OECD

POLICY ROUNDTABLES

# Regulated Conduct Defence 2011

## Introduction

The OECD Competition Committee debated the regulated conduct defence in February 2011. This document includes an executive summary and the documents from the meeting: an analytical note by Alexandre De Streel for the OECD, written submissions from Bulgaria, Canada, Chile, France, the European Union, Hungary, Japan, Korea, Norway, Romania, Russia, the Slovak Republic, South Africa, Spain, Chinese Taipei,Turkey, the United States, and BIAC.

## Overview

The regulated conduct defence allows antitrust immunity where conduct is required by federal or state regulation. The regulated conduct defence is important to ensure that the state can exercise its sovereign power to apply regulation that it deems justified for economic and/or social reasons even though the regulation may conflict with competition policy. The defence is also important to ensure firms do not face multiple and inconsistent legal demands, in particular from regulations and competition law.

Nevertheless, the regulated conduct defence also bears important risks including high potential costs for society. Indeed, the defence may preserve unduly anti-competitive regulation entailing welfare cost not necessary for achieving the regulatory objective. The defence may also lead to competition law exemptions of only weakly regulated conduct. The roundtable identified circumstances when the regulated conduct defense is most appropriate and when it is least appropriate.

## Related Topics

Standard Setting (2011)
Structural Separation Report (2011)
Competition Assessment Toolkit, Volume 1: Principles (2011)
Competition Assessment Toolkit, Volume 2: Guidance (2011)
Recommendation of the Council concerning Structural Separation in Regulated Industries (2001)

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**English, French**

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS**
**COMPETITION COMMITTEE**

# THE REGULATED CONDUCT DEFENCE

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## FOREWORD

This document comprises proceedings in the original languages of a Roundtable on the Regulated Conduct Defence held by the Competition Committee (Working Party No. 2 on Competition and Regulation) in February 2011.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

## PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur les Moyens de défense fondés sur une conduite réglementée qui s'est tenue en février 2011 dans le cadre du Comité de la concurrence (Groupe de Travail No. 2 sur la Concurrence et la Réglementation).

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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## EXECUTIVE SUMMARY

*By the Secretariat*

In the light of the written submissions, the background note and the oral discussion, the following points emerge:

*(1) In many jurisdictions a "regulated conduct defence" shields conduct from competition law consequences where it is required by a federal or state regulation. When firms invoke the doctrine as a defence against allegations of illegal anti-competitive behaviour, they seek what is sometimes called a regulated conduct defence or regulated conduct exemption. The regulated conduct defence is a narrower form of immunity than exempting an entire sector from the application of competition law, and permitting this defence should be preferred to broad, sector-wide exemptions from competition law.*

In most cases, competition law and regulation pursue distinct objectives, use different tools, and affect different aspects of business conduct. Therefore, the two instruments complement each other and may be applied cumulatively.

In some cases, however, the application of both competition law rules and regulation are incompatible as regulation may restrict competition (e.g. by establishing entry barriers) or impose behaviours that may be condemned under competition law (e.g. fixing minimum prices). In such cases, regulation may imply an exemption to the application of competition law. Such exemption may be beneficial to society when the regulation aims to correct market failure or ensure distributional objectives, whilst minimising anti-competitive effects. If, however, regulation goes beyond what is necessary to achieve the underlying public interest objectives, the competition law exemption is likely to be detrimental. Thus where a specific rationale for exemption has been identified, consideration should be given to the means by which its scope can be minimized. For example, an exemption which is narrow and focused is better than a broad one. In Romania, any intervention by the NRA must respect the principle of minimum distortion of competition.

These issues are now clearly understood in most jurisdictions where the solution to "exempt" the whole regulated sector from the application of competition law has been progressively abandoned. In the US, several antitrust exemptions have been narrowed or eliminated over time, due in part to advocacy efforts of the antitrust agencies directed at federal and state entities. Similarly in Korea, the KFTC enacted the Omnibus Cartel Repeal Act in 1999, a series of 18 laws which abolished 20 cartel practices by implementing measures such as lifting the limit on wage schemes for professional service providers such as lawyers, and reducing the number of items subject to group private contract. More recently, the KFTC has focused on reforming entry regulations. In Japan, the antitrust agency requested a fundamental review of antitrust exemptions in several sectors, including international aviation and the international shipping industry.

*(2) The core principles, conditions and underlying legal doctrines behind the regulated conduct defence are similar across OECD jurisdictions, although there are some differences between both sides of the Atlantic.*

*In principle, antitrust authorities can not intervene, and the regulated conduct defence applies, when firm behaviour has been mandated or dictated by regulation. Conversely, antitrust authorities may intervene when the behaviour has been autonomously decided by the firm. When the firm was induced to violate competition rules, for instance due to administrative guidance, this could be taken into account as a mitigating factor to reduce, without necessarily suppressing, the fine. The principles of legal certainty and of legitimate expectation should be respected.*

*Often, an anti-competitive regulation cannot be directly challenged by antitrust authorities, the only route being to rely on advocacy and try to convince the author of the regulation to change it. However, in some jurisdictions, regulation that violates superior antitrust principles should be dis-applied.*

*The underlying legal doctrine of the regulated conduct defence could be viewed as related to a hierarchy of norms.*

- *When competition law and regulation are at the same hierarchical level, the regulated conduct defence may be based on express immunity when one of the legal rules explicitly provides for competition law immunity or an implied immunity when there is a plain repugnancy in the application of both legal rules to the challenged conduct. In some jurisdictions, the defence also applies when there is no added value in applying competition law in conjunction with regulation.*

- *In multi-level governance settings such as federal states, when competition law is at a "superior" level to the regulation, the regulated conduct defence may be based on some form of "state action" doctrine and applies, in accordance with national law, when the challenged conduct is imposed or at least actively supervised by the regulator.*

The regulated conduct defence may be based on an explicit competition law exemption. Such immunity is often provided by the competition law itself, but it may also be provided by a regulation when adopted at the same level as the competition law. Such explicit exemptions are strictly construed in OECD jurisdictions. Although free-market competition is the fundamental U.S. economic policy and hence the vast majority of the US economy is subject to the antitrust laws, several statutory competition exemptions exist. Statutory exemptions from antitrust law exist for example in the following sectors: insurance, agricultural and fishing cooperatives, maritime shipping, rail transportation, sports broadcasting, labour, and export associations. Narrow statutory exemptions for specific categories of conduct exist for example in trademarked soft drink licensing, international civil aviation alliances, healthcare, and education. In Australia, the main sectors with exemptions are: postal, banking, financial and insurance services, as well as customs. In Japan, there are currently 21 exemption systems stipulated in 15 legislations. In Hungary, exemptions are very rare, but exist for quantitative restrictions in agriculture for instance.

A regulated conduct defence may also be based on antitrust immunity which is only implicitly in the law and deduced by the courts. Such cases may require a "plain repugnancy" between the competition law and the regulatory provisions. In the US, there are several recent Supreme Court cases (Trinko, Credit Suisse, linkLine) that some commentators have interpreted to imply that antitrust rules should not apply when there is no added value compared to regulation, a position that may represent a shift of the belief in the relative efficiency of regulation and competition rules to police market behaviour. According to some

authors, these decisions increase the scope of the regulated conduct defence in the US and make it broader than in other jurisdictions such as the EU. However, the interpretation of these cases is controversial.

The application of the regulated conduct defence in multi-level governance settings can be based on a form of "state action" doctrine. The situation is more complex as different legal principles collide and anti-competitive state regulation may in some circumstances be displaced. In such settings, there is usually a legal principle of hierarchy of norms whereby the norm adopted at the superior (e.g., federal) level prevails over the norm adopted at the inferior (e.g., state) level. According to this principle, federal competition law prevails over state regulation and, in such circumstances, the regulated conduct defence would not be accepted. However, according to principles of state autonomy and of subsidiarity, courts in some OECD jurisdictions allow regulation adopted at an inferior level to include an exemption from competition law adopted at a superior level. Moreover under the principles of legal certainty and legitimate expectations (extensively relied on in some jurisdictions such as Spain) which are crucial for the business community, courts have decided that undertakings abiding by regulation that is contrary to a superior competition law norm should not be sanctioned.

In the U.S., the Supreme Court accepted a state action defence for private actors when the challenged conduct met two conditions:

- the conduct is clearly authorised, ensuring that the state has affirmatively authorized departures from free-market competition, and

- the conduct is actively supervised by the state, ensuring that state action immunity shelters only the particular anticompetitive acts of private parties that, in the judgment of the State, are deemed to further state regulatory policies.

The US antitrust agencies, seeking to limit possible anticompetitive effects of regulation, have active advocacy programs at the sub-federal level, and have advocated limits on the breadth of the state action doctrine.

In the EU, the Court of Justice decided that Member States may not adopt regulations that would deprive EU competition rules of their effectiveness. The Treaty on the Functioning of the European Union nonetheless does provide such exceptions in this matter, particularly with regards to the provision of services of general economic interest. Thus, Member States (legislative, executive, regulatory authorities) may not adopt regulations that would encourage or force undertakings to violate EU competition law and if they do, regulations should be dis-applied. A regulatory authority, for instance, may not approve or authorise any price fixing arrangements between companies or any excessive price contrary to EU competition rules. However, if a Member State does not fulfil its obligations under EU law and adopts a regulation compelling undertakings to adopt anti-competitive behaviours that cannot be justified to ensure the provision of a service of general economic interest, a regulated conduct defence may be allowed to preserve the principles of legal certainty and legitimate expectations. This will, however, only be the case when the regulated firm has no autonomy and if the national law has not yet been declared contrary to EU law by a national authority or by the European Commission. The regulated conduct defence is not permitted when the regulation merely encourages or authorises the undertakings to engage in autonomous anti-competitive conduct. In such cases, the presence of a regulation is merely a mitigating factor when setting the sanction. The European Commission reduced the fines by 10% when condemning Deutsche Telekom and when condemning Telefonica for an abuse of a dominant position in the presence of regulation. This is also the case in several EU Member States (such as Germany, Bulgaria, Romania, Hungary) or in other OECD jurisdictions such as Chile.

*(3) The regulated conduct defence is sometimes used as a defence in merger cases on the basis that merged companies, even if they gained market power, would not be able to harm others due to access or price regulations, that constrain the ability to exercise market power.*

Merger review may be based on different substantive standards. It may be based on a competition law standard relating to efficiency (the merger should be prohibited if it significantly lessens competition but otherwise is should be allowed). It may also be based on a broader regulatory "public interest" standard (the merger should be prohibited if it goes against the public interest but otherwise it should be permitted).

In the jurisdictions and sectors where a competition law merger review standard is applicable, the merger review authority may decide to take regulation into account when it pursues the same goals as competition law and controls the possible anti-competitive behaviours resulting from the merger. This is particularly the case in recently liberalised sectors where regulation supports competition law in steering the market towards effective competition.

In the EU for instance, the European Commission does not impose competition law remedies in order to approve concentrations if the sector regulation is deemed to be sufficient to prevent anti-competitive behaviour or anti-competitive effects as a result of a merger. In Spain, mergers in the gas and electricity sector have been cleared because the access regulation was sufficient to prevent any abuse of dominant position by the merging parties.

*(4) Institutional settings can reduce potential inconsistencies between the design and the enforcement of regulatory structures and competition law, for example by:*

- *Assessing competitive effects of regulations before their adoption. If the assessment identifies significant potential for weakening competition within the affected industry or related industries, policymakers should consider the least anti-competitive alternative that would achieve the same policy goal. Moreover, the benefits and costs of such a regulatory approach should be weighed against each other. Anti-competitive regulation is only justified if its benefits exceed its costs.*

- *Ensuring mutual co-operation between regulators and competition authorities through both formal and informal agreements.*

- *Ensuring that competition authorities undertake an important advocacy role which involves convincing other public authorities to abstain from either designing or enforcing a regulation in an unduly anticompetitive way.*

Competition assessment, as for instance set out by the OECD Competition Assessment Toolkit, is increasingly used in OECD jurisdictions. This is for instance the case in a number of countries: the US, the EU with the 2009 Impact assessment guidelines, Japan with the 2010 Regulatory Impact Analysis, and Spain with the 2009 Guide to Competition Assessment. The competition assessment should be integrated at an early stage in the policy making process and competition authorities should be involved.

When different authorities are in charge of the enforcement of competition law and regulation, formal co-operation agreements could be put into place in order to alleviate or reduce conflict between their activities. Co-operation agreements may allow a division of tasks between authorities. This is particularly important in jurisdictions where competition and regulatory authorities have concurrent jurisdiction, as is for instance the case in South Africa where a Memorandum of Agreement between the competition and the communications authorities exists. In Slovakia, the competition authority will only intervene in a case already dealt with by the regulatory body when it is efficient to do so.

Co-operation agreements may also encourage closer cooperation between both authorities with:

- a right for the competition authority to make submissions or provide industry regulators with comments or expert reports, as well as to participate in regulatory hearings, and ask for optional referrals;

- joint proceedings in certain instances in order to make use of complementary expertise;

- mandatory agreements, consultations and referrals by the competition authority to the regulator, or notification of investigations that are within the jurisdiction of the other agency, and mandatory consultation or referrals.

In Korea, regulatory authorities have to consult with or notify the KFTC in advance when intending to propose potentially anticompetitive legislation or revise laws that have anticompetitive provisions. In most EU Member States, there is strong cooperation between the telecom regulatory agency and the competition authority for the market analysis. In general, the opinion of the competition authority given to the regulatory authority is not binding and does not prejudge any competition law case. In Romania, cooperation mechanisms have been set by MoUs signed between the Romanian Competition Council and the main regulators, covering mainly the exchange of information between parties and the delineation of attributions and coordination of market interventions. When competition and regulatory agencies deal with the same case, they shall consult each other in order to ensure the consistency of the decisions and proportionality of the sanctions.

Competition and regulatory authorities may also rely on more informal and soft techniques of co-operation including the development of a shared culture.

Antitrust authorities in OECD countries rely very much on advocacy, which should be strong, reliable and evidence-based. For instance, the US antitrust agencies have recently engaged in competition advocacy in the sectors of health care, legal services, and real estate transactions. They benefit from the federal nature of the country where the natural experiments in the different states may be benchmarked against each other.

In the specific context of deregulation, advocacy has been carried out in three main ways:

- the elaboration of sector-specific studies and sector enquiries that take into account market structure and emphasise the benefits of allowing access and of introducing competition;

- the implementation of co-operation agreements between the sector regulatory agencies and the competition authorities. These are especially useful in helping regulators to detect anticompetitive practices;

- the drafting of guidelines and sector codes of conduct or compliance with the competition law.

## SYNTHÈSE

*Par le Secrétariat*

Les contributions écrites, le document de référence et la discussion orale ont mis en évidence les points suivants :

*(1) Dans un bon nombre de juridictions, la « défense fondée sur une conduite réglementée » exempte de l'application du droit de la concurrence les comportements qui sont imposés par une réglementation fédérale ou d'un État fédéré. Quand des entreprises invoquent cette exception comme moyen de défense contre des actions en concurrence, elles demandent à bénéficier de ce que l'on appelle parfois une « défense fondée sur une conduite réglementée » ou « exemption pour conduite réglementée ». La défense fondée sur une conduite réglementée est une forme d'immunité plus restrictive que l'exemption d'un secteur entier de l'application du droit de la concurrence, et l'octroi de cette défense devrait être préféré aux exemptions générales du droit de la concurrence couvrant un secteur.*

Dans la plupart des cas, la législation de la concurrence et la réglementation poursuivent des objectifs distincts, utilisent des outils différents, et touchent des aspects différents du comportement des entreprises. Partant, ces deux instruments se complètent et peuvent s'appliquer de manière cumulative.

Toutefois, dans certains cas, l'application du droit de la concurrence et l'application de la réglementation peuvent être incompatibles parce que la réglementation peut restreindre la concurrence (par exemple, en créant des barrières à l'entrée) ou imposer des comportements éventuellement condamnables en vertu du droit de la concurrence (par exemple, la fixation de prix minimums). Dans ce cas, la réglementation peut impliquer une exemption de l'application du droit de la concurrence. Cette exemption peut être bénéfique à la société quand la réglementation a pour but de corriger une défaillance de marché ou vise des objectifs d'équité, tandis que les effets anticoncurrentiels possibles sont réduits au minimum. Cependant, si la réglementation dépasse ce qui est nécessaire pour réaliser les objectifs d'intérêt public sous-jacents, l'exemption du droit de la concurrence est, dans la plupart des cas, dommageable. Ainsi, dans le cas où on a mis en lumière une raison particulière justifiant une exemption, il faut envisager les moyens d'en limiter le champ d'action le plus possible. Par exemple, une exemption restrictive et ciblée est préférable à une large exemption. En Roumanie, toute intervention des autorités de régulation nationales doit respecter le principe consistant à fausser le moins possible la concurrence.

Ces questions sont maintenant clairement comprises dans la plupart des juridictions, où la solution « d'exempter » la totalité d'un secteur réglementé de l'application du droit de la concurrence a été progressivement abandonnée. Aux États-Unis, un certain nombre d'exemptions du droit antitrust ont été restreintes ou supprimées au cours du temps, souvent en partie dû aux efforts de plaidoyer des autorités antitrust auprès des entités fédérales et des États fédérés. De même, en Corée, la KFTC a mis en œuvre l'Omnibus Cartel Repeal Act de 1999, série de 18 lois qui abolissent 20 pratiques de cartel en appliquant des mesures comme la suppression de l'encadrement des tarifs de professions libérales comme les avocats ou la réduction du nombre des produits soumis à des contrats privés collectifs. Plus récemment, la KFTC s'est attachée à réformer la réglementation de l'entrée sur les marchés. Au Japon, l'organisme antitrust a demandé une révision fondamentale des exemptions à l'égard du droit antitrust dans un certain nombre de secteurs, comme le transport aérien international ou le transport maritime international.

*(2)* *L'essentiel des principes, des conditions et des doctrines juridiques sous-jacentes est similaire au sein des juridictions de l'OCDE, malgré quelques différences entre les deux côtés de l'Atlantique.*

*En principe, les autorités antitrust ne peuvent pas intervenir, et la défense fondée sur une conduite réglementée s'applique, quand le comportement de l'entreprise est imposé ou dicté par la réglementation. À l'inverse, les autorités antitrust peuvent intervenir quand le comportement résulte d'une décision autonome de l'entreprise. Quand l'entreprise a été induite à enfreindre les règles de la concurrence, par exemple du fait de recommandations administratives, cela peut être pris en compte comme circonstance atténuante pour réduire l'amende, sans nécessairement la supprimer. Les principes de la sécurité juridique et des expectatives légitimes doivent être respectés.*

*Souvent, une réglementation anticoncurrentielle ne peut être directement contestée par les autorités antitrust, la seule voie restante étant les efforts de plaidoyer pour convaincre l'auteur de la réglementation de la changer. Toutefois, dans certaines juridictions, une réglementation qui enfreint une législation antitrust de niveau supérieur doit être écartée.*

*La doctrine juridique sous-jacente de la défense fondée sur une conduite réglementée peut être considérée comme liée à la hiérarchie des normes.*

- *Quand le droit de la concurrence et la réglementation sont au même niveau hiérarchique, la défense fondée sur une conduite réglementée peut s'appuyer sur une immunité expresse si une des règles légales le prévoit explicitement, ou sur une immunité implicite s'il existe une claire incompatibilité dans l'application des deux règles légales au comportement en cause. Dans certaines juridictions, la défense s'applique aussi quand l'application du droit de la concurrence en plus de la réglementation n'apporte pas de valeur ajoutée.*

- *Dans les environnements de gouvernance à plusieurs niveaux comme les systèmes fédéraux, quand la législation de la concurrence se situe à un niveau « supérieur » à celui de la réglementation, la défense fondée sur une conduite réglementée peut reposer sur une forme ou une autre de doctrine de « l'action de l'État » et s'applique en accord avec la loi nationale quand le comportement en cause est imposé ou au moins activement surveillé par le régulateur.*

La défense fondée sur une conduite réglementée peut reposer sur une exemption explicite du droit de la concurrence. Cette immunité est souvent stipulée par la législation de la concurrence elle-même, mais elle peut l'être aussi par une réglementation quand celle-ci est adoptée au même niveau que le droit de la concurrence. Ces exemptions explicites sont interprétées de manière stricte dans les juridictions de l'OCDE. Même si la concurrence de libre marché constitue le fondement même de la politique économique des États-Unis et si l'économie américaine est, de ce fait, en majeure partie soumise au droit de la concurrence, plusieurs exemptions sont cependant prévues par la loi. Ces exemptions concernent principalement les secteurs suivants : l'assurance, les coopératives agricoles et de pêche, le transport maritime, le transport ferroviaire, les retransmissions d'événements sportifs, le travail et les associations d'exportateurs. Pour certaines catégories précises de comportements, il existe en outre des exemptions restrictives applicables par exemple aux licences relatives aux boissons sans alcool protégées par une marque déposée, aux alliances internationales dans le secteur de l'aviation civile, à la santé et à l'éducation. En Australie, les principaux secteurs concernés par les exemptions sont les services postaux, la banque, les services financiers et l'assurance et la douane. Au Japon, on dénombre actuellement 21

systèmes d'exemptions stipulés dans 15 législations. En Hongrie, les exemptions sont très rares, mais il en existe par exemple pour les restrictions quantitatives dans l'agriculture.

La défense fondée sur une conduite réglementée peut aussi reposer sur une immunité qui n'est qu'implicite dans la loi et qui est déduite par les tribunaux. Ces cas spécifiques nécessitent une « claire incompatibilité » entre le droit de la concurrence et les dispositions réglementaires. Aux États-Unis, certains commentateurs ont interprété les jugements de la Cour suprême dans un certain nombre d'arrêts récents (Trinko, Crédit Suisse, linkLine) comme un signe que les règles antitrust ne devraient pas s'appliquer quand cela n'apporte pas de valeur ajoutée par rapport à la réglementation – une prise de position qui représenterait peut-être un changement d'appréciation quant à l'efficience relative de la réglementation et des règles de la concurrence pour discipliner les comportements sur le marché. D'après certains auteurs, ces décisions augmentent le champ de la défense fondée sur une conduite réglementée aux États-Unis et le rendent plus large que dans d'autres juridictions comme l'Union européenne. Toutefois, l'interprétation de ces affaires est controversée.

L'application de la défense fondée sur une conduite réglementée dans les environnements de gouvernance à plusieurs niveaux peut reposer sur une certaine forme de la doctrine de « l'action de l'État ». La situation est plus complexe du fait que des principes légaux différents entrent en conflit et que la réglementation anticoncurrentielle de l'État peut dans certaines circonstances être écartée. Dans ces environnements, il existe habituellement un principe juridique de hiérarchie des normes suivant lequel la norme adoptée au niveau supérieur (par exemple, fédéral) prévaut sur la norme adoptée au niveau inférieur (par exemple, d'un État fédéré). D'après ce principe, la législation fédérale de la concurrence prévaut sur la réglementation d'un État fédéré et, dans ces circonstances, la défense fondée sur une conduite réglementée ne serait pas être acceptée. Cependant, en vertu des principes de l'autonomie de l'État et de la subsidiarité, les tribunaux dans certaines juridictions de l'OCDE permettent à la réglementation adoptée à un niveau inférieur d'inclure une exemption à l'égard du droit de la concurrence qui lui est supérieur. En outre, s'appuyant sur les principes de la sécurité juridique et des expectatives légitimes (d'une large application dans certaines juridictions comme l'Espagne) qui sont des éléments essentiels pour les entreprises, des tribunaux ont jugé que des entreprises qui se conformaient à une réglementation contraire au droit de la concurrence supérieur ne devaient pas être sanctionnées.

Aux États-Unis, la Cour suprême a admis une défense basée sue la doctrine de l'« action de l'Etat » quand le comportement en cause satisfaisait à deux conditions :

- le comportement est clairement autorisé : cette condition vise s'assurer que l'État fédéré a explicitement autorisé des dérogations au droit de la concurrence, et

- le comportement est activement surveillé par l'État fédéré : cette condition vise à s'assurer que l'immunité en vertu de « l'action de l'État » ne protège que les seuls actes anticoncurrentiels de parties privées qui, aux yeux de l'État fédéré, favorisent les politiques réglementaires de ce dernier.

Les autorités américaines, en vue de limiter les potentiels effets anticoncurrentiels de réglementions, ont en place des programmes de sensibilisation au nouveau sub-fédéral, et ont milité pour l'introduction de limitations d'application de la doctrine de « l'action de l'Etat ».

Dans l'Union européenne, la Cour de justice a jugé que les États membres ne peuvent pas adopter des réglementations qui priveraient de leur effet les règles de l'UE en matière de concurrence. Le Traité sur le fonctionnement de l'Union européenne prévoit néanmoins des exceptions à cet égard, notamment en ce qui concerne la fourniture de services d'intérêt économique général. Ainsi, les États membres (pouvoir législatif, exécutif ou de régulation) ne peuvent pas adopter des réglementations qui encouragent ou obligent les entreprises à enfreindre la législation de la concurrence de l'UE et, s'ils le font, ces

réglementations doivent être écartées. Une autorité de régulation, par exemple, ne peut pas approuver ou autoriser un accord de fixation de prix entre des entreprises ou un prix excessif en infraction avec le droit de la concurrence européen. Toutefois, si un État membre ne remplit pas les obligations qui lui incombent en vertu du droit européen et adopte une réglementation qui force les entreprises à se livrer à des comportements anticoncurrentiels non justifiés par la fourniture d'un service d'intérêt économique général, une défense fondée sur une conduite réglementée peut être admise afin de préserver les principes de la sécurité juridique et des expectatives légitimes. Toutefois, l'exception ne pourra être invoquée que tant que l'entreprise réglementée n'a pas de liberté de choix et si la législation nationale n'a pas encore été déclarée contraire à la législation européenne par une autorité nationale ou par la Commission européenne. La défense fondée sur une conduite réglementée n'est toutefois pas acceptée quand la réglementation se borne à encourager ou autoriser les entreprises à se livrer à un comportement anticoncurrentiel autonome. Dans ce cas, l'existence d'une réglementation est seulement une circonstance atténuante dans l'établissement de la sanction. La Commission européenne a réduit de 10 % les amendes dans les affaires Deutsche Telekom et Telefonica pour abus de position dominante en présence d'une réglementation. C'est aussi le cas dans un certain nombre d'États membre de l'UE (comme l'Allemagne, la Bulgarie, la Roumanie et la Hongrie) ou dans d'autres juridictions de l'OCDE comme le Chili.

*(3) La défense fondée sur une conduite réglementée peut être invoquée dans le contrôle de concentrations en soutenant que les entreprises fusionnées, même si elles devenaient puissantes sur le marché, ne seraient pas en mesure de nuire aux autres, grâce aux réglementations de l'accès ou des prix qui restreignent la capacité d'exploiter leur pouvoir de marché.*

Le contrôle des concentrations peut reposer sur différentes normes de fond. Il peut reposer sur une norme du droit de la concurrence relative à l'efficience (la concentration doit être interdite si elle diminue significativement la concurrence, sinon on doit l'autoriser). Il peut aussi avoir pour base une norme réglementaire plus générale relative à « l'intérêt public » (la concentration doit être interdite si elle va à l'encontre de l'intérêt public, sinon on doit l'autoriser).

Dans les juridictions et les secteurs où une norme d'examen de concentration au regard du droit de la concurrence est applicable, l'autorité chargée de cet examen peut décider de prendre en compte la réglementation quand celle-ci poursuit les mêmes buts que le droit de la concurrence. C'est en particulier le cas dans les secteurs récemment libéralisés où la réglementation apporte un soutien au droit de la concurrence pour conduire le marché vers une concurrence effective.

Par exemple, dans l'UE, la Commission européenne n'impose pas de mesures correctrices au titre du droit de la concurrence pour autoriser les concentrations si la réglementation du secteur est jugée suffisante pour empêcher des comportements anticoncurrentiels ou des effets anticoncurrentiels à la suite d'une concentration. En Espagne, des concentrations dans le secteur du gaz et de l'électricité ont été autorisées parce que la réglementation de l'accès était suffisante pour empêcher tout abus de position dominante par les entreprises fusionnées.

*(4) Les environnements institutionnels peuvent réduire les conflits potentiels entre la réglementation et le droit de la concurrence, tant dans leur conception que dans leur application, par exemple :*

- *En évaluant avant leur adoption l'impact des réglementations sur la concurrence. Si l'évaluation met en lumière un potentiel important d'affaiblissement de la concurrence dans l'industrie en question ou dans des industries connexes, les responsables publics devraient prendre en compte la solution de remplacement la moins anticoncurrentielle permettant la réalisation du même objectif. En outre, il convient de mettre en balance les coûts et avantages de la réglementation envisagée. Une réglementation anticoncurrentielle ne se justifie que si ses avantages l'emportent sur ses coûts.*

- *En assurant une coopération réciproque entre les régulateurs et les autorités de concurrence au moyen d'accords formels ou informels.*

- *Par l'action importante de plaidoyer des autorités de concurrence, consistant à convaincre les autres autorités publiques de s'abstenir d'élaborer ou d'appliquer une réglementation d'une manière excessivement anticoncurrentielle.*

L'analyse d'impact sur la concurrence, telle qu'elle est exposée par exemple dans le Manuel pour l'évaluation d'impact sur la concurrence de l'OCDE, est de plus en plus utilisée dans les juridictions de l'OCDE. C'est le cas par exemple aux États-Unis, dans l'Union européenne avec les Lignes directrices concernant l'analyse d'impact de 2009, au Japon avec l'analyse d'impact de la réglementation de 2010 et en Espagne avec le guide d'évaluation d'impact de la concurrence de 2009. Cette évaluation de l'impact sur la concurrence doit être intégrée au processus d'élaboration des politiques à un stade précoce et les autorités de la concurrence doivent y être associées.

Quand différentes autorités sont chargées d'appliquer le droit de la concurrence et la réglementation, il convient de mettre en place des accords de coopération formels afin d'atténuer ou limiter les conflits de compétence. Ces accords de coopération peuvent prévoir une division des tâches entre les autorités. Ce point est particulièrement important dans les juridictions où les autorités de concurrence et les autorités de régulation ont simultanément compétence dans le domaine considéré comme c'est le cas, par exemple, en Afrique du Sud où il existe un Mémorandum d'entente entre l'autorité de la concurrence et le régulateur des communications. En Slovaquie, l'autorité de la concurrence n'intervient dans une affaire déjà traitée par le régulateur que si des raisons d'efficience le justifient.

Ces accords peuvent aussi favoriser une coopération plus étroite entre les deux autorités avec :

- le droit pour l'autorité de concurrence de soumettre des contributions ou de communiquer des observations ou des rapports d'experts aux régulateurs sectoriels, de participer aux audiences réglementaires et de demander des saisines facultatives ;

- des procédures conjointes dans certains cas afin de bénéficier d'une expertise complémentaire ;

- des accords ou consultations obligatoires, saisines obligatoires du régulateur par l'autorité de la concurrence ou notification des investigations qui sont de la compétence de l'autre organisme.

En Corée, les autorités de régulation doivent préalablement consulter ou avertir la KFTC quand elles ont l'intention de proposer une législation potentiellement anticoncurrentielle ou de réviser des lois contenant des dispositions anticoncurrentielles. Dans la plupart des États membres de l'UE, il existe une forte coopération entre les autorités de régulation des télécommunications et de concurrence pour l'analyse des marchés. En général, l'avis de l'autorité de concurrence donné au régulateur n'a pas de force obligatoire et ne préjuge d'aucune procédure au titre du droit de la concurrence. En Roumanie, des mécanismes de coopération ont été établis par des mémorandums d'entente entre le Conseil de la concurrence roumain et les principaux régulateurs, couvrant principalement l'échange d'information entre les parties, la délimitation des attributions et la coordination des interventions sur les marchés. Quand l'autorité de la concurrence et un régulateur traitent une même affaire, ils doivent se consulter mutuellement pour assurer la cohérence des décisions et la proportionnalité des sanctions.

L'autorité de la concurrence et les régulateurs peuvent aussi recourir à des techniques de coopération plus informelles et plus souples, visant notamment à établir une culture commune.

Les autorités antitrust dans les pays de l'OCDE ont une forte activité de plaidoyer, avec des arguments qui doivent être convaincants, fiables et fondés sur les faits. Par exemple, les organismes antitrust aux États-Unis ont récemment lancé des campagnes de plaidoyer pour la concurrence dans le secteur de la santé, des services juridiques, et des transactions d'agences immobilières. Ils tirent profit du caractère fédéral du pays où il est possible de comparer les expériences réelles observées dans les différents États fédérés.

Dans le contexte particulier de la déréglementation, le plaidoyer pour la concurrence a été mené principalement de trois façons :

- réalisation d'études sectorielles et d'enquêtes qui prennent en compte la structure du marché et mettent en lumière les avantages d'ouvrir l'accès et d'introduire la concurrence ;

- mise en œuvre d'accords de coopération entre les organismes de régulation sectoriels et les autorités de concurrence, particulièrement utiles pour aider les régulateurs à détecter les pratiques qui restreignent la concurrence ;

- élaboration de lignes directrices et de codes de conduite sectoriels ou de conformité à la législation de la concurrence.

**BACKGROUND PAPER**

*By the Secretariat*[1]

## 1. Introduction

The "regulated conduct defence" shields conduct from competition law[2] consequences where it is required by a federal or state regulation. When firms invoke the doctrine as a defence against allegations of illegal anti-competitive behaviour, they seek a regulated conduct defence or regulated conduct exemption.[3] The defence has direct links with several legal doctrines that lead to the non-application of competition law in some circumstances: express immunity, implied immunity, or the state action doctrine.

The regulated conduct defence is important to ensure that the state can exercise its sovereign power to apply regulation that it deems justified for economic and/or social reasons even though the regulation may conflict with competition policy.[4] The defence is also important to ensure firms do not face multiple and inconsistent legal demands, in particular from regulations and competition law. The risks of such inconsistent legal demands are particularly important given the wide applicability of competition law and its evolving interpretations. In the specific case where the regulatory structure has the same goals as competition law, the regulated conduct defence may also be justified on the basis of a cost-benefit analysis when there is no added-value to apply competition law in addition to regulation.

The regulated conduct defence carries, however, also important risks and, with them, high potential costs for society. Indeed, the defence may lead to the application of regulation that is unduly anti-competitive and entails a welfare cost not justified to achieve the objective of the regulation.[5] Government restraints on competition may be as harmful to consumer welfare as private restraints. This will be particularly the case if the regulation results from the lobbying by private interests, which may be more common in period of economic downturn. The defence may also lead to an exemption from competition law oversight of a conduct that is only weakly regulated by the state.

This paper will emphasise a number of key points:

- Regulations can at times require actions that would, absent the regulation, constitute potential violations of competition law.

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2 The paper does not deal with the state aid rules that are applicable in some jurisdictions.

3 Related terms include the regulated industries exemption, regulated industries defence and regulated industries doctrine. See Competition Bureau of Canada (2010, p.1).

4 As observed by Carlton and Picker (2007, p.15), regulated conduct defence may move competition from the market to the legislative bodies.

5 See OECD (2011a) and OECD (2011b). The OECD Competition Assessment Toolkit aims at identifying regulation that unnecessarily restricts competition beyond what is necessary to achieve the regulatory goal.

- One way to avoid inconsistent demands on companies is through sector exemptions, but these are typically overbroad and better tailored solutions exist. The regulated conduct defence offers a narrower form of immunity than exempting an entire sector from the application of competition law.

- The application of the regulated conduct defence is more complex in multi-level governance settings as different legal principles may collide.

- The regulated conduct defence should only apply where companies have no autonomy over their behaviour.

- In some jurisdictions competition rules enacted at federal level prevent state regulators from imposing or facilitating conduct that would otherwise violate competition rules.

- The regulated conduct defence may be invoked as a defence in merger cases.

- Institutional settings can play an important role in reducing potential inconsistencies between the design and the enforcement of regulatory structures and competition law.

- The regulated conduct defence may entail substantial welfare costs for society and should therefore be applied by courts with caution.

This background note is organised as follows. Section 2 is a general introduction and deals with the rationale for the regulated conduct defence and the risks for consumer welfare. This Section characterises the main differences between competition rules and regulation, the different relationships between both sets of rules and the scope for a regulated conduct defence. Sections 3 and 4 go into more detail concerning the conditions of application of the regulated conduct defence in the two main branches of competition policy: on the one hand, anti-competitive agreements and abuses of dominant position/monopolization cases, and on the other hand, merger review. Section 5 then moves from substantive to institutional issues. It deals with possible measures to alleviate or reduce harmful conflict in the design and the enforcement of regulation and competition rules. Finally, Section 6 briefly concludes.

## 2. The regulated conduct defence: rationale and risks[6]

### *2.1 The objectives and the tools of competition rules and regulation*

Competition law has the specific goal of making markets work better for the benefit of consumers. Competition law provides two main prohibition tools: (i) prohibition of anti-competitive agreements and abuses of a dominant position (or monopolization) so as to impede the harm for consumers that would result from artificial increases in market power; and (ii) prohibition of mergers that would substantially lessen effective competition. In most jurisdictions, they apply uniformly to all economic sectors, unless specified otherwise.

Regulation is a much broader concept that may have very different economic or non economic objectives.[7] It relies on a variety of instruments and usually is more prescriptive than competition law[8]:

6 This section draws heavily from the work of the International Competition Network, see ICN (2004a).

7 Baldwin and Cave (1999, Chapter 1), Breyer (1982, Chapter 1).

8 As noted by ICN (2005, p.7): “the emphasis of competition law is on what undertakings should not do, whereas regulation does the reverse and tells market agents what to do”.

- Regulation may correct *market failures* and, as competition law, make markets work better to the benefit of the consumers:

  - It may reduce *transaction costs*, via rules related to property rights or contracts.

  - It may address *information asymmetries* among economic agents that are not easily corrected by experience, such as rules ensuring minimum quality standards or preventing consumer harm.

  - It may address *externalities*, i.e. situations where economic agents neglect the spill-over effects of their decisions on third parties, which may be positive (such as in case of education) or negative (such as in case of pollution, traffic congestion and of financial market instability).

  - It may permanently address *structural market power* when the characteristics of the sector prevent effective competition (e.g. a natural monopoly). In this case, regulation may aim at mimicking the result of effective competition with, for example, retail price controls.

  - It may also temporarily address *market power when the sector is being liberalised* but the application of competition rules is not sufficient to ensure a competitive market. In this case, regulation may steer the sector towards effective competition through structural (vertical separation) or behavioural (compulsory third-party access) obligations.[9] This is for instance the case of the EU electronic communications regulatory framework discussed in Box 1.

- Regulation may address *distributional issues*, such as ensuring the provision of minimum or universal services to all consumers at affordable prices. In those circumstances, regulation may sacrifice efficiency to increase equity, but then the regulation should try minimizing the efficiency costs to society.[10] For instance in the EU, the provision of telecommunications universal service is intended not to distort competition and should minimise market distortions.[11]

- Regulation may address many other issues, such as health, safety standards and risk.

Regulation may at times suffer from failures.[12] It may go beyond what is necessary to achieve the public interest objectives and impose a welfare cost that is not commensurate to the public interest.[13] This is particularly the case when regulation results from the lobbying of private parties to favour their own at the expense of the general interest (regulatory capture). For instance, regulation may serve as a coordinating mechanism for a cartel. Moreover, there is a potential for economic distortions to arise, as different sectors are subject to different regulatory environments. Such distortions can have a negative

9 On structural separation measures, see the OECD Council Recommendation on Structural Separation (OECD, 2001) and the Report on the Implementation of the Recommendation on Structural Separation (OECD, 2011c).

10 On this issue, see OECD (2004).

11 Directive 2002/22 of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, OJ [2002] L 108/51 as amended by Directive 2009/136, Art. 1(2) and 3(2), and Case C-220/07, *Commission v France* [2008] E.C.R. I-95, paras.29 and 31.

12 Peltzman (1976) and (1989), Stigler (1971).

13 For some examples, see the contributions in Amato and Laudati (2001).

impact on economic welfare by distorting consumer decisions as to which products and services they purchase. In addition, regulation may quickly become out-of-date, especially in fast-moving industries for technological reasons that are not directly connected with the legal regime, or where liberalisation has begun and some companies are moving fast to adapt to the new situation.

From a public interest perspective, it is therefore important that regulation applies only when its economic and social benefits outweigh its costs. Potential regulatory failures may in some cases imply that effective competition and competition policy may be a better solution than regulation.

According to Carlton and Picker (2007, p.51): "The relative advantages and disadvantages of each mechanism became clearer over time. Regulation produced cross-subsidies and favours to special interests, but was able to specify prices and specific rules of how firms should deal with each other. Antitrust, especially when it became economically coherent within the past 30 years or so, showed itself to be reasonably good at promoting competition, avoiding the favouring of special interests, but not good at formulating specific rules for particular industries. The partial and full deregulation movement was a response to the recognition of the relative advantages of regulation and competition law. This does not mean that no sector will be regulated, but rather that competition, constrained only by competition law, will be used over more activities, even in regulated industries". According to Temple Lang (2008, at section II) "competition law gives power only to stop already identifiable illegal actions, whether by companies or State measures, while regulation gives power to alter an existing situation which is entirely legal, to promote regulatory objectives. Regulatory powers, or competition law powers being used or misused for regulatory purposes, therefore create a temptation to "improve" the existing market"[14].

**Box 1. The EU electronic communications economic regulation**

In 2002, the European Union substantially changed the economic regulation of the electronic communications sector. The goal of the reform was to render economic regulation closer to economic realities, technologically neutral, flexible and more harmonised between the Member States. According to the Framework Directive[15], the national regulatory authorities follow three steps to regulate a market. Such steps should be applied prospectively and repeated every 2-3 years to take into account market developments.

First, the regulatory authority selects, on the basis of Recommendation from the European Commission, the markets justifying possible regulation on the basis of three cumulative criteria: (i) the existence of high and non-transitory barriers to entry of a structural, legal or regulatory nature; (ii) a market structure that, taking account of the barriers to entry, will not tend towards effective competition within the relevant time horizon of the market analysis (2-3 years); and (iii) the insufficiency of competition law alone to adequately address the market failure(s) present on the market. Then, the regulatory authority defines the product and geographical boundaries of the selected markets according to the antitrust methodologies relying on the so-called SSNIP (small but significant non-transitory increase in price) test;

Second, the regulatory authority analyses the market to determine whether one or several operators enjoy significant market power, which is equivalent to the dominant position in competition law;

Third, the regulatory authority imposes on the operators having significant market power the most appropriate and proportionate regulatory obligations provided in EU law Directives, such as transparency, non-discrimination,

14 On a comparison between antitrust rules and regulation in terms of substance and processes, see also Katz (2004, p.245-246), Laffont and Tirole (2000).

15 Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, OJ [2002] L 108/33, as amended by Directive 2009/140, Art.14-16 and European Commission (2002). See Garzaniti and O'Regan (2010, Chapter 1), Monti (2003), de Streel (2003).

accounting separation, third-party access, price control, or functional separation.

This competition-based regulation has several advantages. It is more flexible and guarantees that national regulatory authorities' decisions are based on sound economic principles and reflect the reality of the market. It ensures a progressive removal of obligations as competition develops on the relevant markets (market-by-market sunset clauses) and facilitates the transition towards the mere application of competition law. Such an approach requires close co-operation between regulatory and competition authorities.

### *2.2 The relationship between competition law and regulation*

When a business conduct is directly or indirectly affected by regulation, a conflict may exist between the implementation of the regulation and the enforcement of antitrust rules.

#### *2.2.1 Complementarity of regulation and competition law*

In most cases, competition law and regulation enforcement pursue distinct objectives, use different tools and affect different aspects of business conduct. Therefore, the two instruments complement each other and may be applied cumulatively.

For instance, regulation aimed at limiting pollution does not reduce the need for the competition law prohibition of anti-competitive agreements, abuses of a dominant position or anti-competitive mergers. Similarly, mandatory labelling or the prohibition of misleading advertising aim at promoting transparency and increasing the ability of consumers to choose among different alternatives, complementing competition law in ensuring an effective competitive discipline.

The complementary role of competition law and regulation is also evident in recently liberalised sectors where the role of regulation has changed radically. Historically, regulation was responsible for issuing licences and setting prices. Now in certain liberalised sectors, regulation is increasingly based on competition analysis and respects market forces. As stated by M. Monti (2003), a previous EU Commissioner for competition policy, "competition instruments and regulatory tools are complementary means. They deal with a common problem and try to achieve a common aim. The problem is high levels of market power and the likelihood of it being abused, and the aim is putting the end user at the centre of any economic activity"[16]. Both legal instruments have specific characteristics: Regulation focuses only on the main aspects of business conduct (for instance, access or final pricing), providing the ex-ante framework that regulated firms need to follow. Competition law prohibitions on agreements and abuses are expressed in more general terms and are enforced ex-post. The prohibition of abuse of a dominant position, for example, seeks to impede behaviour that may distort competition and is not specifically covered by regulation. In most jurisdictions, when an industry or a firm is regulated, competition law enforcement represents an additional tool, with the baseline being determined by regulation.

#### *2.2.2 Substitutability of regulation and competition law*

In some cases, however, the application of both competition law rules and regulation is incompatible as regulation may restrict competition (for example by establishing entry barriers) or impose behaviours that may be condemned under competition law (for example fixing minimum prices). In such cases, regulation may imply an exemption to the application of competition law.

Such exemption may be beneficial to the society when the regulation aims to correct market failure or ensure distributional objectives, while at the same time the possible anti-competitive effects are reduced to

16 Also see the remarks of the current U.S. Assistant Attorney General Varney (2010, p.14).

the minimum. If, however, regulation goes beyond what is necessary to achieve the underlying public interest objectives, the competition law exemption is detrimental.

It is thus important that exemptions to competition law apply only when the economic and social benefits of the exemption outweigh its costs. That is why the OECD (1997, p. 271) has taken the position that exemptions from the general competition law should be minimized or even eliminated: "As a general reform strategy, governments should expand the scope and effectiveness of competition policy. The scope and effectiveness of competition law and competition authorities should be reviewed, and strengthened where necessary. Exemptions to competition law should be eliminated, absent evidence of compelling public interests that cannot be served in better ways."[17]

Thus where a specific rationale for exemptions has been identified, consideration should be given to the means by which its scope can be minimized. For example, an exemption which is narrow and focussed is better than a broad exemption. In the same vein, a legislated monopoly requiring all producers of a particular commodity to sell to a particular licensed exporter may be an inferior substitute to a system that allows producers to engage in co-operative export selling arrangements, but does not compel them to do so.

This is now clearly understood in most jurisdictions where the solution to "exempt" the whole regulated sector from the application of competition law has been progressively abandoned for several reasons[18] (i) technical progress has allowed competition in many previous natural monopoly environments and justified liberalization in several network industries, (ii) competition law has increasingly been recognised as a more suitable regulator given the limitations of industry regulation and (iii) the increased use of economics in competition law analysis has allowed for an improved balance between pro and anti-competitive effects.[19]

If the broad sector exemption is not applicable, the issue is whether and at what conditions a specific regulated conduct may be exempted from competition law enforcement. Given the possible welfare costs of such exemption,[20] the conditions for a regulated conduct defence should be strictly designed.

### *2.3 The scope of the regulated conduct defence*

In practice, the courts have restricted the use of the regulated conduct defence in order to diminish its risk and potential costs for society. The courts have generally accepted the regulated conduct defence when the firm's contested behaviour is the policy choice of a sovereign government. However, it has not been accepted where private parties have invoked it in order to manipulate the democratic process in such a way as to give themselves effective, unsupervised control over a market.[21] As noted by ICN (2004a, p. 4), "Antitrust enforcement, unless there is a specific exemption, is always possible when there is a restriction of competition which falls under the prohibition of the antitrust law and this restriction may be attributed to an autonomous firm decision, i.e. it is not mandated by regulation. In some jurisdictions antitrust rules may also be applied when the anticompetitive regulation is clearly not in the general interest and it delegates the power to implement its provisions to the regulated firms themselves".

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17 Also see OECD (2005a, p.12).

18 See Baldwin and Cave (1999, Chapter 10), Breyer (1982, at Parts II and III), Cooper and Kovacic (2010, p.1558). On the means and the benefits to bring competition to regulated sectors, see OECD (2005a).

19 On that last point, see in particular Varney (2010).

20 Carlton and Picker (2007, p.16).

21 Hovenkamp (2005, at §18.5).

The regulated conduct defence has different conditions and implications depending on whether it is relied upon in an ex-post or an ex-ante antitrust case. Both types of cases will be considered in the following two sections.

## 3. The regulated conduct defences in anti-competitive agreements and monopolization or abuses of dominant position cases

In cases involving anti-competitive agreements and abuse of a dominant position or monopolization cases, the regulated conduct defence is based on several doctrines that allow exemption from competition law under some conditions. These doctrines are mainly of a legal nature and do not always meet strict economic efficiency criteria. They have been developed pragmatically on a case-by-case basis without drawing on a fully coherent framework. One of the main criteria for allowing an exemption from competition law is whether the regulation was taken at the same level as the competition law or at an inferior level. This paper deals with both questions in turn in the following two sub-sections.

### *3.1 Regulated conduct defence when regulation is at the same legal level as competition law*

#### *3.1.1 Explicit legislative regulated conduct defence and immunity to antitrust*

The regulated conduct defence may be based on an explicit exemption from competition law. Such immunity may be provided by the competition law itself or by a regulation when adopted at the same level as the competition law. Exemption may vary in intensity: it may provide limited competition law immunity for specific conduct or types of agreements between firms, it may apply to narrow areas but provide a broader immunity, it may apply broadly but provide a limited immunity or it may create a broad immunity for entire areas.

In the U.S., the competition law provisions are contained in federal and state acts. The federal competition law, which the Supreme Court has called "the Magna Carta of free enterprise"[22], generally applies to interstate commerce or any activity affecting interstate commerce, whether or not the conduct at issue is subject to state or federal regulation.

Some federal regulatory acts, however, provide for an express immunity to the federal competition law provisions either directly or by giving a federal agency the authority to grant competition law immunity via administrative decision.[23] In general, such explicit exemptions are strictly construed,[24] which has been welcomed by the bi-partisan Antitrust Modernization Commission.[25] There are more than thirty statutory competition law exemptions and they relate mainly to the following sectors: agriculture and fishing, maritime or railroads transport[26], banking, insurance and financial services, sport leagues, professional societies, export cartels, labour, healthcare, education.[27] According to the Antitrust

22 *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972).

23 See Antitrust Modernization Commission (2007, p.347-356), Carlton and Picker (2007, p.16-19), Hovenkamp (2005, at §19.7).

24 *FMC v. Seatrain Lines*, 411 U.S. 726, 733 (1973) construing the exemption so as to cover operating agreements but not mergers.

25 Antitrust Modernization Commission (2007, p.356: Recommendation 61).

26 Shipping Act of 1984, 46 USCA § 1706. Motor carrier Act of 1980, 49 USCA § 10706(b); Staggers Rail Act of 1980, 49 USCA § 17706(a) permit firms to engage in joint rate making without violating antitrust provisions against collusion.

27 See the list of statutory exemptions from Antitrust Law in Antitrust Modernization Commission (2007, p.378).

Modernization Commission:[28] "Statutory immunities (…) should be granted rarely, and only where, and for so long as, a clear case has been made that the conduct in question would subject the actors to antitrust liability *and* is necessary to satisfy a specific societal goal that trumps the benefit of a free market to consumers and the U.S. economy in general."

In the EU, the competition provisions are contained in the Treaty on the Functioning of the European Union (TFEU), which is the constitutional Charter of the EU[29] and in the laws of the Member States. EU competition rules apply to private and public "undertakings", which have been defined by the Court of Justice as every entity engaged in an economic activity regardless of its legal status or the way it is financed.[30] Economic activity, in turn, depends on the function carried out by the entity, and consists of offering goods or services on the market where that activity could, at least in principle, be carried out by private undertakings in order to make profits. Thus EU competition law applies to all entities, private or public, that offer products or services normally provided against remuneration. Conversely, competition law does not apply to activities where the Member states exercise sovereign power (such as control of air space, anti-pollution surveillance) or that are governed by the principle of solidarity such as compulsory social security insurance schemes (for examples in the healthcare sector, see Box 2).

EU competition law applies to all sectors of the economy with very rare exemptions. The TFEU provides for a possible exemption in the agricultural sector.[31] However, the Council of Ministers decided to make competition law applicable to agriculture with certain exemptions to Article 101 TFEU in order to ensure a proper functioning of the Common Agricultural Policy and its national organizations of agricultural markets[32]. The TFEU also provides for exemptions for nuclear energy and military equipment.[33] The Council also provides for an exemption to Article 101 TFEU for certain agreements in rail, road and inland waterway transport aiming at technical improvements or achieving technical cooperation.[34] Thus, in all other sectors, competition law applies fully. The European Commission, however, adopted several block exemptions for certain economic sectors: motor vehicle, insurance, and transport (air, maritime). In those cases, competition law applies, but the agreements meeting the conditions set by the Commission are automatically exempted on the basis of Article 101(3) TFEU. The Commission has also adopted cross-sectoral block exemptions for some types of horizontal (research and development, and specialisation) agreements, vertical agreements and Technology Transfer agreements.[35]

Moreover, the Treaty provides that competition rules do not apply to economic activities when it is necessary for the provision of services of general economic interest (SGEI)[36] as explained below.

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28 Antitrust Modernization Commission (2007, p.350: Recommendation 57).

29 Case C-294/83, *Les Verts v. European Parliament* ECR [1986] 1339, at para.23.

30 Case C-41/90 *Hofner and Elser v. Macroton* [1991] I-1979.

31 Art. 42 TFEU.

32 Council Regulation 1184/2006 of 24 July 2006 applying certain rules of competition to the production of, and trade in, agricultural products, O.J. [2006] L 214/7. See Whish (2008, p. 957-961).

33 Art. 346(1b) TFEU. See Whish (2008, p. 957).

34 Council Regulation 169/2009 of 26 February 2009 applying rules of competition to transport by rail, road and inland waterway, *OJ* [2009] L 61/1.

35 http://ec.europa.eu/competition/antitrust/legislation/legislation.html.

36 Article 106(2) TFEU.

**Box 2. The provision of healthcare services**

There have been a number of interesting cases concerning the provision of healthcare services which have raised questions about how the involvement of the state effects the application of competition law.

In 2006 the European Court of Justice (ECJ) in FENIN[37] held that public bodies acting as purchasers of medical supplies did not constitute 'undertakings', and therefore Articles 101 and 102 TFEU did not apply to them. FENIN is an association of undertakings involved in the marketing of medical goods used in Spanish hospitals. FENIN had complained to the European Commission (EC) that the public bodies managing the Spanish health service had abused their dominant position as purchasers of the medical goods produced by FENIN's members. The ECJ agreed with the earlier judgment of the General Court (GC) and confirmed that "it is the activity of offering goods and services on a given market which determines whether an activity is economic, not purchasing as such."[38]

The earlier FENIN case before the GC came out a short time after the UK BetterCare II case that also involved abuse of dominance claims in the provision of healthcare. Some interesting parallels can be drawn. Indeed, the OFT was motivated to publish a note to emphasise the different reasoning of the two tribunals.[39] The BetterCare cases concerned a provider of residential and nursing home care who had complained to the OFT that the purchaser, a Health and Social Services Trust (N&W), was abusing its dominant position. The OFT rejected the complaint on the grounds that N&W was not an undertaking for the purposes of the Competition Act 1998. However, on appeal, the Competition Appeals Tribunal (CAT) decided that N&W *was* acting as an undertaking, both through the purchasing of services from BetterCare and the direct provision of elderly care by its own statutory homes. In its policy note the OFT sets out the principle differences between the two cases which allowed the CAT to come to its seemingly divergent decision.[40] In particular it was emphasised that while the GC held that the characteristic of an economic activity does not include the business of purchasing, the CAT's key consideration was whether an entity is in a position to generate the effects which competition rules seek to prevent. The OFT concludes that where a public body is only a purchaser of goods or services in a particular market, and is therefore not involved in the direct provision of any goods or services in that, or any related market, it will not be an undertaking for the purposes of the Competition Act 1998. However, the legal position regarding bodies that both purchase and directly provide goods for non-economic purposes (as is often the case in the provision of healthcare services) was stated as unclear and in a state of development pending the final judgment in FENIN.

The provision of healthcare services in the UK is now able to benefit from the newly formed Co-operation and Competition Panel (CPP). The CPP is an independent, non-statutory advisory body that was established by the Secretary of State to provide advice to the Department of Health, Strategic Health Authorities (SHAs) and other NHS bodies. The CPP has no concurrent powers to enforce competition law as this responsibility remains with the OFT. [41] However, it does have the power to advise and undertake cases concerning the Principles and Rules of Cooperation and Competition (PRCC)[42].

In the 2007 *Baxter* case in Australia *ACCC v Baxter* [2007] HCA 38, it was asserted before the court that competition law did not apply to health care procurements by the States operating hospitals, despite the fact the suppliers were private sector organisations. The ACCC had accepted that the tender and procurement of sterile fluid products by the purchasing authorities did not amount to carrying on a business. This meant that the purchasing authorities themselves were not bound by the Trade Practices Act (TPA), now the Competition and Consumer Act 2010. However, Baxter as a private sector organisation had linked competitive products to monopoly products and was therefore able to supply both on a non-competitive basis. Baxter argued that derivative crown immunity applied, and therefore the TPA could not apply to Baxter as this would affect the freedom of the Crown to enter into contracts of its choosing. The High Court did not agree, and the majority held that Crown immunity does not automatically extend to third parties unless that immunity is clearly necessary to protect the Crown's proprietary contractual legal rights.

37 Case C-205/03, *FENIN v Commission of the European Communities* [2006] ECR I-6295.

38 See above, para 24 of ECJ judgment.

39 See Policy note 1/2004, The Competition Act and public bodies available at: http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_mini_guides/oft443.pdf.

40 See above, para 13.

41 See "Working arrangements between the OFT and the CPP".

42 http://www.ccpanel.org.uk/content/Final-draft-Rules-of-Procedure.pdf.

Baxter's activity of supplying State health purchasing authorities was therefore not immune from the TPA. The decision of the High Court clarifies that companies are subject to the TPA, irrespective of whether the TPA also applies to the other party to the arrangement and companies will not automatically receive the protection of any Crown immunity when dealing with Commonwealth, State or Territory authorities.

In Australia, the competition provisions are included in a federal law (the Competition and Consumer Act 2010) and several regulations adopted at the federal level provide for an exception to the competition law. The main sectors concerned are: postal, banking, financial and insurance services (see Box 8), and customs.[43]

In Singapore, the Competition Act of 2004's prohibitions against anti-competitive conduct does not apply to the government, any statutory body, or person acting on behalf of the government. Moreover, the Act creates a number of sector exclusions, such as for postal, rail, and cargo services while in some other areas, competition oversight of sector-specific businesses has been exempted (e.g., telecoms, media, and energy).

In China, the Anti-Monopoly Law creates immunities from competition law for state owned enterprises in strategic sectors such as aviation, banking, electricity, oil, railroads, and telecommunications.[44] In these sectors it is therefore the industry regulatory authorities that have power to take action against any anticompetitive behaviour.

Two concerns have, however, been raised by SAIC (the State Administration for Industry and Commerce) concerning its inability to act in these areas.[45] First, the industry regulatory authorities usually have a close relationship with the enterprises under their ambit. This may give rise to conflict of interest issues impairing the protection of consumer interests and rights. Second, there have been some inconsistencies in the level of sanctions that regulatory authorities can administer. An example of this can be seen under the Telecommunications Regulations, stipulating that fines for anticompetitive behaviour will be between Rmb 10,000 and Rmb 100,000. These are, however, considerably lower than the fines administered under the Anti-unfair Competition Law which range from Rmb 50,000 to Rmb 200,000.

### *3.1.2 Implicit judicial regulated conduct defence and immunity to competition law*

A regulated conduct defence may also be based on antitrust immunity not explicitly provided by the competition or regulatory law, but which is implicitly in the law and deduced by the courts.

In the U.S., the regulated conduct defence based on implicit immunity requires plain repugnancy between the competition law and regulatory provisions and is strictly construed.[46] The courts will look at

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43 The federal exceptions are listed on the website of ACCC : http://www.accc.gov.au/content/index.phtml/itemId/688173: Australian Postal Corporation Act 1989 , Banking Act 1959 , Customs Act 1901, Financial Sector (Business Transfer and Group Restructure) Act 1999 , Insurance Act 1973, Liquid Fuel Emergency Act 1984, Northern Territory National Emergency Response Act 2007, Payment Systems (Regulation) Act 1998, Payment Systems (Regulation) Regulations 2006, Trade Practices Act 1974, s. 173.

44 See Fox (2008).

45 See China's contribution to 2005 GFC on the Relationship between Competition Authorities and Sectoral Regulators. DAF/COMP/GF/WD(2005)9.

46 *United States v. Philadelphia national Bank*, 374 U.S. 321 at 350-351 (1963). ICN (2004b, p.21).

four elements:[47] (i) The existence of regulatory authorities to supervise the challenged conduct; (ii) The evidence that the regulatory authorities exercise the supervision with the suitable degree of attentiveness,[48] this condition requires that the challenged conduct should have been investigated by a public regulatory agency or possibly approved after a fairly full review of the merits; (iii) The risk of conflicting requirements between competition law and regulation, for instance because both legal instruments have different and conflicting objectives; and (iv) a conduct squarely within the heartland of regulation.

In practice, the courts have accepted a regulated conduct defence based on implied competition law exclusion only in limited instances, in particular in securities regulation supervised by the SEC.[49] The courts tend to exempt, according to the proportionality principle, only to the minimum extent necessary to make the regulatory statute work.

Moreover, when there is rate regulation at the federal (or the state level, see below), the Supreme Court allows implied immunity limited to some sanctions under the "filed rate doctrine."[50] The doctrine forbids purchasers from lodging competition law complaints concerning prices fixed by suppliers, where those suppliers have duly filed their rates with the regulatory authority and the rates have not been disapproved by the authority.

In Canada, the Competition Bureau (2010, p. 7) indicates that "it will not pursue a matter under any provision of the (Competition) Act where Parliament has articulated an intention to displace competition law enforcement by establishing a comprehensive regulatory regime and providing a regulator the authority to itself take, or to authorize another to take, action inconsistent with the (Competition) Act, provided the regulator has exercised its regulatory authority in respect of the conduct in question", and that it "will generally conclude that the enactment by Parliament of specific provisions to address the conduct in question is intended to take precedence over a law of general application such as the Competition Act i.e. application of the *generalia specialibus non derogant* maxim".

### *3.1.3 A hybrid analysis when regulation complements competition law*

In *Trinko,*[51] the U.S. Supreme Court decided that federal competition law could not be the basis for a duty to deal of a telecommunications incumbent operator subject to an access obligation under the federal telecommunications laws. This was not a case of express or implied immunity due to the antitrust saving clause of the 1996 Telecommunications Act. The Supreme Court did, however, a cost-benefit analysis and considered that there was no added-value to apply competition law in addition to regulation which follows the same logic and follows more ambitious goals than competition law. The Supreme Court states that, where such regulatory structure exists, the benefit of an additional application of competition law is small as both legal instruments have objectives going in the same direction while the cost of applying competition law may be high as the authority deciding under competition law (in this case, a judicial court which is not well equipped to deal with the complex issues underlying access obligations) may make errors and condemn practices that are competitive.

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47 *National Gerimedical Hospital v. Blue Cross of Kansas City* 452 U.S. 378, 388 (1981); *Silver v. NYSE* 373 U.S. 341; *Gordon v. New York Stock Exchange*, 373 U.S. 659 (1975); *Credit Suisse Securities (USA) v. Billing* 551 U.S. 264 (2007).

48 According to Hovenkamp (2005, at §19.3c), the same standard of regulatory supervision should apply for a antitrust exemption in case of federal regulation and in case of state regulation.

49 *Gordon v. New York Stock Exchange*, 373 U.S. 659 (1975).

50 *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922).

51 *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko*, 540 U.S. 682 (2004).

According to the Antitrust Modernization Commission (2007, p. 362), "The Court simply held that the specific, regulatory duties to deal established under the 1996 Telecommunications Act did not also create a new cause of action under the refusal-to-deal doctrine of Section 2 of the Sherman Act. *Trinko* is best understood only as a limit on refusal-to-deal claims under Section 2 of the Sherman Act. It should not be read to displace the role of the antitrust laws in regulated industries as an implied immunity, nor should it be taken as a judicial rejection of a savings clause".[52]

### *3.2 Regulated conduct defence when regulation is at an inferior level than competition law: an application of the State action doctrine*

The application of the regulated conduct defence is more complex in multi-level governance settings as different legal principles collide. In such settings, there is usually a legal principle of hierarchy of norms whereby the norm adopted at the superior (e.g., federal) level prevails over the norm adopted at the inferior (e.g., state) level. According to this principle, federal competition law prevails over state regulation and, in such circumstances, the regulated conduct defence should not be accepted.

However, according to, for example, the principles of state autonomy and of subsidiarity, courts in some jurisdictions allow regulation adopted at an inferior level to include an exemption from competition law adopted at a superior level. Moreover under the principles of legal certainty and legitimate expectations, courts have decided that undertakings abiding by regulation that is contrary to a superior competition law norm should not be sanctioned. In all those cases, the courts have allowed, in effect, a regulated conduct defence. Depending on the institutional context and the judicial history, the conditions of the defence may differ among jurisdictions.

#### *3.2.1 State Action doctrine in the U.S.*

In the U.S., the federal law prevails over state laws pursuant to the supremacy clause of the U.S. Constitution.[53] Thus in principle, federal competition laws prevails over state regulations. However, the Supreme Court created an exception to the principle and accepted a state regulated conduct defence when the challenged conduct met two conditions:[54] (i) the conduct should be clearly authorised and (ii) the conduct should be actively supervised by the state. The first condition serves to ensure that the state has affirmatively authorized departures from free-market competition. The second condition serves to ensure that state action immunity shelters only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies.

Clear authorisation

First, the challenged conduct must be authorised by a clearly articulated and affirmatively expressed state regulatory policy. The state should have contemplated the challenged conduct and decided to permit it, while the details of the regulatory scheme may be left to a state agency or government subdivision. The Supreme Court held that the condition was satisfied when the anti-competitive conduct was the

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52 For a different interpretation of Trinko, see among others Shelanski (2011) who sees and regrets and new form of antitrust immunity in Trinko..

53 U.S. Const. Art. VI, §2. ICN (2005, p.66). On the ambiguous relationship between pre-emption and the state action doctrine, see Hovenkamp (2005, at §20.1).

54 *Parker v. Brown*, 317 U.S. 341 (1943); *Goldfarb v. Virginia State Bar* 421 U.S. 773 (1975); *California Retail Liquor Dealers Assn. v. Midcal Aluminium*, 445 U.S. 97 (1986). For an analysis of those conditions, see Antitrust Modernization Commission (2007, 366-377), Bush (2006), Delacourt J.T. and Zywicki TJ. (2005), Elhauge (1991).

"foreseeable result" of a state statute.[55] Such standard led courts to allow regulated conduct to be shielded through "clear articulation" by either a general state authority or through a broad regulatory regime. Moreover, the Supreme Court merely requires that the conduct is authorised, and not imposed, by the state.[56]

Authorisation must come from the state itself in its executive, legislative and judicial branches (state's Supreme Court), but not from a governmental subdivision such as a municipality or from a subordinated agency of the state. As put by Hovenkamp (2005 at §20.4), the courts have focused on three questions to determine what constitutes a state body:

*i) "Whether the agency or board at issue has quasi-legislative powers and is not merely instructed to carry certain functions;*

*ii) Whether the decision makers in the agency, office or board are composed entirely of government officials with no financial interests in the regulated market and not from representatives of the regulated market;*

*iii) Whether the agency is governed or answerable in some explicit fashion to the legislature, governor or state supreme court".*

The FTC State Action Report (2003) notes that some lower courts have implemented the clear articulation standard too loosely in a manner not consistent with its underlying goal. To address this concern, that Report recommended[57] that courts ask two questions in applying the clear articulation requirement: (1) whether the conduct at issue has been authorized by the state, and (2) whether the state has deliberately adopted a policy to displace competition in the manner at issue. Such requirements would focus the inquiry on the existence of deliberate and intended state policies to displace competition.

Active supervision

Second, the challenged conduct must be actively supervised by the state itself. Thus, the state's policy may permit private parties to act anti-competitively, but the state must ensure that private decision makers are acting in accordance with state policy and not carrying out additional anticompetitive acts that fall outside the state authorisation. According to Hovenkamp (2005 at §20.5), three issues should be distinguished: when is supervision required, what kind of supervision is required and who must supervise.

*i) The supervision is required when the challenged conduct is that of a private party with discretionary power, but not when the actor is governmental[58] or a private party acting without discretion.[59]*

*ii) The supervising agency or the court should be empowered to supervise and it should carry out such supervision in practice. As stated by the U.S. Supreme Court, "The active supervision*

55 *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985) and *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985).

56 *Southern Motor Carriers Rate Conference Inc. v. United States*, 471 U.S. 48 (1985).

57 Such recommendation has also been made by the Antitrust Modernization Commission (2007, p.371 recommendation 71). On the review of the US State action doctrine, see also Cooper and Kovacic (2010, p. 1585)

58 See *Town of Hallie.*

59 See *Municipal Utilities Board of Albertville v. Alabama Power Co*, cert. denied, 513 U.S. 1148 (1995).

*requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy"*[60]*, and the "mere potential for state supervision is not an adequate substitute for a decision by the State".*[61] *Similarly, mere reporting or supervision which is limited to process is not sufficient.*

*iii) The supervision should be done by the same level of government that has imposed the regulation. If the regulation is from the state, then supervision should be carried out by the state agency in charge of enforcing the regulatory regime. If the regulation is municipal, then supervision should be carried out by the city council directly or by a commission or an agency.*[62]

The Antitrust Modernization Commission (2007, p.373) recommends that courts use a flexible, "tiered" approach that requires a different level of active supervision depending on factors such as the type of conduct at issue (e.g. per se violation of competition law or not), the entity engaging in that conduct (whether the entity is more or less governmental), the industry, and the regulatory scheme.

Thus when the conduct is not clearly authorised and actively supervised by the state, a regulated conduct defence is not allowed. However, when there is rate regulation at the federal or the state level, the Supreme Court allows competition law immunity limited to some sanctions under the "filed rate doctrine" explained above.

### *3.2.2 State action doctrine in the EU*

In the EU, the TFEU prevails over all Member States rules.[63] Therefore, EU competition law should normally prevail over national regulations. Although the competition provisions of the TFEU are addressed to private and public undertakings, the Court of Justice decided that, according to the loyalty clause of the Treaty on the European Union (TEU),[64] Member States may not adopt regulation that would deprive EU competition rules of their effectiveness,[65] save the exceptions provided in the TFEU especially regarding the provision of services of general economic interest. On that basis, the Court of Justice has not allowed any industry to claim a complete exemption from EU competition law on the basis of a national regulation.[66]

The prohibited national measures fall into four categories:

- encouraging or reinforcing unlawful agreements or practices;
- giving companies power to regulate themselves;

60 *Patrick v. Burget*, 486 U.S. 94, 101 (1988).

61 *FTC v. Ticor Title Ins. Co*, 504 US 621, 638 (1992).

62 Hovenkamp (2005 at §20.5c).

63 Case 6/64 *Flaminio Costa contre E.N.E.L.*, [1964] ECR 1141.

64 Art. 4(3) TEU.

65 Combination of Articles 4(3) TEU with 101 and 102 TFEU for private undertakings and Article 106 TFEU for public undertakings. Case 267/86 *Van Eycke v ASPA* [1988] ECR 4769 at 16, Case 66/86 *Ahmed Saeed* [1989] ECR 838 at 48.

66 See Case 172/80, *Züchner* v. *Bayerische Vereinsbank* [1981] ECR 2021 (banking industry); Case 41/83, *Italy* v. *Commission* [1984] ECR 873 (telecommunications industry); Case 45/85, *Verband der Sachversicherer* v. *Commission* [1987] ECR 405 (insurance industry).

- requiring conduct incompatible with Articles 101-102 TFEU;
- making violations of those Articles inevitable.[67]

Thus, Member States (legislative, executive, regulatory authorities) may not adopt regulation that would encourage or force undertakings to violate EU competition law. For instance, a regulatory authority may not approve or authorise any price fixing arrangements between companies which is contrary to Article 101 TFEU or any price which is so excessive that it is contrary to Article 102 TFEU. If a Member State would adopt such regulation, contrary to EU law, this regulation should be dis-applied by all Member State's authorities, including a competition authority, a regulatory authority or a court.

However, the Treaty provides that competition rules do not apply, hence national law may apply, when it is necessary for the provision of a service of general economic interest (SGEI).[68] This provision is construed narrowly by the Court of Justice and requires three conditions to be met:[69]

*i) Undertaking is 'entrusted' by the state, with legislation or a contract, to carry out a service as SGEI. Although Member States have large discretion to determine what a SGEI is, some EU criteria are emerging: the service should be universal, compulsory and provided for general, and not private, interest.[70] Examples include controlling navigation on an important waterway, a universal and continuous mooring service at ports, operating the public telephone network, broadcasting television, operating the national public electricity supply, the basic postal service, supplementary pension schemes, operating an unprofitable air route for reasons of the general interest, and management of environmentally undesirable waste.[71]*

*ii) The restriction of competition is necessary to ensure that the service can be provided under economically acceptable conditions;*

*iii) The restriction of competition is not contrary to the interest of the Union. This provision has not yet received a detailed scrutiny by the Court of Justice, but it requires more than the proof that the state measures do not affect the trade between Member States.*

If a Member State does not fulfil its obligations under EU law and adopts a regulation compelling undertakings to adopt anti-competitive behaviours that cannot be justified for the provision of a SGEI, the Court of Justice may allow a regulated conduct defence. This will, however, only be the case in the situation where the regulated firm has no autonomy and if the national law has not yet been declared contrary to EU law by a national authority or by the European Commission.

No autonomy for the firms

67 Moreover, national regulation may not violate the EU internal market rules.

68 Article 106(2) TFEU.

69 Chalmers et al. (2010, p.1030). See Case C-320/91 *Corbeau* [1993] ECR I-2523, Case C-203/*96 Dusseldorp* [1998] ECR I-4075, Case C-475/99 *Ambulanz Glöckner v Landkreis Südwestpfalz*, [2001] ECR I-8089.

70 See Case T-289/03 *BUPA v Commission* [2008] ECR II-81, paras 172 and European Commission (2001).

71 See Temple Lang (2008, at section VIII).

The regulated conduct defence, which is construed restrictively,[72] is only accepted when the regulation imposes the challenged conduct and removes any autonomy of the undertakings.[73] This implies that the regulation should have been adopted by public authorities and not by the regulated parties. According to Gerard (2011), the courts consider three main criteria:

*i) Whether the regulation is subject to the final approval of a government authority, e.g. a Minister, possibly after consulting with other independent public bodies;*

*ii) Whether the regulation has been elaborated by a committee composed of a majority of members independent from the industry actors or associations. As noted by Temple Lang (2004), "the case law distinguishes between companies being represented on consultative bodies, which is legal as long as official powers are exercised by an official authority, and situations in which a dominant enterprise or a group of companies are themselves allowed to take the operative decisions or to exercise official regulatory powers, which is illegal.[74] It is lawful for prices to be proposed by committees including representatives of enterprises, provided that the legislation granting the power to propose prices requires the public interest to be taken into account (so that judicial review would be possible on this ground) and provided that the public authority has power to alter or override the committee's proposal";*

*iii) Whether industry representatives must take into account statutory criteria aimed at ensuring the public interest.*

The courts will therefore carry out a test to verify that it is the Member State, acting through a government body that retains the final word in the decision making process administering the regulated conduct. The test is mainly formal and avoids any substantive assessment of the public policy considerations that the state may take into account.[75]

The regulated conduct defence is not permitted when the regulation merely encourages or authorises the undertakings to engage in autonomous anti-competitive conduct. The presence of a regulation may, however, constitute a mitigating factor when setting the sanction. The Commission Guidelines on setting

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72 Case C-198/01 *Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato* [2003] ECR I-8055, at 67 and cases cited therein. At 68-69, the Court of Justice added that: "price competition does not constitute the only effective form of competition or that to which absolute priority must in all circumstances be given. Consequently, pre-determination of the sales price of matches by the Italian State does not, on its own, rule out all scope for competitive conduct. Even if limited, competition may operate through other factors".

73 Wainwright and Bouquet (2004). This is established case-law: Case C-359/95P *Commission and France v. Ladbroke*, ECR [1995] I-6265, para.33, very recently Case C-52/09 *Konkurrensverket v. TeliaSonera* ECR [2011] I-0000, para.49-50.

74 See *e.g.*, Case C-96/94 *Centro Servizi Spediporto* [1995] ECR I 2883; Case C-140/94 *DIP v. Comune di Bassano* [1995] ECR I 3257; Case C-70/95 *Sodemare v. Regione Lombardia* [1997] ECR I 3395 (social welfare health care services: a Member State may decide to allow only non-profit-making operators to provide social welfare, under contracts refunding their expenses to them); Case C-38/97, *Librandi* [1998] ECR I 5955; Case C-266/96, *Corsica Ferries* [1998] ECR I 3949; Case C-35/96, *Commission v. Italy* [1998] ECR I 3851 (legislation allowing a price set by a national committee of customs agents, to be charged by all customs agents, is illegal: the national legislation "wholly relinquished to private economic operators the powers of the public authorities as regards the setting of tariffs"; Case T-513/93, *CNSD v. Commission*, [2000] ECR II 1807.

75 Chalmers at al. (2010, p.1019). Gerard (2011) observes that such formal analysis may be due to the lack of room in the EU competition law system of analysis for the consideration of public interest justifications.

fines[76] state that there is a mitigating factor "where the anti-competitive conduct of the undertaking has been authorized or encouraged by public authorities or by legislation". This view has been endorsed by the Court of Justice in several cases.[77] This is also the case in some Member States, for example Portugal (See Box 7)

The validity of the national regulation

When the national regulation cannot be justified for the provision of a SGEI under EU law, the regulated conduct defence may only be relied upon until a definitive decision has declared the Member State's regulation contrary to EU law,[78] but not after the decision has been rendered.[79]

### *3.2.3 State action doctrine in Canada*

In Canada, the federal Competition Act in principle prevails over provincial regulation pursuant to the federal paramountcy rule and the application of general law in accordance with its plain reading. However, the Supreme Court created an exception to this principle and has accepted the regulated conduct defence when there is a clear operational conflict between the provincial regulation and the Competition Act, such that obedience to the regulation regime means contravention of the Competition Act. It is the specific conduct rather than the industry as a whole that is examined. The Competition Bureau indicates that it will strive to determine Parliament's intention with respect to the application of the relevant Competition Act provision(s) to the impugned conduct, but that it will not refrain from pursuing regulated conduct under the reviewable matters provision(s) simply because the provincial law may be interpreted as authorizing the conduct or is more specific than the Act. The Bureau also observes that greater scrutiny of the activities of regulatees, whether acting in their private capacity or as self-regulators, may be warranted.[80]

### *3.2.4 State action doctrine in Australia*

In Australia, the mechanism to provide exemptions from the competition law was significantly tightened with the National Competition Policy Reform of the mid-1990s. Instead of being shielded by a general state action doctrine, exemptions have now to be explicit. A law could not operate to exempt conduct from competition law unless the exempting law specifically stated that the conduct was exempted and the federal government retained a right to veto state or territory exemptions. Such exemptions are published on the website of the antitrust authority.[81]

## ***3.3 Core principles***

To conclude, in most jurisdictions, the regulated conduct defence is based on the following main related legal principles and judicial policies[82]:

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76 European Commission (2006, at 29). This is also the case in some Member States. For instance Bundeskartellamt (2006), para.17.

77 *Fiammiferi*, at 57, *Deutsche Telekom*, at 279.

78 *Fiammiferi*, at 53-54.

79 *Fiammiferi*, at 55.

80 Competition Bureau of Canada (2010, p.5-6).

81 See : http://www.accc.gov.au/content/index.phtml/itemId/688173.

82 ICN (2004b, p.20).

- The defence aims to respect the intent of the legislator and the *bona fide* exercise by the State of its sovereign regulatory powers. In the particular context of multi-level governance, the defence may be justified by the principle of federalism and the principle of subsidiarity.

- Conversely, the defence is also based on the principle that it should not be up to politically unaccountable private actors to determine when marketplace outcomes are unacceptable or not. More generally as Odudu (2006, p.46) observes, "differential treatment of public authorities and private (corporate) citizens can be justified to reflect the differing roles played by citizens and the state in a constitutional democracy," as "public power is exercised in the public interest, and the public interest is determined through democratic representation".

- The defence also applies the principles of legal certainty and legitimate expectations by ensuring that firms do not face inconsistent legal demands from regulations and competition law.

- When regulation pursues the same goals than competition policy, the defence may also be justified by a cost-benefit analysis indicating that there is little added-value of applying competition law in addition to regulation.

In general, courts accepted the regulated conduct defence only restrictively and only to the extent that the exemption to antitrust is necessary to achieve the goals of regulation as all legal doctrines on which the defence is based (express immunity, implied immunity and state action doctrine) are strictly construed.[83] As observed by the ICN (2004b, p. 6), "as a general interpretative rule, exceptions to competition laws are not easily inferred by the courts, who need to be conveniently satisfied that the regulator validly intended to grant competition law immunity to some conducts. Thus, in the majority of cases, permission of a given behaviour under a specific regulatory regime cannot entail per se that the requirements of competition laws need not be complied with by the regulated subjects".

Beyond those core principles, the jurisprudence is complex as it has developed pragmatically on a case-by-case basis and lacks clarity in marginal cases.[84] The degree of supervision that the state should provide where there is an exemption from competition law is one such example. Moreover, sometimes the regulated conduct defence has been accepted too easily by lower Courts as its conditions of application have not been sufficiently strictly respected.[85]

The conditions for a regulated conduct defence may vary across jurisdictions. For instance, the EU has more power to limit the Member States' anti-competitive regulation than the U.S. federal institutions

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83 In some jurisdictions in the past, courts have applied the exemptions too broadly and the legislator intervened to narrow the interpretation. An example is provided by South Africa where the 1998 Competition Act excluded 'acts subject to or authorised by other legislation.' Courts began to interpret this phrase so that firms in regulated sectors escaped Competition Act oversight whether or not the other regulatory process also controlled anticompetitive conduct so that bank mergers were exempted, agricultural co-operatives were exempted. The legislation was amended to avoid the problem in the future: OECD (2003, p. 51).

84 ICN (2004b, p.19) ; Temple Lang (2004).

85 As observed by the Antitrust Modernization Commission (2007, p.344), "Critics warn, however, that the lower courts increasingly have applied the *Midcal* test in ways that allow defendants to obtain antitrust immunity in situations where a state did not intend to displace competition. Others question whether courts have properly taken into account the potential for one state's endorsement of anticompetitive conduct to have spillover effects that raise prices or otherwise harm consumers in other states. And there is also a serious question whether the state action doctrine should immunize conduct by state government entities and municipalities when they act as market participants".

despite the much higher degree of U.S. federal integration. In the EU, Member States have a duty to act in accordance with EU competition policy and organs of state should 'disapply' national legislation contravening EU law. In the U.S., the Supreme Court observes that the State action doctrine does not aim "to determine whether the State has met some normative standard", but rather to consider "whether the State has exercised sufficient independent judgement and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties."[86] Moreover, the case-law differs in some cases due the difference in institutional framework as explained in Box 3.

**Box 3. Telecommunications cases in the EU and in the U.S.: Deutsche Telekom and Trinko**

In the EU, the European Commission[87] imposed a fine of €12.6 million, on the basis of Article 102 TFEU, on the German telecommunications operator Deutsche Telekom for an anti-competitive price squeeze between its wholesale fixed network access charges and its retail end-users tariffs for access lines. At the same time, the German regulatory authority was regulating the wholesale charges on a cost-basis and imposing a price cap on a basket of retail services which included access lines and calls. The Commission condemned Deutsche Telekom because although it has no autonomy as regards wholesale charges, it has some room for autonomous actions with respect to retail tariffs. Deutsche Telekom could have eliminated or reduced the squeeze by decreasing the tariffs of its access lines (and by increasing the tariffs of its calls). The Commission decision and reasoning were upheld in appeal first by the General Court[88] and then by the Court of Justice.[89]

Adopting a different position, the U.S. Supreme Court[90] refused to condemn, on the basis of Section 2 of the Sherman Act, the telecommunications operator Verizon for not having given competitors access to its network. This was a private enforcement case launched by a customer of Verizon's competitors, Mr. Trinko. At the same time, the FCC and the New York state regulators had condemned Verizon for having violated its access obligation under the 1996 Telecommunications Act. The New York state regulator issued orders requiring Verizon to pay $10 million to its injured competitors, and pursuant to FCC consent decree, Verizon agreed to pay $3 million to the U.S. Treasury. The Court held that the regulatory duties to deal established under the 1996 Telecommunications Act did not create a new cause of action under the refusal-to-deal doctrine of Section 2 of the Sherman Act.

Some authors[91] note that the position of the U.S. Supreme Court may partly be explained by the specificities of the U.S. legal system as well as the peculiarities of the case at hand: first, the U.S. telecommunications regulation was very pervasive at the time; second the U.S. competition law provides for high private damages in cases of violation of competition law (possibility of class actions and treble damages) which increase the costs of competition law enforcement errors, and is administrated by judicial Courts which are not able to monitor behavioural remedies; third, Mr. Trinko was a customer of a new entrant that claimed to have suffered loss because his operator had faced refusal to deal from the incumbent (thus Mr. Trinko was more interested by the prospect of earning large financial compensation than by the protection of the competitive structure.)

The differences between the EU and U.S. solutions may also be explained by their different institutional settings. EU competition law has a constitutional value (as enshrined in the TFEU) whose application can not be removed by

86 *FTC v. Ticor Tile Ins. Co.*, 504 U.S. 621, 635 (1992). Note however that, as it is the case in the EU, U.S. state laws can not discriminate against interstate commerce according to the U.S. Constitution. See for instance: *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981).

