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EU Competition Law in the Regulated Network Industries

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Abstract: This piece considers the interface between EU competition law and the regulation of network industries. The two have been transformed as a result of their interactions. It is difficult to make sense of contemporary EU competition law without taking into account the consequences that the liberalisation process has had on it. Similarly, regulation sees EU competition law as a model and an aspiration. In this sense, the two disciplines can be said to be mutually compatible.

In spite of the compatibility between EU competition law and sector-specific regulation, there is tension between them. The objectives of the two are not identical. Regulation is conceived to undermine the position of the incumbent and to introduce fragmentation. EU competition law, on the other hand, seeks to preserve the competitive constraints to which firms are subject. As a consequence of this tension, the substantive standards in EU competition law may vary to accommodate the features and demands of network industries.

Finally, it appears that EU competition law and sector-specific regulation have a complementary relationship. Sectoral regimes often lack the tools to achieve their objectives. The substantive scope of regulation may be limited, or the range of measures insufficient to address all concerns. EU competition law is a versatile instrument that can remedy some of these gaps. It has proved to be an effective tool to preserve fragmentation in liberalised markets and to manage technological change.

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1. INTRODUCTION

The liberalisation of network industries has had a decisive influence on EU competition law and policy. Its evolution cannot be understood without considering the progressive opening to competition of sectors such as energy, postal services and telecommunications. Cases against incumbent operators make up for a significant fraction of the enforcement activity of competition authorities, and in particular the European Commission (hereinafter, the 'Commission'). From a qualitative standpoint, it is apparent that, as a result of the liberalisation process, some substantive issues have acquired a prominence that they did not have in the preceding decades and that they would not otherwise have had. The nature and scope of intervention under EU competition law has, in other words, adapted to the features of network industries. Competition in these sectors is peculiar in that it often revolves around a segment that tends towards monopoly. As a result, the application of competition rules to them gives to unique challenges that have contributed to shaping contemporary debates in EU competition law.

Conversely, EU competition law has inspired the regimes that were laid down in the wake of the liberalisation process. Sector-specific regulation in the network industries is based on the premise that effective competition is, in the long run, the best means to achieve the desired outcomes in terms of price, quality and innovation. Put differently, the default approach is that competition is the preferred form of regulation. Sectoral regimes have thus been devised with the overarching objective of promoting and preserving rivalry in liberalised markets. In the short run, the very purpose of intervention is to create of an ecosystem in which incumbent operators are subject to effective competitive constraints. Sector-specific regulation can be said to be truly successful where it is no longer necessary.

Even though EU competition law and sector-specific regulation are based on the same — or compatible — premises, the intersection between the two regimes is often complex. The fact that they are compatible does not mean that intervention under the two necessarily leads to the same outcomes in practice. There are clear differences in the nature and goals of each discipline. Sector-specific regulation is by definition more intrusive than EU competition law. There is a difference between promoting competition, which the former seeks to achieve, and preserving it. The need for ad hoc regimes arises in markets that not only have a tendency towards monopoly, but that have been protected by exclusive rights for decades. Thus, sector-specific regulation exists not only to introduce long-term rivalry on markets where none could have emerged, but to undermine the overwhelmingly dominant position of the incumbent operator. Intervention seeks, in other words, to alter the features of the relevant market(s) so that they conform to a preconceived vision. As generally understood, EU competition law is more modest in its reach and ambitions. More than engineering markets, its role is confined to the preservation of the observable sources of competitive pressure that exist at the time when intervention is considered.

On the other hand, it is clear that EU competition law is a valuable instrument to ensure that the objectives of sector-specific regimes are achieved. Ad hoc regulation may be more intrusive, but is also more limited in scope. There is often a mismatch between the range of measures that can be adopted under the sector-specific regime, on the one hand, and its objectives, on the other. For instance, regulation may be confined, from a substantive standpoint, to a limited range of activities, or may only be triggered in a limited range of scenarios. As a result, it may provide a partial and imperfect response to the demands and challenges of the industries to which it applies. It is therefore not surprising that EU competition law has played a fundamental role in recently liberalised markets. Provisions such as Articles 101 and 102 TFEU are more flexible — both in the formal and in the substantive sense of the expression — and thus allow for intervention in a wider range of contexts. Similarly, Regulation 139/2004[1] (hereinafter, the 'Merger Regulation'), preserves the fragmented market structures that these regimes seek to promote. The Merger Regulation can also apply to activities that fall outside their substantive scope.

More importantly, the Court of Justice (hereinafter, the 'ECJ' or the 'Court') has interpreted competition law provisions in a way that ensures that they play a prominent role in the regulated network industries. According to the case law, competition law provisions must apply in the ecosystems created by virtue of a sector-specific regime in the same way that they would apply in any other context. The fact that such ecosystems are artificial, in the sense that they only exist as a result of regulatory intervention, does not make a difference in this regard. In addition, the case law and the administrative practice of the Commission suggest that the substantive standards are adapted to the features of recently liberalised industries. Conduct that is typically not anticompetitive may be unlawful where implemented by an incumbent operator.

The remainder of this chapter explores these issues as follows. Section 2 explains at greater length the reasons why EU competition law and sector-specific regulation can be said to be mutually compatible. This comprises both what can be termed the compatibility of objectives and of instruments. As pointed out above, however, the relative compatibility of the two disciplines does not mean that they are identical in the two abovementioned regards. The tensions that might arise between EU competition law and sector-specific regulation are explored in Section 3. In turn, Section 4 addresses the complementary relationship between them. The concerns raised by commentators concerning the interaction between the two disciplines are briefly addressed in the conclusions. The analysis is not confined to a particular sector, even though the examples refer more often to some of them.

[1] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1.

This reflects the relatively greater prominence that, for different reasons, these sectors have acquired in practice.

2. COMPATIBILITY BETWEEN COMPETITION LAW AND SECTOR-SPECIFIC REGULATION

2.1. COMPATIBILITY OF OBJECTIVES

One of the key defining features of network industries is the marked tendency towards monopoly of some market segments — generically referred to hereinafter as bottlenecks. This tendency is generally the consequence of the fact that these segments are natural monopolies. As a result, it is more efficient for a single operator to provide the services in question.[2] Notorious examples of activities with natural monopoly features include the so-called 'local loop' in the telecommunications sector,[3] railways,[4] or the transmission of electricity.[5] The bottleneck features of some industry segments are sometimes reinforced by network effects, which are known to exist where the value of a service for a given user increases along with an increase in the total number of users.[6] Competition may not emerge — and if it does, it may not be easily sustained — within bottleneck segments. In addition, rivalry may not be easy to sustain in neighbouring markets, insofar as the firm controlling the monopolised segment may have the ability and the incentive to foreclose competition therein.

Network industries are relevant for society beyond their purely economic dimension. This is arguably their second key defining feature. Access to electricity, water or electronic communications services are valued as a means to allow citizens to participate in society. As a result, governments often seek to ensure that a set of essential services is available throughout the country at affordable prices. As a rule, achieving this objective requires departing from normal market conditions. Absent governmental intervention, operators would lack the incentive to offer their services in remote and sparsely populated areas, or would only do so on terms and conditions that are more onerous. Sector-specific regulation addressing non-market considerations typically takes the form of a set of public service obligations that one or several firms are required to fulfil.

