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Sectoral regulation and competition law: theory and practice

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I. Theory

EU law - Two ways to open up markets

- starting point : neutrality (Art. 345 TFEU)
  - monopolies are not *per se* contrary to EU law, but …
- two methods to open up markets:
  - internal market law – sectoral regulation:
    Arts. 18, 45, 49, 56, 63 TFEU
    + harmonisation (mainly Art. 114 TFEU)
  - competition law:
    Arts. 106 *juncto* 101, 102, 107 … TFEU
- depending on sector, EU chooses a mix
  - harmonisation is more gradual !

EU law - Two ways to open up markets

- internal market law = prohibition for Member States to discriminate or restrict free movement of goods persons, services, capital
- competition law = prohibition for undertakings to enter into cartels, abuse dominant position, …
- but now: convergence !
  → internal market law applied to individuals / companies
  ← competition law (also restrictive practices) applied to Member States

Relationship competition law – sectoral regulation / NCAs - NRAs

- differences (→ complementary nature)
  - *ex ante* vs *ex post*
  - generalism vs specialism
  - finality (more diverse policy objectives for sectoral regulation)
  - degree of interventionism
  - frequency of intervention
  - information available
  - instruments/powers and expertise required

differences are sometimes overrated

Relationship competition law – sectoral regulation / NCAs - NRAs

- similarities NCAs - NRAs
  - requirement that they exist
  - independence and impartiality
  - acting in the general interest
  - finality (“[NRAs] shall promote competition”)

  …/…

→ *potential overlap, conflicts*

Continued need for sectoral regulation

- ‘sector-specific regulation
  - is better in opening up markets’
  - protects new entrants better’
  - serves a wider range of objectives’
- ‘need for risk-based regulation, better to prevent than cure’
- ‘competition law on refusal to deal cannot replace regulatory access obligations nor price control measures’

I agree in principle but (a) some of these statements are exaggerated and (b) liberalisation of the railway sector is at a different stage than e.g. liberalisation of telecoms

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II. Practice

Practice

1. Competition law is already fully present in the railway sector and is on the rise
2. The stakes in competition law are high(er)
3. It is *not only* (perhaps not mainly) sectoral vs competition law *but also* public vs private enforcement
4. Private enforcement is on the rise → no longer for EU/Comm alone to choose mix internal market - competition law or to opt for gradual harmonisation
5. Major problem: co-operation between supervisors
6. Free competition is not a goal but an instrument and free movement is not absolute either
   → defences exist !

1.1 Competition law in the railway sector

- Competition law is present
  - mergers and acquisitions: 16 cases since 2008
  - abuse of a dominant position: no cases since 2008
  - State aid cases: 32 cases since 2008
  - liberalisation and DG Comp: focus mainly on telecom

- Illustrations from the different branches of competition law
  - restrictive agreements and practices
  - abuse of dominant position
  - concentration control (merger control)
  - State aid
  - public undertakings and services of general interest

… not in isolation but in interaction !

1.2 Restrictive practices in railway sector

- Example: Criminal case in Estonia about attempts to restrict competition by railway freight services provider Spacecom and its main competitor Eesti Raudtee (Estonian Railways, “ER”):
  - division of the clients of rail freight services
  - restriction of access to the market by a third party
  - rental of locomotives
  - price increase
  - differential pricing
- Applicable law:
  - Article 4 § 1 Estonian Competition Law
  - Penal Code § 400: conclusion of anti-competitive agreement regarded as a crime, regardless of whether and how it would be executed later

1.3 Abuse of dominance in railway sector

- *ex post* assessment
- example: Comm. Decision on *Georg Verkehrsorganisation / Ferrovie dello Stato* (2003)
- GVG lodged complaint about FS allegedly refusing to provide access to Italian infrastructure, to enter into negotiations for the formation of an international grouping and to provide traction. Would have prevented GVG from providing int'l rail passenger service from various points in Germany via Basle to Milan
- The Commission:
  - referred to its notice on access agreements in telecommunications
  - applied the "essential facilities" doctrine
  - made explicit that "*Directive 91/440/EC does not prejudice the application of the competition rules of the EC Treaty*"
  - for instance: even if this Directive did not grant the right of access to certain information held by the infrastructure manager, if refusal to provide information may have the effect of preventing market entry, such behaviour may violate article 102 TFEU.

1.4 Concentration control in railway sector

- *ex ante* assessment of effects on competition
- example: approval of acquisition of rail and bus operator Arriva plc of the UK by Deutsche Bahn
  - Comm. considers degree of competition in the German rail and bus markets: “despite the very low market share of Arriva on the market for long-distance passenger rail transport, the market investigation revealed that Arriva is one of the key competitors of DB since it has its own rail tracks [and] it acquired indispensable knowledge of the long-distance market”
  - “very high barriers to entry (financing and production of rolling stock; dependency and possible discrimination of new entrants regarding services offered by DB or DB Netz such as rail energy or rail tracks access)”.
  - approval conditional upon commitment by DB to divest Arriva Deutschland (sale to a suitable purchaser)

1.5 State aid law in the railway sector

- State aid approved for:
  - infrastructure investments
  - purchase and renewal of rolling stock
  - debt cancellation by States with a view to the financial rejuvenation of railway undertakings
  - restructuring aid: e.g. BDZ EAD (Bulgaria): aid would not increase capacity but would ensure compliance with safety and security rules