87 Commission Decision of 21 May 2003, Case 37.451 *Deutsche Telekom*, *OJ* [2003] L 263/9. See also a similar case: Commission Decision of 4 July 2007, Case 38.784 *Wanadoo España v Telefónica*, *OJ* [2008] C 83/6.

88 Case T-271/03, *Deutsche Telekom v. European Commission*, [2008] ECR II-477.

89 Case C-280/08P, *Deutsche Telekom v. European Commission*, [2010] ECR I-0000.

90 *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko*, 540 U.S. 682 (2004).

91 Geradin (2004, p.1548), Larouche (2006, p.7-8).

national sector-specific regulation whereas American competition law has the same legal value as federal sector-specific regulation. Moreover, the Commission is an administrative authority that has the same ability to analyse a case as a regulatory authority. Also, the Commission may want to use competition law cases to ensure that national regulator abide by EU competition rules.

## 4. The regulated conduct defence in merger cases

### *4.1 Competition law and regulatory merger review standards*

On the substantive side, merger review may be based on different substantive standards across jurisdictions and across sectors. The review may be based on a competition law standard related to efficiency (the merger should be prohibited if it significantly lessens competition but otherwise is should be allowed). Or the merger review may also be based on a broader regulatory "public interest" standard (the merger should be prohibited if it goes against the public interest but otherwise should be permitted). The public interest standard, which may vary by industry, may include efficiency considerations but may also include other types of considerations. On the institutional side, the merger review may be done by the competition authority and/or by a regulatory authority.

For instance in the U.S., a public interest standard enforced by regulatory authorities apply in four industries: certain aspects of electricity (regulated by the Federal Energy Regulatory Commission); telecommunications/media (regulated by the Federal Communications Commission which take into account possible effects on the diversity of views available and the obligation to provide universal service, as well as likely effects on competition); banking (regulated by various banking agencies); and railroads (regulated by the Surface Transportation Board which take into account such factors as public benefits, labour conditions, environmental issues, and effects on competition.)[92] In Canada, the responsibility of the approval of bank mergers resides with the Ministry of Finance while the Competition Bureau and the Office of the Superintendent of Financial Institutions play an important role in the analysis. Also for the approval of major airline mergers, responsibility resides with the Governor in Council.

When the sector or a firm is subject to regulation, two issues arise in relation to a competition law merger review.

- The first issue is whether the regulation leads the sector or the firm to be exempted from the application of the competition law merger review. This issue should be dealt with according to the principles analysed above and the courts only allow exemptions restrictively.

- The second issue is what will be the impact of regulation in competition law merger analysis based on an efficiency standard.[93] More particularly, the issue is whether the regulation may be relied upon and used as an ex-ante defence to facilitate the approval of the merger.

### *4.2 The regulated conduct (ex-ante) defence in a competition law merger review*

In the jurisdictions and sectors where a competition law merger review standard is applicable, the authority (whether the competition authority or the regulatory authority) may decide to take regulation into account when regulation pursues the same goals as competition law and controls the possible anti-

92 Antitrust Modernization Commission (2007, p. 363).

93 The paper does not deal with the relationships between antitrust merger review based on an efficiency standard and regulatory merger review based on a public interest standard: for examples on such issues, see ICN (2004c).

competitive behaviours resulting from the merger. This is particularly the cases in recently liberalised sectors where regulation supports competition law in steering the market towards effective competition. In such cases, the merging parties may invoke a sort of ex-ante regulated conduct defence to facilitate the approval of the merger.

For instance in the EU, the European Commission does not impose competition law remedies in order to approve telecommunications concentrations if the sector regulation is deemed to be sufficient to prevent anti-competitive behaviour or anti-competitive effects as a result of a merger (see Box 4). Similarly in Canada, the Competition Bureau has taken sectoral regulation into account to allow mergers in the electricity sector.[94] In the U.S., the Antitrust Modernization Commission (2007, p.364) recommends that competition law enforcement agencies take into account the effects of regulation in their merger assessment.

**Box 4. Regulation serving as a competition law merger defence: Telecommunications in the EU**

In the EU, the European Commission does not impose additional competition law remedies to approve a concentration if EU or even foreign[95] regulation is sufficient to prevent anti-competitive behaviour.

- In *Deutsche Telekom/OTE,* the European Commission approved a merger strengthening the power of the Romanian incumbent by taking into account the regulation imposed by the Romanian regulator on RomTelecom, a subsidiary of OTE.[96]

- Similarly in *Vodafone/Tele2 Italy/Tele2 Spain,* the European Commission approved a 4 to 3 merger by taking into account the regulation of fixed and mobile termination rates by the Italian telecommunications regulator.[97]

- In *T-Mobile/Orange Netherlands*, one of the reasons why the European Commission approved the merger was the fact the mobile termination rates of the merging parties were regulated by the Dutch telecommunications regulator, thereby limiting the merged entity's ability to foreclose rivals.[98]

With the strengthening of EU sector-specific regulation, its alignment to competition law principles and the adoption of the Roaming Regulation,[99] the tendency to take into account regulation in the assessment of concentrations has increased significantly. It led to many mergers being cleared without any competition law remedies being imposed, particularly in respect of vertical foreclosure concerns, where effective regulation is one factor preventing the implementation of foreclosure strategies by the merging parties.

Conversely, the European Commission imposed merger remedies where sector-specific regulation was deemed

94 ICN (2004c, p.6).

95 Commission Decision of 7 October 2005, Case M.3752, *Verizon/MCI*,.

96 Commission Decision of 2 October 2008, Case M.5148, *Deutsche Telekom/OTE*, paras.26, 89 and 115.

97 Commission Decision of 27 November 2007, Case M.4947, *Vodafone/Tele2 Italy/Tele2 Spain*, paras.22–27.

98 Commission Decision of 20 August 2007, Case M. 4748 *T-Mobile/Orange Netherlands*, para.49, where the Commission took into account in its competition assessment the fact that the Dutch regulator found that no undertaking possessed SMP on the wholesale mobile market for access and call origination.

99 Regulation 717/2007 of the European Parliament and of the Council of June 27, 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21, O.J. 2007 L171/32, as amended by Regulation 544/2009, O.J. 2009 L167/12.

to be inadequate.

- In 1999, in *Telia/Telenor*, the Commission found that the sector-specific regulatory regimes in place in Sweden and Norway at the time were inadequate to prevent anti-competitive conduct by the merged entity, which justified the imposition of remedies of a regulatory nature (*i.e.* local loop unbundling).[100]

- Later, in *Telia/Sonera*, the Commission appeared to take the view that both the *ex post* nature of regulation in Finland and Sweden and the EU's sector-specific regulatory regime (which required accounting separation, but not structural separation of undertakings with SMP and local loop unbundling) were (despite strengthening in the meantime) still inadequate to prevent anti-competitive conduct that could have arisen due to the vertical effects of the merger. The Commission therefore imposed conditions requiring the legal separation of the different fixed and mobile network and service businesses of the parties in Sweden and Finland, in addition to more "traditional" divestment conditions.[101]

Similarly in *Newscorp/Telepiu*,[102] the Commission imposed substantial access and behavioural remedies (even though the Italian media regulator had jurisdiction to apply sector-specific regulation), and relied on the Italian regulator to monitor their implementation.

Source: Garzaniti and O'Regan (2010 at 8-025 and 8-026)

## 5. Institutional settings to alleviate or reduce conflict between regulation and competition law and policy[103]

The legal conditions for the regulated conduct defence do not always correspond to the economic criteria for effective and efficient regulation. This may lead to the application of regulation that unduly restricts competition. It is therefore important that institutional mechanisms are in place to alleviate or reduce unjustified conflict between competition and regulation. Such mechanisms may play a role in the design and in the enforcement of regulation.

### *5.1 Institutional settings to alleviate or reduce conflict in the design of regulation and competition law*

One of the main means to alleviate regulations which unduly restrict competition is to perform a competition assessment on the proposed and the existing regulations.[104] Such competition assessment is particularly important if the regulation provides for an explicit competition law exemption. However, for efficiency reasons, a detailed and comprehensive competition assessment should only be undertaken when the initial estimate suggests that the potential costs of the anti-competitive effects of the regulation are significant enough to justify the necessary expenditure of resources that an in-depth competition assessment requires.

100 Commission Decision of 13 October 1999, Case M.1439, *Telia/Telenor* .

101 Commission Decision of 10 July 2002, Case M.2803, *Telia/Sonera* .

102 Commission Decision of 2 April 2003, Case M.2876, *Newscorp/Telepiu*, , para.259.

103 Also Sokol (2009).

104 As recommended by the Council of the OECD: see Recommendation of the Council of the OECD of 22 October 2009 on Competition Assessment.

The OECD Competition Assessment Toolkit[105] provides a general methodology for identifying unnecessary competitive restraints and developing alternative, less restrictive policies that still achieve government objectives. It includes the following four steps:[106]

- Identify policy objectives,
- State alternative regulations which would achieve the same policy objectives,
- Evaluate the competitive effects of each alternative policy option, with the help of a competition checklist,
- Compare the alternatives.

If the assessment identifies significant potential for a weakening of competition within the affected industry or related industries, policymakers should seek, according to the proportionality principle, the least anti-competitive alternative that would achieve the same policy goal. Moreover, the benefits and costs of such a regulatory approach should be weighed against each other. Anti-competitive regulation is only justified if its benefits exceed its costs.

Such competition assessment should be integrated at an early stage in the policy making process[107] and competition authorities should be associated as much as possible. In particular before putting in place explicit competition law immunity through a legislative measure, the U.S. Antitrust Modernization Commission recommends to consult the federal antitrust agencies.[108]

In the EU, the European Commission Impact Assessment Guidelines require an ex-ante analysis of the impact on effective competition of all major EU initiatives.[109] In the United States, Regulatory Impact Analysis (RIA) guidance documents require consideration of market impacts.[110] In Australia, a very comprehensive competitive assessment of federal and state regulations was undertaken in the mid-nineties (see Box 5). Today, the ACCC requires that all RIA documents state whether the proposed regulation complies with the terms of the National Competition Policy agreements, and include analysis to support this conclusion.

**Box 5. Australian National Competition Policy Reforms**

After the completion of the Hilmer Committee's report in 1993 which urged greater microeconomic openness with a focus on pro-competitive reforms, all nine governments agreed in 1995 to undertake a systematic review of legislation that had anti-competitive effects, even if it was not directly inconsistent with the competition law. This included laws that set up entry barriers, such as licensing regimes, or that controlled conduct by setting or controlling qualifications, opening hours, prices, technical specifications, and marketing arrangement. Some 1700 separate enactments, mostly at the state level, were identified as requiring a review. Most reviews were completed in 2001. The standard of review was that the restriction on competition should be necessary to achieve the objectives of the regulation, and the benefits of the restriction should outweigh the costs. New legislation requires a regulation impact

105 See OECD (2011a and 2011b). Also Baldwin and Cave (1999, Chapter 7), Cooper and Kovacic (2010, p. 1607).

106 OECD (2011a, p.35).

107 Also ICN (2002, p.60).

108 Antitrust Modernization Commission (2007, p.353: recommendation 59).

109 European Commission (2009, p. 33 and 40-41). In the EU Member States, see OFT (2007).

110 See Office of Management and Budget, Circular A-4, 17 September 2003.

analysis that incorporates the same standard. The federal government offered funding to aid state and territorial governments with any adjustment costs that might arise from revisions of legislation.

Other means ensuring the reduction of unjustified conflicts between regulation and competition rules are: to provide the regulation with a sunset clause forcing the legislator to revisit after a certain period the need for a regulation which may have anti-competitive effects[111]; or to base regulation on competition principles as it as been done for instance with the EU regulatory framework for telecommunications (see Box 1).

### *5.2 Institutional settings to alleviate or reduce conflict in the enforcement of regulation and competition law*

Even if regulation and competition law pursues similar objectives, a conflict may still arise in the enforcement of both types of rules. This is especially the case when different authorities are involved. To alleviate those risks, several mechanisms are possible. These mechanisms should be adapted to the national circumstances and flexible enough respond to, develop, and change in accordance with, new economic circumstances.[112]

#### *5.2.1 Delimitation of jurisdiction between authorities in charge of enforcement of competition law and regulation*

Single authority in charge of competition law and regulation

The most radical means to alleviate conflict between the implementation of competition law and regulation is to ensure that the same authority is in charge of both legal instruments. In Australia, New Zealand or the Netherlands, the competition authority applies the regulation affecting certain network industries.

Conflicts may, however, still arise even if the same authority is responsible for both competition and regulatory enforcement. There is a risk of conflict that may arise between the objective to protect competition and other objectives pursued by the regulator (for example financial market stability). Regulatory objectives may in some cases take precedence over those pursued by competition rules.[113] Internal co-operation and hierarchical oversight are thus required to ensure close integration of competition and regulatory objectives.

Different authorities in charge of competition law and regulation

A common institutional set-up in many jurisdictions is based on a functional separation of the regulatory and competition law enforcement activities. Enforcement of competition law is therefore overseen by the competition authority while the regulation of prices and access is assigned to an often sector specific regulator.[114]

111 Antitrust Modernization Commission (2007, p.353 recommendation 60).

112 ICN (2004c, p.4), ICN (2005, p.10). For examples of institutional settings to reduce conflict in the telecommunications sector, see OECD (2006).

113 ICN (2004a, p.4), Temple Lang (2008, at section VI).

114 ICN (2004a, p. 4).

The main advantage of this functional approach is transparency and specialised expertise of each body.[115] There are, however, also a number of risks including: inter-agency conflict, inefficient use of resources and increased costs, additional requirements and complexities due to multiple and divergent standards of review, potential delay in closing the transaction in merger cases, potential lack of transparency, risk of inconsistent results when complying with the requirements of both authorities, risk of regulatory gaming by market participants.[116] Thus a sound allocation of tasks between authorities and cooperation is necessary.

When there is a specific regulatory authority, it may have concurrent power to apply competition rules. In those circumstances, one means to alleviate conflict is through the conclusion of cooperation agreements between authorities which set out the respective roles of each. (See the example of the UK in Box 6).

When there is no concurrency power, an allocation of roles may be decided by the laws, courts or by agreements or practices between agencies. For instance, in Mexico, the law provides that the competition authority is responsible for some aspects of regulation: the determination of market power that is needed prior to regulation of a firm's product or services. In the U.S., courts have decided, under the primary jurisdiction doctrine, that the competition authority should remain the appropriate body until the regulatory authority decides when the regulatory decision has a bearing on the competition law dispute.[117] In the EU, the Commission has transferred several telecommunications competition law cases to the national regulatory authorities when they could be dealt with by such national authorities equally efficiently.[118]

**Box 6. The division of work in case of concurrency power: The UK case**

Under the 1998 UK Competition Act[119], the OFT and sector regulators have concurrent power to pursue cases of alleged anti-competitive behaviour. The Competition Act (Concurrency) Regulations 2004 sets out which regulator is to undertake the relevant functions. In 2004 the OFT also released guidelines entitled "Concurrent application to regulated industries" which state that the purpose of the concurrency regulations is to ensure "the coordination of the performance of concurrent functions under the Act by the OFT and the Regulators".[120]

The power of sector regulators to apply competition law has recently been considered in the Cityhook case[121]. Cityhook claimed that the OFT had acted unlawfully in failing to consider whether the case should be transferred to the telecoms regulator Ofcom (at the time Oftel) under the concurrency provisions. At the start of the case the OFT and Ofcom had formally agreed that the OFT would take on the case. The OFT then decided, due to administrative priorities, to close the case. One of the reasons given by the OFT was Ofcom's concurrent jurisdiction in the matter. However, at no point did the OFT engage in a dialogue with Ofcom which would have allowed the regulator the opportunity to take over the case. The court held that as a result the OFT had not respected the concurrency regulations. Proper consideration should have been given to the possible transfer of the case to Ofcom, who should be

115 On those advantages, see also Laffont and Tirole (2000)

116 ICN (2005, p.9). Note that Barros and Hoernig (2004) show that it may be more efficient that both authorities decide a case independently than jointly for three reasons. First, with independent decisions, the probability that cases are solved is highest, even though each authority may give less attention to the case than it was alone. Second, independent decisions are less vulnerable to lobbying. Third, it is also less likely that no authority feels responsible for a given case.

117 *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973). See Hovenkamp (2005 at §19.4).

118 Geradin and Sidak (2005, p.539), Garzaniti and O'Regan (Chapter V).

119 See section 54.

120 See OFT (2004, p.30).

121 *Cityhook Ltd, Cityhook (Cornwall) Ltd v Office of Fair Trading* [2009] EWHC 57 (Admin).

able to decide for itself (based on its own available resources and administrative priorities) whether to take on the case.

The National Audit Office (NOA) 2010 Review of the UK's Competition Landscape[122] also discusses in some detail the role of regulators in applying competition law. One of the findings of the review was that "to date Regulators have used their competition enforcement powers sparingly, with the risk that the case law is not as rich as it needs to be." Regulators tend to prefer using their regulatory powers and the review provided three main disincentives against the use of competition powers; (i) the duration of Competition Act cases, (ii) the difficulty of proving an infringement and the resource commitment and (iii) the impact on a regulators own limited resources when compared to using regulatory powers.

### *5.2.2 Cooperation between competition and regulatory authorities*

When different authorities are in charge of the enforcement of competition law and regulation, they may conclude formal cooperation agreements to alleviate or reduce conflict between their activities. Such cooperation is particularly necessary in some jurisdictions such as the EU where regulatory authorities can not violate EU competition rules and where the principle of proportionality requires the avoidance of multiple procedures on similar facts. Cooperation agreements may provide for the following:[123]

- A right for the competition authority to make submissions or provide industry regulators with comments or experts reports, participate in regulatory hearings, and ask for optional referrals. For instance, under the EU telecommunication regulation, a national regulator performing a regulatory market analysis should associate the national competition authority and then submit its draft decision to the Commission (including the Directorate-General for Competition) for possible veto for violation of EU law (including competition rules).[124] In the U.S., the Antitrust Division of the Department of Justice participates in proceedings, submits comments to, appears before, or consults on competition-related issues with many federal agencies. Also Section 271 of the U.S. Telecommunications Act of 1996 requires the FCC to consult with the DOJ regarding entry in the long distance telephony market and to accord "substantial weight" to the DOJ's evaluation. In Canada, the Competition Bureau has authority under sections 125 and 126 of the Competition Act, to make representations in federal and provincial regulatory proceedings in respect to competition and those representations are given serious consideration by the regulatory authorities.

- Allowing for joint proceedings in certain instances in order to make use of complementary expertise;

- Mandatory agreements, consultations and referrals by the competition authority to the regulator, or notification of investigations that are within the jurisdiction of the other agency as in Portugal (see Box 7), and mandatory consultation or referrals as is the case for example in Germany;

Both authorities may also rely on more informal and soft techniques of co-operation in the following manner, which is important to develop a shared culture:[125]

122 Available at http://www.nao.org.uk/publications/0910/competition_landscape.aspx

123 ICN (2004c, p.8) and ICN (2005) which contains specific examples in some jurisdictions, OECD (2005b).

124 Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, OJ [2002] L 108/33, as amended by Directive 2009/140, Art. 7, 7a and 16(1).

125 ICN (2004d, p.6) and ICN (2005, p.11) which contains specific examples of some jurisdictions.

- Formal and informal contacts, and exchange of views, appointment of contact persons within each agency, appointment of industry experts, regular or ad-hoc meetings to consider pending matters, and the creation of joint working groups or inter-agency task forces. Such contacts usually require the exchange of information that may need to be prescribed by law if the information is confidential.

- Training and exchange of staff and officials on a regular basis, such as providing educational co-operation and vocational training by the other authority, allowing staff at each agency to work at the other, and encouraging staff secondment or exchange of officials between agencies. For instance, the Australian Competition and Consumer Commission (ACCC) has associate commissioners in addition to the five permanent commissioners. Associate commissioners can include appointees from Commonwealth and State regulatory agencies.

**Box 7. Consultation between Sector Regulator and Competition Authority in Portugal**

In 2008 the Portuguese Competition Authority found that *PT Comunicações* (PTC) abused its dominant position in the wholesale market for circuit leasing. Wholesale clients lease circuits for interconnection between fixed and mobile networks and the sector is subject to regulation by ICP-ANACOM, the National Communications Authority. PTC was applying discriminatory conditions for equivalent services, to the benefit of enterprises in its own group and to the detriment of competitors. PTC had proposed its scale of charges to ICP and the regulator decided not to oppose them coming into effect.

In Portugal, competition law and sector regulation are applied in complementary legal frameworks, with the ICP review taking place ex-ante and competition law coming into play ex-post. Intervention (or lack of it) from a sector regulator does not prevent the possibility of the competition authority taking action. Companies are therefore obliged to ensure that their behaviour confirms to both legal frameworks.

Whenever the competition authority carries out an ex –post analysis in the electronic communications sector, it is obliged to consult with ICP. In this case ICP was consulted both at the instigation of the case, and before the decision was adopted by the competition authority. The final decision took into account the opinion issued by ICP on the case.

In setting the fine for PTC the competition authority took as mitigating circumstances the decision of ICP not to oppose the scale of charges when they initially came into effect, and the fact that PTC ceased to apply them after the sector regulators later decision on the issue.

**Box 8. The interaction between payments systems interchange fee regulation and competition law in Australia**

The Reserve Bank of Australia (RBA) has powers to regulate payments systems where it considers it to be in the public interest. In this context the public interest is defined to include financial safety of the payments system, efficiency and competitiveness (Payments Systems (Regulation) Act (1998)). The Australian Competition and Consumer Commission concurrently has general powers to enforce the competition law's price fixing provisions and to grant applications for exemptions from the price fixing prohibitions (known as "authorisation") where there is net public benefit. There is a Memorandum of Understanding between the two agencies to facilitate efficient processes and outcomes.

When using its powers, the RBA's policy is to encourage participants to voluntarily reform their payments systems and, failing a voluntary solution, the RBA would generally regulate. The RBA's power to regulate includes, amongst other things, the power to make standards setting or controlling interchange fees paid between institutions for processing payments within a payments system. Indeed, under this regulatory framework there have been voluntary interchange fee reforms and also the RBA has imposed regulations on a number of occasions.

In one case of attempted voluntary reform, the participants in the Electronic Funds Transfer Point of Sale system (EFTPOS), agreed to adopt a zero interchange fee in response to firm moral suasion by the RBA of a reasonably

specific nature. Because the proposal for a zero interchange fee was by agreement between the participants, the conventional wisdom was that the agreement would risk breaching the prohibition against price fixing unless the participants sought and were granted ACCC authorisation. The ACCC did indeed grant authorisation but merchant customers of the system successfully appealed to the Australian Competition Tribunal Re EFTPOS Interchange Fees Agreement [2004] ACompT 7 (25 May 2004) who quashed the grant of authorisation and the voluntary reform therefore failed. This ultimately resulted in further reform work and a mixed voluntary and regulated outcome.

In another case where voluntary reform failed to satisfy the RBA's reform priorities for the Australian part of the Visa and MasterCard systems, the RBA used its powers to regulate the interchange fees The Setting of Wholesale ('Interchange') Fees in the Designated Credit Card Schemes (2005). In this case, the question then arose, as to whether participants in such payments systems who followed the RBA's requirements might be in contravention of Australia's price fixing prohibitions These are now contained in the Competition and Consumer Act (2010) and previously known as the Trade Practices Act (1974). There are a number of possible theories: perhaps there is no breach of the competition prohibitions because the RBA regulations remove the freedom of agreement between the parties and therefore there is no real "agreement" to set prices; perhaps there is an agreement but the agreement did not have the purpose or effect of fixing prices because the regulation not the agreement had that purpose and effect; or perhaps the enactment of the RBA's powers constitute a limited implied repeal by Parliament of the general competition law prohibition. On the other hand, perhaps the competition law prohibition would be contravened.

ACCC litigation was at least a theoretical possibility and private sector litigation was reasonably likely. Rather than leave the answers to these questions uncertain, an exemption from the competition law prohibitions were put in place, initially temporarily by regulation and subsequently by legislation. After the temporary regulation was replaced the permanent legislation is contained within section 18A of the Payments Systems (Regulation) Act (1998) and this operates in conjunction with section 51(1)(a) of the Competition and Consumer Act (2010).

### *5.2.3 Consistent interpretation of regulation and competition law via judicial appeal*

Another important means to alleviate conflict between the implementation of competition law and regulation is to ensure that both sets of rules are interpreted consistently. This may be achieved through the following techniques:

- Ensuring a common appeal framework against the decisions of the competition law and regulatory authorities.[126] This is the case in Belgium, France and the UK where the appeal against the decisions of the competition authorities and of some network industry regulators are heard before the same appeals court.

- Ensuring that the competition authority or the regulatory authority can be heard by judges as *amicus curiae*.

- Ensuring that competition authorities adopt interpretative guidelines clarifying in advance the application of competition law to the regulated sectors. Such guidelines are useful for firms but also for judges. For instance in the EU, the European Commission adopted guidelines on the application of competition policy in the telecommunications or postal sectors.[127] This was also the case in Japan in the electricity, gas and telecommunications sectors.[128]

126 ICN (2004d, p.8).

127 European Commission (1998a) and (1998b). Temple Lang (2008, at section I).

128 ICN (2005, p.61).

### *5.3 The importance of advocacy by competition authorities*

As defined by the ICN Advocacy Report[129], "Competition advocacy refers to those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition". Thus advocacy refers to practically all the activities of a competition authority that do not fall under the enforcement activities.

The effectiveness of such competition advocacy is affected by three main factors: the timing of the consultation, the compulsory or non-compulsory status of the consultation and the degree to which the recommendations made are binding.[130]

In the context of a regulated conduct defence, advocacy implies convincing other public authorities to abstain from either designing or enforcing a regulation in an unduly anticompetitive way. As explained above, this implies (i) encouraging and participating in competition impact assessment, (ii) cooperating with regulatory agencies to ensure that they fulfil their mandates by respecting competition policy objectives, and (iii) co-operating with judicial bodies to ensure they interpret regulatory provisions in a way consistent with competition policy.

In the specific context of deregulation, ICN (2002, p. 70) observes that advocacy has been carried out in three main ways:

- Elaboration of sector specific studies that consider market structures, emphasizing the benefits of allowing access and of introducing competition,

- Implementation of cooperation agreements between the sector regulatory agencies and the competition authorities, especially useful to detect restrictive anticompetitive practices on competition by the regulated agents,

- Drafting of guidelines and sector codes of conduct or compliance with the competition law.[131]

The practice shows that such advocacy has been particularly useful in the sectors of telecommunications, electricity, transport, and financial services.

## 6. Conclusion

The "regulated conduct defence" shields companies who carry out potentially anticompetitive behaviour from enforcement action when the behaviour is required under federal or state regulation.

A number of key points emerge from this paper:

- The regulated conduct defence is grounded in several legal principles (state sovereignty, federalism, subsidiarity, legal certainty and legitimate expectations). The openness of competition law authorities to the legitimacy of regulated conduct defences is essential for ensuring that companies are not placed in situations where they face inconsistent legal demands. The regulated

129 ICN (2002, p. 25).

130 ICN (2002, pp.59-67). Also Cooper and Kovacic (2010, p.1581).

131 See above footnotes 127 and 128.

conduct defence may, however, entail substantial welfare costs for society. Therefore, the courts should adopt a cautious approach when applying the defence.

- Regulations can at times require actions that would, absent the regulation, constitute violations of competition law. (i) When regulation complements and pursues the same objectives as competition law (e.g., total or consumer welfare), regulated conduct is less likely to be at odds with competition law, assuming the regulation and competition law rigorously implement the common goal. (ii) When regulation restricts competition (e.g. by establishing entry barriers or fixing minimum prices), disputes may require weighing of different societal objectives.

- The regulated conduct defence is a narrower form of immunity than exempting an entire sector from the application of competition law and permitting this defence should be preferred to broad, sector-wide exemptions from competition law.

- The regulated conduct defence is based on several legal doctrines such as express immunity, implied immunity and the state action doctrine that have been developed pragmatically in the case-law. Although the core principles are relatively clear in many jurisdictions, uncertainties remain.

- The conditions of application of a regulated conduct defence depend on the hierarchy of norms. When competition law and regulation are at the same hierarchical level, the regulated conduct defence applies if one of the legal rules provides for competition law immunity (express immunity) or if there is a plain repugnancy in the application of both legal rules to the challenged conduct (implied immunity). In some jurisdictions, the defence also applies where there is no added-value in applying competition law in conjunction with regulation. When competition law is at a superior level to the regulation, the regulated conduct defence applies when the challenged conduct is imposed or at least actively supervised by the regulator.

- The regulated conduct defence should only apply in cases where companies have no autonomy over their potentially anti-competitive actions. If a regulation strengthens or facilitates anti-competitive behaviour without directly imposing specific conduct, a company's conduct is open to discretion and competition laws should in principle apply to the regulated conduct.

- In some jurisdictions competition rules enacted at the federal level prevent State regulators from imposing or facilitating a conduct that would otherwise violate the competition law.

- The regulated conduct defence is sometimes used as a defence in merger cases on the basis that merged companies, even if they gained market power, would not be able to harm others due to access or price regulations, that constrain the ability to exercise market power.

- Institutional settings can reduce potential inconsistencies between the design and the enforcement of regulatory structures and competition law, for example by (i) assessing competitive effects of regulations before the adoption of regulations, (ii) providing regulators with competition law enforcement powers or a competition authority with regulatory powers, (iii) ensuring mutual co-operation between regulators and competition authorities through both formal and informal agreements and (iv) ensuring a consistent interpretation of regulatory and competition rules through, for example, advocacy by competition authorities.

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# NOTE DE RÉFÉRENCE

*Par le Secrétariat*[1]

## 1. Introduction

La « défense fondée sur une conduite réglementée » protège des conséquences de la législation de la concurrence[2] les comportements qui sont imposés par une réglementation fédérale ou d'un État. Quand les entreprises invoquent cette doctrine comme moyen de défense contre des accusations de comportement anticoncurrentiel illégal, elles demandent à bénéficier de la « défense pour conduite réglementée » ou d'une « exemption pour conduite réglementée »[3]. Cette défense a des liens directs avec un certain nombre de doctrines juridiques conduisant à la non-application de la législation de la concurrence dans certaines circonstances : immunité explicite, immunité implicite ou doctrine de l'action de l'État.

La défense pour conduite réglementée est un élément important pour faire en sorte que l'État puisse exercer son pouvoir souverain d'appliquer la réglementation qu'il juge justifiée pour des raisons économiques et/ ou sociales même si cette réglementation peut être en contradiction avec la politique de la concurrence[4]. Cette défense est aussi importante pour que les entreprises ne se heurtent pas à de multiples exigences contradictoires, émanant en particulier de la législation de la concurrence et de réglementations. Ces exigences légales contradictoires comportent des risques particulièrement sérieux étant donné la large applicabilité de la législation de la concurrence et ses interprétations qui évoluent. Dans le cas particulier où la structure réglementaire a les mêmes objectifs que la législation de la concurrence, la défense pour conduite réglementée peut aussi se justifier par une analyse coûts-avantages quand l'application de la législation de la concurrence en plus de la réglementation n'apporte pas de valeur ajoutée.

La défense pour conduite réglementée comporte toutefois elle aussi des risques importants, avec des coûts potentiels élevés pour la société. En effet, cette défense peut conduire à l'application d'une réglementation excessivement anticoncurrentielle et entraînant pour l'accomplissement de son objectif un coût de bien-être injustifié[5]. Les restrictions gouvernementales de la concurrence peuvent être aussi dommageables pour le bien-être des consommateurs que les restrictions privées. C'est particulièrement le cas si la réglementation en question résulte de pressions exercées par des intérêts privés, ce qui peut être plus fréquent dans les périodes de fléchissement économique. Cette défense peut aussi conduire à exempter

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2 On ne considère pas dans ce document les règles relatives aux aides d'État qui sont applicables dans certaines juridictions.

3 On peut aussi mentionner les termes connexes suivants : « exemption relative aux industries réglementées », « défense des industries réglementées » ou « théorie des industries réglementées ». Voir Bureau de la concurrence du Canada (2010, p. 1).

4 Comme l'ont observé Carlton et Picker (2007, p. 15), la défense pour conduite réglementée peut changer le lieu de la concurrence, la déplaçant du marché vers les organismes légaux.

5 Voir OCDE (2011a) et OCDE (2011b). Le manuel pour l'évaluation de la concurrence sert à identifier les réglementations qui restreignent inutilement la concurrence au-delà de ce qui est nécessaire pour atteindre leur objectif.

de l'application de la législation de la concurrence un comportement qui n'est que faiblement réglementé par l'État.

On souligne dans le présent document un certain nombre de points clés :

- Les réglementations peuvent quelquefois imposer des actions qui, sans réglementation, constitueraient des violations potentielles de la législation de la concurrence.

- Les exemptions sectorielles sont un moyen d'éviter les exigences discordantes pour les entreprises, mais elles sont en général excessivement larges et il existe des solutions plus précisément adaptées. La défense pour conduite réglementée offre une forme d'immunité plus étroite que celle consistant à exempter un secteur entier de l'application de la législation de la concurrence.

- L'application de la défense pour conduite réglementée est plus complexe dans les environnements de gouvernance à plusieurs niveaux, où des principaux légaux différents peuvent entrer en conflit.

- La défense pour conduite réglementée ne doit s'appliquer que quand les entreprises n'ont pas de liberté quant à leur comportement.

- Dans certaines juridictions, les règles de la concurrence promulguées au niveau fédéral empêchent les autorités de régulation au niveau des États d'imposer ou de faciliter des conduites qui seraient en infraction avec ces règles.

- La défense pour conduite réglementée peut être invoquée dans les affaires de fusion.

- Les environnements institutionnels peuvent jouer un rôle important pour réduire les contradictions potentielles entre les structures réglementaires et la législation de la concurrence, dans la conception et dans l'application de ces dernières.

- La défense pour conduite réglementée peut entraîner des coûts de bien-être substantiels pour la société et devrait donc être appliquée avec précaution par les tribunaux.

Le présent document de base est organisé comme suit. La Section 2, introduction de caractère général, expose la raison d'être de la défense pour conduite réglementée et les risques pour le bien-être des consommateurs. Dans cette Section, on caractérise les principales différences entre la législation de la concurrence et la réglementation, les différentes relations entre ces deux ensembles de règles et le champ de la défense pour conduite réglementée. Les Sections 3 et 4 abordent de manière plus détaillée les conditions d'application de la défense pour conduite réglementée dans les deux principales branches de la politique de la concurrence : premièrement, les ententes anticoncurrentielles et les affaires d'abus de position dominante/monopolisation et, deuxièmement, l'examen des fusions. La Section 5 passe des questions juridiques de fond aux questions institutionnelles et considère dans les mesures possibles pour atténuer ou réduire les conflits nuisibles entre la législation de la concurrence et la réglementation au stade de leur conception et de leur mise en œuvre. Enfin, la Section 6 présente une brève conclusion.

## 2. La défense pour conduite réglementée : raison d'être et risques[6]

### *2.1 Les objectifs et les outils de la législation de la concurrence et de la réglementation*

La législation de la concurrence a pour but spécifique d'améliorer le fonctionnement des marchés au profit des consommateurs. La législation de la concurrence offre deux principaux outils d'interdiction : (i) l'interdiction des ententes anticoncurrentielles et des abus de position dominante (ou monopolisation) de manière à empêcher les dommages aux consommateurs qui résulteraient d'augmentations artificielles de la puissance de marché ; et (ii) l'interdiction de fusions qui amoindriraient substantiellement la concurrence effective. Dans la plupart des juridictions, ces outils s'appliquent uniformément à tous les secteurs économiques, sauf mention contraire.

La réglementation est un concept beaucoup plus large qui peut avoir des objectifs économiques ou non économiques très différents[7]. Elle recourt à des instruments variés et est habituellement plus prescriptive que la législation de la concurrence[8] :

- La réglementation peut corriger des *défaillances de marché* et, comme la législation de la concurrence, améliorer le fonctionnement des marchés au profit des consommateurs :

  - Elle peut réduire les *coûts de transaction*, par des règles relatives aux droits de propriété ou aux contrats.

  - Elle peut traiter les *asymétries d'information* entre les agents économiques qui ne se corrigent pas facilement par l'expérience, avec par exemple des règles assurant des normes minimales de qualité ou empêchant les dommages aux consommateurs.

  - Elle peut traiter les *externalités*, c'est-à-dire les situations où les agents économiques négligent les répercussions de leurs décisions sur les tiers, qui peuvent être favorables (comme dans le cas de l'éducation) ou défavorables (comme dans le cas de la pollution, de l'encombrement de la circulation ou de l'instabilité des marchés financiers).

  - Elle peut traiter de manière permanente la *puissance de marché structurelle* quand les caractéristiques du secteur empêchent une concurrence effective (par exemple, monopole naturel). Dans ce cas, la réglementation peut viser à imiter le résultat d'une concurrence effective avec, par exemple, une réglementation des prix de détail.

  - Elle peut aussi traiter temporairement la *puissance de marché quand le secteur est en cours de libéralisation* mais que l'application de la législation de la concurrence n'est pas suffisante pour assurer un marché concurrentiel. Dans ce cas, la réglementation peut diriger le secteur vers une concurrence effective par des obligations structurelles (séparation verticale) ou comportementales (accès des tiers obligatoire)[9]. C'est le cas par exemple du cadre

6 Cette section s'inspire largement des travaux de l'International Competition Network, voir ICN (2004a).

7 Baldwin et Cave (1999, chapitre 1), Breyer (1982, chapitre 1).

8 Comme le note l'ICN (2005, p. 7) : « la législation de la concurrence met l'accent sur ce que les entreprises ne doivent pas faire, alors qu'à l'inverse la réglementation dit aux agents de marché ce qu'ils doivent faire ».

9 Pour ce qui est des mesures de séparation structurelle, voir la Recommandation du Conseil de l'OCDE concernant la séparation structurelle (OCDE, 2001) et le rapport sur la mise en œuvre de la Recommandation sur la séparation structurelle (OCDE, 2011c).

réglementaire commun pour les réseaux et services de communications électroniques dont il est question dans l'encadré 1.

- La réglementation peut traiter des *questions distributionnelles*, en assurant par exemple la fourniture de services minimums ou universels à tous les consommateurs à des prix abordables. Dans ces circonstances, la réglementation peut sacrifier l'efficience au profit de l'équité, mais la réglementation doit alors essayer de réduire dans toute la mesure du possible le coût d'efficience pour la société[10]. Dans l'Union européenne, par exemple, la fourniture du service universel de télécommunications est conçue de manière à ne pas fausser la concurrence et à réduire autant que possible les distorsions de marché[11].

- La réglementation peut aborder beaucoup d'autres questions comme la santé, les normes de sûreté et le risque.

La réglementation peut quelquefois souffrir de défaillances[12]. Elle peut dépasser ce qui est nécessaire pour réaliser les objectifs de l'intérêt public et imposer un coût de bien-être disproportionné[13]. C'est particulièrement le cas quand la réglementation résulte de pressions d'entités privées en faveur de leurs intérêts propres et aux dépens de l'intérêt général (captation de la réglementation). Par exemple, la réglementation peut servir de mécanisme coordinateur pour un cartel. En outre, il existe des risques de distorsions économiques, différents secteurs étant soumis à des environnements réglementaires différents. Ces distorsions peuvent avoir un impact négatif sur le bien-être économique en faussant les décisions des consommateurs quant aux produits et services qu'ils achètent. La réglementation peut aussi devenir rapidement périmée, notamment dans des industries en évolution rapide pour des raisons technologiques qui ne sont pas en prise directe avec le régime juridique, ou quand la libéralisation a débuté et que certaines entreprises agissent promptement pour s'adapter à la nouvelle situation.

Du point de vue de l'intérêt public, il importe donc que la réglementation ne s'applique que quand ses avantages économiques et sociaux l'emportent sur ses coûts. Du fait des défaillances potentielles de la réglementation, une concurrence effective et la politique de la concurrence peuvent dans certains cas offrir une meilleure solution que la réglementation.

D'après Carlton et Picker (2007, p. 51) : « Les avantages et les inconvénients relatifs de chacun de ces deux mécanismes sont devenus plus clairs au cours du temps. La réglementation a produit des subventions croisées et des mesures de faveur au profit d'intérêts particuliers, mais a permis de spécifier des prix et des règles spécifiques sur la façon dont les entreprises doivent traiter les unes avec les autres. La législation antitrust, notamment quand au cours de la dernière trentaine d'années elle est devenue économiquement cohérente, s'est avérée raisonnablement apte à promouvoir la concurrence, en évitant de favoriser des intérêts particuliers, mais non à formuler des règles spécifiques pour des industries particulières. Le mouvement de déréglementation partielle ou totale a été une réponse à la reconnaissance des avantages relatifs de la législation de la concurrence et de la réglementation. Cela n'implique pas qu'aucun secteur ne sera réglementé, mais que la concurrence, sous la seule contrainte de la législation de la concurrence, couvrira un nombre croissant d'activités, même dans des industries réglementées ». D'après Temple Lang

10 Sur cette question, voir OCDE (2004).

11 Directive 2002/22/CE du Parlement européen et du Conseil du 7 mars 2002 concernant le service universel et les droits des utilisateurs au regard des réseaux et services de communications électroniques, JO [2002] L 108/51, modifiée par la directive 2009/136, art. 1(2) et 3(2), et affaire C-220/07, *Commission/France* [2008] Recueil de jurisprudence I-95, paragraphes 29 et 31.

12 Peltzman (1976) et (1989), Stigler (1971).

13 Pour quelques exemples, voir les contributions dans Amato et Laudati (2001).

(2008, section II), « la législation de la concurrence donne seulement le pouvoir de faire cesser des actions illégales, émanant d'entreprises ou découlant de mesures étatiques, déjà identifiables, tandis que la réglementation donne le pouvoir de modifier une situation existante qui est totalement légale, afin de promouvoir des objectifs réglementaires. Les pouvoirs de la réglementation, ou les pouvoirs de la législation de la concurrence utilisés ou détournés à des fins de réglementation, créent ainsi la tentation « d'améliorer » le marché existant »[14].

**Encadré 9. La réglementation économique des communications électroniques dans l'UE**

En 2002, l'Union européenne a sensiblement modifié la réglementation économique du secteur des communications électroniques. L'objet de la réforme était de rapprocher la réglementation de la réalité économique, de la rendre technologiquement neutre et de faire en sorte qu'elle soit à la fois souple et plus harmonisée entre les États membres. Conformément à la directive cadre[15], les autorités réglementaires nationales procèdent en trois étapes pour réglementer un marché. Ces étapes doivent être appliquées de façon prospective et répétées tous les 2 à 3 ans afin de tenir compte de l'évolution des marchés.

Premièrement, l'autorité réglementaire sélectionne, sur base d'une recommandation de la Commission européenne, les marchés justifiant une réglementation éventuelle sur la base de trois critères cumulatifs : i) la présence de barrières élevées et non provisoires à l'entrée, qu'elles soient de nature structurelle, légale ou réglementaire, ii) une structure du marché qui, compte tenu des obstacles à l'entrée, ne favorisera pas une concurrence effective à l'horizon retenu dans l'analyse du marché (2 à 3 ans) et iii) l'insuffisance du seul droit de la concurrence pour remédier de façon adéquate aux défaillances des marchés. Ensuite, l'autorité réglementaire définit les contours par produits et géographique des marchés retenus en appliquant les méthodes d'analyse de la concurrence fondées sur le test du monopole hypothétique (augmentation faible mais non négligeable et non transitoire des prix, ou SSNIP) ;

Deuxièmement, l'autorité réglementaire analyse le marché pour déterminer si un ou plusieurs opérateurs jouissent d'un pouvoir de marché significatif, équivalant à une position dominante en vertu du droit de la concurrence ;

Troisièmement, l'autorité réglementaire impose aux opérateurs qui jouissent d'un pouvoir de marché significatif les obligations réglementaires les plus appropriées et proportionnées prévues dans les directives de l'UE, notamment en termes de transparence, de non-discrimination, de séparation comptable, d'accès des tiers, de contrôle des prix ou de séparation fonctionnelle.

Cette réglementation fondée sur la concurrence présente plusieurs avantages. Elle est plus souple et garantit qui les décisions des autorités réglementaires nationales sont fondées sur des principes économiques sains et reflètent la réalité du marché. Elle assure une levée progressive des obligations à mesure que la concurrence se développe sur les marchés pertinents (clauses d'extinction marché par marché) et facilite la transition vers une simple application du droit de la concurrence. Une telle approche exige une étroite coopération entre les autorités réglementaires et les autorités de la concurrence.

### *2.2 La relation entre la législation de la concurrence et la réglementation*

Quand le comportement d'une entreprise est soumis directement ou indirectement à la réglementation, il peut exister un conflit entre la mise en œuvre de la réglementation et l'application de la législation antitrust.

14 Sur la comparaison entre la législation antitrust et la réglementation du point de vue du fond et des processus, voir aussi Katz (2004, p. 245-246) et Laffont et Tirole (2000).

15 Directive 2002/21/CE du Parlement européen et du Conseil du 7 mars 2002 relative à un cadre réglementaire commun pour les réseaux et services de communications électroniques, JO [2002] L 108/33, modifiée par la directive 2009/140, art.14-16 et la Commission européenne (2002). Voir Garzaniti et O'Regan (2010, chapitre 1), Monti (2003), de Streel (2003).

### *2.2.1 Complémentarité de la législation de la concurrence et de la réglementation*

Dans la plupart des cas, la législation de la concurrence et l'application de la réglementation poursuivent des objectifs distincts, utilisent des outils différents et touchent des aspects du comportement des entreprises différents. En conséquence, ces deux instruments se complètent mutuellement et peuvent s'appliquer de manière cumulative.

Par exemple, la réglementation visant à limiter la pollution ne rend pas moins nécessaire d'interdire par la législation de la concurrence les ententes anticoncurrentielles, les abus de position dominante ou les fusions anticoncurrentielles. De même, l'étiquetage obligatoire ou l'interdiction de la publicité mensongère visent à promouvoir la transparence et à accroître la capacité des consommateurs de choisir entre différentes possibilités, et complètent la discipline de concurrence effective imposée par la législation de la concurrence.

La complémentarité de la législation de la concurrence et de la réglementation se manifeste aussi dans des secteurs récemment libéralisés où le rôle de la réglementation a radicalement changé. Historiquement, il était du ressort de la réglementation de délivrer les licences et de fixer les prix. Maintenant, dans certains secteurs libéralisés, la réglementation repose de plus en plus sur une analyse de la concurrence et respecte les forces du marché. Comme l'affirmait M. Monti (2003), ancien Commissaire à la concurrence de l'Union européenne, « les instruments de la concurrence et les outils réglementaires sont des moyens complémentaires. Ils traitent un problème commun et visent un but commun. Le problème réside dans les niveaux élevés de puissance de marché et les risques qu'on en abuse, et le but est de placer l'utilisateur final au centre de toute activité économique »[16]. Les deux instruments juridiques ont des caractéristiques propres : la réglementation ne porte que sur les principaux aspects de la conduite des entreprises tels que l'accès ou la tarification finale, créant le cadre ex ante que les entreprises réglementées doivent suivre. Les interdictions des ententes et abus établies par la législation de la concurrence s'expriment en termes plus généraux et leur respect est imposé a posteriori. L'interdiction des abus de position dominante, par exemple, vise à s'opposer aux comportements qui peuvent fausser la concurrence et n'est pas spécifiquement couverte par la réglementation. Dans la plupart des juridictions, quand une industrie ou une entreprise est réglementée, l'application de la législation de la concurrence représente un outil additionnel, la base étant déterminée par la réglementation.

### *2.2.2 Substituabilité de la législation de la concurrence et de la réglementation*

Dans certains cas, cependant, l'application de la législation de la concurrence et celle de la réglementation sont incompatibles du fait que la réglementation peut restreindre la concurrence (par exemple, en créant des barrières à l'entrée) ou imposer des comportements que la législation de la concurrence peut condamner (par exemple, la fixation de prix minimums). Dans de tels cas, la réglementation peut impliquer une exemption de l'application de la législation de la concurrence.

Une telle exemption peut être bénéfique à la société quand la réglementation a pour but de corriger une défaillance de marché ou vise des objectifs distributionnels, tandis que simultanément les effets anticoncurrentiels possibles sont réduits au minimum. Cependant, si la réglementation dépasse ce qui est nécessaire pour réaliser les objectifs de l'intérêt public, l'exemption de la législation de la concurrence est dommageable.

Il importe donc que les exemptions de la législation de la concurrence n'aient lieu que quand leurs avantages économiques et sociaux l'emportent sur leurs coûts. C'est pourquoi l'OCDE (1997) a adopté la position qu'il faut réduire le plus possible ou même éliminer les exemptions de la législation

[16] Voir aussi les remarques de l'actuelle Assistant Attorney General des États-Unis, C. Varney (2010, p. 14).

générale de la concurrence : « À titre de stratégie générale en matière de réforme, les pouvoirs publics devraient élargir le champ et l'efficacité de la politique de la concurrence. Le champ et l'efficacité du droit de la concurrence et des autorités chargées de la concurrence devront être réexaminés, et renforcés si besoin est. Les exemptions au droit de la concurrence devraient être supprimées, dès lors que l'on ne peut prouver l'existence d'intérêts publics supérieurs qui ne peuvent être servis par des moyens plus satisfaisants »[17].

Ainsi, dans le cas où on a mis en lumière une raison particulière justifiant une exemption, il faut envisager les moyens de limiter son champ le plus possible. Par exemple, une exemption étroite et ciblée est préférable à une large exemption. Dans le même ordre d'idées, un monopole légal exigeant que tous les producteurs d'un certain produit vendent à un exportateur agréé particulier peut être un substitut inférieur à un système qui permet aux producteurs de conclure des accords de coopération pour la vente à l'exportation mais qui ne les oblige pas à le faire.

C'est un point maintenant clairement compris dans la plupart des juridictions où la solution « d'exempter » de l'application de la législation de la concurrence tout un secteur réglementé a été progressivement abandonnée pour différentes raisons[18] : (i) le progrès technique a permis la concurrence dans beaucoup d'environnements relevant auparavant du monopole naturel et a justifié la libéralisation de plusieurs industries de réseau, (ii) la législation de la concurrence a été de plus en plus reconnue comme un moyen de régulation plus adéquat étant donné les limitations de la réglementation sectorielle et (iii) le recours accru à la science économique dans l'analyse de la législation de la concurrence a permis un meilleur équilibre entre les effets pro- et anti-concurrentiels.[19]

En dehors du cas d'une exemption sectorielle générale, la question est de savoir si et à quelles conditions on peut exempter une conduite réglementée particulière de l'application de la législation de la concurrence. Étant donné les coûts de bien-être possibles d'une exemption de ce genre[20], les conditions de la défense pour conduite réglementée doivent être conçues de manière stricte.

### *2.3 Le champ de la défense pour conduite réglementée*

Dans la pratique, les tribunaux ont restreint l'utilisation de la défense pour conduite réglementée afin d'en diminuer le risque et les coûts potentiels pour la société. Les tribunaux acceptent généralement la défense pour conduite réglementée quand le comportement eu cause de l'entreprise est le choix d'un gouvernement souverain. Au contraire, elle n'a pas été acceptée quand des parties privées l'ont invoquée pour manipuler le processus démocratique de manière à s'arroger un pouvoir effectif échappant à toute surveillance sur un marché[21]. Comme le note l'ICN (2004a, p. 4), « l'action répressive antitrust, à moins qu'il n'existe une exemption spécifique, est toujours possible quand il y a une restriction de la concurrence tombant sous le coup de l'interdiction stipulée par la législation antitrust et que cette restriction peut être attribuée à une décision autonome de l'entreprise, c'est-à-dire qu'elle n'est pas imposée par la réglementation. Dans certains juridictions, la législation antitrust peut aussi s'appliquer quand la

17 Voir aussi OCDE (2005a, p. 14).

18 Voir Baldwin et Cave (1999, chapitre 10), Breyer (1982, parties II et III) et Cooper and Kovacic (2010, p.1558). Sur les moyens et les avantages d'introduire la concurrence dans les secteurs réglementés, voir OCDE (2005a).

19 Sur ce dernier point, voir en particulier Varney (2010).

20 Carlton et Picker (2007, p. 16).

21 Hovenkamp (2005, paragraphe 18.5).

réglementation anticoncurrentielle n'est manifestement pas de l'intérêt général et qu'elle délègue aux entreprises réglementées elles-mêmes le pouvoir d'appliquer ses dispositions ».

La défense pour conduite réglementée a différentes conditions et implications suivant qu'elle est utilisée dans une affaire antitrust ex post ou ex ante. On considère ces deux types d'affaires dans les deux sections suivantes.

## 3. La défense pour conduite réglementée dans les affaires d'ententes anticoncurrentielles et de monopolisation ou d'abus de position dominante

Dans les affaires relatives à des ententes anticoncurrentielles et à des abus de position dominante ou monopolisation, la défense pour conduite réglementée repose sur plusieurs doctrines qui permettent l'exemption de la législation de la concurrence sous certaines conditions. Ces doctrines sont principalement de nature légale et ne satisfont pas toujours à de stricts critères d'efficience économique. Elles se sont développées pragmatiquement au cas par cas sans s'appuyer sur un cadre vraiment cohérent. Un des principaux critères pour permettre une exemption de la législation de la concurrence distingue si la réglementation a été établie au même niveau que la législation de la concurrence ou à un niveau inférieur. On considère successivement ces deux circonstances dans les deux sous-sections suivantes.

### *3.1 La défense pour conduite réglementée quand la réglementation est au même niveau légal que la législation de la concurrence*

#### *3.1.1 Défense pour conduite réglementée et immunité à l'égard de la législation antitrust explicites dans la loi*

La défense pour conduite réglementée peut reposer sur une exemption explicite de la législation de la concurrence. Cette immunité peut être stipulée par la législation de la concurrence elle-même ou par une réglementation quand celle-ci est adoptée au même niveau que la législation de la concurrence. L'exemption peut être plus ou moins forte : elle peut assurer une immunité limitée à l'égard de la législation de la concurrence pour un comportement spécifique ou des types d'ententes spécifiques entre entreprises ; elle peut s'appliquer à des domaines étroits mais assurer une immunité plus générale ; ou elle peut créer une immunité générale pour des domaines entiers.

Aux États-Unis, les dispositions de la législation de la concurrence sont contenues dans les lois fédérales et dans celles des États. La législation fédérale de la concurrence, que la Cour suprême a qualifiée de « Grande charte de la libre entreprise »[22], s'applique en général au commerce inter-États ou à toute activité touchant le commerce inter-États, que le comportement en question soit ou non soumis à une réglementation fédérale ou d'État.

Certaines lois réglementaires fédérales, cependant, créent expressément une immunité à l'égard des dispositions de la législation fédérale de la concurrence soit directement, soit en conférant à un organisme fédéral le pouvoir d'octroyer par voie de décision administrative une immunité à l'égard de la législation de la concurrence[23]. En général, ces exemptions explicites sont interprétées de manière stricte[24], ce qu'approuve l'Antitrust Modernization Commission, organe bipartite[25]. Il existe dans la loi plus de trente

22 *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972).

23 Voir Antitrust Modernization Commission (2007, p. 347-356), Carlton et Picker (2007, p. 16-19), Hovenkamp (2005, paragraphe 19.7).

24 *FMC v. Seatrain Lines*, 411 U.S. 726, 733 (1973), qui interprète l'exemption comme couvrant les accords d'exploitation mais non les fusions.

25 Antitrust Modernization Commission (2007, p. 356, recommandation 61).

exemptions de la législation de la concurrence, concernant principalement les secteurs suivants : agriculture et pêche, transports maritimes ou ferroviaires[26], banque, assurance et services financiers, fédérations sportives, associations professionnelles, ententes à l'exportation, travail, santé, éducation[27]. D'après l'Antitrust Modernization Commission[28] : « Les immunités légales (…) ne devraient être octroyées que rarement, et seulement quand, et tant que, il est clairement prouvé que la conduite en question ferait tomber les acteurs sous le coup de la législation antitrust *et* qu'elle est nécessaire pour répondre à un objectif sociétal spécifique qui est supérieur à l'avantage d'un marché libre pour les consommateurs et pour l'économie des États-Unis en général ».

Dans l'Union européenne, les dispositions en matière de concurrence sont contenues dans le Traité sur le fonctionnement de l'Union européenne (TFUE), qui est la charte constitutionnelle de base de l'Union européenne[29] et dans les lois des États membres. La législation de la concurrence de l'Union européenne s'applique aux « entreprises » privées et publiques, que la Cour de justice a définies comme toute entité exerçant une activité économique quel que soit son statut juridique ou son mode de financement[30]. La notion d'activité économique elle-même dépend de la fonction exercée par l'entité, et elle consiste à offrir des biens ou services sur le marché, cette activité pouvant, au moins en principe, être exercée par des entreprises privées dans un but lucratif. Ainsi, la législation de la concurrence de l'Union européenne s'applique à toutes les entités, privées ou publiques, qui offrent des produits ou services normalement fournis contre rémunération. À l'inverse, la législation de la concurrence ne s'applique pas aux activités où les États membres exercent un pouvoir souverain (comme le contrôle de l'espace aérien ou la surveillance anti-pollution) ou qui sont gouvernées par le principe de solidarité comme les régimes d'assurance sociale obligatoires (pour des exemples dans le secteur de la santé, voir l'Encadré 2).

La législation de la concurrence de l'Union européenne s'applique à tous les secteurs de l'économie avec de très rares exemptions. Le TFUE prévoit une exemption possible dans le secteur agricole[31]. Cependant, le Conseil des ministres a décidé que la législation de la concurrence serait applicable à l'agriculture avec certaines exemptions de l'Article 101 du TFUE afin d'assurer un bon fonctionnement de la Politique agricole commune et des organisations nationales des marchés agricoles[32]. Le TFUE prévoit aussi des exemptions pour l'énergie nucléaire et les équipements militaires[33]. Le Conseil a aussi établi une exemption de l'Article 101 du TFUE pour certains accords dans les transports par chemin de fer, par route ou par voie navigable qui ont pour objet des améliorations techniques ou la coopération technique[34]. Ainsi, dans tous les autres secteurs, la législation de la concurrence s'applique pleinement. La Commission européenne

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26 Le Shipping Act de 1984, 46 USCA § 1706, le Motor Carrier Act de 1980, 49 USCA § 10706(b) et le Staggers Rail Act de 1980, 49 USCA § 17706(a) permettent aux entreprises de pratiquer une tarification conjointe sans violer les dispositions antitrust réprimant la collusion.

27 Voir la liste des exemptions légales de la législation antitrust dans Antitrust Modernization Commission (2007, p. 378).

28 Antitrust Modernization Commission (2007, p. 350, recommandation 57).

29 Affaire C-294/83, *Les Verts c. Parlement européen* Rec. [1986] 1339, paragraphe 23.

30 Affaire C-41/90, *Hofner et Elser c. Macroton* [1991] I-1979.

31 TFUE, Art. 42.

32 Règlement (CE) n° 1184/2006 du Conseil du 24 juillet 2006 portant application de certaines règles de concurrence à la production et au commerce des produits agricoles, JO [2006] L 214/7. Voir Whish (2008, p. 957-961).

33 TFUE, Art. 346(1b). Voir Whish (2008, p. 957).

34 Règlement (CE) n° 169/2009 du Conseil du 26 février 2009 portant application de règles de concurrence aux secteurs des transports par chemin de fer, par route et par voie navigable, JO [2009] L 61/1.

a toutefois adopté un certain nombre d'exemptions par catégorie pour certains secteurs économiques : véhicules à moteur, assurance et transports (aériens, maritimes). Dans ces cas, la législation de la concurrence s'applique, mais les accords satisfaisant aux conditions fixées par la Commission sont automatiquement exemptés sur la base de l'Article 101(3) du TFUE. La Commission a aussi adopté des exemptions par catégorie transsectorielles pour certains types d'accords horizontaux (recherche-développement et spécialisation), d'accords verticaux et d'accords de transfert de technologie[35].

En outre, le Traité stipule que la législation de la concurrence ne s'applique pas à des activités économiques lorsque celles-ci sont nécessaires à la fourniture d'un service d'intérêt économique général (SIEG)[36], comme on le verra ci-après.

**Encadré 10. La fourniture de services de santé**

Un certain nombre d'affaires intéressantes concernant la fourniture de services de santé ont soulevé des questions quant à l'effet de la participation de l'État sur l'application de la législation de la concurrence.

En 2006, la Cour de justice européenne a statué dans l'affaire FENIN[37] que les entités publiques agissant comme acheteuses de fournitures médicales ne constituaient pas des « entreprises » et qu'en conséquence les Articles 101 et 102 du TFUE ne leur étaient pas applicables. La FENIN est une association d'entreprises qui commercialisent des biens médicaux utilisés dans les hôpitaux espagnols. La FENIN s'était plainte à la Commission européenne que les entités publiques qui gèrent le service de santé espagnol avaient abusé de leur position dominante en tant qu'acheteuses de biens médicaux produits par les membres de la FENIN. La CJE, confirmant l'arrêt précédent du tribunal, a statué que « c'est bien l'action d'offrir des produits ou des services sur un marché donné qui caractérise la notion d'activité économique et non pas l'activité d'achat en tant que telle ».[38]

L'affaire FENIN jugée en première instance par le Tribunal est apparue peu après l'affaire BetterCare II au Royaume-Uni, qui comprenait elle aussi des allégations d'abus de position dominante dans le domaine des soins de santé. On peut faire certains parallèles intéressants. En fait, cela a amené l'OFT à publier une note pour exposer le raisonnement différent des deux tribunaux.[39] Dans les affaires BetterCare, un fournisseur de soins en établissement et à domicile s'était plaint à l'OFT que l'acheteur (N&W, organisation de services sociaux et de santé) abusait de sa position dominante. L'OFT rejeta cette plainte au motif que N&W n'était pas une entreprise au sens de la Loi sur la concurrence de 1998. En appel, le Competition Appeals Tribunal (CAT) décida, au contraire, que N&W agissait en qualité d'entreprise, à la fois par l'achat de services à BetterCare et par la fourniture directe de soins aux personnes âgées par ses propres établissements. Dans sa note, l'OFT expose les différences de principes entre les deux affaires qui ont amené le CAT à une décision apparemment divergente.[40] Il souligne en particulier que, alors que le tribunal affirmait que l'activité économique ne se caractérise pas par l'acte d'achat, la considération essentielle du CAT était de savoir si une entité est en position de générer les effets que la législation de la concurrence vise à empêcher. L'OFT conclut que si une entité publique est seulement acheteuse de biens ou services sur un marché donné, et ne se livre donc pas à l'activité de fournir directement des biens ou services sur ce marché ou sur un marché connexe, elle n'est pas une entreprise au sens de la Loi sur la concurrence de 1998. Toutefois, l'OFT déclare que la position juridique concernant les entités qui, à la fois, achètent et fournissent directement des biens ou services à des fins non économiques (comme c'est souvent le cas dans la fourniture des services de santé) est « incertaine et en développement », en attendant l'arrêt final dans l'affaire FENIN.

La fourniture des services de santé au Royaume-Uni est maintenant en mesure de bénéficier de la contribution du Co-operation and Competition Panel (CPP), nouvellement créé. Le CPP est un organisme consultatif indépendant,

35 http://ec.europa.eu/competition/antitrust/legislation/legislation.html.

36 TFUE, article 106(2).

37 Affaire C-205/03, *FENIN c. Commission des Communautés européennes*, [2006] Rec. I-6295.

38 Voir ci-dessus, paragraphe 24 de l'arrêt de la CJE.

39 Voir : Policy note 1/2004, The Competition Act and public bodies, disponible à http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_mini_guides/oft443.pdf.

40 Voir ci-dessus, paragraphe 13.

d'origine non législative, établi par le Secretary of State pour conseiller le ministère de la santé, les Strategic Health Authorities (SHA, autorités de santé régionales) et d'autres organes du NHS. Le CPP n'a pas de pouvoir partagé pour faire respecter la législation de la concurrence, cette responsabilité restant du ressort de l'OFT.[41] Il a toutefois le pouvoir d'apporter conseil et de prendre en charge des affaires concernant les « Principes et règles de coopération et de concurrence »[42].

Dans l'affaire *Baxter* en Australie en 2007 (*ACCC v. Baxter* [2007] HCA 38), il a été allégué devant le tribunal que la législation de la concurrence ne s'appliquait pas aux achats de produits de santé par les États pour leurs hôpitaux, malgré l'appartenance des fournisseurs au secteur privé. L'ACCC avait admis que l'appel d'offres et l'achat de liquides stériles par les autorités d'approvisionnement ne constituait pas une activité d'entreprise. Cela impliquait que ces autorités elles-mêmes n'étaient pas soumises à la Loi sur les pratiques commerciales (Trade Practices Act, TPA, actuellement Competition and Consumer Act de 2010). Cependant, Baxter, qui appartenait au secteur privé, avait lié des produits concurrentiels à des produits monopolistiques et était ainsi en mesure de fournir les deux types de produits dans des conditions non concurrentielles. Baxter arguait d'une immunité dérivée de celle de la Couronne et affirmait qu'ainsi le TPA ne lui était pas applicable étant donné que cela aurait porté atteinte à la liberté de la Couronne de conclure des contrats de son choix. La Haute cour d'Australie n'accepta pas cet argument, et la majorité statua que l'immunité de la Couronne ne s'étend pas automatiquement aux tierces parties si cette immunité n'est pas clairement nécessaire pour protéger les droits de la Couronne en matière de propriété, de contrats ou autres. L'activité de Baxter en tant que fournisseur des autorités d'approvisionnement des États n'était donc pas soustraite à l'application du TPA. Il ressort clairement de l'arrêt de la Haute cour que les entreprises sont soumises au TPA, indépendamment du fait que cette loi s'applique ou non aussi à l'autre partie contractante, et que les entreprises ne bénéficieront pas automatiquement de la protection d'une quelconque immunité de la Couronne dans leurs transactions avec les autorités du Commonwealth, des États ou des Territoires de l'Australie.

En Australie, les dispositions relatives à la concurrence sont spécifiées par la législation fédérale (Competition and Consumer Act de 2010) et un certain nombre de réglementations adoptées au niveau fédéral établissent des exceptions à la législation de la concurrence. Les principaux secteurs concernés sont les services postaux, la banque, les services financiers et l'assurance (voir Encadré 8) et la douane[43].

À Singapour, les dispositions de la Loi sur la concurrence de 2004 contre les comportements anticoncurrentiels ne s'appliquent pas à l'administration publique, aux organismes officiels créés par une loi, ni aux personnes agissant au nom de l'État. Cette loi institue aussi un certain nombre d'exclusions sectorielles (par exemple, services postaux, ferroviaires, de gare de fret) et il existe aussi des exemptions dans certains autres domaines (par exemple, télécommunications, médias ou énergie) pour les comportements régis par les dispositions sectorielles.

En Chine, la Loi antimonopole institue des immunités de la législation de la concurrence pour les entreprises d'État dans des secteurs stratégiques comme le transport aérien, la banque, l'électricité, le pétrole, les chemins de fer et les télécommunications[44]. Dans ces industries, ce sont donc les autorités de régulation sectorielles qui sont habilitées à agir contre les comportements anticoncurrentiels éventuels.

41 Voir « Working arrangements between the OFT and the CPP ».

42 http://www.ccpanel.org.uk/content/Final-draft-Rules-of-Procedure.pdf.

43 Le site web de l'ACCC, http://www.accc.gov.au/content/index.phtml/itemId/688173, énumère les lois fédérales instituant ces exceptions : Australian Postal Corporation Act 1989, Banking Act 1959, Customs Act 1901, Financial Sector (Business Transfer and Group Restructure) Act 1999, Insurance Act 1973, Liquid Fuel Emergency Act 1984, Northern Territory National Emergency Response Act 2007, Payment Systems (Regulation) Act 1998, Payment Systems (Regulation) Regulations 2006, Trade Practices Act 1974, s. 173.

44 Voir Fox (2008).

L'Administration d'État pour l'industrie et le commerce a toutefois exprimé deux préoccupations concernant son incapacité d'agir dans ces domaines[45]. Premièrement, les autorités de régulation sectorielles ont habituellement une relation étroite avec les entreprises soumises à leur compétence. Cela peut soulever des problèmes de conflit d'intérêts nuisibles à la protection des droits et intérêts des consommateurs. Deuxièmement, il existe certaines incohérences dans le niveau des sanctions que les autorités de régulation peuvent infliger. Par exemple, la réglementation des télécommunications prévoit pour les comportements anticoncurrentiels des amendes de 10 000 à 100 000 Rmb, qui sont cependant très inférieures à celles instituées par la Loi contre la concurrence déloyale, comprises entre 50 000 et 200 000 Rmb.

### *3.1.2 Prise en compte implicite de la défense pour conduite réglementée et de l'immunité à l'égard de la législation de la concurrence*

La défense pour conduite réglementée peut aussi reposer sur une immunité à l'égard de la législation de la concurrence qui n'est pas explicitement stipulée par cette dernière ou par la réglementation mais qui est implicite dans la loi et déduite par les tribunaux.

Aux États-Unis, la défense pour conduite réglementée reposant sur une immunité implicite nécessite une claire incompatibilité entre la législation de la concurrence et les dispositions réglementaires et elle est interprétée de manière stricte[46]. Les tribunaux examinent quatre éléments :[47] (i) l'existence d'autorités de régulation pour surveiller le comportement en cause ; (ii) la preuve que les autorités de régulation exercent cette surveillance avec une attention suffisante[48], cette condition impliquant que le comportement en cause doit avoir été examiné par un organisme public de régulation ou éventuellement avoir été autorisé après un examen assez complet de sa justification ; (iii) le risque d'exigences contradictoires entre la législation de la concurrence et la réglementation, par exemple parce que ces deux instruments légaux ont des objectifs différents et discordants ; et (iv) un comportement qui se situe pleinement au cœur du domaine réglementé.

Dans la pratique, les tribunaux ont accepté une défense pour conduite réglementée sur la base d'une exclusion implicite de la législation de la concurrence seulement dans des cas limités, notamment dans la réglementation des valeurs mobilières sous l'autorité de la SEC[49]. Les tribunaux ont tendance à prononcer une exemption, conformément au principe de proportionnalité, seulement dans la mesure nécessaire pour permettre au cadre réglementaire de fonctionner.

En outre, quand il existe une réglementation tarifaire au niveau fédéral (ou d'un État, voir ci-dessous), la Cour suprême admet une immunité implicite limitée à certaines sanctions dans le cadre de la « doctrine des tarifs enregistrés »[50]. Cette doctrine interdit aux acheteurs de déposer des plaintes en vertu de la

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45 Voir la contribution de la Chine au Forum mondial sur la concurrence 2005, « The Relationship between Competition Authorities and Sectoral Regulators », DAF/COMP/GF/WD(2005)9.

46 *United States v. Philadelphia national Bank*, 374 U.S. 321, p. 350-351 (1963) ; ICN (2004b, p. 21).

47 *National Gerimedical Hospital v. Blue Cross of Kansas City* 452 U.S. 378, 388 (1981) ; *Silver v. NYSE* 373 U.S. 341 ; *Gordon v. New York Stock Exchange*, 373 U.S. 659 (1975) ; *Credit Suisse Securities (USA) v. Billing* 551 U.S. 264 (2007).

48 D'après Hovenkamp (2005, paragraphe 19.3c), le même critère de surveillance réglementaire doit s'appliquer pour une exemption antitrust dans le cas de la réglementation fédérale et dans celui de la réglementation d'un État.

49 *Gordon v. New York Stock Exchange*, 373 U.S. 659 (1975).

50 *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922).

législation de la concurrence en ce qui concerne des prix fixés par les fournisseurs, quand ces fournisseurs ont dûment fait enregistrer leurs tarifs auprès de l'autorité de régulation et que celle-ci ne les a pas rejetés.

Au Canada, le Bureau de la concurrence (2010, p. 7) indique qu'il « n'engagera pas de procédure en vertu d'une disposition de la *Loi [sur la concurrence]* lorsque le Parlement a exprimé l'intention d'exclure l'application de la *Loi* en établissant un régime complet et en conférant à une autorité réglementaire le pouvoir de prendre ou de faire prendre une mesure incompatible avec la *Loi [sur la concurrence]*, à condition néanmoins que l'autorité réglementaire ait exercé son pouvoir de réglementation relativement à la conduite en cause », et qu'il « conclura généralement que les dispositions spécifiques adoptées par le Parlement pour régir la conduite en cause sont censées avoir préséance sur la *Loi [sur la concurrence]* qui est une loi d'application générale. [Note] Il s'agit de l'application de la maxime *generalia specialibus non derogant* ».

### *3.1.3 Analyse hybride quand la réglementation complète la législation de la concurrence*

Dans l'affaire *Trinko*[51], la Cour suprême des États-Unis a statué que la législation fédérale de la concurrence ne pouvait pas être la base d'une obligation de vendre pour un opérateur de télécommunications historique soumis à une obligation d'accès en vertu de la législation des télécommunications fédérale. Ce n'était pas un cas d'immunité explicite ou implicite en raison de la disposition de sauvegarde antitrust de la Loi sur les télécommunications de 1996, mais la Cour suprême a fait une analyse coûts-avantages et a jugé qu'il n'était pas utile d'appliquer la législation de la concurrence en plus de la réglementation qui suit la même logique et vise des buts plus ambitieux que la législation de la concurrence. La Cour suprême déclare que, quand il existe une structure réglementaire de ce genre, il y a peu d'avantage à appliquer en plus la législation de la concurrence étant donné que ces deux instruments légaux ont des objectifs qui vont dans la même direction alors que le coût de l'application de la législation de la concurrence peut être élevé, du fait que l'autorité qui prend les décisions en matière de législation de la concurrence (dans le cas présent, une juridiction d'ordre judiciaire qui n'est pas bien équipée pour traiter les questions complexes sous-jacentes aux obligations d'accès) peut faire des erreurs et condamner des pratiques qui sont concurrentielles.

D'après l'Antitrust Modernization Commission (2007, p. 362), « le tribunal a simplement statué que les obligations de vendre réglementaires spécifiques établies par la Loi sur les télécommunications de 1996 ne créaient pas aussi une nouvelle cause d'action en vertu de la doctrine du refus de vente de la Section 2 de la Loi Sherman. Il faut considérer *Trinko* seulement comme une limite aux plaintes pour refus de vente en vertu de la Section 2 de la Loi Sherman. On ne doit pas y voir une suppression de l'application de la législation antitrust dans les industries réglementées sous la forme d'une immunité implicite, ni un rejet judiciaire d'une disposition de sauvegarde ».[52]

## *3.2 La défense pour conduite réglementée quand la réglementation est à un niveau inférieur à celui de la législation de la concurrence : application de la doctrine de l'action de l'État*

L'application de la défense pour conduite réglementée est plus complexe dans les environnements de gouvernance à plusieurs niveaux, du fait du conflit de principes légaux différents. Dans ces environnements, il existe habituellement un principe légal de hiérarchie des normes suivant lequel la norme adoptée au niveau supérieur (par exemple, fédéral) prévaut sur la norme adoptée au niveau inférieur (par exemple, d'un État). D'après ce principe, la législation fédérale de la concurrence prévaut sur la

51 *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 682 (2004).

52 Pour une interprétation différente de l'affaire *Trinko*, voy. entre autres Shelanski (2011) qui estime que *Trinko* crée une nouvelle forme d'immunité au droit de la concurrence et qui regrette cette nouvelle forme.

réglementation de l'État et, en pareille circonstance, la défense pour conduite réglementée ne devrait pas être acceptée.

Cependant, en vertu, par exemple, des principes de l'autonomie de l'État et de la subsidiarité, les tribunaux dans certaines juridictions permettent à la réglementation adoptée à un niveau inférieur d'inclure une exemption de la législation de la concurrence adoptée au niveau supérieur. En outre, conformément aux principes de la certitude légale et des attentes légitimes, des tribunaux ont statué que les entreprises qui se conforment à une réglementation contraire à une norme de la législation de la concurrence supérieure ne devaient pas être sanctionnées. Dans toutes ces affaires, les tribunaux ont admis, de fait, une défense pour conduite réglementée. Suivant le contexte institutionnel et l'histoire judiciaire, les conditions de cette défense peuvent différer suivant les juridictions.

### *3.2.1 Doctrine de l'action de l'État aux États-Unis*

Aux États-Unis, la législation fédérale prévaut sur les législations des États conformément à la clause de suprématie de la Constitution[53]. Ainsi, en principe, la législation fédérale de la concurrence prévaut sur les réglementations des États. Toutefois, la Cour suprême a créé une exception à ce principe et admis une défense pour conduite réglementée par l'État quand le comportement en cause satisfait à deux conditions[54] : (i) le comportement doit être clairement autorisé et (ii) le comportement doit être activement surveillé par l'État. La première condition permet de s'assurer que l'État a positivement autorisé des dérogations à la concurrence de libre marché. La seconde condition permet de s'assurer que l'immunité en vertu de l'action de l'État ne protège que les seuls actes anticoncurrentiels de parties privées qui, aux yeux de l'État, favorisent réellement les politiques réglementaires de l'État.

Autorisation claire

Premièrement, le comportement en cause doit être autorisé par une disposition réglementaire de l'État clairement formulée et positivement exprimée. Il faut que l'État ait considéré le comportement en cause et ait décidé de l'autoriser, tandis que les détails du dispositif réglementaire peuvent être laissés à un organisme ou une subdivision administrative de l'État. La Cour suprême a statué que cette condition était satisfaite quand le comportement anticoncurrentiel était le « résultat prévisible » d'une loi de l'État[55]. Ce critère a conduit les tribunaux à permettre la protection d'un comportement réglementé suivant une « formulation claire » par une autorité générale de l'État ou un régime réglementaire général. En outre, la Cour suprême ne demande pas que le comportement soit imposé, mais simplement autorisé, par l'État[56].

L'autorisation doit émaner de l'État lui-même, dans sa branche exécutive, législative ou judiciaire (Cour suprême de l'État), mais non d'une autorité subdivisionnaire telle qu'une municipalité ou d'un organe subordonné de l'État. Suivant les termes de Hovenkamp (2005, paragraphe 20.4), les tribunaux ont considéré trois questions pour déterminer ce qui constitue une entité d'État :

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53 Constitution des États-Unis, Art. VI, §2. ICN (2005, p. 66). Sur la relation ambiguë entre la suprématie fédérale et la doctrine de l'action de l'État, voir Hovenkamp (2005, paragraphe 20.1).

54 *Parker v. Brown*, 317 U.S. 341 (1943) ; *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) ; *California Retail Liquor Dealers Assn. v. Midcal Aluminium*, 445 U.S. 97 (1986). Pour une analyse de ces conditions, voir Antitrust Modernization Commission (2007, 366-377), Bush (2006), Delacourt J.T. et Zywicki T.J. (2005), Elhauge (1991).

55 *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985) et *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985).

56 *Southern Motor Carriers Rate Conference Inc. v. United States*, 471 U.S. 48 (1985).

*iv)* *« Si l'agence ou office en question a des pouvoirs quasi législatifs et ne se borne pas à recevoir l'ordre d'accomplir certaines fonctions ;*

*v)* *Si les décideurs dans l'agence, bureau ou office se composent entièrement de responsables gouvernementaux sans intérêts financiers dans le marché réglementé et non de représentants du marché réglementé ;*

*vi)* *Si, de quelque façon explicite, l'agence est gouvernée par le corps législatif, le gouverneur ou la cour suprême de l'État ou doit leur rendre compte. »*

Le rapport de la FTC (2003) sur l'action de l'État note que certains tribunaux inférieurs ont appliqué trop souplement le critère de la formulation claire, de manière incompatible avec son but sous-jacent. Pour répondre à cette préoccupation, le rapport recommande[57] que les tribunaux considèrent deux questions dans l'application du critère de la formulation claire : (1) si le comportement en cause a été autorisé par l'État, et (2) si l'État a délibérément adopté une politique visant à déroger à la concurrence de la manière considérée. Ces exigences focaliseraient l'investigation sur l'existence de politiques délibérées et intentionnelles de l'État visant à déroger à la concurrence.

Surveillance active

Deuxièmement, le comportement en cause doit faire l'objet d'une surveillance active par l'État lui-même. Ainsi, la politique de l'État peut permettre à des parties privées d'agir de manière anticoncurrentielle, mais l'État doit veiller à ce que les décideurs privés agissent conformément à la politique de l'État et ne se livrent pas à des actes anticoncurrentiels supplémentaires non couverts par l'autorisation de l'État. D'après Hovenkamp (2005, paragraphe 20.5), il convient de distinguer trois questions : les cas où la surveillance est requise, le type de surveillance requis et l'entité qui doit exercer la surveillance.

*i)* *La surveillance est requise quand le comportement en cause est celui d'une partie privée agissant à son gré, mais non quand l'acteur est gouvernemental[58] ou une partie privée sans liberté d'action[59].*

*ii)* *L'organisme de surveillance ou le tribunal doit être habilité à exercer la surveillance et il doit exercer cette surveillance dans la pratique. Comme l'a déclaré la Cour suprême des États-Unis, « la surveillance active requiert que des représentants de l'État aient et exercent le pouvoir d'examiner les actes anticoncurrentiels particuliers de parties privées et rejettent ceux qui ne s'accordent pas avec la politique de l'État[60], et le « simple potentiel de surveillance par l'État n'est pas un substitut suffisant de la décision de l'État »[61]. De même, le simple dépôt de déclarations ou la surveillance qui se limite à la procédure ne sont pas suffisants.*

*iii)* *La surveillance doit être effectuée par le même niveau d'administration publique que celui qui a imposé la réglementation. Si la réglementation émane de l'État, la surveillance doit être*

57 L'Antitrust Modernization Commission a présenté la même recommandation (2007, p. 371, recommandation 71). Sur des propositions de révision de la doctrine d'action d'Etat, voy. également Cooper and Kovacic (2010, p. 1585).

58 Voir *Town of Hallie*.

59 Voir *Municipal Utilities Board of Albertville v. Alabama Power Co*, cert. denied, 513 U.S. 1148 (1995).

60 *Patrick v. Burget*, 486 U.S. 94, 101 (1988).

61 *FTC v. Ticor Title Ins. Co*, 504 U.S. 621, 638 (1992).

> *effectuée par l'organisme d'État chargé de faire respecter le régime réglementaire. Si la réglementation est municipale, la surveillance doit être effectuée par le conseil municipal directement ou à travers une commission ou une agence*[62].

L'Antitrust Modernization Commission (2007, p. 373) recommande que les tribunaux utilisent une approche souple, « étagée », exigeant un niveau de surveillance active différent suivant, par exemple, le type de comportement en cause (par exemple, infraction en soi à la législation de la concurrence ou non), l'entité qui se livre à ce comportement (suivant qu'elle est plus ou moins gouvernementale), l'industrie et le dispositif réglementaire.

Ainsi, quand le comportement n'est pas clairement autorisé et activement surveillé par l'État, la défense pour conduite réglementée n'est pas admise. Toutefois, quand il existe une réglementation tarifaire au niveau fédéral ou d'un État, la Cour suprême admet une immunité à l'égard de la législation de la concurrence limitée à certaines sanctions dans le cadre de la « doctrine des tarifs enregistrés » exposée ci-dessus.

### *3.2.2 Doctrine de l'action de l'État dans l'Union européenne*

Dans l'Union européenne, le TFUE prévaut sur toutes les règles des États membres[63]. En conséquence, la législation de la concurrence de l'UE devrait normalement prévaloir sur les réglementations nationales. Bien que les dispositions du TFUE en matière de concurrence visent les entreprises privées et publiques, la Cour de justice a statué qu'en vertu de la clause de loyauté du Traité sur l'Union européenne (TUE)[64], les États membres ne peuvent pas adopter des réglementations qui priveraient de leur efficacité les règles de l'UE en matière de concurrence[65], en dehors des exceptions stipulées dans le TFUE concernant spécialement la fourniture de services d'intérêt économique général. Sur cette base, la Cour de justice n'a admis aucune industrie à bénéficier d'une exemption complète de la législation de la concurrence de l'UE au motif d'une réglementation nationale[66].

Les mesures nationales interdites se répartissent en quatre catégories :

- encourager ou soutenir les ententes ou pratiques illégales ;
- donner aux entreprises le pouvoir de se réglementer elles-mêmes ;
- exiger un comportement incompatible avec les Articles 101 et 102 du TFUE ;
- rendre inévitables les violations de ces Articles[67].

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62 Hovenkamp (2005, paragraphe 20.5c).

63 Affaire 6/64 *Flaminio Costa contre E.N.E.L.*, [1964] Rec. 1141.

64 TUE, Art. 4(3).

65 Combinaison de l'Article 4(3) du TUE avec les Articles 101 et 102 du TFUE pour les entreprises privées et avec l'Article 106 du TFUE pour les entreprises publiques. Affaire 267/86, *Van Eycke c. ASPA* [1988] Rec. 4769, paragraphe 16 ; affaire 66/86, *Ahmed Saeed* [1989] Rec. 838, paragraphe 48.

66 Voir affaire 172/80, *Züchner* v. *Bayerische Vereinsbank* [1981] Rec. 2021 (industrie bancaire) ; affaire 41/83, *Italie c. Commission* [1984] Rec. 873 (télécommunications) ; affaire 45/85, *Verband der Sachversicherer* v. *Commission* [1987] Rec. 405 (assurances).

67 En outre, une réglementation nationale ne peut violer les règles du marché intérieur de l'UE.

Ainsi, les États membres (autorités législatives, exécutives ou de régulation) ne peuvent adopter des réglementations qui encouragent ou obligent les entreprises à violer la législation de la concurrence de l'Union européenne. Par exemple, une autorité de régulation ne peut approuver ou autoriser aucun accord sur les prix entre entreprises qui soit contraire à l'Article 101 du TFUE ou aucun prix qui excessif au point de violer l'Article 102 du TFUE. Si un État membre adoptait une telle mesure contraire à la législation de l'UE, toute autorité de cet État membre, que ce soit une autorité de la concurrence, une autorité de régulation ou un tribunal, devrait la récuser.