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[2] On the notion of natural monopoly, see Dennis W Carlton and Jeffrey M Perloff, *Modern Industrial Organization* (4th edn, Pearson 2015) 128–129.
[3] See Jonathan E Nuechterlein and Philip J Weiser, *Digital Crossroads: Telecommunications Law and Policy in the Internet Age* (2nd edn, MIT Press 2013) 25–28.
[4] Christopher Decker, *Modern Economic Regulation: An Introduction to Theory and Practice* (CUP 2015) 235–241.
[5] See for instance Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy and Practice* (OUP 2012) 455–458.
[6] See in this sense Joseph Farrell and Paul Klemperer, 'Coordination and Lock-In: Competition with Switching Costs and Network Effects' in Mark Armstrong and Robert Porter (eds), *Handbook of Industrial Organization*, vol 3 (North Holland 2007).

The regulatory regimes created following the wave of liberalisations that took place in the 1990s and 2000s deal with the two abovementioned features in a manner that is compatible with the promotion of competition. This approach represents a fundamental departure from legacy regulation. For a long time, the bottleneck segments in network industries were assumed to require the creation of a legal monopoly that would cover all activities and that would be subject to tight regulation defining the price, quality and other conditions under which the services had to be provided. The award of exclusive rights was also deemed necessary to allow the legal monopoly to fulfil its public service mission through cross-subsidies.[7] Under legacy regulation, some profit-making activities subsidised loss-making ones.

The two key defining features of network industries are no longer assumed to require the award of exclusive rights across all activities. The purpose of post-liberalisation regimes is, first, to introduce and preserve competition in — product and geographic — market segments that allow for it. Instead of awarding exclusive rights to a firm, sector-specific regulation typically seeks to curb the ability and the incentive to foreclose competition by the firm controlling the bottleneck segment. Similarly, these regimes are based on the premise that the fulfilment of public service obligations does not necessarily require cross-subsidies. These obligations can also be satisfied in a manner that is compatible with the promotion of effective competition on markets for profit-making activities.

In post-liberalisation regimes, the number of market players is not limited artificially. As a rule, providing a service typically depends on a general authorisation, which does not require from the operator any more than a declaration to start an activity falling within the scope of the regime. Examples in this sense include the principles set out in the so-called Authorisation Directive (telecommunications)[8] or in the Postal Directive.[9] There may be instances where it might be justified to depart from this approach. This may be due to the nature of the activity (think of airline services[10] and the generation of electricity[11]) or to the

[7] See Case C-320/91 Criminal proceedings against Paul Corbeau, EU:C:1993:198, para 17: 'the obligation on the part of the undertaking entrusted with that task to perform its services in conditions of economic equilibrium presupposes that it will be possible to offset less profitable sectors against the profitable sectors and hence justifies a restriction of competition from individual undertakings where the economically profitable sectors are concerned'. For an overview of the phenomenon and its compatibility with EU law, see Leigh Hancher and José Luis Buendía Sierra, 'Cross-Subsidization and EC Law' (1998) 35 Common Market Law Review 901.

[8] See Articles 3 and 4 of Directive 2002/20/EC of the European Parliament and the Council of 7 March 2002 on the authorisation of electronic communications networks and services, as amended by Directive 2009/140/EC [2002] OJ L108/21 (hereinafter, the 'Authorisation Directive').

[9] See Articles 2 and 9 of Directive 97/67/EC of the European Parliament and the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, as amended by Directive 2002/39/EC, Regulation (EC) No 1882/2003 and Directive 2008/6/EC [1998] OJ L15/14 (hereinafter, the 'Postal Directive').

[10] Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community [2008] OJ L293/3.

[11] See Articles 7 and 8 of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2008] OJ L211/55 (hereinafter, the 'Electricity Directive').

features of the market (in the case of mobile telecommunications services, which require access to a finite resource[12]). Even in such instances, however, sector-specific regulation lays down procedures to ensure that access to the market is made subject to objective, transparent and non-discriminatory procedures.[13]

The idea underpinning free market entry and exit is that effective competition is the best means to deliver new and better services for consumers at lower prices. In this sense, the constraints that come from other market players are preferred over regulatory obligations dictating the terms and conditions under which a service has to be provided by firms. The latter is perceived to be a second-best instrument, which is typically justified in a narrow set of circumstances and, often, on a temporary basis only.[14] The primary goal of sector-specific regulation is thus to create an ecosystem in which new entrants can constrain the behaviour of the incumbent. This goal is achieved through the isolation of the bottleneck segment.

It is possible to think of a variety of techniques to isolate bottleneck segments. Some remedies are structural in nature, and thus more intrusive, whereas others impose behavioural obligations on the incumbent operator. The most intrusive form of regulatory intervention consists of placing the bottleneck segment under separate ownership so as to eliminate the ability and the incentive of the incumbent to foreclose competition.[15] At the other end of the spectrum, authorities may impose access, non-discrimination and accounting separation obligations on the bottleneck operator.[16] Other formulas explored over the past decade include what is known as the 'functional separation', whereby a separate business is carved out for the activities corresponding to the bottleneck segment.[17]

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[12] See for instance Article 5 of the Authorisation Directive.

[13] See in this sense Article 9 of Directive 2002/20/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, as amended by Directive 2009/140/EC [2002] OJ L108/33 (hereinafter, the 'Framework Directive') and Article 7 of the Electricity Directive.

[14] For a clear example, see Case C-36/14 *Commission v Poland*, EU:C:2015:570, concerning the implementation of Article 3 of Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L211/94 (hereinafter, the 'Gas Directive'). The EU Regulatory Framework for electronic communications is clearly biased against intervention at the retail level. See in this sense the Commission Recommendation of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, C(2014) 7174 final (hereinafter, the 'Commission Recommendation').

[15] For an analysis of this remedy, see Ofcom, Making Communications Work for Everyone — Initial Conclusions from the Strategic Review of Digital Communications, available at http://www.ofcom.org.uk/.

[16] See in this sense Articles 10–12 of the Access Directive.

[17] On the different techniques that can be used to separate the bottleneck segment, see Martin Cave, 'Six Degrees of Separation Operational Separation as a Remedy in European Telecommunications Regulation' (2006) 64 Communications & Strategies 89. The relevant legislation defines 'functional separation' as an obligation 'to place activities related to the wholesale provision of relevant access products in an independently operating business'. See in this sense Article 13a of the Access Directive. On the concept of 'unbundling', which is relied upon in the Electricity and Gas Directives, see Article 9 of the Electricity Directive. For an analysis, see Angus Johnston and Guy Block, EU Energy Law (OUP 2012), ch 3.

