Market and Competition Law Review / VOLUME VII / No. 1 / APRIL 2023

The Interaction of Competition Law and Sector Regulation

Pier Luigi Parco, Giorgio Monti and Marco Botta

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1. Introduction

Although both sector regulation and competition policy translate into state interventions in the economy – and, in this sense, one can argue that their relationship is of true symbiosis, both appearing as enablers of effective competition – their interaction will not always be devoid of difficulties. After all, as National Competition Authorities (NCAs) and sectoral regulators pursue their respective aims, there is a real risk that inconsistency in their decisions could lead to the creation of uncertainty for market participants[1]. Thus, as the authors point out (p. 2), and in order to avoid undesirable overlaps, it is necessary to find criteria – such as market failures or even non-economic objectives[2] – that allow the selection of sectors in which, to the *ex post* intervention of competition law, *ex ante* sectorial regulation should also intervene.

In this sense, the book edited by Pier Luigi Parco, Giorgio Monti, and Marco Botta fills a gap in legal literature, dealing with three sectors – telecommunications, energy, and pharmaceuticals – which, despite their idiosyncrasies, enjoy the similarity of having both competition law and sector-specific rules applied to them. The book's scope is to identify, at both European and national level, trends in the interaction between these two areas.

DOI: https://doi.org/10.34632/mclawreview.2023.12678.

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[1] OECD, *Interactions between Competition Authorities and Sector Regulators – OECD Competition Policy Roundtable Background Note*, https://www.oecd.org/daf/competition/interactions-between-competition-authorities-and-sector-regulators-2022.pdf.

[2] Robert Baldwin, Martin Cave and Martin Lodge, "Why regulate?", in *Understanding Regulation: Theory, Strategy and Practice*, ed. Robert Baldwin *et al.* (Oxford, 2011), 15-16.

2. The book

The *Interaction of Competition Law and Sector Regulation* is divided into nine chapters (preceded by an introductory one, in which the editors make a general approach to the topic and frame the main conclusions of the research presented in the book), oriented around three sub-themes: telecommunications, energy, and pharmaceutical sector.

3. Description

The first chapter, by Martin Cave, discusses the evolution of regulation – particularly in the telecom and energy sectors – since their liberalisation, whose emerging regulatory framework was proficient in transforming the telecom market, historically dominated by monopolies, into an oligopoly, at least in most member states. However, while this was possible in the telecom sector, the author points out that it seems unlikely that widespread competition will emerge in the water and energy sectors. In this sense, and to obviate this inevitability, he puts forward some pro-competitive paths. The first, based on a vision that we deem more traditional, suggests the creation of a public entity acting for consumers that "could then institute a tender process which would seek alternative investment proposals from different firms to deal with the expected need" (p. 32). The second path puts its trust in digitalisation: Firstly, and against the background of the energy sector, algorithms could enable customers to shift their consumption patterns "from peak hours to times when generation sets and transmission and distribution assets are underutilized" (p. 33). Secondly, and bearing in mind telecoms, the author suggests "network slicing, in which the network is transformed into a set of logical networks sitting on top of a shared infrastructure" (p. 34).

The second contribution, by Pietro Crocioni and Mateo Silos Ribas, delves into the emerging difficulties of trying to control firms' market power through *ex ante* regulation. Firstly, the authors plunge in the way the use of revenue caps can promote the exploitation of market power by firms, eventually leading to a Crew-Kleindorfer effect. In this sense, the authors provide two examples from the UK market that illustrate this fact in a proper manner, making it easier for the reader to understand.

Besides, it is also stated by the authors that, to some extent, a total revenue cap that covers both potentially contestable and non-contestable services may "significantly strengthen the regulated firm's incentive to predate in the market for contestable services" (p. 45).