    Where infrastructure use is open to all potential users in a fair and non-discriminatory manner, and access to that infrastructure is charged for at a rate in accordance with Community legislation in force, the Commission considers that public financing of the infrastructure does not constitute State aid.
  - remarkable: the definition of state aid and the scope of the state aid prohibition is defined by sector-specific regulation

2. The stakes in competition law are higher

- Sanctions for non-compliance with sectoral regulation in the railway sector :
  - (threat with) infringement procedure
  - prohibition to grant or order to recover State aid
- Sanctions for non-compliance with competition law :
  - (extremely high) fines
  - criminal sanctions in some jurisdictions
  - absolute nullity of contracts
  - damages which may top the fines

  = a different world

- Comp. law = best developed area in terms of judicial protection in EU law, generates extraordinary power

3-4. Private enforcement in internal market law

- [supremacy, direct effect]
- use *against one's own Member State*
- a mere *restriction* suffices (no discrimination required)
  …
- *one* restriction suffices (even if it is offset by multiple cases of reverse discrimination) …
- a *hypothetical* restriction suffices …

… to set aside the nat'l law you dislike
"no more need to wait for the lawmakers / politicians"

3-4. Private enforcement in competition law

- most important development in EU comp. law
- *public enforcement* = EU or national public authorities
  fine (accept commitments, settlements, …)
  in the public interest
- *private enforcement* = private parties claim damages before a national judge in their private interest
- distinguish EU plans *vs* reality in courts today
- all public enforcement action should take into account private enforcement consequences !

5.1 Major problem: co-operation between supervisors

- proliferation of supervisors
- disadvantages
  - cost, risk of legal uncertainty, of forum shopping, of inconsistent decisions, of exchange of confidential information, of renationalisation of EU law?
- potential for conflict between
  - national vs. supranational supervisors
  - national law vs. EU law
  - general vs. sector-specific regulation and supervision
  - legislative vs. judiciary vs. executive
  - primary (directly effective) EU law vs. secondary (sector-specific) law
    cf phenomenon of "overactive" national judge
  - politicians (may opt for gradual approach) vs "technicians"

5.2 Major problem: co-operation between supervisors

- solutions?
  - integration of sectoral regulators and competition authorities (e.g. EU Commission, e.g. Netherlands)
  - establishing hierarchy between regulators/supervisors? (e.g. Belgium at one stage)
  - establishing specialisation? (e.g. not NCA but NRA)
  - increased co-operation through legislation
  - increased co-operation through protocols
    - cross-border
    - cross-sectoral
    - between competition authorities and sectoral supervisors
    - other, e.g. between competition authorities and public prosecutor
  - constant evaluation, if possible simplification, of supervision structures; need to *think* about supervision

5.3 European Competition Network (ECN) as a model?

- formal or informal network?
  - Articles 11-16 of Council Reg. 1/2003 impose "co-operation" and enable exchange of information
    ↔
  - *Commission Notice* establishes ECN as a "forum for discussion and co-operation"
- more than a "*forum*": decision making power not only of network partners but also of / "within" the network
  e.g. "best placed authority"
- more than a network *of supervisors*
  Comm has legislative role, NCAs often have (informal) role in nat'l legislation as well
- not a network of equals
- efficient, but…

5.4 ECN as a model? Issues

- transparency, accountability, legal certainty, judicial protection
  - "informal discussions"
    → no access to records, if they exist
    → no right to appeal
  - exchange of (confidential) information can have important consequences
    for detection, for private enforcement (discovery!), for leniency

para 72 and Annex to Network Notice + ECN 'Model leniency programme'

'*The heads of Member States' competition authorities will use their best efforts to align their leniency programmes on the Model Programme*'

5.5 ECN as a model? Issues

- *ne bis in idem ?*
- only now do the problems become visible

  example ECJ 7 Dec. 2010, C-439/08 VEBIC

  example ECJ C-17/10 Toshiba a.o., hearing 7 June 2011, AG Kokott Opinion 8 Sept. 2011

6. “Workable competition” only!

- free competition not a goal but an instrument
  - not “absolute” but “balanced” competition
  - free competition is reconciled with other interests
    e.g. environment, regional development, R&D, …
  - important social corrections, protection of services of general interest ↔ social exclusion
  - Art. 93 TFEU
    aids to transport compatible if they represent reimbursement for obligations inherent in the concept of a public service
- free movement is not absolute either
- as a consequence, defense against unwarranted free movement / free competition claims by Comm./NRAs/NCAs is possible

Conclusions

- competition law has unlimited room in the railway sector
- … but comp. law does not aim at unlimited competition !
- impact of competition law expected to grow
  - DG COMP keeps relatively low profile in railway sector but
  - national enforcement by NCAs
  - private enforcement
  - ‘overactive’ nat’l judges < Treaty prevails over secondary law
- (dis-)advantage of comp. law: it bites
- (dis-)advantage of sectoral regulation: slow but with relative consensus, more democratic legitimacy?
- disadvantage of overlap: legal uncertainty, too many supervisors, conflicts
- major problem: co-operation between supervisors
  - ECN-like network of supervisors is an option
  - but ECN is not without shortcomings

thank you,

and please stay in touch

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