The re-regulation process that has taken place since the 1990s shows that the social objectives of sector-specific regimes are compatible with the promotion of effective competition. In the post-liberalisation context, universal service provisions ensure that all citizens have access to a given set of services at affordable prices and a specified quality. Instead of introducing price distortions and cross-subsidies, which preclude the emergence of effective competition on markets and areas that allow for it, the preferred approach is to compensate for the net costs incurred by the firm(s) in charge of universal service obligations. The operator in charge of such obligations may be compensated by means of State resources or by means of a fund created by other operators.[18]

The above approaches are compatible with the logic of EU competition law. The primary purpose of Articles 101 and 102 TFEU, on the one hand, and the Merger Regulation, on the other, is to preserve the competitive constraints to which firms are subject. As much as sector-specific regulation, these provisions rely on the competitive process to ensure that firms retain the ability and the incentive to lower prices and develop new and better products. In fact, sector-specific regulation, by creating an ecosystem in which effective competition can emerge and be sustained, allows for the meaningful application of EU competition law. The Commission has focused on leveraging abuses resulting in the extension of a dominant position from the bottleneck segment to those open to competition. These practices include 'margin squeeze' practices, whereby the conditions of access to the bottleneck segment do not allow new entrants to compete on a related market,[19] discrimination,[20] as well as other constructive refusals to supply.[21]

The approach to the non-economic aspects of network industries is also compatible with the logic of Articles 106 and 107 TFEU. Article 106(2) TFEU, allows Member States to depart from EU competition law provisions only insofar as their intervention is necessary and proportionate for the operation of a service of general economic interest.[22] The purpose of the universal service provisions

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[18] See in this sense Article 13 of Directive 2002/20/EC of the European Parliament and the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, as amended by Directive 2009/140/EC [2002] OJ L108/51; and, in particular, Article 7 of the Postal Directive.

[19] The Commission defines a 'margin squeeze' as an instance in which 'a dominant undertaking [charges] a price for the product on the upstream market which, compared to the price it charges on the downstream market, does not allow even an equally efficient competitor to trade profitably in the downstream market on a lasting basis'. See Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7, para 80 (hereinafter, the 'Guidance').

[20] See for instance *German Electricity Balancing Market* (Case COMP/39.389) Commission Decision of 26 November 2008 [2009] OJ C36/8. In this case, the Commission argued, inter alia, that E.On had 'discriminated between domestic balancing energy and import balancing energy'.

[21] See for instance *Telekomunikacja Polska* (Case COMP/39.525) Commission Decision of 22 June 2011 [2011] C324/7 and *Slovak Telekom* (Case AT.39523) Commission Decision of 15 October 2014 [2014] OJ C314/7.

[22] For an overview, see José Luis Buendía Sierra, 'Article 102 – Exclusive or Special Rights and Other Anti-Competitive State Measures' in Jonathan Faull and Ali Nikpay (eds), *The EU Law of Competition* (3rd edn, OUP 2014).

described above is indeed to minimise, if not eliminate, the distortions resulting from intervention in markets where competition is sustainable. In fact, these provisions reflect the logic of *Altmark*, which defines the instances in which compensations for public service obligations do not grant an advantage within the meaning of Article 107(1) TFEU and thus do not qualify as State aid.[23]

2.2. Compatibility of Instruments

The liberalisation of network industries has led to a process of convergence between EU competition law and sector-specific regulation. The instruments through which the former achieves its objectives have changed to adapt to the features of the liberalised markets. Sector-specific regimes, in turn, endorse the tools and approach of EU competition law. One of the advantages of EU competition law over other disciplines is that enforcement is based on broad and vague provisions that can apply to a variety of scenarios and evolve seamlessly to address new challenges. Instead of providing for a closed list of infringements and a finite set of remedies, Articles 101 and 102 TFEU revolve around open-ended prohibitions. The same can be said of EU merger control, under which the Commission examines whether a transaction leads to a 'significant impediment to effective competition'.

In the telecommunications sector, the EU legislator chose to rely upon a principles-based regime. This preference is explained by the major changes that the industry was undergoing already in the late 1990s. It was clear at the time that technological evolution alone could deal effectively with some of the perceived concerns. Thus, instead of defining the bottlenecks requiring intervention and the required remedies, the EU Regulatory Framework for electronic communications (hereinafter, the 'EU Regulatory Framework') identifies the conditions under which intervention is justified and sets out the range of remedies that may be adopted.[24] The need for, and the reach of, intervention, is to be established on a case-by-case basis by national regulatory authorities (hereinafter, 'NRAs').

Action by NRAs under the EU Regulatory Framework is not fundamentally different from action by competition authorities. In essence, the review of markets required under the Framework is not fundamentally different from the sort of analysis that takes place in the field of merger control. Under the Merger Regulation, competition authorities examine whether a transaction will have a negative impact on firms' ability and incentive to compete. The exercise under the EU Regulatory Framework is the opposite one. NRAs are required to engage in a prospective analysis to establish whether the relevant market under consideration,

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[23] Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht*, EU:C:2003:415.
[24] See in particular Articles 14–16 of the Framework Directive.

defined in accordance with competition law principles,[25] tends towards effective competition or whether, instead, intervention is required. The markets in which remedial action is justified under the EU Regulatory Framework present bottleneck features, which are identified in light of the so-called 'three criteria test'.[26] Regulatory intervention may thus be considered on segments that do not tend towards effective competition in the relevant time horizon, which present 'high and non-transitory' barriers to entry, and for which the application of competition law may be insufficient.[27]

The liberalisation of network industries raised new challenges for EU competition law regimes. The demands of the bottleneck segments have been one of the drivers forcing authorities to reconsider the nature and reach of remedial intervention. The wording of competition law provisions suggests that remedial action is necessary proscriptive — a practice is prohibited, a merger is declared to be incompatible with the internal market — and that it takes place on a one-off basis after an infringement is established. An approach to enforcement that conforms to the letter of the provisions would be appropriate in oligopolistic markets. Indeed, it suits well practices such as cartel arrangements and horizontal mergers, as well as some unilateral practices like predatory pricing. Effective intervention in these cases can take the form of a cease-and-desist order — and possibly a fine.

Where competition revolves around a bottleneck segment, meaningful intervention may require remedies of a different nature. Insofar as access to the bottleneck is indispensable to compete on a neighbouring market, it may be necessary to impose a positive obligation on the incumbent operator. Access obligations, moreover, require by definition setting the terms and conditions under which the input must be supplied, as well as monitoring that the incumbent complies with them.[28] Competition authorities are notoriously uneasy dictating the prices and other conditions under which goods and services are to be supplied.[29]

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[25] As explained in para 9 of the Commission Recommendation, 'When carrying out a market analysis under Article 16 of Directive 2002/21/EC, the assessment of a market should be done from a forward-looking perspective, starting from existing market conditions. The analysis should assess whether the market is prospectively competitive and whether any lack of competition is durable, by taking into account expected or foreseeable market developments'.

[26] Ibid, para 11: 'The wholesale markets listed in the Annex may have such characteristics as to justify ex ante regulation because overall they meet the following three cumulative criteria, which have also been used to identify markets susceptible to ex ante regulations in the previous versions of the Recommendation. The first criterion is the presence of high and non-transitory barriers to entry. […] The second criterion addresses whether a market structure tends towards effective competition within a relevant time horizon. […] The third criterion is that the application of competition law alone would not adequately address the market failure(s) concerned. […]'.

[27] For an explanation, see para 12 of the Recommendation, where the Commission distinguishes between 'structural barriers' to entry, which exist, for instance, 'where the provision of service requires a network component that cannot be technically duplicated or only duplicated at a cost that makes it uneconomic for competitors'. Competition law intervention is deemed insufficient, in particular, where 'the compliance requirements of an intervention to redress persistent market failure(s) are extensive or where frequent and/or timely intervention is indispensable'.

