

A comparison with the energy and telecommunication sectors in the UK

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Key points

1. Assigning sector-specific regulators the power to apply competition law to their sectors is a good idea
2. Restricting application of sector-specific regulation only when competition law does not solve the concern is a bad idea
3. Development of 'regulatory' competition law at EU level is a worrying trend
4. Intersection of competition/regulation has problems.

1. Concurrent powers

- Comparative advantage of regulator (knows the industry better than a general competition authority & is aware of regulatory framework).
- Guidelines/consultation schemes can be designed to manage which authority takes which case
- No reported problems in the UK
- BUT: few competition law cases brought by regulatory agencies
- Note that second tier case allocation may arise among national competition authorities & Commission (i.e. which national authority is best placed to act?)

2. Limited role for regulation

- Regulation only when competition law insufficient
 - No clear guidance on how this standard works
 - Tendency by UK regulators to apply regulatory powers when competition law would work
 - Decisions applying competition law have a high fail rate on appeal (reliance on complex theories of harm, ambiguous economic analysis)
 - Regulation often has better enforcement tools
- Why not allow regulator to choose the most effective framework?

3. Regulatory antitrust

- Commission decisions (final or commitments) which aim to achieve regulatory tasks.
 - Merger allowed on conditions that markets are opened to third parties (but merger raises no foreclosure risk)
 - Structural remedies in commitment decisions with exotic theories of harm under Article 102 (e.g. strategic under investment)
- Impact: renders choice of competition law/regulation ambiguous

4. Problems

- Competition Law always applies even if the regulator has acted
 - Except if regulator forces the regulated firms to behave in a specific manner (then the regulator's action may be challenged as anticompetitive under EU competition law)
 - If regulator encourages a form of conduct by the regulated firm, the firm may still be liable to pay fines under antitrust (reduced perhaps); and damages in private litigation.

Questions

- What is the proper role for regulation?
 - To create conditions for workable competition (sunset clauses with no regulation as desired end-point)
 - To regulate the sector in the public interest, which includes creating competition but also pursue other values, e.g. environmental protection; protecting vulnerable citizens (means anticompetitive regulation can be tolerated)
- What is the proper role for competition law in regulated sectors?
 - None if regulation is the effective steward of competition (Verizon v Trinko, 2004)
 - The same as in other sectors: deter acts by undertakings that restrict competition
 - None if there is good reason for restricting competition