Cependant, le Traité stipule que les règles de concurrence ne s'appliquent pas, et que la législation nationale peut donc s'appliquer, quand la fourniture d'un service d'intérêt économique général (SIEG) l'exige[68]. Cette disposition, que la Cour de justice interprète de manière étroite, nécessite de réunir trois conditions[69] :

*i) L'État a « chargé » une entreprise, par la législation ou par contrat, d'assurer la fourniture d'un SIEG. Bien que les États membres aient une grande latitude pour déterminer ce qu'est un SIEG, certains critères de l'UE commencent à se dégager : le service doit être universel, obligatoire et répondre à l'intérêt général et non à un intérêt privé[70]. On peut en donner comme exemples le contrôle de la navigation sur une voie d'eau importante, un service de lamanage universel et continu dans les ports, l'exploitation du réseau téléphonique public, la diffusion télévisuelle, l'approvisionnement public national en électricité, le service postal de base, les caisses de retraite complémentaire, l'exploitation d'une ligne aérienne non rentable pour des raisons d'intérêt général, ou la gestion des déchets nuisibles à l'environnement[71].*

*ii) La restriction de la concurrence est nécessaire pour que le service puisse être fourni dans des conditions économiquement acceptables.*

*iii) La restriction de la concurrence n'est pas contraire à l'intérêt de l'Union. Cette disposition n'a pas encore fait l'objet d'un examen détaillé de la Cour de justice, mais elle exige plus que la preuve que les mesures d'État touchent le commerce entre les États membres.*

Si un État membre ne remplit pas les obligations qui lui incombent en vertu de la législation de l'UE et adopte une réglementation qui oblige les entreprises à se livrer à des comportements anticoncurrentiels ne pouvant pas être justifiés par la fourniture d'un SIEG, la Cour de justice peut admettre une défense pour conduite réglementée. Ce ne sera toutefois le cas que si l'entreprise réglementée n'a pas de liberté de choix et que la mesure nationale n'a pas encore été déclarée contraire à la législation de l'UE par une autorité nationale ou par la Commission européenne.

Pas de liberté de choix pour les entreprises

68 TFUE, Article 106(2).

69 Chalmers et al. (2010, p. 1030). Voir affaire C-320/91 *Corbeau* [1993] Rec. I-2523, affaire C-203/*96 Dusseldorp* [1998] Rec. I-4075, affaire C-475/99 *Ambulanz Glöckner c. Landkreis Südwestpfalz* [2001] Rec. I-8089.

70 Voir l'affaire T-289/03, *BUPA c. Commission* [2008] Rec. II-81, paragraphe 172 et Commission européenne (2001).

71 Voir Temple Lang (2008, section VIII).

La défense pour conduite réglementée, qui est interprétée de manière restrictive[72], n'est acceptée que quand la réglementation impose le comportement en cause et supprime toute liberté de choix des entreprises[73]. Cela implique que la réglementation doit avoir été adoptée par les autorités publiques et non par les parties réglementées. D'après Gerard (2011), les tribunaux considèrent trois grands critères :

- *Si la réglementation est soumise à l'approbation finale d'une autorité gouvernementale, par exemple un ministre, éventuellement après consultation avec d'autres organismes publics indépendants ;*

- *Si la réglementation a été élaborée par une commission composée d'une majorité de membres indépendants des acteurs ou associations de l'industrie. Comme l'a noté Temple Lang (2004), « la jurisprudence fait une distinction entre les entreprises qui sont représentées dans les organes consultatifs, ce qui est légal dès lors que les pouvoirs officiels sont exercés par une autorité officielle, et les situations où il est permis à une entreprise dominante ou à un groupe d'entreprises de prendre elles-mêmes les décisions opérationnelles ou d'exercer des pouvoirs réglementaires officiels, ce qui est illégal[74]. Il est légal que des prix soient proposés par des commissions comprenant des représentants des entreprises, à condition que la législation qui attribue le pouvoir de proposer les prix exige que l'intérêt public soit pris en compte (de telle sorte que le contrôle juridictionnel serait possible sur cette base) et à condition que l'autorité publique ait le pouvoir de modifier ou de passer outre à la proposition de la commission » ;*

- *Si les représentants de l'industrie doivent prendre en compte des critères inscrits dans la loi visant à garantir l'intérêt public.*

Les tribunaux effectueront donc une vérification pour s'assurer que c'est l'État membre, agissant à travers un organisme public, qui a le dernier mot dans le processus de décision régissant le comportement

72 Affaire C-198/01, *Consorzio Industrie Fiammiferi (CIF) c. Autorità Garante della Concorrenza e del Mercato* [2003] Rec. I-8055, paragraphe 67 et affaires mentionnées dans cet arrêt. Aux paragraphes 68-69, la Cour de justice observe que « la concurrence par les prix ne constitue pas la seule forme efficace de concurrence ni celle à laquelle il doit, en toutes circonstances, être accordé une priorité absolue. En conséquence, la fixation à l'avance du prix de vente des allumettes par l'État italien n'exclut pas, par elle-même, toute possibilité de comportement concurrentiel. Quoique limitée, la concurrence peut opérer au travers d'autres facteurs ».

73 Wainwright et Bouquet (2004). Il s'agit d'une jurisprudence constante : affaire C-359/95P *Commission et France C. Ladbroke*, [1995] Rec. I-6265, paragraphe 33, et dernièrement affaire C-52/09 *Konkurrensverket c. TeliaSonera* [2011] non encore publié au recueil, paragraphes 49-50.

74 Voir, par exemple, affaire C-96/94, *Centro Servizi Spediporto* [1995] Rec. I 2883 ; affaire C-140/94, *DIP c. Comune di Bassano* [1995] Rec. I 3257 ; affaire C-70/95, *Sodemare c. Regione Lombardia* [1997] Rec. I 3395 (services de santé dans le cadre de l'assistance sociale : un État membre peut décider de n'admettre que des opérateurs sans but lucratif pour fournir l'assistance sociale, dans le cadre de conventions où leurs dépenses leur sont remboursées) ; affaire C-38/97, *Librandi* [1998] Rec. I 5955 ; affaire C-266/96, *Corsica Ferries* [1998] Rec. I 3949 ; affaire C-35/96, *Commission c. Italie* [1998] Rec. I 3851 (la législation permettant qu'un prix fixé par un conseil national d'expéditeurs en douane soit appliqué par tous les expéditeurs en douane est illégale : la législation « a complètement abandonné à des opérateurs économiques privés la compétence des autorités publiques en matière de détermination des tarifs » ; affaire T-513/93, *CNSD c. Commission*, [2000] Rec. II 1807.

réglementé. Cette vérification est essentiellement formelle et exclut toute appréciation de fond des considérations de politique publique que l'État peut prendre en compte[75].

La défense pour conduite réglementée n'est pas admise quand la réglementation se borne à encourager ou autoriser les entreprises à se livrer à un comportement anticoncurrentiel autonome. La présence d'une réglementation peut toutefois constituer une circonstance atténuante dans l'établissement de la sanction. Les Lignes directrices de la Commission pour le calcul des amendes[76] stipulent qu'il existe une circonstance atténuante « lorsque le comportement anticoncurrentiel a été autorisé ou encouragé par les autorités publiques ou la réglementation ». La Cour de justice a adopté ce point de vue dans plusieurs affaires[77]. C'est aussi le cas dans certains États membres, comme le Portugal (voir l'encadré 7).

La validité de la réglementation nationale

Lorsque la réglementation nationale ne peut être justifiée par la fourniture d'un SIEG en vertu de la législation de l'UE, on ne peut recourir à la défense pour conduite réglementée que jusqu'à ce qu'une décision définitive ait déclaré la réglementation de l'État membre contraire à la législation de l'UE[78], mais non après que cette décision a été rendue[79].

### *3.2.3 Doctrine de l'action de l'État au Canada*

Au Canada, la loi fédérale sur la concurrence prévaut en principe sur la réglementation provinciale en vertu de la règle de suprématie fédérale et de l'application du droit commun suivant son sens ordinaire. Toutefois, la Cour suprême a créé une exception à ce principe et a accepté la défense pour conduite réglementée quand il existe clairement un conflit entre l'application de la réglementation provinciale et celle de la Loi sur la concurrence, de telle sorte qu'obéir au régime réglementaire implique de contrevenir à la Loi sur la concurrence. C'est le comportement particulier en cause et non l'industrie dans son ensemble qui est examiné. Le Bureau de la concurrence indique qu'il s'efforcera de cerner l'intention du Parlement quant à l'application des dispositions pertinentes de la Loi au regard de la conduite reprochée, mais qu'il ne s'abstiendra pas d'intenter des poursuites relativement à une conduite donnée en vertu des dispositions relatives aux comportements susceptibles d'examen pour le seul motif que la loi provinciale peut s'interpréter comme autorisant la conduite en question ou qu'elle est plus spécifique que la Loi. Le Bureau observe aussi qu'il y a lieu d'examiner de plus près les activités des personnes et entités réglementées, qu'elles agissent à titre personnel ou à titre d'organisme d'autoréglementation[80].

### *3.2.4 Doctrine de l'action de l'État en Australie*

En Australie, le mécanisme générant des exemptions de la législation de la concurrence a été nettement resserré avec la Réforme de la politique nationale de la concurrence au milieu de la décennie 1990. Au lieu d'être couvertes par une doctrine générale de l'action de l'État, les exemptions doivent

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75 Chalmers et al. (2010, p. 1019). Gerard (2011) observe que cette analyse formelle résulte peut-être du fait que la considération des justifications de l'intérêt public n'a guère de place dans le système d'analyse de la législation de la concurrence de l'Union européenne.

76 Commission européenne (2006, paragraphe 29). C'est aussi le cas dans certains États membres. Par exemple, Bundeskartellamt (2006), paragraphe 17.

77 *Fiammiferi*, paragraphe 57, *Deutsche Telekom*, paragraphe 279.

78 *Fiammiferi*, paragraphes 53-54.

79 *Fiammiferi*, paragraphe 55.

80 Bureau de la concurrence du Canada (2010, p. 5-6).

maintenant être explicites. Une loi ne peut avoir pour effet d'exempter un comportement de la législation de la concurrence que si elle stipule spécifiquement que le comportement est exempté et le gouvernement fédéral conserve un droit de veto sur les exemptions adoptées par les États ou Territoires. Ces exemptions sont publiées sur le site Web de l'autorité antitrust.[81]

### *3.3 Principes centraux*

Pour conclure, dans la plupart des juridictions, la défense pour conduite réglementée est fondée principalement sur l'ensemble de principes légaux et de politiques judiciaires suivant[82] :

- La défense vise à respecter l'intention du législateur et l'exercice de bonne foi par l'État de ses pouvoirs réglementaires souverains. Dans le contexte particulier d'une gouvernance à plusieurs niveaux, la défense peut se justifier par le principe du fédéralisme et le principe de subsidiarité.

- Inversement, la défense repose aussi sur le principe qu'il n'incombe pas à des acteurs privés qui n'ont politiquement pas de comptes à rendre de déterminer dans quel cas les résultats sur le marché sont ou non inacceptables. Comme l'observe plus généralement Odudu (2006, p. 46), « le traitement différencié des autorités publiques et des citoyens privés (entreprises) peut se justifier par les rôles différents que jouent les citoyens et l'État dans une démocratie constitutionnelle », étant donné que « la puissance publique s'exerce dans l'intérêt public, et l'intérêt public est déterminé à travers la représentation démocratique ».

- La défense applique aussi les principes de la certitude légale et des attentes légitimes en faisant en sorte que les entreprises ne se heurtent pas à des exigences contradictoires émanant de la législation de la concurrence et de réglementations.

- Quand la réglementation vise les mêmes buts que la politique de la concurrence, la défense peut aussi se justifier par une analyse coûts-avantages indiquant que l'application de la législation de la concurrence en plus de la réglementation n'apporte guère de valeur ajoutée.

En général, les tribunaux n'ont accepté la défense pour conduite réglementée que de manière restrictive et uniquement dans la mesure où l'exemption de l'application des règles de concurrence est nécessaire à la réalisation des objectifs de la réglementation étant donné que toutes les doctrines juridiques sur lesquelles elle repose (immunité explicite, immunité implicite ou doctrine de l'action de l'État) sont interprétées de manière stricte[83]. Comme l'observe l'ICN (2004b, p. 6), « en règle générale pour l'interprétation, les tribunaux ne concluent pas facilement à des exceptions à la législation de la concurrence ; ils doivent avoir l'assurance suffisante que l'auteur de la réglementation voulait de manière valide octroyer à certains comportements une immunité à l'égard de la législation de la concurrence. Ainsi, dans la majorité des cas, le fait qu'un comportement donné soit permis par un certain régime réglementaire

81 Voir http://www.accc.gov.au/content/index.phtml/itemId/688173.

82 ICN (2004b, p. 20).

83 Dans le passé, dans certaines juridictions, les tribunaux ont appliqué les exemptions trop largement et le législateur est intervenu pour restreindre l'interprétation. En Afrique du Sud, par exemple, la Loi sur la concurrence de 1998 ne couvrait pas les « actes soumis à une autre législation ou autorisés par une autre législation ». Les tribunaux commencèrent par interpréter cette phrase de telle manière que les entreprises des secteurs réglementés échappaient à l'application de la Loi sur la concurrence, sans considération du fait que, de l'autre côté, le processus réglementaire contrôlait ou non le comportement anticoncurrentiel, si bien que les coopératives agricoles ou les fusions entre banques étaient exemptées. La législation a été corrigée pour éviter ce problème à l'avenir (OCDE, 2003, p. 51).

ne peut impliquer par lui-même que les parties soumises à la réglementation ne doivent pas se conformer aux exigences de la législation de la concurrence ».

Au-delà de ces principes centraux, la jurisprudence est complexe étant donné qu'elle s'est développée pragmatiquement au cas par cas et elle manque de clarté dans les cas marginaux[84]. Le degré de surveillance que l'État doit exercer en cas d'exemption de la législation de la concurrence en est un exemple. En outre, la défense pour conduite réglementée a parfois été acceptée trop facilement par les tribunaux inférieurs, qui n'ont pas respecté assez strictement ses conditions d'application[85].

Les conditions de la défense pour conduite réglementée peuvent varier d'une juridiction à l'autre. Par exemple, l'Union européenne a plus de pouvoir pour limiter la réglementation anticoncurrentielle des États membres que les institutions fédérales des États-Unis, malgré le beaucoup plus haut degré d'intégration fédérale des États-Unis. Dans l'UE, les États membres sont tenus d'agir conformément à la politique de la concurrence de l'Union et les organes d'État doivent récuser la législation nationale qui contrevient à la législation européenne. Aux États-Unis, la Cour suprême observe que la doctrine de l'action de l'État ne vise pas à « déterminer si l'État a satisfait à une certaine norme », mais plutôt à examiner « si l'État a exercé un jugement et un contrôle indépendants suffisants pour que les détails des tarifs ou les prix soient le produit d'une intervention délibérée de l'État et pas simplement d'un accord entre des parties privées »[86]. En outre, la jurisprudence diffère dans certains cas en raison de la différence des cadres institutionnels, comme l'explique l'Encadré 3.

**Encadré 11. Affaires relatives aux télécommunications dans l'Union européenne et aux États Unis :**

Dans l'UE, la Commission européenne[87] a infligé une amende de 12.6 millions €, sur la base de l'Article 102 du TFUE, à l'opérateur de télécommunications allemand Deutsche Telekom pour un effet de ciseau anticoncurrentiel entre ses prix de gros d'accès au réseau fixe et ses tarifs de détail des lignes d'abonné appliqués aux utilisateurs finals. En même temps, l'autorité de régulation allemande réglementait les prix de gros sur la base des coûts et imposait un plafonnement des prix sur un panier de services de détail comprenant les lignes d'abonné et les appels. La Commission condamna Deutsche Telekom parce que, bien qu'il n'eût pas de choix en ce qui concerne les prix de gros, il avait une certaine liberté d'action en ce qui concerne les tarifs de détail. Deutsche Telekom aurait pu supprimer

84 ICN (2004b, p. 19) ; Temple Lang (2004).

85 Comme le note l'Antitrust Modernization Commission (2007, p. 344), « d'après certains observateurs critiques, les tribunaux inférieurs ont de plus en plus appliqué les critères *Midcal* d'une façon qui permet aux défendeurs d'obtenir une immunité à l'égard de la législation antitrust dans des situations où un État n'avait pas pour intention de déroger à la concurrence. D'autres se demandent si les tribunaux ont convenablement pris en compte la possibilité que l'approbation du comportement anticoncurrentiel par un État se répercute dans d'autres États par une hausse des prix ou quelque autre dommage pour les consommateurs. Il y a aussi l'importante question de savoir si la doctrine de l'action de l'État doit protéger les comportements des entités publiques de l'État et des municipalités quand elles agissent en tant que participants au marché ».

86 *FTC v. Ticor Tile Ins. Co.*, 504 U.S. 621, 635 (1992). On notera toutefois que, comme dans le cas de l'Union européenne, les lois des États des États-Unis ne peuvent établir une discrimination au détriment du commerce inter-États, en vertu de la Constitution des États-Unis. Voir par exemple : *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) ; *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981).

87 Décision de la Commission du 21 mai 2003, affaire 37.451, *Deutsche Telekom, JO* [2003] L 263/9. Voir aussi une affaire similaire : décision de la Commission du 4 juillet 2007, affaire 38.784, *Wanadoo España c. Telefónica, JO* [2008] C 83/6.

ou réduire l'effet de ciseau en augmentant les tarifs de ses lignes d'abonné (et en baissant les tarifs pour les appels). La décision et le raisonnement de la Commission furent confirmés en appel, d'abord par le Tribunal[88] puis par la Cour de justice[89].

La Cour suprême des États-Unis[90] a adopté une position différente en refusant de condamner sur la base de la Section 2 de la Loi Sherman l'opérateur de télécommunications Verizon pour n'avoir pas donné à ses concurrents l'accès à son réseau. Cette affaire avait été intentée à titre privé par un client d'un concurrent de Verizon, M. Trinko. La FCC fédérale et l'autorité de régulation de l'État de New York avaient condamné Verizon pour avoir violé son obligation d'accès, en vertu de la Loi sur les télécommunications de 1996. L'autorité de régulation de l'État de New York avait prononcé des ordonnances imposant à Verizon de payer 10 millions USD à ses concurrents lésés et, dans le cadre d'une décision transactionnelle de la FCC, Verizon avait accepté de verser 3 millions USD au Trésor des États-Unis. La Cour suprême statua que les obligations de vendre réglementaires établies par la Loi sur les télécommunications de 1996 ne créaient pas une nouvelle cause d'action sur la base de la doctrine du refus de vente de la Section 2 de la Loi Sherman.

Certains auteurs[91] notent que la position de la Cour suprême des États-Unis peut en partie s'expliquer par les spécificités du système juridique des États-Unis ainsi que par les aspects particuliers de l'affaire en question : premièrement, la très grande portée de la réglementation des télécommunications des États-Unis à l'époque ; deuxièmement, la législation de la concurrence des États-Unis prévoit de forts dommages-intérêts en cas d'infraction à ses dispositions (possibilité d'actions de groupe et de dommages triplés) qui augmentent les coûts des erreurs d'application de cette législation et elle est administrée par des cours judiciaires qui n'ont pas les moyens de suivre les mesures correctrices des comportements ; troisièmement, M. Trinko était un client d'un nouvel entrant qui se plaignait d'avoir subi des pertes parce que son opérateur s'était heurté à un refus de vente de l'opérateur historique (ainsi, M. Trinko s'intéressait plus à la perspective d'obtenir de fortes indemnités qu'à la protection de la structure concurrentielle).

Les différences entre les solutions de l'Union européenne et des États-Unis s'expliquent peut-être aussi par leurs environnements institutionnels différents. La législation de la concurrence de l'UE a une valeur constitutionnelle (consacrée par le TFUE) à laquelle la réglementation sectorielle nationale ne peut déroger alors que la législation de la concurrence des États-Unis a la même valeur légale que la réglementation sectorielle fédérale. En outre, la Commission est une autorité administrative qui a la même habilité qu'une autorité réglementaire à analyser une affaire. La Commission veut peut-être aussi utiliser les affaires intentées au titre de la législation de la concurrence pour faire en sorte que le régulateur national respecte les règles de l'UE en la matière.

## 4. La défense pour conduite réglementée dans les affaires de concentrations

### *4.1 Les normes de contrôle des concentrations dans le cadre de la législation de la concurrence et de la réglementation*

Sur le fond, le contrôle des concentrations peut reposer sur différentes normes de fond d'une juridiction ou d'un secteur à l'autre. L'examen peut reposer sur une norme de la législation de la concurrence relative à l'efficience (la fusion doit être interdite si elle amoindrit significativement la concurrence, sinon on doit l'autoriser), ou il peut aussi avoir pour base une norme réglementaire plus générale relative à « l'intérêt public » (la concentration doit être interdite si elle va à l'encontre de l'intérêt public, sinon on doit l'autoriser). La norme de l'intérêt public, qui peut varier selon l'industrie, peut inclure des considérations d'efficience mais aussi d'autre nature. Du point de vue institutionnel, le contrôle des concentrations peut être effectué par l'autorité de la concurrence et/ou une autorité de régulation.

88 Affaire T-271/03, *Deutsche Telekom c. Commission européenne*, [2008] Rec. II-477.

89 Affaire C-280/08P, *Deutsche Telekom c. Commission européenne*, [2010] non encore publié au recueil.

90 *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 682 (2004).

91 Geradin (2004, p. 1548), Larouche (2006, p. 7-8).

Par exemple, aux États-Unis, une norme relative à l'intérêt public est appliquée par les autorités de régulation dans quatre industries : certains aspects de l'électricité (régulés par la Federal Energy Regulatory Commission) ; télécommunications/ médias (régulés par la Federal Communications Commission qui tient compte des effets possibles sur la diversité des opinions exprimées et sur l'obligation de fournir un service universel, ainsi que des effets probables sur la concurrence) ; banque (régulée par divers organes publics sectoriels) ; et chemins de fer (régulés par le Surface Transportation Board qui tient compte de facteurs tels que les avantages pour le public, les conditions de travail, les questions environnementales et les effets sur la concurrence)[92]. Au Canada, la responsabilité de l'autorisation des concentrations de banques incombe au ministère des Finances, tandis que le Bureau de la concurrence et le Bureau du surintendant des institutions financières jouent un rôle important dans l'analyse. En outre, l'autorisation des concentrations des grandes compagnies aériennes est de la responsabilité du Gouverneur en conseil.

Quand le secteur ou une entreprise est soumis à une réglementation, deux questions se posent pour un contrôle des concentrations dans le cadre du droit de la concurrence.

- La première question est de savoir si la réglementation entraîne une exemption du secteur ou de l'entreprise à l'égard de l'examen de fusion dans le cadre de la législation de la concurrence. Cette question doit être traitée conformément aux principes analysés ci-dessus et les tribunaux n'accordent des exemptions que de manière restrictive.

- La seconde question est quel sera l'impact de la réglementation dans l'analyse de fusion conduite sur la base d'une norme d'efficience dans le cadre de la législation de la concurrence[93]. Plus particulièrement, la question est de savoir si on peut s'appuyer sur la réglementation et l'utiliser comme une défense ex ante pour faciliter l'autorisation de la fusion.

### *4.2 La défense pour conduite réglementée (ex ante) dans un contrôle des concentrations dans le cadre du droit de la concurrence*

Dans les juridictions et les secteurs où une norme d'examen de fusion au regard du droit de la concurrence est applicable, l'autorité (que ce soit l'autorité de la concurrence ou l'autorité de régulation) peut décider de prendre en compte la réglementation quand celle-ci poursuit les mêmes buts que le droit de la concurrence et exerce un contrôle sur les comportements anticoncurrentiels susceptibles de résulter de la concentration. C'est en particulier le cas dans les secteurs récemment libéralisés où la réglementation apporte un soutien au droit de la concurrence pour conduire le marché vers une concurrence effective. Dans ce genre de cas, les parties qui fusionnent peuvent invoquer une sorte de défense pour conduite réglementée ex ante pour faciliter l'autorisation de la concentration.

Par exemple, dans l'UE, la Commission européenne n'impose pas de mesures correctrices au titre du droit de la concurrence pour autoriser les concentrations dans les télécommunications si la réglementation du secteur est jugée suffisante pour empêcher des comportements anticoncurrentiels ou des effets anticoncurrentiels à la suite d'une fusion (voir l'Encadré 4). De même, au Canada, le Bureau de la concurrence a pris en compte la réglementation sectorielle pour autoriser des fusions dans le secteur de l'électricité[94]. Aux États-Unis, l'Antitrust Modernization Commission (2007, p. 364) recommande que les

92 Antitrust Modernization Commission (2007, p. 363).

93 On n'aborde pas les relations entre l'examen de fusions antitrust sur la base d'une norme d'efficience et l'examen de fusions réglementaire sur la base d'une norme relative à l'intérêt public ; pour des exemples sur ces questions, voir ICN (2004c).

94 ICN (2004c, p. 6).

organismes chargés de faire respecter le droit de la concurrence prennent en compte les effets de la réglementation dans leur appréciation des fusions.

**Encadré 12. La réglementation servant de défense en matière de fusion dans le cadre de la législation de la concurrence : les télécommunications dans l'Union européenne**

Dans l'UE, la Commission européenne n'impose pas de mesures correctrices supplémentaires au titre de la législation de la concurrence pour autoriser une concentration si une réglementation dans l'UE ou même extérieure[95] est suffisante pour empêcher les comportements anticoncurrentiels.

- Dans *Deutsche Telekom/OTE,* la Commission européenne a autorisé une fusion renforçant le pouvoir de l'opérateur historique roumain en prenant en compte la réglementation imposée par le régulateur roumain à RomTelecom, filiale d'OTE[96].

- De même, dans *Vodafone/Tele2 Italy/Tele2 Spain,* la Commission européenne a autorisé un regroupement de 4 à 3 en prenant en compte la réglementation des tarifs de terminaison fixe et mobile par le régulateur italien des télécommunications[97].

- Dans *T-Mobile/Orange Netherlands*, une des raisons pour lesquelles la Commission européenne a autorisé la fusion est le fait que les tarifs de terminaison mobile des parties qui fusionnaient étaient réglementés par le régulateur néerlandais des télécommunications, limitant ainsi la capacité de l'entité fusionnée de fermer le marché aux concurrents.[98]

Avec le renforcement de la réglementation de l'UE pour ce secteur, son alignement sur les principes de la législation de la concurrence et l'adoption du Règlement sur l'itinérance,[99] la tendance à prendre en compte la réglementation dans l'appréciation des concentrations a notablement augmenté. De ce fait, beaucoup de fusions ont été approuvées sans qu'aucune mesure correctrice soit imposée au titre de la législation de la concurrence, notamment en ce qui concerne les préoccupations relatives au verrouillage vertical, où l'existence d'une réglementation efficace est un des facteurs qui empêchent les parties fusionnées d'appliquer des stratégies d'éviction.

Au contraire, la Commission européenne a imposé des mesures correctrices à des fusions quand la réglementation sectorielle apparaissait comme insuffisante.

- En 1999, dans *Telia/Telenor*, la Commission a jugé que les régimes réglementaires sectoriels en place en Suède et en Norvège à l'époque étaient insuffisants pour éviter un comportement anticoncurrentiel de l'entité fusionnée, ce qui a justifié l'imposition de mesures correctrices de nature réglementaire (à savoir, le dégroupage de la boucle locale).[100]

95 Décision de la Commission du 7 octobre 2005, affaire M.3752, *Verizon/MCI*.

96 Décision de la Commission du 2 octobre 2008, affaire M.5148, *Deutsche Telekom/OTE*, paragraphes 26, 89 et 115.

97 Décision de la Commission du 27 novembre 2007, affaire M. 4947, *Vodafone/Tele2 Italy/Tele2 Spain*, paragraphes 22–27.

98 Décision de la Commission du 20 août 2007, affaire M. 4748 *T-Mobile/Orange Netherlands*, paragraphe 49. La Commission a tenu compte, dans son évaluation de la concurrence, du fait que l'autorité de régulation néerlandaise a considéré qu'aucun opérateur n'avait une puissance significative sur le marché de gros de téléphonie mobile pour l'accès et le départ d'appels.

99 Règlement n° 717/2007 du Parlement européen et du Conseil du 27 juin 2007 concernant l'itinérance sur les réseaux publics de téléphonie mobile à l'intérieur de la Communauté et modifiant la directive 2002/21/CE, J.O. 2007 L171/32, modifié par le Règlement n° 544/2009, J. O. 2009 L167/12.

100 Décision de la Commission du 13 octobre 1999, affaire M. 1439, *Telia/Telenor*.

- Plus tard, il apparut dans *Telia/Sonera* que la Commission considérait que la réglementation en Finlande et en Suède, de nature ex post, ainsi que le régime réglementaire sectoriel de l'UE (qui exigeait une séparation comptable, mais non une séparation structurelle des entreprises puissantes sur le marché et le dégroupage de la boucle locale) étaient encore insuffisants (malgré un renforcement qui avait eu lieu entretemps) pour empêcher un comportement anticoncurrentiel susceptible de résulter des effets verticaux de la fusion. En conséquence, la Commission imposa des conditions exigeant la séparation juridique des différentes activités de réseaux et de services fixes et mobiles des parties en Suède et en Finlande, en plus des obligations de cession plus « traditionnelles ».[101]

De même, dans *Newscorp/Telepiu*,[102] la Commission a imposé des mesures substantielles en matière d'accès et de comportement (malgré la compétence du régulateur italien des médias pour appliquer une réglementation sectorielle), en s'appuyant sur le régulateur italien pour en suivre la mise en œuvre.

Source : Garzaniti et O'Regan (2010, sections 8-025 et 8-026)

## 5. Environnements institutionnels propres à atténuer ou réduire les conflits entre la législation et la politique de la concurrence et la réglementation[103]

Les conditions juridiques de la défense pour conduite réglementée ne correspondent pas toujours aux critères économiques d'une réglementation efficace et efficiente. Cela peut conduire à l'application de règles qui restreignent indûment la concurrence. Il importe donc que des mécanismes institutionnels soient en place pour atténuer ou réduire les discordances injustifiées entre le domaine de la concurrence et la réglementation. Ces mécanismes peuvent jouer un rôle dans la conception de la réglementation et dans l'action menée pour la faire respecter.

### *5.1 Des environnements institutionnels pour atténuer ou réduire les conflits dans la conception de la réglementation et le droit de la concurrence*

Un des principaux moyens pour remédier aux mesures réglementaires qui restreignent excessivement la concurrence est d'effectuer une évaluation des réglementations en projet ou existantes du point de vue de la concurrence[104]. Cette évaluation d'impact sur la concurrence revêt une importance particulière si la réglementation prévoit une exemption explicite de la législation de la concurrence. Toutefois, pour des raisons d'efficience, on ne devrait entreprendre une évaluation d'impact sur la concurrence complète et détaillée que quand, suivant une estimation initiale, les coûts potentiels des effets anticoncurrentiels de la réglementation sont assez importants pour justifier la consommation de ressources qu'exige une telle évaluation approfondie.

Le Manuel pour l'évaluation de la concurrence[105] de l'OCDE présente une méthodologie générale pour identifier les restrictions inutiles de la concurrence et pour élaborer d'autres mesures moins

101 Décision de la Commission du 10 juillet 2002, affaire M. 2803, *Telia/Sonera*.

102 Décision de la Commission du 2 avril 2003, affaire M.2876, *Newscorp/Telepiu*, paragraphe 259.

103 Voir aussi Sokol (2009).

104 Comme le recommande le Conseil de l'OCDE : voir la Recommandation du Conseil sur l'évaluation d'impact sur la concurrence du 22 octobre 2009.

105 Voir OCDE (2011a et 2011b), ainsi que Baldwin et Cave (1999, chapitre 7) et Cooper and Kovacic (2010, p. 1607).

restrictives qui permettent néanmoins la réalisation des objectifs publics. Elle comprend les quatre étapes suivantes[106] :

- Identifier les objectifs d'action
- Formuler les solutions réglementaires de remplacement qui permettraient la réalisation des mêmes objectifs
- Évaluer les effets de chaque solution possible sur la concurrence, à l'aide d'une Liste de référence pour l'évaluation d'impact sur la concurrence
- Comparer les différentes solutions.

Si l'évaluation met en lumière un potentiel important d'affaiblissement de la concurrence dans l'industrie en question ou dans des industries connexes, les responsables publics doivent rechercher, conformément au principe de proportionnalité, la solution de remplacement la moins anticoncurrentielle permettant la réalisation du même objectif. Par ailleurs, il convient de mettre en balance les coûts et avantages de la solution en question. Une réglementation anti-concurrentielle ne se justifie que si ses avantages l'emportent sur ses coûts.

Cette évaluation d'impact sur la concurrence doit être intégrée au processus d'élaboration des politiques à un stade précoce[107] et les autorités de la concurrence doivent y être associées dans toute la mesure du possible. En particulier, avant d'instituer une immunité explicite par une mesure législative, l'Antitrust Modernization Commission des États-Unis recommande une consultation des organismes antitrust fédéraux[108].

Dans l'UE, les Lignes directrices concernant l'analyse d'impact de la Commission européenne demandent une analyse ex ante de l'impact sur la concurrence effective pour toutes les grandes initiatives de l'Union européenne.[109] Aux États-Unis, les documents guides pour la Regulatory Impact Analysis (RIA) demandent un examen des impacts sur le marché[110]. En Australie, une évaluation très complète des réglementations fédérales et des États au regard de la concurrence a été entreprise au milieu de la décennie 1990 (voir l'Encadré 5). Aujourd'hui, l'ACCC exige que tous les documents d'évaluation indiquent si la réglementation envisagée est conforme aux accords sur la Politique nationale de la concurrence et contiennent une analyse à l'appui de cette conclusion.

**Encadré 13. Les réformes liées à la politique nationale de la concurrence en Australie**

A la suite du rapport de la Commission Hilmer en 1993 qui appelait à une plus grande ouverture microéconomique en mettant l'accent sur les réformes destinées à favoriser la concurrence, les neuf gouvernements ont convenu en 1995 d'entreprendre un réexamen systématique des textes légaux ayant des effets anticoncurrentiels, même s'ils n'étaient pas directement incompatibles avec la législation de la concurrence. Cela incluait les lois qui créaient des barrières à l'entrée, comme les régimes de délivrance d'autorisations, ou qui régissaient les comportements en fixant ou en contrôlant les qualifications, les heures d'ouverture, les prix, les spécifications techniques ou l'organisation de la commercialisation. Les travaux ont mis en lumière l'existence d'environ 1700 textes

106 OCDE (2011a, p. 39).

107 Voir aussi ICN (2002, p. 60).

108 Antitrust Modernization Commission (2007, p. 353, recommandation 59).

109 Commission européenne (2009, p. 36 et 45-46). Dans les États membres de l'UE, voir OFT (2007).

110 Voir Office of Management and Budget, Circular A-4, 17 septembre 2003.

différents, principalement au niveau des États, nécessitant un réexamen. La plupart de ces réexamens ont été achevés en 2001. Le critère était que la restriction de la concurrence doit être nécessaire pour atteindre les objectifs visés et que les avantages de la restriction doivent l'emporter sur ses coûts. Toute nouvelle législation exige une analyse d'impact fondée sur le même critère. Le gouvernement fédéral a offert aux Etats et Territoires des financements pour faire face aux coûts d'ajustement pouvant résulter de la révision des textes concernés.

D'autres moyens peuvent être utilisés pour assurer une réduction des discordances injustifiées entre la législation de la concurrence et la réglementation : attacher à la réglementation une clause d'extinction obligeant le législateur à réexaminer après un certain temps la nécessité d'un texte qui peut avoir des effets anticoncurrentiels[111] ou fonder la réglementation sur les principes de la concurrence comme cela a été fait par exemple pour le cadre réglementaire de l'Union européenne dans le domaine des télécommunications (voir encadré 1).

### *5.2 Des environnements institutionnels pour atténuer ou réduire les conflits dans l'action menée pour faire respecter la réglementation et le droit de la concurrence*

Même si la législation de la concurrence et la réglementation poursuivent des objectifs similaires, un conflit peut néanmoins survenir dans l'action menée pour faire respecter ces deux types de règles. C'est particulièrement le cas quand différentes autorités interviennent. Pour réduire ces risques, un certain nombre de mécanismes sont possibles. Ces mécanismes doivent être adaptés aux circonstances nationales et être assez souples pour répondre aux nouvelles situations économiques et évoluer en conséquence[112].

#### *5.2.1 Délimitation de juridiction entre les autorités chargées de faire respecter la législation de la concurrence et la réglementation*

Autorité unique chargée de la législation de la concurrence et de la réglementation

Le moyen le plus radical pour réduire les conflits dans l'application respective de la législation de la concurrence et de la réglementation est de faire en sorte que la même autorité soit chargée de ces deux instruments légaux. En Australie, en Nouvelle-Zélande ou au Pays-Bas, l'autorité de la concurrence applique la réglementation concernant certaines industries de réseau.

Des conflits peuvent toutefois encore se produire même si la même autorité est chargée à la fois d'appliquer la législation de la concurrence et la réglementation. Il peut y avoir un risque de conflit entre la protection de la concurrence et d'autres objectifs poursuivis par le régulateur (par exemple, la stabilité de marchés financiers). Les objectifs de la réglementation peuvent dans certains cas prendre le pas sur ceux de la législation de la concurrence[113]. La coopération interne et la supervision hiérarchique sont ainsi nécessaires pour une étroite intégration des objectifs de la législation de la concurrence et de la réglementation.

Des autorités différentes pour la législation de la concurrence et la réglementation

Une structure institutionnelle courante dans de nombreuses juridictions repose sur une séparation fonctionnelle des activités menées pour faire respecter la législation de la concurrence et la réglementation.

111 Antitrust Modernization Commission (2007, p. 353, recommandation 60).

112 ICN (2004c, p. 4), ICN (2005, p. 10). Pour un exemple d'environnement institutionnel visant à réduire les conflits dans le secteur des télécommunications, voir OCDE (2006).

113 ICN (2004a, p. 4), Temple Lang (2008, section VI).

Ainsi, l'application du droit de la concurrence est du ressort de l'autorité de la concurrence tandis que la réglementation des prix et de l'accès incombe à un régulateur souvent spécifique[114].

Cette approche fonctionnelle a pour principaux avantages la transparence ainsi que l'expertise propre à chacun de ces deux organismes[115]. Toutefois, cela comporte aussi un certain nombre de risques : conflit entre organismes, utilisation non efficiente des ressources et coûts plus élevés, exigences et complexité supplémentaires dues à la multiplicité et à la diversité des critères d'examen, retard éventuel de la conclusion de la transaction dans les affaires de fusion, manque éventuel de transparence, risque de résultats incohérents quand il faut se conformer aux exigences des deux autorités, risque de jeu avec la réglementation de la part des participants sur le marché.[116] Ainsi, une répartition efficace des tâches entre les autorités et une coopération sont nécessaires.

Quand il existe une autorité de régulation, elle peut disposer de la compétence d'appliquer le droit de la concurrence, concurremment avec l'autorité de concurrence. Dans ce cas, un moyen de réduire les conflits est de conclure des accords de coopération entre autorités, qui stipulent le rôle respectif de chacune (voir l'exemple du Royaume-Uni dans l'Encadré 5).

Quand il n'y a pas de pouvoir simultané, l'attribution des rôles peut être fixée par la législation, par les tribunaux ou par des accords ou pratiques convenues entre organismes. Par exemple, au Mexique, la loi stipule que l'autorité de la concurrence est responsable de certains aspects de réglementation : la détermination de la puissance de marché, qui est requise avant la réglementation d'un produit ou de services d'une entreprise. Aux États-Unis, des tribunaux ont statué en vertu de la doctrine de la juridiction primaire que l'autorité de la concurrence reste l'organisme compétent sous réserve d'attendre une décision de l'autorité de régulation, quand la décision réglementaire a une incidence sur le litige en matière de concurrence[117]. Dans l'Union européenne, la Commission a transféré aux autorités de régulation nationales plusieurs affaires relatives à la concurrence dans le secteur des télécommunications lorsque ces affaires pouvaient être traitées avec autant d'efficacité par lesdits autorités nationales[118].

**Encadré 14. La division du travail dans le cas de pouvoirs simultanés : exemple du Royaume Uni**

Aux termes de la Loi sur la concurrence de 1998 du Royaume-Uni[119], l'OFT et les régulateurs sectoriels ont concurremment le pouvoir d'entreprendre des poursuites contre les comportements anticoncurrentiels. Un règlement de 2004 (Competition Act (Concurrency) Regulations) désigne l'autorité chargée de telle ou telle fonction. En 2004, l'OFT a aussi publié des lignes directrices intitulées « Concurrent application to regulated industries » déclarant que le règlement régissant ces pouvoirs simultanés a pour but d'assurer « la coordination de l'accomplissement par l'OFT et les régulateurs des fonctions concurremment exercées dans le cadre de la Loi ».[120]

114 ICN (2004a, p. 4).

115 Sur ces avantages, voir aussi Laffont et Tirole (2000)

116 ICN (2005, p. 9). On notera que Barros et Hoernig (2004) montrent qu'il peut être plus efficient que les deux autorités décident d'une affaire indépendamment que conjointement pour trois raisons. Premièrement, avec des décisions indépendantes, la probabilité que les affaires soient résolues est plus grande, même si chaque autorité consacre peut-être moins d'attention à l'affaire que si elle était seule. Deuxièmement, les décisions indépendantes sont moins vulnérables aux tentatives d'influence. Troisièmement, il est aussi moins probable qu'aucune autorité ne s'estime avoir la charge d'une affaire donnée.

117 *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973). Voir Hovenkamp (2005, paragraphe 19.4).

118 Geradin et Sidak (2005, p. 539).

119 Voir section 54.

120 Voir OFT (2004, p. 30).

Le pouvoir des régulateurs sectoriels d'appliquer la législation de la concurrence a récemment été un sujet d'attention dans l'affaire Cityhook[121]. Cityhook affirmait que l'OFT avait agi illégalement en s'abstenant d'examiner s'il fallait transférer l'affaire au régulateur des télécommunications (l'Ofcom, à l'époque l'Oftel) en vertu des dispositions relatives aux pouvoirs simultanés. Au début de l'affaire, l'OFT et l'Ofcom avaient officiellement convenu que l'OFT la prendrait en charge. L'OFT décida ensuite, en raison de priorités administratives, de clore l'affaire. Une des raisons données par l'OFT était la compétence simultanée de l'Ofcom en la matière. Cependant, à aucun moment l'OFT n'a engagé un dialogue avec l'Ofcom qui aurait donné à ce régulateur la possibilité de prendre l'affaire en charge. Le tribunal statua qu'en conséquence l'OFT n'avait pas respecté les règles des pouvoirs simultanés. Il aurait fallu examiner convenablement le transfert possible de l'affaire à l'Ofcom, en lui donnant la possibilité de décider lui-même (sur la base de ses propres ressources disponibles et de ses priorités administratives) s'il prenait l'affaire en charge.

Le rapport du National Audit Office (NOA) de 2010 intitulé « Review of the UK's Competition Landscape »[122] examine lui aussi de manière assez détaillée le rôle des régulateurs dans l'application de la législation de la concurrence. Une des conclusions du rapport est que « jusqu'à présent, les Régulateurs ont utilisé leur pouvoir d'application de la législation de la concurrence parcimonieusement, avec le risque que la jurisprudence ne soit pas aussi riche qu'elle ne le devrait ». Les régulateurs préfèrent généralement utiliser leurs pouvoirs réglementaires et le rapport désigne trois principaux facteurs tendant à décourager l'utilisation des pouvoirs en matière de concurrence : (i) la durée des affaires relevant de la Loi sur la concurrence, (ii) la difficulté de prouver l'infraction et les ressources à engager à cette fin et (iii) l'impact sur les ressources globalement limitées du régulateur par comparaison avec l'utilisation des pouvoirs réglementaires.

### *5.2.2 La coopération entre l'autorité de la concurrence et les autorités de régulation*

Quand des autorités différentes sont chargées de faire respecter la législation de la concurrence et la réglementation, elles peuvent conclure des accords de coopération officiels afin d'atténuer ou réduire les conflits entre leurs activités. Cette coopération est particulièrement nécessaire dans certaines juridictions comme l'UE où les autorités de régulation ne peuvent aller à l'encontre des règles européennes de la concurrence et où le principe de proportionnalité exige que l'on évite de multiplier les procédures concernant des faits similaires. L'accord de coopération peut prévoir les éléments suivants[123] :

- Le droit pour l'autorité de la concurrence de soumettre des contributions ou de communiquer des commentaires ou des rapports d'experts aux régulateurs sectoriels, de participer aux audiences réglementaires et de demander des saisines facultatives. Par exemple, les règles de l'Union européenne dans le domaine des télécommunications stipulent qu'un régulateur national qui effectue une analyse réglementaire du marché doit y associer l'autorité nationale de la concurrence et soumettre ensuite son projet de décision à la Commission (en particulier à la Direction générale de la concurrence) pour un veto possible au motif d'infraction à la législation de l'UE (régissant notamment la concurrence)[124]. Aux États-Unis, l'Antitrust Division du ministère de la Justice (DOJ) participe aux instances, soumet des commentaires, comparaît ou consulte pour les questions relatives à la concurrence avec de nombreux organismes fédéraux. La Section 271 de la Loi sur les télécommunications de 1996 des États-Unis ordonnait que la FCC mène des consultations avec le DOJ concernant l'entrée sur le marché de la téléphonie à grande distance et accorde un « poids substantiel » à l'évaluation du DOJ. Au Canada, le Bureau de la concurrence est habilité en vertu des articles 125 et 126 du Competition Act à présenter des

121 *Cityhook Ltd, Cityhook (Cornwall) Ltd v Office of Fair Trading* [2009] EWHC 57 (Admin).

122 Disponible à http://www.nao.org.uk/publications/0910/competition_landscape.aspx

123 ICN (2004c, p. 8) et ICN (2005) qui contient des exemples particuliers de certaines juridictions, OCDE (2005b).

124 Directive 2002/21/CE du Parlement européen et du Conseil du 7 mars 2002 relative à un cadre réglementaire commun pour les réseaux et services de communications électroniques, JO [2002] L 108/33, modifiée par la Directive 2009/140, Art. 7, 7a et 16(1).

observations dans les procédures réglementaires fédérales et provinciales au sujet de la concurrence et ces observations sont reçues avec attention par les régulateurs.

- Permettre des procédures conjointes dans certains cas afin de bénéficier d'une expertise complémentaire.

- Accords ou consultations obligatoires, saisines obligatoires du régulateur par l'autorité de la concurrence ou notification des investigations qui sont de la compétence de l'autre organisme comme au Portugal (voir l'Encadré 7), et consultation ou saisines obligatoires comme en Allemagne, par exemple.

Les deux autorités peuvent aussi recourir à des techniques de coopération plus informelles et plus souples par les moyens suivants, importants pour établir une culture commune[125] :

- Contacts et échanges de vues officiels et informels, nomination de correspondants à l'intérieur de chaque organisme, nomination d'experts de l'industrie, réunions régulières ou occasionnelles sur les questions en cours, ou création de groupes de travail conjoints ou d'équipes interorganismes. Ces contacts impliquent habituellement l'échange d'informations, ce qui peut nécessiter d'être inscrit dans la loi si ces informations sont confidentielles.

- Formation et échange de personnel et de responsables de manière régulière : coopération éducative et formation professionnelle fournie par l'autre autorité, possibilité pour des membres du personnel de travailler dans l'organisme partenaire, promotion du détachement de personnel ou de l'échange de responsables entre organismes. Par exemple, l'Australian Competition and Consumer Commission (ACCC) comprend des commissaires associés en plus des cinq commissaires permanents. Les commissaires associés peuvent être des membres des organismes réglementaires du Commonwealth d'Australie ou des États.

**Encadré 15. Consultation entre un régulateur sectoriel et l'autorité de la concurrence au Portugal**

En 2008, l'autorité portugaise de la concurrence a jugé que *PT Comunicações* (PTC) abusait de sa position dominante sur le marché de gros de la location de circuits. Les clients du marché de gros louent des circuits pour l'interconnexion entre les réseaux fixes et mobiles et ce secteur est soumis à la réglementation de l'autorité nationale des communications, l'ICP-ANACOM. PTC appliquait des conditions discriminatoires pour des services équivalents au profit des entreprises de son propre groupe et au détriment des concurrents. PTC avait présenté son barème tarifaire à l'ICP et le régulateur avait décidé de ne pas s'opposer à son entrée en vigueur.

Au Portugal, la législation de la concurrence de la concurrence et la réglementation sectorielle s'appliquent dans des cadres légaux complémentaires, l'examen de l'ICP ayant lieu ex ante et la législation de la concurrence entrant en jeu ex post. L'intervention (ou l'abstention) d'un régulateur sectoriel n'exclut pas la possibilité que l'autorité de la concurrence agisse. Les compagnies sont donc obligées de faire en sorte que leur comportement satisfasse aux deux cadres légaux.

Quand l'autorité de la concurrence effectue une analyse ex post du secteur des communications électroniques, elle est tenue de mener des consultations avec l'ICP. Dans cette affaire, l'ICP a été consultée aussi bien au début de la procédure qu'au moment de la prise de décision de l'autorité de la concurrence. La décision finale a pris en compte l'opinion exprimée par l'ICP sur l'affaire.

Dans la fixation de l'amende infligée à PTC, l'autorité de la concurrence a admis comme circonstances atténuantes la décision de l'ICP de ne pas s'opposer au tarif à l'époque de son entrée en vigueur et le fait que PTC a

125 ICN (2004d, p. 6) et ICN (2005, p. 11) qui contient des exemples particuliers de certaines juridictions.

cessé de l'appliquer après la seconde décision du régulateur sectoriel sur la question.

**Encadré 16. L'interaction entre la réglementation des commissions d'interchange dans les systèmes de paiements et la législation de la concurrence en Australie**

La Reserve Bank of Australia (RBA) a le pouvoir de réguler les systèmes de paiements quand elle juge qu'il en va de l'intérêt public. Dans ce contexte, la définition de l'intérêt public couvre la sûreté financière du système de paiements, l'efficience et le degré de concurrence (Payments Systems (Regulation) Act (1998)). L'Australian Competition and Consumer Commission a parallèlement le pouvoir général d'appliquer les dispositions de la législation de la concurrence relatives aux ententes sur les prix et d'accepter les demandes d'exemption de l'interdiction de ces ententes (délivrer une « autorisation ») quand il en résulte un avantage net pour le public. Il existe un mémorandum d'entente entre ces deux organismes pour favoriser l'efficience des processus et des résultats.

Dans l'exercice de ses attributions, la RBA a pour politique d'encourager les participants à réformer de leur propre initiative leurs systèmes de paiements et, en l'absence d'une telle solution volontaire, elle prend généralement des décisions de régulation. À cet égard, la RBA a, entre autres, le pouvoir de prendre des décisions fixant ou régissant les commissions d'interchange payées entre les institutions pour le traitement des paiements à l'intérieur d'un système. De fait, dans ce cadre réglementaire, les commissions d'interchange ont fait l'objet de réformes volontaires et la RBA a aussi imposé des règles à diverses occasions.

Dans une affaire concernant une tentative de réforme volontaire, les participants du système de paiement électronique au point de vente EFTPOS avaient convenu d'adopter une « commission zéro » en réponse à une ferme pression morale de la RBA, de nature assez précise. Étant donné que ce projet de réduire à zéro les commissions d'interchange constituait une entente entre les participants, l'opinion courante était que cet accord risquait d'être en infraction avec l'interdiction des ententes sur les prix si les participants ne demandaient pas ou n'obtenaient pas l'autorisation de l'ACCC. L'ACCC accorda l'autorisation, mais les commerçants clients du système firent appel avec succès de cette décision devant le Tribunal de la concurrence australien (EFTPOS Interchange Fees Agreement [2004] ACompT 7, 25 mai 2004) qui annula l'autorisation, entraînant l'échec de la réforme volontaire. À la suite de cela, d'autres travaux de réforme aboutirent à une solution mixte à la fois volontaire et réglementée.

Dans une autre affaire où une réforme volontaire ne satisfaisait pas aux priorités de réforme de la RBA pour la partie australienne des systèmes Visa et MasterCard, la RBA a utilisé ses pouvoirs pour régir les commissions d'interchange (« The Setting of Wholesale ('Interchange') Fees in the Designated Credit Card Schemes », 2005). Dans cette affaire, la question s'est alors posée de savoir si les participants de ces systèmes de paiements qui se conformaient aux exigences de la RBA pouvaient être en infraction avec les interdictions des ententes sur les prix de la législation australienne. Celles-ci figurent maintenant dans le Competition and Consumer Act de 2010, anciennement Trade Practices Act de 1974. Un certain nombre de théories sont possibles : peut-être n'y a-t-il pas d'infraction aux interdictions stipulées par la législation de la concurrence parce que les règles de la RBA suppriment la liberté de conclure des accords entre les parties et que, de ce fait, il n'y a pas « d'entente » réelle sur les prix ; peut-être y a-t-il une entente, mais celle-ci n'a pas eu pour intention ou pour effet de fixer les prix parce que c'est la réglementation et non l'entente qui a eu cette intention et cet effet ; ou peut-être l'instauration des pouvoirs de la RBA par la loi constitue une exception limitée apportée implicitement par le Parlement à l'interdiction générale établie par la législation de la concurrence. Peut-être, au contraire, il y a une infraction à l'interdiction établie par la législation de la concurrence.

### *5.2.3 Interprétation cohérente de la législation de la concurrence et de la réglementation par la voie de l'appel judiciaire*

Un autre moyen important pour atténuer les conflits entre l'application de la législation de la concurrence et de la réglementation consiste à faire en sorte que ces deux ensembles de règles soient interprétés de manière cohérente. On peut y parvenir par les techniques suivantes :

- En assurant un cadre de recours commun contre les décisions des autorités de la concurrence et des autorités de régulation[126]. C'est le cas en Belgique, en France et au Royaume-Uni où les recours contre les décisions des autorités de la concurrence et de certains régulateurs des industries de réseau sont portés devant la même instance de recours.

- En faisant en sorte que l'autorité de la concurrence ou l'autorité de régulation puisse être entendue par les juges à titre d'amicus curiae.

- En faisant en sorte que les autorités de la concurrence adoptent des grandes lignes d'interprétation clarifiant à l'avance l'application de la législation de la concurrence aux secteurs réglementés. Ces lignes directrices sont utiles aux entreprises mais aussi aux juges. Dans l'UE, par exemple, la Commission européenne a adopté des lignes directrices sur l'application des règles de concurrence dans le secteur des télécommunications ou le secteur postal[127]. C'est aussi le cas au Japon dans les secteurs de l'électricité, du gaz et des télécommunications[128].

### *5.3 L'importance du plaidoyer conduit par les autorités de la concurrence*

Suivant la définition de l'ICN[129], « le plaidoyer pour la concurrence désigne les activités conduites par l'autorité de la concurrence visant à promouvoir un environnement concurrentiel pour les activités économiques par des moyens autres que l'action répressive, notamment par ses relations avec les autres entités gouvernementales et en faisant mieux connaître au public les avantages de la concurrence ». Ainsi le « plaidoyer » couvre pratiquement toutes les activités d'une autorité de la concurrence qui n'entrent pas dans le cadre de la répression.

L'efficacité de ce plaidoyer pour la concurrence dans le cadre de consultations dépend de trois facteurs principaux : le moment de la consultation, le caractère obligatoire ou facultatif de la consultation et dans quelle mesure il doit être obligatoirement tenu compte des recommandations formulées[130].

Dans le contexte de la défense pour conduite réglementée, le plaidoyer pour la concurrence implique de convaincre les autres autorités publiques de s'abstenir d'élaborer ou d'appliquer une réglementation d'une manière excessivement anticoncurrentielle. Comme on l'a vu ci-dessus, cela implique (i) d'encourager les évaluations d'impact sur la concurrence et d'y participer, (ii) de coopérer avec les autorités de régulation pour faire en sorte qu'elles remplissent leur mandat en respectant les objectifs de la politique de la concurrence, et (iii) de coopérer avec les organes judiciaires pour faire en sorte qu'ils interprètent les dispositions réglementaires d'une manière qui concorde avec la politique de la concurrence.

Dans le contexte particulier de la déréglementation, l'ICN (2002, p. 70) observe que le plaidoyer pour la concurrence a été mené principalement de trois façons :

- Réalisation d'études sectorielles qui examinent les structures de marché, en soulignant les avantages d'ouvrir l'accès et d'introduire la concurrence

126 ICN (2004d, p. 8).

127 Commission européenne (1998a) et (1998b). Temple Lang (2008, section I).

128 ICN (2005, p. 61).

129 ICN (2002, p. 25).

130 ICN (2002, p. 59-67). Egalement Cooper and Kovacic (2010, p.1581).

- Mise en œuvre d'accords de coopération entre les organismes de régulation sectoriels et les autorités de la concurrence, particulièrement utiles pour détecter les pratiques des agents réglementés qui restreignent la concurrence

- Rédaction de lignes directrices et de codes sectoriels de conduite ou de conformité à la législation de la concurrence[131].

On constate dans la pratique que ce plaidoyer pour la concurrence a été particulièrement utile dans les secteurs des télécommunications, de l'électricité, des transports et des services financiers.

## 6. Conclusion

La « défense pour conduite réglementée » protège contre l'action répressive les entreprises qui se livrent à un comportement potentiellement anticoncurrentiel, quand ce comportement est exigé par une réglementation fédérale ou d'un État.

Le présent document met en lumière un certain nombre de points clés :

- La défense pour conduite réglementée est fondée sur un certain nombre de principes légaux (souveraineté de l'État, fédéralisme, subsidiarité, certitude légale et attentes légitimes). Une attitude ouverte des autorités de la concurrence à l'égard de la légitimité des défenses fondées sur la conduite réglementée est essentielle pour éviter que les entreprises soient amenées à faire face à des exigences légales discordantes. La défense pour conduite réglementée peut toutefois entraîner des coûts de bien-être substantiels pour la société et devrait donc être appliquée avec précaution par les tribunaux.

- Les réglementations peuvent quelquefois imposer des actions qui, sans réglementation, constitueraient des violations de la législation de la concurrence. (i) Quand la réglementation complète la législation de la concurrence et poursuit les mêmes objectifs (par exemple, bien-être total ou bien-être des consommateurs), la conduite réglementée est moins susceptible d'aller à l'encontre de la législation de la concurrence, en supposant que la législation de la concurrence et la réglementation mettent en œuvre rigoureusement le but commun. (ii) Quand la réglementation restreint la concurrence (par exemple, en créant des barrières à l'entrée ou en fixant des prix minimums), les conflits peuvent nécessiter de mettre en balance des objectifs sociétaux différents.

- La défense pour conduite réglementée est une forme d'immunité plus étroite que celle consistant à exempter un secteur entier de l'application de la législation de la concurrence et l'admission de cette défense est préférable à ces larges exemptions sectorielles.

- La défense pour conduite réglementée repose sur un certain nombre de doctrines juridiques comme celles de l'immunité explicite, de l'immunité implicite ou de l'action de l'État qui se sont développées pragmatiquement par la jurisprudence. Les principes centraux sont relativement clairs dans beaucoup de juridictions, mais il subsiste des incertitudes.

- Les conditions d'application d'une défense pour conduite réglementée dépendent de la hiérarchie des normes. Quand la législation de la concurrence et la réglementation sont au même niveau hiérarchique, la défense pour conduite réglementée s'applique si une des règles légales prévoit l'immunité à l'égard de la législation de la concurrence de la concurrence (immunité explicite) ou

131 Voir les notes 127 et 128 ci-dessus.

s'il existe une claire incompatibilité dans l'application des deux règles légales au comportement en cause (immunité implicite). Dans certaines juridictions, la défense s'applique aussi quand l'application de la législation de la concurrence en plus de la réglementation n'apporte pas de valeur ajoutée. Quand la législation de la concurrence se situe à un niveau supérieur à celui de la réglementation, la défense pour conduite réglementée s'applique quand le comportement en cause est imposé ou au moins activement surveillé par le régulateur.

- La défense pour conduite réglementée ne devrait s'appliquer que dans le cas où les entreprises n'ont pas de liberté quant à leurs actions potentiellement anticoncurrentielles. Si une réglementation appuie ou facilite un comportement anticoncurrentiel sans imposer directement une conduite déterminée, l'entreprise a une certaine liberté de choix et la législation de la concurrence doit en principe s'appliquer à la conduite réglementée.

- Dans certaines juridictions, les règles de la concurrence promulguées au niveau fédéral empêchent les régulateurs des États d'imposer ou de faciliter des conduites qui seraient en infraction avec ces règles.

- La défense pour conduite réglementée est quelquefois invoquée dans les affaires de fusion avec l'argument que les entreprises fusionnées, même si elles devenaient puissantes sur le marché, ne seraient pas en mesure de nuire aux autres, grâce aux réglementations de l'accès ou des prix qui restreignent la capacité d'exploiter la puissance de marché.

- Les environnements institutionnels peuvent réduire les contradictions potentielles entre les structures réglementaires et la législation de la concurrence, dans la conception et dans l'application de celles-ci, par exemple (i) en évaluant les effets des réglementations sur la concurrence avant leur adoption, (ii) en conférant aux régulateurs des pouvoirs d'application de la législation de la concurrence ou à l'autorité de la concurrence des pouvoirs de réglementation, (iii) en assurant une coopération réciproque entre les régulateurs et les autorités de la concurrence au moyen d'accords formels ou informels et (iv) en assurant une interprétation cohérente des règles de la réglementation et de la concurrence, par exemple grâce au plaidoyer des autorités de la concurrence.

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# CANADA

While competition law and industry-specific regulatory regimes are both aimed at protecting the public interest, their interface poses challenges for courts, regulators and competition law practitioners. This paper describes the regulated conduct doctrine (the "RCD")[1] and, in particular, how Canadian courts have to date balanced the "tension between regulation and competition law."[2] It also outlines the Competition Bureau's (the "Bureau") approach to applying the RCD when enforcing the *Competition Act*[3] (the "Act").

## 1. Background and historical context

The Bureau is an independent law enforcement agency headed by the Commissioner of Competition (the "Commissioner"). It is responsible for the administration and enforcement of the Act, a federal law of general application. With a limited number of exceptions, the Act governs most business conduct in Canada, and contains both criminal and civil provisions aimed at preventing anti-competitive practices in the Canadian marketplace.

Competition or anti-combines legislation was first enacted by the federal government in 1889. Under Canada's system of federalism, the federal and provincial governments each have authority to legislate within their respective jurisdictions. However, this can lead to federal and provincial laws overlapping and conflicting in their application.

The RCD is one of a number of interpretive tools developed by Canadian courts to resolve potential conflicts between validly enacted laws. Under certain limited conditions, the RCD, and other interpretive tools, may remove from the application of the Act conduct that is authorized or required by another federal, provincial or municipal law or legislative regime.

The Supreme Court of Canada has traditionally concluded that a valid federal law will override a valid provincial law where the operation of the provincial law conflicts with the operation of the federal law ("federal paramountcy" rule); a conflict occurs where a party cannot comply with both laws (so-called "impossibility of dual compliance" test).[4] More recently, the Supreme Court has held that even absent such a conflict "[p]rovincial legislation that displaces or frustrates Parliament's legislative purpose" can also be overridden by a valid federal law.[5] The RCD is an exception to the standard rules for the application of a general law in accordance with its plain meaning and for the paramountcy of validly enacted federal law, such as the Act.

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1 The RCD has been described by a number of terms, such as regulated conduct defence, regulated conduct exemption, regulated industries exemption, regulated industries defence and regulated industries doctrine; it is not limited to matters involving the *Competition Act*.

2 Calvin S. Goldman Q.C. and John D. Bodrug eds, *Competition Law of Canada* (New York: Juris Publishing, 2009) at 11-2.

3 R.S.C. 1985, c. C-34.

4 See, for example, *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 at 191.

5 *Rothman, Benson & Hedges v. Saskatchewan*, [2005] 1 S.C.R. 188 at para. 12ff.

## 2. Development of RCD Jurisprudence

Canadian jurisprudence analysing the interaction between competition law and regulation emerged in the early 1900s. However, there have been relatively few competition law cases in which the RCD has been argued, and they have been predominantly criminal cases.

### *2.1 Emergence of the RCD*

The RCD emerged from a series of constitutional cases[6] that considered the constitutional validity of provincial legislation related to agricultural products and price maintenance schemes. In these early cases, persons convicted of an offence under a provincial regulatory regime tried to escape liability on the grounds that the provincial regime was unconstitutional because it, or the actions of the provincial regulator, contravened the criminal conspiracy provisions of the anti-combines law in existence at the time. The courts in these cases were concerned with whether the impugned conduct was properly a matter of federal jurisdiction under the criminal law or trade and commerce powers, or within provincial jurisdiction as a matter relating to property and civil rights within the province. The central issue for the courts was whether the provincial statute in question was *intra vires* the provincial legislature so as to sustain the conviction, not whether the anti-combines law applied to the conduct in question.

In the earliest case, *R. v. Chung Chuck*,[7] Mr. Chung Chuck was convicted and imprisoned for unlawfully marketing potatoes, contrary to a provincial statute. The British Columbia Court of Appeal held that the provincial statute was valid, and was not an infringement on the federal government's powers to legislate regarding criminal law and the regulation of trade and commerce. The court found no violation of the federal combines law because compliance with provincial legislation could not constitute a criminal offence, given that there was no criminal intent (*mens rea*) or undue lessening of competition caused by actions of those carrying out the provisions of the provincial statute, and it was not reasonable to interpret a statute intended to safeguard an industry so as to bring it within the ambit of the criminal law. This was the case whether the provincial regulatory statute authorized or compelled the conduct.[8]

Building from *Chung Chuck*, a number of subsequent provincial marketing board cases, focused on an additional element, namely, the public interest. Most notably, the Supreme Court of Canada, in *Reference Re Farm Products Marketing Act*,[9] analysed the issue of whether the price-fixing activities of an Ontario marketing board contravened the *Combines Investigation Act*'s criminal prohibition against agreements that "unduly" restricted competition to the detriment of the public interest, and articulated what is commonly known as the "public interest" test. Under this analysis, "any scheme that is otherwise within the authority of the provincial legislature cannot be against the public interest when the legislature is seized of the power and the obligation to take care of that interest."[10] The court linked the concepts of "public interest," and "unduly" limiting competition by commenting that a scheme deemed by the provincial legislature to be in the public interest could not be said to "unduly" limit or prevent competition. As such, one of the elements of the offence of engaging in a price-fixing conspiracy was not satisfied.[11]

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6 *R.v. Chung Chuck* (1929), 1 D.L.R. 756 (B.C.C.A.)[hereinafter *Chung Chuck*]; *Cherry v. R.* (1938), 1 D.L.R. 156 (Sask. C.A.); *R.v. Simoneau* (1936), 1 D.L.R. 143 (Que. Ct. Sess).

7 *Ibid.*

8 *Ibid* at 760.

9 [1957] 1 S.C.R. 198.

10 *Ibid* at 206.

11 The relevant provision in the *Combines Investigation Act* at that time provided that it was a criminal offence to engage in a price-fixing conspiracy that "unduly" prevented or lessened competition. As a

Furthermore, in deciding that the provincial marketing scheme did not contravene the *Combines Investigation Act*, the court distinguished voluntary conduct from conduct that was compelled or authorized by regulation. Essentially, for the court, "voluntary conduct could be the object of competition law enforcement; compelled or authorized conduct, which was presumed to be in the public interest, could not."[12] In the court's view, the marketing board members were merely carrying out their duties as required by the provincial statute; as such, the *Combines Investigation Act* did not apply.

### *2.2 Modern caselaw*

In *R. v. Canadian Breweries Ltd.*,[13] the Crown alleged that a series of mergers had resulted in limited price competition, but the defence argued that, because the Ontario Liquor Control Board set the prices for beer and liquor, the industry was outside the scope of the *Combines Investigation Act.* The court applied the public interest test articulated in *Farm Products*, and concluded that the application of the *Combines Investigation Act* was excluded to the extent that regulatory powers had been exercised to remove particular fields of activity from the competitive sphere. The court also noted that, where the regulation of an industry was hindered by the behaviour of those subject to the regulation ("regulatees"), the RCD would not apply to protect them.[14] In other words, for the RCD to apply, the conduct of the regulatees must not have frustrated the exercise of authority by the regulator. Although no Canadian court has stated that the application of the RCD differs as between regulators and regulatees, the caselaw suggests that regulators are more likely than regulatees to benefit from the application of the RCD.[15]

The court in *Canadian Breweries* outlined certain general principles, and the case has been referenced as standing for the proposition that an accused should not be convicted under the federal competition legislation if it can be shown that:

- There is validly enacted provincial legislation (*i.e.*, it is not *ultra vires*);

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result, if a price-fixing conspiracy resulted in a prevention or lessening of competition, but that prevention or lessening was not "undue," a conviction could not be sustained.

12 Janet Bolton and Lorne Saltzman, "*The Regulated Conduct Doctrine and the Competition Bureau's 2006 Technical Bulletin: Retrospective and Prospective"* at 4, available online at: http://www.mccarthy.ca/pubs/salzmanbolton.pdf.

13 [1960] O.R. 601 (H.C.J.) [hereinafter *Canadian Breweries*].

14 *Ibid* at 629-630. The court held: "When a provincial legislature has conferred on a commission or board the power to regulate an industry and fix prices, and the power has been exercised, the Court must assume that the power is exercised in the public interest. In such cases, in order to succeed in a prosecution laid under the Act with respect to the operation of a combine, I think it must be shown that the combine has operated, or is likely to operate, so as to hinder or prevent the provincial body from effectively exercising the powers given to it to protect the public interest. If the evidence shows that by reason of a merger the accused is given a substantial monopoly in the market, the onus, in my opinion, would be discharged. …There may, however, be areas of competition in the market that are not affected by the exercise of the powers conferred on the provincial body in which restraints on competition may render the operations of the combine illegal."

15 See, for example, *Waterloo Law Association v. A.G. Canada* (1986), 58 O.R. (2d) 275; *R. v. Charterways Transportation Ltd.* (1981), 32 O.R. (2d) 86 (Ont.C.A.) and *R. v. B.C. Fruit Growers Assoc. et al* (1985), 11 C.P.R. (3d) 183 (B.C.S.C.). The U.S. "state action doctrine" only immunizes the conduct of regulatees where their conduct is authorized by state law and is subject to active state supervision (see *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985)). Similarly, the U.S. "implied immunity" doctrine does not apply to conduct voluntarily initiated by regulatees save where undertaken in the context of a detailed scheme of administrative oversight and where the refusal to accord such immunity would subject the regulatees to conflicting and potentially irreconcilable liability (See *Otter Tail Power Co. v. U.S.*, 410 U.S. 366 at 374).

- A provincial legislature has conferred on a commission or board (*i.e*., a regulator) the power to regulate an industry and take action contrary to the combines legislation (e.g., fix prices);

- The commission or board has in fact exercised that power; and

- The exercise of that power has not been frustrated by the actions of the accused regulatee.[16]

In 1982, the Supreme Court of Canada again considered the RCD in *Attorney-General of Canada v. Law Society of British Columbia* ("*Jabour*").[17] In that case, the provincial law society imposed a ban on advertising, and took disciplinary actions against one of its members who violated that ban. The court held that the disciplinary actions were justified by a provincial statute that gave the law society the authority to discipline its members for any conduct that it deemed to be "contrary to the best interests of the public or of the legal profession," and therefore the actions of the law society did not amount to a conspiracy pursuant to the *Combines Investigation Act*. The court held that, where possible, a federal statute should be interpreted so as not to interfere with a provincial statute.[18]

In *Industrial Milk Producers et al v. Milk Board et al*,[19] the Federal Court Trial Division struck out a civil claim commenced by a group of milk producers who contested federal and provincial restrictions on milk marketing in the province of British Columbia. The court held that the RCD applied, and that, in fixing quotas, the Milk Board was carrying out a mandate specifically granted to it. The court held that the RCD does not apply to industries as a whole, but merely to "activities which are required or authorized by…federal or provincial legislation."[20] The court further stated that, where regulators "use their statutory authority as a springboard (or disguise) to engage in anti-competitive practices beyond what is authorized by the relevant regulatory statutes," they will be in breach of the Act.[21]

There is limited caselaw regarding the application of the RCD to the civil provisions of the Act. In *Alex Couture Inc. v. Canada (Attorney General),*[22] the Quebec Court of Appeal did not decide whether the RCD applied because it found that there was no incompatibility between the merger provisions of the Act and provincial legislation, which only marginally affected competition. Subsequently, in *Law Society of Upper Canada v. Canada (Attorney General),*[23] it was decided that s. 61 of Ontario's *Law Society Act*, which provided for a mandatory insurance scheme, did not contravene the civil tied-selling, exclusive dealing or abuse of dominance provisions of the Act. However, as the parties had simply agreed that the RCD applied to the civil provisions, the court's decision did not include a comprehensive analysis of the RCD in the civil context.

16 *Supra* note 13 at 629; Duane Schippers and James Sutton, "Regulated Industries and Antitrust Law in Canada: Understanding the 'Regulated Conduct Doctrine'" 2000 (unpublished) at 32-33.

17 [1982] 2 S.C.R. 307.

18 The court's statement on this point was quoted with approval in the subsequent case of *Garland* v. *Consumers' Gas Co*.,[2004] 1 S.C.R. 629 [hereinafter *Garland*].

19 (1988), 47 D.L.R. (4th) 710 (F.C.T.D).

20 *Ibid*. at 726.

21 *Ibid.*

22 (1991), 38 C.P.R. (3d) 293 (Que. C.A.), leave to appeal to the Supreme Court of Canada denied [1992] 2 S.C.R. at v.

23 (1996), 67 C.P.R. (3d) 48 (Ont. Gen. Div).

While most RCD cases have arisen in the context of Canadian constitutional law, as exceptions to the doctrine of paramountcy, it sometimes occurs that two federal statutes may overlap and give rise to a potential conflict. In *Society of Composers, Authors and Publishers of Canada v. Landmark Cinemas* of *Canada*,[24] the Federal Court Trial Division considered whether the defendant could rely on the Act to argue that the fixing of tariffs by the federal Copyright Board was illegal. The court held that the activities of the board were expressly sanctioned by the *Copyright Act*, and were therefore exempt from the application of s. 32 of the Act. The court's decision may be considered merely an application of the principle of statutory interpretation that specific statutes normally take precedence over framework laws of general application.

### *2.3 "Leeway" Language and Garland v. Consumers Gas Co.*

In 2004, the Supreme Court of Canada once again considered the RCD in *Garland v. Consumers Gas Co*.[25] The court ordered the respondent, a gas utility company, to re-pay "late payment penalties" that it had collected from consumers because those penalties amounted to charging a criminal rate of interest, contrary to s. 347 of the *Criminal Code*. The respondent gas company argued that the money it collected was authorized by orders issued by a provincial energy board. The court rejected this argument because, in the court's view, s. 347 of the *Criminal Code* did not include language which, either expressly or by necessary implication, granted "leeway" to those acting pursuant to a valid provincial regulatory scheme. The court held that Parliament could have granted "leeway" by including terms such as "the public interest," "against the interests of the public" or "unduly" (limiting competition) in the *Criminal Code* provision, and noted that Parliament had not done so. According to *Garland*, the RCD can only immunize conduct from the *Criminal Code* where the *Criminal Code* clearly allows for the application of the RCD, for example, by such "leeway language" found in the competition law provisions at issue in previous RCD caselaw.

When the *Competition Act* was amended in 2010, and the word "unduly" was removed from subsection 45(1),[26]subsection 45(7) was added, to clarify that, notwithstanding the removal of the word "unduly," the RCD continues to apply as a defence to a prosecution under subsection 45(1).

## 3. The Competition Bureau's approach to "regulated" conduct

On September 27, 2010, the Bureau released its updated *Bulletin on "Regulated" Conduct* (the "Bulletin").[27] The Bulletin is based on the Bureau's recognition that the Act is a framework law of general

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24 (1992), 45 C.P.R. 346 (F.C.T.D.).

25 *Supra*, note 18.

26 Subsection 45(1) now contains a *per se* prohibition. 45(1) Conspiracies, agreements or arrangements between competitors--Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges

(a) to fix, maintain, increase or control the price for the supply of the product;

(b) to allocate sales, territories, customers or markets for the production or supply of the product; or

(c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

27 The Bulletin is not intended to be a substitute for the advice of counsel and is intended solely to provide information. It is not a binding statement of how discretion will be exercised in a particular situation. Final interpretation of the law is the responsibility of the courts and the Competition Tribunal. The Bulletin replaces and supercedes any other publications of the Bureau in this area. The Bulletin can be found on the Bureau's website at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/RegulatedConduct-sept-2010-e.pdf/$FILE/RegulatedConduct-sept-2010-e.pdf.

application, and that Parliament "… is not presumed to depart from the general system of law without expressing its intention to do so with irresistible clearness…".[28] It is the Bureau's position that the RCD is an exception to this and other important principles of statutory interpretation, and that RCD caselaw is underdeveloped. Consequently, absent further judicial guidance, it is the Bureau's view that a cautious application of the RCD is warranted.[29]

Generally, in determining whether conduct regulated by another law will be pursued under the Act, the Bureau will carefully consider the purpose of the Act and any other law said to be applicable to the conduct, the interests sought to be protected by both laws, the impugned conduct, the potentially applicable provision(s) of the Act and of the other law, the parties involved, and the principles of statutory interpretation applicable to the case.[30] The Bureau will not necessarily approach conduct regulated by provincial laws in the same manner as conduct regulated by federal laws.[31] Similarly, the Bureau will not necessarily approach the application of the reviewable matters provisions in the Act to conduct regulated by another law in the same manner as it will approach the application of the criminal provisions of the Act to such conduct.[32]

If particular conduct is not immune from the application of the Act by virtue of one doctrine or defence, such as the RCD, a party may still benefit from other defences or doctrines, such as a lack of requisite *mens rea*, official inducement of error, statutory justification, issue estoppel or Crown immunity. Even absent any such defence or doctrine, the Bureau will consider the public interest in pursuing conduct undertaken in good faith in reliance on a law or in exercise of fundamental freedoms. While each case will be considered on its individual merits in accordance with its particular facts, it is unlikely that the Bureau will pursue a case under any criminal (Part VI) provision(s) of the Act in respect of conduct that is authorized or required by a valid law.

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28 *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co*., [1956] S.C.R. 610 at 614.

29 Recognized principles of statutory interpretation, such as *expressio unius est exclusio alterius* (see Sullivan, *Driedger on the Construction of Statutes*, 4th ed. at 179 ff), and the recent Supreme Court decision in *Garland*, *supra* note 17 at 665, suggest that the Bureau, in particular, should refrain from immunizing conduct from the Act absent confidence that Parliament intended such immunity.

30 A requirement that a party comply with more than one law, for example, does not, of itself, raise a conflict requiring resolution. See, for example, *Smith v. Queen*, [1960] S.C.R. 776 at 800 [hereinafter S*mith*].

31 The "federal paramountcy" concern identified in the RCD cases (which resulted in, effectively, the application of a reverse paramountcy rule until *Garland*) is not present where the Act is alleged to conflict with another federal law. In addition, provincial and federal laws need not be presumed to be coherent as they emanate from different legislators (see, for example, *Garland*). It is noteworthy that two distinct doctrines exist in the United States: the "state action" doctrine applies to claimed conflicts between state law and federal antitrust law and the "implied antitrust immunity" doctrine applies to claimed conflicts between federal antitrust law and other federal laws. Under the "state action" doctrine, only actions "required" or "compelled" by the state or actions undertaken pursuant to a "clearly articulated and affirmatively expressed state policy" to displace antitrust laws enjoy a "regulated industries" exemption (See *Parker v. Brown* 317 U.S. 341 (1943); *Goldfarb v. Virginia State Bar* 421 U.S. 773 (1975); *California Retail Liquor Dealers Association v. Midcal Aluminum* 445 U.S. 97 (1986)). Under the "implied immunity" doctrine, "only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system" is immunity from antitrust laws available (See *National Gerimedical Hospital v. Blue Cross of Kansas City* 452 U.S. 378, 388 (1981) and *Silver v. NYSE* 373 U.S. 341).

32 There is no concern with the imposition of criminal liability nor the need for criminal intent in respect of parties arguably engaged in "regulated" conduct under the reviewable matters provisions of the Act. Moreover, there is no presumption that reviewable conduct is contrary to the "public interest" or unlawful (see *Proctor and Gamble Co. v. Kimberley Clark of Canada* (1991), 40 C.P.R. (1st) 1 (F.C.T.D.)).

Regardless of whether the RCD or some other doctrine or defence immunizes an impugned conduct from a provision(s) of the Act, the Bureau will always consider the regulatory context in which the conduct is engaged where it is relevant to the application of the provision(s) of the Act in question; for example, the extent to which a regulatory regime already limits or constrains the exercise of market power in certain areas of competition but not others.[33]

### *3.1 Conduct that may be regulated by provincial laws*

In compliance with the decision of the Supreme Court in *Jabour*, the Bureau will always consider whether the RCD applies to conduct that may be regulated by provincial law. It will do so by focusing on the question of whether a validly enacted provincial law authorizes (expressly or impliedly) or requires the impugned conduct.[34] Where this occurs, the Bureau will not pursue a case under section 45 of the Act [35]in reliance on the RCD.

With respect to the other provisions of Part VI (Offences in Relation to Competition) of the Act, (s. 46 foreign directives, s. 47 bid- rigging, s. 48 conspiracy related to professional sport, s. 49 agreements or arrangements of federal financial institutions, s. 52 false or misleading representations, s. 52.1 deceptive telemarketing, s. 53 deceptive notice of a winning prize, s. 54 double ticketing, s. 55 multi-level marketing plan, and s. 55.1 pyramid schemes), in compliance with *Garland*, the Bureau will first attempt to determine whether Parliament intended that the particular provision(s) of the Act apply to the impugned conduct. If the Bureau concludes that the provision of the Act is intended to apply to the impugned conduct, the Bureau may nonetheless exercise its discretion to refrain from pursuing the case in reliance on the RCD, on other doctrines or defences,[36] or the Bureau's general discretion to commence an inquiry.

RCD caselaw is extremely limited in respect of the reviewable matters provisions of the Act. While the jurisprudential preference for avoiding (where possible) an application of the federal paramountcy rule seems to support the application of the RCD to the reviewable practice provisions of the Act, neither the "public interest" nor the "*mens rea*" rationales relied upon by the courts in RCD cases support the application of the RCD to the reviewable matters provisions of the Act. Moreover, in *Garland*, the Supreme Court applied a federal law resulting in penal sanctions to conduct expressly authorized by a provincial regulatory body because there was no clear Parliamentary intent to do otherwise.[37] In this

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33 See, for example, *Canadian Breweries*, *supra* note 13.

34 A regulator's conduct is not "authorized" where it is not contemplated by its governing legislation: *Jabour*, *supra* note 17. A regulatee's conduct is not "authorized" where it undermines or frustrates the regulatory regime: *R. v. Charterways* (1981), 32 O.R. (2nd) 719 (H.C.J.), affirmed on appeal (1982), 69 C.C.C. (2d) 94 (Ont. C.A.).

35 *Supra* note 26

36 As indicated above, the Bureau does not view *Garland* as eliminating any regulation based defences (e.g. an action authorized by a validly enacted provincial law may satisfy an (implied) due diligence requirement) to a prosecution under a provision of Part VI of the Act. The Bureau's view is simply that the RCD, *stricti juris*, may not immunize conduct from every provision(s) of Part VI of the Act. Other doctrines or defences that may be available include official inducement of error, statutory justification, issue estoppel and Crown immunity.

37 While some commentators have suggested that words such as "substantially" or "may" in reviewable matters provisions provide the "leeway" required by the Supreme Court in *Garland*, a number of provisions of the Act contain no language that is, even arguably, analogous to the "leeway language" required by the Supreme Court in *Garland*.

context, and absent further judicial guidance, the Bureau cannot responsibly limit its statutory mandate by the general application of the RCD to the reviewable matters provisions of the Act.[38]

With respect to the reviewable matters provisions of the Act, until RCD caselaw is further developed in this area, the Bureau will consider RCD caselaw in its examination of reviewable matters, but will not consider RCD caselaw to be dispositive of such matters. Consistent with *Garland*, the Bureau will strive to determine Parliament's intent with respect to the application of the relevant provision(s) of the Act to the impugned conduct. The Bureau will not refrain from pursuing regulated conduct under the reviewable matters provision(s) simply because the provincial law may be interpreted as authorizing the conduct or is more specific than the Act given that the Bureau's mandate is to enforce the law as directed by Parliament,[39] not a provincial legislature or its delegate.

The RCD may be invoked by regulators and regulatees. Indeed, regulators may, depending on the legislative regime, also be regulatees. Although no Canadian court has expressly indicated that the application of the RCD differs as between regulators and regulatees, regulatees have not typically benefited from an application of the RCD by Canadian courts.[40]Therefore, greater scrutiny of the activities of regulatees, whether acting in their private capacity or as self-regulators, may be warranted.

### *3.2 Conduct that may be regulated by other federal laws*

When faced with conduct that may be regulated by a valid federal law(s) other than the Act, the Bureau will, applying ordinary principles of statutory interpretation, attempt to determine whether Parliament intended that the particular provision(s) of the Act, or conceivably the entire Act, apply to the particular conduct. In undertaking this analysis, the Bureau will consider existing RCD caselaw but does not consider the RCD caselaw to be dispositive of the analysis.

The Bureau will read the Act and the other federal law(s) in their ordinary sense harmoniously with the scheme and objects of the statutes in which they appear. As Parliament is presumed to enact legislation that is coherent,[41] the Bureau will, of course, consider whether the provisions can stand together and both operate without either interfering with the other,[42] *i.e*. whether a party may reasonably comply with both the Act and the other federal law(s).[43] The Bureau will apply the Act as it reads unless it can confidently

38 While the Bureau recognizes that *Re L.S.U.C.*, *supra* note 23, supports the proposition that the RCD is available for reviewable matters, as mentioned in the first part of this submission, the lower court, in that case, did not expressly consider the issue; it merely accepted the agreement of all parties (including the then Director of Investigation and Research) that the RCD, if engaged, was applicable to all provisions of the Act.

39 The constitutionality of the reviewable matters provisions of the Act has been upheld under Article 91(2) of the *Constitution Act*, 1867 in *General Motors of Canada Ltd. v. City National Leasing Ltd.*, [1989] 1 S.C.R. 641; *Alex Couture*, *supra* note 23; and *Thomson Newspapers Ltd. v. Canada* (*Director of Investigation and Research, Restrictive Trade Practices Commission*), [1990] 1 S.C.R. 425.