[28] See in this sense Phillip Areeda, 'Essential Facilities: An Epithet in Need of Limiting Principles' (1990) 58 Antitrust Law Journal 841.

[29] See in this sense, OECD, *Excessive Prices*, DAF/COMP(2011)18.

However, EU competition law enforcement in network industries has seen the application of these remedies in the past few years. *Deutsche Bahn* is an example in this regard The Commission put an end to the proceedings after the firm operating the railway infrastructure in Germany accepted to change the prices charged for traction current.[30]

Remedies under Articles 101 and 102 TFEU are typically behavioural in nature, whether this is a one-off prohibition or a positive obligation that requires monitoring. Structural intervention leading to the divestiture of assets by a firm remains exceptional. The possibility of adopting the latter was made possible by virtue of Regulation 1/2003.[31] Article 7 enabled the Commission to require structural remedies 'where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy'.[32] It is precisely in the network industries that structural remedies have been required. In cases like *E.On* and *RWE*, the Commission put an end to the proceedings after the incumbent operator accepted, inter alia, the structural isolation of the bottleneck segment.[33]

3. TENSION BETWEEN COMPETITION LAW AND SECTOR-SPECIFIC REGULATION

3.1. DIVERGENCE OF OBJECTIVES AND SUBSTANTIVE STANDARDS

EU competition law and sector-specific regulation pursue mutually compatible objectives. As already explained, the two disciplines seek to minimise distortions resulting from public intervention and are both based on the idea that effective competition is the best form of regulation. As a result, they can co-exist. This fact does not mean, however, that the objectives of EU competition law and sector-specific regulation are identical. Typically, the purpose of the latter is to *promote* competition in markets that were formerly monopolised by the incumbent. The

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[30] *Deutsche Bahn I* and *Deutsche Bahn II* (Case COMP/AT.39678 and Case COMP/AT.39731) Commission Decision of 18 December 2013 [2014] C86/4.

[31] 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 [2003] L1/1.

[32] For an analysis, see Frank P Maier-Rigaud, 'Behavioural versus Structural Remedies in EU Competition Law' in Philip Lowe, Mel Marquis and Giorgio Monti (eds), *European Competition Law Annual 2013: Effective and Legitimate Enforcement of Competition Law* (Hart 2016).

[33] *German Electricity Wholesale Market* and *German Electricity Balancing Market* and (Cases COMP/39.388 and Case COMP/39.389) Commission Decision of 26 November 2008 [2009] OJ C36/8 and *RWE Gas Foreclosure* (Case COMP/39.402) Commission Decision of 18 March 2009 [2009] OJ C133/10. For an analysis of the two decision, see Philippe Chauve, Martin Godfried, Kristóf Kovács, Gregor Langus, Károly Nagy and Stefan Siebert, 'The E.ON electricity cases: an antitrust decision with structural remedies' (2009) 1 Competition Policy Newsletter 51; and Oliver Koch, Károly Nagy, Ingrida Pucinskaite-Kubik and Walter Tretton, 'The RWE gas foreclosure case: Another energy network divestiture to address foreclosure concerns' (2009) 2 Competition Policy Newsletter 32.

point of EU competition law, on the other hand, is to *preserve* competition. This difference is not purely semantic. It has important implications for the nature and reach of intervention under each of the disciplines. It is also the main source of tension between them.

Sector-specific regulation seeks to achieve its objectives by introducing fragmentation on liberalised markets. The point of the regime is not simply to create the conditions in which rivalry can emerge and be sustained, but to undermine progressively the position of the incumbent on the relevant markets. Typically, the success of sector-specific regulation is measured by reference to the number of players competing with the incumbent and the extent to which the market share of the incumbent has been reduced. Thus, an effectively competitive market is considered to be one in which the incumbent operator no longer holds a dominant position.[34] In such circumstances, it is generally understood that remedies imposed under sector-specific regulation can be removed.

These ideas are probably best illustrated in light of the principles set out in the EU Regulatory Framework. What triggers intervention under the Framework is the existence of a position of Significant Market Power (hereinafter, 'SMP') on a market that fulfils the 'three criteria test' as described above. Article 14 of the Framework Directive defines the notion of SMP by reference to the concept of dominance within the meaning of Article 102 TFEU.[35] Where, conversely, the NRA finds that the market is effectively competitive, in the sense that no firm holds a position of SMP, regulatory obligations are lifted. The expectation of the legislator is that market entry would progressively undermine the position of the incumbent, thereby leading to the incremental withdrawal of sector-specific regulation. This expectation is graphically captured in the 'ladder of investment' concept. According to this notion, new entrants in telecommunications markets would initially access the local loop at the lowest possible level and would progressively move up the ladder up until the point they invest in building their own infrastructure and compete head-to-head with the incumbent.[36]

EU Competition law departs from this approach in several respects. The purpose of the discipline is not to undermine the position of existing market players but to ensure that they remain subject to effective competitive constraints. In other words, the point of EU competition law is not to alter the features of the

[34] For instance, Ofcom's strategy in the UK has been to promote 'market entry and the emergence of scale competitors to BT in residential telecoms'. The success of the strategy is measured by the relative share of the market enjoyed by new entrants. See in this sense Ofcom, Strategic Review of Digital Communications: Discussion document (2015). For a comparative analysis taking the same perspective on the success of regulation, see James Allen and Ceri Tinine, Final report for Ofcom: International case studies (Analysis Mason 2015).

[35] Pursuant to Article 14 of the Framework Directive, 'An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers'. This definition endorses the definition of dominance given by the Court in Case 85/76, *Hoffmann-La Roche & Co. AG v Commission*, EU:C:1979:36, para 38.

[36] See Martin Cave, 'Encouraging infrastructure competition via the ladder of investment' (2006) 30 Telecommunications Policy 223.

relevant market, but to preserve the ability and incentive to compete of existing players. This approach to enforcement has two major consequences that make EU competition law stand apart from sector-specific regulation. First, market power is not challenged as such. It is only the strengthening of market power by means of an anticompetitive behaviour or a merger that triggers intervention. Secondly, fragmentation is not, in and of itself, an objective of EU competition law.

Suffice it to compare, to illustrate the first idea, the difference that exists between Article 102 TFEU and the SMP procedure within the meaning of the EU Regulatory Framework. As already pointed out, the purpose of the latter is to progressively undermine dominant positions. As a consequence, regulatory intervention is not triggered by a behaviour or a merger. The features of the relevant market, and its evolution, are sufficient to justify remedial action. Article 102 TFEU, on the other hand, does not prohibit dominant positions as such. It is the abuse of this position that is prohibited.[37] Put differently, a precondition for the application of Article 102 TFEU is the existence of a behavioural trigger — or a State measure having the same effects.[38]

It appears, in light of the above, that the fact that an incumbent enjoys a monopoly position over a bottleneck segment is not in itself a concern. Only the extension of the monopoly position by means of an exclusionary practice can trigger remedial action. The limits to intervention under Article 102 TFEU become apparent when one considers the case law on refusals to deal. The existing precedents suggest that such behaviour is in breach of Article 102 TFEU where it involves two vertically-related markets, and thus the leveraging of a dominant position — and not simply where a firm holds a dominant position in the relevant upstream market. Thus, what amounts to an abuse is the impact on competition on the neighbouring market. The same can be said of other related practices, such as 'margin squeeze' abuses, which are only prohibited under Article 102 TFEU insofar as they have an exclusionary effect on the relevant downstream market.[39]

Market concentration is taken only as a very imperfect proxy for the degree of competition existing in a particular industry. As a result, fragmentation is not a concern, in and of itself, under EU competition law. For instance, an increase in market concentration is not prohibited by its very nature. Under the Merger Regulation, it would be necessary to show that a transaction leads to significant increase in the market power held by the parties. Similarly, an obligation to supply on a firm is not simply imposed because it is deemed desirable to increase the

[37] Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission*, EU:C:1983:313, para 37.

