's international transmission pipeline system. This, in the Commission's view, amounted to capacity hoarding as well as capacity degradation and strategic underinvestment. The practices were potentially harmful for competitors, weakened competition on the downstream gas markets and ultimately harmful for gas customers in Italy. In order to remove these competition concerns, ENI offered to divest its shares in the companies that owned, operated and managed the transport capacity on the international pipelines to bring gas into northern Italy from Russia and the North of Europe. Also in this case the Commission then adopted a decision that rendered legally binding the commitments offered by ENI.[68]

83. These cases confirm that, in situations where regulation alone is not sufficient to prevent or deter abuses or generally anticompetitive conducts, competition authorities can and have to take action via their general instruments. This can result in measures that go beyond the general requirements of sectoral regulation. In the end, whether this has to be interpreted as the supremacy of EU competition law over (EU and/or national) regulation is less relevant in practice. What is relevant is that also in regulated sectors competition law can be efficient and fast, in particular because it can be tailored to the specific case under investigation.

3.2.3. Banking and payments

84. As regards payments, the Commission maintained its competition enforcement even after the adoption of the interchange fee regulation, by addressing conducts that were not covered by that regulation.

85. Specifically, the Commission investigated the inter-regional interchange fees (also referred to as "inter-regional MIFs") of both Mastercard and Visa. These are MIFs applied to payments made in the EEA with consumer debit and credit cards issued outside the EEA. These MIFs were not covered by the Interchange Fee Regulation, as the Regulation does not apply to cards issued outside the EEA. By a decision of 2019, the Commission made legally binding the commitments offered by Mastercard and Visa, which reduced the level of inter-regional interchange fees.[69]

4. Conclusion

86. The Commission believes that competition and regulation can and have to coexist as they are both key for improving outcomes for customers. Effective competition leads to

[67] Commission Decision of 18 March 2009, *RWE Gas Foreclosure*, case COMP/39.402.

[68] Commission Decision of 29 September 2010, *ENI*, case COMP/39.315.

[69] See https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2311.

lower prices and better quality for products and services. Moreover, it promotes innovation and technological advances. Regulation can promote economic growth and consumer benefits as well, and can be better suited to address systemic market failures, but it can also have other direct policy objectives (such as health and safety, environment).

87. As for the interplay between the two, on the one hand, regulation has a crucial role to play in supporting competition, in particular by providing the legal framework where competition takes place. On the other hand, the EU past practice, briefly described above, confirms that competition has still a major role to play in regulated sectors, in particular to address conducts that are not caught by regulation, or when regulation was not sufficient to prevent problems on the markets.