40 *Supra* note 15.

41 Described in Sullivan, *Driedger on the Construction of Statutes*, 4th ed. at 17, as a presumption that is "virtually irrebuttable".

42 Consistent with the decision of the Federal Court of Appeal in *Eli Lilly et al. v Apotex Inc.*, [2005] F.C.J. No. 1808.

43 In the context of allegedly "conflicting" laws, the Supreme Court has, repeatedly, stated that an actual – often coined an "operational" – conflict must be apparent before a court should resort to any mechanisms for resolving a conflict arising from a plain reading of the legislation, e.g. "reading in" or "reading down" language in a statute. See, for example, *Smith*, *supra* note 30, at 800 and *Multiple Access v. McCutcheon*, [1982] 2 S.C.R. 161 at 191.

determine that Parliament intended that the other federal law prevail, either by clear language in the Act or by the other federal law authorizing or requiring the particular conduct or, more generally, providing an exhaustive statement of the law concerning a matter.[44] Parliament's intention in the other federal law may be express or implied; in the latter situation, the Bureau will generally conclude that the enactment by Parliament of specific provisions to address the conduct in question is intended

> to take precedence over a law of general application such as the Act.[45]

Accordingly, the Bureau will not pursue a matter under any provision of the Act where Parliament has articulated an intention to displace competition law enforcement by establishing a comprehensive regulatory regime and providing a regulator the authority to itself take, or to authorize another to take, action inconsistent with the Act, provided the regulator has exercised its regulatory authority in respect of the conduct in question. Where such a regulator has forborne from regulation, the Bureau will apply the Act to the unregulated conduct until such time as the regulator exercises its authority to vary or rescind such forbearance; where such a regulator has forborne conditionally, the Bureau will apply the Act to all conduct conditionally forborne from regulation.[46]

In summary, in order to responsibly fulfill its mandate under the Act, the Bureau will, using all applicable statutory interpretation tools and considering the particular facts of the case, attempt to determine whether Parliament intended that the relevant provision(s) of the Act apply to the conduct in question and, if so, whether any defence(s) or doctrine(s), including the RCD, immunizes that conduct. Even if the Bureau concludes that the Act applies, it will proceed to consider whether it is, nonetheless, in the public interest to pursue the conduct under the Act in the circumstances.

## 4. Conclusion

This submission has provided an overview of RCD jurisprudence and the complexities that Canada's system of federalism, and the role of regulation, have created for competition law enforcement in Canada. The RCD is an important and challenging issue for the courts, regulators and competition law practitioners because the case law is underdeveloped, and there are many issues to consider when determining the scope and applicability of the RCD. The Bureau has aimed to provide some clarity with its Bulletin, which outlines its understanding of the current law, and its general approach to the enforcement of the Act for conduct that is regulated by another law or legislative regime.

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44 See, for example, *Toronto Railway Co. v. Paget*, [1909] S.C.R. 488 at 499 (per Anglin J.); *Friends of Oldman River Society v. Canada (Min. of Transport)*, [1992] 1 S.C.R. 3 at 38; *Rothmans, Benson & Hedges Inc v. Saskatchewan*, [2005] 1 S.C.R. 188; Sullivan, *Driedger on the Construction of Statutes*, 4th ed. at 1, 154, 168, 198, 236 and 262-67; and P.-A. Côté, *The Interpretation of Legislation in Canada*, 3rd ed. (2000), at 307, 343, 351-52, 450 and 459.

45 *i.e.* application of the *generalia specialibus non derogant maxim*.

46 See, for example, *R. v. B.C. Fruit Growers Association et al.*, *supra* note 15.

# CHILE

## 1. Introduction

In Chile, regulators have no concurrent powers with competition authorities. Therefore, competition law has traditionally played an important role in regulated sectors. Arguments related with regulatory issues are frequently used in competition law litigation. Generally speaking, the case-law states that competition law can be applied to regulated industries, although in a few occasions such faculty has been limited by way of judicial review.

This document, jointly elaborated by both the *Tribunal de Defensa de la Libre Competencia* ("TDLC")[1] and the *Fiscalía Nacional Económica* ("FNE")[2], reviews the treatment the "Regulated Conduct Defence" ("RCD") has had in Chilean competition law. It summarizes the main type of cases in which the RCD has been used, how the TDLC has dealt with it, and what areas remain unsettled.

Apart from this introduction, the rest of the document has been organized as follow. Section 2 presents a general overview of the RCD in Chile. Section 3 summarizes the most recent case law. Section 4 considers other roles of competition authorities in regulation. Summary tables are included in section 5. Concluding remarks follow in section 6.

## 2. Overview of the RDC in Chile

In Chile, regulation is issued mainly by the Congress (legislation), the executive (*reglamentos*)[3] and other public entities (such as municipalities). Since Chile is a centralised republic, there are no normative concerns arising from federalism.

Regulatory goals vary widely. The purpose of some regulations is not always clear. Unless expressly stated otherwise, when analysing regulatory cases Chilean competition authorities consider competition policy objectives (mainly the protection of consumer welfare and economic efficiency) as the main goals to pursue[4]. That is, if a regulation grants a sector authority some discretion to act, it should act in the way that is less competition restrictive.

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1 The TDLC is an expert judicial body with specific jurisdiction on competition law issues.

2 The FNE is an administrative and autonomous body in charge of competition law enforcement (investigation, and litigation) and competition advocacy. The FNE also acts as an independent technical body on competition law issues (drafting technical reports).

3 *Reglamento* is an administrative regulation of general application contained in a Decree issued by the President. The *reglamento* establishes specifics not included in the corresponding law.

4 For example, regarding specific goals of media law, the TDLC has held: *"[I]n the Tribunal's view, considering the aims of the law, the interest at stake is that the social, cultural and political content communicated through a mass media firm could be verified, compared or contrasted with other media. In this sense, the provision does not require to vary the analysis from the one performed regarding any other merger under the competition law provisions, however, it orders for the analysis to take into account the additional consideration of the effects a merger in the media industry can have with respect to pluralism in the media and freedom of speech"*, TDLC, July 27th, 2007, Decision N° 20/2007, *(Iberoamerican)*, Rc. 8°.

Competition law and regulation may clash in three areas. First, when competition law is used to tackle regulation failures[5]; secondly, when competition law is applied to the actions of the regulator[6]; and finally, when the TDLC issues general regulations in markets and recommendations to regulators.

The RCD is frequently raised. The existence of regulation is used to build a defence in almost every case regulation exists. Defendants commonly state that '*competition law does not apply to the issuer or enforcer of a certain regulation*'[7]; that '*the plaintiff should comply with the regulation too*'[8]; or that the dispute '*is beyond TDLC's jurisdiction*'[9], amongst others.

Notwithstanding the foregoing, the RCD has had limited legal consequences. Competition authorities almost never refrain from intervention in the corresponding sector. Only occasionally the Supreme Court has held that the TDLC lacks jurisdiction in a given area.[10]

In its assessment, the TDLC reviews the purpose of regulation and whether the latter ensures compliance with competition law. The TDLC also analyses how regulation influences the defendant's behavior. When reviewing the conduct of a legal monopoly, the TDLC has identified a special duty of the monopolist to abide competition law and to refrain from violating it[11]. A negligent behavior of the regulator regarding competition law enforcement is frequently considered a mitigating circumstance to reduce the fine[12].

## 3. Case law by sector

Telecommunications has been the sector most frequently subject to competition law scrutiny. There is no doubt that this sector has given competition authorities the greatest challenges in the last two decades. As technology changes "by the day", regulations have to follow lengthy political processes to adapt. Furthermore, incumbents slow those processes in order to keep the *status quo* as long as they can. Chile has not been an exception, and the TDLC has faced a variety of cases in which the incumbent resists change with anticompetitive conducts, using – unsuccessfully – defences based on telecommunication law.

The case law has also dealt with other regulated sectors. These include airport concessions, air transport licences, other infrastructure concessions, and ports. Also, in a slightly broader sense, activities

5 See cases in telecommunications and concession sectors detailed below.

6 TDLC has issued mandatory orders to regulators, *inter alia*, in *JAC* and *3G* cases, detailed below.

7 Raised by defendant in TDLC's Ruling N° 34/2005 *(Cauquenes)*, detailed below.

8 Raised by defendant in two cases in telecommunication sector, TDLC's Ruling N° 45/2006 *(Voissnet I)*, y TDLC's Ruling N° 88/2009 *(Celulink)*, detailed below.

9 Held by the Supreme Court in *3G* case, detailed below, stating that number portability (ordered by the TDLC in the reviewed decision) was a matter of regulators' jurisdiction, and thus, eliminated this tender condition

10 E.g. Supreme Court, March 29th, 2006, docket n° 383-2006, Rc. 8°, 9°, 13°, reviewing TDLC's Ruling N° 34/2005 *(Cauquenes)* (stating that public procurement is not subject to competition law). Also, Supreme Court, January 27th, 2009, docket n° 4797-2008, Rc. 12°-15°, reviewing TDLC's Decision N° 27/2008 *(3G)* (stating that number portability was a matter of regulators' and not TDLC's jurisdiction).

11 TDLC, September 30th, 2008, Ruling N° 75/2008 (*Atrex-SCL*), Rc. 64°-66°, 74°. Upheld by S.Ct. January 28th, 2009, docket n° 6545-2008; and also in TDLC, July 2nd, 2009, Ruling N° 85/2009 *(Sanitarias)*, Rc. 189°. Upheld by S.Ct., May 18th, 2010, docket n° 5449-2009.

12 See cases below.

by regional and local authorities can also be considered "regulatory" and as such they have been subject to competition law.

### *3.1 Telecommunications*

#### *3.1.1 The incumbent as the "sheriff"*

Cases in which the existing regulation has been part of the argument are mostly found in the telecommunication sector. The incumbent has not defend their conduct as being *allowed* by the regulation, but has justified it on the illegality of the behaviour of their competitors.

The main company in the fixed line segment (*Telefónica* with 65% market share in 1997) has engaged in exclusionary conducts against competitors. Its defence in those cases has been based on the alleged illegality of the activities of the entrants. The TDLC has rejected these defences, since illegalities must not be corrected by private parties and, furthermore, because it did not agree with the legal interpretation of the incumbent.

The first of these cases (*Voissnet I*)[13] was brought to court by a voice-over-internet-protocol (VoIP) provider who accused *Telefónica* – not only the dominant player in telephony, but also supplier of broadband – of setting technical and contractual barriers to their services by prohibiting ISP to allow VoIP services. The main defence of *Telefónica* was that VoIP phone providers needed, and lacked, a permission to operate. The TDLC considered that this type of service did not require a permission and, even if it did, it was not *Telefónica* the agent called to enforce the law. Another RCD related defence in this case was that the (then active) regulation of final tariffs aimed to assure the company with enough income to cover its costs. The defendant claimed that if the exclusionary conduct was not adopted that goal could not be reached. The TDLC rejected this argument, on the basis that tariff regulation in Chile is aimed to cover the costs of an hypothetical firm with the demand projected for the next five years, hence the income of the real firms will depend on the actual demand and technical changes in the five years term (which may be favourable or not to the regulated firm). However, uncertainty in regulation of VoIP services[14] was considered by the TDLC as a mitigating factor to reduce the fine – a criterion upheld by the Supreme Court, which further reduced the fine[15].

The second case was about exclusionary discriminatory price or margin squeeze[16]. The case was brought by small companies offering the service of converting calls dialled from a fixed line to a mobile phone of *Movistar* – subsidiary of *Telefónica* – or other mobile companies through a conversion device placed either in the premises of the client or the supplier of the conversion service. The accused conduct was a discriminatory increase in price by *Movistar* to the suppliers, in comparison to prices paid by final customers. The defence of *Movistar* was again about the illegality of the service. It claimed that the call was made using interconnection facilities and not paying for that service. During the trial, it was proved that there was no interconnection to be paid, since the conversion was made in a private network.

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13 TDLC, October 26th, 2006, Ruling N° 45/2006 (*Voissnet I*).

14 At that time uncertainty in regulation of VoIP services meant it was not clear whether VoIP services should be regulated or not and, if regulated, what regulation was applicable.

15 Supreme Court, July 4th, 2007, docket n° 6236-2006, Rc. 33°, reviewing TDLC's Ruling N°45/2006 (Voissnet I). Also, a substantive limit was held by the Supreme Court: the TDLC cannot decide on the nature of VoIP services, whether they should be subject to regulation, or the kind of regulation (Ibid., Rc. 34).

16 TDLC, October 15th, 2009, Ruling N° 88/2009 (*Celulink*). Upheld by S.Ct., July 7th, 2010, docket n° 8077-2009.

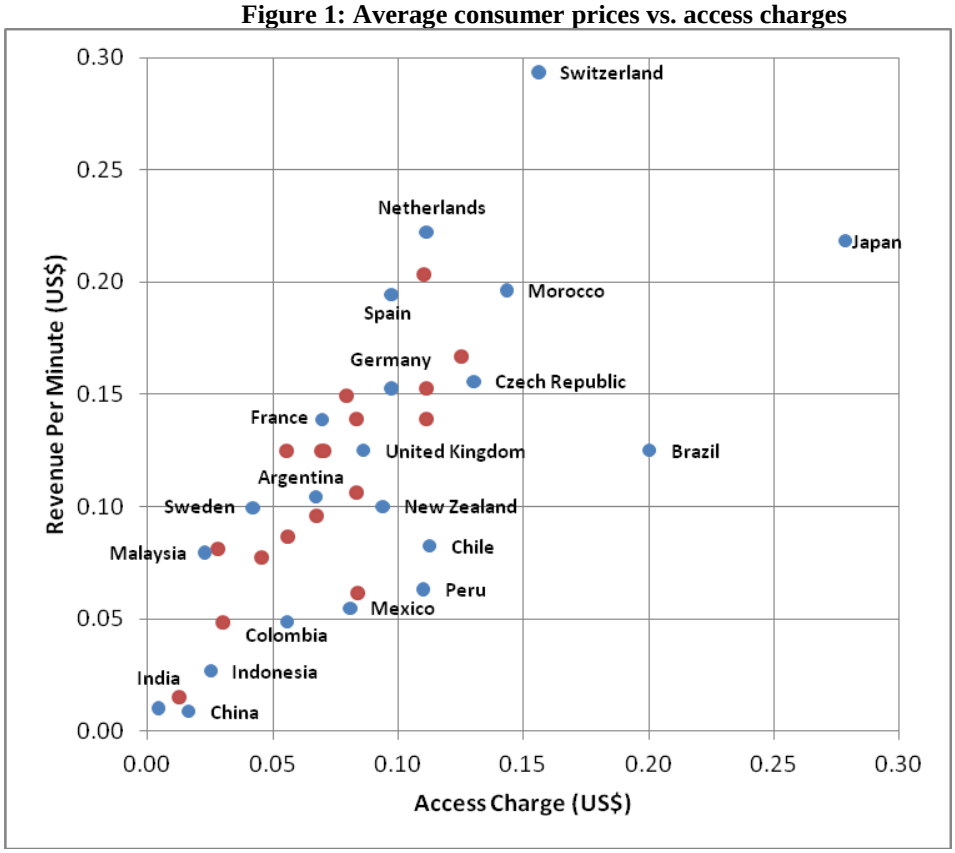
Furthermore, *Movistar* itself provided the service. Another other RCD used by *Movistar* was related to the reduction of its income. The argument was rejected on the same grounds explained in the previous case (see paragraph 14 above).

### *3.1.2 What comes now: on-net/off net rates*

The TDLC has stated in many rulings that additional measures must be taken to increase competition in the telecommunication sector. In particular, it recommended the authority to implement the numeric portability – a recommendation finally materialized in a law passed in 2010.

Another barrier to competition identified by the TDLC is the huge difference between off-net and on-net tariffs. This difference reduces mobility and grants an artificial advantage to bigger companies.[17] It is urgent to solve this problem, since additional spectrum has been opened. In 2011, two new entrants should start their operations and will face the challenge to win market share against various incumbents with investments in both type of platforms – particularly *Movistar*, with 65% in the local network and 43% in the mobile phone industry. Given this scenario, the TDLC called a public audience to study the possibility to dictate a general instruction to regulate the matter.

**Figure 1: Average consumer prices vs. access charges**




*Source*: Global Wireless Network

The TDLC has *sua sponte* authority to issue general regulations for an economic sector. The TDLC has been careful in the use of this faculty. In fact, this is the second time in almost seven years that the

[17] Mobile companies shares: *Movistar* 43%, *Entel* 39,6% and *Claro* 17,6%. The problem may worsen as *Movistar* (formerly *Telefónica*, the incumbent) has launched a new kind of plans. These include lower tariffs for calls made by subscribers of its local platform to their mobile network, distorting competition not only in the mobile sector but also in the fixed sector.

TDLC has called a public audience to decide whether a sector needs a general ruling issued by the TDLC to improve its competition environment[18].

Although the opinions of the players have not been yet analyzed, it is possible to envision a hypothetical RCD in this case. One obvious justification for the difference in off-net and on-net rates is the access charge paid to the receiving company but not paid when the call is originated and terminated in the same network. Since access charges are regulated, companies might argue that the TDLC cannot instruct them to charge less than the regulated price for terminating a call of the competitor and that the only way to equate off-net and on-net prices would be to increase on-net charges. The TDLC may have to decide whether it can order the companies to charge access prices more aligned with what each firm charges for an on-net call, considering that the regulated access charge is only a legal maximum or a price cap.

### *3.2 Cases in other sectors*

#### *3.2.1 Collusion in rural bus transportation*

The TDLC has dealt with several cases of collusion in rural bus services. The facts are largely similar: there is an incumbent association of independent buses and a new entrant with lower rates. The association reacts setting lower prices, new frequencies and, sometimes, using violence. In two of these cases, the local transport authority called them to reach an agreement. When brought to the TDLC by the FNE, the defendant used the intervention of the authority as a defence. The TDLC accepted the defence only to reduce the corresponding fine[19].

For example, in *Transportes Central – Osorno*[20] independent urban transport companies brought to an end a price war by fixing prices. To reach this solution, the regional transport authority facilitated its premises and even suggested companies to finish the price war by an agreement. The FNE filed a complaint against this cartel. The TDLC condemned the cartel, imposed fines on its members and released the regulator from a fine on the sole circumstance that the authority was not included in FNE's complaint. The involvement of the authority in facilitating the infringement to competition law was considered by the TDLC as mitigating factor[21]. The Supreme Court upheld TDLC's decision, and increased the fines[22].

#### *3.2.2 Government auctions*

Another interesting case (*P.T. Los Andes*[23]) was an accusation made by importers who used the premises of a land port where different authorities made the inspection of the load against the port operator. The complaint was grounded on violations to the concession contract and excessive pricing, which constituted an exploitative abuse of dominance. The defendant explained that this monopoly was a

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18 The first time it did it (in the market for waste collection, transport, sewage and disposal) was to rule on a matter that had a long and repetitive jurisprudence, so no new ideas were introduced. The only aim of the general regulation was to reduce the number of cases consulted, on the same grounds, before the TDLC.

19 TDLC, January 7th, 2010, Ruling N° 94/2010 (*Transportes Central - Osorno*); TDLC, August, 11th, 2010, Ruling N° 102/2010 *(Agmital)*, upheld by Supreme Court, January 14th, 2011, docket n° 6615-2010.

20 TDLC, January 7th, 2010, Ruling N° 94/2010 (*Transportes Central - Osorno*).

21 TDLC, January 7th, 2010, Ruling N° 94/2010 (*Transportes Central - Osorno*) Rc. 90°-92°, 99°

22 Supreme Court, December 29th, 2010, docket n° 1746-2010, Rc. 12°, reviewing TDLC's Ruling N° 94/2010 (*Transportes Central - Osorno*)

23 TDLC, July 21st, 2010, Ruling N° 100/2010 (*P.T. Los Andes*) [exploitative abuse].

result of a competitive process carried by the Ministry of Public Works, so there was no possibility of abuse.

The TDLC compared the services actually rendered by the defendant with the activities included in the auction basis. It determines the defendant was charging for inexistent services and therefore abusing its monopoly power[24]. In its judgement, the TDLC discarded the RCD, holding that concessionaire should also abide provisions of the Competition Act. The TDLC imposed the defendant a US$ 350,000 fine. In setting the fine the TDLC took into account the fact that the Ministry of Public Works not only accepted the terms of the auction, but also, when questioned by the port users if the charges were correct, it gave a positive answer[25].

The Supreme Court discarded the RCD allegation invoked by the defendant[26]. Nonetheless, the Court overturned the TDLC's decision, holding that the matter was not a competition law issue because the problem was by nature outside the remit of competition law and no evidence on the market's effects had been submitted[27].

### *3.2.3 Airports*

In *SCL-Delfos*[28], the FNE alleged that the defendant (an airport concessionaire, "SCL") should allocate sub-concessions for land transport services trough competitive tender processes.[29] In its defence, SCL argued that concession regulations do not order a specific mechanism for allocating sub-concessions. In addition, SCL argued that the regulator did not enforce any competition principle. The TDLC dismissed SLC's argument. The TDLC held that concessionaire should not only abide specific regulation, but also competition law. The absence of an appropriate regulation or the lack of an effective enforcement does not exempt the concessionaire of abiding competition law[30]. However, the TDLC partially upheld a different argument. SCL claimed it had acted under the conviction that the obligation of allocating sub-concessions through a competitive tender had been explicitly overturned. Even though an obligation ordering an open tender was still in force, the TDLC deemed reasonably that SCL understand that this was not the case, because the antitrust decision that established the obligation had been partially overturned in several other parts.[31] The TDLC did not impose any fine for the infringement, only injunctions[32].

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24 The auction was allocated according the lowest bid for the general use of the premises, but the main service (support for the authorities' inspection) came predetermined in the basis of the auction considering the full unloading and loading of the truck. That service was never rendered because only a sample was taken from the inspected trucks.

25 TDLC, July 21st, 2010, Ruling N° 100/2010 (*P.T. Los Andes*) Rc. 15°-17°.

26 Supreme Court, January 28th, 2011, docket n°6100-2010, Rc. 6°, reviewing TDLC's Ruling N° 100/2010 (*Pto.Terrestre Los Andes*)

27 Supreme Court, January 28th, 2011, docket n°6100-2010, Rc. 14°, reviewing TDLC's Ruling N° 100/2010 (*Pto.Terrestre Los Andes*)

28 *TDLC's Ruling N° 61/2007* [exploitative abuse].

29 The concessionaire has the legal right to grant "sub-concessions", whereby a third party (the "sub-concessionaire) "supply the required service.

30 TDLC, December 27th, 2007, Ruling N° 61/2007 (*SCL-Delfos*) Rc. 16°- 18°, 54°.

31 A previous antitrust decision (*Comisión Preventiva Central, Dictamen N° 1202/02*) ordering an open tender for allocating sub-concessions had been overturned by *Comisión Resolutiva, Resolución N° 684/2003*. However, that decision did not overturned the competitive tender obligation. These two "Comisiones" were predecessors of the TDLC.

In *Atrex-SCL*[33] courier companies argued that the defendant, an airport concessionaire (SCL) was behaving in violation of the concession contract, amongst others, by charging excessive pricing, which constituted an exploitative abuse of dominance. The TDLC adjudicated in favour of the plaintiffs. The TDLC declared an abuse of dominance had taken place, issued an order to cease and desist and imposed the defendant a US$ 1,3 m fine.

In its ruling, the TDLC assessed the following argument raised by the defendant: the regulator had reviewed the conducts (allegedly illegal) and did not challenge them nor found any infringement to competition provisions in the regulation. The TDLC partially dismissed the argument holding that negligence of regulator in performing its enforcement duties does not clear the infringement nor prevents the TDLC from imposing a fine. However, it considers the same argument as a mitigating factor and sufficient ground to reduce the fine[34]. The TDLC granted the same mitigating effect to a similar argument raised by a defendant, also a concessionaire, in another case[35].

The TDLC also held that the approved regulations do not totally guarantee that a competition law infringement will not occur, nor they mitigate concessionaire's liability[36]. On the contrary, concessionaire's liability is particularly serious due to its legal monopoly. The existence of regulation for a legal monopoly increases its duty of preventing a competition infringement, making the infringement more serious when determining fines[37].

### *3.2.4 Air Frequencies: Auction to the higher bid in a concentrated sector*

The most interesting case in which the RCD has been alleged so far is *JAC*[38]. The FNE filed a complaint before the TDLC against the aviation regulator, after unsuccessfully attempting to persuade it of adopting pro-competitive regulations. The issue at stake concerned the mechanism in force for allocating air routes licences (an essential facility for providing air transport services). In the FNE's view, tender conditions for allocating licences favoured the dominant company and hence were anticompetitive.

According to air transport regulations, when additional air frequencies are available in negotiations between Chile and any other party with restricted skies, the frequencies are allotted among national operators to the higher bid. Being a highly concentrated market, it is not surprising that frequencies of any commercial interest are almost always allocated to the dominant company, LAN[39]. It is interesting to note that, from a long list of countries analyzed, only Chile and Peru contemplate this simple mechanism of allocation.

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32 TDLC, December 27th, 2007, Ruling N° 61/2007 (*SCL-Delfos*) Rc. 48° - 56°.

33 TDLC's Ruling N° 75/2008 [exploitative abuse].

34 TDLC, September 30th, 2008, Ruling N° 75/2008 (*Atrex-SCL*), Rc. 67°, 74°. Upheld by S.Ct. January 28th, 2009, docket n° 6545-2008.

35 TDLC, July 21st, 2010, Ruling N° 100/2010 (*Pto.Terrestre Los Andes*), Rc. 110°. In this case, regulator had dismissed concessionaire's customer claims, which in TDLC's view, gave the concessionaire the idea of legality. TDLC's ruling was overruled by Supreme Court, January 28th, 2011, docket n°6100-2010.

36 TDLC, September 30th, 2008, Ruling N° 75/2008 (*Atrex-SCL*), Rc. 64°-66°, 74°. Upheld by S.Ct. January 28th, 2009, docket n° 6545-2008.

37 *Ibídem*, and also in TDLC, July 2nd, 2009, Ruling N° 85/2009 *(Sanitarias)*, Rc. 189°

38 TDLC's Ruling N° 81/2009 *(JAC)* [regulator's anticompetitive activity]. January 16th, 2009

39 Market share of LAN in main routes: Chile-U.S.A 80%, Chile-Spain 85%, Chile-Brazil 57%, Chile-Argentina 72%, Chile-Mexico 98%, Chile-Peru 85%.

The first time when one of such auctions was brought to the TDLC, the sector authority was absolved, since the *reglamento* ordered this special kind of auction[40]. But, the TDLC recommended changes to the *reglamento*[41]. At the time of *JAC*, the *reglamento* had not yet been changed. This time the TDLC ordered to change the terms of the auction and banned allocations of more than 75% of the air frequency to any particular operator in the route under scrutiny[42].

The Supreme Court overturned the TDLC's decision[43], admitting the RCD allegation. The Court overruled the prohibition on the grounds that the *reglamento* did not allow any other allocation parameter. Being this one a clear and direct interpretation of the law, the TDLC lacked the power to change it. In practice, this means that if there are regulations in force, they should be applied in spite of its anticompetitive effect.

In conclusion, although Chilean Competition Act states that the TDLC can correct any conduct impairing "free competition", it is not yet clear at what kind of norms it can interfere. It seems to be a consensus that if the law, or its *reglamento*, grants a sector authority some discretion to act, it should act in the way that is less competition restrictive. But the issue is not settled in cases where there is no room for interpretation. According to the case presented above, the TDLC can only recommend changes to the corresponding law or administrative ruling that causes the anticompetitive conduct, but it cannot impose the regulator a duty to refrain from enforcing a legal regulation.

Regarding the recommendations of changes in regulations, the experience has been rather frustrating for the TDLC. In most cases, they have been totally ignored by the executive. This behaviour has led to the opinion that a change in the law is called for. The change would require the executive branch at least to explain why the recommendation is not applied.

## 4. Summary and concluding remarks

Table 1 summarizes different legal consequences of the RCD.

**Table 1: RCD in Chilean competition Law**

| Allegation | Cases[44] | Legal consequence | |
|---|---|---|---|
| | | TDLC | Supreme Court |
| A new entrant should abide with the same regulations than the incumbent; otherwise the entrant violates regulation; ensuring regulation enforcement exempts defendant from a competition law violation. | *Voissnet I* [exclusionary abuse]<br>*Celulink* [exclusionary abuse] | RCD was rejected | RCD was rejected |
| Regulations are not pro-competitive; TDLC cannot discard regulation, cannot fill out incomplete regulation. | *JAC* [regulator's activity] | RCD was rejected | Grounded on RCD, overruled TDLC's decision |

40 See note 3 above.

41 Ruling N° 44/2006.

42 The TDLC also recommended immediate unilateral openness of Chilean skies, both for international and domestic flights.

43 Supreme Court, June 15th, 2009, docket n° 1855-2009, Rc. 8°, reviewing TDLC's Ruling N° 81/2009 *(JAC)*

44 Cases detailed above.

| | | | |
|---|---|---|---|
| Regulations are enough guarantee that competition principles are abided. | *Atrex-SCL* [exploitative abuse]<br>*Sanitarias* [exploitative abuse]<br>*Transportes Central – Osorno* [horizontal agreement] | RCD was rejected. Legal monopolist's has a special duty to abide competition law | RCD was rejected |
| Regulator facilitated the infringement; regulator did not enforce competition law; this should exempt or mitigate defendant's liability for a competition law infringement. | *Agmital* [horizontal agreement]<br>*Atrex-SCL* [exploitative abuse] | RCD was considered a mitigating factor | RCD was considered a mitigating factor |
| | *P.T. Los Andes* [exploitative abuse] | RCD was considered a mitigating factor | --- (overruled on different RCD grounds) |
| Uncertainty or ambiguity in regulation should exempt or mitigate defendant's liability for a competition infringement. | *SCL-Delfos* [exploitative abuse]<br>*JAC* [regulator's activity] | Defendant exempted from a fine on the basis of RCD | --- (upheld on different grounds) |
| TDLC lacks jurisdiction; defendant is not subject to competition law; the matter is not framed as a competition law issue. | *P.T. Los Andes* [exploitative abuse]<br>*Cauquenes* [regulator's activity] | RCD was rejected | Grounded on RCD, overruled TDLC's decision |
| | *Voissnet I* [exclusionary abuse] | RCD was rejected | Grounded on RCD, overruled specific recitals of TDLC's decision |
| Regulation should not be applied on the basis of analogy; | *Sanitarias* [exploitative abuse] | RCD was rejected | --- (upheld on different grounds) |
| An adversarial proceeding is not the appropriate procedure for the TDLC to issue recommendations to regulators | *JAC* [regulator's activity]<br>*Sanitarias* [exploitative abuse] | RCD was rejected | Grounded on RCD, overruled recommendations contained in TDLC's decision |

Chilean competition authorities defend a broad application of competition law in regulated sectors. Therefore, the RCD has been frequently rejected, and its scope remains limited.

# FRANCE

## 1. Introduction

Les entreprises soulèvent généralement deux types d'objections pour se défendre d'avoir mis en œuvre des pratiques anticoncurrentielles donnant lieu à des poursuites : elles soutiennent qu'il existe une disposition législative ou un texte réglementaire pris pour son application autorisant ces pratiques, ou encore que la réglementation de leur secteur d'activité ou de l'activité qu'elles exercent ferait échapper celle-ci au droit de la concurrence.

Si certaines dispositions découlant de la loi peuvent faire échapper les ententes et les abus de position dominante au droit de la concurrence c'est à condition que les comportements des entreprises soient non seulement autorisés mais imposés par l'action de l'Etat et que le cadre juridique en cause élimine tous les paramètres de la concurrence. En revanche, les espaces laissés à l'autonomie des entreprises par ces textes législatifs demeurent soumis au droit de la concurrence.

L'Autorité de la concurrence a ainsi été amenée à donner les contours de l'exemption fondée sur l'autorisation de la loi, prévue à l'article L. 420-4 I du code de commerce, et les juridictions administratives à sanctionner les initiatives étatiques conduisant les opérateurs économiques à violer le droit de la concurrence (premier point).

Par ailleurs, les pratiques des entreprises qui n'entrent pas strictement dans les prévisions des dispositions réglementaires prises pour application d'une exemption législative demeurent justiciables du droit de la concurrence, et l'Autorité définit largement le champ d'application du droit de la concurrence (article L. 410-1 du code de commerce) (deuxième point).

Sa pratique décisionnelle, dans le respect de la jurisprudence européenne, est marquée, dans les deux cas de figure, par une interprétation stricte des textes et par la recherche précise et in concreto des interstices où le droit de la concurrence peut être appliqué, en égard à la nature de l'activité économique exercée, aux caractéristiques des marchés concernés et à l'autonomie de volonté et de comportement dont disposent les acteurs.

## 2. La justification des pratiques par l'existence d'une réglementation est prévue par les textes mais peu mise en œuvre

Le Conseil de la concurrence, auquel a succédé l 'Autorité de la concurrence, a toujours affirmé leur volonté d'interpréter de manière extrêmement étroite les exigences de l'article 10. 1 de l'ordonnance de 1986 devenu l'article L. 420-4, I, 1° du Code de commerce aux termes duquel « *Ne sont pas soumises aux dispositions des articles L. 420-1* [relatif aux ententes*] et L. 420-2* [relatif aux abus de position dominante] *les pratiques :*

> *1°-Qui résultent de l'application d'un texte législatif ou d'un texte réglementaire pris pour son application »*

La mise en oeuvre de cet article implique la réunion de conditions strictes tenant, d'une part, au texte normatif susceptible d'être invoqué (A) et, d'autre part, au lien de causalité existant entre le comportement

restrictif de concurrence et le texte invoqué (B). Lorsque la pratique reprochée ne relève pas de la compétence de l'Autorité, des recours peuvent être formés contre les règlements et actes administratifs violant le droit de la concurrence (C).

### *2.1 Les conditions relatives aux textes susceptibles d'être invoqués à l'appui de l'exception d'autorisation de la loi sont interprétées strictement (article L. 420-4 1°du code de commerce)*

#### *2.1.1 Sur le plan formel, rares sont les textes invocables*

Seuls une loi ou un texte réglementaire pris pour application de l'article L. 420-4 1° du code de commerce ou d'une disposition législative spéciale peuvent constituer le fondement d'une justification et l'Autorité de la concurrence a toujours été extrêmement attentive à vérifier la nature législative ou réglementaire de l'acte invoqué et son champ d'application.

Interprétant strictement cette condition, elle a ainsi considéré que ne pouvaient être invoqués utilement des usages professionnels[1], un "protocole" signé entre syndicats professionnels, associations et fédération française de sport et ministère de la Jeunesse et des sports[2], ou un accord de parrainage signé entre une société et une fédération[3]. Ces actes qui n'émanent pas de l'administration ne peuvent en effet légitimer une pratique anticoncurrentielle.

Il en est de même des incitations[4] ou attitudes de tolérance[5] que des autorités administratives expriment tacitement ou expressément, mais qui n'ont pas été formalisés dans un acte législatif ou réglementaire.

Il en va de même lorsqu'il est prétendu que la pratique reprochée a été mise en oeuvre pour contrecarrer des décisions d'autorités publiques : en ce cas leur éventuelle illégalité peut être invoquée devant le juge compétent[6].

Enfin, il est de jurisprudence constante qu'une situation prétendument illicite n'autorise pas les entreprises à commettre elles-mêmes des pratiques anticoncurrentielles et ne peut justifier des pratiques anticoncurrentielles, que la loi interdit, sur le fondement de l'article L. 420-4, I, 1°, du Code de commerce.[7] Il appartient en effet aux entreprises s'estimant victimes d'agissements illicites de la part de leurs concurrents de saisir de cette situation les autorités compétentes et d'utiliser les voies de droit à leur disposition.

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1 Décision 07-D-41, 28 nov. 2007, Pratiques s'opposant à la liberté des prix des services proposés aux établissements de santé à l'occasion d'appel d'offres en matière d'examens anatomo-cyto-pathologiques.

2 Décision 94-D-40 relative à la situation de la concurrence dans le secteur de l'assurance ski.

3 Décision 97-D-71 relative à une saisine présentée par les sociétés Asics France et autres.

4 Décision 05-D-10 relative à des pratiques mises en œuvre sur le marché du chou-fleur de Bretagne.

5 Arrêt de la cour de cassation Société Bedel du 30 mai 1995.

6 Décisions 08-D-23 relative à des pratiques mise en oeuvre par le syndicat des artisans et entrepreneurs de taxis des Alpes-de-Haute-Provence et 07-D-49 (approvisionnement des hôpitaux en défibrillateurs cardiaques) implantables.

7 Voir par exemple l'arrêt de la cour d'appel de Paris du 3 mai 1990, Confédération nationale des syndicats dentaires, la décision du Conseil de la concurrence 09-D-14 du 25 mars 2009 relative à des pratiques mises en oeuvre dans le secteur de la fourniture de l'électricité et l'avis 07-A-04 relatif à la possibilité de réserver aux producteurs d'une filière de qualité agricole ou alimentaire certains produits intermédiaires.

L'Autorité de la concurrence vérifie également que les textes réglementaires invoqués ont bien été pris directement pour l'application d'une loi ; dans le cas contraire, ils ne peuvent pas être invoqués pour justifier le comportement restrictif de concurrence.

Cette règle, qui exclut les règlements autonomes, découle du principe selon lequel des restrictions à la libre concurrence ne peuvent être instituées qu'à l'issue d'un débat parlementaire et uniquement dans la mesure où un intérêt supérieur le justifie. En effet, la réforme qui, en 1986, a institué le Conseil de la concurrence « *avait pour objectif de supprimer l'interventionnisme de l'État dans le fonctionnement de l'économie et de protéger la libre concurrence sur les marchés. Un mécanisme permettant au pouvoir réglementaire autonome d'adopter des textes instituant des restrictions de concurrence sans effet réel sur le progrès économique et au bénéfice d'intérêts souvent corporatistes aurait été en désaccord avec l'esprit général de l'ordonnance relative à la liberté des prix et de la concurrence* »[8].

La notion de texte réglementaire d'application d'une loi ne recouvre donc pas l'ensemble des dispositions réglementaires qui peuvent être rattachées plus ou moins étroitement à l'application d'un texte législatif. Elle vise uniquement les dispositions qui constituent les mesures d'exécution d'une loi. Il a ainsi été considéré qu'un arrêté interministériel, pris pour l'application d'un décret d'application d'une loi n'était pas susceptible d'être invoqué par les auteurs de pratiques anticoncurrentielles, ce type d'arrêté n'étant que très indirectement lié à l'application d'une loi[9] .

Dans la décision 04-D-49, relative à des pratiques anticoncurrentielles dans le secteur de l'insémination artificielle bovine, le Conseil de la concurrence a ainsi retenu quatre griefs d'entente et d'abus de position dominante à l'égard des centres d'insémination artificielle car les pratiques ne pouvaient être regardées comme une conséquence nécessaire et implicite du monopole légal et conforme au droit communautaire dont bénéficient les centres agréés. Il a en revanche écarté un grief relatif à une entente sur les prix car la Cour de cassation avait jugé à plusieurs reprises « *le principe de la tarification unique et de l'utilisation de son matériel est imposé* [par un arrêté ministériel] *au centre d'insémination agréé en raison de l'exclusivité qui lui est conférée par la réglementation* »[10].

### *2.1.2 Le texte invoqué doit être antérieur au comportement illicite*

Le recours à un texte postérieur aux faits litigieux permettrait la disparition rétroactive du caractère illicite des comportements constatés et, en conséquence, la non-application du principe de prohibition des pratiques anticoncurrentielles ; par le refus de toute rétroactivité l'Autorité de la concurrence cherche donc à réduire l'impact de l'ordre de la loi en tant que fait justificatif.

Elle a ainsi rappelé à plusieurs reprises que les auteurs d'une pratique anticoncurrentielle ne pouvaient se prévaloir utilement d'un texte que si ce dernier est en vigueur au moment où ils ont adopté leur comportement restrictif de concurrence. Ainsi dans une affaire relative à des pratiques mises en oeuvre dans le secteur des fraises, une association interprofessionnelle invoquait l'esprit de la loi du 15 mai 2001 relative aux nouvelles régulations économiques pour justifier le bien fondé de son action : elle soutenait que le marché de la fraise, connaissant des difficultés spécifiques, la réglementation applicable aux crises agricoles au moment des faits était inadaptée alors que des décisions devaient être prises dans l'urgence, ainsi que l'avait reconnu le Parlement en modifiant la loi sur ce point. Cependant, le Conseil de la concurrence a fait une application classique de la loi dans le temps en considérant que les dispositions de

8 Voir J-Cl Concurrence-consommation fasc 320 « faits justificatifs des pratiques anticoncurrentielles ».

9 Décision 94-D-41 relative à des pratiques relevées dans le secteur des volailles sous label.

10 Décision 04-D-49 du 28 octobre 2004 relative à des pratiques anticoncurrentielles dans le secteur de l'insémination artificielle bovine.

ladite loi, à supposer qu'elles aient trouvé à s'appliquer en l'espèce, étaient intervenues postérieurement à la mise en oeuvre des pratiques reprochées, de sorte qu'il était vain de les invoquer pour justifier ces pratiques[11].

*2.1.3 Le texte invoqué doit être conforme au droit communautaire*

La difficulté de se prévaloir avec succès de l'article L. 420-4, I est accrue lorsque le comportement anticoncurrentiel en cause affecte le commerce entre États membres et entraîne l'application du droit communautaire, selon le principe de la primauté de celui-ci.

En effet, en droit communautaire de la concurrence, le traité CE devenu TFUE, impose aux États membres de ne pas prendre de mesures, même de nature législative ou réglementaire, susceptibles d'éliminer l'effet utile des règles de concurrence applicables aux entreprises[12].

Tel est le cas lorsqu'un État membre impose ou favorise la conclusion d'ententes contraires à l'article 101 TFUE, renforce les effets de telles ententes, ou retire à sa propre réglementation son caractère étatique en déléguant à des opérateurs privés la responsabilité de prendre des décisions d'intervention en matière économique.

Lorsqu'existe un comportement étatique imposant ou favorisant les ententes, la Cour de justice impose aux autorités nationales de concurrence de ne pas se contenter d'en prendre acte. Elle a ainsi jugé qu'

> *« [...] en présence de comportements d'entreprises contraires à l'article 81, paragraphe 1, CE, qui sont imposés ou favorisés par une législation nationale qui en légitime ou renforce les effets, plus particulièrement en ce qui concerne la fixation des prix et la répartition du marché, une autorité nationale de la concurrence qui a reçu pour mission, notamment, de veiller au respect de l'article 81 CE :*
>
> - *a l'obligation de laisser inappliquée cette législation nationale ;*
> - *ne peut infliger de sanctions aux entreprises concernées pour des comportements passés lorsque ceux-ci ont été imposés par cette législation nationale ;*
> - *peut infliger des sanctions aux entreprises concernées pour leurs comportements ultérieurs à la décision de laisser inappliquée cette législation nationale, une fois que cette décision est devenue définitive à leur égard ;*
> - *peut infliger des sanctions aux entreprises concernées pour des comportements passés lorsqu'ils ont été simplement facilités ou encouragés par cette législation nationale, tout en tenant dûment compte des spécificités du cadre normatif dans lequel les entreprises ont agi »*[13].

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11 Décision 03-D-36 relative à des pratiques mises en oeuvre sur le marché des fraises produites dans le Sud-Ouest. Voir aussi décisions 93-D-27 relative à des pratiques constatées dans le secteur du déménagement, et 96-D-59 relative à des pratiques relevées dans le secteur des vins de Champagne.

12 CJCE, arrêts BNIC/Clair 30 janvier 1985, BNIC/Aubert 3 décembre 1987, Van Eycke/Aspa 21 septembre 1988.

13 CJCE, 9 septembre 2003, Consorzio Industrie Fiammifieri (CIF) et Autorità Garante della Concorrenza e del Mercato, (C-198/01, Rec.p. I-8055).

Ainsi dans la décision 03-MC-03, le Conseil n'a pas pris en compte les dispositions de la loi conférant à la société Télédiffusion de France (TDF) le monopole de la diffusion des programmes de Radio France, ainsi que les dispositions du cahier des charges de Radio France approuvées par décret car ces textes n'étaient pas conformes aux objectifs d'une directive européenne prévoyant l'ouverture du secteur à la concurrence dont l'échéance de transposition avait expiré.

En conséquence, le Conseil a enjoint à TDF, dans le cadre de mesures conservatoires, de ne plus se prévaloir de son monopole légal et de proposer, en concurrence avec les autres opérateurs, de nouvelles offres de diffusion de programmes radiophoniques détaillées en conformité avec la nouvelle législation communautaire.

Dans cette hypothèse, puisque la législation nationale invoquée n'était plus conforme au droit communautaire, l'opérateur, qui disposait d'une marge d'autonomie, ne pouvait être exonéré de son comportement anticoncurrentiel.

### *2.2 La pratique décisionnelle est exigeante quant au lien de causalité entre les comportements restrictifs et le texte invoqué*

Par une pratique décisionnelle ancienne et constante, l'Autorité de la concurrence exige que soient démontrés non pas seulement une simple relation de causalité entre le texte et le comportement reproché mais aussi le fait que ce comportement est la conséquence « directe et inéluctable » ou « directe et nécessaire » du texte invoqué.

#### *2.2.1 Existence d'un lien de causalité entre le comportement restrictif de concurrence et le texte invoqué*

Pour qu'un comportement anticoncurrentiel soit rattaché à l'application d'un texte au sens de l'article L. 420-4, I, 1° du Code de commerce, il est indispensable que ce texte ait été élaboré pour permettre d'éventuelles restrictions de concurrence. Ainsi, seules des dispositions qui ont vocation à autoriser des pratiques anticoncurrentielles permettent de supposer l'existence d'un lien de causalité suffisant entre le texte et le comportement en cause[14].

En outre, l'article L. 420-4 1 ne peut être invoqué si le texte a vocation à protéger la concurrence. L'objectif de protection de la concurrence du texte exclut ainsi toute justification d'une attitude anticoncurrentielle.

Ainsi, dans une décision 02-D-62, relative à une entente sur des devis mise en oeuvre dans le secteur du déménagement de personnels de l'État, le Conseil de la concurrence a écarté le moyen des entreprises mises en cause selon lequel leurs agissements leur étaient imposés par le décret fixant le barème des frais de mutation des personnels de l'État, au motif que les dispositions régissant le remboursement des frais de déménagement des militaires visaient, au contraire, à faire échec à de telles pratiques en valorisant la concurrence, afin de faire baisser les prix à l'avantage du consommateur[15].

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14 Voir décisions 89-D-41, situation de la concurrence dans le secteur de la vente de livres par clubs et 90-D-38, auto-écoles des Hauts-de Seine.

15 Voir aussi décision 91-D-45, relative à la situation de la concurrence sur le marché de l'exploitation des films dans les salles de cinéma , 91-D-55 relative à la situation de la concurrence dans le secteur des géomètres-experts, 09-D-17 relative à des pratiques mises en oeuvre par le conseil régional de l'ordre des pharmaciens de Basse-Normandie.

À supposer que le texte invoqué autorise des atteintes à la concurrence, l'existence d'une relation de causalité entre le texte et la pratique suppose que la situation en cause soit au nombre de celles qui sont prévues par le texte. Si tel n'est pas le cas, l'Autorité de la concurrence, conformément à la jurisprudence européenne considère que le comportement anticoncurrentiel ne résulte pas, au sens de l'article L. 420-4, I, 1° du code de commerce, du texte invoqué, mais du comportement autonome des opérateurs économiques en cause[16].

Il en a été jugé ainsi à propos d'une pratique d'alignement des prix non visée par l'interdiction de la vente à perte prévue par le Code de commerce, par exemple[17], ou de pratiques dépassant le champ d'application du texte invoqué et non susceptible de s'y rattacher[18]

*2.2.2 Caractère direct et nécessaire du lien de causalité existant*

Pour que l'exemption par autorisation de la loi soit constatée, la pratique anticoncurrentielle doit apparaître, non seulement, comme une attitude dictée par les seules exigences du texte, mais aussi, comme l'unique attitude susceptible de répondre à ses exigences ; le lien de causalité sera jugé insuffisant à chaque fois qu'un comportement, autre que celui adopté, aurait pu répondre de manière plus adéquate aux prescriptions de la loi.

Une très abondante et ancienne jurisprudence impose ce lien de causalité renforcé[19].

Les entreprises qui l'invoquent n'obtiennent donc que très rarement avec succès le bénéfice de l'exemption par l'autorisation de la loi.

On peut citer que deux décisions, rendues en 2003, s'agissant d'une même pratique, consistant, pour le barreau de Marseille et le barreau d'Albertville, à obliger les membres du barreau à adhérer au contrat collectif d'assurance des risques professionnels des avocats souscrit par lui. Après avoir constaté que cette pratique privait chacun des membres du barreau de la possibilité de recourir à l'assureur de son choix, dans des conditions librement négociées, le Conseil de la concurrence a conclu que l'article 27 de la loi du 31 décembre 1971 ne peut être interprété que comme excluant la faculté pour les avocats, lorsqu'une assurance collective de responsabilité civile professionnelle a été contractée par le barreau, de ne pas y adhérer et de s'assurer individuellement et que dans ces conditions, l'obligation de souscription collective résulte directement et nécessairement de l'application de la loi et bénéficie de l'exemption prévue au paragraphe 1 de l'article L. 420-4 du code de commerce. [20] Il a néanmoins exclu de cette exemption la couverture de certains risques qui n'étaient pas propres à l'exercice de la profession d'avocat et ne relevaient pas de leur responsabilité civile professionnelle.

16 Voir arrêt CJCE, 11 novembre 1997, Commission et France/Ladbroke Racing, C-359/95P et C-379/95P, Rec. p. I-6265.

17 Décision 07-D-50, Pratiques mises en oeuvre dans le secteur de la distribution de jouets.

18 Décision 87-D-53, Situation de concurrence dans le domaine des honoraires d'architectes. Voir aussi, dans le domaine agricole, la décision 96-D-60, Situation de la concurrence dans le secteur des plants de pommes de terre.

19 Voir par exemple décisions 98-D-70, Saisine des Stés Multivision et Télévision par satellite dans le secteur des droits de diffusion audiovisuelle et récemment, et 09-D-17 relative à des pratiques mises en œuvre par le conseil régional de l'ordre des pharmaciens de Basse-Normandie.

20 Décisions 03-D-03 Pratiques mises en oeuvre par le barreau des avocats de Marseille en matière d'assurances et 03-D-04, 16 janv. 2003, Pratiques mises en oeuvre par le barreau d'Albertville en matière d'assurances.

Ainsi, l'ordre de la loi ne paraît avoir qu'un impact réduit en droit français de la concurrence. Quelques textes nationaux y font néanmoins directement ou indirectement référence. C'est par exemple le cas de l'article L. 632-14 du Code rural qui, sous certaines conditions, fait échapper à l'interdiction des ententes et des abus de domination certaines pratiques de l'organisation interprofessionnelle laitière. Cependant ces rares dispositions n'enlèvent rien au caractère limité de la portée de l'ordre de la loi en tant que fait justificatif des pratiques anticoncurrentielles[21].

En outre, l'Autorité a eu l'occasion de rappeler que les dispositions législatives en cause n'instituent aucune exemption au regard du droit communautaire lorsque les échanges au sein du marché intérieur sont susceptibles d'être affectés. Ainsi, dans son avis du 2 octobre 2009[22], l'Autorité a rappelé que les pratiques de prix recommandés mises en œuvre par les interprofessions laitières, même exemptées au niveau national, restaient prohibées par l'article 101 TFUE si elles avaient des effets transfrontaliers.

### *2.3 Le contrôle de l'action de l'Etat par les juridictions administratives*

Il est d'autant moins aisé d'échapper au droit de la concurrence, que les mesures étatiques font elles mêmes, parallèlement l'objet d'un strict contrôle par les juridictions administratives, faisant application d'une abondante jurisprudence communautaire. Les juridictions administratives incluent en effet les règles de concurrence dans le bloc de légalité[23] et connaissent de tous les actes réglementaires et de tous les actes et décisions d'organisation du service public ou mettant en œuvre des prérogatives de puissance publique.

#### *2.3.1 L'interdiction faite à l'État d'intervenir pour encourager la formation d'une pratique anticoncurrentielle ou en accroître les effets.*

Dans cette situation, la pratique litigieuse préexiste à la mesure étatique qui la valide ou la renforce. La responsabilité de l'Etat naît de ce qu'il aggrave par son action, un comportement déjà anticoncurrentiel.

La constatation de l'incompatibilité d'une mesure réglementaire avec l'article 101 ou 102 TFUE exige que soit établi un lien entre la mesure étatique et le comportement privé adopté par une ou plusieurs entreprises.

Sont notamment concernés les actes de ratification par lesquels l'autorité publique rend applicable à l'ensemble des entreprises, ou à l'ensemble d'une branche professionnelle ou d'une profession, un accord conclu entre représentants des partenaires sociaux ou une décision prise par les professionnels. De tels actes, qui peuvent prendre la forme de décisions d'extension d'accords collectifs, ou d'approbation ou encore d'homologation de décisions prises par les organismes professionnels, sont en effet de nature à rendre possibles des pratiques anticoncurrentielles ou, tout au moins, à renforcer l'impact desdites pratiques sur le marché.

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21 Par exemple, avis du conseil de la concurrence 02-A-12, Situation du marché de la pêche et nectarine.

22 Avis n° 09-A-48 du 2 octobre 2009 relatif au fonctionnement de la filière laitière.

23 Conseil d'Etat, Sect., 8 novembre 1996, Fédération française des sociétés d'assurance, Rec. Lebon p. 441 ; 1er avril 1998, *Union hospitalière privée et Fédération intersyndicale des établissements d'hospitalisation privée*, Rec. Lebon p. 114 ; avis du 8 novembre 2000, Sté Jean-Louis Bernard Consultants, n°222208, J.O n° 282 du 6 décembre 2000 page 19380 ; 16 février 2001, Syndicat national de l'industrie pharmaceutique, n° 208205, Rec. Lebon p. 624 ; comme découlant de l'ordonnance du 1er décembre 1986 : Conseil d'Etat, Million et Marais, 23 novembre 1997, n° 169907, Rec. Lebon, p. 406 ; 5 octobre 1998, Fédération française des pompes funèbres et association Force ouvrière consommateurs, n°s 193261 et 193359, publié au Recueil Lebon.

Selon les cas, le Conseil d'État a eu à connaître de la légalité d'actes administratifs rendant obligatoires ou amplifiant des agissements anticoncurrentiels.

Ainsi, dans l'arrêt *Société Christ et Fils*, du 12 juin 1996, le Conseil d'Etat a examiné la validité d'un arrêté ministériel étendant à l'ensemble d'un secteur économique d'un accord interprofessionnel agricole comportant l' obligation de pratiquer un prix déterminé. Il a estimé que ce type d'accord ayant vocation à être rendu obligatoire à l'ensemble des opérateurs intervenant sur un marché avait, par sa nature même, pour objet de fausser le libre jeu de la concurrence sur ce marché et que, portant sur la totalité de la production du territoire national, il était susceptible d'affecter les échanges entre États membres. Il en a dès lors déduit que l'arrêté interministériel dont l'objet était d'étendre un accord interprofessionnel contraire à l'article 101 TFUE, était incompatible avec les obligations faites aux États de respecter l'effet utile des règles communautaires de concurrence.

*2.3.2 La théorie de l'abus automatique de position dominante*

La juridiction administrative se fonde sur cette théorie pour annuler des dispositions réglementaires structurellement génératrices d'abus avant même que tout abus soit constaté.

Issue du droit communautaire, cette jurisprudence permet notamment d'annuler des décrets instaurant des situations monopolistiques. Elle repose sur le principe selon lequel les États, par les mesures qu'ils prennent, ne doivent pas placer les opérateurs sur un marché dans une situation telle qu'ils seraient amenés nécessairement à abuser d'une situation de monopole ou de droits exclusifs ou spéciaux.

L'annulation de l'acte implique que l'opérateur concerné dispose d'une position dominante sur un marché, que ce soit de son fait ou à l'initiative d'une autorité publique, et surtout, qu'il soit démontré que c'est la mesure elle-même, et non le comportement de l'opérateur sur le marché, qui conduit à l'exploitation abusive d'une position dominante.

Le Conseil d'Etat a ainsi fait pour la première fois application de cette solution dans un arrêt *Fédération Française des sociétés d'assurance* , du 8 novembre 1996, en jugeant, à propos de l'attribution par voie réglementaire de l'exclusivité de la gestion du régime complémentaire de retraite des professions agricoles à l'organisme chargé par ailleurs de la gestion du régime obligatoire, que « *le fait de créer une telle position dominante par l'octroi d'un droit exclusif au sens de l'article 90, paragraphe 1(du TCE) n'est incompatible avec l'article 86 du traité que si l'entreprise en cause est amenée, par le simple exercice du droit exclusif qui lui a été conféré, à exploiter sa position dominante de façon abusive* ».

En l'espèce, le juge a annulé le texte attribuant l'exclusivité de la gestion du régime de retraite complémentaire.

Cette jurisprudence présente l'avantage d'assurer le respect des règles de concurrence indépendamment du statut de l'auteur des pratiques.

La juridiction administrative peut en outre solliciter l'expertise de l'Autorité. Ainsi, le Conseil de la concurrence, saisi par le Conseil d'Etat par une décision avant dire droit, a procédé à un examen des tarifs pratiqués par l'Institut national de la statistique dans le cadre de la tenue du répertoire national d'identification des entreprises et de leurs établissements[24] afin de vérifier l'existence d'un effet de ciseau

[24] Avis n° 01-A-18 du 28 décembre 2001 relatif à des pratiques de l'INSEE concernant les conditions de commercialisation des informations issues du répertoire SIRENE.

tarifaire[25]. A la suite de cet avis, le Conseil d'Etat a jugé que, par leur caractère excessif, les redevances liées à l'utilisation des données nuisaient à l'activité concurrentielle d'autres opérateurs économiques, pour lesquels ces données constituaient une ressource essentielle pour élaborer un produit ou assurer une prestation qui diffèrent de ceux fournis par l'Etat et a annulé, pour ce motif, l'arrêté instituant la redevance[26].

## 3. Les comportements des entreprises n'entrant pas dans le champ d'application des dispositions réglementaires prises pour l'application d'une exemption demeurent justiciables du droit de la concurrence si bien qu'il n'existe à proprement parler aucune immunité sectorielle dont puisse se prévaloir les entreprises mises en cause

### *3.1 Le droit de la concurrence s'applique à toutes les activités économiques*

L'article L. 410-1 du code de commerce dispose que les dispositions de ce dernier relatives aux pratiques anticoncurrentielles, « *s'appliquent à toutes les activités de production, de distribution et de services, y compris celles qui sont le fait de personnes publiques, notamment dans le cadre de délégations de service public* ».

Le droit de la concurrence s'applique donc à toutes les activités économiques, c'est-à-dire dès lors qu'il y a une offre et une demande sur un ou plusieurs marchés pour un produit déterminé.

A cet égard, la pratique décisionnelle de l'Autorité et la jurisprudence rappellent constamment que la qualité ou le statut juridique de l'opérateur mis en cause importent peu.

Il n'existe pas non plus d'immunité sectorielle, aucun secteur en tant que tel n'étant exclu du champ d'application du droit de la concurrence. La jurisprudence nationale se réfère sur ce point à une abondante jurisprudence européenne[27] .

Ainsi dans son rapport annuel au titre de l'année 1991, le Conseil de la concurrence soulignait que : « les statuts législatifs dont bénéficient certaines professions ou certaines autorités pour des motifs spécifiques-professions libérales, mutuelles, coopératives, banques, compagnies d'assurance etc- ne sauraient, en l'absence de dispositions législatives expresses, les dispenser, dans l'exercice d'activités de production, de distribution ou de prestation de services, de respecter les obligations résultant [des dispositions relatives à la liberté des prix et du commerce]. »

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25 Le Tribunal de Première instance des Communautés européennes a jugé que « *Les pratiques poursuivies désignées par les termes de ciseau tarifaire consistent, pour un opérateur généralement verticalement intégré, fixent à la fois les tarifs de détail sur un marché et le tarif d'une prestation nécessaire pour l'accès au marché de détail, à ne pas laisser entre les deux un espace suffisant pour la couverture des autres coûts encourus pour la fourniture de la prestation de détail* » (Tribunal de Première instance des Communautés européennes, Deutsche Telekom/Commission, T-271/03, Rec. p. II-477). La Cour de justice a confirmé cet arrêt (Cour de justice de l'Union européenne, 15 octobre 2010, C-208/08 P, à publier au recueil). Pour sa part, la Cour de cassation a estimé « *qu'une pratique de 'ciseau tarifaire' avait un effet anticoncurrentiel si un concurrent potentiel aussi efficace que l'entreprise dominante verticalement intégrée auteur de la pratique ne peut entrer sur le marché aval qu'en subissant des pertes ; qu'un tel effet peut être présumé seulement lorsque les prestations fournies à ses concurrents par l'entreprise auteur du 'ciseau tarifaire' leur sont indispensables pour la concurrencer sur le marché aval* » (Cass.com, 3 mars 2009, Société française de radiotéléphonie, pourvois n°s F 08-14.435 et N 08-14.464).

26 Conseil d'Etat, Société Cegedim, 29 juillet 2002, n° 200886, Rec. p. 280.

27 Voir par exemple CJCE, 18 juin 1998, Comm. c/ Italie (aff C.35/96) : l'activité des expéditeurs en douane a un caractère économique et dans ces conditions, la circonstance que cette profession est réglementée n'est pas de nature à l'exclure du champ d'application des articles 85 et 86 du traité CE.

Toutes les activités économiques sont donc soumises au droit de la concurrence, y compris les secteurs réglementés par la puissance publique, telles les professions juridiques ou les entreprises de distribution de la presse. Ainsi la cour d'appel d'Orléans a rappelé que les dispositions de la loi du 2/04/1947 relatives au statut des entreprises de groupage et de distribution des journaux et publications périodiques, même si elles organisent la liberté de la diffusion de la presse, n'autorisent pas pour autant les entreprises de presse à violer le droit de la concurrence (arrêt du 29/08/1995 Champagne c/ SA).

### *3.2 L'existence d'un cadre réglementaire s'appliquant à un secteur donné ne fait pas obstacle à l'application du droit de la concurrence*

#### *3.2.1 L'existence d'un monopole en aval ne fait pas en soi obstacle à l'application du droit de la concurrence*

Dans la décision n° 96-D-80, le Conseil de la concurrence a ainsi considéré que le fait que, sous le régime de monopole du transport et de la distribution d'électricité, EDF ait été soumis à une obligation d'achat et de transport d'électricité à l'égard des producteurs autonomes d'électricité, à des prix régulés par la puissance publique, et que les litiges entre EDF et ces producteurs autonomes soient arbitrés par le ministre de l'industrie, n'excluait pas l'application de l'ordonnance de 1986 . Cette réglementation visait à permettre aux producteurs autonomes, qui n'avaient pas d'autre alternative, d'écouler leur production d'électricité ; dès lors, le Conseil était compétent pour connaître des pratiques mises en œuvre par EDF dans ses relations avec les producteurs autonomes.

La cour d'appel de Paris, dans un arrêt du 27 janvier 1998 a confirmé cette décision en considérant « que la production d'électricité destinée à être achetée par EDF, non en sa qualité d'utilisateur final pour l'incorporer à sa propre activité, mais comme intermédiaire détenteur du monopole du transport et de la distribution de cette énergie en vue de la commercialiser auprès des utilisateurs des secteurs industriel, tertiaire et domestique est une activité de production entrant dans le champ de l'ordonnance »

#### *3.2.2 L'existence d'un cadre réglementaire spécifique assurant l'ouverture à la concurrence de certains secteurs ne les fait pas échapper au droit de la concurrence*

Le Conseil de la concurrence a rappelé à de nombreuses reprises que « l'existence d'un cadre réglementaire spécifique assurant la régulation de l'ouverture à la concurrence d'un secteur ne plaçait pas celui-ci en dehors du champ d'application des dispositions du livre IV du code de commerce ».

Cette pratique décisionnelle est intervenue dans le cadre tant de ses activités contentieuses que de ses activités consultatives.

Ainsi, dans la décision 07-MC-02, relative à des pratiques concernant la diffusion hertzienne terrestre en mode analogique, dans le contexte de l'ouverture à la concurrence de ce domaine, le Conseil a estimé que le fait que l'ARCEP, régulateur sectoriel français des communications électroniques, dispose d'un pouvoir de révision des contrats conclus par les entreprises de radiodiffusion publiques ne le privait pas de la compétence de qualifier ces mêmes contrats au regard des règles de concurrence résultant du code de commerce.[28]

A l'occasion de ses activités consultatives, l'Autorité se place davantage dans une optique de prévention.

[28] Voir aussi décision 05-D-59 s'agissant de pratiques mises en œuvre sur le marché de gros de l'accès à Internet haut débit (ADSL).

Avec l'ouverture à la concurrence des marchés des télécommunications, de l'électricité, du gaz et des transports ferroviaires, s'est posée avec acuité la question de l'insertion des monopoles publics dans le libre jeu de la concurrence, d'autant plus, que la libéralisation de ces secteurs s'est accompagnée de la diversification des activités des anciens monopoles. Dans le rapport annuel de 2003[29], le Conseil a rappelé que « *L'appartenance des entreprises concernées au secteur public ne les met pas en dehors du champ d'application du droit commun de la concurrence (…) De même, l'existence éventuelle d'une régulation sectorielle spécifique répond à des objectifs complémentaires par rapport à ceux du droit de la concurrence, qui vise à garantir le fonctionnement efficace des marchés. Le Conseil a ainsi joué un rôle notable dans la clarification des conditions de l'insertion des entreprises publiques dans le jeu concurrentiel, à l'occasion des contentieux dont il a été saisi, mais aussi dans le cadre de son rôle consultatif. Depuis dix ans, le Conseil a en effet rendu une vingtaine d'avis et de nombreuses décisions sur ces questions.* ».

Dans l'avis 04-A-17, le Conseil de la concurrence a fait valoir ces principes dans le contexte du processus d'ouverture à la concurrence du secteur des télécommunications et s'est référé à une recommandation de la Commission européenne[30] qui précise que l'un des critères qui doivent être pris en compte afin de justifier une régulation ex ante des marchés est que l'application des règles de droit commun de la concurrence n'est pas suffisamment efficace.

Or, il résulte de la jurisprudence tant des autorités nationales que communautaires qu'un certain nombre d'obligations s'imposent déjà aux opérateurs en position dominante sur un marché. En particulier, le droit de la concurrence impose déjà à une entreprise en situation de monopole ou de position dominante, qui détient une infrastructure à laquelle les entreprises opérant sur un marché aval (ou amont) doivent nécessairement avoir accès pour concurrencer l'entreprise détentrice de l'infrastructure, de permettre l'accès à cette dernière sur une base équitable et non discriminatoire[31].

Le Conseil a observé toutefois que, dans une telle période intermédiaire, les contraintes attachées à une régulation ex ante pouvaient justifier que, malgré le rapprochement opéré, les notions de marché pertinent et de position dominante telles que visées dans le code des postes et télécommunications, ne coïncident pas totalement avec celles du droit de la concurrence.

De nombreux avis ont ainsi été rendus sur les projets de lois liés aux grandes étapes de l'ouverture à la concurrence des industries de réseau (réglementation des télécommunications[32], marché électrique[33], services postaux[34] ), mais aussi à l'occasion de la diversification des activités des entreprises publiques (en matière d'électricité[35], ou concernant les activités de messagerie de la SNCF *via* le Sernam, par exemple[36]). Le Conseil s'est aussi prononcé sur les questions soulevées au regard du droit de la concurrence, s'agissant de France Télécom, par la coexistence au sein d'une même structure juridique et

29 Etude thématique « Les monopoles publics dans le jeu concurrentiel ».

30 Recommandation C(2003) 497 du 11 février 2003 concernant les marchés pertinents de produits et de services dans le secteur des communications électroniques susceptibles d'être soumis à une réglementation ex ante conformément à la directive 2002/21/CE du Parlement européen et du Conseil relative à un cadre réglementaire commun pour les réseaux et services de communications électroniques.

31 Voir avis 02-A-08.

32 Avis 96-A-04.

33 Avis 98-A-05.

34 Avis 03-A-06.

35 Avis 94-A-15 concernant EDF et GDF.

36 Avis 95-A-18.

commerciale, d'activités de télécommunications exercées en situation concurrentielle et sous monopole[37] et, récemment sur les jeux en ligne[38].

### *3.3 Les secteurs à tarifs réglementés*

#### *3.3.1 Il n'y a pas d'incompatibilité entre droit de la concurrence et tarifs réglementés : l'Autorité de la concurrence recherche si une concurrence s'exerce ailleurs que sur les prix*

Le marché est le lieu théorique sur lequel s'échangent des produits et des services par le jeu d'un système d'offres et de demandes émanant librement des agents économiques.

Il a toutefois été observé que « la théorie comme la pratique économique montrent que les restrictions apportées au libre jeu de l'offre et de la demande (réglementation sanitaires, contrôle des prix, droit de la publicité, déontologies professionnelles, par exemple) ne suffisent pas à supprimer l'existence voire l'efficacité d'un marché, dès lors qu'il demeure une liberté réelle de choix des demandeurs et une multiplicité d'offreurs »[39].

Selon une pratique décisionnelle ancienne qui reflète ce point de vue, l'Autorité de la concurrence considère que l'existence d'une réglementation des prix, qui peut certes restreindre le jeu de la concurrence, ne fait pas obstacle à l'application du droit de la concurrence et à l'application des règles qui prohibent les ententes et les abus de position dominante. Il reste en effet une place pour d'autres paramètres de la concurrence, notamment sur la qualité des services rendus.

Le secteur de la santé est à cet égard emblématique.

L'Autorité s'appuie sur la jurisprudence nationale et communautaire ancienne, selon laquelle les particularités attachées à l'activité médicale et le caractère réglementé de celle-ci ne sont pas de nature à l'exclure « *du champ d'application du droit de la concurrence, dès lors qu'elle s'analyse en une activité de services, permettant la rencontre, moyennant paiement, d'une demande de la part des malades, et d'une offre de la part des médecins* ».[40]

Elle estime que « Non seulement la fixation des prix n'atteint pas les autres espaces de concurrence mais il peut même être considéré que l'absence de liberté tarifaire permet de privilégier la concurrence par les services rendus ou par la qualité. C'est ainsi que la fixation des tarifs permettrait de protéger le patient, en double situation d'infériorité : à la fois malade et subissant une asymétrie d'informations par rapport au médecin. »[41].

Ainsi dans la décision n° 01-D-07 du 11 avril 2001 relative à des pratiques mises en œuvre sur le marché de la répartition pharmaceutique, le Conseil de la concurrence a considéré que la qualité du service rendu par les grossistes-répartiteurs peut varier d'un opérateur à un autre, laissant donc la place à une concurrence par les mérites ; il a donc rejeté l'argumentation des entreprises mises en cause, selon lequel

37 Avis 97-A-07.

38 Avis 10-SOA-03.

39 In « Concurrence et secteurs à tarifs réglementés : à propos d'une apparente contradiction » Juliette Théry-Schultz, Revue Concurrences n° 4-2009.

40 CA Paris, 4 avril 1997, Syndicat des médecins de la Somme. Voir aussi CJCE, 12 septembre 2000, Pavel Pavlov, C-180/98 à C-184/98, Rec. p. I-6451.

41 In « Concurrence et secteurs à tarifs réglementés : à propos d'une apparente contradiction » Juliette Théry-Schultz, Revue Concurrences n° 4-2009.

le droit de la concurrence n'avait pas à s'appliquer sur le marché concerné, puisque celui-ci était administré et que les marges et ristournes des grossistes, ainsi que les prix de détail des pharmaciens, étaient plafonnés[42].

Dans la décision 09-D-39 relative à des pratiques tarifaires reprochées au Conseil national des exploitants thermaux, qui avait imposé aux curistes assurés sociaux un forfait supplémentaire de dix euros, non remboursé par la sécurité sociale, l'Autorité a écarté le moyen fondé sur l'inapplicabilité des règles de concurrence.

Elle a estimé en effet que les exploitants thermaux exerçaient une activité de services et que le secteur était soumis aux dispositions du livre IV du Code de commerce relatif à la liberté des prix et de la concurrence et elle a souligné qu'à partir du moment où des exploitants thermaux facturaient des prestations hors forfait de la sécurité sociale, ils étaient à cet égard en situation de concurrence par les prix. Or, la dérogation au principe de liberté des prix sur certaines prestations de santé n'empêche pas leur soumission aux règles de la concurrence sur tous les autres aspects de leur activité.

### *3.3.2 Certaines pratiques anticoncurrentielles, qui ne sont pas des pratiques tarifaires, sont parfois sanctionnées dans un contexte de tarifs réglementés*

L'Autorité de la concurrence a par exemple sanctionné les ententes et les abus de position dominante que constituaient des pratiques de dénigrement destinées à empêcher l'entrée sur le marché de médicaments génériques[43], des pratiques d'exclusion destinées à défendre le monopole d'une profession réglementée comme celle de chirurgien et prothésiste-dentaire[44], ainsi que des pratiques de contingentements ou commerce parallèle de médicaments[45].

La CJCE, dans un arrêt du 16 septembre 2008, Sot. Lélos kai Sia EE C-468/06 a d'ailleurs confirmé que la réglementation relative aux prix des médicaments ne saurait enlever son caractère abusif à tout refus d'une entreprise pharmaceutique en position dominante de satisfaire les commandes qui lui sont adressées par des grossistes actifs dans les exportations parallèles, estimant qu' *« une telle entreprise doit néanmoins être en mesure de prendre des mesures raisonnables et proportionnées à la nécessité de préserver ses propres intérêts commerciaux*. » (pt 70).

### *3.3.3 L'identification d'un comportement autonome, l'exemple des ciseaux tarifaires*

Par ailleurs, s'agissant même de questions tarifaires, l'Autorité de la concurrence cherche à distinguer « les espaces où le législateur a jugé nécessaire que la fixation des prix résulte du libre jeu de la concurrence de ceux où le prix est réglementé »[46]. A travers cette recherche elle doit en fait déterminer quelle est la part d'autonomie donc disposait l'entreprise mise en cause, cette part d'autonomie étant ce qui permet de sanctionner le comportement fautif.

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42 Le Conseil a aussi relevé que s'il est constant que les textes fixent des plafonds pour les marges à appliquer par les grossistes, ils n'interdisent nullement de mettre en œuvre des marges plus faibles (voir plus loin).Décision confirmée par CA de Paris, 22 janvier 2002.

43 Décision 07-MC-06.

44 Décisions 97-D-25 et 05-D-43.

45 Décisions 05-D-72 et 04-D-05.

46 In « Concurrence et secteurs à tarifs réglementés : à propos d'une apparente contradiction » Juliette Théry-Schultz, Revue Concurrences n° 4-2009.

En effet, selon une jurisprudence ancienne, un comportement n'est pas autonome, et donc répréhensible, au sens du droit de la concurrence lorsqu'il est imposé aux entreprises par la législation nationale ou lorsque celle-ci a éliminé toute possibilité de comportement concurrentiel de leur part, ce qui n'est admis que de façon très restrictive. Dans le cas inverse, le droit de la concurrence s'applique, comme l'ont rappelé les décisions et arrêts européens dans l'affaire Deutsche Telekom, s'agissant d'abus de position dominante par ciseaux tarifaires (ou compression des marges)[47].

Pour mémoire, la Commission européenne a condamné Deutsche Telekom pour avoir violé l'article 82 CE en mettant en œuvre une tarification abusive, sous la forme d' « effet de ciseaux », en facturant à ses concurrents des prix pour ses prestations intermédiaires qui étaient supérieurs aux prix de détail qu'elle facture à ses abonnés.

L'entreprise mise en cause considérait que son comportement ne pouvait être considéré comme abusif en raison de la marge de manœuvre insuffisante dont elle disposait pour éviter l'effet de ciseaux tarifaire, car elle ne pouvait pas modifier des tarifs soumis au régulateur sectoriel.

Le TPI, puis la Cour de justice, ont rejeté cet argument et confirmé la décision en soulignant que si une loi nationale se limite à inciter ou à faciliter l'adoption, par les entreprises, de comportements anticoncurrentiels autonomes, celles-ci demeurent justiciables des articles 81 CE et 82 CE. Au vu de ces éléments et des circonstances de l'espèce, le Tribunal a donc approuvé la Commission d'avoir estimé que Deutsche Telekom disposait de marges manœuvres suffisantes pour augmenter ses prix de détail et mettre fin au ciseau tarifaire, ce qu'elle n'a pas fait, ayant au contraire utilisé cette marge de manœuvre pour baisser certains de ses prix de détail.

Il s'agit donc d'apprécier dans quelle mesure la marge de manœuvre de l'opérateur intégré dans la fixation de ses tarifs de gros et de détail lui permet d'éviter de maintenir un effet de ciseau tarifaire.

Dans plusieurs affaires, le marché de la prestation intermédiaire était soumis à régulation, mais celle-ci n'allait pas jusqu'à prescrire le niveau du prix amont : la régulation imposait seulement un prix plafond. L'opérateur intégré restait libre de réduire le niveau en deçà du plafond, et de supprimer ainsi l'effet de ciseau tarifaire. Il pouvait donc en être tenu pour responsable au regard du droit de la concurrence[48].

Ainsi, dans les décisions 07-MC-04 et 07-D-43, le Conseil de la concurrence, saisi par la société Direct Énergie de pratiques mises en œuvre par EDF sur le marché de la fourniture d'électricité, a recherché, conformément à cette jurisprudence, si les entreprises en cause conservaient la possibilité d'adopter un comportement autonome susceptible d'empêcher la concurrence.

En l'espèce, le Conseil de la concurrence a limité l'analyse de l'effet de ciseau aux offres de gros et de détail d'EDF destinées au marché libre. Il a relevé que : « *Les tarifs réglementés sont d'un niveau significativement inférieur à celui des prix de marché correspondants car ils sont construits selon une logique de couverture des coûts moyens totaux de la production. Ils sont "réglementés" par l'État selon une logique propre qui ne relève pas de la maximisation du profit d'EDF, mais dans le but de faire bénéficier la clientèle de masse d'une énergie électrique relativement bon marché, sans perte pour l'entreprise du fait du faible niveau de ses coûts moyens totaux.* » L'action du Conseil était donc fondée sur le comportement adopté par l'opérateur historique sur le seul marché libre, la fourniture d'électricité par EDF aux tarifs réglementés ne revêtant pas un degré d'autonomie suffisant au sens du droit de la

47 Com,21 mai 2003, Deutsche Telekom AG, 2003/707/CE, TPICE,10 avril 2008, Deutsche Telekom AG. T 271/03, CUE, 14 octobre 2010, Deutsche Telekom AG,C-280/08 P.

48 Voir rapport annuel 2008, étude thématique « *Les pratiques de ciseaux tarifaires* ».

concurrence, sans que l'existence parallèle de tarifs réglementés puisse immuniser le comportement autonome d'EDF sur ce marché libre contre l'application des articles L. 420-2 du code de commerce et 82 CE[49].

## 4. Conclusion

L'exception de régulation sectorielle, quelles que soient les différentes formes juridiques qu'elle peut prendre est donc rarement admise, l'Autorité de la concurrence et des juridictions cherchant à identifier concrètement la marge d'autonomie dont bénéficient les entreprises mises en cause au regard de la réglementation dont leur activité fait l'objet.

Au final, c'est toujours l'appréciation de l'autonomie de la volonté qui est le pivot de leur analyse, condition essentielle pour qu'un comportement anticoncurrentiel puisse être sanctionné.

[49] Voir aussi affaire dite « Tenor » : décision 04-D-48 du 14 octobre 2004 relative à des pratiques mises en œuvre par France Télécom, SFR Cegetel et Bouygues Telecom. Arrêts de la cour d'appel de Paris du 12 avril 2005 et du 2 avril 2008. Arrêts de la Cour de cassation du 10 mai 2006 et du 3 mars 2009.

# HUNGARY

One of the first steps that must be taken when making a legal assessment under the competition enforcement procedure of the Hungarian Competition Authority is an assessment of the scope and applicability of the Competition Act, given that Article 1(1) of the Competition Act applies to the market behaviour of businesses, conducting their behaviour or having their impact on the territory of Hungary, except where otherwise regulated by statute. The question of the applicability of the Competition Act is particularly important in regulated industries. Many of the sectors that are highly important to the national economy are regulated by specific legislation (as well). These sector-specific regulations aim to solve and prevent market failures. Since these sector-specific regulations sometimes cover anticompetitive conduct (or conduct that may be caught by the Competition Act), it is essential to clarify whether the Competition Act can also be applied to such behaviour in practice.

## 1. Conditions for the use of the regulatory conduct defence in abuse of dominance and horizontal agreement cases

### *1.1 General principles*

Abuse of dominance cases are by far the most common type of cases that the regulated conduct defence has been attempted in. The way in which this defence is considered by the Competition Authority is quite similar in horizontal agreement cases; therefore in the forthcoming section we present the principles of our approach as laid down in relevant abuse or cartel cases together.

In light of what we have said about the conditions of applicability of the Competition Act in the first paragraph, the regulated conduct defence may be based on one or both of the two following arguments: the conduct cannot be judged within the ambit of the Competition Act as a) it is provided otherwise by law or b) the conduct was not autonomous as a result of sector-specific regulation that is in force.

One situation where other laws prevent the application of the Competition Act is when its application is explicitly prohibited by the law in question. E.g. “the guiding price and quantitative restrictions are exempted from Article 11 of the Competition Act on restrictive practices.” Act No. XVI. of 2003 on the Agricultural Regime contains such an exemption but it is a very rare example. In case a restriction on the application of the Competition Act does not explicitly appear in the law, the intention of the legislator needs to be looked at. An exemption is justified only if it is established beyond reasonable doubt that the legislator authorised the given conduct on the market with the express aim of excluding the conduct from the ambit of the Competition Act. That is, the legislator wanted to exempt the given economic sector from the application of the Competition Act. However, this is to be carefully assessed on a case by case basis – as it is laid down in the relevant position statement of the Competition Commission.

In this given case on funeral services, in addition to the exemption spelled out in a sector specific regulation, the Competition Council considered it necessary to examine the existence of an additional condition. Namely, a condition that insures that competition is restricted only to the extent that is necessary in order to reach the desired aim, and that the interest of consumers is not hampered. In this particular case, the legislature imposed a wholesale contract obligation on the undertaking with regard to all of the services covered with the exclusivity granted by the law. The wholesale services were to be offered on the ground of necessary and reasonable costs, and the charges were to be calculated on the basis of the given service.

This stipulation was to guarantee specific capacity needs, and to prevent the exclusion of undertakings from adjacent markets.

As the provision in Article 1 of the Competition Act that states "except where otherwise regulated by statute" is an exception under the general proposition, it is to be narrowly interpreted. This corresponds to the legislator's intention of sector neutral competition law. Accordingly, any statutory authorisation for anti-competitive conduct shall be regulated in (or clearly deducible from) an act. Furthermore, the intention of the legislature needs to be undoubtedly spelled out in the act. As a result, in the absence of the clear intention of the legislature, no legislation should be interpreted in such a way that certain anti-competitive practices would be authorised. It is also noted that in general, pro-competitive principles in sector-specific regulations supporting liberalisation (e.g. in electronic communications or in energy) cannot be interpreted in such a manner that would narrow down the applicability of the Competition Act or that would deprive the competition authority of its powers.

What conditions shall be considered if parties claim that allegedly anticompetitive behaviour is not autonomous? In general, the prohibitions contained in the Competition Act may not be invoked if the conduct is a direct consequence of state action, that is, in case the undertaking is engaged in the conduct without acting on its own initiative. In the event that the state measure influencing market behaviour leaves room for some freedom in decision-making, then the Competition Act is applicable. However, in case it is justifiable, state intervention can be taken into account as a mitigating factor in calculating the fine to be imposed on the undertaking for the violation of competition rules.

The lack of applicability of the Competition Act in this situation is not based on the superiority of other legislation, nor can it be explained by explicit limiting terms in laws, but is due to a criterion spelled out in the Competition Act: the market behaviour of the company is not based on its own autonomous decision. That is, in this case it is not the existence of legislation limiting the applicability of the Competition Act that explains the exceptions (conduct where the Competition Act is not invoked), but the market situation in which the behaviour of the undertaking lacks discretion due to state intervention.

This type of defence is acceptable in two situations. First, when the law obliges the undertaking to adopt certain conduct; second, when the law explicitly authorises conduct which goes against the rules of the Competition Act.

The mere fact that the conduct may violate other laws cannot preclude the possibility of assessing the very same conduct under the Competition Act. The Competition Act contains general provisions aimed at protecting competition in the whole economy, while other legislation may contain provisions on a particular market or on a particular behaviour. Consequently, in certain cases, it can occur that another administrative body may be entitled or obliged to act under the very same circumstances of a given market behaviour. However, a procedure carried out by another authority based on a specific law does not preclude the initiation of competition proceedings. Proceedings by another authority for the breach of another law may strengthen the grounding of the decision of the Competition Council. However, facts and changes on the market resulting from another authority's proceedings shall be taken into account in the proceedings of the GVH.

This particular situation may occur when liberalisation rules prevail. The sector-specific economic regulations supporting liberalisation usually conform to the regulatory principles found competition law. This is because the aim of liberalisation is consistent with the interests protected by the Competition Act: the main objectives of all of these types of regulations are the protection of consumer interests and the creation and strengthening of competition. These are in line with the Competition Act's aim to preserve competition, and to protect consumers' interests. Like elsewhere in Europe, the application of competition law and the regulatory regimes of liberalisation in Hungary are looked upon as interventions existing

alongside each other, in complementary ways. Neither the existence of regulatory authorities, nor that of competition based sectoral-regulation automatically prevent the application of competition law in the markets and for the market players concerned. The assessment of a given behaviour on a regulated market always takes into account an analysis of the specific conduct, the regulatory environment, primarily through an assessment of the scope for autonomous action on the side of the undertaking.