[38] Pursuant to Article 106(1) TFEU, which deals with the award of special and exclusive rights, Member States 'shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109'. According to the case law of the Court, Articles 106(1) and 102 TFEU may be jointly infringed without there being an abuse by the firm that benefits from exclusive rights. See in this sense Case C-553/12 P *Dimosia Epicheirisi Ilektrismou AE v Commission*, EU:C:2014:2083 and Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH*, EU:C:1991:161.

[39] Case C-280/08 P *Deutsche Telekom AG v Commission*, EU:C:2010:603, paras 250–251.

number of players on a given market. A refusal to deal is only abusive where, at the very least, it leads to the elimination of all competition on the relevant downstream market.[40] Where dealing with the dominant firm is not indispensable to operate on that market, a refusal to supply is not contrary to Article 102 TFEU, even if the alternative forms of access are less advantageous for rivals.[41] Similarly, the exclusion of rivals is not always a concern justifying intervention. As a rule, the foreclosure of less efficient rivals is the consequence of the normal play of market forces and thus not unlawful.[42]

The implication of the above is that substantive standards are significantly lower under sector-specific regulation than under competition law. Suffice it to compare the conditions under which access obligations may be imposed in the context of Article 102 TFEU and in the context of the EU Regulatory Framework. Because the latter is explicitly concerned with fragmentation and with undermining dominance, an obligation to supply may be imposed in circumstances that are considerably laxer than those that govern the application of Article 102 TFEU to refusals to deal. Pursuant to Article 12 of the Access Directive, an NRA may impose an access obligation where 'denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-user's interest'.[43]

3.2. The Transformation of EU Competition Law in the Regulated Network Industries

The tension between EU competition law and sector-specific regulation has led in practice to the transformation of the former. An analysis of developments in the course of the past decade supports the conclusion that the substantive standards in EU competition law change when it applies in the regulated network industries. Indeed, EU competition law appears to adapt to the demands of markets in which incumbents have long been protected by exclusive rights and in which competition is fragile — either as a result of legacy regulation itself or due to the features of the relevant market. The Commission, with the support of the Court,

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[40] Joined Cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission*, EU:C:1995:98, para 56 (hereinafter, '*Magill*'); Case C-7/97 *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co KG and Mediaprint Anzeigengesellschaft mbH & Co KG*, EU:C:1998:569, paras 41–44; and Case C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG*, EU:C:2004:257, paras 40–47.

[41] Ibid, para 28.

[42] Case C-209/10 *Post Danmark A/S v Konkurrencerådet*, EU:C:2012:172, para 22 (hereinafter, '*Post Danmark I*').

[43] Article 12 of the Access Directive reads:

> A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations on operators to meet reasonable requests for access to, and use of, specific network elements and associated facilities, inter alia in situations where the national regulatory authority considers that denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-user's interest.

has interpreted the relevant provisions in a way that ensures that EU competition law contributes to the success of the liberalisation process.

The development that best captures the observed transformation of EU competition law is the definition of the substantive standards that apply to 'margin squeeze' abuses by vertically-integrated firms. The choice of the legal test has a decisive impact on the role of Article 102 TFEU in the regulated network industries. Depending on the standard set, it may be a relatively marginal provision — as it is in the US — or a meaningful instrument to preserve effective competition in liberalised markets. In *TeliaSonera*,[44] the Court was confronted with the question of whether the substantive standards that apply to 'margin squeeze' practices are the same than those that apply to refusals to deal or whether, instead, they constitute a stand-alone form of abuse. The implications of this question are important. If a 'margin squeeze' is subject to the same substantive standards that apply to refusals to deal, it only amounts to an abuse of a dominant position if a very strict set of conditions is fulfilled. As explained above, it would be necessary to show, at the very least, that access to the relevant input is indispensable for downstream competition and the practice leads to the elimination of all competition on the relevant market.

The reasons why it would make sense to examine a 'margin squeeze' as a refusal to supply — and thus that it should be subject to the same legal treatment — are straightforward. A firm may refuse to deal with a rival outright or may instead chose to deal with the rival on terms and conditions that make it impossible for it to operate on the relevant downstream market — including by means of a 'margin squeeze'. Accordingly, where a firm is entitled to refuse to deal with a rival, it should also be entitled to engage in a 'margin squeeze', which, from an economic standpoint, is an identical practice. The US Supreme Court endorsed this approach in *linkline*.[45] It held that a 'margin squeeze' does not give rise to antitrust liability in the absence of a duty to supply or, alternatively, absent evidence that the retail prices charged by the vertically-integrated operator are predatory.[46]

In *TeliaSonera*, the Court held that a 'margin squeeze' is a stand-alone form of abuse. Thus, a 'margin squeeze' may be abusive under Article 102 TFEU even if there is no evidence showing that the relevant input is indispensable for downstream competition.[47] More generally, it is not necessary to show that the conditions under which an outright refusal would be abusive are fulfilled.[48] The Court held that doing so would 'unduly reduce the effectiveness of Article 102

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[44] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, EU:C:2011:83.
[45] *Pacific Bell Telephone Co v linkLine Communications, Inc*, 555 U.S. 438 (2009).
[46] Ibid: 'An upstream monopolist with no duty to deal is free to charge whatever wholesale price it would like; antitrust law does not forbid lawfully obtained monopolies from charging monopoly prices'.
[47] *TeliaSonera* (n 44), para 72.
[48] Ibid, paras 55–59. The ruling expressly discussed in *TeliaSonera* is *Bronner*. In *Bronner*, the Court considered the application of the *Magill* line of case law to a refusal to supply a physical input.

TFEU',[49] and that exclusionary effects may arise even when the input is not indispensable within the meaning of the case law on refusals to deal. The Court, in other words, interpreted Article 102 TFEU to preserve its role in the ecosystems created by virtue of sector-specific regulation. The apparent incoherence that results from treating outright refusals to deal more harshly than constructive refusals was only given secondary importance.[50]

The Guidance on exclusionary abuses issued by the Commission offers an alternative rationale for the differential treatment of 'margin squeeze' practices and outright refusals to supply. According to the document, constructive and outright refusals to supply should, as a matter of principle, be examined in accordance with the same principles.[51] It would be justified to lower the substantive standards, on the other hand, where the input to which access is requested has benefited from the award of exclusive rights and/or government subsidies.[52] The Commission considers that, in such circumstances, an obligation to supply would either have no impact on firm's ex ante incentives to innovate or that the sector-specific regime would have already struck the balance between short-term and long-term competition.