The third article, by Gera Van Duijunvoorde, starts from the notion of connectivity as a cornerstone of digital transformation to then make a historical review of regulatory developments in the Telecom Sector from 2002 to 2018, giving particular focus to the Telecom Code[3] and the main changes introduced by this instrument. With this in mind, the author argues the Telecom Code entailed an extension of the scope of application vis-à-vis the previous directive, analysing particularly thoroughly the definition of "electronic communications network", pointing out that, "By supplementing this definition with the wording that all transmission systems are included, whether or not based on a permanent infrastructure of centralized administration capacity, there is no doubt that these new forms of networks[4] are covered" (p. 68). At the end of the article, the author states that although this instrument serves its purpose of promoting connectivity, the intervention of soft law as a mechanism for clarifying its provisions, coupled with the lack of a solid and coherent legal framework, could possibly prove problematic in the future.

In the fourth contribution, coming from Pier Luigi Parcu and Maria Alessandra Rossi, and after a brief incursion on the interplay between competition policy and sectorial regulation (given that it was assumed that the former – in view of the regulatory framework of the Telecom sector – would be replaced by the latter), the authors did not fail to denote that the entry into force of the Telecoms Code, together with the deepening of technological development, accelerated the paradigm of substitution of competition policy by regulation, "while adding a new goal: the promotion of very high-speed connectivity investment" (p. 118). Later on, the authors focus on the network neutrality principle, introduced by the Telecoms Single Market Regulation[5], referring that the European network neutrality variant should be changed, especially in face of the adjustments introduced by the 5-G technology, which "is bound to weaken the rationale for rigid versions of network neutrality regulations" (p. 115).

The fifth article, by Gonçalo Coelho, begins by dealing with the much-discussed Article 345 of the TFEU, which, despite being assumed, at least in theory, as a rule that could hinder the possibility for the EU to regulate

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[3] Directive 2018/1972 establishing the European Electronic Communications Code (Recast) 2018 OJ L321/36 ("Telecom Code").

[4] Namely the ones consisting exclusively of autonomous systems of mobile radio equipment connected via a wireless link without a central management or centralized network operator.

[5] Regulation (EU) 2015/2120.

energy resources and radio spectrum, has been interpreted somewhat strictly, if only because several of these matters now appear to be competences shared between the Union and the Member States. Furthermore, the author does not fail to mention that the European Union has also overcome the dispute concerning article 345 TFEU by resorting to competition law. In fact, "through several merger decisions we can observe the Commission applying competition law in a 'property rights manner', using remedies as a replacement for the exercise of the ownership rights that it lacks" (p. 132). However, at the end of his article, the author argues that it seems that, currently, the Commission has favoured a more regulatory approach, not only through the approval of the Electronic Communications Code (regarding spectrum rights), but also by (apparently) abandoning the use of state aid in the energy sector.

The focus of the sixth contribution, by Mario Sigarusa and Alice Setori, is on Article 102 TFEU and its ability to cover the refusal to provide technical or customer information as an abusive conduct in the energy sector. To this extent, the authors support the idea that information-related abuses in the energy sector pose particularly sensitive problems in what regards the relationship between competition and regulation. Then, after analysing a set of cases – both from the EU and Italy – the authors state that the ICA (Italian Competition Authority), "in adopting commitment decisions with a clear purpose to provide guidelines for subsequent decisions (...) and to define standards of behaviour that all companies should follow" (p. 167), takes on a clearly regulatory role, which seems to translate into interference in the competences that typically belong to the regulatory bodies.

The seventh article, by Giovanni Pitruzzella, dissects the notion of 'unfair price' in what concerns excessive pricing, explaining the underlying reasons why this practice is considered abusive under European competition law – unlike under US law. In fact, the author believes that, in these cases, there is more at stake than the mere distortion of competition, considering that these practices may attack the core of social equality, considering that "differences in the possession of basic good cannot depend on earning capacity without undermining social cohesion" (p. 171). The author then goes on to analyse in detail the criteria set out in *United Brands*[6] for determining the existence of excessive pricing, while also pointing out that these same criteria generally require complex investigations and will

[6] Judgment 14/2/2978, *United Brands Company*, C-27/76, EU:C:1978:22.

often lead to inaccurate results, so that case law and the Commission have adopted other "stand-alone analysis methods" (p. 173) to tackle this issue. The article ends, in its point 3, with an analysis of the case law that has arisen in relation to excessive prices practiced by collective management organisations.