All of the above is supported by our experiences. In the vast majority of the cases in the telecommunications, postal, energy, rail and financial sectors between 2000 and 2010, the GVH applied the Competition Act, even in cases where the relevant sectoral legislation contained provisions against behaviour that may be found to be illegal by competition law (such as providing anti-competitive discounts, the restriction of carrier selection). Similarly, the GVH did not consider the Competition Act inapplicable if a condition – being incidentally anti-competitive – had been approved by the industry regulator given that the latter did not/could not assess behaviour according to the criteria of competition law due to lack of competence. This approach of the Competition Council was either not disputed by national courts or was positively approved.

It might be worth mentioning the approach towards price cap regulation at this point, as the Competition Council has dealt with the issue of the regulated conduct defence in several of such cases where price cap regulation in force had an impact on the pricing of undertakings being investigated. In connection to the price cap regulation common in electronic communications markets, it laid down that this regulation did not preclude the autonomous market behaviour of the undertakings. Accordingly, the applicability of the Competition Act was not called into question. The Competition Council held that the full exploitation of a price cap did not automatically exclude the possibility of a violation of the Competition Act, as the price cap regulation usually leaves room for manoeuvre in setting the price for products and services (provided that the regulation concerns ranges of products/services and not individual ones).

As far as the concerted action of setting price levels just below the regulated maximum price, or increasing it to reach the maximum considered, it also does not fall outside of the application of the Competition Act. This conduct can fall foul of the rules on anticompetitive restrictive agreements. At the same time, however, this behaviour cannot constitute an abuse of a dominant position in the form of excessive pricing, if the method used in the price regulation employs the same competition assessment that would be employed by the GVH. In this case the regulated price can be excessively high only if the regulator would have set it contrary to the legal provisions. However, this question cannot be dealt with under the Competition Act. In case the price is regulated by law, then the review falls within the competence of the Constitutional Court, if the price is regulated in an administrative decision, then the national court is the competent forum. Nevertheless, the scenario is different if trade between Member States is affected – then the conduct can be assessed under Community Law. This is the case when the hierarchy of norms is important.

### *1.2 Hierarchy of norms*

A national competition authority of an EU Member State, such as the GVH, may initiate a competition enforcement procedure against an undertaking – provided that trade between Member States is affected – if it violates EU competition rules, even if it does not violate the national competition rules. In the CIF decision[1] the ECJ established that based on joint application of the principle of primacy of Community Law and Article 10 of the Treaty, there is an obligation on the side of the Member States to disapply national legislation that contravenes Community law. In line with the ruling in the CIF case, however, the national competition authority has to take into account that a national law contributed to the

[1] See Case C-198/01 Consorzio Industrie Fiammiferi (CIF) [2003] ECR I-8055, [2003] 5 CMLR 829.

unlawful conduct of the undertaking when setting the fine for the illegal action. With regard to the liberalisation of the electronic communications sector, in the Guidelines[2] and the in the Access Notice of the European Union, the Commission spelled out that it regards competition law and its application as entirely part of the overall approach in telecommunications. It emphasised that the liberalisation and harmonisation of telecommunications markets should be implemented in line with EC competition rules. The Commission is of the view that the direct applicability of competition rules (Articles 101 and 102 of the TFEU) shall continue to apply in cases where other provisions of the Treaty or secondary legislation aim, in particular, to stimulate competition. These are both important and mutually contribute to the proper functioning of the markets. The Commission has adhered to this approach in specific cases (such as Deutsche Telekom and Telefónica), and established their anticompetitive practice in spite of the sector-specific competition rules.[3] In analogy to the foregoing – as a consequence of the direct applicability of the provisions of the Treaty and the primacy of Community law – we are of the opinion that competition proceedings would be/are possible in other liberalised sectors despite the existence of similar sector-specific regulations.

### *1.3 Other issues*

It is possible that the existence of regulation does not prevent the application of the Competition Act, however, it prevents the establishment of the infringement.

One example of this was the case against the Hungarian Chamber of Pharmacists (hereinafter 'Chamber'). In this case, the GVH examined the agreement between the Chamber and the pharmaceutical producers based on which the Chamber published the wholesale and retail prices of drugs not subsidised. As a result, this information was freely accessible to all producers, wholesalers and retailers. The GVH could not establish that the agreement had the objective of restricting competition, as stipulated in Article 101 of the TFEU. Therefore, it examined whether it restricted competition by effect. A recommended price by an association of undertakings may restrict competition by providing the competitors on the market with an opportunity to get to know each other's pricing policies, and to take this into account in their own policies regarding their future price setting. In the course of assessing the condition of anticompetitive effect, the GVH attached high importance to the fact that the Chamber had made available the recommended prices only whilst the wholesale and retail margins were set in the relevant Act. This of course points to the direction of a single retail price on the market. The Competition Council found no evidence (although it could not rule it out either) that the publication of the recommended retail prices by the Chamber would have significantly strengthened the coordinated effects, the existence of which arose

2 Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services.

3 Based on the data from the ECN case statistics, national competition authorities in the EU follow a similar approach to that of the Commission. A number of national competition authorities have initiated proceedings against market players of the electronic communications sector for abusing their dominant positions. These cases were started in spite of the fact that the primary goal of the European regulatory framework for the electronic communications sector is sustainable (and preferably "automatically" workable) competition. Additionally, the instrument provided for the attainment of this goal, the imposition (and checking) of obligations on dominant firms with substantial market power – based on the principles of competition law. Indeed, relying upon the data from the ECN Interactive, exactly these types of cases are in an overwhelming majority. For the suspected violation of the competition provisions of the Treaty in the electronic communications sector, between May 2004 and March 2010, only 20 cases out of 103 were about anti-competitive agreements or concerted practices (2 cases before the Commission, while 18 before national competition authorities). All of the other proceedings concerned abuse of dominant position cases (of which 9 before the Commission and 74 before national competition authorities). The latter ones were initiated typically for price abuse practices, despite the fact that regulatory authorities have broad powers in price regulation.

from the price cap anyway. In the evaluation of the effect of the recommended prices on competition, the other factor that could not be overlooked was that they were made available by the Chamber for only a relatively short period of time (just over one year).

This is of importance because it is likely that during this period memories of the earlier practice still subsisted. Earlier, the Ministry of Health published in its official journal the actual retail prices, calculated on the basis of producer prices taking into account the maximum mark-ups. These retail prices were automatically applied by the pharmacies. As a consequence of this practice, the vast majority of pharmacies, in November 2005, would most likely not have been prepared to set the prices for thousands of individual products. Therefore, it can be reasonably assumed that, even in the absence of the Chamber's practice, retail prices would have been set in the same way (based on the maximum mark-ups) by the majority of the pharmacies. Therefore, the Competition Council held that the publication of prices by the Chamber, in itself, did not restrict competition.

Another situation was when the GVH terminated its proceeding – initiated on the suspicion of abuse of a dominant position – because, during the proceeding, the conduct became the subject of a regulation that excluded the applicability of the Competition Act. In other words, a new circumstance came about in the course of the investigation, which would have prevented the initiation of the proceeding from the outset. In such a case, the proceeding has to be terminated, because the continuation is not justified by public interest.

In certain cases the GVH pointed out the weaknesses in the sector regulation, emphasising that the licensing and control powers transferred to market players did not, in themselves, (on account of the public power aspect) exempt their conduct from the application of the competition rules, if an essential condition, such as a legal remedy, is lacking.[4]

Concerning the discretionary power of the regulatory authorities, an interesting jurisdictional question arises, namely, where the regulator has discretion to initiate proceedings. The Competition Council has repeatedly held that the GVH has powers to initiate proceedings in cases where another regulatory authority has already initiated proceedings or could have done so. If the regulatory authority did not challenge a given behaviour, although it could have done so, then the applicability of the Competition Act might exist, as the undertaking cannot use as a defence the argument that the competent authority did not

[4] A similar problem ("quasi regulatory powers") came before the Competition Commission in two cases concerning the energy market. In these cases, the Competition Commission – on top of the condition of the availability of a legal remedy, referred to above – tied in other conditions as well to the public power "status"; e.g. the express authorisation for judging eligibility, and codification of the underlying aspects. However, in a case about student loans, proceedings against a financial service provider were terminated by the Competition Council – in part – with regard to a lack of business-type activity. The Competition Council concluded in its assessment that the purpose of granting student loans (equal opportunities for higher education in society as a whole) is the responsibility of the state, belonging to the category of public interest. And the mere fact that the organisation responsible for the implementation of this programme seeks some kind of return does not mean that it qualifies as a market activity, especially if ultimately the state can collect it via authorities (e.g. tax authority) and coercive measures. The exact the opposite situation exists if the conduct of a public body affects the market, though the conduct does not belong to the public sphere. This may be the case if a municipality exercises its ownership rights. In such a case, the Competition Act may be applicable. Decisions of public authorities are characterised by unilateralism, and establish rights for the client/party (or deprives it). Furthermore, these decisions are enforceable by public authorities. However, if the decision is not taken in the sphere of public power (that is, when the activity is not connected with the exercise of the power of the public authority), then an agreement concluded based on such a decision is characterised by a co-ordinate relation, and not that of a subordinate one. Consequently, such an agreement can be subject to competition supervision proceedings.

initiate a proceeding. The fact that the legislator and enforcer of sectoral legislation did not act – implicitly approving the behaviour – can be taken into account only in the calculation of the fine.

## 2. Conditions for the use of the regulatory conduct defence in merger cases

In merger cases we can cite one relevant example when the parties claimed that sectoral regulation underway would properly guarantee that merging parties cannot abuse their market power and cannot deny access to their broadband Internet infrastructures. Nevertheless, the GVH stated that competition law based merger control prevails in regulated markets as well. Being preventive by nature one very important function of this structural control is to hinder the emergence of market situations that need to be cured by regulatory measures. This is particularly the case in electronic communications markets where it is a European regulatory principle that sectoral regulation and competition law complement each other and it is essential that ex ante regulatory obligations should only be imposed where there is no effective competition and where national and Community competition law remedies are not sufficient to address the problem.

## 3. Role of competition authorities in regulation and its consequences

Another important feature of economic regulation prevailing in the electronic communications sector in the EU is that where appropriate, sectoral regulators and competition authorities are in close collaboration with each other during the market regulation process, i.e. in the SMP designation procedures. In Hungary this is one of the examples of the direct involvement of the competition authority in the design of regulatory remedies. The other example is the regulation of electricity and natural gas markets where similar a regulatory solution applies. The Act on Electronic Communications states that the national regulatory authority of electronic communications and the competition authority shall cooperate closely to enforce the protection of competition under uniform principles in the electronic communications market and to apply a uniform approach in the justice system, such as in procedures:

- for defining the relevant markets of the electronic communications sector;
- for analysing competition in the relevant markets;
- for the identification of service providers with significant market power and for defining the obligations conferred upon these service providers;
- for drawing up a methodology for the examination of price squeeze and for the examination of price squeeze.

In the process of defining the relevant markets of the electronic communications sector, analysing the competition on the relevant markets and identifying service providers with significant market power, the regulatory authority shall pay special attention to the opinion of the GVH and shall inform it if deviating from its opinion, along with the reasons indicated.

There are very similar provisions in the Electricity Act and in the Natural Gas Act. However, we have to point out, first, that the opinions of the competition authority are not binding, they focus more on the market definition and SMP designation carried out by the sectoral regulators and less on the remedies planned. Second, there is always a disclaimer included in the formal document containing the GVH's opinion that the statements made there are not binding on the decisions of the Competition Council. Consequently, the prior involvement of the competition authority in establishing these regulatory decisions neither immunises conduct nor adds strength to the regulated conduct defence. This is also true for those cases when there is no direct involvement but the competition authority comments on regulations

exercising its general competition advocacy role and the specific authorisations of the Competition Act for that[5].

[5] The President of the Hungarian Competition Authority (…) shall be solicited for his opinion concerning all planned measures and draft legislation that have a bearing on the responsibilities of the Authority, in particular if such planned measures or legislation restrict competition (performance of some activity or entry into the market), grant exclusive rights or contain provisions pertaining to prices or terms of sale. The notary of a municipality may solicit the President of the Hungarian Competition Authority for his opinion concerning draft municipality regulations which have, as set out above, a bearing on the responsibilities of the Hungarian Competition Authority.

# JAPAN

## 1. Introduction

The Antimonopoly Act (hereinafter, referred to as the "AMA") institutes systems for exempting the application of the AMA's prohibition provisions to certain conducts in specific fields with a view to achieving certain objectives of economic policies, such as rationalising firms. These systems are stipulated in the AMA as well as in individual legislations. There are currently 21 exemption systems stipulated in 15 legislations. Moreover, in past experiences of enforcing the AMA, there have been cases where businesses claimed regulated conduct defence.

Presented below are the views of the Japan Fair Trade Commission (hereinafter, referred to as the "JFTC") on regulated conduct defence and its efforts toward resolving the conflicts that arise between the competition authority and the regulatory authorities when formulating regulations.

## 2. View on regulated conduct defence

It is conceivable that claims are made such as "cases where the AMA and other regulations share the same objectives are exempt from the application of the AMA" or "it is permissible to violate the AMA by complying with another regulation" regarding the relationship between the AMA and other regulations.

In past experiences of enforcing the AMA, there have been no cases where complying with another law directly led to the violation of the AMA. However, there have been cases in the past where businesses claimed regulated conduct defence in response to a cease and desist order from the JFTC and the JFTC presented its view on the matter in hearing decisions.

Such an example is a private monopolization case in the telecommunications industry. In this case, as a point at issue, there have been discussions on whether the application of the AMA should be exempt for conducts permitted under sector-specific laws, on the grounds that sector-specific laws provide more detailed regulations than the AMA with the same objective of promoting fair competition. In the hearing decision, it was noted that the provisions of different laws regulating business activities should be implemented consistently, and that their implementation should not differ depending on whether the laws share the same objectives or not. On the other hand, it was also noted that a conduct will not be exempt from the application of the AMA just because it does not violate sector-specific laws possessing the characteristics mentioned above, unless there is an explicit exemption provision precluding its application.

Furthermore, in a cartel case in the transportation industry, a view was presented regarding exceptional situations where cartels do not "substantially restrain competition." Here, it was explained that cartels on fares, in principle, fall under the provisions of the AMA and are subject to cease and desist orders, but when the competition which the cartel is attempting to limit concerns illegal trading terms prohibited by other legislations with criminal punishment, etc., for example, when the fare collection agreement restricts the illegal competition below approved fares that is prohibited by a law, it has been stated that, as an exception, competition is not construed to be substantially restrained.

## 3. Relationship between the Competition Authority and regulators

There is a general framework within the Japanese government through which ministries and agencies coordinate the contents of draft bills with each other before bills are submitted to the Diet (parliament) so as to ensure policy coherence within the government. The JFTC utilises this process to harmonise draft bills with competition law and policy. From our viewpoint, the primary aim of this coordination is preventing other governmental agencies from making legislations which preclude the application of the AMA and which will induce cartels and other anticompetitive conducts by businesses. Recently, firms are hardly likely to claim regulated conduct defence as new regulations have left little latitude to allow anticompetitive conducts. As the JFTC has been actively participating in this coordination process, an increasing number of ministries and agencies approach the JFTC for consultation on possible negative impacts on competition prior to official drafting and circulation of bills to all ministries and agencies for more general coordination.

Additionally, all draft bills and cabinet orders introducing and changing regulation on businesses are subject to competition assessment, which was initiated in April 2010 as a part of general regulatory impact analysis (hereinafter referred to as "RIA"). Competent ministries and agencies should fill in a "Competition Assessment Checklist"[1]. The ministries and agencies are able to easily assess the general impact of envisaged regulation on competition by answering questions on the checklist. The competition assessment is still at a stage of trial implementation. However, once it is officially implemented, which is due at an appropriate point after FY 2011, ministries and agencies are expected to describe the possible impact on competition as a social cost on RIA reports, when they find that a proposed regulation would have an effect on competition. The JFTC has been strongly supporting the implementation of competition assessment in various manners such as providing seminars on competition policy, and distributing the "Competition Assessment Checklist Guidance" to ministries and agencies.

The JFTC has also devoted sustained efforts for ex-post impact assessment through reviewing existing government regulations and AMA exemptions. The "Study Group on Government Regulations and Competition Policy[2]" at the JFTC has been examining the necessity of AMA exemptions in various sectors and based on those reports the JFTC has so far requested a fundamental review of AMA exemptions in several sectors, such as international aviation and the international shipping industry.

Furthermore, the JFTC has been taking a strong position against administrative guidance[3] which is conducted by competent ministries with a view to prevent excessive competition or stabilize the market. The fact that competent government ministries give those kinds of administrative guidance may be utilised as a defence by defendants who are alleged to have violated the AMA, as has actually been done in past cases, as described above. As concerns about the relationship between administrative guidance and cartels were raised, the JFTC initially published the "Interpretations Concerning the Relation between the Antimonopoly Act and Administrative Guidance" (the former Administrative Guidance Guidelines) in March 1981. The JFTC sent the guidelines to the relevant ministries and agencies with a request to

1 The Japanese version of competition assessment checklist, which was compiled by the JFTC, based on the OECD Competition Assessment Toolkit version 1.0.

2 As of March 2010, this study group consists of 8 members comprising academics and experts that meet with the purpose of reviewing public regulations as well as policies for securing and promoting competition in related fields, by considering the changing social and economic environment in Japan.

3 The meaning of Administrative Guidance is currently stipulated in Article 2, Paragraph 6 of the Administrative Procedure Act (Act No. 88 of 1993): " recommendations, advice, or other acts by which an Administrative Organ may seek, within the scope of its duties or affairs under its jurisdiction, certain action or inaction on the part of specified persons in order to realise administrative aims, where such acts are not Dispositions"

consider them in their policy decisions. The JFTC later reviewed the former Administrative Guidance Guidelines and formulated new "Guidelines Concerning Administrative Guidance under the Antimonopoly Act[4]" in June 1994, which show the agency's views on administrative guidance. The guidelines clarify that any conduct by a firm is by no means exempt from the application of the AMA, even if it was brought about through administrative guidance, and provide concrete examples indicating categories of administrative guidance that may pose a problem under the AMA, such as restriction of entry and price competition.

[4] http://www.jftc.go.jp/e-page/legislation/ama/administrative.pdf.

# KOREA

## 1. Introduction

People often argue that "regulated industries should be exempted from antitrust enforcement due to their unique nature". In responding this argument, there is a need to take a closer look which goes beyond the mere understanding of the argument itself. Rather than the mere logics of the argument, backgrounds that gave birth to the argument should be examined in a comprehensive manner: the history of economic development in a nation, market structure of an industry, features of regulations imposed in that industry and behavioral aspects of a regulatory authority.

## 2. Backgrounds of regulated conduct defence in korea

### *2.1 Government-led development*

Korea achieved dramatic economic growth within a short period of time. The intensive growth was possible in part thanks to the government-led development policy support and strong compliance of the businesses to the government policy.

Remnants of this development history still remain despite strengthened capacity of the private sector and various efforts including deregulation. The sector regulators still attempts to intervene in the market. And the business, too, tries to pander to the regulatory authority and collude with competitors rather than taking the initiative and engaging in free completion.

### *2.2 Highly concentrated industry*

Intensely regulated industries in Korea, such as telecommunications and finance, maintained oligopoly structure where a few companies dominate markets with perpetuated high market share

### *2.3 Anticompetitive regulations: entry and price regulations*

In most of the regulated industries, direct and anticompetitive regulations on market entry or prices exist due to its distinct characteristics as public goods. Accordingly, a regulatory agency which has the authority to approve entry to a market or prices has enormous influence on companies operating in the given industry.

### *2.4 Regulated companies' strong efforts to influence government policy through business organization*

In regulated industries, regulations on, for example, entry to a market or prices can have immediate and tangible effects. Therefore, those companies directly impacted by those regulations try to keep close track of and exercise influence over policy direction of the authority.

The problem here is that it is not an easy task for an individual company to make its voices heard in the course of setting policy direction of a regulatory authority. Especially when a policy change based on claims of one company is expected to bring a "zero-sum result" where the requesting company's interests

are reflected at the expense of its competitors', a regulatory authority may find it difficult to accept the claims, even though they are legitimate ones, due to expected strong resistance from the rivals and public backlash.

Regulated companies, therefore, want to join hands with others within the industry and take an action as a group to achieve their purpose and avoid public backlash, even if this approach does not fully satisfy their individual needs.

In Korea, regulated industries try to reflect their interest in the government policy by forming business organizations. Korea Federation of Banks, Korea Life Insurance Association, General Insurance Association of Korea and Korea Alcohol & Liquor Industry Association are several examples of this. These business associations make policy recommendations for the government after adjusting interests of member companies.

## 3. Rules on exemption of antitrust enforcement: cartel

Article 19 (1) of the MRFTA that bans undue coordinated interaction does not apply in the case where cartel conduct occurs after getting the green light from the KFTC under the Cartel Approval System (Article 19 (2) of the MRFTA), or where the conduct is exempted from law enforcement after its occurrence under Article 58 of the MRFTA.

The following is further explanation on Article 19 (2) and Article 58 that have become a major issue in several cases.

### *3.1 Cartel Approval System* [1]

The KFTC has been operating the Cartel Approval System since 1986 under which potentially unlawful cartel conduct is approved to serve certain purposes such as economic recovery or industrial rationalization. To get KFTC's approval, cartel conduct should aim for purposes set forth in Article 19-2 of the MRFTA - rationalization of industry, research & development, recovery from the economic recession, industrial restructuring, rationalization of transaction terms and stronger competitiveness of small and mid-sized enterprises (SMEs) -, and satisfy all the requirements set for the each purpose. However, the KFTC is very strict about operating the system and has never allowed cartel conduct since the 1980s.

### *3.2 Antitrust enforcement exemption: Article 58 of the MRFTA*

Article 58 of the MRFTA stipulates that "this Act shall not apply to justifiable acts of an enterprise or an enterprisers' organization as committed in accordance with any Act or any orders under the Act". While the Cartel Approval System exempts cartel conduct from law enforcement in advance, Article 58 governs enforcement exemption for an act which has already taken place when the act satisfies given requirements.

In the meantime, the KFTC and the court[2] take very stringent approach to the interpretation of Article 58, allowing the application of the provision only when the following four requirements are met.

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1 For further information, consult "Global Forum on Competition-Crisis Cartels [Contribution from Korea] (DAF/COMP/GF/WD(2010)73)"

2 Supreme Court's ruling on a case involving Korea Judicial Agent Association "According to Article 58 of the MRFTA 'this Act shall not apply to justifiable acts of an enterprise or an enterprisers' organization as committed in accordance with any statute or any orders under the statute. 'Justifiable acts' in Article 58 mean the minimum level of activity committed pursuant to a statute or an order under the statute that provides exceptional cases where free competition can be restricted in an

- *An industry where limited competition is deemed reasonable considering unique nature of that industry, or an industry which needs strong government regulation for the purpose of public benefits while monopoly status is guaranteed by limited market entry under the industry's approval-based system.*

- *Exception for free competition should be prescribed in detail in a statute.*

- *Cartel conduct should remain within the scope prescribed in a statute or an order under the statute.*

- *Cartel conduct of enterprises or enterprisers' organizations should be limited to the least possible level of the permitted scope.*

## 4. Need for antitrust enforcement against regulated industries

### *4.1 Industrial structure vulnerable to cartel schemes*

#### *4.1.1 Structural factors*

Korea's regulated industries are especially vulnerable to cartel due to decades of government-led economic development, highly concentrated industrial structure with perpetuated dominance of a few companies and numerous regulations on market entry and prices.

First, entry and price regulations create the environment conducive to a "collusive agreement among competitors" by limiting the number of operating companies and setting the range of price changes.

Second, the perpetuated and concentrated industrial structure helps companies, which are relatively a few in the number, maintain close relationship with one another, making it easier for them to forge an "agreement".

Third, as remnants of the long sustained practice of government-leading economic growth has yet to be cleared entirely, regulatory authority still tends to intervene in a market through the official or unofficial means. Companies, too, prefer cooperative practices of such as "adjustment or consultation among competitors" following guidance from the regulatory authority, rather than actively competing with one another.

As shown here, regressive mindset of regulatory agencies and companies holding onto the outdated practices has made Korea's regulated industries particularly susceptible to cartel.

#### *4.1.2 Behavioral aspects*

Apart from business associations striving to have their interests reflected in the government policy, regulatory authorities sometimes use business organizations to ensure policy implementation. In this case, the authority usually contacts a business organization representing the given industry, but, where just a few companies participate in the industry, it has direct consultation with those companies to implement its policy.

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industry whose unique nature justifies limited competition, or an industry which needs heavy government regulation for the purpose of public benefit despite guaranteed monopoly status under the approval-based system."

This way of policy implementation has its own merits, for example realizing policy effect without considerable resistance, but, in the long run, could weaken competitiveness of the industry. As companies would simply need to make efforts within the designated level following the authority's guidance, they do not bother to compete with great efforts. Consequently, they come to focus more on "sales or consultation with competitors" than "technological development or innovation", which in turn would diminish the industry's competitiveness.

### *4.2 Example: cartel by telecommunications industry*

In Korea, a government agency regulating the telecommunications industry once brought regulated companies together in a meeting and instructed them to reduce mobile phone call charges by 5~6%. That instruction was not based on legal provisions, but was a form of administrative guidance, and hence companies would not have been sanctioned by law even if they had not complied.

For regulated companies, however, this kind of guidance is almost equivalent to carrying legal binding force. A regulatory agency which has the approval authority on various matters might make a policy decision disadvantageous to incompliant companies.

What was problematic in this case was that the administrative guidance had high possibility of resulting in or inducing cartel conspiracy. That is because the guidance limited the scope of companies' agreement by setting the reduction level at 5~6%.

In fact, companies had separate meetings after the meeting with the regulatory authority and agreed to keep the price reduction to the minimum level. The collusive act, of course, resulted in law enforcement[3] by the KFTC.

### *4.3 Example: cartel by insurance industry*

Telecommunications companies do not have distinct gap in their technology prowess or business capacity to the extent they are put in different ranks, even though market share of each company is somewhat different.

On the contrary, the life insurance industry is dominated by the top three insurers, so-called Big3. Other companies are not comparable to the Big3 in terms of the number of actuaries and capacity of developing new products.

The industry's regulatory authority once had the Korea Life Insurance Association develop a new product. At that time life insurers used the Association dominated by the Big3 to set expense ratio, interest rates, and other coverage policies of the new product to their advantage and the product was approved later without any trouble.

A problem here was that they continued to have meetings and phone call communications to forge an agreement on the timing and level of interest rate changes even after the industry's regulation was relaxed to allow companies to separately set their own interest rates. The KFTC sanctioned the companies involved for the collusion[4].

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3 Refer to the KFTC written decision No. 2006-253 (November 12, 2006).

4 Refer to the KFTC written decision No. 2008-282 (October 27, 2008).

### *4.4 KFTC's position on regulated industry's defence*

#### *4.4.1 No statute existent for application of Article 58*

There is no statute in Korea that stipulates exceptional cases where companies are allowed to engage in cartel conduct as provided in Article 58 of the MRFTA. For example, although the Insurance Business Act[5] provides the Financial Services Committee (FSC) the authority to grants permission to insurance companies on entering into a mutual agreement, it also stipulates that the FSC shall consult with the KFTC before the permission.

#### *4.4.2 No case until now subject to Article 58*

For cartel conduct to be exempted from law enforcement according to Article 58, the conduct should be made pursuant to its relevant statutes and orders under the statute. However, as mentioned before, there is no statute that prescribes exceptional cases where cartel conduct is allowed, so the Article 58 has not been enforced.

Nevertheless, Korea saw several cartel cases where colluding companies tried to justify their behavior citing that the conduct had occurred based on administrative guidance, hence should be exempted from antitrust enforcement by Article 58 of the MRFTA. Administrative guidance, however, does not meet the requirements provided in the Article 58 for law enforcement exemption, as it is non-mandatory instruction that is issued in the forms of, such as, guidance, recommendation or advice, not an order prescribed in a law.

The problem here is that administrative guidance issued by a regulatory agency which has the authority to grant approval on various business matters could be seen as having binding force just like an order given by a law. And that is why companies often defend themselves based on administrative guidance calling for enforcement exemption under Article 58.

However, in cartel cases involving typical regulated industries such as telecommunications, finance and alcoholic beverage the KFTC and court have never accepted the companies' argument for enforcement exemption considering the fact that cartel conduct had occurred based on administrative guidance. [6]

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5 Article 125 of the Insurance Business Act (Approval on Mutual Agreement with Competitors).

An Insurance company which intends to forge an agreement for coordinated interaction shall seek approval from the Financial Services Committee in accordance with the Presidential Decree. This shall apply when it intends to change or drop the agreement.

When deemed particularly necessary for public benefits or sound development of the insurance industry, the Financial Services Committee may order changing or dropping the agreement provided in Paragraph a), forge a new agreement, or comply with the part or entire of the agreement.

The Financial Services Committee shall consult with the Korea Fair Trade Commission in advance when intending to grant approval or issue an order on forging, changing or dropping an agreement pursuant to Paragraph a) and b).

6 Seoul High Court ruling on group accident insurance (November 18, 2009) "In this case, it is considered that insurance companies were encouraged to enter into and enforce an agreement to reduce competitive factors themselves just because of their difficulty in practical business affairs. If it is the case, the insurers' behavior cannot be deemed a 'justifiable act' provided in Article 58 of the MRFTA."

## 5. Efforts for antitrust enforcement in regulated industries

### *5.1 Need for competition advocacy*

As mentioned before, no statute in Korea stipulates that cartel can be allowed in exceptional cases as provided in Article 58. But there still remain some legal provisions that could discourage competition and, thereby, create an environment prone to cartel schemes.

The case in point is a provision that mandates a company to join a business organization of the concerned industry. A regulatory authority and regulated companies cite the strengthening of market's self-regulation as a reason for the legislation. But the actual intention is often to use a business organization to exercise control over companies and pursue coordinated practices.

This is why a competition authority should work to thwart this kind of competition-restricting attempt as well as enforce the law for individual antitrust cases including cartel. Its work includes preventing the establishment of potentially anticompetitive laws and making improvements in anticompetitive regulations.

### *5.2 Prevention of introduction of anticompetitive regulations*

#### *5.2.1 Statutory consultation*

Article 63 of the MRFTA requires a regulatory authority to consult with or notify the KFTC in advance when intending to propose potentially anticompetitive legislation or revise laws to have anticompetitive provisions.

Accordingly, if a regulatory agency intends to introduce a law that contains potentially anticompetitive regulations such as entry or price regulations on the grounds of the nature of a regulated industry, the authority should first seek consultation with the KFTC, which reviews whether a proposed legislation includes anticompetitive aspects and, if so, delivers its opinions to make correction to the authority.

Particularly in 2010 guidelines were issued to provide standards for reviewing anti-competitiveness in laws and examples of actual review cases by the KFTC so that a regulatory agency can examine anti-competitiveness of laws under its competency by itself and voluntarily make correction.

The guidelines includes 4 criteria for assessing anti-competitive effect of a law according to the OECD Competition Assessment Toolkit: whether the law limits the number of companies or business area, restricts companies' competitive capacity, reduces incentives for competition and limits consumer choices and information available for consumers.

#### *5.2.2 Competition Assessment System*

Apart from the above-mentioned statutory consultation, Competition Assessment System was newly introduced in 2009 to conduct prior review on whether a proposed regulation would substantially lessen competition. Under the system, a regulatory authority intending to newly introduce or strengthen a regulation is required to analyze potential effect of the regulation on a market and deliver the result to the KFTC. Based on this, the KFTC conducts competition assessment in the two stages - preliminary and in-depth assessments, and notifies the result to the Regulatory Reform Committee (RRC) which is in charge of overall work of regulatory review. The RRC then takes the KFTC's assessment into consideration to decide whether to put the proposed new or strengthened regulation in force.

### *5.3 Improvement on anticompetitive regulations*

Since its establishment, the KFTC has been playing a leading role in the government's effort to make improvements in anticompetitive regulations. In line with this effort the KFTC enacted the Omnibus Cartel Repeal Act in 1999 to abolish 20 cartel practices governed by 18 laws by, among others, lifting limit on wage scheme for professional service providers such as lawyers and reducing the number of items subject to group private contract.

Recently the KFTC has been focusing its efforts on reforming entry regulations. So far it conducted two rounds of entry regulation improvement, resulting in pledges from regulatory authorities to make improvements for 46 regulations of service industries and public monopoly areas such as health care, medicine, distribution and air cargo.

## 6. Conclusion

The regulatory authority and regulated companies tend to use their industry's special nature as pretext of their behavior. A regulatory authority introduces entry or price regulations for the reason of the industry's unique nature, and companies defend their behavior by citing the unique nature of the industries they are in. According to them, their conduct is essential or inevitable for efficiency increase in the industry.

Their justification should be seen from the following perspectives.

First, the unique nature of a regulated industry is not aimed to serve purposes of a regulatory authority or regulated companies. They should know that the unique nature of an industry can be considered only for national economic development and stability in people's livelihood. In other words, the nature of a regulated industry cannot be the rationale for their unlawful behavior.

Second, the argument that "we engaged in cartel in an attempt to increase efficiency of the industry" can be justified only when cartel is the only way to increase efficiency. Historically in cartel cases, however, enhancing efficiency has never been the only reason for cartel schemes and the "argument that cartel is the only way to ensure efficiency" never been proved or accepted.

For these reasons, the KFTC has been taking strict approach to antitrust violations including cartel in conventional regulated industries such as telecommunications, finance and alcoholic beverage. It also strives to prevent a regulatory authority's attempt to limit competition or grant enforcement exemption, and correct its anticompetitive practices.

Despite the special nature of a regulated industry, efficiency in an industry should be increased by competition, not cartel. Therefore, an attempt to lessen competition or get away with cartel conduct cannot be allowed in the first place and should come under close scrutiny of a competition authority.

# NORWAY

## 1. Introduction

The Tine case is the second court decision in a dominance case in Norway. Tine claimed that the firm held no dominant position in the cheese market, arguing that the agricultural regulations implied that Tine lacked the ability to act independently of its competitors and customers. The court found, however, that the regulations have contributed to Tine's market power, and that the regulations did not prevent Tine from holding a dominant position.

The Norwegian Competition Act is partly harmonized with EU competition rules and includes prohibitions against cartels and abuse of dominance. The provision against agreements that restrict competition (section 10), and the prohibition on abuse of dominant position (section 11), are designed along the lines of article 53 and 54 in the EEA Agreement, and article 101 and 102 in the TFEU.

There is, however, an exemption from Sections 10 and 11 regarding restrictions that are necessary to implement agriculture policies. As will be pointed out later, some of the regulations that are relevant in the Tine case are comprised by this exemption.

This contribution will focus on the assessment of dominance, especially the role of economic regulations in this assessment. First, a brief description of the Tine case and the Norwegian dairy market will be presented.

## 2. A brief description of the case

In 2007, the Norwegian Competition Authority imposed a fine on Tine for violating the Competition Act because Tine, a dairy producer and distributor, acquired a position as a sole supplier of cheese to Rema 1000, a grocery chain, as a result of its annual negotiations in 2004. The infringement also comprised a similar behaviour vis-à-vis the grocery chain Ica. The Authority found that Tine had infringed the Competition Act provision on abuse of dominant position (section 11), and also the prohibition against agreements that restrict competition (section 10).

The Authority concluded that there was a great danger that Tine's only competitor, Synnøve Finden, would be entirely or partly foreclosed as a result of Tine's exclusionary behaviour. The reduction in competition would harm consumers in the form of higher prices, more limited selection and reduced product development. In 2007 the Authority imposed a fine of NOK 45 million (approximately 5.7 million Euros) on Tine.

Tine contested the decision and sued the government through the Competition Authority to the District Court. In March 2009 The Oslo District Court decided that Tine's behaviour did not infringe the Competition Act. The Authority appealed the decision to the Norwegian Civil Court of Appeal. The court found that Tine has infringed the Competition Act provision on abuse of dominant position in connection with the annual negotiations with Rema 1000. Tine was, however, acquitted of the claim regarding behaviour vis-à-vis Ica, as well as the claim related to competition-restricting cooperation. The court imposed a fine of NOK 30 million (approximately 3.8 million Euros) on Tine.

## 3. The Norwegian dairy markets

### *3.1 Market structure*

The relevant market in this case is national, comprising cheese sold to the Norwegian grocery chains. Tine is a cooperative, owned by milk producers (farmers), and vertically integrated from the farm to the processing industry. Tine holds a market share of 97 percent in the market for collecting milk from farmers. Tine is also by far the largest producer of both cheese and liquid dairy products (milk, yoghurt, cream etc.) in the Norwegian market. In a national market for cheese sold to the grocery chains Tine holds a market share of 70-90 percent.

Synnøve Finden is the only national competitor with a significant market share. Synnøve Finden produces only cheese, not liquid dairy products. In addition, there are several small suppliers of cheese, typically producing a few niche products for local or regional markets.

The Norwegian cheese market is characterized by high prices compared to the neighbouring countries. The prices are approximately 100 percent higher than the prices on similar cheeses in Denmark.

### *3.2 Market regulations*

The Norwegian dairy markets are comprised by a number of complicated regulations. A comprehensive presentation of these regulations is beyond the scope of this contribution. Here, just a brief presentation of those regulations most relevant to the assessment of dominance in the Tine case will be presented. The description is related to the situation in 2004. Some of the regulations are changed or removed since then.

Several regulations in the dairy markets are non-economic regulations, introduced to achieve agricultural goals such as a national production of agricultural products, income for farmers and the preservation of cultivated landscapes. The cheese markets are subject to import protection, consisting mainly of high import tariffs on dairy products and raw milk. The import tariffs on milk vary between four and five NOK (approximately 0.5 – 0.6 Euros) per litre, making them prohibitive at current price level, regardless of the milk being used for consumption or cheese production. Import tariffs on firm cheese vary between 25 and 28 NOK (approximately 3.0 – 3.5 Euros) per kilo cheese, approximately 50 percent of the whole-sale price of cheese to Norwegian retailers.

The import protection is a prerequisite for ensuring the provision of Norwegian agricultural products and achieving target prices as a basis for a satisfactory income for Norwegian farmers. The dairy products are exempted from the EEA agreement, making it legitimate for Norwegian authorities to protect national dairy production without violating the terms of the agreement.

The total production volume of milk is determined by a production quota system. The total quota is decided by the government, after negotiations with the farmers' associations. Milk production beyond the individual quota is unprofitable for farmers. The quota system is considered necessary to implement agriculture policies. It works like a regulated milk cartel and is exempted from section 10 in the Competition Act.

There is also a target price on milk determined in negotiations between the government and the farmers' associations. The target price is the price Tine is seeking to pay to the farmers for their raw milk.[1]

[1] Formally, this is a target price for milk sold to the processing industry. The price to farmers is the price of milk sold to the processing industry minus the costs of collecting raw milk.

Over the year Tine's price on milk may not exceed the target price. However, Tine is free to set the price lower than this.

The quota system, the import tariffs and other regulations are put in place to give the cooperative Tine the possibility to exploit sufficient market power so as to realize the target price for milk. However, there are also economic regulations put in place to stimulate competition at the industry level. Tine is obliged to supply its competitors with milk as raw material for processing, at non-discriminatory prices. This implies that Tine cannot demand a higher price when selling milk to competitors than Tine's internal price on raw milk to its own processing industry. Tine is administratively divided into two parts, *Tine Råvare* (Tine Raw Material, the upstream unit, collecting milk from farmers and selling milk to processors) and *Tine Industri* (Tine Industry, the downstream processing unit), with separate accounts. This separation is a necessary tool for the enforcement of the obligation to supply at non-discriminatory prices.

A price regulation scheme ("*Etterregningsordningen*") is also put in place to avoid margin squeeze for Tine competitors.[2] The value of milk – measured as the price of a dairy product minus other manufacturing costs – should not exceed the price Tine's competitors pay for the milk from Tine Råvare. This regulation ensures positive profits for more efficient competitors.

Tine is free to set its own prices selling dairy products to the retailers, as long as the margin is not negative. There are no special exemptions from the Competition Act for the dairy markets at this level.

## 4. Dominance – tines view

In its defence, Tine claimed that the firm did not enjoy a dominant position. The regulatory framework constituted a significant part of the argumentation.

Firstly, Tine claimed that the assessment of dominance could be done by a direct method, without delineating the relevant market and calculating the market shares, as is the normal procedure in dominance cases. Tine took as its starting point the definition of dominance as it is laid down in United Brands v Commission:[3]

> *"The dominant position thus referred to [by Article 82] relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers"*.

Tine argued that in this case the court should first assess the impact of the agricultural regulations on Tine's capability of behaving independently, before considering other aspects. In Tine's opinion the regulations in the dairy market taken together have the effect that Tine's prices are determined by the government. The argument goes as follows:

If Tine raises the price on cheese over the existing level – determined by import tariffs and import prices – import of cheese will become more profitable. Tine also alleged that it is obliged not to raise the price above the level that is sufficient to reach the target price for milk. Thus, a price ceiling is established for cheese. Also, the target price and the price regulation scheme taken together establish a price floor for the dairy products. Thus, Tine has neither the capability nor the incentives to raise its prices, or to lower

2 This regulation was removed in 2007.

3 United Brands Co and United Brands Continentaal BV v Commission (27/76) [1978] E.C.R. 207; [1978] 1 C.M.L.R. 429.

them. This implies that Tine does not possess the power to behave to an appreciable extent independently of its competitors and customers, and therefore does not hold a dominant position in the cheese market.

Secondly, Tine argued that the regulations were relevant for the delineation of the relevant market, if the traditional method were used. Normally a quantitative method will use the SSNIP test, taking the smallest conceivable product market and the existing prices as a starting point, asking whether a hypothetical monopolist would find it profitable to introduce a price increase of 5-10 percent. If the answer is yes, other products do not place a competitive constraint on the monopolist, and the market is delineated. In dominance cases it may be problematic using this test on the existing prices, since the prices may already be influenced by the market power of the dominant firm. When this problem is present, the test will exaggerate the scope of the relevant market. This error – the Cellophane Fallacy – is clearly a relevant problem in the Norwegian dairy markets. Tine, however, claimed that since the high prices were caused by the regulations, not by Tine's market power, there can be no Cellophane Fallacy problem. Thus, the existing prices may be used as starting point for a SSNIP test.

Tine presented a quantitative SSNIP test – a critical loss test – showing that a price increase on cheese of 5 - 10 percent would not be profitable. Based on this test Tine alleged that the market is broader than Norway, and in a broader European market Tine's market shares are too small to find Tine dominant.

## 5. The Norwegian Competition Authority's assessment

The Norwegian Competition Authority (NCA) made a both qualitative and quantitative delineation of the relevant market. The NCA assessed the product characteristics of Norwegian cheese, its use and its prices. The authority also interviewed customers and competitors regarding the substitutability of Norwegian cheese. On this basis, the authority concluded that two product markets could be defined; a market for brown cheese, and a market for firm white cheese. It also concluded, however, that the dominance assessment would be the same if the market was defined as one market for all cheese. Regarding the geographical dimension of the relevant market, the NCA found that the cheese market is national.

The NCA also conducted a quantitative analysis, based on Tine's own data used in its critical loss analyses. The analysis concluded that the test could not delineate markets that are broader than a national market for cheese. More importantly, however, was the NCA's claim that due to the Norwegian regulations the prices of Norwegian cheese are already above the competitive level, hence there is a Cellophane Fallacy problem in this market. Whether Tine's market power and the high prices is a result of the governmental regulations, such as import tariffs and the production quota, is not relevant in this respect. A critical loss test based on the existing high prices would, therefore, expand the market too much.

The NCA also claimed that the high Norwegian prices relative to prices on comparable products in neighbouring countries establishes a quantitative test of the relevant market. The Norwegian cheese prices are approximately twice as high as the prices of similar cheese in Denmark. It is obvious that Norwegian prices are raised more than 5-10 percent above the competitive level. Since Tine has found this price level profitable, it is also obvious that a hypothetical monopolist – who also controls the price of the nearest competitor's products – would have found it profitable to raise the price at least this much. Thus, the relevant market cannot be larger than national for cheese.

In the national market for cheese, the NCA found that Tine's market shares were larger than 70 percent. The NCA considered the effects of buyer power and potential competition, and concluded that Tine holds a dominant position.

## 6. The assessment of the Civil Court of Appeal

### *6.1 The relevant market*

The Civil Court of Appeal agreed on the main points in the NCAs delineation of the relevant market. The Court of Appeal based its assessment on the EEA Notice on the definition of relevant market, as the NCA did, and agreed with the NCAs conclusions from the qualitative analysis.

The Court of Appeal also commented Tine's empirical critical loss analysis. The court concluded that competition in this market was imperfect in 2004, and that Tine had raised the prices above the competitive level. The Court of Appeal referred to the fact that there were only two competitors in the market, Tine and Synnøve Finden, and that the extensive tariff protection and the production quota system supported the high prices. The Court of Appeal also pointed to the NCAs economic experts, and endorsed their view that it was Tine's market power that led to the high prices, and that the prices are raised by significantly more than 5-10 percent compared to prices under normal competitive conditions. On this basis, the Court of Appeal stated that there is a Cellophane Fallacy problem. Therefore, the critical loss test conducted by Tine's experts, i.e. the consultancy firm Copenhagen Economics, expanded the market too much.

The Court of Appeal found that it undoubtedly was right to delineate the relevant market for cheese geographically to Norway. In the courts opinion, it was sufficient to point at the import tariffs and the other market regulations.

### *6.2 The assessment of dominance*

Two sections in the court's decision discuss the importance of the agricultural regulations for dominance assessment was in particular. We briefly present these.

First, Tine argued that a "*direct method"* should be applied: The Court of Appeal must evaluate how the agricultural policy framework affects Tine's independence, before entering into the assessment of other factors. The notion of a "direct method" was rejected by the Court of Appeal, which concluded that the arguments Tine adduced was not sufficient to waive the regular method.

Secondly, the court evaluated how the regulations affect Tine's position in the market. The Court of Appeal took as its starting point Tine's high market shares in a national market for cheese. The court pointed out that in other cases market shares at this level have been sufficient to conclude that a firm holds a dominant position. Nevertheless, the court considered if extraordinary circumstances could imply that Tine did not possess the power "*to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers*". In addition to buyer power and potential competition, the Court of Appeal considered the consequences of the agricultural regulations. The court held that Tine is subject to extensive governmental regulations which put the firm in a special position, and considered the significance these regulations have for Tine's position in the national market for cheese. The Court of Appeal found that the regulations restrict Tine's pricing, but not to the degree that Tine claimed they did. The court concluded that the regulations do not prevent Tine from being regarded as a dominant firm in the cheese market in Norway in 2004.

## 7. Concluding remarks

The dairy markets in Norway are highly regulated. In the Tine case, Tine and the Norwegian Competition Authority agreed that the regulations led to high prices. While Tine argued that the impact of the regulations on Tine's pricing implied that Tine did not hold a dominant position, the NCA argued that the regulations established a national market, and that Tine holds a dominant position in this market. The Court of Appeal agreed with the NCA.

Tine has appealed the case to the Supreme Court. However, the assessment of dominance is not appealed.

# SLOVAK REPUBLIC

## 1. Legislative framework and decision-making practice

The Antimonopoly Office of the Slovak Republic (hereinafter "the Office") has been established in 1990. Its competence is to protect competition in SR and since 1st May 2004 it is also exclusively competent to apply the Articles 101 and 102 (previously the Articles 81 and 82 of EC Treaty) of the Treaty on the Functioning of the European Union (hereinafter "TFEU").

The Office's attitude towards activities of undertakings in regulated sectors and their defence changed over time and mirrored the development of its legal opinion and interpretation of the particular wording of the Competition Act in force, reflecting also the opinion of the European Commission. Thus, the approach taken in the particular decisions has to be read and understood in close relation with the explanations described further in this section.

This agenda appeared sometime in late 90-ties, hand in hand with the privatisation of former state-owned monopolies and gradual liberalisation of market such as for instance telecommunications and energy sector. Simultaneously, the national regulatory authorities were established and specialised law governing their competencies was adopted. It has to be stressed that in this time the Office already had been exercising its powers for quite a long time.

In SR there are several regulatory bodies, namely the Regulatory Office for Network Industries established on 1st August 2001, Telecommunications Regulatory Authority of the Slovak Republic established on 1st January 1993, Postal Regulatory Office established on 1st January 2002 and the Railway Regulatory Authority established on 28th October 2005. Regulatory bodies have been established based on special independent laws defining also their competences. Act on Protection of Competition defining powers of the Office has not been defining the relation of the Office and the regulators till 2002. This relation has been defined for the first time only by the amendment to the Act coming into force on 1st October 2002.

Relevant provision (Art. 2 par. 6 of the Competition Act, hereinafter also referred to as "*non bis idem clause*") was of the following wording: "This Act does not apply to the cases of competition restriction in which the other authority ensuring the protection of competition pursuant to the special legislation is competent." Footnote to this provision as an example referred to the Act on Postal Services, Act on Regulation in Network Industries, Telecommunications Act (later Act on Electronic Communications).

However, at the very beginning of establishment of regulatory bodies there were certain confusions regarding the possible overlapping of competences between the regulators and the competition authority, but these have been consequently clarified and the provision had only the aim to eliminate the potential duplicated intervention by two bodies in the same matter and thus to ensure the enforcement of legal principle non bis in idem.

The Office and the regulators definitely did not read this provision in such a manner as it would eliminate the competence of the Office to intervene into regulated sectors.

In the earliest period, after the establishment of the specialized regulatory bodies, the Office had to react to objections raised by the undertakings, which claimed that it is not competent to intervene into regulated sectors.

The essence of the defence used by the investigated undertakings consisted in arguing that the Office is not competent to deal with regulated sectors. They relied mainly on the wording of the sector-specific regulation, which usually in the preamble of the law generally stated that the regulatory body is competent for creation and support of the competitive environment in the particular sector. The Office refuted such defence by stating that it is the general body entrusted with the protection of competition and if the particular activity (i) cannot be solved by the regulatory body pursuant a particular provision of the regulatory act and simultaneously (ii) fulfils the characteristic of anticompetitive behaviour defined in the Competition Act, its competence cannot be disputed. This opinion was supported by the courts[1]. The court refuted the defence of the incumbent telecommunication operator by stating: *"From the defined status of the Telecommunication Office it is not possible to establish its exclusive competence in the telecommunication sector in such a sense, that it would deprive the Antimonopoly Office of its competencies concerning competition given by the Competition Act. The behaviour of undertakings fulfilling the characteristics defined by the Competition Act (agreements restricting competition, concentrations and abuse of dominant position) has to be assessed pursuant the Competition Act by the Antimonopoly Office and the Antimonopoly Office cannot resign on performing such its duties …"* By saying that the court also stressed the difference between the ex-ante regulation used by the regulatory bodies and ex-post sanctioning system applied by the competition authority.

If the assessed behaviour was foreseen by the particular provision of regulatory legislation, regardless of whether the regulatory body really dealt with it or not, the Office used to stop the investigation/proceedings[2]. Such attitude was applied by the Office app. up to 2005.

Later on, probably due to sometimes not very prompt reaction of the regulatory bodies, which were established later than the Office, the Office received complaints from the alternative operators in particular in telecommunication sector. The Office started taking into consideration not only the direct legal instruments of the regulatory bodies (it means the concrete provisions of the regulatory acts enabling the intervention of the regulatory body), but also the factual regulatory measures adopted by the regulatory bodies. It means, if the regulatory legislation enabled the regulatory body to regulate a concrete activity of the dominant undertaking but the regulatory body did not adopt any measures so far and the said activity constituted a breach of the Competition Act, the Office intervened. If during the proceedings carried by the Office the regulatory body adopted some regulatory measures concerning the problem, the Office only assessed and sanctioned the behaviour which took place before the intervention of the regulatory body. According to the legal opinion of the Office such approach was consistent with the *non bis idem* principle and protected the undertaking from being sanctioned twice for the same conduct. Such approach was applied in cases from the telecommunication sector described in section 2.1.3.

We can conclude, that finally, as regards the interpretation of the "*non bis in idem clause*", the Office distinguished three possible situations as follows:

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1 See for instance the judgment of the Supreme Court of the Slovak Republic No. 2 Sž 14/2004 http://www.antimon.gov.sk/480/3410/rok-2005.axd.

2 See for instance case No. 2005/ZK/R/2/129, where the Office stopped the proceedings concerning the joint access to infrastructure, because the regulatory body had a direct competence to deal with the problem and to state the particularities of a contract establishing the access.
http://www.antimon.gov.sk/244/2020/rozhodnutie-c-2005zkr2129.axd

Firstly it was the situation when the regulator had no competence or it was granted a competence but it did not intervene in the matter due to the various reasons. As an example we may give the situation when the regulatory body was competent to control the technical and trade terms of interconnections set in regulatory rules, but the dominant undertaking demanded such terms which did not belong to terms of this nature, thus the regulator was not competent to intervene. The Office intervened in these cases.

Secondly it was the situation when the certain undertaking is subject to regulation, but its particular assessed illegal conduct, realized within the set regulation constitutes its autonomous behaviour. The Office intervened also in these cases. As an example may serve the case when the Office imposed a fine to the undertaking Slovak Telecom, a.s., committed the practice of margin squeeze and this undertaking was simultaneously subject to price regulation (see the case described in 2.1.3).

Thirdly it was the situation when already the regulator intervened in certain case and its decision was enforceable by sanction. In such case the Office came out from the fact that it is necessary to assess each particular case and to consider, regarding the provision of the article 2, par. 6, if it would be effective and efficient to intervene. The Office has not intervened in such cases in praxis. As an example may serve the proceedings in the matter of company Slovak Telecom, a.s. referring to conditioning the subscription of Internet services xDSL by subscription of calling programmes as described in section 2.1.3.

However, the European Commission objected such approach regarding the application of the Article 82 of EC Treaty (102 TFEU now) by the Office.

The European Commission required the Office to explain the provision of the Article 2, par. 6 of the Act. Though the Office explained that this provision does not prevent the Office from the effective application of competition rules in regulated sectors both at national and European levels, the European Commission considered this provision to be restricting the capability of the Office to effectively apply the Articles 81 and 82 of EC Treaty and hence it was contrary to the Article 10 of EC Treaty connected with the Article 35 and 5 of EC Council Regulation No. 1/2003.

The Office wanted to prevent from any doubts referring to application of this provision and it also wanted to prevent from proceedings against the Slovak Republic by the European Commission, thus it omitted this provision in the Act by the amendment to the Act valid from 1st June 2009.

After the amendment of the Competition Act due to the intervention of the European Commission, where the "*non bis in idem clause*" was abolished, the current position of the Office reflects the opinion of the Commission taken in its intervention. However, as the Office has already stated in the decision mentioned above, intervention into an area already dealt by the regulatory body would remain a question of prioritisation of the Office's work. The decisive factor would probably be the assessment of the effectiveness of such intervention.

As regards the defence of the undertaking under possible investigation, the main objections against such approach consist in the lack of legal certainty for regulated undertakings. Pursuant to this legal opinion they cannot rely only on the fact that their activities respect the sector-specific rules but have to take into consideration also the competition rules. In other words, the compliance with the sector-specific rules does not absolve them from the liability under competition law. The Office is of the opinion that most if not all of the dominant undertakings in network industries are strong multinational firms with good knowledge of competition law (compared to many small undertakings operating only in the national or local markets which according to the Office's experience are still not very familiar with all the competition rules) so they should be aware of the principles applied EU-wide. On the other hand, in the particular case when thinking about an intervention the Office would always intensively communicate with the regulatory body and not the "double punishment" but the prompt remedy in the market will be the priority.

On the other hand, from the Office´s point of view the question of efficiency (not the possibility) of paralel intervention by both bodies (it means both the competition authority and the regulatory body against certain conduct of undertaking) is still open. The opinion of the European Commission, presented in objections to the "*non bis idem clause"* comes from the fact that the regulatory body never assesses the same matter as the competition authority does, as it always sees it from the view of regulator protecting also other interests which are not protected by the competition authority. In this view the assessment could not be the same and hence the competences could not overlap.

Is it necessary to perceive the instructions like "it is expected that effective cooperation between NRAs and NCAs would prevent the duplication of procedures concerning identical market issue" only as a situation when both bodies may apply competition rules, it means Articles 101 and 102 of TFEU? Is it possible to admit that both these bodies would assess the same case for example in the matter of tying? Basic approach of Commission has not changed since the time of setting the regulation framework and the Commission still prefers the national regulator to deal with the issue in the national market as it is capable to remedy the situation. Hence the Commission does not deal with the matter as it is no more important in the view of its priorities. The possibility of Commission to deal with the cases according to its priorities was upheld by the court. But what to do in situation when the national telecommunication regulator which can not apply the Article 102 of TFEU intervened by its regulatory measure and remedied the situation in the market? Is the intervention of national competition body, the only one authorized to apply the Article 102 of TFEU still needed? Another question is when the regulator has already imposed a fine for example for tying whether the competition body should take this fact into account or not.

## 2. Cases (detailed description of selected landmark cases)

We will describe the development of the Office's attitude towards regulated sectors using practical examples from our decision-making practice and explaining the legal opinion presented there. For the purposes of this contribution we will focus mainly on the telecommunication sector, which relates to the majority of cases where the regulated conduct defence was used by the undertakings and had to be dealt by the Office. Where appropriate, we will also mention cases from other sectors such as heat supply, gas sector etc. Some landmark cases are described in a detailed way in this section.

As regards the assessed anticompetitive behaviour, the agenda and cases mainly concern the abuse of dominant position by the incumbent undertakings. Beside the "classical" antitrust instruments the Office has the competence to intervene against the state administrative bodies and municipalities when they by evident support giving advantage to certain undertakings or otherwise restrict competition. In such proceedings the Office challenged inter alia the regulations issued by municipalities. Some of these cases also relate to regulated sectors, mainly to heat supply. In such cases the defence of the municipalities mainly consisted in arguing that the Office is not competent to challenge the regulations adopted by them pursuant to and in line with the law governing their activities. The Office insisted on the argument, that regulating their activities the municipalities cannot contravene other acts, it means, among others, they have to respect also the Competition Act. Repeatedly, the position of the Office was upheld by the courts.

### *2.1 Abuse of dominant position*

#### *2.1.1 The gas distribution case (network industries)*

According to the Office's decision the company eustream (the company active in gas distribution and operating the gas distribution network) abused its dominant position by enforcing an unfair trade condition. Eustream forced the entrepreneur GasTrading to sell off to the company eustream the connecting device to transport network ran by eustream conditioning the company GasTrading connection to transport network by buying the connecting device into its possession. GasTrading as operator of newly built distribution

network of natural gas in an industrial area under threat of losses from late start of operation and despite its disagreement agreed with sale of connecting device.

First of all eustream objected the Office's competence to assess the case because of the exclusive competence of the Regulatory Office for Network Industries in this field. Eustream claimed that the "*non bis in idem clause*" impeded the Office to intervene into an area, where another state body is competent to solve the problems. The Office analyzed the relevant legislation, intensively communicated with the regulatory body and came to conclusion, that even if the regulatory body has certain competences to regulate the gas sector, it has no competence in this case and since imposing unfair trade conditions constituted a breach of the Competition Act, the competition authority is the only one to deal with the case.

Before the court eustream used more or less the same defence. The court[3] gave its legal opinion on how the *"non bis in idem clause"* must be construed in this case.

"It cannot be disputed that the Office is a general body for the protection of competition. In a concrete case, if the regulatory body has a legal instrument for sanctioning the anticompetitive behaviour, the Antimonopoly Office cannot decide on the same conduct, even if the behaviour would fulfil the characteristic of the infringement of the Competition Act. Such a legal instrument of a regulatory body exists either if the assessed conduct constitutes a direct breach of the regulatory act, or a breach of a regulatory measure adopted by the regulatory body on the basis of such an act. If there is no such a legal instrument, either due to the fact, that the behaviour is not in contradiction with the regulatory act, or because of the fact, that pursuant to the regulatory act there is a possibility to regulate the area but the regulatory body did not regulate it so far, the competence of the Antimonopoly Office is indubitably given."

Further the court added that if the assessed conduct would directly contravene the regulatory act or measure, the Office would be not competent to deal with it even if the regulatory body would be passive.

Eustream appealed against this judgement to the Supreme Court of the Slovak Republic using the same defence. The Supreme Court has not given its opinion yet.

*2.1.2 The unbundled local loops case (telecommunication sector)*

In the case of dominant player ST, a.s., when the Office has been assessing the non-provision of access to the system of local loops as an essential facility, the participant to the proceedings within its defence stated that the obligation to enable the access to local loops to third parties arises only based on the decision of the Telecommunications Regulatory Authority issued pursuant to the particular act on electronic communications. According to ST, a.s., it was not obliged to provide such an access till issuing such decision and this obligation is not enforceable based on the Competition Act as it is a regulatory institute being fully in competence of the Telecommunications Regulatory Authority. The Office refused such argumentation of participant to the proceedings. The case had been already examined by the courts and the Office´s competence was not disputed by them.

*2.1.3 Internet/Voice services (telecommunication sector, margin squeeze and tying)*

In 2008 the Office issued a decision imposing a fine of SKK 525 million (EUR 15.770.000) on the undertaking ST for abuse of a dominant position according to Article 8 of the Act and Article 82 (102)

[3] Judgement of the Regional Court in Bratislava No. 2 S 204/08 issued on June 30, 2010. The judgement is not the final one and is not publicly available. The case is pending before the Supreme Court of the Slovak Republic.

TFEU. Based on the appeal of the party to the proceeding the Council of the Office confirmed the decision and it became valid in May 2009. To this date the case is pending before Regional court in Bratislava which reviews the legality of the decision upon the legal action brought by the undertaking ST[4].

During the investigation the Office had to resolve the question of its competence to intervene. The lack of competence to evaluate the conduct was one of the main objections raised by ST in the first instance proceeding as well as in the appellate procedure. ST also continues with such arguments before the court reviewing the legality of the first instance and the appellate decision of the Office. At the beginning it is important to mention that in general competences of the Office and the sector specific regulator (hereinafter "TU SR"), based on ex post vs. ex ante principle of the division of powers were not disputed. The assessment of the competence in this case was divided into two subsections, regarding the practice of margin squeeze and tying.

Margin squeeze

The case involved the margin squeeze practice in fixed voice telecommunication services as well as dial up internet services offered by ST in its fixed telecommunication network. ST was the only telecommunication operator providing voice services on fixed lines till 2003. Voice services have been liberalized de iure on 1.1.2003. Inevitable condition for alternative operators (hereinafter only "AO") was to sign the interconnection contracts with ST, but such contracts were signed only at the beginning of 2005 and with effect only from August 1, 2005 when first AOs on fixed lines could enter the market.[5] Based on the comparison between wholesale fees offered to AOs and retail prices of voice services the Office concluded that such pricing policy represented the margin squeeze abuse.[6]

Similar margin squeeze analysis was made on certain dial up products offered by ST on retail level and the wholesale fees for the access to the network per minute charged by ST to alternative internet providers. In this area the competence of the Office has not been disputed as TU SR as the sector specific regulator did not regulate the prices of providing dial up services provided on fixed telecommunication network at all.

The undertaking objected that TU SR has issued several decisions which contained the duties for ST preventing him from applying any margin squeeze with regard to voice services provided on fixed telecommunication network. The undertaking raised the issue of non bis in idem principle. According to him, these decisions of TU SR deprived the Office from the competence to assess the conduct of ST as the margin squeeze.

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4 ST is the former state monopoly with the most extensive telecommunication network of fixed telecommunication lines, which covers the entire territory of Slovakia.

5 Within particular call plans at the retail market for voice services ST introduced during 2004 and 2005 tariffs enabling its customers to call free of charge in certain time during the day or almost free of charge in certain times. These tariffs were introduced shortly before AOs really entered the market. The activities of AOs in the market of voices services for residential and business customers were limited to voice services provided on the base of so called carrier selection system. Within the carrier selection system an end user could only choose the specific telecommunication provider before each individual call. End users remained still connected to the telecommunication network of ST and could only choose AOs by dialling specific phone number before each phone call. AOs had to pay the wholesale price – interconnection fees to ST for each call of their customers (charged per minute) through carrier selection.

6 The margin squeeze analysis was done at the level of individual specific tariffs within the retail voice products of ST. Detailed analysis and reasons why the Office has chosen this approach is not the subject of this contribution, the explanation of the practice is made only to describe better the background of the case to understand the dispute on competences made in this case.

The Office reviewed whether these regulatory measures prevented ST to behave independently on the market, in other words whether ST could determine the prices of its retail products and individual tariffs freely and whether the TU SR regulated the margin between wholesale and retail prices of voice telecommunication services.

Firstly, according to these regulative measures of TU SR adopted in 2006 the dominant provider could not impose inadequate retail prices. This duty did not however refer to any specific retail voice products of the dominant player but to its products as a whole (for example national calls in the fixed telecommunication network as a whole).

According to the decisions of the regulatory body ST also could not charge the retail prices for voice services which would be lower than wholesale costs connected with such services. This condition was applied with regard to the total revenue from retail voice services (for example from national calls). According to this regulatory measure the TU SR was competent to assess only the rate between total retail revenue from voice services categorised according to the type of the call and wholesale costs of ST connected with those kinds of calls.

The Office came to the conclusion that TU SR did not solve the prices of individual call plans (or tariffs within call plans) in comparison with wholesale fees, it means it did not solve the question of the margin between wholesale price fees charged to the AOs and retail prices of individual call plans (tariffs) charged to the end customers. The decisive element was that the TU SR's decisions did not prevent the undertaking ST to determine freely the prices of individual retail products and tariffs as well as wholesale prices. The possibility of competition to be restricted by the autonomous conduct of the dominant undertaking was left open. This conclusion was consistent with the wording adopted in similar case by the European Commission[7]

Demonstrating the competence of the Office to intervene in this case, it was also very helpful that TU SR itself on the basis of requests from the Office confirmed its lack of competence to assess the conduct of ST in question and confirmed that its regulatory measures did not relate to the margin between really charged retail prices of voice services and wholesale interconnection fees charged to the AOs. Therefore the Office in the first instance decision concluded that it had the competence to solve the case and this conclusion was fully confirmed by the Council of the Office.

Tying

The Office stated that making the access to the network conditional upon the purchase of voice services had an effect of exclusion with respect to AOs providing voice services on fixed telecommunication network and, at the same time, derived benefits from customers who would have otherwise bought solely the access to the network. The Office defined this conduct of ST as prohibited tying of two independent products.[8] Also tying of voice services and dial up internet services and also xDSL services and voice services were prohibited by the Office.[9]

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7 Deutsche Telekom, C – 280/08.

8 As was mentioned before, each end user had to buy from ST together with the product of access to the fixed telecommunication network one of the ST's call plans. The end user was therefore forced to use automatically voice telecommunication services provided by ST and could not choose to buy only the access to the network from ST and the voice service from AO. Within the particular call plan an end user paid to ST for both services, for access to the network as well as for voice services.

9 ST has provided internet services of low-speed (classic dial-up and ISDN) and high-speed (xDSL) Internet. Any end user could buy the service of low speed or high speed internet provided on fixed

With regard to the high speed internet (xDSL) the TU SR issued decisions by which he prohibited the dominant undertaking to tie together xDSL services and voice telecommunication services provided on fixed telecommunication network. The dispute on competence arose mainly with regard to these decisions, which came into force on January 1, 2006.

Firstly the undertaking objected that these measures deprived the Office of the possibility to take any action as to possible tying of any electronic communication services to the access to the network (tying of voice services and access to the network and tying of internet and voice services). But TU SR has clearly demonstrated that those regulative measures were aimed only to prevent the dominant undertaking to tie internet services and voice services. The term access to the telecommunication network was, according to TU SR, understood in light of the existing practice, as the connection to the network plus voice telecommunication services. It was therefore evident, that TU SR did not adopt any regulative measure to prevent ST from tying voice services and access to the telecommunication network. The competence of the Office with regard to this practice was not doubtful and this conclusion in the first instance decision was upheld by the Council of the Office.

With regard to the tying of xDSL internet services and voice telecommunication services provided on fixed telecommunication network, the first instance body limited the duration of the infringement only until January 1, 2006, when specific regulatory measures aimed to achieve the same goal, were adopted. Taking into account the opinion of the European Commission (presented in the section 1) the Council of the Office has changed this conclusion.

In the reasoning of the appellate decision the Council of the Office stated following reasons:

The Office is a general body on protection of competition therefore its competence to intervene when the competition on specific market is restricted should be unlimited. The main goal, which should be followed, is to remove the competition problem and at the same time to impose on undertaking an adequate fine. It is necessary in any case to establish the competence on the basis of a real situation/existence of any competition problem on specific relevant market. At the same time it is important to emphasize that the national regulatory body does not have the power to apply the Article 82 (now 102 TFEU). The only national body empowered to apply EU competition legislation was the Office.

The possibility of the Office to intervene, even in case the specific regulation exists, is given by the fact, that the goals, tasks, purposes of intervention and tools of the Office and sector specific regulatory bodies are not uniform, which is the consequence of different interests pursued by the competition authorities and sector specific regulatory bodies. The essential goal of regulation is to "create" the market in specific sectors and to introduce the competition by ex ante regulation. The main aim of competition rules is to guarantee the effective competition on the market.

The Council of the Office supported its reasoning also by the approach of the European Commission adopted in Deutsche Telekom case[10] and concluded that the competence of the Office was not limited.

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telecommunication network (either from ST or from other internet provider) only after he bought voice telecommunication services from ST.

[10] See footnote 7, Point 13: … "Commission recognises that national regulatory authorities (NRAs) have different tasks, and operate in a different legal framework from the Commission when the latter is applying the competition rules. First, the NRAs operate under national law, albeit often implementing European law. Secondly, that law, based as it is on considerations of telecommunications policy, may have objectives different to, but consistent with, the objectives of Community competition policy....".

On the other side the Council of the Office in this case came to the conclusion that it was not necessary to intervene and impose a fine on undertaking for the tying of abovementioned services which occurred after January 1, 2006. It was not rational since from May 2006 it was possible to buy xDSL services without voice services. Therefore the Office came to the conclusion that the other intervention would have been worthless in this case.

### *2.2 Agreements restricting competition*

In terms of agreements restricting competition[11], the main questions relating to regulatory conduct defence appeared in cases concerning self-regulation, in particular where the Office assessed agreements in form of decision of the association of undertakings, mainly different types of measures adopted by professional chambers (Codes of conduct/Ethical codes, demographic criteria for performance of the profession, advertising restrictions etc.). The undertakings usually defended themselves by saying the notion of professional self - regulation essentially consists in the possibility to regulate the affairs on their own without of the state control represented by the Office.

In practice, the Office first of all analysed the relevant legislation. It has to be stressed, that a lot of professional chambers established by law which also regulates the principles of their member's conduct and performance of the profession. Usually, on the basis of such law the chambers adopt additional sets of rules such as Codes of conduct, disciplinary rules etc. In case the particular assessed restriction was allowed or regulated by the law, the Office did not intervene since it has no competence to challenge the legislation. If the particular area was not directly regulated by law and the assessed restriction was adopted arbitrarily by the Chamber for instance in its Code of Conduct, the Office intervened. The Office's argumentation was based mostly on the hierarchy of norms: by adopting its internal rules the professional chambers have to respect the competition legislation.

In cases of professional services where the necessity to protect the public interest was often claimed by the parties, the Office sensitively focused on the proportionality of the given restrictions.

The Office's approach might be illustrated by the case of Slovak Bar Association.

The Office dealt with the *Rules of Professional Conduct*, issued by the Slovak Bar Association. The *Rules* were issued pursuant to the Slovak Act on Advocacy and were binding upon all attorneys practising law in Slovakia. The Office came to the conclusion, that several provisions of the *Rules* constituted an agreement restricting competition in the form of a decision of an association and thus contravened the national competition rules as well as the Art. 81 of the EC Treaty (now Art. 101 TFEU, ECN case 870).

According to the Office, certain provisions regulating the attorney's business name and the designation of the law firm created conditions for discrimination of the foreign attorneys since they may exclude attorneys operating in other EU countries from the Slovak market. Concretely, the attorneys were prohibited from using the name of another law firm already established and operating in Slovakia or outside Slovakia, even if they had the full consent of the owner of the name. In fact, these provisions prevented the foreign law firms from providing their services in Slovakia under internationally established and known names. The Office concluded that these provisions excluded some competitors from the Slovak market and influenced the structure of competition.

Beside this, the Office examined also the provisions of the *Rules* regulating the advertising of the attorneys. The *Rules* contained a detailed definition of the content, form and means of advertising, which

[11] The national legislation on agreements restricting competition is modeled after the European one and in fact it is identical with the wording of article 101 of TFEU.

amounted to unjustified reduction of the possibilities for providers of legal services to promote their services. The Office took into account that some regulation of advertising might be necessary in this sector in order to protect the clients and the dignity and credibility of the attorney's status, but it must meet the requirements of proportionality and must not go beyond the restrictions which are objectively necessary to attaint this aim. In the Office's opinion the restrictions introduced by the *Rules* did not comply with the adequacy criteria and thus restricted the freedom of the attorneys to promote their services with a negative effect on the intensity of competition.

The Regional Court of Bratislava only partially agreed with the Office's argumentation, in terms of the use of the business names.

As regards the advertising restrictions, such a regulation is not the restriction of the attorney's advertising but it observes legitimate objection/purpose to retain the dignity and credibility of the attorneys` status. The court pointed out some decisions of European Court of Human Rights specially the CASADO COCA vs. Spain in 1994 and also regulations in Denmark, France, Luxemburg, Portugal.

The court holds the opinion that when such a regulation is proportionate from the view of the constitutional right for freedom of speech and the right for information then it is proportionate from the view of protection of the competition.

The Office appealed against the judgment to the Supreme Court of the Slovak Republic, but this court upheld the opinion of the Regional Court. The case was returned back to the Office. The Office respected the opinion of both courts and issued a decision only on the part of the conduct concerning the restriction of the business name. Currently we do not have the information whether the Office's decision was again challenged before the court (the party has such possibility).

### *2.3 Concentrations*

As regards control of concentrations, the Office is the only state body to assess the operation constituting concentration pursuant the competition legislation. Given that, the question concerning regulatory conduct defence did not arise during the proceedings before the Office.

## 3. Conflicts

In this part we would like to describe the possibilities and legal instruments which could prevent or minimize the conflicts between regulation and competition law. Some of them are of institutional and formal nature, often established by law (as for instance legislative procedure), some are purely non formal and depend only on the initiative of the competition authority (some forms of competition advocacy activities, communication between competition and regulatory authority etc.)

### *3.1 Cooperation between the Office and regulatory authorities*

The cooperation of the Office and the regulatory bodies is either foreseen by legislation (as for example by the Telecommunication Act, where the Office gives its opinion of the market analysis carried out by the Telecommunication Office) or is based on voluntary basis (the Office signed a memorandum on cooperation with the Telecommunication Office). Especially the latter one is an efficient tool in handling the cases and establishing or excluding the Office's competence in a concrete case. Such communication was also used by the Office before the courts when justifying the Office's competence.

### *3.2 Legislative proceedings*

We believe that the active participation of the Office in the legislative proceedings and an appropriate communication of all agencies responsible for design of the competition policy[12] is a very important tool which may prevent many conceptual and also practical problems.

Concerning the governmental bills, the Office has power, established by law, to comment and raise objections to all governmental proposals, not only legislative ones, but also strategies, conceptions, etc. within so called interministry comment procedure. Thus, the Office has the opportunity to comment and provide its standpoint on proposals regarding competition law. Unfortunately, the proposals that concern also competition issues are not always consulted from the starting point of their preparation before the interministry comment procedure begins.As regards the proposals in Parliament, the Office does not have any powers to influence the process but can be invited to explain its position.

With regard to the regulation, the Office actively commented the bills concerning the sector specific regulation (Telecommunication Act, Act on Regulation of Network Industries, Postal Act etc.) and legislation concerning professional services (different acts establishing professional services).

It has to be stressed, that regarding the proposals, there is no obligatory CIA (Competition impact assessment). That is why the Office strives to be very active in commenting the draft legislation and other proposals.

### *3.3 Competition advocacy*

In our point of view, competition advocacy activities are important especially in such an environment, where the competition culture is still not well established yet. According to our experiences this is also the case of Slovakia.

The advocacy activities might have different forms. As regards those of formal nature, the Office has legal powers described in section answer under question 3.2. Until the end of 2010, the Office was also represented in regular (weekly) sessions of Cabinet (Government) where these proposals are passed (approved) with a right to present its standpoint as an advisory body. Especially the latter was a good occasion to present and explain the “competition point of view” and we suppose the new system introduced since the beginning of 2011 will weaken our possibilities of competition advocacy.

The non formal forms of competition advocacy include the promotion of competition culture via active participation of the Office and its employees in different academic and scientific forums, workshops organised by the Office for business community, publication activities etc.

Recently, based on its own initiative, the Office carried out two sector inquiries and elaborated surveys concerning the gas sector and railway sector with the aim of identification of possible competition problems in these areas. Identification of problems, which do not constitute a breach of the Competition Act, but point out systematic problems in the set regulatory or legislative framework, may serve as an incentive to improve the sector-specific regulation.

[12] The design of the competition policy is divided among Competition Authority, Regulatory Agencies and economic Ministries.

# SPAIN

Competition rules in Spain apply both to public[1] and private undertakings, regardless of the sector where they operate, since no sector is exempted in principle from the application of the Competition Act (CA).

However, the prohibitions in articles 1 to 3 of this Act -on concerted practices, abuses of dominance and unfair practices with effects on competition- do not apply where the concerned conducts are harbored by a legal Act emanating from Parliament[2][3], unless such legal Act is itself in breach of the European Treaty[4].

Anticompetitive conducts emerging from the exercise of other administrative powers or caused by the action of public authorities or entities without that legal protection are not exempted[5].

Indeed, conducts imposed by any kind of legal provision not requiring Parliament approval are not excluded from the application of the Competition Act, no matter which public authority is responsible for them (central, regional or local Governments, Ministries, sector regulators…). And obviously, conducts that are encouraged, sponsored, endorsed, or in any way promoted, by any public authority by means other than legal provisions, are not excluded either.

Nevertheless, the possibility that the offenders acted in the belief that their conduct was legal is taken into account within the principle of *legitimate expectations*, which prevents the Public Administrations from, surprisingly and unreasonably, betraying an expectation of legality generated by their actions. This principle is closely linked to the general principle of *good faith*, as well as to that of *legal certainty*, which enlightens the entire legal system.

The principle of *legitimate expectations* was introduced into the Spanish administrative law in 1999[6]. The legislator did not establish at that time which administrative acts, and under which circumstances,

1 Where the public undertakings act as economic operators and not as regulators within the scope of their administrative responsibilities. See CNC Cases r 267/97 Tragsa 3, r 409/00 Seguridad marítima, r 447/00 Piñas Andalucía, r 572/03 Servicios Deportivos Logroño, r 621/06 CST/ AENA, 2779/07 Consejo Regulador de Denominación de Origen Vinos de Jerez y Manzanilla de Sanlúcar.

2 See article 4.1 of the Competition Act.

3 Either the State Parliament or the Autonomous Parliaments (the Parliaments of the Regions).

4 The European Treaty establishes that Member States shall neither enact nor maintain in force any measure contrary to the rules contained in that Treaty, including the rules on competition. Besides, the European Court of Justice has also made clear that Competition Authorities have the duty to disapply national legislation which contravenes Community Law (see Judgement of the Court of 9 September 2003 in Case C-198/01, paragraphs 45 to 50).

5 See article 4.2 of the Competition Act.

6 As a reform of article 3.1 of *Act 30/1992, of 26 November, on the Legal Regime of the Public Administrations and Common Administrative Procedure*

would generate *legitimate expectations*, nor the effects that would follow from the application of the principle.

*Legitimate expectations* limit the Competition Authority's sanctioning powers but do not affect its capacity to declare the existence of an infringement of competition law, or to adopt any measures other than sanctions, foreseen in the Competition Act[7] (TDC Decision of 8 January 1996 in Case *Zontur*).

According to case-law, for the principle of *legitimate expectations* to be applied by the Competition Authority, "external and sufficiently conclusive signs produced by the Public Administrations must exist, which induce the undertaking to reasonably rely on the legality of the administrative action and on the legality of its own anti-competitive behavior".

The case-law has established the following guidelines to determine the occurrence of such condition:

- Previous decisions of the Competition Authority have been made which clearly and legitimately may prompt the undertaking's belief that its behavior, although anticompetitive, is compatible with Competition Law.

- Changes in the Competition Authority's approach to a given issue do not invalidate the undertaking's exclusion of liability granted by alleged *legitimate expectations* based on its previous approach (CNC Decision of 14 April 2009 in Case *SESCAM*).

- The Competition Authority's "tolerance" of a specific behavior brought to its attention while exercising its enforcement or advocacy powers, may also generate *legitimate expectations* on the future exclusion of the undertaking's liability (CNC Decision of 14 April 2010 in Case *Fútbol*)[8].

- Nonetheless, a Competition Authority's decision prohibiting a conduct hitherto known and tolerated, eliminates any *legitimate expectations*. The same effect takes place if the Competition Authority makes the anticompetitive nature of the conduct known -by means of an Opinion (article 25 of the Spanish Competition Act), a Report (article 26) or a clarifying Communication (Third Additional Provision of the same Act)-, clearly enough as to throw over any *legitimate expectations* (CNC Decision of 14 April 2010 in Case *Fútbol*, just mentioned).

- For *legitimate expectations* based on an administrative precedent to apply, the facts of the case in that precedent must be identical to those of the case under scrutiny (CNC Decision of 30 July 2009)[9].

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7 According to Article 53 of the Spanish Competition Act, the Decisions of the Council on antitrust proceedings may declare the existence of prohibited conducts, and may contain the order to cease the prohibited conduct, the imposition of specific conditions or obligations, be they structural or behavioural, the order to remove the effects of the prohibited practices contrary to the public interest, the imposition of fines, and any other measures authorised by the Act (such as the publicity of the Decision or the imposition of coercive fines, as foreseen in article 27 and 67, respectively).

8 Under Community Law, the EC has considered that the inactivity of the Competition Authorities, even where aware of the anticompetitive conduct, does not exclude liability but can serve as a mitigating circumstance (Decision of 20 October 2004 in Case *Tabaco crudo España*).

9 EU case-law has dealt with the issue of *legitimate expectations* in relation to the application of the EC *Communication on sanctions* to anticompetitive practices that occurred before the Communication was published. The Court ruled on 28 June 2005 that, taking into account that the EC needs to adapt the level of the fines in order to effectively apply competition rules, the undertakings cannot legitimately expect that the existing situation will be maintained.

- There is no unified criterion as to whether a Public Administration not competent in Competition matters is likely to give rise to *legitimate expectations*. Although many instances have argued that only the actions of the Competition Authority may generate *legitimate expectations* likely to exclude the undertaking's liability (Judgement of the *Tribunal Supremo* of 3 February 2009, Judgements of the *Audiencia Nacional* of 6 May 1999 and 12 February 2003[10], TDC Decision of 16 December 1996 in Case *Pan de Barcelona,* CNC Decision of 8 September 2010 in Case *Navieras Líneas de Cabotaje Ceuta-Algeciras*), there have also been pronouncements in the opposite direction.

- The Courts have always emphasized that the principle of *legitimate expectations* must be strictly interpreted, and thus, taking into account that compliance with the general principles of *good faith* and *due diligence* is required from all players in the market, a businessman who knows that his anticompetitive conduct is illegal and that the Public Administration in question lacks the powers to either authorize or harbor it, may not argue *legitimate expectations* before the Competition Authority (Judgment of the *Audiencia Nacional* of 12 February 2003).

- The anticompetitive initiative must come from the Public Administrations and not from the undertakings (TDC Decision of 29 July 1996 in Case *Grúas del País Vasco*). An initiative taken by the undertakings would not be consistent with the required *good faith* and therefore could not generate *legitimate expectations*. Moreover:

  - Public Administrations without Competition competences acting passively or simply tolerating anticompetitive conducts are not likely to produce the required "external sufficiently conclusive signs" that induce the undertakings to reasonably rely on the legality of their actions (Judgments of the *Tribunal Supremo* of 14 February 2006 and 18 December 2007).

  - The mere mediation of Public Administrations, even when it leads to an anticompetitive agreement, does not generate *legitimate expectations* likely to exclude the undertakings' liability, since such an agreement would not be imposed nor caused by the Public Administrations. The administrative action in this case is equivalent to passivity.

  - In order to generate *legitimate expectations*, the Public Administrations should either impose or directly cause the anticompetitive conduct. As a result, the undertakings' conduct must be identical, both in nature and in duration, to that imposed, caused, suggested or promoted by the Public Administrations involved. (Judgments of the *Tribunal Supremo* of 14 February 2006 and 3 February 2009).

  - An administrative action taken as a result of a search or a request by the undertakings to harbor a restrictive agreement, generates no *legitimate expectations* on the requesting undertakings likely to exclude liability (CNC Decisions of 28 and 31 July 2010).

Nevertheless, in general, even in situations where *legitimate expectations* on the Public Administrations' actions do not exclude the undertakings' liability, such administrative action can be taken into account as a mitigating circumstance in the calculation of the fine, provided that the action was not caused by the undertakings and it is somehow related to the anticompetitive conduct (TDC Decision of 8 January 1996 in Case *Zontur*, TDC Decision of 16 December 1996 in Case *Pan de Barcelona,* Judgment of the *Audiencia Nacional* of 6 May 1999).

[10] The *Audiencia Nacional* and the *Tribunal Supremo* are the Competition Authority's revision Courts in the first and second instances, respectively.

As regards merger control, the Spanish Competition Act establishes certain thresholds over which prior notification to the CNC is mandatory. This obligation applies to all sectors of the economy. Nevertheless, the 2007 Competition Act maintains the capacity of the Government to revise, for reasons of general interest other than the defense of competition, CNC second-phase decisions prohibiting a concentration or submitting it to conditions[11]. The Government has never made use of this capacity yet.

In regulated sectors, such as energy and telecommunications, sector-specific regulation is taken into consideration by the Competition Authority when making merger control decisions.

In gas and electricity, there have been cases in which the regulatory framework establishing the prices and the conditions for access to essential transport and distribution facilities has been considered by the CNC adequate enough, even when the proposed mergers created or reinforced dominant positions in the market, to prevent any possibility for the dominants to commit abuse.