As explained above, the Court has suggested in several rulings — including *TeliaSonera* — that Article 102 TFEU is only concerned with the exclusion of equally efficient rivals. As a result, practices such as selective price cuts are not in themselves contrary to Article 102 TFEU. They would only amount to an abuse of a dominant position if they lead to below-cost pricing.[53] Similarly, the application of the 'as efficient competitor' test may provide a useful indication of whether a system of rebates applied by a dominant firm is abusive.[54] There are some instances, however, where EU competition law is concerned with the exclusion of less efficient competitors. As the Court held in *Post Danmark II*, there are cases in which the emergence of a competitor as efficient as the dominant firm is 'practically impossible'.[55] This may be due to the bottleneck features of the

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[49] In para 58, the Court holds that

> if *Bronner* were to be interpreted otherwise, in the way advocated by TeliaSonera, that would, as submitted by the European Commission, amount to a requirement that before any conduct of a dominant undertaking in relation to its terms of trade could be regarded as abusive the conditions to be met to establish that there was a refusal to supply would in every case have to be satisfied, and that would unduly reduce the effectiveness of Article 102 TFEU

[50] The Court interpreted *Bronner* in a narrow manner, as concerning a refusal to deal alone. As explained in para 57 of TeliaSonera, the Court held that, in *Bronner*, it 'did not make any ruling on whether the fact that an undertaking refuses access to its home-delivery scheme to the publisher of a rival newspaper where the latter does not at the same time entrust to it the carrying out of other services, such as sales in kiosks or printing, constitutes some other form of abuse of a dominant position, such as tied sales'.

[51] Guidance, paras 80–81.

[52] Ibid, para 82.

[53] *Post Danmark I* (n 42). See, in the same vein, Case C-62/86 *AKZO Chemie BV v Commission*, EU:C:1991:286, para 72.

[54] Case C-23/14 *Post Danmark A/S v Konkurrencerådet*, EU:C:2015:651 (hereinafter, '*Post Danmark II*'), para 58.

[55] Ibid, para 59.

relevant market and of the regulatory landscape. In such circumstances, EU competition law may adapt and support rivals, even if they are less efficient. Sustaining market entry is, as observed above, the very purpose of sector-specific regulation.

The administrative practice of the Commission suggests that EU competition law provisions are interpreted in a sui generis manner when they apply to liberalised industries. There are, in particular, several decisions in which the concerns raised by the Commission related not so much to the behaviour of a firm but to the features of the relevant market, and in particular the existence of a position of dominance at one or several levels of the value chain. Similarly, remedial action in some of these cases sought to address to change the structure of the market to undermine the position of the incumbent. In this sense, it is not surprising that intervention by the Commission has sometimes been perceived as an attempt to regulate the market through competition law enforcement.[56]

E.On, mentioned above, is a valuable example in this regard. The Commission raised two separate concerns in the case. One of them related to practices on the German wholesale electricity market, in which E.On was found to enjoy a collective dominant position together with two other operators. The Commission argued that E.On withdrew generation capacity in the short term with a view to raising electricity prices.[57] It was also claimed that the firm's long-term strategy was to deter investments by third parties on the market for the generation of electricity in Germany. What is notable about this case is that the declared purpose of the structural remedies was to eliminate the ability and incentive of the E.On and other players to alter the prices of electricity on the wholesale market. In this sense, the sale of generation capacity agreed upon by the firm looked like an attempt to undermine the collective dominant position of incumbent operators. As such, the remedy would fall outside the substantive scope of Article 102 TFEU which, as explained above, is not concerned with dominant positions as such.

In another series of cases, the Commission has raised concerns that relate less to a practice by a dominant firm than to the fact that the market structure does not allow for the emergence of effective competition. Remedial action was thus closer in nature to intervention under sector-specific regulation. This tendency was to some extent apparent in *E.On*,[58] but transpires more clearly in *GdF Suez*.[59] In the latter, the Commission argued that GdF's 'strategic underinvestment' in an infrastructure amounted to an abuse of a dominant position. In other words, the

[56] See in this sense Niamh Dunne, 'Commitment Decisions in EU Competition Law' (2014) 10 Journal of Competition Law & Economics 399.
[57] *German Electricity Wholesale Market* (n 33), paras 28–40.
[58] In the *German Electricity Wholesale Market*, the concerns raised by the Commission relate, first and foremost, to the degree of market concentration on the relevant market. In para 82, the Commission pointed that the contested behaviour was the consequence of 'E.On's electricity generation portfolio'.
[59] *Gaz de France* (Case COMP/39.316) Commission Decision of 3 December 2009 [2010] OJ C57/13.

Commission argued that the firm had chosen to reduce competition by limiting the amount invested in import capacity.[60]

Prior to *GdF Suez*, lack of capacity was considered to be an objective justification excluding the application of Article 102 TFEU to a refusal to deal.[61] This traditional understanding is compatible with the idea, outlined above, that the purpose of EU competition law is not to create new competitive constraints, but to preserve those to which firms are subject. If the existing market structure precludes the emergence of effective competition due to lack of capacity, it is difficult to say that the absence of rivalry is attributable to the behaviour of the dominant firm. In an approach that departs from this traditional understanding, the Commission held in *GdF Suez* that lack of capacity was not only not a valid justification, but the very concern justifying intervention. As in the cases discussed above, the remedy accepted by the authority sought to undermine the dominant position enjoyed by GdF Suez — as opposed to precluding the extension of a dominant position to a neighbouring market. More precisely, the firm agreed to share the bottleneck with rival firm by releasing at least 50% of import capacity to third parties.

4. COMPLEMENTARITY BETWEEN COMPETITION LAW AND SECTOR-SPECIFIC REGULATION

4.1. PRESERVING FRAGMENTATION

EU competition law complements sector-specific regulation from an institutional and substantive standpoint. As explained above, post-liberalisation regimes aim at introducing fragmentation by undermining the dominant position enjoyed by the incumbent operator. However, these regimes are not always adequately equipped to achieve this objective. The most obvious limit in this sense has to do with the fact that sector-specific regulation typically applies ex ante — and often only ex ante. As a result, the actual behaviour of incumbent operator, or the attempts by the incumbent operator to circumvent regulatory obligations, may fall outside the scrutiny of NRAs. It is in such a context that reactive intervention through EU competition law may prove useful to preserve fragmentation. 'Margin squeeze' abuses and related practices capture the role of EU competition law in this context well. *Slovak Telekom* is an eloquent example. The Commission fined the Slovak

[60] Ibid, in particular paras 29 and 40 ('GDF Suez's behaviour regarding the Montoir LNG terminal could be regarded as a refusal to supply an essential input by means of a strategic limitation of investments in additional capacity, and might constitute an abuse of its dominant position').
[61] For an overview of this case law, see Pietro Merlino and Gianluca Faella, 'Strategic Underinvestment as an Abuse of Dominance under EU Competition Rules' (2013) 36 World Competition 513.

incumbent for obstructing market entry by delaying and making more difficult access to the bottleneck segment.[62]

