

3rd Portuguese Spanish Conference on Competition Law

**Interface between Competition and Regulatory authorities
- perspectives, functions and missions**

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Interface between Competition and Regulatory authorities - perspectives, functions and missions

- Industry specific regulation and competition law
- From industry specific regulation to competition law
- Institutional design for regulation

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Industry specific regulation and competition law

- Market failures
- Cooperation duties
- Scope for intervention of competition authorities: EU vs US
- Conflicting views?

Regulation and market failures

- Industry specific regulation
 - Monopoly power
 - Asymmetric information
 - Divergence between private cost and social cost
 - Network externalities
 - Environmental externalities
 - Non economic arguments
 - Universal service
 - Competition law
 - Natural oligopolies
- Reciprocal economic insights
 - Essential facilities
 - Price regulation
 - FRAND
 - Proportional and non discriminatory prices in network access

Cooperation duties

- Advisory roles

- *Sale* of radio licenses
 - Electronic communications regulatory (Anacom) authority advise media regulatory (ERC) authority on transmission of radio licenses
 - Anacom should get advice from the competition authority (AdC)
- Mergers & acquisitions
 - ERC special case: non economic objectives
- Market analysis
 - Anacom should get advice from AdC

Cooperation duties

Remedies design & follow up

- Follow up and cooperation on the design of remedies
 - Industry regulator cooperation remedies design?
 - At least informed?
- Follow up and supervision on the remedies
 - Industry regulator supervision?
 - At least informed?

Intervention of competition authorities in regulated industries: EU vs US

- Case T-271-03, Deutsche Telekom v. Commission, CFI judgment in 2008; Case T-336-07, CFI judgment 2012)
 - Fines imposed on conduct and prices approved by industry specific regulator
 - Ex post competition rules will continue to apply despite the existence of ex ante industry specific regulation, unless industry regulation leaves the dominant operator no margin of discretion in pricing
- AdC, Decision on PTC leased lines pricing early 2003, 2008
 - Industry regulator had not opposed prices but conducted an analysis of pricing for the same period followed by corrective measures

Intervention of competition authorities in regulated industries: EU vs US

- US Supreme Court , Trinko Case (540 US 398, 2004)
 - The existence of a regulatory structure to deter and remedy anticompetitive harm is a key factor in recognizing an anti trust claim against a regulated firm
 - Where such a structure exists the additional advantages of antitrust enforcement may be small
 - Emphasis on regulatory structure, not on regulatory performance
 - Break up of AT&T impossible?

Conflicting views?

- **Predatory prices retail level**
 - Supervision by industry specific regulator under EU 2002 Directives for electronic communications (*Lei nº 51 2011*)
 - Criteria for predatory pricing for the same definition
 - Costs to be included
 - Relevant period of assessment
- **Different criteria for margin squeeze (*ex ante* and *ex post*) (Ofcom, 2004, ComReg, 2005)**
 - “...ex post competition law would tend to start from a presumption that the appropriate standard against which the dominant firm should be assessed is one of equally efficient competitors...(but in the context of ex ante regulation the) objective is the promotion of competition. Given this objective Ofcom has concluded that a modification of this conceptual approach is warranted”
 - Reasonably efficient competitor
 - Cost standard: ATC

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From industry specific regulation to competition law

- Unregulated duopoly vs. regulated monopoly / duopoly with a dominant firm position
 - Electricity in the short run
- Electronic communications test for effective competition (EU 2002 Directives)
 - Absence of dominance: dominance to be regulated by sector specific regulatory authority.
- How much contestability?
 - Mobile origination
 - Network access and facilitating entry

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Institutional design for intervention

Net neutrality

- Problems of price discrimination and eventually quality of service discrimination
- Competition law applies but:
 - Dependent on abuse of dominant position
 - Normal delays following due process under competition law possibility of competitive distortions
- Avoiding the development of dominant positions and anti competitive behavior jeopardizing consumers' interest and innovation
 - Anacom has been given the powers to enforce obligations of information related to quality of service and network management and
 - The power to set quality of service obligations (*Lei nº 51/2011*, transposing Directives 2009/136 and 2009/140)

Institutional design for intervention

Access to ducts

- Solving a dominant position problem:
 - mandatory access to ducts of dominant operator in market for fixed network infrastructures imposed by Anacom under Electronic Communications Law (*Lei n^o 5/2004* transposing EU 2002 Directives for electronic communications)
- Solving a coordination problem
 - Mandatory access to ducts of every operator and public service and publication of information on schedules for public works involving ducts under *Decreto-lei n^o 123/2009*. Anacom as the regulatory authority.

Institutional design for intervention

Network externalities

- Network industries tend to be natural oligopolies with asymmetric positions
- Competition law applies
 - In case abuse of dominant position is proven
 - Normal delays following due process under competition law
 - Technological change
 - Impossibility of accurate forecast of results of action of competition authority
- A role for industry specific regulation?
 - Industry specific regulation risks jeopardizing technological change
 - Regulator faces huge informational problems

Challenges

- Improving cooperation
- Regulatory risk
 - Different approaches
 - Regulatory competition
- *Ex ante* RIA to select intervention level and authority in charge