In other instances, however, the CNC's position regarding the potential impact on competition of sector-specific regulatory frameworks has been different. The case C/0084/08 Tradia/Teledifusión Madrid[12] is paradigmatic in this regard. The case involves the acquisition by *Abertis Telecom* of *Teledifusión Madrid*, an operator active in the Region of Madrid. The relevant market for the transport and broadcasting of television signals was subject to a sector-specific regulation under review at the time the notification of the merger was submitted to the CNC. This regulation was in fact replaced by a new regulatory framework before the merger control proceedings ended.

The parties based their request for approval of the merger on the entry into force of the new regulation, an argument that the CNC considered insufficient to solve competition concerns arising from the operation. Its Decision established that remedies were required to approve the merger since, without them, the takeover would have allowed Abertis to become the only terrestrial television carrier in the Region of Madrid, in a market with high barriers to entry and a sector-specific regulation insufficient to offset the restrictive effects on competition of those barriers.

Spanish regulators must apply better regulation principles according to the Law[13]. In particular, in the field of access to economic activities, *Act 17/2009, of 23 November, on free access to service activities and its practice*[14] establishes that any requirement to develop an economic activity in Spain must be justified on the grounds of the necessity to protect the public interest. Additionally, the requirement imposed has to be the least restrictive alternative possible to reach that objective, and it has to be non-discriminatory. Furthermore, some access requirements are prohibited because they are supposed to cause, or threaten to cause, an adverse impact on competition. And some others can only be applied exceptionally.

The CNC plays a significant role in the prevention of anticompetitive regulation. Articles 25 and 26 of the 2007 Spanish Competition Act have assigned it new advocacy competences which include the evaluation of draft legislation and regulations in order to make, where needed, proposals for modifications to reduce potential harmful effects on competition. The CNC is entitled as well to publish markets studies and sector inquiries which may also contain recommendations for regulatory reform in order to promote competition in specific sectors[15]. In addition, article 12.3 of the same Competition Act allows the CNC to

11 See Articles 10.4 and 60 of the Competition Act.

12 See accumulated cases C/0110/08 Abertis/Axión and C/0084/08 Tradia/Teledifusión Madrid.

13 Article 39 bis of Act 30/1992, of 26 November, on the Legal Regime of the Public Administrations and Common Administrative Procedure.

14 Transposing the EU Services Directive.

15 CNC regulatory reports, sector inquiries and market studies are made public on its website.

challenge before the competent Courts of Law those administrative acts and regulations from which restrictions to competition are derived[16].

In its analysis of legislation and regulation, the CNC bears in mind those public interests other than competition that the norms aim to protect, following the methodology stated in its *Guide to Competition Assessment* published in January 2009[17]. The purpose of the *Guide* is to provide orientation to law makers on how to conduct their own competition assessment of new legislation.

The Guide advocates the following three-step analysis for such assessment:

- Step 1 "Identification"

  It consists in identifying the possible negative effects on competition that the projected law or action may generate. Identification is based on a checklist of key questions that, in a highly intuitive manner, help the user to "think" from the competition perspective and to spot possible problems. The conclusion of this analysis, as well as the reasons why no potential competition problems are considered to be present, when appropriate, must be described in the Competition Assessment Report before the procedure can be considered completed. If, on the other hand, the proposal is found to include provisions or mechanisms capable of restricting competition, then the next steps in the analysis will have to be carried out.

- Step 2 "Justification of the restrictions on competition that have been identified"

  It involves analysing the public interest goal pursued by the regulation in order to evaluate how necessary those anti-competitive constraints are for achieving that purpose, and their proportionality. If the anti-competitive restriction whose introduction is proposed cannot be justified, the draft proposal will have to be modified accordingly. If, conversely, justification can be found for the restriction's necessity and proportionality, the possibility of regulatory alternatives with less anticompetitive effect must be considered.

- Step 3 "Analysis of the regulatory alternatives"

  It involves first the search and determination of possible alternative mechanisms to reach the same goal, and second a comparison of their respective impact on competition. If such a less anticompetitive regulatory alternative is identified, it should be adopted.

  Besides the elaboration of the Guide, the CNC has played an important role in its dissemination, first through its impulse and support for approval of Royal Decree 1083, which establishes the requirement to conduct a competition impact assessment of every draft new piece of legislation, but also by the CNC's active participation in numerous workshops, aimed at public officers and civil servants, on the application of the competition aspects of the *Methodological guide on*

16 The CNC has recently challenged two regional provisions on concessions granted for bus passenger transport. See press releases:

http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=38642&Command=Core_Download&Method=attachment

http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=43451&Command=Core_Download&Method=attachment

17 http://www.cncompetencia.es/Administracion/GestionDocumental/tabid/76/Default.aspx?EntryId=29518&Command=Core_Download&Method=attachment

*impact assessment* accompanying the Royal Decree, which incorporates the principles and orientations advocated by the CNC in its Guide.

# TURKEY

## 1. Introduction

The Act on the Protection of Competition No: 4054 (the Competition Act) in principle does not have any express exemption and/or exception for any specific market/industry and undertaking regardless of whether state-owned or private. However, the Turkish Competition Authority (TCA) may have difficulty in enforcing the Competition Act in some cases in particular where;

- there is a specific regulatory framework providing legitimacy to a particular conduct, which is normally an infringement in the absence of such regulatory framework,
- the Competition Act is not applicable to conduct authorized by another specific act according to Turkish legal system,
- there is a special law which envisages an exception from the coverage of competition law[1],
- there is a specific administrative decision/action which may allow the allegedly anticompetitive conduct.

In this contribution, the experience of the TCA will be analyzed with a view to providing light for the policy of the TCA with respect to regulated conduct defense.

## 2. Regulated conduct defense in regulated sectors

### *2.1 Electricity market*

Three cases handled by the TCA where regulatory conduct defense was addressed in the analysis of the relevant infringements may be summarized below.

In the first case on "electricity distribution companies"[2], the TCA investigated price increases by electricity distributors. It was claimed that the electricity distribution companies had increased their retail prices well above the inflation rate amounting to excessive pricing through monopolistic power in their respective regions. The TCA conducted a benchmarking analysis comparing costs and cost variables among distribution companies and concluded that there were some signs of excessive pricing in some regions which should be examined in a more detailed analysis. However, the TCA rejected to initiate an investigation in this case on the ground that tariffs of those companies were subject to approval of newly established Energy Market Regulatory Authority (EMRA) and the issue was completely within the competence of the EMRA. At a later stage, the TCA had submitted the analysis and conclusions of an *ex officio* study on the matter to the EMRA.

1 In the Banking Law, mergers and acquisitions are excluded from application of the Competition Act where sectoral share of the total assets of the banks involved does not exceed 20%.

2 Decision of the TCA is dated 30.4.2002 and numbered 02-26/262-102.

It is here possible to consider that the case is a typical illustration by which TCA has made it clear that regulated conduct (particularly regulated prices) which falls into competence of sector specific regulators were accepted to be out of the scope of the Competition Act.

In the second case involving TEDAŞ[3] (the electricity distribution and retail incumbent), it was alleged by the private energy suppliers that TEDAŞ had abused its dominant position by not participating in balancing and settlement mechanism in the electricity market, therefore evading costs of the mechanism. Private energy suppliers requested the TCA to require TEDAŞ to participate in the settlement mechanism.

Balancing and settlement mechanism was adopted by the EMRA to balance the load on the grids and to settle financial reimbursement among suppliers/eligible customers. Suppliers and eligible customers were free to conclude bilateral contracts for electricity trading. However, they were also under the obligation to participate in the settlement mechanism for their realized energy generation or consumption that did not meet the quantity agreed in their contracts. In fact, the real matter in this case was prices of settlement fixed by the public wholesale company, TETAŞ. At that time, settlement prices were not market prices; TETAŞ was entitled to fix settlement prices for three periods during a day according to a regulation adopted by the EMRA. TETAŞ was also exclusively entitled to buy electricity surplus of suppliers and to sell electricity to market participants, which were in short of energy. The gap between selling and buying prices for balancing the load in grid was creating a significantly disadvantageous position for participants of the mechanism. For example, a generator who supplied much more than the contracted quantity had faced very low prices for its surplus, whereas it was charged with very high prices in case it had fallen short of its contractual obligations. The TEDAŞ (the defendant), which had the greatest number of captive customers served at regulated tariffs, had also certain contracts with eligible customers subject to freely agreed tariffs between the parties. However, as TEDAŞ was not a participant of the settlement mechanism it was not exposed to the costs of balancing and settlement.

The TCA had concluded that the mechanism was not conducive to promotion of private participation and competition, implying an entry barrier for private suppliers in the market for eligible customers. However, the TCA rejected the complaints in the case on the basis that the issue was not a matter of strategic behavior of the defendant (TEDAŞ), but rather it was a problem within the design of balancing and settlement mechanism which had fallen under the competence of sector specific regulator.

At a later stage, regulation on balancing and settlement mechanism had been changed by the EMRA and turned into a kind of spot market in which prices were set up on the basis of market rules.

In the final case, ÇEAŞ[4], a regional incumbent electricity producer, was accused of refusal to access to an essential facility. ÇEAŞ, was party to a concession agreement with the Ministry of Energy. The agreement granted ÇEAŞ the rights to operate certain dams and all transmission and distribution facilities in the southern Turkey. Complainants which had established some gas fired generation plants in the region alleged that ÇEAŞ had refused to give access to transmission system and therefore abused its dominant position. The defendant (ÇEAŞ) on the other hand, had based its main argument on the fact that the concession agreement granted protection against competition and claimed that application of the Competition Act would have been an infringement of its contractual rights.

The TCA has concluded that neither the Act governing concession agreements nor the agreement itself granted any exclusive right in supply market and therefore imposed a fine equal to 2% of the turnover of ÇEAŞ.

3 Decision of the TCA is dated 9.12.2004 and numbered 04-78/1114-281.

4 Decision of the TCA is dated 10.11.2003 and numbered 03-72/874-373.

Considering the above-mentioned cases in the electricity market of Turkey it is possible to argue that the TCA gives high priority to the evaluation of regulated conduct defense, particularly when there is sector specific regulation and regulator. It is mostly the first step to consider existence of regulation before going on an antitrust analysis. The TCA declines to act for the issues which fall clearly under sector specific regulation, e.g. price or quality regulation. In such cases, the intervention by the TCA takes the form of competition advocacy, rather than enforcement of antitrust rules and procedures.

However, there are some potential areas of conflict in concomitant application of regulatory and antitrust rules. One such area is mergers/acquisitions and particularly privatization which is an ongoing process in Turkey. Privatization of energy utilities would be a highly effective process in shaping the market structure in energy industry. However, there seems to be different "perceptions of competition" among the TCA and sector specific regulator, the EMRA. The TCA favors a much fragmented market structure horizontally and vertically, whereas the EMRA and the Ministry of Energy seem to focus on economies of scale and scope. The TCA gives high importance to retail competition and demand side management as well as wholesale competition. However, retail competition and demand side management does not take much attention from the EMRA. It may be roughly, but not wrong to describe the issue as "competition between many vertically separated suppliers vs. competition between few vertically integrated suppliers". In fact, the sectoral regulator also has a primary objective of "promoting competition in the market". Nevertheless, there may be different approaches in attaining this objective. Therefore, even along similar objectives, there is a potential conflict in the application of two legal instruments (e.g. merger control by the TCA and authorization of licensing by the EMRA).

A second area of potential conflict is seen in cases involving abuse of dominant position. In general, since regional monopolies like those in electricity distribution are common in the energy sector, there may be several cases where conduct of a utility falls under competence of the TCA and the EMRA at the same time. As it's explained at the beginning, the TCA tries to make a careful elaboration in such cases to determine whether the conduct is a result of mandatory regulatory rule. Even if there is no such rule, any incentive caused by regulatory rules is taken into account by the TCA. In such situations, the TCA considers that relevant conduct does not fall within its competence. In such situations, the TCA does not enforce competition legislation. The TCA also considers whether it's convenient to intervene through its tools arising from the application of the Competition Act. As the second case on TEDAS shows, in certain cases it's the change of regulatory framework (direct intervention of the regulator) which provides for an effective and less-time consuming solution. Last but not least, particularly in cases involving abuse of dominant position, it should be noted that the TCA and the sectoral regulator may have different objectives or priorities like competition vs. security of supply.

### *2.2 Telecommunications sector*

The terms of competition, regulation and deregulation are relatively new topics for the Turkish legislation environment. Thus, the interaction between regulatory agencies and the competition authority is not entirely cleared up in mindset of the stakeholders. The TCA began to operate in 1997 and it has been followed by the establishment of Telecommunications Authority (TA) in August 2000 with law No. 4502. Though these developments are in line with the EU *acquis*, none of the legislation (the Competition Act, Laws No. 2813 and 4502) provided a clear cut procedure on handling competition cases in the telecommunications sector.

The Electronic Communications Law (Law No. 5809), which came into effect recently (10.11.2008), also did not solve the problematic situation with respect to the competition investigations. Article 7[5] of

[5] *Provision of competition*

Electronic Communications Law preserves the jurisdiction of the TA on competition cases with some improvements while explicitly acknowledging the TCA's role in the sector at the same time.

The TCA's experience in the telecommunications sector can be discussed in two stages[6]. In the beginning, the TCA was more eager to pursue investigations in this sector, while as a new entity TA was trying to construct its legal presence and stance in the industry and most of its secondary legislations were yet to be made.

During this transitional period, the TCA handled a couple of important cases. One of them and the first one was an investigation involving Turkcell (the leading GSM operator in Turkey) for its exclusive contracts with handset distributors. The TCA decided that Turkcell, by abusing its dominant position in the market via exclusive contracts which were imposed on distributors, raised its rival's (Telsim at that time, Vodafone later) costs by making it harder to find handset distributors to work with[7].

Another important decision in TCA's history is the Turk Telekom Inc. (incumbent operator in the fixed line telecommunications market: TTAŞ) investigation. The process started with a complaint from the Association of Internet Service Providers alleging that TTAŞ abused its dominant position by refusing to provide or by providing necessary network elements for rival Internet Service Providers (ISPs) and raising their lease tariffs in favor of its internet service provider brand, TTNet. The TCA started an investigation and this was followed by TA which started its own investigation based on some clauses and articles on Law No. 4502 and indicated that infringement of competition also fell within its jurisdiction. The TCA continued its investigation and found that TTAŞ violated the Competition Act by keeping tariffs charged to both residential and corporate users of internet services below the tariff of lines it was leasing to ISPs[8].

One of the most controversial decisions[9] given by the TCA was the national roaming case. After winning the auction for the GSM license, İŞ-TİM (İşbank – Telecom İtalia Joint Venture) entered into the Turkish mobile market. After signing the concession agreement, the TA issued a regulation regarding national roaming. The regulation was aimed to allow newcomers to use existing operators' network (Turkcell and Telsim) under certain conditions since newcomers had little or no coverage at that time to effectively compete with incumbents. No sooner than the regulation issued, incumbents took the regulation to the International Court of Arbitration (ICC), a strategic action which stalled all of the TA's regulations

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*ARTICLE 7- (1) Without prejudice to the provisions of the Competition Act, the TA is entitled to perform examination and investigation of any action conducted against competition in electronic communications sector, on its own initiative or upon complaint; to take measures it deems necessary for the establishment of competition and to request information and documents within the scope of its tasks.*

*(2) The TCA while performing examinations and supervisions and while making any decisions on electronic communications sector, including decisions about merges and acquisitions, takes into consideration primarily the TA's view and the regulatory procedures of the TA.*

*(3) The TA may identify the operators with significant market power in the relevant markets as a result of conducting market analyses. The TA may also impose obligations on operators with significant market power with the aim of ensuring and promoting an effective competition environment. Differentiating may be performed among the operators with significant market power in the same and/or different markets, in terms of the obligations in question.*

6 For detailed information on this subject: Ardıyok,S.,& Oguz, F.Competition law and regulation in the Turkish telecommunications industry: Friends or foes? Telecommunications Policy (2009), doi:10.1016/j.telpol.2009.10.002.

7 Decision of the TCA is dated 29.12.2005 and numbered 05-88/1221-353.

8 Decision of the TCA is dated 05.01.2006 and numbered 06-02/47-8.

9 Decision of the TCA is dated 09.06.2003 and numbered 03-40/432-186.

and enforcement practices concerning national roaming. Since the ICC's process takes considerable time, İŞ-TİM also brought the case to the TCA claiming that Turkcell and Telsim were abusing their dominant position by jointly refusing to provide national roaming. After considering that the regulation issued by the TA has been stalled, the TCA started an investigation and found that Turkcell and Telsim violated the Competition Act. The TCA decided that Turkcell and Telsim, abused their collective dominant position in the market by denying access to an essential facility. The fine was high for both companies, $15 million for Turkcell and $6 million for Telsim. However, the decision was cancelled by the Council of State, the high administrative court due to procedural reasons.

The TCA also conducted an investigation on Cable TV infrastructure market. In 2005 the TCA investigated the effect of TTAŞ's behaviors on independent ISPs who wanted to provide internet services over the cable TV network due to complaints from ISPs. The same complaints also received by TA and it started another investigation on the same topic. The TCA clearly declared its presence with this investigation as an ex-post regulator. The TCA indicated that since TA's regulation covered access issues in the Cable TV Network it might not include anticompetitive behaviors and damages resulting from actions by TTAŞ. The TCA decided that TTAŞ did abuse its dominant position, but did not charge a fine or penalty since TTAŞ was found to be working with the TA with the purpose to open up the cable TV network to ISPs.[10]

With the enhancement of TA's secondary legislation and the enactment of the new Electronic Communications Law (Law No. 5809), the TCA looks like it has assumed a more submissive role in the sector. In this second stage, the TCA usually sends the cases to the TA if it sees that the market segment is regulated by TA. Since most of the industry is under the TA's regulations and supervisions now, the TCA was left with a little room to maneuver. Even if the complaints are about the issues concerning the infringement of competition, the TCA asks for the opinion of the TA (as required by Article 7/2 of the Electronic Communications Law) and if the area is/will be under regulation of the TA, it lets the TA take action for the relevant matter in order not to duplicate the procedures in the market.

In 2004, the TCA rejected a complaint from one of the ISPs regarding the allocation of the ADSL ports among the TTNet and rival ISPs. In its decision[11] the TCA stated that TA already issued a regulation for the subject and both the TTAŞ and the TA was working on the matter and it therefore decided that no further action by itself was necessary at that time. Similarly in 2005, the TCA rejected another file which alleged that TTAŞ metro Ethernet service violated the Competition Act. Following the preliminary findings regarding the issue, the TCA decided that necessary regulations were in progress in TA and there was no need to intervene.[12]

In that historical perspective Naked ADSL decision[13] by the TCA holds a different characteristic that stands alone. In this case, TTAŞ stipulated ADSL users to buy a fixed line from it if they wanted to become subscribers. Technical findings showed that buying fixed line was not required for the ADSL service and two services could be separated from each other with little or no cost at all. Based on these facts, the TCA declared that this kind of tying might be considered as an abuse of dominant position by the TTAŞ in the market and without opening an investigation it required TTAŞ (according to Article 9/3 of the Competition Act) to apply TA for separation of those services.

10 Decision of the TCA is dated 10.02.2005 and numbered 05-10/81-30.

11 Decision of the TCA is dated 02.09.2004 and numbered 04-57/796-199.

12 Decision of the TCA is dated 28.06.2005 and numbered 05-41/583-150.

13 Decision of the TCA is dated 18.02.2009 and numbered 09-07/127-38.

Even though the TCA seems to maintain a low profile in the sector, in the absence of regulation the TCA continues to intervene in the market. On 8.2.2007 the TCA initiated an investigation to analyze TTAŞ and TTNet Inc's operations in the broadband Internet access services market. TTAŞ claimed that the area, which TCA was investigating, was regulated by the TA and therefore the TCA had no jurisdiction at all. Having had TA's opinion in hand, the TCA found that broadband Internet access services was regulated at the wholesale level but not regulated at the retail level. Following the TA's official view on the case, the TCA decided that TTAŞ abused its dominant position on the wholesale market by creating a margin squeeze in the retail market and imposed a fine.[14]

In brief, for the practices and experiences of the TCA in telecommunications sector, it can be argued that, while keeping some reserves, the TCA lately lies outside of the picture if the issue is related with a market under the regulation of the TA . The TCA still holds its authority in the industry since there is no sectoral exception involving immunity from the competition law, but it may choose to remain behind if the relevant market is subject to regulation and let the TA handle the case in order to prevent forum-shopping by the market players and not to cause a duality.

## 3. Laws conflicting with the Competition Act

The TCA had some cases where the alleged violation was based on an authority resulting from a specific law.

In the case on Union of Bar Association,[15] the TCA examined fixing of minimum fees by the Union of Bar Association. Attorneyship Law grants Union of Bar Associations of Turkey the right to determine the minimum level of fees[16]. Although the TCA mentioned that this has the effect of restricting competition and the provisions of Attorneyship Law conflicts with those of the Competition Act, the TCA decided to use its advocacy powers before the National Assembly, Prime Ministry and the relevant ministry to demand amendment in the Attorneyship Law upon a complaint regarding fixing of minimum level of fees by the Union of Bar Associations of Turkey.

In this decision, the TCA also mentioned that although the Union of Bar Associations of Turkey exceeded its powers granted by Attorneyship Law to fix minimum level of fees by fixing monthly fees to be paid to attorneys working on a contractual basis, actually the powers granted to the Union of Bar Associations of Turkey to fix the minimum level of fees were contrary to the Competition Act, and advocacy powers should be used before the National Assembly, Prime Ministry and the relevant ministry for the amendment in the Attorneyship Law. According to the TCA, following amendments in the relevant laws, demands by the professional associations to fix minimum level of fees may be assessed under the exemption provisions of the Competition Act.

In sum, the TCA can not use its enforcement powers against conduct by professional associations like that of the Union of Bar Associations of Turkey that is authorized by another law such as Attorneyship Law and it employs its advocacy powers to amend the relevant provisions of such laws.

The case on TEB[17] is also relevant as to whether the practices resulting from a specific law can fall within the scope of the Competition Act[18]. In this case the TCA initiated an investigation concerning

14 Decision of the TCA is dated 19.11.2008 and numbered 08-65/1055-411.

15 Decision of the TCA is dated 13.11.2003 and numbered 03-73/876 (a)-374.

16 Discussed also in the contribution for the Roundtable on "Competition in the Legal Professions", June 2007.

17 Decision of the TCA is dated 4.11.2004 and numbered 04-70/1012-247.

decisions and practices by Turkish Pharmacists' Association (TEB) and related chambers of pharmacists to fix discount rates while selling medicines to governmental and private authorities and establishments.

TEB is a public professional organization established by law and it, like other professional organizations, has its roots in the Turkish Constitution.[19] According to the law establishing TEB, TEB can conclude agreements such as protocols with the relevant public and private authorities and establishments on behalf of pharmacists. It should be mentioned that decisions of TEB and such protocols are binding on the pharmacists according to the law establishing TEB and TEB monitors whether pharmacists comply with the decisions and imposes fines on those failing to comply. However, it should be mentioned that in case no such protocol exists, conditions of sale can be determined by the pharmacies and the relevant authorities and establishments independently of TEB.

As TEB represents the pharmacists and has a legal authority to sign agreements with public as well as private authorities and establishments, it signs a protocol with the Ministry of Finance representing various governmental authorities each year whereby conditions of sale of medicines to employees of the public authorities and establishments are regulated. The discount rate for medicines had been fixed in the protocol at 5% in 2001 whereas it decreased to 2.5% in 2002 and 2003 meaning that pharmacists had to make a discount of the fixed rate over the value of the prescription.

The TCA, in this case, imposed fines on TEB due to its decisions and practices fixing discount rates. It should be mentioned that the TCA could impose fines in this case as TEB tried to extend the practice of fixing the discount rates to be followed by pharmacists regarding their sale of medicines within the context of procurement by public (and private) authorities and establishments that were not subject to the above-mentioned protocol.

However, the TCA, being aware of the negative effects of the Protocol on competition in the public procurement of medicines, has decided to send its Opinion including its findings on regulations and practices affecting competitive conditions for the sale of medicines to the Ministry of Finance and Ministry of Health as part of its advocacy role.

The decision of the TCA was taken to the Council of State. The Council of State held the following decision:

> *"the Turkish Pharmacists' Association (TEB) was established by Turkish Pharmacists' Association Act No. 6643 and regulates the duties and powers of the Association and member chambers of pharmacists. The decisions and practices of TEB considered to be anticompetitive by the TCA, depend on Article 39, subparagraph (j) of the Act No. 6643.*
>
> *Within this framework, it is argued that the decisions and practices of TEB, which are found to be within the scope of the Competition Act, depend on the application of a legal provision on an issue that is under its sphere of duty. Therefore, as it is necessary that the said decisions and practices be evaluated under the Act No. 6643, which is under the Association's sphere of duty,*

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18 Discussed also in the contribution for the Roundtable on "Public Procurement - The Role of Antitrust Agencies in Promoting Competition", June 2007.

19 According to Turkish Constitution; "*Public professional organisations and their higher organisations are public corporate bodies established by law, with the objectives of meeting the common needs of the members of a given profession, to facilitate their professional activities, to ensure the development of the profession in keeping with common interests, to safeguard professional discipline and ethics in order to ensure integrity and trust in relations among its members and with the public ...*".

*and be found whether they are in compliance with the legislation and law, the TCA does not have powers to make inquiries and take decisions on that matter.*

*In this case, the TCA's decision imposing administrative fines due to the infringement of Article 4 of the Competition Act, concerning a decision taken by TEB depending on Article 39(j) of the Act No. 6643 was found not to be in compliance with law."*

Thus as seen from the above-mentioned decision, the Council of State concluded that the practices of TEB which are regarded anticompetitive by the TCA are based on an authority resulting from the Act No: 6643 and there is no ground for them to fall within the scope of the Competition Act as an infringement.

## 4. Regulated conduct defense and horizontal issues

The TCA initiated an investigation against the milk producers participating in a tender for school milk campaign of the Government. In this case[20] it was found that there was bid rigging by the participants to equally share the amount and value of a sealed-bid tender for milk organized by the Fund for the Encouragement of Social Assistance and Solidarity under Prime Ministry[21]. The tender involved provision and distribution of 1 million packed milk to primary schools. Such an amount exceeded the capacity of any milk producer in Turkey. 8 milk producers joined the tender. The TCA obtained enough evidence indicating that the milk producers held several meetings and shared the amount and the value of the tender equally. However, milk producers alleged that the outcome of the tender was influenced by guidance of the relevant Ministry and therefore it was out of their volition. Moreover, the participants also alleged that the tender specifications permitted the participants to form joint ventures with different undertakings for different regions which enabled the participants to learn the price for the regions in which the tender was related and the tender would not be realized successfully if the participants did not share equally the amount foreseen in the tender.

The TCA mentioned that tender design permitted sharing the amount equally only if all the participants acted in agreement. Refusal to join the agreement even by a single milk producer makes who would be awarded the tender in what region unclear and disallows a clear-cut market sharing.

As to allegations of intervention by the Ministry, the TCA argued that despite attempts by the Ministry to influence the bids to be made by milk producers, the correspondence sent from the Ministry did not designate that outcome of the tender was fixed by the Ministry. Moreover, given the existence of various laws prohibiting such instances, even an instruction by the Minister would be far from binding legally. However, the TCA agreed that the several attempts by the Ministry had an impact on milk producers and regarded them as mitigating circumstances.

Regarding the allegations that tender specifications permitting the participants to form joint ventures with different undertakings for different regions enabled the participants to learn the price in the region in which the tender was related, the TCA argued that the tender specifications enabled undertakings to join the tender alone or by a joint venture. The TCA argued that the fact that the tender design was wrong could not justify bid-rigging and the resulting equal sharing of the outcome. Moreover, tender specifications forbade bidding by both the milk producer and the JV it involved for the same region. Finally, the TCA argued that it could not be said that a sealed-bid tender was so falsely designed that it enabled equal sharing of the outcome in terms of the amount and value. At the end of the case, milk producers were imposed fines.

[20] Decision of the TCA is dated 26.05.2006 and numbered 06-36/464-126.

[21] Discussed also in the contribution for the Roundtable on "Competition in Bidding Markets", October 2006.

As seen from the case, the TCA did not accept the involvement of the relevant Ministry that was claimed to lead bid-rigging among the milk producers.

Another significant decision that should be discussed under the "Regulatory Conduct Defence" topic is TCA's accumulator decision.[22] The decision was adopted after an investigation on AKUDER (Accumulator and Recovery Industrialist Association) [23].

The case was focused on the markets related to waste accumulators. As is known, issues concerning accumulators and waste accumulators, from production to final disposal, are regulated under the Directive 2006/66/EC in the European Union countries. This Directive repeals and replaces the Directive 91/157/EC which was the primary Community legislation on waste accumulators.

Since Turkey is in the process of harmonizing its legislation with the EU Acquis, several laws and secondary legislation have been adopted and/or changed in this process. With regard to the field of environment and waste management, "Used Batteries and Accumulators Control Regulation" was introduced on 31 August 2004 (the Regulation). The Regulation is mainly based on the Directive 91/157/EC. Likewise the Directive 91/157/EC, the purpose of the Regulation is to arrange the legal and technical principles to:

- ensure the production of batteries and accumulators according to certain criteria,
- prevent the production, import, export or sale of batteries and accumulators containing harmful substances,
- establish a collecting system for the recovery and disposal of used batteries and accumulators, and to create a management plan.

In line with this regulation, two associations were established to comply with the Regulation in Turkey, namely AKUDER which was founded mainly by the accumulator producers in Turkey and TUMAKUDER (Accumulator Importers and Producers Association) which was founded by importers.

AKUDER was established by five accumulator producers and three recovery firms. The producers' market share reaches approximately 90% in the accumulator market. Three of them are the main accumulator producers in Turkey which have almost 80% market share. Two of these producers have recovery facilities as their subsidiaries.

AKUDER collects the waste accumulators from distributors through AKUCEV (Waste Accumulator Collection Incorporated) which is a firm that was established by the founding members of AKUDER. AKUCEV organizes and performs the tasks of collecting and delivering the waste accumulators to the recovery firms on behalf of AKUDER's members. According to AKUDER's plan, waste accumulators can only be transferred to the member recovery firms. Waste accumulators are distributed among the member recovery firms with respect to their shares in AKUCEV. AKUCEV do not sell the waste accumulators to non-member recovery firms. On the other hand, member recovery firms are not allowed to take waste accumulators from the collectors other than AKUCEV. The price of the waste accumulators at which AKUCEV sell them to the recovery firms is determined by the Board of Directors' decisions of AKUCEV regularly.

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22 The decision of the TCA is dated 20.05.2008 and numbered 08-34/456-161.

23 Discussed also in the contribution for the Roundtable On "Horizontal Agreements In The Environmental Context", October 2010.

AKUCEV, by its Board of Directors' decisions, was fixing the prices each and every stage of the transactions of waste accumulators. The quantity of waste accumulators to be sold to the recovery firms was also determined by AKUCEV beforehand. Under this system, all the concerned actors were prevented from exploiting the waste accumulators commercially themselves. Neither the dealers nor the distributors nor the recovery firms were able to determine or negotiate the prices at which they wished to sell or purchase the waste accumulators. In addition to that, they were also restricted in their relations with third parties. The dealers and distributors were not allowed to sell their waste accumulators to collectors other than AKUCEV despite the fact that under the Regulation's requirements they can deliver the waste accumulators to any licensed collectors or to any licensed recovery firms directly. The member recovery firms were prevented from purchasing waste accumulators from collectors other than AKUCEV although their sole obligation under the Regulation is not to accept waste accumulators brought by unlicensed collectors.

Having examined all the findings of the investigation, the TCA decided that AKUCEV violated the ban of Article 4 of the Competition Act by fixing the sale price of the waste accumulators of dealers and distributors, preventing the distributors and dealers from selling waste accumulators to other licensed collectors, and preventing the recovery firms from purchasing waste accumulators from other licensed collectors.

The TCA's analysis showed that while the regulation put some targets for the producers and importers in terms of the management of waste accumulators, it had no provisions regarding the price or business activities of the firms. On this account, the TCA put forward that the activities and decisions of AKUCEV neither emanated from requirements of the Regulation nor served the realization of environmental goals behind the Regulation.

## 5. Conclusion

Regulated conduct defense has been used in different contexts in competition law and policy enforcement in Turkey. With respect to regulated markets, the TCA has adopted an approach to do its best to enforce the competition rules where there is no clear regulatory legislation with respect to the case in question. However, the TCA may refrain from enforcing the competition rules if there is a clear regulatory rule that may justify or authorize a specific conduct which is otherwise a competition infringement. In general the TCA has been in the opinion that the sectoral regulators should be focusing on economic and technical regulations with a view to enhancing, protecting and improving competition in the regulated sectors. Thus it is important to see that sectoral regulators should be careful about competition issues and refrain from authorizing an otherwise anticompetitive conduct.

With respect to the laws that allow room for regulated conduct defense, the TCA takes the position of enforcing competition rules where the specific law is not clear enough to authorize a conduct as in the case of TEB. However, the TCA may refrain from enforcing competition rules where the specific law clearly authorizes the conduct in question as in the case of decision on Union of Bar Association.

With respect to horizontal competition issues that may result from a specific regulation and/or administrative action, the TCA has an approach of enforcing competition rules effectively. In such cases, existence of such a regulation and/or administrative action could only be regarded as an alleviating factor in the calculation of fines to be imposed.

# UNITED STATES

This submission responds to the chair's letter of December 17 calling for submissions for the Roundtable on the Regulated Conduct Defense. The submission discusses express statutory immunities from the U.S. antitrust laws, with examples of how such immunities apply in particular sectors, implied statutory immunities, along with state action and federalism issues, and the role of the Antitrust Division of the U.S. Department of Justice ("Division") and the Federal Trade Commission ("FTC"), (collectively, "the agencies") in addressing competition issues that arise as a result of these immunities.

## 1. Introduction

There is no general "regulated conduct" defense in U.S. antitrust law. The antitrust laws – which the Supreme Court has called "the Magna Carta of free enterprise"[1] – generally apply to interstate commerce or any activity affecting interstate commerce, whether or not the conduct at issue is subject to state or federal regulation. The Supreme Court consistently has held that the mere existence of regulation does not give rise to antitrust immunity. In most contexts, regulation serves goals that Congress has determined are distinct from, but not inconsistent with, the competition standards of the antitrust laws. For example, Congress may, without displacing the antitrust laws, provide for environmental and safety regulations, or regulation of the prices and practices of utilities and other providers of critical services. Congress may also enact legislation that promotes activity that the antitrust laws neither prohibit nor require.

Some regulatory statutes, however, do displace the antitrust laws to a limited extent, either expressly or by implication. The nature and extent of such exemptions or immunities is a policy decision made by Congress; the role of the courts is to interpret the relevant statutes. Congress may provide an express statutory exemption when it determines that specific anticompetitive conduct otherwise prohibited by the antitrust laws should be permitted or required to further non-antitrust goals, or that competition should be "balanced" with other factors that can best be evaluated by a specialized regulatory agency. Even absent express statutory exemptions, the Supreme Court has held, in limited situations, regulatory statutes may be construed as intended by Congress to create implied exemptions from the antitrust laws to the extent necessary to avoid conflict with a regulatory scheme. In addition, relying on "principles of federalism and state sovereignty," the Supreme Court has long held that the Sherman Act does not apply to "anticompetitive restraints imposed by the States 'as an act of government.'"[2]

This submission first discusses express immunity from the antitrust laws, using examples from statutes that apply to the U.S. ocean shipping, railroad, and civil aviation sectors. It then summarizes the principles the Supreme Court has articulated to govern implied immunity and discusses the Court's most recent decisions applying those principles. The submission next describes the state action doctrine, which is based on federalism concerns and distinct from immunities based solely on federal law. In each of these areas, the basic legal principles are well established. The application of those principles to particular fact

[1] Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 415 (2004) (quoting United States v. Topco Associates, Inc., 405 U.S. 596, 610 (1972)).

[2] City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 370 (1991) (quoting Parker v. Brown, 317 U. S. 341, 352 (1943)).

patterns and allegations involving a range of complex regulatory schemes, however, is a subject of much litigation and debate. Of course, the conclusion that particular conduct is not immune or exempt from the antitrust laws does not mean that it violates the antitrust laws. If there is no immunity, established antitrust standards apply. Regulation, however, remains a relevant part of the fact pattern in determining whether a violation has occurred, and must be taken into account in fashioning or modifying injunctive relief.

The submission concludes with examples of how the agencies, through competition advocacy and participation in regulatory proceedings, seek to ensure that government regulators properly analyze and weigh competition in carrying out their responsibilities to execute and enforce regulatory statutes through rulemaking and adjudication.

## 2. Examples of express statutory immunities

Over the past century, Congress has enacted a number of express statutory exemptions from the full application of the federal antitrust laws in certain regulated sectors.[3] Some of these exemptions have been narrowed or eliminated over time, but today this category includes agricultural and fishermen's cooperatives, insurance, and various transportation services.[4] In some cases the exemption is dependent on action taken by the regulatory authority. The exemption may also be limited to particular activities or types of agreements. Determining whether particular conduct falls within the relevant immunity can also raise difficult questions of statutory construction. The following section discusses three examples of express statutory immunity in the transportation sector.

### *2.1 Ocean shipping*

The Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 ("OSRA"),[5] exempts ocean common carrier agreements from the antitrust laws and subjects them to oversight by the Federal Maritime Commission ("FMC"), an independent regulatory agency.

> *The resulting regulatory system has always permitted fixing of price, output, and service terms by horizontal cartels, subject to the oversight of a federal regulatory agency. The agency, the FMC and its predecessors, has had varying roles in reviewing and approving conference agreements, and the agreements have always been required to be on file with the agency and available to the public. ... The FMC and its predecessors have always had some degree of power to investigate and prosecute abuses in the system, and shipping law has always provided for certain special restrictions on conference agreements to prevent anticompetitive conduct.*[6]

The passage of OSRA was a significant deregulatory step. Although carrier agreements retain their antitrust immunity, and members can still publish voluntary collective service guidelines, OSRA permits individual members to negotiate independent confidential service contracts with shippers, and prohibits the group from taking any retaliatory action against shippers or carriers that do so. As a result, independent service contracts now dominate the traffic carried by carriers that belong to conferences and rate agreements. Despite these shipper benefits from the independent service contracts, the exemption still denies the full benefits of competition, and the Division has twice testified before Congress in favor of

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3 Congress also has authority to create exemptions for non-regulated conduct.

4 See ABA Section of Antitrust Law, Federal Statutory Exemptions From Antitrust Law (2007).

5 Shipping Act of 1984, 46 U.S.C. App. §§ 1701-1719, as amended by the Ocean Shipping Reform Act of 1998, Pub. L. 105-258, 112 Stat. 1902 (1998).

6 Supra n.4, at 168-69.

elimination of the exemption.[7] Note that the immunity provided by the Shipping Act does not extend to mergers and acquisitions involving ocean carriers, which remain subject to the antitrust laws.

### *2.2 Railroads*

A substantial responsibility for competition law and policy relating to the railroad industry lies with the Surface Transportation Board ("STB"), a "decisionally independent" economic regulatory agency administratively affiliated with the Department of Transportation, and the successor agency to the Interstate Commerce Commission. The STB has authority over mergers and acquisitions, and transactions approved by the Board receive antitrust immunity. In addition, if the STB determines that a railroad possesses "market dominance" over a particular shipment, it has the authority to regulate the rate for that shipment. The STB also has the authority to approve, and thereby immunize from the antitrust laws, certain limited agreements among railroads subject to strict statutory limits. The Division may prosecute railroads for antitrust violations that are not within the STB's jurisdiction, *e.g.*, price-fixing.

Congress's stated reasons for giving jurisdiction over mergers and dominant firm rate regulation to the STB are technical expertise and the need to review mergers using a "public interest" standard that takes into account such factors as public benefits, labor conditions, environmental issues, and effects on competition.

The differences between STB and Division approaches to competition issues can be seen clearly in the 1996 Union Pacific/Southern Pacific merger, which involved the combination of two of the three major railroads in the Western United States. The Division concluded that the transaction would significantly reduce competition in numerous markets where the number of carriers dropped from two to one or from three to two, and that the remedy proposed by the carriers (granting trackage rights[8] to the third major western railroad) was unworkable and, in any case, insufficient to remedy the harm. The Division also found that the efficiencies claimed did not outweigh the competitive harms. The Division therefore recommended that the STB deny the merger application.[9] The STB did not accept the Division's recommendation, instead giving great weight to the benefits claimed by the carriers. The Board also found that trackage rights were sufficient to replace direct competition where the number of carriers fell from two to one, and that a reduction from three competitors to two was not of concern. Unfortunately, following implementation of the merger, there was a massive service breakdown in the West, resulting in billions of dollars in losses to shippers. In addition, there were numerous complaints that the trackage rights were ineffective in replacing competition lost because of the merger. In 2001, the STB promulgated new rules for rail mergers that require a stronger showing of public benefits to future major mergers.[10]

### *2.3 Civil aviation*

From 1938 to 1978, air carriers were extensively regulated in the U.S. by the Civil Aeronautics Board (CAB), which had broad powers to regulate entry and exit, rates, mergers, agreements, and methods of competition. The CAB was eliminated in 1985, at which point the U.S. Department of Transportation (DOT) took over its remaining regulatory responsibilities (*e.g.*, fitness to provide service, ownership, advertising), including several relating to competition. The Division has enforcement authority under the

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7 See James, 2002, http://www.justice.gov/atr/public/testimony/11244.htm; Nannes, 2000, http://www.justice.gov/atr/public/testimony/4377.htm.

8 "Trackage rights" grant to the trains of a third railroad access over the tracks of the merged railroad, in order to serve shippers adversely affected by the merger.

9 See press release available at http://www.justice.gov/atr/public/press_releases/1996/0673.htm.

10 49 C.F.R. § 1180.

antitrust laws, while the DOT has concurrent explicit authority to prohibit unfair and deceptive practices and unfair methods of competition;[11] air carriers are exempt from the jurisdiction of the FTC.

Statutory changes moved antitrust review of airline mergers from the CAB to DOT, and, since 1989, to the Division. Apart from merger review, however, DOT has explicit authority to review agreements among airlines that affect international air transportation, and to confer upon such agreements immunity from the U.S. antitrust laws. Because of DOT's power to grant immunity, the Division consults with the DOT and often brings its expertise to bear in formal comments in DOT regulatory proceedings. Over the years, the Division has commented on various code-sharing arrangements between U.S. and foreign carriers, and many of the Division's recommended limits on such arrangements have been accepted and implemented by DOT. DOT employs a public interest standard in approving such agreements and in granting antitrust immunity to them.[12]

### 3. Implied Statutory Immunity

In some circumstances, federal regulatory statutes may be deemed to express congressional intent to limit the applicability of the antitrust laws. Under this doctrine of "implied immunity" the Supreme Court has made clear that the "proper approach" to a claim that a federal regulatory statute impliedly repeals the antitrust laws with regard to challenged conduct "is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted."[13] The Court has described this admonition to give effect to both regulatory policies as the "guiding principle" for resolving claims of implied antitrust immunity.[14] "[A] cardinal principle of construction [is] that repeals by implication are not favored,"[15] and "can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system,"[16] "Repeal is to be regarded as implied only if necessary to make the [regulatory statute] work, and even then only to the minimum extent necessary."[17] Thus, the Court has repeatedly rejected the view that all conduct regulated under another statutory scheme enjoys "a blanket exemption" from antitrust law.[18]

The Supreme Court's most recent decision on a question of implied antitrust immunity, *Credit Suisse Securities (USA) v. Billing*,[19] involved the extent to which alleged conduct that is subject to the regulatory scheme governing public offerings of securities is immune from liability under the federal antitrust laws. The Court reaffirmed the basic principle that "an implied repeal of the antitrust laws" should "be found only where there is a plain repugnancy between the antitrust and regulatory provisions."[20] The Court noted

11 49 U.S.C. § 41712.

12 49 U.S.C. § 41309.

13 Silver v. NYSE, 373 U.S. 341, 357 (1963).

14 National Gerimed. Hosp. & Gerontology Ctr. v. Blue Cross, 452 U.S. 378, 392 (1981) (National Gerimed.).

15 Silver, 373 U.S. at 357 (quoting United States v. Borden Co., 308 U.S. 188, 198 (1939)).

16 United States v. National Ass'n of Securities Dealers, Inc., 422 U.S. 694, 719-20 (1975) (NASD); National Gerimed., 452 U.S. at 388.

17 Silver, 373 U.S. at 357.

18 National Gerimed., 452 U.S. at 392. See also Otter Tail Power Co. v. United States, 410 U.S. 366, 372 (1973) ("Activities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws.").

19 551 U.S. 264 (2007).

20 Id. at 272.

that determinations of implied immunity "may vary from statute to statute depending upon the relation between the antitrust laws and the regulatory program" and "the relation of the specific conduct at issue to both sets of laws."[21] The private treble damage complaint in this case alleged violations of regulatory and antitrust laws in connection with "underwriters' efforts jointly to promote and to sell newly issued securities" – an activity "central to the proper functioning of well-regulated capital markets."[22] Drawing on earlier implied immunity decisions involving securities markets, the Court considered the extent to which the complaint involved (1) an area of conduct squarely within the heartland of securities regulations; (2) clear and adequate SEC authority to regulate; (3) active and ongoing agency regulation; and (4) a serious conflict between the antitrust and regulatory regimes. Based on the extensive regulatory authority exercised by the Securities and Exchange Commission over the initial public offering process, the Court found that, in this particular context, even assuming that the SEC had disapproved the alleged conduct, the private litigation was "likely to prove practically incompatible with the SEC's administration of the Nation's securities laws."[23] Such a "serious conflict" between "application of the antitrust laws" and "proper enforcement of the securities law," the Court held, requires implied antitrust immunity.[24] The Court's opinion did not address the scope of implied antitrust immunity for other securities-related conduct or in other regulated industries.

The Court's 2004 decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*[25] also touched, indirectly, on the relationship between regulatory law and antitrust law. The Telecommunications Act of 1996 ("1996 Act"), among other things, required that incumbent local exchange carriers "open" their networks to new entrants, under rules established by the Federal Communications Commission, in order to facilitate competition. The question in *Trinko* was whether a complaint alleging breach of such a duty stated a claim of illegal monopolization under Section 2 of the Sherman Act. The Court held that it did not. The 1996 Act contains an express antitrust "savings clause"; it "preserves claims that satisfy existing antitrust standards," but "it does not create new claims that go beyond existing antitrust standards."[26] It was unnecessary, therefore, for the Court to consider whether, absent that savings clause, "a detailed regulatory scheme such as that created by the 1996 Act" would raise the question whether the regulated entities would be "shielded from antitrust scrutiny by the doctrine of implied immunity."[27]

For the most part, the substantive scope of the antitrust laws is the same in government enforcement actions and in private treble damage actions. When regulated rates are alleged to be the subject of a price-fixing conspiracy, however, the "filed rate doctrine" limits private treble damage actions, but not government enforcement actions or actions seeking injunctive relief.[28] Because filing makes the rates the only "legal" rates, the legal rights of a customer against the regulated entity defendant are measured by the published tariff. The plaintiff could not have been "injured in his business or property" within the meaning of § 7 of the Sherman Act by paying the rate that had been filed with the regulatory agency, and thus has

21 Id. at 271.

22 Id. at 276.

23 Id. at 277.

24 Id. at 284.

25 540 U.S. 398 (2004).

26 540 U.S. at 407.

27 540 U.S. at 406 (citing United States v. National Ass'n of Securities Dealers, Inc., 422 U.S. 694 (1975); Gordon v. New York Stock Exchange, Inc., 422 U.S. 659 (1975)).

28 Keogh v. Chicago & Northwestern R. Co., 260 U.S. 156 (1922); Square D Co. v. Niagra Frontier Tariff Bureau, 476 U.S. 409 (1986).

no right to bring a private treble damage action. The Court refused in its Square D decision (1986) to overrule this long-standing statutory construction that Congress has consistently refused to disturb, emphasizing that the filed rate doctrine should not be viewed as an "immunity" question. The alleged collective activities of the defendants in such cases are subject to scrutiny under the antitrust laws by the government and to possible criminal sanctions or injunctive relief. Square D – and its predecessor, Keogh – "simply held that an award of [antitrust] damages is not an available remedy for a private shipper claiming that the rate submitted to, and approved by, the [regulatory agency] was the product of an antitrust violation. [29]

**4. State action**

In contrast to express and implied regulatory immunities, which involve the relationship between the federal antitrust laws and federal regulatory statutes, the "state action" doctrine involves the relationship between federal antitrust laws and conduct by – or subject to regulation under the laws of – the fifty states. In *Parker v. Brown*,[30] the Supreme Court held that even assuming that "that Congress could, in the exercise of its commerce power, prohibit a state from maintaining a[n anticompetitive price-] stabilization program," there was "no hint" in the Sherman Act's language or history "that it was intended to restrain state action or official action directed by a state." Thus, while "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful,"[31] the state agricultural marketing program at issue in that case did not violate the antitrust laws.

Subsequent Supreme Court decisions have developed distinctions among actions by a state acting in its sovereign capacity, which are not subject to the federal antitrust laws, and actions by subordinate state entities or private parties claiming "state action immunity." For example, municipalities, the Court has held, are not sovereign, and they may claim "state action" immunity from the Sherman Act for particular conduct only if they can "demonstrate that their anticompetitive activities were authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service.'"[32] "The principle of freedom of action for the States, adopted to foster and preserve the federal system," the Court noted,[33] led to the two-part test, announced in *California Retail Dealers Assn. v. Midcal Aluminum, Inc.*,[34] that applies where private parties participate in a price fixing regime. "First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself."[35] Applying that test, the Court has held, for example, that the state action doctrine did not provide immunity for the state-mandated resale price schedules at issue in *Midcal*, or for the medical peer review committees challenged in *Patrick v. Burgett*.[36]

In *Southern Motor Carriers Rate Conference v. United States*,[37] the Court held that state action immunity barred a case brought by the Antitrust Division. The legislatures of the relevant states, while not

29 Square D, 476 U.S. at 422.

30 317 US. 341, 351 (1943).

31 Id.

32 Town of Hallie v. City of au Claire, 471 U.S. 34, 38-39 (1985) (quoting City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 413 (1978)).

33 FTC v. Ticor Title Ins. Co., 504 U.S. 621, 633 (1992).

34 445 U.S. 97 (1980).

35 445 U.S., at 105 (internal quotation marks omitted).

36 486 U.S. 94 (1988).

37 471 U.S. 48 (1985).

compelling the private rate bureaus to set prices, had each clearly articulated an intent to displace competition with respect to the rates of intrastate carriers,[38] and "the Government ha[d] conceded that the relevant States, through their agencies, actively supervise the conduct of private parties,"[39] so that the two requirements of the state action doctrine were satisfied. The Court made it clear that, acting alone, the subordinate state agencies could not immunize private anticompetitive conduct. Only the state legislatures could articulate the requisite policy to displace competition.[40]

The most recent state action case to reach the Supreme Court is *FTC. v. Ticor Title Ins. Co.*,[41] decided nearly twenty years ago. In *Ticor*, the FTC ruled that title insurance companies had fixed prices for title searches and examinations, thereby violating Section 5(a)(1) of the FTC Act, which prohibits "unfair methods of competition," as well as Section 1 of the Sherman Act. The Supreme Court explained that the purpose of the active supervision inquiry is "to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties."[42] It therefore held that in order to establish "active supervision" where prices or rates are set by private practices, subject only to a possible veto by the State, the party claiming immunity must show "that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or rate-setting scheme,"[43] and that such a showing had not been made in this case.

Aside from clear state entities, a question has arisen as to the status of certain 'hybrid' organizations that have characteristics of both state actors and private organizations. For example, the FTC recently issued a complaint, in the matter of *The North Carolina Board of Dental Examiners*,[44] alleging that a state regulatory board consisting of persons with a financial interest in the subject matter regulated by the board was not entitled to state action protection of its anticompetitive acts because it did not satisfy the 'clear articulation' nor the 'active supervision' prong of the Doctrine.

## 5. Competition advocacy and participation in regulatory proceedings

### *5.1 Competition advocacy directed at antitrust exemptions*

The agencies have a long history of competition advocacy directed at the elimination or circumscribing of exemptions from the antitrust laws. In recent remarks on antitrust immunities, AAG Christine Varney explained that

> *the changing dynamics of many industries coupled with the increasing analytical rigor that courts and antitrust enforcement agencies apply should alleviate the concerns that have been cited by advocates of exemptions. Free market competition is a fundamental and core principle of this country. As the bi-partisan Antitrust Modernization Commission recognized, just as*

38 Id. at 65.

39 Id. at 66.

40 Id. at 62-63.

41 Supra note 33.

42 Id. at 634-34.

43 Id. at 638.

44 See http://www.ftc.gov/os/adjpro/d9343/index.shtm.

> *private constraints on competition can be harmful to consumer welfare, so can government restraints. Thus, the use of such restraints should be minimized.*[45]

AAG Varney has testified on the express statutory immunity for the "business of insurance" contained in the McCarran-Ferguson Act, 15 U.S.C.§§ 1011 *et seq.*:

> *[T]he application of the antitrust laws to potentially procompetitive collective activity has become far more sophisticated during the 62 years since the McCarran-Ferguson Act was enacted. Some forms of joint activity that might have been prohibited under earlier, more restrictive doctrines are now clearly permissible, or at very least analyzed under a rule of reason that takes appropriate account of the circumstances and efficient operation of a particular industry. Thus, there is far less reason for concern that overly restrictive antitrust rulings would impair the insurance industry's efficiency.*[46]

As part of health care reform during the 111th Congress, the Antitrust Division worked with Congress by providing this testimony along with analysis[47] of legislation that included repeal of the McCarran-Ferguson Act as it applies to the business of health insurance, and worked with the White House to issue a Statement of Administration Policy in support of the legislation[48] that passed the House of Representatives overwhelmingly by a vote of 406 to 19.

Former FTC Chairman Deborah Platt-Majoras has testified before the Antitrust Modernization Commission, noting that

> *Over time, the reach of the antitrust laws has been narrowed by a large number of formal statutory exemptions and immunities. Most of these "exceptions" to the antitrust laws may have had sound policy justifications when they were enacted, but advancements in technology and the increased mobility of capital likely have rendered many of them inconsistent with the core principles underlying our nation's economic policy….. [S]some exemptions that were needed to correct market failures when enacted likely no longer serve consumers and the economy. There also probably are less restrictive ways than antitrust immunity to allow efficiency-enhancing collaborations among competitors in some of the industries to which the exemptions apply.*[49]

The agencies have testified on many other occasions in favor of legislative proposals to reduce or eliminate antitrust exemptions,[50] and in opposition to legislation creating new immunities.[51] For example,

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45 Christine Varney, Antitrust Immunities (June 24, 2010), available at http://www.justice.gov/atr/public/speeches/262745.htm.

46 Christine A. Varney, Statement before the Senate Judiciary Committee for Its Hearing Entitled "Prohibiting Price Fixing and Other Anticompetitive Conduct in the Health Insurance Industry" 4 (Oct. 14, 2009), *available at* http://www.justice.gov/atr/public/testimony/250917.htm.

47 Letter of the Department of Justice to Chairman John Conyers, Committee on the Judiciary, U. S. House of Representatives, providing views on H.R. 3596, the Health Insurance Industry Antitrust Enforcement Act of 2009 (October 20, 2009).

48 Statement of Administration Policy, H.R. 4626—Health Insurance Industry Fair Competition Act (February 23, 2010), available at http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/111/saphr4626r_20100223.pdf.

49 Statement of then FTC Chairman Deborah Platt Majoras before The Antitrust Modernization Commission (March 21, 2006) available at http://www.ftc.gov/speeches/majoras/060321antitrustmodernization.pdf.

50 See n. 2 above; Donna Patterson, Statement Before the Subcommittee on Postal Service, House Government Reform Committee (March 4, 1999), available at

in a statement to Congress, FTC Commissioner Kovacic expressed concern that any diminution of the FTC's existing jurisdiction over the internet access services market would restrict the Commission's ability to continue to play the integral role it has in protecting consumers from harm and ensuring robust competition in this market.[52] The agencies have also been active in working on amicus curiae briefs filed with appellate courts, arguing for limits on the scope of antitrust immunities.[53]

### *5.2 Competition advocacy directed at federal regulatory agencies*

As illustrated above in the section on express statutory immunities, the antitrust agencies work closely with regulatory agencies on issues relating to antitrust immunity. The antitrust agencies have developed good working relationships with their regulatory counterparts, at both senior and staff levels, and have had staff exchanges and joint seminars and workshops. In some cases, *e.g.* applications for immunity for international aviation agreements, the antitrust agency – in this case, the Division – participates formally in the regulatory agency's rule-making; in others, coordination and consultation can be informal. Congress can provide a particular statutory role for the antitrust agency; for example, in the telecommunications sector, Section 271 of the Telecommunications Act of 1996 required the FCC to consult with the Attorney General regarding proposed Bell company entry into long distance and to accord "substantial weight" to the Attorney General's evaluation. Even where there is no explicit authorization, regulatory agencies regularly request the antitrust agencies' views on competition issues.[54]

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http://www.justice.gov/atr/public/testimony/2285.htm; Steven Sunshine, Statement Before the Subcommittee on Railroads, Committee on Transportation and Infrastructure, House of Representatives (January 26, 1995), available at http://www.justice.gov/atr/public/testimony/0056.htm; FTC Statement Before the U.S. Senate Committee on Commerce, Science, and Transportation pp. 16-18 (April 8, 2008) available at http://www.ftc.gov/os/testimony/P034101reauth.pdf; FTC Statement Before the U.S. Senate Committee on Commerce, Science, and Transportation, p. 12 (September 12, 2007) available at http://www.ftc.gov/os/testimony/070912reauthorizationtestimony.pdf.

51 FTC Statement on "The Importance of Competition and Antitrust Enforcement to Lower-Cost, Higher-Quality Health Care," Before the Senate Subcommittee On Consumer Protection, Product Safety, And Insurance, Committee On Commerce, Science & Transportation, (July 16, 2009), page 4, available at http://www.ftc.gov/os/2009/07/090716healthcaretestimony.pdf; Joel Klein, Statement Before the House Judiciary Committee on H.R.1304, The Quality Health-Care Coalition Act of 1999(June 22, 1999), available at http://www.justice.gov/atr/public/testimony/2502.htm;

52 FTC Commissioner William E. Kovacic, Statement on "FTC Jurisdiction Over Broadband Internet Access Services" before the U.S. Senate Judiciary Committee p. 2 (June 14, 2006) available at http://www.ftc.gov/os/2006/06/P052103CommissionTestimonyReBroadbandInternetAccessServices06142006Senate.pdf

53 See briefs in Credit Suisse First Boston v. Glen Billing (November 9, 2006), available at http://www.justice.gov/atr/cases/f221000/221024.htm; Gosselin World Wide Moving N.V. and The Pasha Group v. U.S. (January 30, 2006), available at http://www.justice.gov/atr/public/appellate/index.html#page=page-5; Jackson, Tennessee Hospital Co. v. West Tennessee Healthcare (June 1, 2004), available at http://www.justice.gov/atr/cases/f203800/203897.htm.

54 For a listing of Division competition advocacy work directed at federal regulatory agencies, see http://www.justice.gov/atr/public/comments/comments.htm; FTC competition advocacy directed at regulatory agencies is available at http://www.ftc.gov/opp/advocacy_date.shtm.

### *5.3 Competition advocacy directed at state entities*

#### *5.3.1 Health care*

The agencies have long engaged in competition advocacy in the health care industry.[55] One area of concern has been state certificate of need (CON) laws, which prevent firms from entering certain areas of the health care market unless they can demonstrate to state authorities that there is an unmet need for their services. The agencies have submitted advocacy letters to a number of state legislative bodies urging the repeal or rejection of CON laws. In 2008, for example, the agencies issued a joint statement to the Illinois Task Force on Health Planning Reform regarding CON laws.[56] The agencies argued that these laws: undercut consumer choice, stifle innovation, weaken the ability of markets to contain health care costs, impede the efficient performance of health care markets by creating barriers to entry and expansion, and create opportunities for existing competitors to exploit the CON process to thwart or delay new competition, i.e., the laws can facilitate anticompetitive agreements among providers and the CON process itself may be susceptible to corruption.

Other FTC advocacy examples in this area include a letter to Louisiana state policy makers recommending rejection of proposed legislation that would impose costs on dental offices that bring dental services directly to underserved children in a school setting;[57] and a letter to the Georgia state policy makers advising rejection of a proposal that would prohibit dental hygienists from providing basic preventive dental services in public health settings except under the indirect supervision of a dentist, because the proposed amendments were likely to raise the cost of dental services in Georgia and reduce the number of consumers receiving dental care.[58]

#### *5.3.2 Legal Services*

In recent years, the agencies have engaged in competition advocacy at the state level to oppose occupational and professional licensing requirements that unnecessarily restrict competition. Such restrictions often are protected under the state action doctrine from challenges under the antitrust laws. For example, some states require that all real estate closing services be performed by licensed attorneys, prohibiting non-attorneys from competing to provide these services. The Division and the FTC have jointly taken the position that such restrictions unduly restrict competition and reduce consumer welfare without providing any offsetting benefits that consumers value. The agencies have submitted advocacy letters or briefs opposing such restrictions to several state legislatures (which pass laws defining the profession of law), state bar agencies (which formulate rules on the practice of law for court approval), state courts (which implement and oversee rules on the practice of law), state bar associations (which are private organizations of lawyers licensed to practice in the state), and the American Bar Association. The agencies have also submitted amicus curiae briefs outlining their views in two state litigation proceedings. Since the agencies began their competition advocacy efforts in this area, several states have rescinded,

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55 For a listing of FTC advocacy work see http://www.ftc.gov/opp/advocacy_date.shtm; more specifically, for a listing of FTC health care advocacy filings see http://www.ftc.gov/bc/healthcare/outreach/advofilehealthcare.htm.

56 Available at http://www.justice.gov/atr/public/comments/237351.htm.

57 See http://www.ftc.gov/os/2009/05/V090009louisianadentistry.pdf, press release available at http://www.ftc.gov/opa/2009/05/ladentistry.shtm.

58 See http://www.ftc.gov/os/2010/12/101230gaboarddentistryletter.pdf , press release available at http://www.ftc.gov/opa/2011/01/dentists.shtm.

modified, or rejected provisions that would prohibit non-attorneys from competing with attorneys to provide real estate closing services, although some states have rejected this position.[59]

*5.3.3 Real Estate*

In recent years, the agencies have engaged in both enforcement activities[60] and competition advocacy to oppose unnecessary restrictions on competition in the provision of real estate brokerage services. The emergence of new Internet-based and other innovative business models in this industry have led some traditional realtors and their various trade associations to urge state lawmakers and regulators to enact legislation or regulations that would block or impede these new forms of competition from the market. For example, a number of states have considered so-called "minimum services" rules, which require that real estate brokers provide a prescribed package of services, regardless of whether the consumer actually wants all of the services in the package. Such laws prevent the development of new business models that aim to offer smaller, often custom-tailored, packages of services, in exchange for a smaller total fee. Likewise, other states have considered legislation or regulation that would prohibit brokers from giving clients rebates on their commissions.

Through competition advocacy, the agencies have urged state legislatures, agencies, and officials to reject proposed legislative or regulatory provisions that would inhibit competition in real estate brokerage services. The agencies have submitted comments to state legislatures, agencies, and officials in over a dozen states regarding enacted or proposed regulation or legislation in this industry. Since the agencies began these competition advocacy efforts, 11 states have rescinded, modified, or rejected proposals to implement legislative or regulatory restrictions that the agencies advised would harm competition, although some states have rejected this position. The agencies continue to work regularly with state officials to educate them on the competitive impact of proposed policy initiatives.[61]

## 6. Conclusion

U.S. antitrust laws generally apply to interstate commerce or any activity affecting interstate commerce, whether or not the conduct at issue is subject to state or federal regulation. However, although there is no general "regulated conduct" defense in U.S. antitrust law, Congress has enacted a number of express statutory exemptions from the full application of the federal antitrust laws, and in some cases the courts have found a limited implied repeal by Congress of the antitrust laws when there is a "plain repugnancy" between them and certain regulatory provisions. Under the state action doctrine, the Supreme Court has interpreted the antitrust statutes as inapplicable to action by one of the 50 states acting in its capacity as a sovereign, or to private action pursuant to state policy and actively supervised by the state. The U.S. antitrust agencies have publicly advocated the elimination or limitation of many of these immunities, and have worked with regulatory agencies and state legislatures, courts, and agencies to protect competition and consumers and to reconcile the antitrust laws with federal and state regulatory laws in a manner consistent with Congressional intent.

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59 See http://www.justice.gov/atr/public/comments/comments_states.htm for examples of competition advocacy before state and other organizations.

60 For a listing of FTC case filings in the real estate sector see http://www.ftc.gov/bc/realestate/cases/index.htm.

61 See http://www.justice.gov/atr/public/real_estate/index.html for a description of Division activity in the real estate sector.

# EUROPEAN UNION

## 1. Introduction

The regulated conduct defence is brought forward in antitrust proceedings if the market behaviour of an undertaking concerned is subject to regulation, be it by administrative decision of a national regulator or body or, in exceptional cases, national law. The aim of the defence is either to avoid at all or at least soften an intervention based on EU competition rules (antitrust and merger). The regulated conduct defence is not an established legal term or concept under EU law but rather describes a specific type of defence.

In the section 2, this paper will set out the principles which explain the assessment of the "regulatory conduct defence" under EU competition law. Section 3 will deal first with the regulatory conduct defence in abuse of dominance cases under Article 102 of the Treaty on the Functioning of the European Union (TFEU) (section 3.1). It will then turn to the use of the defence in cases dealing with horizontal agreements under Article 101 TFEU (section 3.2) and finally deal with this defence in the context of merger cases (section 3.3). Section 4 describes mechanisms to avoid conflicts.

## 2. General approach and principles

Articles 101 and 102 TFEU do not contain an explicit exemption of an undertaking's behaviour from the application of competition rules if an undertaking or a certain behaviour of it is subject to regulation. Only if the conduct is required by national legislation (be it by national law or administrative decision) and if the undertaking has no discretion to act differently[1], then EU competition rules may not be enforced against undertakings[2]. To the contrary, the European Court of Justice has recently clarified that EU antitrust rules apply to any conduct engaged in by undertakings on their own initiative. If e.g. prices set by an undertaking have been approved by a regulator, this does not absolve the undertaking from

1 Court, case 280/08 P, judgement of 14.10.2010, Deutsche Telekom v Commission, paragraph. 56 ss; Court of First Instance, case T-271/03, judgement of 10.4.2008, Deutsche Telekom v Commission, paragraph 85 with reference to previous case law.

2 It should be noted that national laws or administrative decisions have to be compatible with EU law. If state measures violate competition law, they may, for instance, constitute an infringement against Article 106 TFEU (see on a recent case concerning anti-competitive state measures case COMP/38.700 - *Greek lignite and electricity markets*). Art. 119 TFEU demands that Member States and the Union pursue an economic policy which is "conducted in accordance with the principle of an open market economy with free competition". Protocol No 27 annexed to the TFEU on the internal market and competition states that "the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted". This Protocol was seemingly adopted to counteract the removal of Articles 3(1)g and 5 TEU (Maastricht Treaty), which explicitly limited the ability of Member States including national regulators to adopt and impose measures contrary to Articles 81 TEU (now 101 TFEU) and 82 TEU (now 102 TFEU). In case of non-observance of these principles the EU Commission has the powers to open an infringement procedure against the Member state concerned and if the relevant act is not amended my bring an infringement case to the Court, which may oblige the Member state concerned to withdraw the relevant law or administrative measure.

responsibility under EC competition rules[3]. Also, if national law merely encourages or makes it easier for undertakings to engage in autonomous anti-competitive conduct, EU competition rules remain applicable[4].

However, in some Member States the national regulator has also the competence to apply Articles 101 and 102 TFEU[5]. If such a regulator intends to adopt a regulatory measure which at the same time applies these Articles to the behaviour of an undertaking, and if the Commission decides not to act in the same case[6], then the national regulator is competent to apply EU competition law[7].

As regards the application of the EU merger regulation, decisions adopted by regulators requesting an undertaking or the whole industry to behave in a certain way play also a role. They are taken into account as factual elements determining the market conditions. In the context of remedies, which undertakings propose to remove competition problems linked to a merger, decisions of regulators, even if they will only be adopted with a high degree of probability in the future, are also taken into account as factual element which has an influence on the future market conditions (e.g. decisions making more radio spectrum for mobile telecommunication available).

## 3. Regulated conduct defence in the different areas of competition policy

### *3.1 Regulated conduct defence in cases of abuse of dominant positions (Article 102 TFEU)*

#### *3.1.1 Telecoms*

The Commission has assessed a number of regulated conduct defences in abuse of dominant position (Article 102 TFEU) cases which concerned either predatory pricing or margin squeezes.

A claim of *France Télécom (FT)*, the dominant player, that competition rules cannot be applied because the relevant wholesale tariffs were approved by the relevant French ministry was rejected by the Commission. This approval was based on an opinion of the French telecoms regulator, which had no power of initiative as to their level and simply formulated an opinion on proposals made by FT without being able to amend them in any way. At best, the French regulator had the power to reject en bloc a tariff proposal deemed unsatisfactory and ask FT to submit a new proposal, without, however, being able to dictate its content. FT had therefore in the Commission's view sufficient margin for manoeuvre to set its tariffs on its own initiative[8]. FT did not challenge this reasoning in Court.

The Commission used similar arguments in the *Deutsche Telekom (DT)* margin squeeze case, where the German telecoms regulator had set the wholesale price for broadband access. It had also set a maximum price cap for a number of retail services (including retail broadband services) included in a basket. Under this regulation, DT still had the freedom to adjust the retail prices of the services in the basket by e.g. lowering the retail price for broadband access and increasing the price for other services,

3 See Court case 123/83 BNIC [1985] ECR 391, paragraphs 21 to 23; Court of First Instance, case T-271/03, judgement of 10.4.2008, Deutsche Telekom v Commission, paragraph 107.

4 Court of First Instance, case T-271/03, judgement of 10.4.2008, Deutsche Telekom v Commission, paragraph 87 ss with reference to previous case law.

5 The British telecoms regulator, OFCOM, is also responsible to apply EU and national competition rules.

6 See the rules on cooperation between the Commission and the competition authorities of the Member States in Art. 11 of Regulation 1/2003.

7 Article 11 Regulation (EU) n° 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 4.1.2003, L 1 page 1.

8 See pt. 289 of the Commission decision of 16 July 2003 (Case COMP/38.233 – Wanadoo Interactive).

such as telephony, it could have avoided a margin squeeze concerning broadband services. DT could also have asked the regulator to authorise higher retail prices for broadband access and thus also have avoided a margin squeeze[9]. The regulatory defence was thus dismissed by the Commission as regards the application of antitrust law.

However, the Commission took account of the fact that both the wholesale and retail prices were regulated, as it had an influence on the prices set by DT. It also noted that the German regulator had at several occasions considered the question of the existence of a margin squeeze (which in its view did not make it impossible for DT to compete). The Commission concluded in its decision that the intervention by the German regulator in the price setting mechanisms should be considered as a mitigating circumstance. It lowered the fine by 10%, which was upheld by the Courts[10].

In the Court proceedings DT argued that a fine decision would violate the principle of legal certainty and protection of legitimate expectations. It pointed to the German regulator's view expressed in a decision that despite the presence of a margin squeeze DT's competitors would be able to enter the market and remain in it. Both EU Courts held that this finding of the national Regulator could not create a legitimate expectation for DT that its behaviour was compatible with Article 82 EC (now Article 102 TFEU).

In the most recent margin squeeze case, *Telefónica*, the Spanish incumbent, claimed that it was subject to ex ante and ex post regulation and therefore lacked autonomy in setting prices. The Commission rebutted these arguments by pointing out that the Spanish telecoms regulator had only set maximum prices for the wholesale broadband access and that Telefónica had thus retained its freedom to avoid a margin squeeze by either proposing lower wholesale prices to its competitors or by asking the Spanish regulator to authorise a lower wholesale price for broadband access[11]. Furthermore, the Commission clarified in its decision that even if a national courts has recognised the competence of the national regulator within the meaning of Article 5 of the Framework Directive 2002/21[12] to also have the general task to safeguard competition, this would not hinder the application of EU competition rules. This also applies if an agreement or practice has already been the subject of a decision by a national Court even if the decision contemplated by the Commission conflicts with the national court's decision[13]. Finally, the Commission underlined it its decision that the Spanish regulator was not entrusted with the enforcement of EU competition rules, namely Article 102 TFEU and that, therefore, EU competition rules can be enforced.

When setting the fine, the Commission accepted as a mitigating factor the fact that the Spanish national regulator had set a wholesale price for one of the inputs concerned which was based on market

9 See pts. 163 of the Commission decision of 21 May 2003 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-1/37.451, 37.578, 37.579 — Deutsche Telekom AG).

10 Court of First Instance, case T-271/03, judgement of 10.4.2008, Deutsche Telekom v Commission, paragraph 117.

11 See Commission decision of 4.7.2007 (Case COMP/38784) – Wanadoo España v Telefónica, paragraphs 673-675.

12 Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.4.2002, p. 33.

13 Court, case C-344/98, judgement of 14.12.2000 Masterfoods Ltd. v HB ICE Cream Limited (*"Masterfoods"*), paragraph 48; Commission decision of 4.7.2007 (Case COMP/38784) – Wanadoo Espana v Telefónica, paragraphs 677-680.

forecasts and cost information supplied by Telefónica which, as Telefónica should have realised shortly after their supply to the regulator, were inaccurate[14]. It reduced the fine by 10%.

The appeal of Telefónica against this decision is pending.

### *3.1.2 Energy*

Competition enforcement in the energy sector in Europe deals with largely regulated markets, and the Commission necessarily has to take into account the respective regulatory framework in its competition cases, e.g. with respect to network access, the definition of bidding zones or price regulation. Many of the Commission's recent antitrust cases in the energy sector dealt with issues that were also addressed by regulation; the regulatory measures, however, did not have the expected effect and competition enforcement was still required (see e.g. Commission cases concerning network access, where national regulatory measures proved not to be efficient enough[15]). As set out above, regulatory provisions in the energy sector (e.g. concerning prices, the layout or the access to the network) cannot have an "exculpatory" effect if companies still enjoy discretion how to comply with these provisions[16].

### *3.1.3 Transport/ Postal services*

In the *GVG* decision that concerned the refusal by the Italian national railway carrier, Ferrovie dello Stato S.p.A. (FS), to provide access to the Italian railway infrastructure, to enter into negotiations for the formation of an international grouping and to provide traction, the Commission came to the conclusion that by denying the complainant, GVG, access to the services in question, FS had abused its dominant position.

On this occasion, the Commission noted that "[a]t the present stage in the liberalisation of the European rail passenger market, railway undertakings can only provide cross-border rail passenger services if they have formed an international grouping with a licensed railway undertaking established in another Member State. However, the existence of this European regulatory framework does not preclude the application of Article [102 TFEU] to situations in which there is only one railway undertaking available to form an international grouping and which refuses to enter into negotiations with a view to the formation of such a grouping."[17]

As far as postal services are concerned, the Commission issued a communication on the application of the competition rules to this sector in 1998. This makes it clear that "[n]ational regulations concerning postal operators to which the Member States have granted special or exclusive rights to provide certain postal services are 'measures` within the meaning of Article [106(1) TFEU] and must be assessed under the Treaty provisions to which that Article refers."[18] Moreover if "Member States have the freedom to define what are general interest services, to grant the special or exclusive rights that are necessary for providing them, to regulate their management and, where appropriate, to fund them", they must "[h]owever, under [106(1) TFEU], […] in the case of public undertakings and undertakings to which they have granted

14 See paragraphs 765 and 727-729 of the decision.

15 See e.g. Commission cases COMP/39.315 - ENI; COMP/39.316 - Gas de France; 39.317 - E.ON Gas; 39.402 - RWE gas Foreclosure.

16 Court, case 280/08 P, judgement of 14.10.2010, Deutsche Telekom v Commission, paragraph. 56 ss; Court of First Instance, case T-271/03, judgement of 10.4.2008, Deutsche Telekom v Commission.

17 Commission decision of 27 August 2003 (COMP/37.685 GVG/FS) *OJ* L 11, 16.1.2004, p. 17–40.

18 Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services, OJ C 39, 6.2.1998, p. 2–18, point 4.2.

special or exclusive rights, neither enact nor maintain in force any measure contrary to the Treaty rules, and in particular its competition rules."[19]

### *3.2 Regulated conduct defence in cases of horizontal agreements (Article 101 TFEU)*

#### *3.2.1 Energy*

It is conceivable that regulatory provisions may also be invoked in cases of horizontal agreements. If national regulation clearly mandate a certain behaviour (e.g. the exchange of certain production data) the Commission would normally assess the validity of this regulatory provision under competition law and not go against the affected undertaking.

#### *3.2.2 Transport / Postal services*

Contrary to air transport within the EU which is fully liberalised, air transport between the EU and third countries is governed by bilateral air services agreements (ASAs) setting the conditions for the airlines designated by the parties to the ASA (the so-called "designated carriers") to fly between points in their territories. Certain ASAs still contain restrictive clauses requiring designated carriers to agree on fares before filing them with Aviation Authorities.

In the recent *Airfreight* decision that concerned a cartel in the provision of airfreight services with respect to various surcharges, the carriers received a reduction of 15% on account of the general regulatory environment in the sector which could be seen as encouraging price coordination.[20] This makes clear that the existence of such a regulatory background does not prevent the application of competition law even if it may lead to a reduction of fine.

In the *Ahmed Saeed* case, the Court of Justice applied the combination of Articles 4(3) TEU and 101 TFEU to the aviation sector. This case concerned a provision in German law prohibiting the application in Germany of tariffs not approved by the competent minister. The Court ruled that Article 4(3) TEU imposed a duty on the State not to adopt or maintain in force any measure which could deprive the competition rules of their effectiveness.[21]

#### *3.2.3 Financial services – Insurance*

The German Association of Property Loss Insurers (VdS) had adopted in 1980 a recommendation inviting its members to increase their insurance premiums by a specified percentage. This recommendation had been notified to the German regulator for the insurance industry and the German competition authority. Both authorities had endorsed this recommendation. The VdS took the view that EU Article 85 EU (now 101 TFEU) was not applicable.

The Commission prohibited this recommendation pursuant to Article 85 EU (now Article 101 TFEU). It pointed out that an infringement of the EEC competition rules is not vindicated simply because the endorsement of the recommendation by the national regulator and competition authority. In the present case, where the horizontal agreement was "a clear breach of binding principles of EEC competition law, it

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19 *Ibidem*, point 6.1.

20 Commission decision of 9 November 2010 (Case COMP/39.258 – Airfreight), not yet published.

21 Case C-66/86, Ahmed Saeed [1989] ECR p. I-803, paragraph 48.

is the settled case law of the European Court of Justice that in the event of conflict EEC law must prevail"[22].

*3.2.4 Other industries*

Italian law required the *National Council of Customs Agents (CSDN)* to set compulsory tariffs for customs agents[23]. The National Council adopted such tariffs in 1988 and some further conditions about the setting of prices in 1990. In 1993 the Commission adopted a prohibition decision (without fine) under Article 85 EU (now Article 101 TFEU)[24] in which it considered that the relevant law could not hinder the application of EU competition rules. The Court of First Instance (CFI) upheld this decision by highlighting in particular that the national law did not set the tariffs or contain any criteria for their setting by the CSND. The CSND could thus e.g. decide a 400% increase of the tariffs and conditions for the billing. It retained thus the freedom to restrict price competition between its members[25]. The CFI thus rejected the various regulated conduct defences brought forward by the CSND, namely that the CSND was a public body with regulatory powers and that it was obliged by law to set the tariffs for its members[26].

Italian law also requested that the criteria for determining fees and emoluments payable to members of the *Italian bar* were to be set every two years by decision of the National Council of the Bar (this being composed of members of the Bar elected by their fellow members). These had then to be approved by the Minister after having obtained the opinion of the Inter-ministerial Committee on Prices. The Court of Justice ruled that this system did not violate Articles 4(3) TEU and 101 TFEU.[27] The Court confirmed that Articles 4(3) TEU and 101 TFEU are infringed where a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to Article 101 TFEU or reinforces their effects, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere.[28]

This was confirmed in the *Cipolla* judgment.[29] The Court added however that the legislation at issue that contained an absolute prohibition of derogation, by agreement, from the minimum fees set by a scale of lawyer's fees for services which were (a) court services and (b) reserved to lawyers constituted a restriction on the freedom to provide services laid down in Article 56 TFEU.[30]

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22 Commission decision of 5 December 1984 (Case IV/30.307 - Fire insurance (D)), OJ L 35, 7.2.1985, p. 20, paragraphs 14 and 28.

23 The Commission also brought an action against Italy alleging that it was infringing the EU treaty. The Court held that Italy had infringed Articles 5 and 85 of the EU Treaty by requiring the National Council to adopt a compulsory tariff, by relinquishing to a private economic operator the powers of the public authority to set tariffs, by prohibiting any derogation from the tariff and by adopting a decree approving the tariff set by the National Council; see Court Case C-35/96 judgement of 18.6.1998, paragraph 51, 56 ss.

24 Commission decision of 30.6.1993 (Case IV/33.407 – CNSD), OJ L 203, 13.8.1993, p. 27, paragraph 43 and 44.

25 CFI judgement case T-513/93 judgement of 30.3.2000, CNSD v Commission, paragraphs 62 ss.

26 CFI judgement case T-513/93 judgement of 30.3.2000, CNSD v Commission, paragraphs 41-44.

27 Case C-35/99, Arduino [2002] ECR p. I-1529, paragraph 44.

28 Case C-35/99, Arduino [2002] ECR p. I-1529, paragraph 35.

29 Case C-94/04 and C-202/04, Cipolla [2006] ECR, p. I-11421, paragraph 54.

30 Case C-94/04 and C-202/04, Cipolla [2006] ECR, p. I-11421, paragraph 70.

In the *Doumalis* case, the Court of Justice ruled that Article 101 TFEU, read in conjunction with Article 4(3) TEU, does not preclude a national law which prohibits any person or dental care providers, in the context of professional services or a dental surgery, from engaging in advertising of any kind in the dental care sector.[31]

### *3.3 Regulated conduct defence in merger cases*

The regulatory framework is part of the facts which need to be assessed in the context of a merger. In particular, we take the regulatory situation into account for the competitive assessment of markets.

For example, in relation to telecommunication services, we would consider the role of wholesale regulation in order to assess the ability of broadband service providers to compete in the retail market (case COMP/M.5532 *Carphone Warehouse/Tiscali UK).* Another example would be a vertical link between retail fixed telephony in country A and wholesale call termination in country B on the fixed network of an operator also active in retail fixed telephony in country A. As termination fees in country B are fixed by the national regulator, there would be no scope for price discrimination *vis-à-vis* other competitors active in country A (cases COMP/M.5148 *Deutsche Telekom/OTE* or COMP/M.5730 *Telefónica/Hansenet).*

However, the interaction between merger control and sector regulation may also give rise to parallel proceedings in some cases. For example, under Article 21 of the Merger Regulation, EU Member States may take appropriate measures in relation to a merger notified to the Commission in order to protect legitimate interests other than those taken into consideration by the Merger Regulation. Those measure must be compatible with the general principles and other provisions of Community law (case COMP/M.4685 *Enel/Acciona/Endesa*). Examples of legitimate interests include, among others, public security, plurality of the media and prudential rules.

Parallel proceedings may also exist outside the scope of Article 21. For example, in case COMP/M.3916 T-mobile/tele.ring, the Commission and the Austrian regulator conducted parallel procedures in relation to the transfer of spectrum by the merged entity (but not in relation to the other elements of the remedies package finally accepted by the Commission) because the Austrian Telecommunications Act allowed frequency usage rights to be transferred, but subject to approval by the telecoms regulator.

## 4. Mechanisms to avoid conflicts

### *4.1 Legal approach aiming at avoiding a conflict between regulation and antitrust law enforcement*

If regulation is in place in a certain sector this may indicate according to the Commission's policy under Art. 102 TFEU that a company can be regarded as an "essential facility" in refusal to supply cases[32].

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31 Case C-446/05, Doulamis [2008] ECR p. I-1377.

32 See paragraph 82 of the Commission's *"Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings"* (OJ 2009, C 45/02): "*In certain specific cases, it may be clear that imposing an obligation to supply is manifestly not capable of having negative effects on the input owner's and/or other operators' incentives to invest and innovate upstream, whether ex ante or ex post. The Commission considers that this is particularly likely to be the case where regulation compatible with Community law already imposes an obligation to supply on the dominant undertaking and it is clear, from the considerations underlying such regulation, that the necessary balancing of incentives has already been made by the public authority when imposing such an obligation to supply. This could also be the case where the upstream market position of the dominant*

*Advocate General Mazák* has in his opinion in the reference case for a preliminary ruling (*Konkrrensverket v TeliaSonera A)* put forward a similar reasoning to avoid a conflict between competition law and regulation in a telecoms case[33]. Although this opinion concerns a telecoms case it may also be valid for other regulated industries. The question at stake in this case is whether a dominant undertaking abuses its market power if it supplies on a voluntary basis an input for its downstream competitors at conditions which lead to a margin squeeze. According to AG Mazák a dominant company can only be accused of an abusive margin squeeze policy under Article 102 TFEU if it is either obliged by a regulatory measure to supply the input or if the competition authority established that this input is indispensable for its downstream competitors in the sense of the Bronner jurisprudence[34].

This approach avoids that competition authorities have to assess based on competition law (Article 102 TFEU) whether an access obligation exists in cases where the regulator has applied regulation to establish such an obligation. An undertaking which has been obliged by the regulator to give access can thus no longer claim in an antitrust proceeding that under competition law it was not obliged to give access and therefore did not violate Article 102 TFEU. It is still open whether the Court will confirm this approach.