What the above cases reveal, in addition, is that there are institutional limits to what sector-specific regulation can meaningfully achieve. For instance, it is impossible to make sense of the seminal ruling on 'margin squeeze' and related practices — *Deutsche Telekom* — without considering the institutional background to the case. The German incumbent argued that, insofar as the wholesale charges were set by the NRA, the alleged abuse was not imputable to it, but to the regulator. More precisely, it argued that the NRA had examined the behaviour and had come to the conclusion that it did not amount to a 'margin squeeze'.[63] From this perspective, the practice would be, first and foremost, the expression of a failure of the ex ante regime, which proved unable to prevent the breach of Article 102 TFEU.[64]

Against this background, *Deutsche Telekom* is valuable in that it clarified that, from an institutional standpoint, EU competition law would be available as an alternative route to ensure the success of the liberalisation process. In the same way that *TeliaSonera* reflected a concern with the 'effectiveness' of Article 102 TFEU from a substantive standpoint, *Deutsche Telekom* is a reminder that EU competition law provisions, as primary EU law, take precedence over national regulation and secondary EU law. The institutional consequence is that EU competition law and sector-specific regulation can apply alongside one another to the same concerns.[65] It is only where sector-specific regulation does not leave firms any scope for action that Articles 101 and 102 TFEU would not come into play.[66]

From a substantive standpoint, merger control has proved to be a particularly effective means to preserve fragmentation in liberalised markets. This is unsurprising if one considers that it is as a tool that shares some features and concerns with sector-specific regimes. Like Articles 101 and 102 TFEU, the Merger Regulation is an instrument that requires the assessment of transactions on a case-by-case basis. Like sector-specific regulation, on the other hand, it applies ex ante and — perhaps more importantly — is concerned with market structures

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[62] *Slovak Telekom* (n 21). The case is pending before the General Court. See Case Case T-851/14 *Slovak Telekom v Commission*, pending.

[63] *Deutsche Telekom* (n 39), para 67.

[64] For an analysis of the ruling from a comparative perspective, see Pierre Larouche, 'Contrasting Legal Solutions and the Comparability of EU and US Experiences' in François Lévêque and Howard Shelanski (eds), *Antitrust and Regulation in the EU and US Legal and Economic Perspectives* (Elgar 2009) and Giorgio Monti, 'Managing the Intersection of Utilities Regulation and EC Competition Law' (2008) 4 Competition Law Review 123.

[65] At the national level, there are different institutional models to deal with the interaction between (EU) competition law and sector-specific regulation. In some countries, including the Netherlands and Spain, the powers to enforce competition law and sector-specific regulation are entrusted to the same authority. In other countries, such as the UK, sector-specific regulators have the power to enforce (EU) competition law. See in this sense Competition and Markets Authority, Regulated Industries: Guidance on concurrent application of competition law to regulated industries (CMA10, 2014).

[66] *Deutsche Telekom* (n 39), para 82.

as such. Thus, transactions can be blocked before there is a change in the market structure. Alternatively, remedies can be designed to re-create the competitive constraints to which firms are subject and to mimic, if necessary, the sort of access obligations that are imposed under sector-specific regulation.[67]

The enforcement practice of the Commission in the network industries shows that merger control is a very versatile instrument. The 'significant impediment to effective competition' test makes it possible to take action in transactions that would not result in the emergence of a dominant position but that would otherwise lead to a deterioration of the conditions of competition. The Commission has repeatedly raised concerns about the effects of concentrations on mobile telephony markets. *T-Mobile Austria/Tele.ring* is often mentioned as one of the first cases in which the Commission argued that the merger would lead to non-coordinated effects, even though the new entity would not have been the market leader (or the dominant player).[68]

In the absence of sector-specific mechanisms, EU merger control has applied to the wave of transactions which, across Europe, has led to a reduction in the number of mobile operators from four to three. In *H3G/Orange Austria*, the Commission required onerous remedies for the approval of a merger resulting in the creation of an entity with a market share below 25%. This is the threshold below which horizontal mergers are presumed to be unproblematic.[69] Similar concentrations have been cleared by the Commission with remedies aimed at restoring the competitive constraints on the relevant markets affected by the transaction.[70] At the time of writing, the Commission has signalled a hardening of its line, which has led to the collapse of some transactions[71] and cast doubts on pending ones, namely *Hutchison UK/Telefonica UK*.[72]

The potential of merger control to preserve fragmentation has become equally apparent outside mobile telephony markets. In *Orange/Jazztel*,[73] the Commission examined an operation bringing together the third and the fourth

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[67] For an overview of such measures, see for instance the Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 [2008] C267/1. In para 62 of the Notice, the Commission explains that 'it has accepted remedies foreseeing the granting of access to key infrastructure, networks, key technology, including patents, know-how or other intellectual property rights, and essential inputs. Normally, the parties grant such access to third parties on a non-discriminatory and transparent basis'.

[68] *T-Mobile Austria/Tele.ring* (Case COMP/M.3916) Commission Decision of 26 April 2006. For an analysis of the practice of the Commission, see Nicholas Levy, 'The EU's SIEC Test Five Years On: Has it Made a Difference?' (2010) 6 European Competition Journal 211.

[69] *Hutchison 3G Austria/Orange Austria* (Case COMP/M.6497) Commission Decision of 12 December 2012 [2013] OJ C224/12. For an analysis of the transaction, see Antonio Bavasso and Dominic Long, 'The Application of Competition Law in the Communications and Media Sectors: A Survey of 2012 Cases' (2013) 4 Journal of European Competition Law & Practice 264.

[70] See in particular *Hutchison 3G Austria/Telefónica Ireland* (Case COMP/M.6992) Commission Decision of 28 May 2014 [2014] C264/6 and *Telefónica Deutschland/E-Plus* (Case COMP/M.7018) Commission Decision of 2 July 2014 [2015] OJ C86/10.

[71] See in particular *Teliasonera/Telenor/JV* (Case COMP/M.7419) [2015] C316/1. See Daniel Thomas, 'Danish telecoms merger shelved after competition concerns' *Financial Times* (London, 11 September 2015).

[72] *Hutchison 3G UK/Telefónica UK* (Case COMP/M.7612), pending.

[73] *Orange/Jazztel* (Case COMP/M.7421) Commission Decision of 19 May 2015 [2015] C407/18.

largest providers of fixed voice telephony and broadband Internet services in Spain. These operators faced strong competition from the incumbent — Telefónica — and from Vodafone (which operates a cable network in the country). In spite of the relative weakness of the merging parties, the Commission concluded that the transaction would lead to a significant impediment of effective competition. The high barriers to entry on the relevant markets, and the reduced incentives of the markets leaders to compete on price in the post-merger scenario, led to this conclusion. As a result, the transaction was only approved after the parties accepted to preserve the degree of fragmentation existing on the relevant market. More precisely, the parties accepted to divest a fibre network equivalent to that exploited by Orange prior to the operation and to give access to Jazztel's ADSL network.

4.2. Managing Change

Typically, sector-specific regulation is crafted, and revolves around, the concerns that are identified when legislation is passed. As a result, it may prove unable to cope with technological evolution. It is in the telecommunications sector that the role of EU competition law as an instrument to manage change has become most apparent. The EU Regulatory Framework was conceived as a 'future-proof' regime that would adapt to the evolving features of the industry. More than ten years after its adoption, it is clear that there were developments that it is not equipped to address. In spite of its principles-based approach to intervention, the EU Regulatory Framework was crafted on the assumption that access to, and interconnection between, networks would be the primary concerns justifying remedial action.