The eighth article, by Adam Scott, focuses on the *Flyyn/Pfizer*[7] case, one of the most relevant judgments of excessive pricing in the European Union, which emerged in the pharmaceutical sector. As the author points out, much of the interest in this case relates to the problem of "balancing appropriate rights of defence with not making it impossible for an Authority to prove infringement" (p. 191). For that very reason, the text revolves around the various possible methods for assessing the existence of an excessive price, through an analysis of OECD Papers, as well as CJEU case law, which may shed some light on this controversy. The text ends with a plea that the grounds for the case under discussion should give the undertakings investigated the expectation "that they will be heard whilst managing away any expectation that every submission should or would lead to a full investigation" (p. 209).

The ninth article, by Margherita Colangelo, addresses, at first, some general considerations regarding excessive pricing practices, stressing – and exemplifying, with decisions of certain competition authorities – that the pharmaceutical sector has revived, to a large extent, the interest in this matter. In a subsequent moment, the article plunges into some of the main arguments used in order to justify the intervention of competition law regarding excessive pricing practices, without the author forgetting the nuances presented by the pharmaceutical sector. The final part looks at the *Aspen* case – decided simultaneously by the ICA and the European Commission[8] – discussing and analysing the different approaches presented by the two authorities. In the wake of this analysis, the author concludes that the "holy grail" of the *Aspen* case undoubtedly lies in the fact that the undertaking has adopted "a sort of regulatory gaming behaviour, defined as a conduct of a private operator harnessing sector-specific rules and using them for anticompetitive purposes" (p. 230).

The last article of the book, by Ilan Akker and Wold Sauter, raises the issue of the possible incompatibility between the prohibition of excessive

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[7] *CMA V Flynn and Pfizer* (2020) EWCA Civ 339 of 10 March 2020.

[8] Case AT.40394 – *Aspen*.

pricing (without leaving untouched the danger that the pursuit of these practices by competition authorities may entail, as they risk taking on the role of price regulators) and the stimulation of innovation. To achieve this explanatory desideratum, the authors suggest "that excessive pricing may also be applied in the context of regulatory exclusivity (i.e., where there is a patent or orphan protection), provided that innovation incentives and investment risk are considered by the competition agency" (p. 234). At the end of their contribution, and after a useful analysis of this problem, the authors point out that the role of competition law in the fight against excessive pricing practices in the pharmaceutical sector will inevitably have to be seen as a complement to sectorial regulation, rather than an alternative.

4. Concluding remarks

The work under review, as mentioned at the beginning of this text, is truly innovative for its analysis of the simultaneous expansive force of both competition law and sector regulation, allowing the reader to conclude that there is currently a trend – identified by several of the authors who contributed to this work, and widespread throughout the various sectors analysed – of real 'regulatory interventions' by multiple competition authorities that might cause some serious damage to the normal functioning of markets and which could certainly subvert the role that these forms of state intervention assume.

However, and according to our understanding, the complete and thorough analysis of the various sectors is, simultaneously, the greatest strength and weakness of the book. Sometimes, and given the specificities and complexity of the sectors under analysis, the work seems somewhat fragmented by sector. Nevertheless, the initial chapter, written by the three editors, allows us to remedy this minor criticism, given that they not only present (in a particularly detailed and profound way) the main trends identified, but also concisely describe the various contributions, allowing the reader to internalise the main ideas of the various authors and identify the various links between sectors.

In short, the book *The Interaction of Competition Law and Sector Regulation* offers the reader a comprehensive guide to the past, present and future of the "rotten peace" relationship between competition law and sector regulation, benefiting immeasurably from its not strictly legal but also economic approach. Due to the multiplicity of the sectors addressed and the interdisciplinary nature of the areas of law covered, it will certainly be

a must-read not only for competition law scholars, but also for all those whose area of practice/study are the pharmaceutical, energy and telecom sectors.

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