### *4.2 Telecommunications - Safeguards in EU directive to avoid conflicts between regulation and competition law enforcement*

The EU regulatory framework for telecommunications, which aims at establishing an internal market for telecommunications with effective competition, contains a number of rules which aim at ensuring that national telecoms regulators apply competition law principles when they define relevant markets or identify companies with significant market power. In order to clarify important issues in this regard, the Directive obliges the Commission to adopt a recommendation, in which it has to define markets in accordance with competition law principles[35]. However, the Framework Directive explicitly specifies that these market definitions are without prejudice to markets that may be defined in specific cases under competition law[36]. The relevant Commission guidelines also specify that in view of the different aims of ex ante and ex post regulation cannot be excluded[37]. Nevertheless, the obligation to use the same methodologies ensures in most cases that the market definitions correspond to the market definitions that would apply under competition law[38].

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*undertaking has been developed under the protection of special or exclusive rights or has been financed by state resources. In such specific cases there is no reason for the Commission to deviate from its general enforcement standard of showing likely anti-competitive foreclosure, without considering whether the three circumstances referred to in paragraph 81 are present."*

33 Opinion of Advocate General Mazák delivered on 2 September 2010, Case C-52/09, Konkrrensverket v TeliaSonera AB, paragraphs 11 and 21.

34 Court, case C-7/97, judgement of 26.11.1998, Oscar Bronner.

35 Article 15(1) last sentence Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37 and Regulation 544/2009, OJ L 167, 18.6.2009, p. 12.

36 Article 15(1) 2nd sentence Framework Directive.

37 See pts 25-32 of the Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services.

38 See pt. 25 of the Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communication networks and services, OJ C 165, 11.7.2002, page 6.

To further avoid conflicting approaches by national telecoms regulators and competition authorities, the Framework Directive asks regulators to carry out a market analysis "where appropriate, in collaboration with the national competition authorities".

Finally, all national regulatory measures have to be notified to the European Commission under the so called Article 7 of the Framework Directive consultation mechanism, on condition that the measure affects trade between Member States, which is normally the case for all measures. During the consultation period of one month, the Commission has to verify i.e. whether a notified draft regulatory measure is compatible with Community law, and in particular the objectives referred to in Article 8 of the Framework Directive, one of which is that the national regulatory authority has to ensure "that there is no distortion or restriction of competition in the electronic communications sector"[39]. This consultation also aims at avoiding conflicts between regulatory market interventions and the application of EU competition rules.

### *4.3 Energy*

Close cooperation between competition and regulatory authorities is crucial to avoid conflicts between the enforcement of regulators and competition authorities in the energy sector. This is in particular true when it comes to designing appropriate remedies in competition cases, which should ideally not be in conflict with the regulatory system in order to allow their smooth implementation. The Commission has in all recent competition cases closely involved the affected national energy regulators already in the stage of the investigation to avoid unnecessary tensions between competition enforcement and the activities of the regulator.

### *4.4 Transport / Postal services*

During the last years, the European Commission has been renegotiating ASAs with numerous third countries in order to remove thereof clauses violating EU law (in particular pricing and nationality provisions). It also negotiated Open Sky agreements with a couple of key third countries. These initiatives serve as a tool to avoid conflicts.

### *4.5 Other industries*

As stated by the Court in the *Cipolla* judgment mentioned above,[40] some restrictions to free price setting can be caught by Article 56 TFEU (freedom to provide services).

## 5. Summary and conclusion

The regulated conduct defence has been brought forward and assessed in many EU competition law cases. In all cases regulation, be it by a law or an administrative decision, did not impose a specific market behaviour. Undertakings had thus leeway as regards their behaviour on the market and to avoid an abuse or not engage in a horizontal agreement with its competitors. The presence of regulation was thus only considered as a mitigating circumstance leading to a reduction of fines but did not shield companies from the full application of EU competition law.

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39 See Article 8(2)(b) Framework Directive.

40 See note 30.

# BULGARIA

The feasibility of enacting and enforcing sector specific regulation has long been a subject of public and academic debate. This debate pinpoints the very core of the economic theories as it relates to the basic question of the admissibility of the state involvement into the market functioning. The role of the competition process as a driving force in markets development on the other hand is recognized and praised by both the advocates and opponents of sector regulation.

For a matter of clarity it should be noted that sector regulation in general covers two main goals: remedying market failures and/or imposing specific rules governing the supply of goods or provision of services with a view of the special characteristics of these goods/services. In both cases the state imposes specific rules for the functioning of the particular markets, thus restricting to some extent the behavior of the market players to pursue their private interest in order to guarantee the prevalence of public interest. Competition law and enforcement is another public policy which aims at improving general economic welfare, ensuring actions against conduct which restricts competition as a process. From this point of view both the sector regulation and competition policy put the public interest as their main goal, which is however to be achieved through different and sometimes contradictory measures. Therefore, the main question to be discussed here will be the interaction between the regulation and competition policy in Bulgaria and the experience of Bulgarian Commission on Protection of Competition in this field.

Bulgarian Law on Protection of Competition (LPC) is the national legal act which lays down the competition rules, applicable to all undertakings in Bulgaria. The LPC provides no exemption for its scope of application either for specific sectors or undertakings. Art. 2 (1) LPC states that it applies to:

- undertakings and associations of undertakings which carry out their activities within or outside the territory of the Republic of Bulgaria, if they explicitly or tacitly prevent, restrict, distort or may prevent, restrict or distort competition in the country;

- state authorities, including executive branch and local authorities, if they explicitly or tacitly prevent, restrict, distort or may prevent, restrict or distort competition in the country;

- undertakings to whom the state or the municipality have assigned services of public interest insofar as the application of the Law does not impede *de facto* or *de jure* the fulfillment of the tasks assigned to them and competition in the country is not affected to an appreciable extent;

- natural persons who commit or contribute to committing an infringement under this Law.

On the other hand, some sector specific laws, particularly those regulating the functioning of such sectors as telecommunications and energy, also contain special rules aimed at ensuring the competition in these specific markets. Such examples are the Law on Electronic Communications[1] and the Energy Law[2].

1 Art. 4. (1) The objectives of this Law are: 1. to provide relevant conditions for development of competition in provision of electronic communications, by […] b) preventing distortion or limitation of competition in the field of electronic communications; 2. to support the development of the internal market of electronic communications, by: a) elimination of possible barriers in provision of electronic communications.

Thus, in parallel with the general application of competition rules under the Law on Protection of Competition, the requirement for observing these rules is imposed on the respective regulators. Therefore, apart from the general legal provisions of the LPC, aimed at ensuring free competition, special provisions to the same are included in some of the sector specific legislation.

Bulgarian Law on Electronic Communications presents an interesting mechanism for cooperation between the CPC and the Communications Regulation Commission (CRC). As part of its obligations under the law, every two years the telecom regulator makes an assessment and analysis of the level of competition on the relevant markets of electronic communication networks and/or services, as well as it identifies undertakings with significant market power on the relevant markets. On the basis of these analyses the Communications Regulation Commission has the power to impose, extend, amend or revoke specific obligations of undertakings, having significant market power.

The terms and conditions and the procedure for identification, analysis and assessment of respective markets and the criteria to be applied to determine undertakings with significant market power are laid down in a methodology, which was drafted and adopted by the telecom regulator, in cooperation with the Commission on Protection of Competition, in compliance with the general principles of the competition laws and in compliance with the requirements of the European Community law. Furthermore, the Law on Electronic Communications stipulates that when determining the relevant market the telecom regulator should be led by the principles of the competition law. The draft decision of the Commission, identifying the relevant market, the analysis and the assessment whether there is effective competition, including determining the undertakings with significant market power on the relevant market and the specific obligations to be imposed, maintained, amended and/or withdrawn, as well as the Communications Regulation Commission draft Annual Report are sent, as a rule, to the CPC, which issues opinion.

Further to its interaction and cooperation with the sector regulators, Bulgarian Commission on Protection of Competition is actively using its competition advocacy powers and the powers to conduct sector inquiries in order to identify those legal provisions in the sector specific regulation, which unnecessary restrict competition. In this respect the CPC is led by the conviction that the achievement of the legitimate goal of protecting public interest through the imposition of sector specific rules should be done with the least restrictive measures.

It should be noted however, that the problem of competition is only one of the particular issues, covered by sector regulation. Sector regulation generally ensures the achievement of different public policies and involves numerous “technical” problems, which should be dealt with, but many of them do not affect competition (for example, the safety of pharmaceutical products or the freedom of media) and thus out of the scope of interest for the competition authority. Therefore, the dual system, adopted in Bulgaria - sector regulators, dealing with the other public policies and the ensuing technical issues and competition authority, ensuring at horizontal level the applicability of competition rules to all economic sectors, seem to be most appropriate. It should be noted however, that such a system necessitates the active approach of the competition authority to pursue the strict enforcement of competition regime in all sectors. Needless to say, a well established legislative and institutional framework for interaction and cooperation between the sector regulators and competition authority is a prerequisite for the successful implementation of both the sector specific and competition policies.

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2 Art. 23. (1) In exercising the regulatory powers thereof, the [State]Commission [on Water and Energy Regulation] shall be guided by the following general principles: 1. preventing and precluding the limitation or distortion of competition on the energy market; 2. balancing the interests of energy companies and customers;3. ensuring non-discrimination between the various categories of energy companies and between groups of customers; 5. providing incentives for development of a competitive market for energy sector activities, where conditions so permit.

Referring to its enforcement powers under the Law on Protection of Competition, Bulgarian Commission on Protection of Competition has the sole competence to investigate possible infringements of LPC rules in the area of antitrust, as well as to exercise merger control. Regardless of the existence of sector specific regulation and regulators, the conduct of regulated undertakings as to their observance of competition rules and the mergers in regulated sector are subject to investigation by the CPC under the provisions of the LPC.

The existence of sector regulation for undertakings, being investigated by the CPC, is taken into account during the procedure. The CPC itself, as part of the case economic and legal analysis, makes an assessment of the impact of the regulation on the behavior of the undertakings concerned or on the competitive effect of a merger. Particularly in merger cases, the general legal framework,as well as the specific sector regulation are always assessed by the CPC in order to identify the existing barriers for entry to the market concerned. The opinion of the sector regulator is also taken into account, together with the opinions of the competitors and interested third parties. Specific data on the sector concerned is usually collected by the corresponding regulator and the Commission on Protection of Competition relies very much on this information during its investigations.

The same approach of making its own assessment of the regulatory framework is also applicable to the CPC investigations for alleged anti-trust violations of the LPC. Apart from the Commission's own analysis of the impact of regulation on the undertaking's conduct, the party concerned may invoke itself the regulated conduct defense in its opinions, submitted to the CPC during the procedure. It is a general practice not to fine an undertaking for a conduct which, while it constitutes an infringement of the antitrust provisions of LPC (especially the abuse of dominance provisions), is objectively the consequence of a sector specific regulation. The CPC may, in these circumstances, use its advocacy powers in order to suggest to the competent bodies to amend those aspects of the regulation which are in contradiction with the LPC.

In some cases, the undertakings may possibly invoke sector specific provisions that regulate the competition on the markets concerned. A problem may arise where such provisions contain specific, pre defined relevant market definitions serving the regulatory purpose of sector legislation. In the event of a parallel investigation of the CPC of a given undertaking that is subject to the aforementioned regulation, the CPC could legitimately come to a relevant market definition that differs from this of the sector regulation. Such a scenario could indeed create among the undertakings the feeling of a double standard competition approach to the same factual situation, depending on whether the control is on an ex-ante or ex-post basis. It should be noted however that the purposes of the ex-post control of the CPC is to correct market dysfunctions that could not have been effectively corrected by the sector regulation, which should allow ex-post flexibility in defining the relevant market as well.

# ROMANIA

## 1. Role of Romanian competition authority in regulation

The Romanian Competition Council (RCC) takes into account the fact that competition is key to efficiency and welfare in basically any economic sector. The presence of regulation aims at achieving the same goal, through an ex-ante approach, in industries and situations where competition cannot act alone or other public interest goals are at stake (regulation is a substitute of competition).

RCC performs its activity, intended to establish the rule of free competition, in a market which was liberated not so long ago from the constraints of a centralized economy, dominated by large state owned companies.

Even if the competition authority does not issue economic regulations such as control of prices or non-economic regulations as for example quality standards, it has an important role in designing sectoral regulation frameworks, either before a legal norm comes into force or after its enactment. This role arises from RCC's legal power to deliver binding opinions on the draft laws or regulations that may have an anticompetitive impact and from its power to require the amendment of legal provisions that affect competition.

Also, the possibility of issuing non-binding opinions may be an effective way of advocacy. According to the national competition law, Romanian Competition Council may recommend to the Government and the local public administration to adopt measures which foster the competition and development in the market.

Regulations/other actions of administrative bodies, at local or central level, which generate significant competitive distortions, are prohibited by competition law; therefore the competition authority may open an investigation and order the cessation of the unlawful conduct. These attributions have been enforced according to recent amendments to the competition law. Now RCC may impose heavy fines on any administrative body that does not cooperate during the procedures.

The protection and strengthening of the competition is mentioned as a primary goal by all laws regulating specific industries, such as telecommunications and energy.

Apart from the above-mentioned legal framework governing the interaction between competition authority and sector regulators or other administrative bodies which enact regulatory measures according to their attributions, cooperation mechanisms have been set by MoUs signed between the Romanian Competition Council and the main regulators, covering mainly the exchange of information between parties and the delineation of attributions and coordination of market interventions.

For example, the MoU concluded with the national regulatory authority in telecom sector (ANCOM) stipulates that RCC and ANCOM should cooperate whenever undertakings commit certain deeds or acts that may constitute, simultaneously, both an infringement of Competition Law and an infringement of the primary or secondary legislation in the field of electronic communications or postal services. The two parties should also cooperate in cases where either RCC or ANCOM already issued a decision, in order to

avoid *contradictory measures or decisions, or the imposition of disproportionate sanctions or obligations as compared to the objectives of the two institutions.*

Therefore, under the cooperation protocol, where one of the parties finds that it has no competence provided by law to investigate or settle a certain dispute in the field of electronic communications or postal services, but considers that the respective dispute may fall under the other party's competence, the former shall transmit to the other party the relevant information on the respective case under investigation, and shall notify, as the case may be, the interested persons. Whenever a negative conflict of competences occurs, the parties should meet in order to clarify the issue and to agree on the measures that must be taken in that particular situation.

On the other hand, where one of the parties finds that it has the competence, according to the law, to investigate or solve a certain case in the field of electronic communications or postal services, but considers that the respective case could also involve the competence of the other party, the former shall inform the other party, for the purpose of identifying a potential positive conflict of competences.

In both types of cases, the party receiving the information shall make its stand on the case, whereas both parties shall inform each other regarding other aspects they may deem relevant.

If, during the parties' correspondence or meetings, it is revealed that one of the parties is not competent to investigate or to solve the respective case, the former shall decline competence.

If both parties decide to continue the investigations or the case settlement, they shall consult each other in order to ensure consistency of the decisions and proportionality of the sanctions and obligations imposed on the providers of electronic communications networks and services or on the postal service providers, taking into account the seriousness and the duration of the infringements, as well as their consequences on the competition. In those situations when either RCC or ANCOM has already issued a decision or imposed obligations in the same or similar case, the party that investigates must request an opinion from the other party, opinion which is non-binding. Also, during the procedures, the parties should meet and analyze the circumstances of the investigated deeds and the consistency of the decisions adopted by each party.

## 2. Hierarchy of norms

A regulation issued by the national legislative body (Romanian Parliament) can not overrule the application of art.101 and 102 TFEU since, according to the Constitution, the application of the treaties' provisions (including TFEU) prevails over the Romanian national legislation. Moreover, the free competition is expressly provided by article 135 of the Romanian Constitution. In such situations competition law provides the possibility for RCC to intervene in order to remove the rules that may lead to anticompetitive behavior.

A regulation enacted by an executive body or a regulatory authority does not prevail over competition regulations. Also, a regulation enacted by a public authority or a private body cannot overrule the application of competition law rules.

It is true that regulations may leave a certain level of discretion to regulators over decisions. Also, regulatory decisions may leave substantial discretion to companies over how to behave (e.g. price cap regulation). But this margin of discretion does not grant protection in antitrust cases for undertakings subject to regulations. Moreover, a higher degree of discretion of the undertakings reduces the credibility of a regulated conduct defense. We believe that the application of regulations does not override the application of competition rules, especially in cases where such regulation is vague or the regulator does little ("has a soft hand") in enforcing the competition rules.

## 3. Cooperation with national regulatory authorities (NRAs) on competition law cases

In order to alleviate the potential conflicts between RCC and NRA, the basic principle is to interpret the regulation in light of competition principles. In fact, the intervention of the NRA must substitute the forces of the market, in order to generate for consumers (end users) similar benefits to those arising from a competitive market. There are a number of situations when the competition rules are not entirely applicable such as universal services, objective constraints regarding the rights of way that derived from public safety considerations, protection of the environment, etc. But in these situations the intervention of NRA must respect *the principle of minimum distortion of the competition.*

In practice, there are some meetings and formal or informal exchanges of opinions and information, including at unit level (between experts) on the subject matter.

## 4. Monopolization or abuse of dominance cases

In its practice, RCC has been confronted with a number of cases where firms having market power and totally or partially regulated behavior invoked the defense that their behavior is already regulated.

There are a number of situations, apart from the ex-ante intervention on regulated markets, where a NRA intervention is necessary in order to ensure the provision of certain services at a minimum level of quality and at accessible prices – the provision of universal services.

The general legal framework[1] provides that the obligations imposed by NRA will not be regarded as anti-competitive *per se*, provided they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary for the kind of universal service provided.

Ensuring an universal service (that is, the provision of a defined minimum set of services to all end-users at an affordable price) may involve the provision of some services to some end-users at prices that depart from those resulting from normal market conditions. However, compensating undertakings designated to provide such services in such circumstances need not result in any distortion of competition, provided that designated undertakings are compensated for the specific net cost involved and provided that the net cost burden is recovered in a competitively neutral way.

Normally, the intervention of NCA in this matter (the provision of universal services) is not necessary, but can not be excluded if there are strong indications regarding an anticompetitive behavior from the universal services provider (i.e. exploitative or exclusionary conduct), especially if that undertaking is the incumbent (i.e. the former monopolist). The origin of that particular behavior may be found in the legal framework itself.

Generally, RCC operates the following distinctions:

- If the behavior is mandatory, RCC does not apply competition law for past regulated behaviors. In such situations, the regulated conduct defense may be used in response to RCC initiated enforcement cases. So far, the competition authority is not aware of any private enforcement actions in such cases in Romania. But we consider that the regulated conduct defense may be used successfully in those cases.

[1] EC Directives on universal services.

Nevertheless, RCC sends its report (and binding opinion) to the NRA in order to take appropriate measures to stop the incriminated practice and remove competitive concerns. Such measures must then receive an approval from the RCC before entering into force. If the NRA does not comply with RCC's binding opinion, RCC will start legal proceedings against the regulator, including opening a judicial procedure in order to restore competition on the market.

- If the behavior mentioned in the regulation is not mandatory or is rather vague, besides the **cease-and-desist order,** the undertakings may be fined by RCC. Regulated conduct defense may be used in response to RCC enforcement actions. However such a defense would only be regarded as a mitigating circumstance, resulting in a reduction of the fines (up to 10% from the base level of the fine). In private enforcement cases, the undertakings in question will continue to be considered liable for damages.

  Where the undertakings in question are already subject to a number of obligations imposed by NRA, but those may be insufficient, ineffective (too general) or may address only some services due to the limited area of NRA's competences in its decision RCC may impose supplementary obligations in order to restore the competitive environment. In that particular situation, RCC considers that it is inefficient to just duplicate the obligation in question; remedies imposed by RCC are, as much as possible, complementary to those already imposed by the regulator and cover only markets where the undertaking is dominant.

In order to illustrate the intervention of RCC, we will present an abuse of dominance case on Romanian postal services markets that involved the incumbent (*Posta Romana*), which is also the universal services provider.

### *4.1 Posta Romana [2010]*

First of all, between 2005 – 2009 Posta Romana was investigated for a number of alleged anticompetitive practices on postal services markets including an excessive pricing policy for the provision of direct mail services started in 2005 and a discriminatory treatment (March 2008 – August 2009) on the market of direct mail and commercial correspondence (bulk mail).

Until 2007, the direct mail postal service was not included in the area of postal universal services. On the other hand, the commercial correspondence service (bulk mail) is a postal universal service. Unlike commercial correspondence, which is reserved for Posta Romana in order to fulfill its obligation as postal universal services provider, the direct mail was not included in reserved postal services area.

For the excessive pricing allegation, Posta Romana defended itself on the following grounds:

- identical cost structures for the provision of these postal services,

- the regulatory intervention regarding the prices for the provision of universal service - ANCOM approved a price increase for the provision of commercial correspondence postal service, justified by the losses incurred by Posta Romana as a direct result of costs increases for the provision of this postal universal service,

- the prices for commercial correspondences and direct mail per a single postal item were identical,

- the structure of rebates was even more favorable for direct mail than for commercial correspondence, at least for lower volumes (up to 2%) and starting from lower quantities.

Even though at that time direct mail was not included in the universal services area, RCC considered the arguments provided by the incumbent as objectively justified. Moreover, ANCOM's intervention on a similar regulated market with the aim to ensure the provision of universal services at affordable prices led RCC to the conclusion that Posta Romana is not responsible for the alleged behavior.

As regards the discriminatory treatment presumption, between March 2008 and August 2009, Posta Romana applied the following discriminatory discount policy for its clients (i.e. undertakings):

- for the supply of direct mail services, two situations could be distinguished:

  – if the customer was also the sender[2] of the postal items, discounts were granted for the consolidated volume (i.e. originated only from the respective customer);

  – if the customer was an intermediary, it received separate discounts for the volumes of each client.

  As a result, the intermediaries could not benefit from discounts for the consolidated volume generated by some of their clients (small or medium senders).

- for the supply of bulk mail services, discounts were granted only if the customer was also the sender of the postal item. As a result, in this market the situation was worse, intermediaries being excluded from getting discounts for the volume generated by all their clients (i.e. small or medium senders which can't receive the discounts themselves).

In fact, prior to the implementation of this pricing policy, documents received by RCC during the investigation revealed that Posta Romana intended to exclude its competitors from the upstream market of mail preparation. The pricing policy that Posta Romana intended to implement was a discount policy oriented only towards senders, on the ground that they originated the postal items and therefore they should receive the discounts. The incumbent did not intend to grant discounts to intermediaries even though intermediaries, and not senders, were contracting parties in the agreements concluded with Posta Romana regarding the respective postal services (direct mail and bulk mail). Moreover, the incumbent intended to grant additional discounts to its clients for self- transportation of postal items (between regional points of its network) and fidelity discounts which increased gradually according to the duration of commercial relations with its customers for the provision of the postal services on the relevant markets.

RCC intervened and warned the incumbent about the consequences that the implementation of such a discount policy might have on competition in upstream markets. As a result, the incumbent adjusted slightly this pricing policy to the policy described above, by renouncing to the fidelity discount.

Posta Romana is also a provider of mail preparation services. The key feature of these upstream markets is the possibility of intermediaries to secure a reduction of postal services costs for their clients, especially for those clients which generate small amounts of volumes (i.e below the threshold of the Posta Romana rebates scheme). So even though this discount policy was also exploitative, in fact Posta Romana's conduct had an exclusionary effect by rising the rivals' costs on the upstream markets.

In its defense, Posta Romana stated that its discount policy was based on the definition for direct mail postal service in the regulatory framework. According to Posta Romana, the definition for *direct mail* issued in 2003 (and reenforced in 2007) in conjunction with the definition of *the sender* led to the

[2] Defined as the natural or legal person which originates or generates the postal item. The postal items belong to the senders and the intermediaries provide services of mail preparation to the senders.

conclusion that in order to receive discounts for direct mail, the postal items must be introduced in the postal network only by the same sender. So intermediaries can receive discounts only for the postal items originated by themselves and not for postal items prepared for the other senders as their clients. Nevertheless, Posta Romana granted discounts also to intermediaries for the volumes of their clients (i.e. senders) in the manner already described above.

But until March 2008, even if the definition of direct mail services was already in force, Posta Romana granted discounts to intermediaries only based on the volumes and the degree of sorting of each cathegory of postal items, without any regulatory intervention or sanctions for this conduct. Moreover, after March 2008, its interpretation of the direct mail postal service definition was applied inconsistently, resulting in a discriminatory treatment between a specific mail preparation firm (i.e. Infopress Group SA) and its competitors by granting discounts for the consolidated volumes only to this particular firm.

Similarly, in the case of bulk mail services there was a provision in the secondary regulatory framework (regarding the rights and obligations of Posta Romana as universal services provider) according to which the incumbent could grant discounts on avoided costs basis for large volumes generated by the same sender only if Posta Romana and the sender had concluded a prior written agreement.. But until March 2008, even if this provision was in force, Posta Romana granted discounts to intermediaries only based on the volumes and the degree of sorting of each cathegory of postal items, without any intervention or sanctions from the regulator for this conduct.

RCC initiated a series of meetings and discussions with the regulator in order to remove any legal provisions that may induce an anticompetitive behavior of the incumbent. In April 2009, during the public consultation on the draft decision regarding the appointment of the universal services provider, RCC made public its opinion about the necessity of changing the definition of the direct mail services and the transposition of Art.12 par 5 of the Amended Postal Services Directive[3]. Such amendments were seen as necessary in order to prevent any exploitative or exclusionary conduct from the universal services provider. Subsequently, the regulator amended the provision in question accordingly.

However, Posta Romana did not comply with RCC's opinion immediately. Moreover, even though RCC made its opinion public and warned the incumbent about the potential infringement of competition law by implementing such discriminatory discount policy, the incumbent put an end to its behavior only in August 2009, shortly before RCC opened a new procedure.

The documents sent by the incumbent in its defense revealed that Posta Romana proposed to NRA some legislative measures with the aim to enforce its discount policy. Moreover, the regulatory measure proposed by Posta Romana would have granted the incumbent the freedom to implement any type of discount policy it considered appropriate in order to maintain its market position, to keep the large senders as its clients and also to have the possibility to attract new customers.

As mentioned before, Posta Romana tried to use regulated conduct defense in order to get immunity for its behavior. RCC considered that the regulatory provisions invoked in the defense were not mandatory and, as already described above, gave Posta Romana a certain level of discretion.

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3 "…whenever universal service providers apply special tariffs, for example for services for businesses, bulk mailers or consolidators of mail from different customers, they shall apply the principles of transparency and non-discrimination with regard both to the tariffs and to the associated conditions. The tariffs shall take account of the avoided costs, as compared to the standard service covering the complete range of features offered for the clearance, transport, sorting and delivery of individual postal items and, together with the associated conditions, shall apply equally both as between different third parties and as between third parties and universal service providers supplying equivalent services. Any such tariffs shall also be available to private customers who post under similar conditions."

Moreover, the investigation showed that:

- Posta Romana's interpretation of the regulatory framework was subjective and inconsistent, addressing its own anticompetitive goals;
- Posta Romana did not change its policy even when warned by the RCC;
- Amendments proposed by Posta Romana to the regulatory framework clearly showed that the incumbent was aware of its flawed interpretation of the regulation.

Nevertheless, RCC considered that the regulatory framework offered the possibility for the incumbent to apply these legal provisions in an abusive manner. This fact was taken into account as a mitigating factor in the establishment of the fine, granting Posta Romana with a 10% reduction of the basic level of the fine.

## 5. Merger cases

In Romania, mergers are reviewed exclusively by the national competition authority. A tool in assessing the market power of the new entity after the merger and its ability to behave independently from its competitors is the analysis of the regulation in force from the perspective of scope and effectiveness.

Regarding the incidence of a regulated conduct defense in merger cases, there were several instances where the merging parties cited the existence of regulation to facilitate the clearance of the merger. Again, cited below as an example is a merger in the telecom sector:

### *5.1 Romtelecom/Newcom [2010]*

The incumbent proposed the acquisition of a part of a competitor in the fixed line telecommunication. The merging firms argued that the market power resulting from their merger could not be abused because regulation will prevent such abuse. At that time, the incumbent was holding a dominant position only in the national and local call markets. Before the merger took place, these markets were deregulated and RCC expressed its favorable opinion, based on the market condition and the regulation of the upstream markets (the wholesale markets of origination, call termination, unbundled local loop).

Nevertheless, in its decision RCC took also into consideration:

- the limited degree of network overlapping between merging parties,
- the small contribution of the acquired firm on these retail markets (up to 2%)
- the fact that the incumbent was not the market leader in other markets concerned (broadband internet access and retransmission of TV packages) and the merged entity did not affect the structure of those markets,
- the acquired firm was in critical financial condition due to poor management decisions and lack of financial resources.

## 6. Horizontal agreements

In RCC's enforcement record there were a consistent number of cases where parties to an anticompetitive horizontal agreement claimed their behavior was either determined by the existing

regulatory framework or was motivated by a requirement of the regulator. Moreover, regulated conduct defense was also claimed by liberal professions or in markets where professional associations attempted to self-regulate behavior on the respective markets with various justifications. Presented below are three such cases:

### *6.1 Romanian Motor Insurers Bureau (RMIB), [2003]*

Following a complaint regarding the insurance premium level charged for Green Card[4] insurance, RCC investigated the agreement concluded between the members of RMIB[5], having as object the concerted fixing of minimum insurance premiums.

The agreement generated an increase in the Green Card premium level with approximately 10 USD. At the same time, setting the minimum premiums caused market foreclosure and damaged consumer interest. Once implemented, consumers had no possibility to choose, as all authorized undertakings adopted the same increased levels of insurance premiums.

In their defence, RMIB representatives and the insurance companies upheld that setting the minimum insurance premiums and their implementation did not restrict competition, since such actions were meant to avoid "an extremely low level of premiums that was uncorrelated to the risks assumed and not adequate to create the technical reserves necessary to the settlement of damages". RCC concluded that such reasoning could not justify an agreement on concertedly fixing the minimum premiums and, anyway, a measure intended to prevent the insolvability of insurance companies does not justify the infringement of Competition Law.

### *6.2 Accor Services SA, Bluticket SA, Cheque Dejeuner Romania, Cuget Liber Poligraf SA, Hungastro SA, International Financial Services SA, Proserv SA, Sodexho Pass SRL [2004] (the "food vouchers" case)*

RCC investigated *ex officio* the agreement between Romanian companies issuing food vouchers, that occurred in 2004 and set a minimum commission of 2% to be applied to the food voucher's value as of April 2004.

In the observations submitted to RCC, a part of the involved undertakings disputed the incriminating nature of the document undersigned by them in March 2004 at the Public Finance Ministry's headquarters, called the Minute. Hence, these companies emphasized that the Minute was in fact an administrative act, representing an administrative measure of the Public Finance Ministry on a regulated market, and in the absence of the involved undertakings' free autonomy of will.

RCC dismissed these arguments, since it had already been proven that the companies had initiated the agreement and a consensus in that respect had been reached as a result of repeated meetings. In addition, there was no evidence to indicate that the Ministry had imposed the setting of the minimum commission's level. Likewise, the mere act of signing a document was reckoned to represent a free manifestation of their

4 Third person liability insurance for vehicles, for accidents occurred abroad.

5 Romanian Motors Insurers Bureau is a nongovernmental professional organization, set up by the Romanian Motors Insurers, with the purpose of developing cooperation in the field of vehicle insurances and representing insurance undertakings in their relations with other Romanian or foreign organisations. According to RMIB Statute, in force at the date of the agreement, RMIB had no attributions as Issuer Office or Managing Office. Therefore, it had no power to repay to foreign Management Offices the amount of due compensations for damages caused by the insurance's holders. At the same time, RMIB had no attribution to pay compensations to Romanian third injured persons.

will, engaging their commitment with respect to the document's content and also their legal responsibility for the assumed obligation. Consequently, the Minute undersigned by the companies reflects the parties' consensus on the enforcement, starting from April 2004, of a minimum commission amounting to 2% for services provided to the employers.

On the other hand, the Ministry had no legal powers to intervene upon commercial relations between the concerned undertakings and their clients. The Ministry's interference in that field was materialized only in setting the total number of consumers that could benefit from food vouchers, in allotting the overall amount of food vouchers between the issuing companies, establishing criteria to be met by the companies in order to get the authorization and, finally, in licensing the companies to issue food vouchers. In addition, although the Minute reaffirms the involved parties' consensus, this cannot be deemed, either in its substance, or in its form, as an act by the authority, or as a manifestation of an express, unilateral will, subject to a regime of public power. However, RCC considered the involvement of the Public Finance Ministry as a mitigating circumstance.

In its final decision, RCC found that the companies issuing food vouchers concertedly fixed commissions in connection to their clients and sanctioned the involved companies for the infringement of the Competition Law.

In addition, the investigation revealed that the enforcement of the legislative framework on the methodology of allotting the number of food-voucher beneficiaries to the issuing companies had a negative impact on the market analyzed, as it set discriminatory conditions for the issuing companies, and raised barriers to entry in the market. As a result, RCC recommended to the initiators, namely to the Ministry of Public Finance and the Ministry of Labour, Social Solidarity and Family, to take the necessary steps in order to facilitate market and competition development, in the sense of waiving the provisions setting the allotment of beneficiaries' quotas between issuing companies. Consequently, the aforementioned normative act was repealed.

Six of the eight undertakings involved contested in Court the decision of RCC. In 2005, the Bucharest Court of Appeal, as first instance court, ruled in all six appeals by upholding the Competition Council's decision. In its judgement, the Bucharest Court of Appeal underlined that the Minute shows the undertakings' concurrence of wills concerning the fixing of a minimum fee, representing an express agreement of undertakings having as object the distortion of competition in the meaning of art.5(1) of Competition Law.

The court noted that the role and involvement of the Ministry of Public Finance does not exonerate the undertakings of their actions, because the Ministry's attributions are exercised in the limits of their legal framework and are related only to the regulated part of the meal ticket market and therefore not applicable to the fee. The Court showed also that the involved parties were well aware that the commercial agreement they concluded was aimed at profit maximization, and that the Ministry of Public Finance had no jurisdiction to apply sanctions if the undertakings involved did not observe the minimum level of fee, influencing thus the conclusion of agreement. The latter argument was used by the incumbents in their defence.

### *6.3 Mandatory pensions funds (Pillar II) [2010]*

On 7 September 2010, RCC adopted a decision finding that 14 administrators of private pension funds had concluded an agreement aimed at sharing clients which registered with more than one private pension fund (double applications) and that this agreement infringed Article 5 (1) let. c) of the national competition law as well as Article 101 TFEU.

According to the legislative framework in force in 2007, any employee under 35 years old was obligated to contribute to a private pension fund. During a so-called "period of initial adhesion" which lasted from September 2007 to January 2008, any employee under 35 years old had the possibility to contribute to one of the pension funds present on the market, chosen in accordance with their own personal criteria. The legislation also foresaw that in cases where a client was reported by one or more administrators as having signed several individual adhesion acts, the national regulator would register that person as a "double application". Double applications will then undergo a process of random allocation proportional with the administrators' market share in Romania. The process of random allocation was also applied in cases where no individual adhesion was signed.

Pension funds administrators are commercial companies. In the course of its investigation, RCC found that the competing undertakings agreed to share double applications according to their own rules, namely 50% - 50%, in order to obtain a higher number of clients, and consequently, a higher market share. According to documents in the case file and to statements taken by RCC, proposals to share the undecided participants were initiated or accepted by the main competitors on the market. The anticompetitive agreement covered the entire territory of Romania and the undertakings involved had a combined market share of 95% on the market of mandatory privately administrated pension fund. The period for the initial adhesion was crucial for establishing the hierarchy on the market (4 million participants).

Even though the agreements were not concluded formally, they were put into practice on a bilateral basis between administrators all throughout the initial adhesion period. In their defense, the parties stated that the 50%-50% allocation solution is a better solution for the interest of the clients than the random allocation solution adopted by the sector regulator (CSSPP); they stated also that CSSPP recommended the re-allocation of the double applications. No evidence in this respect was produced by the parties. The sector regulator had no legal powers to make such a recommendation. During the oral hearing before RCC, the CSSPP representative underlined that the sector regulator did not make such a recommendation.

In its analysis, RCC found that the agreements in questions were not triggered or motivated by regulation, but rather a free manifestation of will; moreover, their goal was not the best interest of the clients, but rather the preservation of market shares between pension funds. Nevertheless, given that the agreements were facilitated by a series of meetings and discussions with the sector regulator, CSSPP, where administrators tried to get CSSPP to validate their allocation system, the participation of CSSPP in all the proceedings was considered a mitigating circumstance and therefore all parties to the anticompetitive agreement were granted a reduction of the basic level of fine.

# RUSSIA

The Federal Antimonopoly Service of the Russian Federation (the FAS Russia) encounters regulated conduct defense when applying competition legislation with regard to a number of regulated sectors of economy, in certain cases this leads to the fact that activity of such companies is exempted from the competition legislation.

Thus, the Federal Law № 135-FZ of 26.07.2006 "On Protection of Competition" sets forth the only exemption from the competition legislation, which is applied for certain actions of economic entities that occupy dominant position and that simultaneously are the subjects for the application of the law on natural monopolies.

This exemption means that the price on the product or service can not be admitted as excessively (monopolistically) high or low if it is set by the subject of the natural monopoly within the tariff fixed by the Russian Federal Service on Tariffs on such products or services. Such defense is justified by the requirement of the legislation on establishing regulated tariffs at the level of the economically justified costs and necessary reasonable profit, i.e. requirements of the competition legislation are a priori met.

At this, the FAS Russia as a member of the Board of the Russian Federal Service on Tariffs (tariff regulator) takes part in fixing tariffs on product circulated within the sphere of natural monopoly. At the meeting of the Board of the tariff regulator the FAS Russia present its opinion in a written form where it expresses it consent or disagreeing over the tariffs in question. In case the FAS Russia disagrees with the tariffs level it submits its reasoning over disagreeing with the decision, warns over possible consequences of taking such decision by the Board of the tariff regulator.

It should be noted that the tariff regulator in accordance with the incumbent legislation sets tariffs at the utmost level. If the tariff regulator didn't set the minimum level of the tariff, the FAS Russia has a right to consider actions of the dominating subject of natural monopoly that set an excessively low price as a violation of competition legislation with regard to establishment and maintenance of monopolistically low price (telecommunications and postal services, services in the transport terminal, port and airports).

Other actions of dominating subjects of natural monopolies are mot exempted from the competition legislation.

At the same time when considering cases on violation of competition legislation the subjects for sectoral regulation refer to regulation as a justification of their anti-competitive conduct.

Thus, the Federal Law "On Communications" introduces notion of "operator holding significant position at the communication network (significant operator). Criteria for operator being a significant are purely of technological nature and they do not take into account market power of such operator on the communication market. Encumbrances imposed on the significant operator are similar with the purposes of antimonopoly regulation, moreover state regulation of tariffs on services on connection to the telecommunication networks and services on traffic pass (including termination) is introduced for significant operators.

In 2009-2010 the FAS Russia considered cases on abuse of dominance by the significant operators (dominant position is defined under general rules). Abuse was in imposing by these significant operators of unfair terms of contract for connection and interaction of telecommunication networks, as well as in refusal to conclude a contract on connection when commitment for such connection is directly established by the sectoral legislation for the significant operators.

To prove their conduct the significant operators referred to the facts that:

firstly, sectoral legislation sets forth cases of compulsory connection to the networks for the significant operators and other ways for connection that are favourable for counteragents are not established as compulsory by the sectoral legislation;

secondly, tariffs of the significant operators are subject to state regulation and under inevitable reduction of profits that would happen as a result of activities of the competitors, the significant operators would not be able to increase prices to compensate lost profits.

Such conduct of the significant operators can lead to restriction of competition on the market of the traffic pass, prevents development of infrastructure by competitors that results in a negative impact on development of telecommunication services on the whole.

The FAS Russia considers reduction of profits as a result of development of competition as a common risk and takes into account that regulated tariffs for the significant operators are set at the level of the economically justified costs, therefore such activity can not be unprofitable.

The judicial practice on consideration of such disputes is ambiguous, however the FAS Russia insists on inadmissibility of maintaining profits of the regulated subject at a high level to the prejudice of development of competition.

The legislation of the Russian Federation can set forth monopolies of the economic entities on the certain product markets, for instance: FSU “ITC “Mark” has a monopoly on production of marks for postal payments; FSUE “Post of Russia” has a monopoly on rendering services in the places of international post exchange, on provision of postal money orders; radio frequency services entities have a monopoly on providing distinguishing signals for radio services, on conduction of expertise of electromagnetic compatibility of radio electronic means. Introduction of such monopolies is justified, primarily, by the requirements of the social security and protection.

In all the cases requirements of the competition legislation on inadmissibility of the abuse of dominant position are fully applicable to the subject monopoly of which is established by law. Thus, the FAS Russia considered cases with regard to the entities of radio frequency services on abuse of their dominance when holding expertise of electromagnetic compatibility of radio electronic means. The last case was considered in 2010 with imposition of a 100 000 rouble fine over FSUE “Main radio frequency center”. The decision was not appealed.

Moreover, it should be noted that the Federal Law №147-FZ “On Natural Monopolies” (Article 7) defines the sequence for conduction of the state control over economic concentration in the spheres of natural monopolies. This function is carried out by the FAS Russia.

The rules for consideration by the FAS Russia of pre-merger and post-merger notifications submitted in accordance with the requirements of the Article 7 of the Law on natural monopolies are defined in the relevant Order of the FAS Russia № 54 of 16.03.2006.

On the whole the FAS Russia finds it inadmissible to exempt actions of the subjects of sectoral regulation that lead or can lead to restriction of competition or infringement of interests of other persons from the sphere of application of competition legislation.

# SOUTH AFRICA

## 1. Introduction

This submission reviews the regulated conduct defense as it has emerged in the electronic communications sector in South Africa. First we provide a brief summary of the relevant legislation. Then we review developments to date arising from the cases against fixed-line incumbent Telkom on the one hand—where the regulated conduct defence has been invoked in the context of a jurisdictional challenge—and complaints regarding mobile termination rates on the other hand—where the Competition Commission ("the Commission"), at its discretion, has deferred to the sector regulator, the Independent Communications Authority of South Africa ("ICASA").

## 2. Legislative background

When the Competition Act of South Africa No. 89 of 1998 ("the Act"), came into effect in November 1998, it conferred on the newly established authorities' powers to enforce competition throughout the economy. However, it appears that these powers would not be applicable to conduct authorised by public regulation as section 3(1) of the Act provided that:

> *"This Act applies to all economic activity within, or having an effect within, the Republic, except-*
>
> *(d) acts subject to or authorised by public regulation"*

The implications of the wording in s3(1) came under scrutiny early on, in 2000, during the Nedcor/Stanbic merger.[1] The Supreme Court of Appeal held that s3(1) excluded from scrutiny by the competition authorities conduct falling under s37 of the Banks Act (i.e. bank mergers). It appears that a literal interpretation of this precedent would have meant that the competition authorities would be excluded from taking action against anticompetitive conduct in all regulated sectors[2].

Wishing to avoid such an outcome the South African Parliament moved quickly to ensure that the Act applied to sectors of the economy regulated by other legislation. Bank mergers remained the only exception. For these the Minister of Finance has sole jurisdiction, but may utilise the services of the Competition Commission ("the Commission") if needed.

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1 Standard Bank Investment Corporation and the Competition Commission, 2000 2 SA 797 (SCA).

2 In his decision Judge AJ Schutz noted: "In the case before us there is no doubt that the proposed bank merger is an 'economic activity.' The question is whether it will be an "act" (Afrikaans "handeling") "subject to or authorised by public regulation." Read in the context of the Act the "acts" envisaged form part of a confined class. That is so because the subject matter of the Act is what may broadly be described as actually or potentially monopolistic or anti-competitive agreements, practices or acts, which are grouped under the headings restrictive horizontal practices, restrictive vertical practices, abuse of dominant position and mergers. Entering into an agreement or abusing dominance may in themselves be "acts" or "handelinge." Because of the frequency with which I will have to refer to the confined construction that I have placed on the word "act", and its importance, I shall refer to the word so construed as a "monopolistic act."

The Second Amendment Act, 2000 deleted paragraph (d) and inserted a new section 3(1A):

> *"(a) In so far as this Act applies to an industry, or sector of an industry, that is subject to the jurisdiction of another regulatory authority, which authority has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 of this Act, this Act must be construed as establishing concurrent jurisdiction in respect of that conduct.*
>
> *(b)The manner in which the concurrent jurisdiction is exercised in terms of this Act and any other public regulation, must be managed, to the extent possible, in accordance with any applicable agreement concluded in terms of section 21(1)(h) and 82(1) and (2)."*

The amendments of 2000 notwithstanding, the Competition Commission would continue to face jurisdictional challenges relating to the conduct of firms in regulated sectors. This was particularly evident in the telecommunications sector where attempts by the Commission to bring complaints of anticompetitive conduct against the fixed line incumbent to the Competition Tribunal were stymied as a result of litigation on jurisdiction.

Perceived inconsistencies between the Competition Act and legislation governing the regulation of the electronic communications sector appear to have played an important role in informing further amendments to the Competition Act. In particular, the Department of Trade and Industry (DTI) was concerned that section 67(9) of the newly introduced Electronic Communications Act, No. 36 of 2006 (" the ECA"), would remove concurrency and introduce legal uncertainty on the role of the Competition Authorities in regulated sectors[3].

According to section 67(9) of the ECA, "subject to the provisions of this Act [the ECA], the Competition Act applies to competition matters in the electronic communications industry". There was concern that the 'subject to' clause would effectively exclude the application of the Competition Act to the conduct of firms regulated in terms of the ECA and that this outcome could potentially be replicated in other sectors by introducing similar clauses into the legislation applicable to those sectors.

The DTI sought to remedy this by proposing that the words 'subject to' in s67(9) of the ECA be replaced with the word 'despite' and that s3 of the Competition Act be replaced with the following:

> *"In so far as this Act applies to any conduct arising within an industry or a sector of an industry which is subject to the jurisdiction of another regulatory authority in terms of any other legislation:*
>
> *this Act, and that other legislation, must be construed as establishing concurrent jurisdiction in respect of any conduct that is regulated in terms of both of these Acts, subject to paragraph (b) such that:*
>
> *(i) any other regulatory authority contemplated in this subsection will exercise primary authority to establish conditions within the industry that it regulates as required to give effect to the relevant legislation in terms of which that regulatory authority functions, and this Act;*
>
> *(ii) the Competition Commission will exercise primary authority to detect and investigate alleged prohibited practices within any industry of sector, and to review mergers within any industry or sector, in terms of this Act; and*

[3] Presentation by the DTI to the Parliamentary Portfolio Committee on Trade and Industry in May 2008.

*(b) details of the administrative manner in which any concurrent jurisdiction contemplated in paragraph (a) is to be exercised, must be determined by an agreement between the Competition Commission and that other regulatory authority, as provided for in sections 21(1)(h) and 82(1)"*

The above proposed amendments have now been signed into law in terms of the Competition Amendment Act, No. 1 of 2009. The President of the Republic of South Africa has yet (as of writing) to announce a date when the amendments will become effective.

## 3. Overview of legislation governing regulation in the electronic communications sector

The Telecommunications Act, No. 103 of 1996 ("the Telecoms Act")—older than the Competition Act—gave the sector regulator (ICASA[4]) powers to adjudicate and investigate competition matters in the electronic communications sector. Although the provisions on competition in the Telecoms Act happened to share common objectives with those that were established in the 1998 Competition Act, Telkom's license granted it considerable exclusivity in respect of core network services, especially in fixed line. Telkom enjoyed a complete monopoly until the introduction of a license for a Second Network Operator (SNO) in 2002.

The Electronic Communications Act (ECA) replaced the Telecoms Act from 19 July 2006, six years after the Competition Act was first amended. Complete liberalization of the sector was one of its central goals.[5] However, as mentioned above and seemingly paradoxically, the ECA pronounced that the Competition Act was 'subject to' it, thus further hindering the Competition Authorities' activities in telecommunications.

Chapter 10 of the ECA deals with competition matters. Sections 67(1), (2) and (3) deal with undue preference and undue discrimination, and sections 67(4)-(8) sets out a framework for *ex ante* regulation based on the principles of competition law analysis. In terms of section 67(4) of the ECA ICASA is required to develop regulations to define *'the relevant markets and market segments, … that pro-competitive conditions may be imposed on licensees having significant market power where the Authority [ICASA] determines such markets or market segments to have ineffective competition.'* The provisions in section 67(4) effectively require ICASA to apply competition law principles to identify market power problems and justify the imposition of "pro-competitive terms and conditions" provided for in terms of section 67(7) of the ECA which refers to, among other things, access conditions, accounting separation, and price controls. In short the ECA calls on ICASA to implement *economic* regulation, aimed at asymmetrically curbing the market power of the fixed line incumbent Telkom.

In this respect, the ECA appears to draw on the approach contained in the EC Framework Directive. This is consistent with the framework provided in section 67(4) – (8) of the ECA, which allows for *ex ante* regulatory interventions justified and developed on the basis of sound competition analysis. There should thus be no conflict of jurisdiction with the Competition Authorities as Chapter 2 of the Competition Act provides solely for *ex post* interventions.

However, uncertainty over jurisdiction may still be present where the Competition Authorities are pursuing allegations of anticompetitive conduct against a respondent who is also subject to an *ex ante*

4 Independent Communications Authority of South Africa, formerly known as the South African Telecommunications Regulatory Authority (SATRA).

5 The ECA reformed the licensing regime, with various service providers receiving equivalent licenses to those of the incumbent fixed line operators.

remedy. Following the guidance provided by the European case law[6] *ex post* intervention by the Competition Authorities should be limited to those cases where some discretion is afforded to the respondent to refrain from engaging in anticompetitive pricing. However, where the *ex ante* remedy affords no such discretion to the respondent then ICASA would have sole jurisdiction in this regard.

## 4. Memorandum of Agreement between the Competition Commission and ICASA

In 2002 the Competition Commission and ICASA entered into a Memorandum of Agreement ("MOA") in order to establish "the manner in which the parties will interact with each other in respect of the investigation, evaluation, and analysis of mergers and acquisition transactions and complaints involving telecommunications and broadcasting matters"[7].

While the MOA establishes a process for interaction between the Commission and ICASA on matters of mutual interest it is important to note that is was never intended as a guideline for defining and clarifying where jurisdiction should reside in particular matters. On the question of jurisdiction, while providing for consultation, paragraph 3.6 the MOA is clear that consultation is 'discretionary and voluntary' and that either regulator will make its 'independent decision' in exercising jurisdiction.

While ICASA and the Commission and ICASA have generally followed procedure in terms of the MOA there is recognition that more should be done to improve communication and coordination between the regulators – particularly on issues of jurisdiction. The Commission and ICASA are currently engaging on either amending or replacing the existing MOA in light of the ECA and the recent amendments to the Competition Act. However, this process is still underway. Therefore, as of the writing of this submission, the MOA of 2002 will remain in place.

## 5. The dispute over the Commission's jurisdiction in the cases against Telkom in the fixed-line market

This dispute over jurisdiction can be traced back to the South African Value Added Network Service Providers (SAVA) complaint where value added network service (VANS) providers and Internet Service Providers (ISPs) complained to ICASA and the Competition Commission that Telkom had engaged in exclusionary abuses. The Commission investigated the complaint, found that Telkom had abused its dominant position in contravention of the Act and referred the case to the Competition Tribunal for adjudication. The Commission charged Telkom with excessive pricing and discriminatory pricing in respect of the provision of access and backbone network facilities, as well as general exclusionary abuse in the manner in which it sought to enforce its own interpretation of its exclusivity rights.

Before the Tribunal could hear the matter, Telkom applied to the Transvaal Provincial Division (TPD) of the High Court to review and set aside the Commission's decision to refer. In its application Telkom sought an order declaring that the alleged conduct fell within the exclusive jurisdiction of ICASA and, as such, that the Commission did not have the power to refer these matters to the Tribunal. Further, that the Tribunal did not have any power in law to adjudicate on these matters. Telkom also applied to have the decision set aside on the basis the Commission did not follow proper procedure in terms of the requirements of the memorandum of understanding entered into between it and ICASA, did not refer all the complaints within the time period allowed for investigation, and that there was a reasonable apprehension of bias due to the Commission's alleged reliance on an external consultant's report.

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6 Deutsche Telekom AG, 2003 0.J. (L 263)9 and Deutsche Telekom v European Commission Case T-271/03.

7 Government Gazette Notice 1747 of 2002.

On 20 June 2008 the High Court ruled in favour of Telkom. In its decision the Court found that while the decision to refer was not reviewable as an administrative act under the Promotion of Administrative Justice Act (PAJA), the Court does have jurisdiction to determine whether the decision to refer is invalid on other grounds. In this regard the Court did find that the decision to refer was invalid on the basis that; there was a reasonable apprehension of bias in relation to the reliance on the external consultant's report, the Commission did not follow proper procedure in relation to its MOA with ICASA and, the referral had been brought outside of the one year time period specified in the Competition Act without the consent of all of the respondents. The High Court did not rule on the question of whether ICASA had exclusive jurisdiction in respect of the alleged anticompetitive conduct.

The Commission subsequently lodged an appeal with the Supreme Court of Appeal ("the SCA") challenging the High Court decision and asking that it be set aside. Telkom cross-appealed on the basis that the High Court should also have found that ICASA had exclusive jurisdiction over the alleged anticompetitive conduct and thus the Commission had no power to investigate and the Tribunal no power to adjudicate.

The matter was heard on 2 November 2009 and the SCA delivered its judgment on 27 November 2009. The SCA found in favour of the Commission on all grounds and thus the decision of the High Court was overturned. Of particular relevance was the finding by the SCA that the Commission's decision to refer could not be set aside on the basis of ICASA's alleged exclusive jurisdiction and that the Competition Tribunal would have been the preferred forum to adjudicate on the issues raised by Telkom. Regarding the following of procedure n terms of the MOA, the SCA confirmed that the Commission's independence to exercise it jurisdiction could not be subject to compliance with the provisions of the MOA.The SAVA matter will now be heard by the Competition Tribunal.

On 26 October 2009 the Commission referred a further five complaints involving allegations of abuse of dominance against Telkom (including those lodged by Internet Solutions, MWeb, Verizon and the Internet Service Providers Association) as one consolidated referral. The complaints raise similar competition issues to those raised in the SAVA matter. In this regard, it is specifically alleged that Telkom has abused its dominant position by engaging in a margin squeeze imposed on downstream network service providers (e.g., ISPs) who obtain facilities from Telkom. As with the SAVA matter, Telkom is raising a regulated conduct defense in respect of those areas it considers to fall within the jurisdiction of ICASA. There are two aspects to this. One relates specifically to facilities (e.g., leased lines) which are subject to price regulation. The other aspect is a more general defense which claims exclusive jurisdiction for ICASA as a consequence the provisions on competition matters in Chapter 10 of the ECA. As of the writing of this submission the matter has yet to be heard by the Tribunal. Although the power of the Commission to investigate and refer is now established in law the Tribunal will still have to adjudicate on questions of jurisdiction.

## 6. Complaints about interconnection and the level of mobile termination rates

After receiving numerous complaints of collusion, reaching back to 2004, the Commission chose to defer to ICASA on the question of interconnection agreements and the determination of mobile termination rates in the mobile telephony market. The Commission argued that ICASA is the appropriate regulatory authority to deal with the issue.

The complaints against the mobile operators can be summarized as follows:

- Interconnection prices in South Africa are amongst the highest in the world resulting in high retail prices for the consumer;

- The mobile network operators MTN, Vodacom, and possibly Cell C have colluded with each other in determining interconnection and retail prices;

- Vodacom and MTN conspired to impede the entry and expansion of Cell C in the market by drastically increasing interconnection prices immediately prior to Cell C's entrance into the market; and

- MTN and Vodacom are dominant firms in the alleged "interconnection service market" and have abused their dominant position by agreeing on substantially increasing interconnection prices, and therefore engaging in excessive pricing.

The Commission investigated the complaints under sections 4(1)(a), 4(1)(b), 8(a) and 8(c) of the Act, which prohibit restrictive horizontal practices (collusion) and abuse of dominance (excessive pricing and exclusionary conduct). After investigating the complaints, the Commission decided not to refer the matter to the Competition Tribunal for determination.

Although the Commission decided not to prosecute in terms of the Competition Act it nevertheless concluded that there are competition concerns with the level of interconnection prices (mobile termination rates in particular) and in the manner that the networks agreed on the interconnection prices.

The Commission found that the network operators met to discuss interconnection prices with each other and agreed on the interconnection prices and increases prior to the rates being lodged with ICASA for approval. On the basis that there is evidence that the respondents held meetings where all three parties were present, discussed and agreed on interconnection prices and related terms and conditions, it may be argued that they therefore colluded as alleged.

However the Commission found that in terms of their licenses and the Interconnection Guidelines set by ICASA, the network operators were and are required to meet and discuss interconnection prices.

Arrangements regarding the determination of interconnection prices, as well as other terms and conditions of interconnection, were first concluded in 1994 following multilateral negotiations involving Telkom, Vodacom, and MTN. These had been facilitated by the then Postmaster General. A special exemption had also been granted by the then Competition Board which allowed, among other things, restrictions preventing mobile operators from undercutting Telkom.

The exemption by the Competition Board and the facilitation of the process by the Postmaster General had taken place in the absence of there being any specific regulation of interconnection and, to a certain extent, was necessary because such regulation was not yet in place. With the subsequent introduction of a sector regulator the need for direct intervention by the Government and exemption by the Competition Authorities fell away as a general regulatory framework for interconnection[8] was now in place.

Subsequent interconnection arrangements were concluded in terms of the general regulatory framework for interconnection falling under the jurisdiction of ICASA. While this general framework provided for interconnection prices and related terms and conditions to be agreed between operators, no clear parameters were set down regarding the form of these negotiations and the appropriate conduct of competing operators in this context.

8 First in terms of the Telecommunications Act and now in terms of the Electronic Communications Act ("ECA").

The Commission's investigation found that there may well have been instances where multilateral negotiations involving operators included agreements extended beyond the legitimate purposes of interconnection, resulting in anticompetitive outcomes. However, such negotiations always took place within the context of the broader regulatory framework for interconnection falling under ICASA's jurisdiction.

Further, with regard to the allegation of excessive pricing, the Commission's findings were that mobile termination rates in South Africa are generally higher than those in comparable developing counties. The findings were that, on a cost basis, the interconnection prices (mobile termination rates) were in excess of the cost of terminating a call on their networks. Although the evidence was not conclusive on whether these rates are excessive in term of the Competition Act, they are indeed high in most comparisons and, in all likelihood, contributed to higher uncompetitive retail prices.

The Commission noted that it is of the view that competition problems arising in the context of interconnection should be addressed by the sector regulator responsible for the implementation of interconnection regulations. However, effective regulation of interconnection has been stymied, in large part, due to limitations in the legislation and gaps in the regulation. In particular, in terms of the now repealed Telecommunications Act, the Interconnection Guidelines did not allow the regulator to set mobile termination rates at an appropriate level. Rather, operators were free to negotiate mobile termination rates on commercial terms.

Given the inherent market power of operators over the termination of calls on their networks there is greater scope for incumbent networks to set prices in a manner and at levels not conducive to effective competitive outcomes. However, this problem is best addressed through price regulation and appropriate rules of engagement. Such *ex ante* regulatory intervention falls within the jurisdiction of the sector regulator. The Competition Authorities are ill equipped to deal with markets requiring *ex ante* regulation as their enabling legislation generally limits them to *ex post* interventions. This is indeed the case in South Africa, and it is mainly for this reason that the Competition Act has not been enforced with regards to matters involving interconnection between telecommunications network operators.

The Commission noted that it has been encouraged by recent developments in the regulation of interconnection. The ECA provides specific powers to ICASA to regulate interconnection and impose *ex ante* pro-competitive remedies. This is evidenced in recent proposed regulation released by ICASA providing for a glide path reduction in mobile termination rates. The Commission noted that it supported in principle the processes undertaken by ICASA and will continue to make substantive inputs as well as advocate best competition practice in respect of interconnection.

## 7. Conclusion

In an address to the Competition Commission Public Sector Consultative Forum in February 2009 Dr Rob Davies, then the Deputy Minister and now the Minister of Trade and Industry, made the following remarks regarding proposed amendments to the Competition Act to address issues of jurisdiction between the competition authorities and sector regulators:

> *"…the 2008 Amendment Bill seeks to improve the interface between the competition authorities and sector regulators by demarcating distinct responsibilities and providing a framework for cooperation. The Bill thus seeks to clarify the respective roles of competition authorities and other regulatory authorities. It provides for "other regulatory authorities" to exercise primary authority to establish conditions within the industry over which they have regulatory power, while giving the competition authorities primary authority to detect and investigate alleged prohibited practices under competition law as well as exercise powers of merger control. The*

*Bill provides further for the details of the exercise of concurrent jurisdiction to be defined by way of an agreement between the regulatory authority and the competition authorities."*

These words have particular resonance in the electronic communications sector where disputes regarding jurisdiction have frustrated both the competition authorities (Competition Commission and Competition Tribunal) and the sector regulator, the Independent Communications Authority of South Africa ("ICASA"), in their efforts to address competition problems in the sector.

The intent to clarify roles and define the details of concurrent jurisdiction needs to be unpacked. These amendments proposed in the Amendment Bill have now been enacted, although an effective date is yet to be announced by the President. In the case of electronic communications, how does one distinguish between the role of ICASA and that of the competition authorities in a manner that does not contradict the notion of "primary authority" in the exercise regulatory functions?

In providing a conceptual basis for clarifying roles, it is helpful to distinguish between two categories of market failure. The first category refers to market failure which arises from the anticompetitive conduct in markets whose structural characteristics support effective competition (or the potential for effective competition) but where effective competition is restricted as a consequence of the conduct of firms in that market. The second category refers to market failure which is inherent given structural and other features of the market in question and where the remedy is designed to simulate a competitive outcome. While this distinction provides a conceptual basis for clarifying a role for sector specific regulation versus that of competition policy its application in practice presents a number of challenges.

Considerable clarity can be achieved, and conflicts over jurisdiction avoided, if ICASA narrows its focus on those markets susceptible to *ex ante* regulation – i.e.; markets where *ex post* competition interventions alone are not sufficient to address market power problems that fall within the second category of market failure alluded to above. This is consistent with the framework provided in section 67(4) – (8) of the ECA, which allows for *ex ante* regulatory interventions justified and developed on the basis of sound competition analysis. There should thus be no conflict of jurisdiction with the Competition Authorities as Chapter 2 of the Competition Act provides solely for *ex post* interventions.

However, uncertainty over jurisdiction may nevertheless be present where the Competition Authorities are pursuing allegations of anticompetitive conduct against a respondent who is also subject to an *ex ante* remedy. This issue arises in existing cases where margin squeeze on the part of the fixed line operator Telkom is alleged in markets where *ex ante* remedies like price controls and access conditions are also present. If one were to follow the guidance provided by the European case law on this matter *ex post* intervention by the Competition Authorities would be limited to those cases where some discretion is afforded to the respondent to refrain from engaging in anticompetitive pricing. However, where the *ex ante* remedy affords no such discretion to the respondent then ICASA would have sole jurisdiction in this regard. Whether this approach will (or can) be followed in South Africa remains to be seen. However, such an approach would be consistent with the conceptual framework discussed in this paper and which appears to underlie the legislative framework for sector specific regulation and general competition law in South Africa.

# CHINESE TAIPEI

## 1. Introduction

This paper will illustrate the issues related to the Chinese Taipei Fair Trade Commission's policy approach to the regulated conduct defense, regulations and cases in the financial sector, as well as the conflict between regulations and competition law.

## 2. An overview of the types of regulated conduct defense in Chinese Taipei and the FTC's policy approach to the regulated conduct defense

In addition to regulating against anti-competitive behaviors that are sufficient to affect the market's operation, Chinese Taipei's Fair Trade Act also emphasizes the individual sectors capable of competition which need to be deregulated and opened up to competition. It is hoped that the competition mechanism can be introduced to the sector regulatory laws.

Before amendments of the Fair Trade Act in 1999, Paragraph 1 of Article 46 provides that the Fair Trade Act shall not apply to any act performed by an enterprise in accordance with other laws. In order to clarify whether sector regulatory laws should take precedence over the Fair Trade Act under Paragraph 1, Article 46, the Fair Trade Commission (hereinafter "the FTC") set up the "461 Review and Consultation Plan" when the Fair Trade Act was initially implemented.

To execute this plan, the FTC established the "461 Project Task Force", which they reviewed all regulations that could have possibly been inconsistent with the Fair Trade Act, and to do so, it had consultations with all relevant agencies. Any regulations that were possibly inconsistent with the Fair Trade Act were listed on the basis of the degree of impact they had both on trading order and on consumers' interests, and were classified into categories related to price setting, concerted actions, restraints on trading counterparts, discriminatory treatment, and so on. Since the aforesaid conducts are often carried out in accordance with sector regulatory laws, they are used as a legal defense against a violation of competition law[1].

The revised Article 46 of the Fair Trade Act states, "Where there is any other law governing the conducts of enterprises in respect of competition, such other law shall govern; provided that it does not conflict with the legislative purposes of this Law." Accordingly, for other laws to have precedence over the Fair Trade Act, the provision requires the precondition that "it does not conflict with the legislative purposes of this Law", rather than the mere existence of the sectoral regulatory authority and the other relevant laws. The rationale behind Article 46 for the application of the Fair Trade Act is function-based (for example, public interest, complementary measures for industry development) and concerns whether there is a conflict with the Fair Trade Act. In other words, the Fair Trade Act still applies when other laws "conflict with the legislative purposes" of the Fair Trade Act.

[1] Fair Trade Commission Decision regarding "461 Review and Consultation Plan" at its 171st Commissioners' Meeting on January 18, 1995.

One fundamental objective of Article 46 is to direct each sector to a competition-based system. Yet it cannot be ignored that, in the interests of industry policy, governments sometimes need to structurally regulate specific industries at certain stages by means of specific laws. However, in Chinese Taipei, such issues, or potential conflicts, are generally resolved through consultation with other authorities, as provided for in Paragraph 2, Article 9 of the Fair Trade Act. Undeniably, this enables competition policy and industry policy to complement each other and thus promote the stability and development of the overall economy.

## 3. The regulated conduct defense of the financial services sector and the FTC's handling approach[2]

### *3.1 According to Article 62-4 of the Banking Act, there are statutory exclusions that are applicable to mergers in the banking sector under certain circumstances*

To prevent financial storms from causing chain reactions as well as avoid financial catastrophes and maintain social order, the financial competent authority is entitled to assign other financial institutions to take receivership over a bank where there is a concern that a bank is unable to pay its debts when due or where there might be detriment to the depositors' interests due to obvious deterioration in the bank's business or financial status. The Banking Act stipulates the procedure of receivership in detail.

If the market share or total sales of the merging parties achieves the filing threshold stipulated in Paragraph 1 of Article 11 of the Fair Trade Act, the merging parties are required to file with the FTC in advance before the receivership procedure can proceed. However, as taking these steps may sometimes be too slow to handle financial crises effectively, the financial competent authority has therefore suggested that the Fair Trade Act not be applied to mergers in banking under such circumstances.

In response to the proposed amendments to the Banking Act by the financial competent authority, an enterprise is exempted from applying to the FTC for an approval in accordance with the Fair Trade Act if there are emergent mergers between banks. The FTC discussed the exemptions from the Fair Trade Act for mergers between financial institutions at its Commissioners' meeting in June 1998. The FTC resolved that emergent mergers between banks are often mandatory, remedial, and non-voluntary in nature and thus differ from regular bank mergers. The main objective is to help problematic financial institutions and maintain financial market order.

The FTC respects the decisions of the financial competent authority in implementing necessary measures for failing financial institutions under emergent conditions; however, the FTC recommends that the financial competent authority consider market competition factors when stipulating provisions for exemptions under the Banking Act.

The financial competent authority accepted the recommendations of the FTC and made amendments to Article 62-4 of the Banking Act. The current provision stipulates that if the competent authority determines that it is necessary to take emergency measures and that there will be no materially adverse effect on the competition in the financial market, approval by the FTC under Paragraph 1, Article 11 of the Fair Trade Act shall not be required.

According to the abovementioned factors, if the financial competent authority takes necessary measures for failing financial institutions under emergent conditions, an enterprise is exempted from applying to the FTC for an approval in accordance with the Fair Trade Act. In addition, the Financial

[2] Fair Trade Commission Decision at its 343rd Commissioners' Meeting on June 3, 1998.

Institutions Merger Act, the Financial Holding Company Act, and the Insurance Act were also amended in 2000 and 2001 in pursuance to the aforesaid content of the Banking Act.

Pursuant to statistics compiled by the Banking Bureau of the Financial Supervisory Commission, there are currently more than 30 local banks and 30 foreign banks in Chinese Taipei. The domestic market for financial business is moderately or lowly-concentrated. Thus, mergers between financial institutions do not give rise to a significant anticompetitive effect on competition. Therefore, the failing firm defense asserted in a review of mergers between financial institutions has not provoked much controversy in Chinese Taipei.

### *3.2 Concerted action case*[3]

In 2009, in view of complaints from the media and the public which indicated that the financial service fees charged by the financial institutions in Chinese Taipei were confounding and unreasonable, the Legislature designated the Financial Supervisory Commission (hereinafter "the FSC"), which is responsible for the enforcement of the Banking Act and other financial regulations, to draft supervisory regulations governing financial service fees. Subsequently, the FSC requested that the Banks Association propose a "Guidelines Govern Criteria for Financial Service Fees (Draft)", while at the same time asking the FTC its opinions as to whether the draft guidelines would be in violation of the Fair Trade Act against concerted actions.

The FTC discussed the case at its 966th Commissioners' meeting in May 2010. The FTC resolved that, should the draft guidelines not be established by the financial competent authority as the regulatory laws, such guidelines would not take precedence over the Fair Trade Act under Article 46. Furthermore, Article 3 of the draft guidelines would allow financial businesses to list all the applicable cost items, and charge fee schedules applicable for services, and thus create rigidity in cost calculations. This would limit financial institutions in setting advantageous prices based on their operations and could lead to concerted actions with restrictions on competition. Therefore, the cost items established by Banks Association for financial businesses to include in their calculation of charges would violate the Fair Trade Act against concerted actions. Even though the Banks Association established the draft guidelines under the instruction of the financial competent authority, it could not employ this reason to defend the legality of such concerted actions.

However, Article 4 of the draft guidelines provided a list of items regarding which financial institutions were not to charge their customers. The FTC respects the decisions of the financial competent authority in protecting the interests of consumers.

Regarding the decision of the financial competent authority in accordance with the resolution of the Legislature to request that the Banks Association formulate the aforesaid service fees criteria, the FTC was of the view that the financial competent authority should have the draft guidelines established as a law, or regulations in respect of procedures, and any provisions of the draft guidelines causing potential restraints on market competition should not be drafted.

As a result of the FTC's suggestions, the FSC decided that it would delete the said draft guidelines, and issued administrative guidance instead by means of official written documents to remind the financial institutions to disclose service charge items and fees based on their reasonable operating costs as well as to disclose various items that are free of charge, such as the issuance of bank passbooks and ATM cards that are necessary for undertaking financial procedures.

3 Fair Trade Commission Decision at its 966th Commissioners' Meeting on May 12, 2010.

## 4. Handling of conflicts between regulations and competition law

"Competition policy" seeks to maintain fair competition mechanisms and improve business operations efficiency so as to achieve the core objective of competition law. On the other hand, "industrial policy" is aimed at promoting the development of industries through *ex ante* structural regulations as well as *ex post* operation supervision set up by the regulatory authorities.

The competition authority and the other regulatory authorities exercise different roles toward the regulated conduct of enterprises and the scope of the authority exercised. As the competent authority for competition laws, in principle, where the regulatory authorities have proposed the formulation of new laws or the revision of relevant laws, the FTC may express its opinions concerning the provisions of laws involved in competition while the regulatory authorities inquire. Nevertheless, such opinions are not mandatory. If such a draft new law or the existing law has any significant impact on market competition, the FTC will continue to insist in accordance with the spirit of competition law. If the opinions and views of both sides remain inconsistent, it shall be up to the Cabinet, the highest administrative body, to deal with the issues of conflict. If the FTC's enforcement effort is not well received by the highest administrative body, the regulated conduct defense will be more than likely to intensify.

# BIAC

## 1. Introduction

The Business and Advisory Committee ("BIAC") to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee Working Party No. 2 for its roundtable on the regulated conduct defence. BIAC also welcomes the Secretariat's paper on the topic.[1] The OECD has previously considered the tension between sector-specific regulation and competition law regimes in a 1998 roundtable on the topic.[2] However, the 1998 roundtable focused largely on avoiding contradictions between regulators, rather than the concerns applicable to businesses that must confront those contradictions.

This submission sets forth BIAC's views concerning the challenges businesses face in confronting regulatory regimes that overlap with competition law regimes. In particular, the submission discusses the application of the regulated conduct defence which, in general terms, should preclude liability for competition law contraventions where a regulatory regime governs the industry at issue. Because competition authorities in different jurisdictions work within different institutional, statutory, and jurisprudential contexts, the precise parameters of the regulated conduct defence vary across jurisdictions.

Regulatory and competition law regimes may overlap both within and across jurisdictions. When regimes overlap or conflict *within* a jurisdiction, issues of federalism and statutory interpretation often arise. When regimes overlap or conflict *across* jurisdictions, "system friction"[3] results, restricting the ability of businesses to implement consistent business practices throughout the jurisdictions in which they operate, thereby inhibiting efficient functioning of global commerce. Businesses would welcome greater convergence in this area, at least in terms of fundamental principles and approaches related to the regulated conduct defence. As has been seen in merger reviews (and other areas), OECD Roundtables have assisted in facilitating dialogue among competition law agencies around the world, which can lead to greater cooperation and convergence and can help address business uncertainty and reduce system friction. The area of regulated conduct would benefit from the same type of dialogue through this and, potentially, future OECD Roundtables.

Where a well-developed regulatory conduct defence (or an equivalent concept) has not been articulated and consistently applied by national regulatory and competition authorities, businesses face legal uncertainty that they cannot easily mitigate. This creates additional costs for both the private and public sectors.

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1 DAF/COMP/WP2(2001)1 Working Party No. 2 on Competition and Regulation: The Regulated Conduct Defence.

2 OECD, Policy Roundtable, Relationship between Regulators and Competition Authorities (1998), *available at* http://www.oecd.org/dataoecd/35/37/1920556.pdf.

3 "System friction," a concept used (among others) by Eleanor Fox, results when global businesses face a conflicting set of global competition law rules, undermining the policy goals of the underlying national regimes. *E.g.*, Eleanor M. Fox, "Antitrust and Regulatory Federalism: Races Up, Down, and Sideways," 75 N.Y.U. L. REV. 1781, 1805 (2000).

A principled and systematic approach to analyzing the regulated conduct defence is important, given the increasingly significant sanctions faced by businesses found in violation of competition law. In addition, the regulated conduct defence is a relatively complicated legal doctrine. It is not usually explicitly spelled out by statute but rather gradually developed by *ad hoc* judicial analysis balancing competing interests and by antitrust agencies exercising their enforcement discretion. This is not ideal from a compliance perspective as it makes it difficult to predict the consequences of business decisions.

From an international perspective, approaching the defence in a principled fashion is also important to establishing clear, guiding principles for jurisdictions with newer competition law regimes, whose specific formulation of a regulated conduct defence is in the process of being established. For many such jurisdictions, the regulated conduct defence will be even more relevant given the trends in certain economies towards de-regulation of key national industries. In this sense, a practical and consistent framework is important not only among established competition law regimes, but also among competition law regimes that have been more recently established.

Accordingly, this paper identifies a number of fundamental principles important to businesses to help guide competition agencies, regulators and legislators, when interpreting and applying the regulated conduct defence. These fundamental principles include the following:

- Businesses should not face criminal or civil liability when dual compliance with competition and regulatory laws is impossible or commercially impractical.

- Businesses should not face criminal or civil liability for conduct that a regulator has in fact mandated, specifically approved, or generally authorized. To this end, businesses should not face criminal or civil liability for conduct subject to regulation where (1) the responsible regulator exercises that authority, (2) such that there is the potential for conflicting guidance, requirements, duties, privileges, or standards of conduct between regulation and competition-law requirements (3) with respect to practices central to the regulated activity.

- To the extent a competition law-related remedy is warranted at all, competition authorities should only seek prospective injunctive relief to remedy such conduct rather than any monetary penalties.

- Businesses should not face criminal or civil liability for conduct required or authorized by a regulator, even if that regulator is subsequently found to have acted *ultra vires*. Jurisdictional conflicts between regulators and competition agencies should be the responsibilities of the competent authorities in the first instance, rather than businesses subject to such conflicting requirements.

- The applicability and scope of the regulated conduct defence should be articulated clearly and explicitly in order to provide greater predictability and certainty to businesses with respect to the status of their operations and practices and to regulators and competition agencies as to the appropriate scope of their authority.

Finally, it is important to recognize that, in certain cases, the existence of a regulatory regime may be relevant to a competition law analysis even if no explicit regulated conduct defence is applicable (e.g., in determining barriers to entry, the reasonableness of certain conduct). For example, the existence of a comprehensive regulatory regime may influence how competition law standards are set. In *Verizon Communications v. Law Offices of Curtivs V. Trinko, LLP*, the U.S. Supreme Court determined that a duty to deal did not exist under the antitrust laws because, under the Telecommunications Act of 1996, access to

the defendant's telecommunications network was governed by a comprehensive regulatory scheme.[4] In addition, dialogue between competition law authorities and their sector-specific regulatory counterparts can be helpful. For example, some competition agencies have an explicit statutory authority to either intervene in or submit comments to regulators. The U.S. antitrust agencies frequently submit testimony or comments on regulatory initiatives, and likewise the Canadian Commissioner of Competition may, on her own initiative, make representations to and submit evidence before a federal or provincial agency with respect to competition concerns.[5] It is preferable from a predictability standpoint to have a competition authority express concerns with a regulatory decision or policy *ex ante* rather than *ex post* through inefficient, costly litigation.

The remainder of this paper describes the regulated conduct defence as applied in the United States, Canada and the European Union. Particular attention is paid to a growing divergence between the application of the regulated conduct defence in Canada and the U.S., on the one hand, and the European Union, on the other, where the European Commission's enforcement limits the scope of the regulated conduct defence available to businesses governed by national regulatory regimes inconsistent with E.U. competition law. Given the growing importance of cross-border trade and corporate operations, clear definition and operation of the law in this area is vital.

## 2. United States

Generally speaking, the regulated conduct defence applies in a number of forms in the U.S.: the "state action" doctrine where state regulation is concerned and the "implied immunity" doctrine where there is an asserted conflict between federal regulatory standards and federal antitrust law. Also important in a multijurisdictional context is the "foreign sovereign compulsion" doctrine, which exempts a private party from liability for acts or failures to act which are compelled by a foreign government.[6] The state action doctrine applies when a person claims that state regulation precludes the application of federal antitrust laws.[7] The individual invoking the state action doctrine bears the burden to demonstrate that (1) the challenged restraint is "one clearly articulated and affirmatively expressed as state policy,"[8] and (2) the policy is "actively supervised"[9] by the state itself.[10]

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4 540 U.S. 398 (2004).

5 *Competition Act*, ss.125, 126; U.S. Dep't of Justice, Antitrust Div. Manual, Ch.5 Competition Advocacy, V-4, *available at* http://www.justice.gov/atr/public/divisionmanual/chapter5.pdf.

6 The acts of the private party, in such a situation, "become effectively acts of the sovereign". See *Inter-American Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1298 (D. Del. 1970).

7 *Parker v. Brown*, 317 U.S. 341 (1943). As a matter of statutory interpretation (and implicit federalism concerns), the U.S. Supreme Court has found that state regulation may preclude the application of federal antitrust law because the federal antitrust laws were not intended to prohibit state-level regulation of industries that could be inconsistent with free competition. *Id.* at 351.

8 With respect to the "clear articulation" requirement, articulation will often be found through an express statutory provision, but authorization need not be specific: "if the State's intent to establish an anticompetitive regulatory program is clear, ... the State's failure to describe the implementation of its policy in detail will not subject the program to the restraints of the federal antitrust laws." *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985). Such an intent could be inferred if anticompetitive conduct foreseeably results from regulation. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42 (1985) (reasoning that broad authority over sewage treatment included authority over sewage collection and transportation, precluding monopolization claims); *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 373 (1991) (finding "[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants"). Moreover, "a state policy that expressly *permits*,

The parameters of the state action doctrine are in large measure consonant with the fundamental principles identified at the opening of this paper.

- First, the active supervision and clear articulation requirements help ensure that individuals will not face liability when dual compliance with regulatory and antitrust laws is impossible.

- Second, by focusing on the foreseeable consequence of a regulator authorizing or permitting conduct, the doctrine seeks to avoid the more subjective and indeterminate question of whether a regulator specifically intended to exempt certain conduct from antitrust law. Such an inquiry is likely to be conducted in hindsight and does not afford predictability to individuals. By contrast, an inquiry into whether a regulator caused allegedly anticompetitive conduct or such conduct was a foreseeable result of regulator activity is a question that can be answered *ex ante* with greater predictability for individuals subject to overlapping regulatory and antitrust regimes.

- Third, the development of the concept through extensive judicial case law discussion has provided some degree of clarity and predictable standards to a very complicated area of law.

Similarly, the implied immunity doctrine, which applies when a federal regulatory regime conflicts with federal antitrust law, also offers a principled framework for assessing liability.[11]

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but does not compel, anticompetitive conduct may be 'clearly articulated.'" *Southern Motor Carriers Rate Conference*, 471 U.S. at 61. The U.S. Federal Trade Commission ("FTC"), however, has typically required a stronger indication that regulators have deliberately intended to replace competition than courts. See *South Carolina Bd. of Dentistry*, 138 F.T.C. 229, 251-52 (2004) ("'Foreseeability' in this context, however, must be restricted to only those regulatory schemes in which the anticompetitive conduct would 'ordinarily or routinely result' from authorizing legislation in order to ensure that there was a deliberate and intended state policy").

9 With respect to the "active supervision" requirement, this element asks whether the state regulators have played a "substantial role in determining the specifics of the economic policy" under challenge. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 635 (1992). The FTC has identified several relevant factors to determining whether active supervision exists, including an agency's: (1) factual record; (2) written decision; (3) assessment of conduct; (4) collection of business data; (5) economic studies; (6) review of profits; and (7) disapproval of inappropriate rates. *Kentucky Household Goods Carriers Ass'n*, 139 F.T.C. 404, 414-30 (2005), aff'd, 199 Fed. Appx. 410 (6th Cir. 2006).

10 *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). Note, however, that the doctrine appears to vary where municipalities or subordinate state agencies are involved. For example, the Supreme Court has established that the state supervision requirement "should not be imposed in cases in which the actor is a municipality". See *Town of Hallie supra* note 8 at 46. The Court in *Hallie* went on to state that, although the issue was not before it, it is likely that active state supervision would not be required in cases where the actor was a state agency.

11 The U.S. Supreme Court has explained that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavoured, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963). See also *Credit Suisse Securities (USA) LLC v. Billing*, 127 S. Ct. 2383, 2392 (2007) (identifying as relevant factors in challenge involving securities regulation: (1) "the existence of regulatory authority under the securities law to supervise the activities in question"; (2) evidence that the responsible regulatory entities exercise that authority"; (3) "a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct"; and (4) "[whether] the possible conflict affect[s] practices that lie squarely within an area of financial market activity that the securities law seeks to regulate.").

The parameters of the implied immunity doctrine also offer a principled framework for determining liability, in that:

- The doctrine recognizes that antitrust liability should not be predicated on conduct that is subject to competing or inconsistent regulatory requirements. In *Credit Suisse v. Billing*, *supra* n.9, the Supreme Court found that antitrust enforcement decision makers (such as juries in private treble-damages antitrust actions) could arrive at decisions as to liability different than expert securities regulators who would better understand industry practices and might have different policy goals.

- The doctrine acknowledges that the benefit of applying antitrust law may be low where conduct lies directly within an area over which a sector-specific regulator exercises authority.

- The framework of the implied immunity doctrine is helpful in that it identifies practical, relevant factors. The more factors that are found to be present and the greater their weight, the more likely the doctrine will be found to apply. In the absence of an explicit statutory clause repealing the application of antitrust law in a given regulated sector, this may be the most practical approach for determining when the regulated conduct defence can be successfully invoked.

## 3. Canada

The regulated conduct defence in Canada arose in a series of cases upholding provincial statutes governing the production and marketing of agricultural products against challenge on the basis that they were contrary to the federal government's competition legislation.[12] The foundation of the defence is a recognition that federal competition laws are directed against private actions contrary to the public interest, and publicly regulated actions ought not to be considered as contrary to the public interest.[13]

Under Canadian law, the regulated conduct defence has three basic elements: (1) the relevant provision of the *Competition Act* (or other statute) must contain the necessary statutory intention[14] to demonstrate that a consideration of the public interest is contemplated[15]; (2) the regulatory legislation must be valid; and (3) the impugned activity must be authorized[16] by and not frustrate the regulatory scheme.

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12 See, e.g., *R v. Chung Chuck*, [1929] 1 D.L.R. 756, *R v. Simoneau*, [1935] 1 D.L.R. 142 (Q. Ct. Sess.), and *Reference re Farm Products Marketing Act*, [1957] S.C.R. 198 ["*Farm Products Marketing Act*"]

13 *Farm Products Marketing Act*, *id.* per Rand J. ("The Provincial statute contemplates coercive regulation in which both private and public interests are taken into account [while] the provisions of the *Combines Investigation Act* and the *Criminal Code* envisage voluntary combinations or agreements by individuals against the public interest that violate their prohibitions").

14 *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629 ["*Garland*"] at para. 77. *Garland* involved an attempt by a regulated gas utility to raise the regulated conduct defence against a class action claim for usury contrary to the *Criminal Code*. The regulator (the Ontario Energy Board) approved a late payment penalty of 5% on any bill left outstanding, regardless of how long it remained outstanding. The penalty amounted to charging a criminal rate of interest. The Supreme Court recognized that there was no "principled reason why the defence should not be broadened to apply to cases outside the area of competition law" but held that it was not available in this case because the usury provision of the Code did not provide the necessary leeway.