The enforcement architecture of the EU Regulatory Framework is, by its very nature, unable to address to some issues raised by the process of technological convergence.[74] This is so, in particular, because audiovisual content was left outside of its substantive scope of application. Content is not considered to be an 'electronic communications service' within the meaning of the Framework Directive.[75] As a result, the EU Regulatory Framework cannot give an appropriate response to the use and exploitation of audiovisual content to hinder the emergence of an effectively competitive market. An incumbent telecommunications operator may indeed acquire the exclusive rights to premium audiovisual content (such as top sports championships and Hollywood blockbusters) to gain a competitive advantage over its rivals. Its position may

[74] Technological convergence has been defined as the progressive coming together of, and the blurring of boundaries between, the telecommunications, media and IT industries. This is a phenomenon that was well understood when the EU Regulatory Framework was proposed. See in this sense Commission, 'Green Paper on the convergence of the telecommunications, media and information technology sectors and the implications for regulation – Towards an approach for the information society' COM(97)623.
[75] See in this sense Article 2(c) of the Framework Directive.

become entrenched — even if the exploitation of a competitive advantage does not lead to anticompetitive foreclosure and the objective of promoting long-term competition may be jeopardised.

Merger control is equipped to deal with the consequences of the integration of content providers and incumbent telecommunications operators. In November 2014, the Commission referred to the Spanish competition authority the acquisition of DTS — the leading pay TV provider in Spain — by the incumbent telecommunications operator, Telefónica.[76] The transaction was approved, subject to conditions, in April 2015.[77] The remedies impose strict obligations in relation to the acquisition and the exploitation of TV rights to premium content by the merged entity. It limits, inter alia, the length of the period over which Telefónica is entitled to acquire the right to premium content. More importantly, it requires the incumbent to supply 50% of its premium channels to its downstream rivals on FRAND terms. Similar, regulatory-like, access obligations have been imposed in cases leading to the emergence of a quasi-monopoly on pay TV-related markets[78] and in cases leading to the integration of the leading pay TV operator with a broadband provider.[79]

Another issue that had not been foreseen in the EU Regulatory Framework is the concept of net neutrality. It had not become a dominating theme when the Framework was adopted. According to the proponents of this regulatory principle, the operators of telecommunications networks should be prohibited from blocking, degrading or discriminating against content and services provided over the Internet. By the same token, network operators should not be allowed to favour affiliated or third-party services. The underlying premise is that innovation in the online world requires preserving the strict non-discrimination ethos on which it was originally based. Concerns about net neutrality emerged as a result of disputes between online content and application providers and network operators, and more precisely in relation to whether the former should compensate the latter for the use of networks.[80]

When, during the mid-2000s, there were widespread discussions around net neutrality, it became clear that discrimination was not, in and of itself, a concern under the EU Regulatory Framework. If anything, the imposition of strict non-discrimination obligations across the board, which is the approach advocated by net neutrality proponents, contradicts the logic of the Framework. In particular, such an approach runs counter to the market analysis procedure described above. As a consequence, it was necessary to introduce ad hoc provisions dealing with net

[76] *Telefónica/DTS* (Case COMP/M.7313) Commission Decision of 25 August 2014.
[77] *Telefónica/DTS* (Case C/0612/14) CNMC Decision of 22 April 2015.
[78] *Newscorp/Telepiù* (Case COMP/M.2876) Commission Decision 2004/311/EC [2004] OJ L110/73.
[79] *SFR/Télé 2 France* (Case COMP/M.4504) Commission Decision 2007/784/EC [2007] OJ L316/57.
[80] On the notion of net neutrality, see C Scott Hemphill, 'Network Neutrality and the False Promise of Zero-Price Regulation' (2008) 25 Yale Journal on Regulation 135 and Filomena Chirico, Ilse M. Van der Haar and Pierre Larouche, 'Network Neutrality in the EU' (2007) TILEC Discussion Paper No. 2007-030.

neutrality, which were only adopted in 2015.[81] In the meantime, the response to net neutrality concerns came from EU competition law. In *Liberty Global/Ziggo*,[82] the Commission examined a merger between cable TV providers in the Netherlands. The merging parties accepted commitments aimed to ensure that the new entity would not restrict the ability of competing Internet-based providers (the so-called OTT players) to offer their services to end-users. In particular, they committed to maintain sufficient interconnection capacity for them.[83]

5. CONCLUSIONS

It is impossible to make sense of contemporary EU competition law without taking into consideration the liberalisation of network industries. From a substantive standpoint, some practices would be little more than an academic curiosity if these sectors were not open to competition. For instance, 'margin squeeze' abuses and similar conduct are only likely to arise in instances where a vertically-integrated operator controls a bottleneck that is difficult to replicate — that is, on markets that share their features with network industries. More generally, some of the debates that have dominated the discipline in the past decades reflect an attempt to rely upon competition rules to achieve, or to contribute to, the liberalisation process.

The demands of network industries have had a lasting impact on the substance of EU competition law provisions. If there is an idea that emerges from the analysis above is that tensions between EU competition law and sector-specific regulation tend to be solved in a way that gives priority to the effectiveness of Articles 101 and 102 TFEU over consistency in the interpretation and enforcement of the two provisions. There are several examples that show that the Commission and the Court sometimes depart from the relevant substantive

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[81] Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union [2015] OJ L310/1. Prior to that, the so-called Citizens' Rights Directive introduced changes that address some net neutrality concerns by means of transparency and quality of service provisions. See Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws [2009] OJ L337/11.

[82] *Liberty Global/Ziggo* (Case COMP/M.7000) Commission Decision of 10 October 2014. About the relationship between this case with net neutrality issues, see Oxera, 'New powers for telecoms and media regulators? Part 2: convergence and regulation' (December 2015) http://www.oxera.com/.

[83] Ibid, para 549: 'the Notifying Party commits to maintain sufficient interconnection capacity for parties seeking to distribute data to its broadband customers by ensuring such parties have at least three uncongested routes into the merged entity's IP network in the Netherlands'.

standards to ensure that EU competition law has a meaningful role to play in liberalised markets. Thus, a constructive refusal to supply — which is the scenario that arises frequently in the regulated industries — is subject to laxer standards than an outright refusal to supply. Similarly, EU competition law may be enforced to preserve less efficient rivals on markets that heavily regulated markets that present bottleneck features.

Institutional factors appear to explain the observed fluctuation of substantive standards in the EU. The Commission is simultaneously an authority in charge of the enforcement of EU competition law (and of preserving the consistent application of Articles 101 and 102 TFEU across the EU) and the institution which proposes the adoption, and oversees the application, of sector-specific regulation. It is therefore unsurprising to note that it interprets and enforces EU competition law with a view to complementing and completing sectoral regimes. In systems dominated by public enforcement, like European ones, any resulting inconsistencies may be effectively confined to network industries. It is equally unsurprising that the Court sought to preserve the role of EU competition law in recently liberalised industries by holding that sector-specific regulation does not as such preclude the application of Articles 101 and 102 TFEU. In a system dominated by private enforcement, on the other hand, greater emphasis may be given to the consistent interpretation of competition law provisions. This factor may explain the observed divergences with US antitrust law.