15 The courts have consistently recognized that "compliance with the edicts of a validly enacted provincial measure can hardly amount to something contrary to the public interest." *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307, 354 ["*Jabour*"]. Competition law advances "the specific public interest in free competition," *R v. Canadian Breweries Ltd.*, [1960] O.R. 601 ["*Canadian Breweries*"], but the law "*deems* action taken pursuant to federal or provincial regulating authorities to be

Consistent with the principle of transparency, the Competition Bureau ("Bureau") has provided guidance to individuals on when and how it will recognize the regulated conduct defence in its Regulated Conduct Bulletin ("Bulletin").[17] Equally importantly, the Bureau has updated its guidance on the regulated conduct defence following major judicial decisions and statutory amendments.[18]

With respect to provincially regulated conduct potentially conflicting with criminal conspiracy law, the Bureau represents that where provincial law "authorizes (expressly or impliedly) or requires the impugned conduct . . . the Bureau will not pursue a [criminal conspiracy] case."[19] This policy is consistent with the principle that regulatory uncertainty should not carry the risk of criminal liability.

With respect to conduct regulated by federal law other than *Competition Act*, the Bureau will attempt to discern whether dual compliance is "reasonabl[e]"; whether federal law "authoriz[es] or require[es] the particular conduct or, more generally, provid[es] an exhaustive statement of the law concerning a matter"; and whether preclusion of the *Competition Act* is implied by Parliament's enactment of "specific provisions to address the conduct in question."[20] This policy is consistent with the principle that displacement of competition law may be express or implied, and where regulatory action is taken by one regulatory authority, potentially conflicting action should not be taken by another which may be at cross purposes.

Finally, the Bulletin recognizes that, even where the regulated conduct defence does not apply, "a party may still benefit from other defences or doctrines, such as a lack of requisite *mens rea*, official inducement of error, statutory justification, issue estoppel or Crown immunity."[21] Because the application of the regulated conduct defence in any given case without guiding precedent can be uncertain, it is important, as a fundamental principle of fairness, to recognize that other defences (such as those identified above) may preclude the imposition of liability where no criminal or otherwise wrongful intent exists.

Like the U.S., Canadian courts and competition authorities have attempted to provide businesses a measure of guidance and leeway where regulatory and competition law regimes intersect.

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[also] in the public interest". *R v. Industrial Milk Producers Association*, [1989] 1 F.C. 463 ["*Industrial Milk*"].

16 A general authorization is more likely to be sufficient where it is based on an elaborated mandate. See *Jabour*, 2 S.C.R. at 381 ("The statute directs the law society acting through the benchers to determine in the public interest what 'matter, conduct or thing' is 'conduct unbecoming a member of the Society'.... The statute does not limit the benchers in the regulation of advertising nor does it confine them to matters of standards of 'competence and integrity'... the mandate was broadly styled [and] is a far cry from a legislative mandate predicated on a single power 'to regulate'").

17 Competition Bureau, Regulated Conduct Bulletin (2010) ("Bulletin"), *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03273.html.

18 The Bureau first published a bulletin on the topic in 2006, following a seminal Canadian Supreme Court decision (*Garland*). The Bureau recently updated its bulletin following amendments to Section 45 of the Act explicitly referencing the regulated conduct defence as it applies to the new *per se* conspiracy offence.

19 Bulletin at 4.

20 Bulletin at 7.

21 Bulletin at 2.

## 4. European Union

In general terms, the scope of the regulated conduct defence under E.U. competition law is much narrower than the scope of the defence in the U.S. or Canada. Many sectors are subject to both competition law and sector specific legislation, and overlap of jurisdiction between the two sets of rules does exist in many circumstances. To make matters more complex for companies operating in Europe there are a number of authorities with different mandates and responsibilities (e.g. the European Commission, national competition authorities, national regulatory authorities) that may be simultaneously positioned to oversee commercial activities. This complex overlapping structure leads, in some instances, to business facing difficulties in complying with sets of rules that may have divergent objectives.

In Europe, the approach towards a regulated conduct defence is somewhat different than in the U.S. and Canada, in part owing to the applicable legal and institutional framework in Europe. The primacy of E.U. law and the duty on Member states to ensure the fulfillment of their obligations under E.U. law have been interpreted to mean that Member States must not maintain legislative, regulatory or other measures which may undermine E.U. law, including E.U. competition rules. In the event a national regulation or action by a regulator leads to outcomes contrary to E.U. competition rules, the Director General of Competition may pursue the Member State for breach of its treaty obligations and/or, simultaneously or alternatively, pursue the regulated undertaking, including to impose fines.

As a matter of policy development and legal authority, the burden of ensuring compatibility between regulatory and competition law regimes should be that of government authorities and not private business. Accordingly, businesses operating in the E.U. would very much welcome a regulated conduct defence.

The regulated undertaking has no defence based on the fact it was complying with national law or regulations, whether the allegedly unlawful conduct is merely permitted or specifically authorized.[22] The telecommunication margin squeeze cases (e.g., Case C-280/08 *Deutsche Telekom v Commission*, Judgment of 14 Oct 2010, on appeal from T-271/03) are examples of pricing decisions which had been approved by national regulators but were later held to be an abuse of dominance. In the *Deutsche Telekom* case, the Commission had held that despite the regulatory approvals, "competition rules may apply where the sector specific legislation does not preclude the undertaking it governs from engaging in autonomous conduct that prevents, restricts or distorts competition".

This position is endorsed by national competition authorities. For instance, the French Autorité de la Concurrence stated in a recent case where heavy fines were imposed French banks in relation to an agreement on inter-bank commissions for cheque clearances (Decision No 10-D-28, 20.09.10) that the approval (and even "active support") of the practice by the bank regulator (Commission Bancaire) and the country's central bank (Banque de France) was not a valid defence absent the imposition of a binding rule.

Absent a specific regulated conduct doctrine, defences based on, inter alia, legitimate expectations and proportionality are unsuccessful.

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22 See Joaquín Almunia, *Competition v Regulation: where do the roles of sector specific and competition regulators begin and end?* (Mar. 23, 2010), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/121&format=HTML&aged=0&language=EN&guiLanguage=en; Neelie Kroes, *The interface between regulation and competition law: Bundeskartellamt conference on 'Dominant Companies – The Thin Line between Regulation and Competition Law* (Apr. 28, 2009), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/202&format=HTML&aged=0&language=EN&guiLanguage=en.

At most, in a few cases, a conflicting regulatory approach has been viewed as a partially mitigating factor when applying sanctions for breach of competition law.[23]

The application of the regulated conduct defence where there is a direct contradiction between incompatible requirements of the national regulator and E.U. competition law and no flexibility to comply with both (where a state compulsion defence would be available if the requirement were imposed by a third country's legislation) is less clear.

The Directorate General for Competition proposed to take the approach that even such an incompatible requirement was no defence in the *Norwegian Gas GfU* case, arguing that even if the conduct was required by the laws of Norway, the companies should have refused to comply with an unlawful national law (Norway being an EFTA Member State bound by an obligation not to breach E.U. competition law similar to that binding E.U. Member States).[24] The case was eventually settled without fines, on the basis of undertakings given by Norway and the companies concerned since Norway agreed to change its law.[25]

## 5. Conclusion

The U.S. and Canada appear to have well-developed concepts of the regulated conduct defence. For regulators and competition agencies, it is important that consistent standards be observed in the application of the regulated conduct defence to avoid system friction. For businesses, it is important that predictable guidance be developed on how to proceed when regulatory and competition law regimes overlap leaving the scope of permitted conduct ambiguous. For countries with newer competition agencies or in the process of deregulating state-controlled industries, a principled framework of the regulatory conduct defence can serve as useful guidance.

23 *E.g., National Grid Plc v. Gas & Elec. Markets Auth.* (UK Competition Appeal Trib. Apr. 29, 2009), *available at* http://www.catribunal.org.uk/files/1.Judg_1099_NationalGrid_29.04.09.pdf; https://rms2.bmeurope.bakernet.com/exchweb/bin/redir.asp?URL=http://www.catribunal.org.uk/files/1.Judg_1099_NationalGrid_29.04.09.pdf>.

24 Liberalisation of European Gas Markets - Commission settles GFU case with Norwegian gas producers, Competition Pol'y Newsletter, No. 3 (Oct. 2002), *available at* http://ec.europa.eu/competition/publications/cpn/2002_3_50.pdf.

25 *Id.*

**MR RICHARD BRUNELL**

The recent decisions by the U.S. Supreme Court in *linkLine*[1] and the European Court of Justice in *Deutsche Telekom*[2] not only reflect sharply divergent views of the merits of a price squeeze as an antitrust violation and, more generally, of the standards for assessing abuse of dominance by vertically integrated monopolists, but also of the relationship between antitrust and sectoral regulation. *Deutsche Telekom*, which upheld the European Commission's determination that the German incumbent telephone company had abused its dominant position by engaging in a margin squeeze, illustrates the European view that antitrust enforcement and sectoral regulation in liberalized markets are generally complementary, rather than mutually exclusive[3]—indeed, antitrust enforcement is arguably *more* necessary when vertically integrated monopolists are partially regulated. On the other hand, *linkLine*, which all but precluded price-squeeze claims in a regulated market, reflects an emerging view that antitrust enforcement should generally stay its hand when federal regulators are on the scene and available to address competitive problems in an industry. This emerging view itself is a marked shift in American policy which, until recently, had been closer to the European stance that allows for only a very narrow "regulated conduct defense" to antitrust claims.

It should be emphasized that the new American view – reflected more explicitly in *Trinko*[4] and *Credit Suisse*[5] than in *linkLine* – is sharply contested, and the case law is open to limiting interpretations that would permit U.S. courts to follow a less expansive implied immunity defense.[6] Moreover, heightened

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1 Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 129 S. Ct. 1109 (2009). The author wrote the amicus brief filed by the American Antitrust Institute in *linkLine* and argued the case as amicus curiae before the Supreme Court.

2 Deutsche Telekom AG v. European Comm'n, Case C-280/08 (2010).

3 *See, e.g.*, Alberto Heimler, *Is a Margin Squeeze an Antitrust or a Regulatory Violation?*, 6 J. COMP. L. & ECON. 879, 885 (2010) ("The relationship between antitrust and regulation is mostly complementary."); INT'L COMPETITION NETWORK, ANTITRUST ENFORCEMENT IN REGULATED SECTORS WORKING GROUP, REPORT TO THE THIRD ICN ANNUAL CONF., April, 2004, at 3 ("Regulation typically focuses only on the main aspects of business conduct . . ., providing the ex-ante framework that regulated firms need to follow. Antitrust prohibitions on agreements and abuses are expressed in more general terms and are enforced ex-post. Therefore, they play a residual role . . . .").

4 Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

5 Credit Suisse Securities (USA) LLC v. Billing, 551 U.S. 264 (2007).

6 Applying *Credit Suisse* outside the securities industry, for example, four lower courts have found no implied immunity. *See* Marguerite M. Sullivan & Kelsey A. McPherson, *Three Years After* Credit Suisse v. Billing: *Courts Still Find the Implied Immunity Doctrine Plainly Repugnant*, 7 ANTITRUST PRACTITIONER, Oct. 2010, at 8. *But see* Jacob L. Kahn, Comment: *From* Borden *to* Billing: *Identifying a Uniform Approach to Implied Antitrust Immunity From the Supreme Court's Precedents*, 83 CHI-KENT L.

deference to regulators under U.S. law is not entirely a new phenomenon: critics have long complained that other immunity doctrines, such as the state action doctrine,[7] the filed rate doctrine,[8] and *Noerr-Pennington* immunity,[9] have been applied too broadly by lower federal courts or the Supreme Court.[10] In any event, the Supreme Court's expansion of implied immunity is a rather surprising because deregulation has long been thought to entail *greater* scope for competition laws in regulated industries,[11] and the deregulation movement itself was driven in significant part by a skepticism of the efficacy and competence of regulators to advance the public interest.[12] Notably, the shift in the regulation/antitrust balance has been led in significant part by Justice Breyer, and opposed by the American antitrust "establishment," including the Department of Justice under President George W. Bush.

In the first part of this paper, I set out the traditional, antitrust-friendly American approach to implied antitrust immunity using the *Otter Tail* and *AT&T* cases as examples. In Part II, I examine the expansion of immunity in *Trinko* and *Credit Suisse*, and explain why *linkLine* continues that trend, although only four Justices expressly embraced it. In Part III, I consider explanations for the new American approach. And in Part IV, I discuss *Deutsche Telekom* and *Telefonica*, another European price squeeze case that rejected an immunity defense notwithstanding the active involvement of regulators, and suggest the immunity rulings

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REV. 1439, 1464-66 (2008) (noting that two lower courts had recently used *Trinko* to grant claims for implied immunity).

7 The state action doctrine mediates the conflict between state regulation and federal antitrust law. It insulates States from liability under the Sherman Act. *See* Parker v. Brown, 317 U.S. 341 (1943). Private actors, and quasi-state actors not considered "the State," are immune when "first, the State has articulated a clear and affirmative policy to allow the anticompetitive conduct, and second, the State provides active supervision of anticompetitive conduct undertaken by private actors." Fed. Trade Comm'n v. Ticor Title Ins. Co., 504 U.S. 621, 631 (1992). While the state action doctrine involves questions that "are somewhat similar to the ones [asked] when the regulation is federal," conflicts between state law and the Sherman Act raise unique federalism/preemption concerns, which means "the scope of power to regulate and the proper domain of regulation [versus antitrust] will always be somewhat different for the states than for the federal government." Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, 2004 COLUM. BUS. L. REV. 335, 344, 350 (recommending a unified and simplified approach).

8 The filed rate doctrine (also known as the filed tariff, or *Keogh* doctrine) bars treble damages actions that directly or implicitly challenge rates or other tariffs approved (or sometimes merely on file with) regulators. *See generally* 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 247 (3d ed. 2006). Although the Supreme Court suggested that modern developments had undercut the rationale for the doctrine, the Court reaffirmed it on the basis of *stare decisis* in Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986).

9 The *Noerr-Pennington* doctrine insulates private actors from antitrust liability for petitioning government regulators to adopt anticompetitive restraints.

10 *See, e.g.*, Darren Bush, *Mission Creep: Antitrust Exemptions and Immunities as Applied to Deregulated Industries*, 2006 Utah L. Rev. 761 (criticizing expansive interpretations of immunity doctrines and noting irony that role of antitrust enforcement has been shrinking as level of traditional regulation has declined); Jim Rossi, *Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era*, 56 VAND. L. REV. 1591 (2003) (criticizing filed tariff doctrine and recommending its abolition); FED. TRADE COMM'N, REPORT OF THE STATE ACTION TASK FORCE (2003) (criticizing lower court expansions of state action doctrine), http://www.ftc.gov/os/2003/09/stateactionreport.pdf.

11 *See* Hovenkamp, *supra* note 7, at 341 ("the natural result of deregulation is an increased role for the antitrust laws"); *see also* Comments of the American Antitrust Institute Working Group on Regulated Industries 19 (2005) ("It is not unusual in deregulatory regimes for pro-competitive rules to enlarge the potential range of anticompetitive mischief, resulting in a need for a correspondingly enlarged areas for antitrust enforcement."), *available at* http://www.antitrustinstitute.org.

12 *See* Hovenkamp, *supra* note 7, at 357-363.

in these cases may have come out differently under U.S. law even under the traditional American approach.

### 1. The Traditional American Approach to Implied Antitrust Immunity

The traditional approach to antitrust immunity afforded by federal regulation under the implied immunity doctrine[13] is expressed by the rule that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions."[14] The "plain repugnancy" standard has been repeated in many Supreme Court cases.[15] The Court has explained that "[r]epeal is to be regarded as implied only if necessary to make the [regulatory statute] work, and even then only to the minimum extent necessary."[16] Even pervasive regulation does not preclude the application of the antitrust laws.[17]

The implied immunity doctrine typically comes into play when the claim is that private conduct that is illegal under the antitrust laws is permitted under a federal regulatory statute.[18] Conduct that has been legitimately *compelled* by federal regulators has always been immune from antitrust attack,[19] while

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13 The implied immunity doctrine is applicable only when the federal regulatory statute does not expressly state how the antitrust laws should apply. Where the regulatory statute contains an antitrust "saving clause" or an express antitrust exemption, the relationship between antitrust remedies and the regulatory structure is supposed to be determined according to the clause or exemption. *See Credit Suisse*, 551 U.S. at 270-71*; Trinko*, 540 U.S. at 406. Express exemptions are themselves narrowly construed. *See* Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 126 (1982). However, the Court has vacillated as to whether the existence of an express exemption precludes implied immunity for conduct not covered by the exemption. *Compare* United States v. Borden Co., 308 U.S. 188, 201 (1939) ("If Congress had desired to grant any further immunity, Congress doubtless would have said so."); Carnation Co. v. Pac. Westbound Conf., 383 U.S. 213, 217 (1966) (same) *with* Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963) (finding implied immunity for conduct not covered by express exemption).

14 United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350-51 (1963). The high standard for finding implied immunity is based in part on the "cardinal principle of [statutory] construction that repeals by implication are not favored," *Borden*, 308 U.S. at 198, as well as the assumption that "[t]he antitrust laws represent a 'fundamental national economic policy,'" Nat'l Gerimedical Hospital & Gerontology Center v. Blue Cross of Kansas City, 452 U.S. 378, 388 (1981) (quoting Carnation Co. v. Pac. Westbound Conf., 383 U.S. 213, 218 (1966)).

15 In addition to *Philadelphia National Bank*, see, for example, *National Gerimedical*, 452 U.S. at 388 ("convincing showing of clear repugnancy" required) (quoting United States v. Nat'l Ass'n of Securities Dealers, Inc., 422 U.S. 694, 719-20 (1975)); *Carnation*, 383 U.S. at 217; *Borden*, 308 U.S. at 199 ("positive repugnancy"); Otter Tail Power Co. v. United States, 410 U.S. 366, 372 (1973). There are numerous others.

16 Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963).

17 *See* AREEDA & HOVENKAMP, *supra* note 8, ¶ 243, at 329 ("The more recent cases clearly stand for the proposition that unless regulation is so totally pervasive that agency initiative or full deliberation controls every aspect of a firm's behavior, 'pervasiveness' may not determine a regulated firm's antitrust exposure."); *National Gerimedical*, 452 U.S. at 389.

18 In the absence of antitrust immunity, lower courts have held that a defendant may still be able to assert a defense of good faith compliance with regulatory policy. *See* AREEDA & HOVENKAMP, *supra* note 8, ¶ 246, at 405-09.

19 *See id.* ¶ 243a2, at 314; *Nat'l Ass'n of Securities Dealers*, 422 U.S. at 705 (if statute "obligates [defendants] to engage in the practices challenged . . . [then it would] necessarily confer[] antitrust immunity").

conduct that *might* be authorized in the future generally has not been immunized.[20] Conduct that is specifically authorized by regulators under a regulatory statute is often immune,[21] but it may not be if there is no conflict between the underlying goals of the regulatory statute and the antitrust laws. So, for example, the fact that Congress authorized banking regulators to approve bank mergers in the public interest did not preclude the application of the antitrust laws to such mergers, even though regulators were required to consider competitive factors.[22]

Conduct that is illegal under both the antitrust laws and the regulatory statute, or that has been disapproved by regulators, has traditionally been thought not to raise a conflict, especially when regulatory remedies are not as broad as antitrust remedies.[23] Moreover, there is no exhaustion requirement in antitrust, i.e., a requirement that an aggrieved party seek relief from a regulatory agency before bringing an antitrust claim,[24] although the "primary jurisdiction" doctrine allows a court to defer an antitrust suit pending action by a regulator for fact finding or a determination whether the conduct is permitted under the regulatory statute.[25]

A good illustration of many of these principles is *Otter Tail Power Co. v. United States*.[26] In that case the Supreme Court upheld a judgment that Otter Tail, a vertically integrated electric utility, had violated Section 2 of the Sherman Act by refusing to sell power at wholesale, and "wheel" it from other utilities, to proposed municipal retail electric power systems in towns where it had been retailing power. Otter Tail contended that its refusal to deal was not subject to the antitrust laws because the Federal Power Act gave the Federal Power Commission authority to compel involuntary interconnections of power, and the aggrieved municipality had in fact obtained such an order in an administrative proceeding. The Supreme

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20 *See Otter Tail*, 410 U.S. at 377; *cf. Carnation*, 383 U.S. at 220-21 (possibility that agency could approve conduct that would otherwise be illegal under Sherman Act means that court may defer acting until agency has opportunity to rule). *See also* Kahn, *supra* note 6, at 1473 ("Prior to [*Credit Suisse*], the Supreme Court had always required a likelihood of conflicting judgments in its implied immunity decisions; the 'mere possibility' of conflicting judgments was not enough . . . .").

21 *See* Gordon v. New York Stock Exchange, Inc., 422 U.S. 659, 689 (1975) (implied immunity appropriate where the challenged commission rate practices "have been subjected to the scrutiny and approval of the SEC"); *see also Nat'l Ass'n of Securities Dealers*, 422 U.S. at 730-33 (treating SEC's authority to disapprove challenged conduct that it closely supervised as tantamount to an approval).

22 *See Philadelphia National Bank*, 374 U.S. at 350-52; *see also* California v. Federal Power Comm'n, 369 U.S. 482 (1962) (agency approval of merger would not bar antitrust challenge); United States v. Radio Corp. of America, 358 U.S. 334 (1959) (same).

23 *See, e.g., Carnation*, 383 U.S. at 222 ("award of treble damages for past and completed conduct which clearly violated the Shipping Act would certainly not interfere with any future action by the Commission"); Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 304, 306 (1973) (if alleged conduct violates regulatory statute "the immunity issue will dissolve"); *see also* AREEDA & HOVENKAMP, *supra* note 8, ¶ 243e3, at 335 ("Clearly no 'repugnancy' exists between a regulatory regime and antitrust policy where enforcing the latter would support the former."). Areeda & Hovenkamp define "repugnancy" as "those instances where the agency reviews and approves conduct using the same criteria that an antitrust court would use or criteria that are clearly inconsistent with antitrust criteria." *Id.* at 329.

24 *See id.* ¶ 243a2, at 315 ("the existence of an administrative remedy does not necessarily oust the antitrust laws"); *e.g., Carnation*, 383 U.S. at 224 (injured party could choose remedy under the antitrust laws or the Shipping Act); Phonetele, Inc. v. AT&T Co., 664 F.2d 716, 734 n.46 (9th Cir. 1981) (Kennedy, J.) (the freedom of an injured party "to elect between an administrative [Federal Communications Act] remedy and a judicial cause of action under the Clayton Act is quite acceptable").

25 *See* AREEDA & HOVENKAMP, *supra* note 8, ¶ 244d, at 379-90; *e.g., Ricci*, 409 U.S. 289.

26 410 U.S. 366 (1973).

Court held that "there is no basis for concluding that the limited authority of the Federal Power Commission to order interconnections was intended to be a substitute for, or to immunize Otter Tail from, antitrust regulation for refusing to deal with municipal corporations."[27] The Court saw no conflict between the district court's decree, which ordered interconnection and wheeling, and the authority of the Federal Power Commission because the Commission lacked authority to order wheeling[28] and, as to interconnection, the district court's order was consistent with the Commission's. The Court doubted a conflict would arise in the future because the lower court's decree made disputes over interconnections and the terms and conditions governing those interconnections subject to Commission approval, but in any event, the *potential* for a conflict was not a ground for immunity.[29]

The lower courts followed a similarly restrictive approach to implied immunity in the cases brought against AT&T leading up to its dissolution. For example, the Seventh Circuit Court of Appeals upheld MCI's $1.8 billion monopolization verdict against AT&T for, *inter alia*, refusing to provide MCI with interconnections to its local networks, which were "essential facilities."[30] The court rejected AT&T's immunity defense because, "[a]lthough the FCC has authority to compel interconnection under [the Communications Act], the initial decision whether to interconnect rests with the utility, and the record shows that the FCC did not control or approve of AT&T's actions here."[31] On the contrary, the court noted, "to the extent that any FCC decisions are relevant to AT&T's claim of implied immunity, those decisions disapprove of, rather than condone, AT&T's actions."[32] And because the FCC's interconnection policies were designed to promote rather than inhibit competition, "allowance of antitrust liability is likely to complement rather than undermine the applicable statutory scheme."[33] The court also rejected immunity with respect to AT&T's allegedly predatory rates because although the rates were regulated, they were initially set by AT&T, and the "FCC does not expressly approve or adopt as agency policy every tariff it permits to become effective."[34] The court expressly rejected the argument that immunity was appropriate merely because "the hearing and enforcement provisions of the Communications Act itself afford competitors such as MCI an adequate opportunity to contest and seek relief from tariffs they consider to be unreasonable or unfair."[35] In the government's monopolization case against AT&T, the court rejected AT&T's immunity claims on similar grounds.[36]

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27 *Id.* at 374-75. The Court observed that when commercial "relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws." *Id.* at 374.

28 The dissent thought that the limited authority granted to the Commission to order interconnection (but not wheeling) reflected an intention of Congress to give utilities a zone of freedom unencumbered by regulatory *or* antitrust restriction. *See id.* at 387 (Stewart, J., dissenting).

29 *See id.* at 377 ("At present, there is only a potential conflict, not a present concrete case or controversy concerning it.").

30 MCI Commc'ns Corp. v. AT&T Co., 708 F.2d 1081, 1132-33 (7th Cir. 1983).

31 *Id.* at 1103.

32 *Id.*

33 *Id.* at 1104

34 *Id.*

35 *Id.* The court allowed AT&T to assert a defense that its denial of interconnections was based on a reasonable belief that it was acting in compliance with an FCC decision, but upheld the jury's rejection of the defense on the facts. *See id.* at 1140.

36 *See* U.S. v. AT&T Co., 461 F. Supp. 1314, 1328 (D. D.C. 1978) (alleged "activities not only violate the antitrust laws but they are also inconsistent with the very purpose of the regulation, or at the very least they are not required or encouraged either by regulatory theory or by regulatory action"); *see also* Phonetele, Inc. v. AT&T Co., 664 F.2d 716, 730 (9th Cir. 1981) (Kennedy, J.) (FCC's decision outlawing challenged practice "may be read not only as precluding a repugnancy argument, but also as precluding an

## 2. The Supreme Court Shifts Direction

### *2.1. Trinko: The Shift Begins*

In *Trinko*, customers of AT&T, then a competitive local exchange carrier, brought a class action against Verizon, the incumbent local exchange carrier, contending that Verizon had unlawfully used its monopoly control over the "local loop" to monopolize the market for local telephone service by providing discriminatory and inadequate operations support systems (OSS) to AT&T. Both the FCC and New York Public Service Commission had found that Verizon's conduct violated its regulatory obligations under the Telecommunications Act of 1996, entered orders requiring remediation, and imposed a modest monetary remedy.[37]

The Second Circuit Court of Appeals reversed the district court's dismissal of the complaint, finding that it stated a monopolization claim under an essential facilities theory or a monopoly leveraging theory. The court saw no conflict between the antitrust laws and the Telecommunications Act of 1996 because the Act contained an express saving clause that the Act was not to be "'construed to modify, impair, or supersede the applicability of any of the antitrust laws.'"[38] Moreover, the court noted that "[t]he two schemes complement rather than contradict each other" because consumers could not obtain compensation under the Act for Verizon's violation of its interconnection obligations.[39]

The Supreme Court reversed in an opinion written by Justice Scalia for six Justices.[40] The Court concluded that the complaint failed state a violation of § 2 because it did not allege conduct that "fit within existing exceptions" to the general rule that a monopolist has no duty to cooperate with a rival, and provided no basis "for recognizing a new one."[41] Although the doctrine of implied immunity was not applicable because of the antitrust saving clause,[42] the existence of regulation was critical to its decision.

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inconsistency argument and affirmatively suggesting that an antitrust remedy is eminently consistent with and complementary to the regulatory scheme"). Numerous other cases against AT&T during this period also held that FCC regulation did not impliedly immunize AT&T's conduct. *See* Daniel F. Spulber & Christopher S. Yoo, *Mandating Access to Telecom and the Internet: The Hidden Side of* Trinko, 107 COLUM. L. REV. 1822, 1852-53 & n.151 (2007) (citing cases).

37 Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 404 (2004) (explaining that Verizon made a "voluntary contribution" to the U.S. Treasury of $3 million, and compensated competing local exchange carriers $10 million).

38 Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atlantic Corp., 305 F.3d 89, 109 (2d Cir. 2002) (quoting 47 U.S.C. § 152).

39 *Id.* at 112 & n.18; *see also id.* (that the same conduct violates both the antitrust laws and the Telecommunications Act "may indicate that the purposes of the two schemes are in synch, reinforcing our conclusion that there is no 'plain repugnancy' between the statutes").

40 Justice Breyer was the only more liberal Justice to join the majority; Justices Stevens, Ginsburg and Souter would have dismissed the complaint for lack of standing. Professor Gavil describes *Trinko* as the "brain child of Justices Scalia and Breyer." Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3, 47 (2004).

41 *Trinko*, 540 U.S. at 408.

42 The Court said that "the enforcement scheme set up by the 1996 Act is a good candidate for implication of antitrust immunity," but that interpretation was "precluded" by the "antitrust-specific saving clause." *Id.* at 406. The Court's distinction between "existing" exceptions and creating "new" ones was arguably driven by the saving clause, which the Court interpreted as "preserv[ing] those claims that satisfy established antitrust standards," *id.* (internal quotation marks omitted), but "not creat[ing] new claims that go beyond existing antitrust standards," *id.* at 407. Yet the saving clause itself made no such distinction, and plaintiffs always maintained that defendant's conduct was illegal under settled antitrust law.

With respect to the "existing exceptions," the Court held that the essential facilities doctrine could have no application where, as here, "'a state or federal agency has effective power to compel sharing and to regulate its scope and terms.'"[43] With respect to a potential "expansion of the contours of § 2," the Court adopted a new form of immunity analysis — what Professor Hovenkamp has described as "soft immunity"[44] and Professor Weiser has called the "*Town of Concord* principle," after the First Circuit case written by then-Judge Breyer — which weighs the costs and benefits of antitrust intervention in a particular regulatory context.[45]

The elimination of the essential facilities doctrine in regulated industries, at least where regulators have "effective power" to compel sharing, while leaving the doctrine possibly available in unregulated industries,[46] has been justifiably criticized as exactly backwards.[47] Historically, the existence of regulation has been an important justification for the doctrine as well as for other antitrust restrictions on the conduct of vertically integrated monopolists in competitive downstream markets. Price regulation that prevents a monopolist from fully exploiting its upstream monopoly is an exception to the "single monopoly profit" theory, and was an important rationale for the breakup of AT&T.[48] Besides providing an anticompetitive incentive for a monopolist to foreclose downstream rivals,[49] regulation may also allow an antitrust court to avoid the difficulties of policing compulsory dealing arrangements. Indeed, Professor Areeda, a sharp critic of the essential facilities doctrine, cited these two factors in explaining why the *Otter Tail* decision was justified.[50] A third factor suggesting that the essential facilities doctrine is more appropriate in

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43 *Id.* at 411 (quoting PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 773e, at 150 (2003 Supp.)). Other "existing exceptions" also did not apply. *See infra*.

44 *See* AREEDA & HOVENKAMP, *supra* note 8, ¶ 243g1, at 358.

45 *See* Philip J. Weiser, *The Relationship of Antitrust and Regulation in a Deregulatory Era*, 50 ANTITRUST BULL. 549, 561 (2005); Town of Concord v. Boston Edison Co., 915 F.2d 17 (1st Cir. 1990) (Breyer, C.J.).

46 The Court was dismissive of the essential facilities doctrine in general. It noted that it was "crafted by some lower courts" and that "[w]e have never recognized such a doctrine," and cited Professor Areeda's article criticizing it. *Trinko*, 540 U.S. at 410, 411. Thus, some commentators have suggested that *Trinko* "represents the near extinction of the doctrine in the Supreme Court." Brett Frischmann & Spencer Weber Waller, *Revitalizing Essential Facilities*, 75 ANTITRUST L. J. 1, 9 (2008).

47 *See, e.g., id.* at 24. Frischmann and Waller note that the doctrine is not needed in completely unregulated markets because "it is hard to find any truly unregulated facility that is essential in the sense required by *MCI* and its progeny." *Id.* at 23. For a thoughtful commentary to the contrary, see Sandeep Vaheesan, *Reviving an Epithet: A New Way Forward for the Essential Facilities Doctrine*, 2010 UTAH L. REV. 911 (arguing that doctrine is needed for intangible essential facilities, but not physical ones where regulators enforce open access requirements).

48 *See* Joseph Farrell & Phillip J. Weiser, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age*, 17 HARV. J. LAW & TECH. 85, 105-07 (2003) (describing regulated monopoly exception to single monopoly profit theory as "Baxter's Law" because it was at the heart of the government's antitrust case against AT&T); Timothy J. Brennan, *Essential Facilities and* Trinko*: Should Antitrust and Regulation Be Combined?*, 61 FED. COMM. L.J. 133, 135 (2008) (describing "radical change in the relationship between competition law and regulation law" between *AT&T* and *Trinko*).

49 Price regulation may also increase the monopolist's ability to exclude downstream rivals through cross-subsidization. *See id.* at 142.

50 *See* Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 848 & n.34, 853 (1990). He also said the essential facilities doctrine was appropriately applied in *MCI v. AT&T*, where "AT&T obstructed its connection to local exchanges, contrary to federal regulatory policy in the communications field." *Id.* at 845 n.21. *See also* 3B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 787c, at 369 (3d ed. 2008) (essential facilities doctrine "may have some relevance in

regulated industries is that insofar as the essential facility has been created under the protective umbrella of regulation, then there is less risk that compulsory dealing will undermine investment incentives.[51]

*Trinko*'s essential-facilities holding followed the Areeda & Hovenkamp treatise, which explained, "Where the agency unambiguously has the authority to order sharing and to supervise its scope and terms, parallel antitrust intervention undermines the agency prerogative and exposes parties to needless collateral attack in an area where directly affected parties are entitled to full judicial review of agency actions."[52] I explore this point below, but, as the treatise notes elsewhere, "[o]rdinarily, [an agency's] mere power to prevent anticompetitive conduct will not immunize that conduct from the antitrust laws."[53]

*Trinko*'s "soft immunity" based on *Town of Concord* balances the benefits of antitrust enforcement, in light of the regulatory framework, against its "sometimes considerable disadvantages."[54] The Court explained that "the existence of a regulatory structure designed to deter and remedy anticompetitive harm" means that "the additional benefit to competition provided by antitrust enforcement will tend to be small . . . ."[55] And in the case at hand, given that the FCC and PSC had sanctioned the anticompetitive conduct and imposed remedies, the Court had no trouble finding that the regulatory regime "was an effective steward of the antitrust function."[56] "Against the slight benefits of antitrust intervention here," the Court cited a likelihood of false positives if antitrust claims were permitted, as "a generalist antitrust court" would face a "daunting task" in evaluating the statute's "highly technical" sharing duties and the numerous complaints likely to be made, and concluded that "[j]udicial oversight under the Sherman Act would seem destined to distort investment and lead to a new layer of interminable litigation, atop the variety of litigation routes already available to and actively pursued by competitive LECs."[57]

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regulated monopolies where it serves to limit the monopolist's power to extend its monopoly into 'adjacent' unregulated (or less regulated) markets").

51 *See* Frischmann & Waller, *supra* note 46, at 33. In its guidance on refusals to supply and margin squeezes, the European Commission considers that it "is particularly likely" that imposing an obligation to supply will not adversely affect a dominant firm's investment incentives where "regulation . . . already imposes an obligation to supply on the dominant undertaking and it is clear . . . that the necessary balancing of incentives has already been made by the public authority when imposing such an obligation to supply. This could be the case where the upstream market position of the dominant undertaking has been developed under the protection of special or exclusive rights or has been financed by state resources." European Commission, Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, 2009 O.J. (C 45) 7, ¶ 82. At the same time, the Court of Justice recently stated in a margin squeeze case that "the absence of a regulatory obligation to supply" the needed input "has no effect on the question of whether the [margin squeeze at issue] is abusive." Konkurrensverket v. TeliaSonera Sverige AB, Case C-52/09 ¶ 59 (2011).

52 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 151 (2003 Supp.)

53 AREEDA & HOVENKAMP, *supra* note 8, ¶ 243f, at 340.

54 Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 412 (2004).

55 *Id.*

56 *Id.* at 413. *But see* Frischmann & Waller, *supra* note 46, at 25 & n.71 ("There is every indication that [the remedies] were not [effective].").

57 *Trinko*, 540 U.S. at 414. The Court added that even without the problem of false positives, "'The problem should be deemed irremedia[ble] by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency.'" *Id.* at 415 (quoting Areeda, *supra* note 50, at 853) (brackets in original). The Court failed to quote Professor Areeda's next sentence in which he noted that remedies may be practical "when, as in *Otter Tail*, a regulatory agency already exists to control the terms of dealing." Areeda, *supra* note 50, at 853.

The Justice Department did not support *Trinko*'s "soft immunity" approach. On the contrary, the Solicitor General argued that the "1996 Act does not by its terms bar application of the Sherman Act to the same sphere of conduct or provide immunity from Section 2 prosecutions"[58] and that "[t]he mere existence of a regulatory structure, even the detailed structure established by the 1996 and the FCC's implementing regulations, does not de facto create antitrust immunity for otherwise anticompetitive conduct."[59] While recognizing then-Judge Breyer's observation in *Town of Concord* that "price regulation 'dramatically alters the calculus of antitrust harms and benefits,'" the Solicitor General opined that "regulation does not necessarily eliminate the risk of monopolization; nor does it obviate the need for antitrust analysis."[60]

Nor did the bipartisan Antitrust Modernization Commission support *Trinko*'s immunity analysis. Rather, the AMC issued a ringing endorsement of the traditional, antitrust-friendly approach to regulatory immunity,[61] and concluded that *Trinko* "is best understood as only as a limit on refusal-to-deal claims under Section 2 of the Sherman Act. It should not be read to displace the role of the antitrust laws in regulated industries as an implied immunity, nor should it be taken as a judicial rejection of a savings clause."[62]

### *2.2 Credit Suisse Continues the Trend*

In *Credit Suisse*, the Supreme Court applied the substance of *Trinko*'s "soft immunity" analysis in determining that conduct was immune from antitrust challenge even if it violated both the antitrust laws and the federal securities laws.[63] A class of investors sued ten large investment banks engaged in joint underwriting, alleging that they had conspired not to sell shares in hundreds of initial public offerings unless the customers also committed to make aftermarket purchases of the shares at inflated prices (a practice called "laddering") and to purchase other less desirable securities from the underwriters (a practice called "tying").[64] In an opinion for seven Justices written by Justice Breyer, the Court found the "securities

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58 Brief for the United States and the Federal Trade Comm'n as Amici Curiae Supporting Petitioner at 10, *Trinko*, 540 U.S. 398 (No. 02-682).

59 *Id.* at 12-13.

60 *Id.* at 12. The Solicitor General argued that the complaint failed to state a claim because it did not allege that defendant's conduct made no sense but for its exclusionary effect. With respect to the essential facilities doctrine, the issue did not turn on whether regulatory relief was available, but that the doctrine did not create an independent antitrust tort. *See id*. at 20-25. In a prior brief in a similar case, the Department of Justice criticized the view that the existence of regulation counsels against allowing an essential facilities claim, noting that the theory is "*more likely* to be invoked against a regulated monopoly." Brief for the United States and the Federal Communications Comm'n as Amici Curiae Supporting Neither Party at 11, Covad Commc'ns Co. v. Bell Atlantic Corp., 407 F.3d 1220 (D.C. Cir. 2005) (No. 02-7057) (emphasis added).

61 *See* ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 358 (2007) ("When the government decides to adopt economic regulation, antitrust law should continue to apply to the maximum extent possible, consistent with that regulatory scheme."); *id.* at 360 ("Courts should continue to apply current legal standards in determining when an immunity from the antitrust laws should be implied, creating implied immunities only when there is clear repugnancy between the antitrust law and the regulatory scheme at issue, as stated in cases such as *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*.").

62 *Id.* at 362.

63 *See* AREEDA & HOVENKMAP, *supra* note 8, ¶ 243d (Supp.) (noting that "the differences between the modes of analysis" in *Trinko* and *Credit Suisse* "are very slight"). *Credit Suisse* was the Court's first "official" implied immunity decision since *National Gerimedical* in 1981.

64 Credit Suisse Securities (USA) LLC v. Billing, 551 U.S. 264, 267 (2007).

law and antitrust law are clearly incompatible," even though the alleged conduct violated both laws, because the risk of false positives in this area was unusually high and threatened to chill lawful joint underwriting activities.[65] At the same time, "any enforcement-related need for an antitrust lawsuit [was] unusually small" because the SEC actively enforced the rules prohibiting the conduct at issue, the agency was required to take into account competitive considerations, and injured investors could bring lawsuits and obtain damages under the securities laws.[66] While the Court purported to apply the "clear repugnancy" standard to its implied immunity analysis, many commentators justifiably argue that the standard has implicitly been overturned.[67]

Once again the Justice Department did not support the approach followed by the Court. Rather, in a brief to the Court of Appeals the Antitrust Division took the position that immunity was appropriate "for conduct expressly or implicitly approved by the securities laws or SEC regulations," but that "the allegations of tying and laddering – practices that are strictly prohibited under the securities laws and that the SEC has never permitted or proposed to permit – should not be dismissed on implied immunity grounds"[68] and that "the enforcement of the antitrust laws as to [this proscribed conduct] does not interfere with the SEC's ability to regulate or exempt from regulation."[69] In the Supreme Court, the Solicitor General proposed a position that was a compromise between the Antitrust Division and the SEC. While rejecting the "view that anticompetitive conduct that is and always has been *forbidden* under the securities laws is nonetheless categorically immune from liability under the antitrust laws,"[70] the Solicitor General would have extended implied immunity to conduct that, although not permitted by the SEC, is

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65 *Id.* at 279. There was "an unusually serious legal line-drawing problem" between joint conduct that the SEC permits and encourages, and that which it forbids, and the evidence tending to show an unlawful conspiracy and lawful securities marketing activity may overlap. *Id.* at 279-81. As a result, "antitrust courts are likely to make unusually serious mistakes," *id.* at 282, which will have "a 'chilling effect' on 'lawful joint activities . . . of tremendous importance to the economy of the country,'" *id.* at 283 (quoting amicus brief for the SEC).

66 *Id.* at 283. The Court quoted *Trinko* for the proposition that "'[t]he additional benefit to competition provided by antitrust enforcement will tend to be small' where other laws and regulatory structures are 'designed to deter and remedy anticompetitive harm.'" *Id.* (quoting *Trinko*, 540 U.S. at 412). Perhaps the principal motive for the opinion can be found in the Court's suggestion that plaintiffs were "dress[ing] what is essentially a securities complaint in antirust clothing" in order to circumvent the procedural requirements that Congress had imposed on securities class actions. *Id.* at 284. Class actions had been brought under the securities laws, and were ultimately settled for $586 million, a small fraction of the more than $32 billion in purported aggregate damages. *See* In re Initial Pub. Offering Sec. Litig., 671 F. Supp. 2d 467, 483 (S.D. N.Y. 2009). The SEC also obtained fines of approximately $150 million against three investment banks. *See* Jesse W. Markham, Jr., *The Supreme Court's New Implied Repeal Doctrine: Expanding Judicial Power to Rewrite Legislation Under the Ballooning Conception of "Plain Repugnancy,"* 45 GONZ. L. REV. 437, 441 (2009).

67 *See, e.g.*, Donald I. Baker, *An Enduring Antitrust Divide Across the Atlantic Over Whether to Incarcerate Conspirators and When to Restrain Abusive Monopolists*, 5 EURO. COMP. J., April 2009, at 145, 185-86; Markham, *supra* note 66, at 439; Howard A. Shelanski, *The Case for Rebalancing Antitrust and Regulation*, 109 MICH. L. REV. 683, 708 (2011) (*Credit Suisse* "marks the first time in the line of implied-immunity cases that the Court has found regulation to imply immunity from legitimate and nonrepugnant antitrust claims").

68 Dept. of Justice, Response of the United States to the Court's Request for Views on the Issue of Implied Antitrust Immunity at 5-6, Billing v. Credit Suisse First Boston Ltd., 426 F.3d 130 (2d Cir. 2005) (Nos. 03-9284 and 03-9288).

69 *Id.* at 4.

70 Brief for the United States as Amicus Curiae Supporting Vacatur at 18, *Credit Suisse*, 551 U.S. 264 (No. 05-1157).

"inextricably intertwined" with permitted conduct, and would have precluded plaintiffs from relying on such conduct to prove their antitrust violation.[71] The Supreme Court rejected the Solicitor General's proposal as insufficient to avoid "the serious risk that antitrust courts will produce inconsistent results that, in turn, will overly deter syndicate practices important to the marketing of new issues."[72]

### *2.3. linkLine: A Break in the Trend, or a Continuation?*

In *linkLine*, independent internet service providers (ISPs) brought a § 2 complaint against SBC (now AT&T), the incumbent local exchange carrier in California, claiming that SBC had monopolized the regional retail market for DSL internet service. At the time, FCC regulations permitted local exchange carriers to offer information services, such as DSL internet service, but only if they provided the telecommunications component of such services to retail competitors on a non-discriminatory basis. In other words, SBC was required to provide the transmission pathway for DSL service – so-called "DSL transport" – to unaffiliated ISPs under the same terms and conditions that it provided such service to its own retail DSL affiliate.

Plaintiffs alleged that SBC had engaged in a price squeeze by charging them a high wholesale price for DSL transport in relation to the price at which it was providing retail DSL internet service. They also alleged that SBC had failed to provide adequate support services for handling orders and installation for plaintiffs' customers, which the district court interpreted as involving claims for refusal to deal and denial of access to an essential facility.

The district court dismissed the refusal-to-deal and essential-facilities theories under *Trinko*. The court held that there could be no liability for a refusal to deal where the dealing is not voluntary, but as here, compelled by law.[73] It declined to dismiss the price squeeze theory, however, because it thought that an inference of anticompetitive intent could be drawn from the pricing behaviour of a monopolist even if the dealing is compelled by law, and that *Trinko* did not bar antitrust claims cognizable under existing case law.[74] The court ordered the plaintiffs to file an amended complaint detailing their price squeeze claim, which they did, and the court subsequently certified for interlocutory appeal its order denying defendants' motion to dismiss the original price squeeze complaint. The court framed the certified question as "whether *Trinko* bars price squeeze claims where the parties are compelled to deal under the federal communications laws . . . ."[75]

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71 The Solicitor General would have remanded the case to the district court to determine "whether the complaint adequately alleges an antitrust offense, without reliance on conduct that is authorized under the regulatory scheme or that is inseparable from such conduct." *Id.* at 24; *see also id.* at 25 ("the complaint must make clear that the claims alleged do not rest on impermissible inferences from protected conduct").

72 *Credit Suisse*, 551 U.S. at 285. Notably, the Solicitor General rejected the argument that the Court should, "as an exercise of judicial policymaking, confer broad antitrust immunity . . . because . . . the prospect of treble damages awards by federal juries applying the antitrust laws will unduly disrupt the capital formation process." Brief for the United States, *supra* note 70, at 21. That argument should be directed at Congress, the SG said, and the fact Congress had restricted securities class actions militated *against* implying an antitrust immunity. *See id.* at 22. The SG noted that "the antitrust laws . . . address, in a way the securities laws do not, the distinct evil of a conspiracy across underwriters and across IPOs . . . ." *Id.*

73 linkLine Commc'ns, Inc. v SBC California, Inc., 2004 WL 5503772, *6, *11 (C.D. Cal. 2004).

74 *Id.* at *13 & n.26.

75 Pet. for a Writ of Certiorari App. 56a, *linkLine*, 129 S.Ct. 1109 (No. 07-512). The court also said that it was inclined to apply the predatory-pricing requirements of *Brooke Group* to plaintiffs' price squeeze claim, but concluded that the amended complaint – which alleged retail prices below wholesale prices – met those requirements. *See id.* at 47a-52a.

The Ninth Circuit affirmed, holding that price squeeze claims survived *Trinko* because "a price squeeze theory formed part of the fabric of traditional antitrust law prior to *Trinko.*"[76] Moreover the court distinguished *Trinko* on the basis that it involved regulation of both wholesale and retail rates, while DSL internet service was only regulated at the wholesale level;[77] "[a]ny restrictions on pricing at the retail level derive primarily from the antitrust laws."[78]

The Supreme Court unanimously reversed, with the majority holding that a price squeeze claim may not be brought "when the defendant is under no antitrust obligation to sell the inputs to the plaintiff in the first place."[79] In an opinion for the five Justice majority, Chief Justice Roberts was highly critical of the price squeeze theory of monopolization,[80] but did not entirely rule out such claims when there is an "antitrust duty to deal."[81] Indeed, the critical issue for the Court was the absence of an antitrust duty to

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76 linkLine Commc'ns, Inc. v. SBC California, Inc., 503 F.3d 876, 883 (9th Cir. 2007).

77 In fact, the regulation of wholesale prices was quite limited. *See* Brief of the American Antitrust Institute as *Amicus Curiae* in Support of Dismissal of the Writ or Affirmance at 33-34 & n.25, *linkLine*, 129 S. Ct. 1109 (No. 07-512) [hereinafter, AAI Amicus Brief].

78 *linkLine*, 503 F.3d at 885. Prior case law in the Ninth Circuit held that a price squeeze claim might be viable even in a fully regulated industry because "'it is possible for a utility to manipulate its filings and requests in a manner that causes a, at least temporary, squeeze which might be just as effective as one perpetrated by an unregulated actor.'" *Id.* at 883 (quoting City of Anaheim v. S. Cal. Edison Co., 955 F.2d 1373, 1377 (9th Cir. 1992)).

79 Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 129 S. Ct. 1109, 1115 (2009).

80 The Court articulated certain institutional or administrability objections to price squeeze claims, and referred to the price squeeze theory as "a new form of antitrust liability never before recognized by this Court," *id.* at 1123, notwithstanding that nearly all of the circuit courts had recognized the theory since Judge Hand's seminal *Alcoa* decision in 1945. Yet while the petitioners and the Solicitor General urged the Court to repudiate *Alcoa*, the majority merely noted, "Given the developments in economic theory and antitrust jurisprudence since *Alcoa*, we find our recent decisions in *Trinko* and *Brooke Group* more pertinent to the question before us." *Id.* at 1120 n.3. Even the Assistant to the Solicitor General at oral argument conceded that a price squeeze claim might be viable if the purpose was to protect the monopolist's upstream monopoly. Transcript of Oral Argument at 26, *linkLine*, 129 S. Ct. 1109 (No. 07-512).

81 Professor Elhauge interprets *linkLine* as holding that a price squeeze claim may be brought as a constructive refusal to deal when the other conditions for an actionable refusal to deal are met. *See* Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397, 466 (2009). This is roughly how the European Union treats price or margin squeezes. *See* European Commission, *supra* note 51, ¶¶ 75-90. Support for this interpretation can be found in the fact that the Court did not reject the arguments that a price squeeze can be anticompetitive; it just said that any such harm could be handled under existing refusal-to-deal or predatory-pricing doctrine. *linkLine*, 129 S. Ct. at 1122 ("We do not need to endorse a new theory of liability to prevent such harm."). On the other hand, the institutional concerns cited by the Court that counselled against recognizing a price squeeze as an independent violation arguably also militate against recognizing a price squeeze as a constructive refusal to deal: (a) the *Alcoa* "fair price" test is difficult to administer; (b) it offers no safe harbour for defendants' pricing behavior; and (c) it chills retail price-cutting by vertically integrated monopolists. Also, the Solicitor General's brief seems hostile to the concept. *See* Brief for the United States as Amicus Curiae Supporting Petitioners at 20 n.11, *linkLine*, 129 S.Ct. 1109 (No. 07-512) ("[E]ven if a monopolist might have an antitrust duty to deal . . . it would not necessarily follow that that it must deal at less than the monopoly price. Yet if downstream competitors must pay monopoly prices for an important component of what they sell while competing against the monopolist, whose cost to produce that input is below the monopoly price, they are likely to face a margin-based price squeeze.").

Addressing administrability concerns, *amici* had proposed a "transfer price test" followed by some U.S. courts and the European Union whereby a price squeeze is presumed if the monopolist could not have

deal, which meant, "If AT&T had simply stopped providing DSL transport service to the plaintiffs, it would not have run afoul of the Sherman Act."[82] *A fortiori* "AT&T was not required to offer this service at the wholesale prices the plaintiffs would have preferred [to avoid a price squeeze]."[83] The majority suggested that not only would a price squeeze be precluded in the absence of an "antitrust duty to deal," but a predatory pricing claim at the retail level may be barred as well because "if AT&T can bankrupt the plaintiffs by refusing to deal altogether, the plaintiffs must demonstrate why the law prevents AT&T from putting them out of business by pricing them out of the market."[84]

In a concurring opinion for the four more liberal Justices, Justice Breyer was critical of the majority's analysis. Breyer endorsed the price squeeze theory as an independent basis of Section 2 liability under *Alcoa*,[85] and rejected the majority's focus on the antitrust-duty-to deal issue. He wrote:

As a matter of logic, it may be that a particular price squeeze can only be exclusionary if a refusal by the monopolist to sell to the "squeezed customer" would also be exclusionary. But a court, faced with a price squeeze rather than a refusal to deal, is unlikely to find the latter (hypothetical) question any easier to answer than the former.[86]

However, Breyer would have dismissed the complaint under *Town of Concord* because a regulatory remedy was available:

We have before us a regulated firm. . . . When a regulatory structure exists to deter and remedy anticompetitive harm, the costs of antitrust enforcement are likely to be greater than the benefits.

Unlike Town of Concord, the regulators here controlled prices only at the wholesale level. But respondents do not claim that that regulatory fact makes any difference; and rightly so, for as far as I can

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made a profit by selling at its retail rates if it purchased inputs at its own wholesale rates. *See* AAI Amicus Brief, *supra* note 77, at 9-11. The Court rejected this test "[w]hether or not [it] is administrable," because "[a]n upstream monopolist with no duty to deal is free to charge whatever wholesale price it would like ..." *linkLine*, 129 S. Ct. at 1122. But under the constructive-refusal-to-deal theory, the monopolist *would* have a duty to deal, so there is no basis in the opinion at least for rejecting a price squeeze theory based on a transfer price test if the other elements of a refusal to deal are established.

82 *Id.* at 1119. According to the Court, the district court held that AT&T had no "antitrust duty to deal with its competitors," and that "this holding was not challenged on appeal." *Id.* at 1118. In fact, however, all the district said was that AT&T's dealing was compelled by law and not voluntary; that is what was not contested on appeal. *See linkLine*, 503 F.3d at 878-79 n.6. The district court thought the question it was certifying was whether the existence of statutory compulsion precluded price squeeze liability.

83 *linkLine*, 129 S. Ct. at 1119.

84 *Id.* at 1123. AT&T and the Solicitor General had conceded that a predatory pricing claim at the retail level would be actionable in the absence of an "antitrust duty to deal." *Amici* argued that this concession meant that the "lesser within the greater" argument as to a price squeeze was not correct, and that one had to understand *why* there was no liability for a refusal to deal before concluding that the rationale was applicable to a price squeeze claim. *See* AAI Amicus Brief, *supra* note 77, at 25-37.

85 *linkLine*, 129 S. Ct. at 1124 (Breyer, J., dissenting). Curiously, Breyer referred to the theory as one where "the Government [is] plaintiff," *id.* at 1124, although the liability provisions of the Sherman Act do not distinguish between private and government actions. Professor Crane observes that this bespeaks Breyer's scepticism of private enforcement and the role of juries. *See* Daniel A. Crane, *Business Regulation:* linkLine's *Institutional Suspicions*, 2008-09 CATO SUP. CT. REV. 111, 125 (noting that government enforcement actions under § 2 seek only injunctive relief and thus are not brought before juries).

86 *linkLine*, 129 S. Ct. at 1124.

tell, respondents could have gone to the regulators and asked for petitioners' wholesale prices to be lowered in light of the alleged price squeeze.[87]

Should the majority's rejection of Breyer's approach be construed as a victory for the traditional restrictive approach to implied immunity? After all, petitioners had argued that soft-immunity considerations of *Trinko* and *Town of Concord* constituted an additional ground for reversal,[88] whereas the Solicitor General's brief, which the Court otherwise largely followed, argued that "[r]egulatory enforcement should not displace antitrust enforcement unless the criteria for implied immunity are satisfied."[89] Yet the Court's focus on the "antitrust duty to deal" may suggest a rather broad immunity: where regulation creates a duty to deal, *only* regulatory remedies are available to police a vertically integrated monopolist's anticompetitive conduct towards its dependent, downstream rivals. As Justice Kennedy said at oral argument, "you use the regulation in order to establish the duty, but then you don't want to go to the regulators to regulate the price. And it seems to me that's inconsistent."[90]

Now, it is true that *Trinko* itself held that the compulsory dealing provisions of the Telecommunications Act only categorically precluded an essential facilities claim, and that there was no liability for a refusal to deal in that case because there was no evidence of predatory intent, as in *Aspen*, and no discrimination against competitor-customers, as in *Otter Tail*. But the *linkLine* majority repeatedly said that *Trinko* was about the implications of the fact that Verizon had no antitrust duty to deal.[91] Reading

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87 *Id.* Justice Breyer reinterpreted his own *Town of Concord* opinion, which did not foreclose potential antitrust liability when the retail level is unregulated notwithstanding the authority of the FERC to remedy a price squeeze. *See* Town of Concord v. Boston Edison Co., 915 F.2d 17, 28, 29 (1st Cir. 1990) ("We recognize that a special problem is posed by a monopolist, regulated at only one level, who seeks to dominate a second, unregulated level . . . ."). Indeed, immunity in *Town of Concord* was not based on the mere availability of an *ex post* regulatory remedy, but on the pervasive regulation of rates, entry, and change of control, which "significantly diminish[ed] the likelihood of major antitrust harm." *Id.* at 25.

88 *See* Brief for Petitioners 35-37, *linkLine*, 129 S. Ct. 1109 (No. 07-512).

89 Brief for the United States as Amicus Curiae Supporting Petitioners 15, *linkLine*, 129 S.Ct. 1109 (No. 07-512). The Solicitor General said it was not necessary to reach the immunity issue, however, stating, "with or without a regulatory scheme, the antitrust laws should not be construed to forbid a mere margin-based squeeze, because such a prohibition would represent unsound antitrust policy and conflict with this Court's modern antitrust jurisprudence." *Id.*

90 Transcript of Oral Argument 47, *linkLine*, 129 S.Ct. 1109 (No. 07-512); *see also id*. at 49 (Justice Scalia asked, "is there no such thing as primary agency responsibility to take care of that problem rather than rushing into a court and take care of it through the . . . Sherman Act?").

91 *linkLine*, 129 S. Ct at 1115 ("In [*Trinko*] we held that a firm with *no antitrust duty to deal* with its rivals at all is under no obligation to provide those rivals with a 'sufficient' level of service.") (emphasis added); *id.* at 1119 ("Given that Verizon had *no antitrust duty to deal* with its rivals at all, we concluded that 'Verizon's alleged insufficient assistance in the provision of service to rivals' did not violate the Sherman Act.") (emphasis added); *id.* ("The nub of the complaint in both *Trinko* and this case is identical – the plaintiffs alleged that the defendants (upstream monopolists) abused their power in the wholesale market to prevent rival firms from competing effectively in the retail market. *Trinko* holds that such claims are not cognizable under the Sherman Act in the absence of *an antitrust duty to deal*.") (emphasis added); *id.* at 1123 ("*Trinko* holds that a defendant with *no antitrust duty to deal* with its rivals has no duty to deal under the terms and conditions preferred by those rivals.")(emphasis added).

The phrase "antitrust duty to deal" does not appear in the Court's prior jurisprudence. The closest *Trinko* comes to using the phrase is at the end of the opinion when it quotes from Areeda's article criticizing the essential facilities doctrine, stating, "'No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise.'" *Trinko*, 540 U.S. at 415. Insofar as *Trinko* involved the lack of an antitrust duty to deal, that was the *conclusion* of the analysis, not the beginning.

*Trinko* as a case about "no duty," rather than "no breach," tends to obscure the issues of defendant's predatory intent and actual course of conduct and to focus on whether a duty exists *ab initio*.[92] It is hard to see how such an abstract duty can be established, particularly when the dealing is compelled by regulation.[93] The essential facilities doctrine, which abstracts from a specific monopolist's intent and behaviour, might do the trick, but *Trinko* plainly forecloses that possibility in a regulated industry.

### 3. What is the Explanation for the New American Approach?

Professor Hovenkamp offers a simple explanation for the Court's new regard for regulatory immunity: "[W]hile the Court is more sceptical about agency regulation than it was in the 1970s, its scepticism about the use of antitrust litigation is even greater."[94] Other scholars have also pointed to the Court's increasing concern with "false positives" resulting from private antitrust litigation, along with the overdeterrence that supposedly results from the combination of opt-out class actions, treble damages, and fee shifting.[95] Many have suggested that such concerns lack empirical support and are overblown, particularly in light of heightened pleading, summary judgment, and class certification requirements.[96] Moreover, it seems unwise to use regulatory immunity to defang private actions when the result is that government actions are stymied as well.[97] And it is odd as well because retrospective actions for damages,

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92 Tort law distinguishes between whether a defendant breached a duty of care and whether a defendant owed the plaintiff a duty of care in the first place. The issue of breach involves the specific defendant and its conduct in the circumstances. As Professor Sugarman notes, "'No duty,' however, is not a matter of evaluating the specific facts of this case. Rather, it is a global determination that, for some overriding policy reason, courts not entertain causes of action for cases that fall into certain categories." Stephen D. Sugarman, *The Monsanto Lecture: Assumption of Risk*, 31 Val. U. L. Rev. 833, 843 (1997).

93 Even prior to Supreme Court's decision in *linkLine*, a number of lower courts, including the trial court in *linkLine*, interpreted *Trinko* to bar a refusal to deal claim whenever the dealing is compelled by law. *See linkLine*, 2004 WL 5503772, at *6; Covad Commc'ns Co. v. BellSouth Corp., 374 F.3d 1044, 1049 (11th Cir. 2004).

94 AREEDA & HOVENKAMP, *supra* note 8, ¶ 243d (2010 Supp.).

95 *See, e.g.*, William E. Kovacic, Competition Policy in the European Union and the United States: Convergence or Divergence?, Speech at the Bates White Fifth Annual Antitrust Conference 14 (June 2, 2008), http://www.ftc.gov/speeches/kovacic/080602bateswhite.pdf (arguing that "judicial fears that the US style of private rights of action . . . excessively deter legitimate conduct have spurred a dramatic retrenchment of antitrust liability standards" over the past 30 years, particularly in the treatment of dominant firm conduct).

96 *See, e.g.*, AMERICAN ANTITRUST INSTITUTE, THE NEXT ANTITRUST AGENDA 219-34 (Albert A. Foer ed., 2008) (offering vigorous defense of the benefits of private enforcement and critique of the claims that U.S. system is excessive); *see also* William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 74-75 ("assumptions about the asserted dangers of overdeterrence from private enforcement in the United States ought not be accepted as a matter of faith and ought to be tested vigorously in light of modern experience and empirical study"). Insofar as there is a problem with false positives, Justice Breyer was wrong to think that it is greater in regulated markets, according to Professors Dogan and Lemley, "because regulators can easily protect particular types of conduct from antitrust scrutiny by the simple expedient of adopting or requiring it." Stacey L. Dogan & Mark A. Lemley, *Antitrust Law and Regulatory Gaming*, 87 TEX. L. REV. 685, 703 (2009).

97 *See* Baker, *supra* note 67, at 176 (*Trinko* and *Credit Suisse* "are so important (and, I think, unfortunate) because they exclude not only private antitrust plaintiffs, but also the DOJ and FTC, from dealing with potential Section 2 violations in regulated markets"). Interestingly, Professor Hovenkamp sees the opportunity for the soft-immunity analysis in *Trinko* "to provide more or less antitrust involvement in a regulated industry depending on the nature of the remedy that the antitrust plaintiff is seeking," so as to avoid "large, often marginally frivolous [treble damages actions] that are particularly disruptive to the

in contrast to injunctive relief, have generally been thought to interfere least with regulatory prerogatives.[98] And the class action device itself tends to reduce the risk of conflicting judgments.

While it is hard to deny the role of class action phobia in the Court's shrinking of the domain of antitrust generally, especially because it seems to cut across ideological lines,[99] the shift in immunity doctrine also does appear to reflect a greater faith in regulators to achieve optimal outcomes and act as an "effective steward of the antitrust function." In contrast, the traditional approach to immunity "is a sceptical, activist view that sees the antitrust court as a watchful overseer not only of private conduct but also the agencies themselves."[100] One might have thought that the financial crisis of 2008 would call into question whether greater faith in regulators is warranted, but the liberal regulatory impulse remains.[101] The arguments against regulatory deference are straightforward: while regulators ordinarily have more technical expertise, antitrust enforcers are less prone to capture, and more capable of enforcing competition norms, than regulators.[102] As former Antitrust Division Chief Donald Baker has noted, the Justice Department historically has taken on cases like *U.S. v. AT&T* where "[t]he competitive problems were simply too large and too controversial politically for a sectoral regulator closely associated with the industry to tackle."[103] Certainly there is no shortage of complaints about regulatory agencies' performance of the "antitrust function."[104] Indeed, the very fact that an antitrust violation occurred under the regulators' watchful eye would seem to suggest some lack of effective antitrust stewardship.[105]

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regulatory process," and permit purely equity actions, which are generally brought by the government. AREEDA & HOVENKAMP, *supra* note 8, ¶243g1, at 360.

98 *See id.* ¶ 242c, at 310-11 ("The case for [regulatory] deference is[] stronger when the antitrust action seeks only an injunction, which is, typically, also within the power of the regulatory agency; and weaker when the antitrust action seeks damages or other remedies not within the agency's power to grant."); *see* Carnation Co. v. Pac. Westbound Conf., 383 U.S. 213, 222 (1966) (award of treble damages for past conduct "would certainly not interfere with any future action of the Commission"); Pan American World Airways, Inc. v. United States, 371 U.S. 296, 313 n.19 (1963) (holding that immunity barred injunctive relief but not necessarily an action for damages).

99 *See generally* Crane, *supra* note 85, at 126 (describing disdain of both the Chicago School and Harvard School for treble damages cases, juries, and the antitrust plaintiffs' bar); *cf.* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1465 n.3 (2010) (Ginsburg, J., dissenting) ("Even in the mine-run case, a class action can result in 'potentially ruinous liability.' A court's decision to certify a class accordingly places pressure on the defendant to settle even unmeritorious claims." (citation omitted)).

100 AREEDA & HOVENKAMP, *supra* note 8, ¶ 243d, at 319.

101 *See* SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 88-119, 229 (2011) (describing regulatory failures leading up to the financial crisis, but noting that "[i]nstead of changing the financial system, the [financial reform legislation] places its faith in the idea that regulators, armed with additional, sorely needed powers, could constrain its excesses and prevent it from once again torpedoing the global economy").

102 *See* Dogan & Lemley, *supra* note 96, at 696-98 (noting that regulatory agencies frequently do not seek to promote economic efficiency through competition, and when they do, it is a secondary concern); AREEDA & HOVENKAMP, *supra* note 8, ¶ 240c4, at 283 ("Often the antitrust authorities are more sceptical than regulators about industry claims of efficiency or the social benefits of restraints on competition."); *see also* Hovenkamp, *supra* note 7, at 357-60 (describing evolution of public choice theory).

103 Baker, *supra* note 67, at 186; *see also id.* at 176 (noting that "sectoral regulators tend to be closer to the monopolist(s) involved and more cautious about disrupting the status quo than independent judges and juries can sometimes be").

104 *See, e.g.*, Weiser, *supra* note 45, at 558 ("many agencies—including the FCC—are beset by delayed decision-making processes, a heavy dose of political influence, and a lack of familiarity with rule-of-law enforcement of the kind familiar to antitrust courts"); Harvey Reiter, *The Contrasting Policies of the FCC*

To be sure, it is possible to interpret the new immunity doctrine as coming into play only when regulators have demonstrated their effectiveness by remedying the conduct at issue. But the Court's emphasis on regulatory "structure," and willingness to confer immunity on motions to dismiss without any actual evidence of agency performance, suggests that the standard of effectiveness may not be very high.[106] Moreover, any case-by-case approach to measuring agency effectiveness raises serious administrability and rule-of-law concerns. The traditional strong presumption against implied immunity is based in part on the venerable rule of statutory construction that implied repeals of older statutes by newer ones are disfavoured. Designed to respect the presumed intent of Congress, the rule arguably limits the discretion of courts.[107] *Trinko*'s approach, in contrast, involves courts in explicit policymaking – balancing the costs and benefits of permitting an antitrust action – to achieve the optimal outcome, a practice that ordinarily raises separation of powers concerns but in which the Supreme Court has increasingly engaged in its Sherman Act jurisprudence.[108]

It is argued that permitting antitrust cases when regulatory remedies exist threatens excessive relief, duplicative proceedings, or a collateral attack on an agency's discretion not to act or its exoneration of the defendant. Yet these risks exist in any system of dual enforcement, and doctrines such as primary jurisdiction are available to minimize them.[109] The U.S. antitrust system is characterized by multiple enforcement – two federal antitrust agencies, state enforcement, and private enforcement – and the benefits of overlapping antitrust responsibility are thought to outweigh the costs.[110] Having diverse centres of enforcement takes advantage of enforcers' different skill sets and incentives, and ensures that that there is no systematic failure of enforcement. At the same time, coordination is facilitated by the fact that enforcement is channelled through a flexible court system. In short, solving coordination problems by giving regulators exclusive authority to enforce competition norms would itself be rather exceptional.[111]

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*and FERC Regarding the Importance of Open Transmission Networks in Downstream Competitive Markets*, 57 FED. COMM. L.J. 243, 318-19 & n.389, 321 (2005) (maintaining that FCC was indifferent to ISP complaints about exclusionary practices and that its "obliviousness to downstream competition issues has led it to ignore alternatives to the deregulatory course it has chosen"); *see also* Rossi, *supra* note 10, at 1626 (arguing that "agencies such as FERC and the FCC . . . do not have significant powers to assess and enforce penalties against wrongdoers").

105 *See* Dogan & Lemley, *supra* note 96, at 704 ("An agency that stops certain conduct after it begins does not sufficiently deter antitrust violations . . . .").

106 *See* AREEDA & HOVENKAMP, *supra* note 8, ¶ 243, at 360 (under *Trinko*, "it need not be the case that the agency has actually imposed a remedy"). This is confirmed by *Credit Suisse*, which referred to the fact that the SEC actively enforced the rules that prohibited the type of conduct in question, but not to any actions taken by the SEC as to the specific conduct alleged by plaintiffs. *See* Credit Suisse Securities (USA) LLC v. Billing, 551 U.S. 264, 277, 283 (2007).

107 *See* Markham, *supra* note 66, at 440 (arguing that presumption against implied repeal "minimized judicial incursions into the legislative sphere and, at the same time, provided a clear, predictable, and administrable rule"). *But see* Karen Petroski, *Retheorizing the Presumption Against Implied Repeals*, 92 CAL. L. REV. 487, 493 (2004) (arguing that implied repeal doctrine has been used to signal judicial restraint while Court engages in judicial activism).

108 *See, e.g.*, Richard M. Brunell, *Overruling* Dr. Miles: *The Supreme Trade Commission in Action*, 52 ANTITRUST BULL. 475, 476 (2007) (arguing that Court's reversal of the per se rule against resale price maintenance marks a new height in antitrust judicial activism).

109 *See supra* note 25 and accompanying text.

110 *See* ANTITRUST MODERNIZATION COMMISSION, *supra* note 61, at 129 (recommending no comprehensive change to existing dual system of FTC and DOJ enforcement); *id*. at 186-87 (same conclusion as to state enforcement); *id*. at 243-44 (same as to private enforcement).

111 *See* Dogan & Lemley, *supra* note 96, at 706 ("antitrust law does not generally worry about the effects of overlapping enforcement").

As Justice Frankfurter once observed about the complementary relationship between administrative agencies and courts, "'neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim.'"[112]

Finally, as others have noted, a strong presumption against antitrust immunity supports the project of deregulation because regulators can be more confident that the elimination of direct regulatory controls on market behaviour, if competition is feasible, will not lead to market abuse.[113] Indeed, the availability of antitrust remedies has frequently been cited as a justification for lifting regulations.[114] As Frischmann and Waller maintain, "one cannot argue in good faith for both deregulation and also the disabling of the courts from enforcing the antitrust rules that were part of the bargain for deregulation in the first place."[115] On the other hand, it might be argued that excessive reliance on *ex post* antitrust (or regulatory) remedies may lead regulators to demur from adopting *ex ante* regulations that might more effectively prevent anticompetitive conduct.[116] Yet providing greater immunity from antitrust law in order to impose more discipline on agencies to perform their antitrust function would be like eliminating seat belts to encourage inexperienced drivers to slow down—a rather risky proposition.

### 4. The European Approach: *Deutsche Telekom* and *Telefonica*

In *Deutsche Telekom*, the European Court of Justice (ECJ) upheld the decision of the General Court (formerly Court of First Instance) affirming the European Commission's determination that Deutsche Telekom, the incumbent operator of the German fixed telephone network, had abused its dominant position by engaging in a margin squeeze: charging competing carriers more for access to its network than it charged its retail customers for traditional analog, digital narrowband, and broadband services.[117] Deutsche Telekom contended it had committed no abuse because the German telecommunications

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112 Far East Conf. v. United States, 342 U.S. 570, 575 (1952) (quoting United States v. Morgan, 307 U.S. 183, 191 (1939)).

113 *See* John Vickers, *Competition Policy and Property Rights*, 120 ECON. J. 375, 382 (2010) (noting that "in the UK and elsewhere in Europe the application of competition law in regulated industries . . . has been seen as positively desirable, not least as a facilitator of the removal of *ex ante* regulation"); Shelanski, *supra* note 67, at 728 ("the availability of antitrust enforcement allows regulation to diminish without leaving a gap in oversight of competitive conduct"); *see also* Comments of the American Antitrust Institute, *supra* note 11, at 3 (maintaining that "the tardy entrance of antitrust enforcement into transitioning markets could delay the process of deregulation in potentially competitive markets").

114 *See* Frischmann & Waller, *supra* note 46, at 27 n.76 (giving numerous examples); *see also, e.g.*, In re Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace, 12 FCC Rcd 15,756, 15,831, at ¶ 128 (1997) (declining to impose ex ante tariff and cost support data requirements on Bell Operating Companies' service because, among other things, predatory price squeeze could be addressed by enforcement of antitrust laws).

115 Frischmann & Waller, *supra* note 46, at 27.

116 *See* Darren Bush & Carrie Mayne, *In (Reluctant) Defense of Enron: Why Bad Regulation is to Blame for California's Power Woes (or Why Antitrust Law Fails to Protect Against Market Power When the Market Rules Encourage its Use)*, 83 OR. L. REV. 207, 212 (2004) (arguing that California's failed electricity "deregulation" experiment was partly the result of an expectation that antitrust law would cure market ills); *cf.* Brief for the American Antitrust Institute as Amicus Curiae in Support of the Petitioner, New York Regional Interconnect, Inc. v. Federal Energy Regulatory Comm'n, _ F.3d _ (D.C. Cir. 2011) (No 09-1309), *available at* www.antitrustinstitute.org (criticizing FERC for relying on potential ex post remedies as a justification for allowing transmission organization to maintain rule with obvious anticompetitive risks).

117 Deutsche Telekom AG v. European Commission, Case C-280/08 (2010).

regulator (RegTP) had approved its wholesale and retail rates and had specifically found no anticompetitive margin squeeze.

The ECJ rejected Deutsche Telekom's "regulation defense." The Court acknowledged the claim that "the purpose of RegTP's regulation is to open the relevant markets up to competition," but explained that "the competition rules laid down by the EC Treaty supplement in that regard, by an ex post review, the legislative framework adopted by the Union legislature for ex ante regulation of the telecommunications markets."[118] In any event, a regulation defense, which has been accepted "only to a limited extent by the Court of Justice,"[119] is applicable

> only if anti-competitive conduct is required of undertakings by national legislation, or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part . . . . In such a situation, the restriction of competition is not attributable . . . to the autonomous conduct of the undertakings.[120]

In this case, although Deutsche Telekom could not eliminate the margin squeeze by altering its wholesale rates, which were cost-based, the Court accepted that Deutsche Telekom "had scope to adjust its retail prices"[121] by applying to the regulator to raise its retail access rates, which were subject to a bundled price cap with other services.[122] Accordingly, "the margin squeeze at issue was attributable to" Deutsche Telekom.[123] The Court said, "the mere fact that [Deutsche Telekom] was encouraged by the intervention of a national regulatory authority such as RegTP to maintain the pricing practices which led to the margin squeeze . . . cannot, as such, in any way absolve [it] from responsibility under Article 82 EC,"[124] although

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118 *Id.* ¶ 92.

119 *Id.* ¶ 81.

120 *Id.* ¶ 80.

121 *Id.* ¶ 85.

122 *See id.* ¶ 2. One of the retail services at issue, broadband, was not subject to advance regulation under the price cap system, but charges for that service could be reviewed subsequently. *Id.* (recital ¶ 23).

123 *Id.* ¶ 85

124 *Id.* ¶ 84. Indeed, the Court noted that "it is not inconceivable . . . that the national regulatory authorities may themselves have infringed Article 82 EC in conjunction with Article 10, and therefore that the Commission could have brought an action for failure to fulfil [sic] obligations against the Member State concerned." *Id.* ¶ 91. Article 10 (now Art. 4(3) TEU) "imposes on the Member States a duty of loyalty to the European Union not to adopt or maintain in force any measure which could deprive EC competition law of its effectiveness." Eleanor M. Fox, *State Action in Comparative Context: What if* Parker v. Brown *Were Italian?*, 463, 466, *in* FORDHAM CORP. L. INST., INTERNATIONAL ANTITRUST LAW & POLICY (B. Hawk ed., 2004) (internal quotes and brackets omitted). However, "the Court has been reluctant to condemn Member States' regulatory laws for undermining Articles 81 and 82." ELEANOR M. FOX, THE COMPETITION LAW OF THE EUROPEAN UNION IN COMPARATIVE PERSPECTIVE 336 (2009). A State may also be liable under Article 86 (now Article 106 T.F.E.U.) when its measures with respect to "public" undertakings and undertakings vested with "special or exclusive rights" conflict with Articles 81 or 82 (or other provisions of the Treaties), except that a State may take advantage of the general exemption for competition rules that would interfere with duties assigned to undertakings "entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly." *See* Niamh Dunne, *Knowing When to See It: State Activities, Economic Activities, and the Concept of Undertaking*, 16 COLUM. J. EUR. L. 427, 431-32 (2010) (describing "public interest" or "public service" exemption). In addition, a State entity may be directly liable as an undertaking under Articles 81 and 82 insofar as it is engaged in "economic activity." *See id*. at 434.

the degree of fault could be taken into account in setting the level of fines.[125] Moreover, the fact that RegTP determined that there was no anticompetitive price squeeze did not absolve DT because the regulator, if it applied Article 82 at all, did so incorrectly; it found a negative spread, but took the view that competitors could still compete by cross subsidizing their own retail services at issue.[126]

The European Commission applied similar reasoning in finding that Telefonica, the Spanish incumbent telecommunications operator, had abused its dominant position by engaging in a margin squeeze between its retail prices and wholesale access charges.[127] The abuse ended when the Spanish regulator intervened and reduced wholesale prices by 22% to 61%,[128] although the regulator had earlier approved rates for some of the services and had found no margin squeeze. With respect to a regulation defense, the Commission stated, "The key question is whether the undertaking subject to price regulation has the commercial discretion to avoid or end the margin squeeze on its own initiative."[129] The Commission found that Telefonica had such discretion because it could have lowered wholesale prices (which either were subject to a cap or were unregulated during the period) or sought higher retail charges.[130] Moreover, the Commission noted that the enforcement of Articles 81 and 82 of the Treaty was not the responsibility of the Spanish regulator, whose "competence to 'safeguard competition' is much more general than the enforcement of competition law as such."[131] Furthermore, the regulator's finding of no margin squeeze was based on estimates of costs that turned out to be inaccurate.[132]

*Deutsche Telekom* and *Telefónica* illustrate the EU's more restrictive approach to regulatory immunity compared to the new American approach. To be sure, it could be argued that regulatory immunity would not have been appropriate in the two cases even under *Trinko*'s "soft immunity" standards. Arguably, neither of the regulators in the cases was an effective steward of the antitrust function: the Spanish regulator had no responsibility for enforcing Article 82, while the German regulator either failed to, or did not properly, apply it. On the other hand, the regulatory structure appears designed to avoid margin squeezes,[133] and the Spanish regulator eventually did intervene to end the abuse. *Trinko* was also concerned with the "sometimes considerable disadvantages" of antitrust – *i.e.*, fears of

125 *See Deutsche Telekom* at ¶ 89. Pierre Larouche observes, "to some extent, the Commission . . . punished Deutsche Telekom for the sins of the German authorities," who failed to carry out tariff rebalancing ahead of liberalization in 1998. Pierre Larouche, Contrasting Legal Solutions and the Comparability of EU and US Experiences, TILEC Discussion Paper 2006-028, at 8 (Nov. 2006), *available at* http://papers.ssrn.com.

126 Deutsche Telekom AG v. Commission of the European Communities, [2008] E.C.R.II-477, ¶¶ 115-19 (decision of the Court of First Instance). Moreover, the ECJ noted that the Commission cannot "be bound by a decision taken by a national body pursuant to Article 82 EC." *Deutsche Telekom* at ¶ 90.

127 Wanadoo España v. Telefónica, Case COMP/38.784 (2007). The Commission fined Telefónica 152 million euros for a "very serious" infringement. *Id.* ¶¶ 750, 768.

128 *Id.* ¶ 747.

129 *Id.* ¶ 667.

130 *Id.* ¶¶ 669-75.

131 *Id.* ¶¶ 678-80.

132 *Id.* ¶¶ 727. Although the Commission found that Telefónica should have known that the cost estimates were not borne out in fact, *id.* ¶ 728, the regulator's review of the margin squeeze issue was a mitigating circumstance that warranted a 10% reduction in the fine, *id.* ¶¶ 765-66.

133 *See* Damien Geradin & Robert O'Donoghue, *The Concurrent Application of Competition Law and Regulation: The Case of Margin Squeeze Abuses in the Telecommunications Sector*, 1 J. COMP. L. & ECON. 355, 361 (2005) (noting that "regulatory powers in respect of a margin squeeze are in principle more extensive" than under competition law); *see Telefónica* at ¶ 684 (noting that Spanish regulator's policy was designed to avoid a margin squeeze).

overdeterrence resulting from private antitrust class actions decided by non-expert, generalist courts – concerns that are not applicable to European competition law, although some might see an analogous risk of overdeterrence in the significant fines the Commission imposes for abuse of dominance.[134]

*Deustche Telekom* and *Telefonica* may have come out differently under U.S. law even prior to *Trinko* insofar as the regulators scrutinized and approved the rates at issue.[135] Such a result might be reached under the traditional implied immunity doctrine,[136] the state action doctrine,[137] or possibly the filed rate doctrine.[138] In all events, the standard for immunity under EU law – whether the firm has discretion to

134 *See The Antitrust Marathon: A Roundtable Discussion, Part IV: Remedies - How Far and How Much?*, 20 LOY. CONSUMER L. REV. 197, 206 (2008). Another important difference in the institutional contexts that may have contributed to the different results is that *Deutsche Telekom* and *Telefónica* were decided on factual records in which the Commission found a clear abuse of dominance, while the recent American cases were decided on motions to dismiss before any factual evidence was taken, and the Supreme Court apparently perceived that the likelihood that anticompetitive harm occurred was low. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 405 (2004) (noting that complaint set forth "a single example" of the alleged failure to provide adequate access); Credit Suisse Securities (USA) LLC v. Billing, 551 U.S. 264, 286-87 (2007) (Stevens, J., dissenting) ("Given the magnitude of the market these practices are alleged to have influenced, I think it obvious as a matter of law that there has been no injury to any relevant competition."); Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 129 S. Ct. 1109, 1118 n.2 (2009) (questioning how AT&T could be a monopolist given that "the market for high-speed Internet service is now quite competitive"). It is one thing to defer to regulators when the antitrust court doubts that serious harm has occurred; it is another when the court is confronted with clear findings of abuse.

135 Independent of the immunity issue, American courts prior to *linkLine* typically required a plaintiff to establish more than the mere existence of a price squeeze, but also that the monopolist had a specific anticompetitive intent. *See, e.g.*, City of Anaheim v. S. Cal. Edison Co., 955 F.2d 1373, 1378 (9th Cir. 1992). In contrast, EU law imposes a "special responsibility" on dominant firms "not to allow their conduct to impair genuine undistorted competition." *Deutsche Telekom* at ¶ 83. There is nothing in the decisions that suggests that either Deutsche Telekom or Telefónica had a specific intent to exclude rivals. *See* Deutsche Telekom AG v. Commission of the European Communities, [2008] E.C.R.II-477, ¶¶ 295-98 (infringement committed intentionally or negligently because Deutsche Telekom "could not have been unaware that the margin squeeze entailed serious restrictions on competition"); *Telefónica* at ¶ 765 (some of Telefonica's conduct merely negligent, albeit seriously so).

136 *See* Gordon v. New York Stock Exchange, Inc., 422 U.S. 659, 689 & n.13 (1975) (practices actively scrutinized and approved by agency were immune from antitrust attack); *cf.* City of Kirkwood v. Union Elec. Co., 671 F.2d 1173, 1178 (8th Cir. 1982) (price squeeze complaint not barred by implied immunity doctrine because FERC only had jurisdiction over wholesale rates and could not necessarily address the whole problem). Still, it might be argued that there was no plain repugnancy between the authorization given by the regulators and the competition law, especially in *Telefónica* where the regulatory policy was to *prevent* a margin squeeze and some of the rates were unregulated.

137 *Cf.* City of Mishawaka v. Indiana & Michigan Elec. Co., 560 F.2d 1314, 1320 (7th Cir. 1977) (price squeeze complaint not barred by state action doctrine where "price squeeze has not been blessed by Indiana or Michigan"). *But see* United States v. Rochester Gas & Elec. Corp., 4 F.Supp.2d 172 (W.D. N.Y. 1998) (state utility regulator's approval of contract with anticompetitive condition does not immunize contract from antitrust scrutiny because state law did not expressly or implicitly authorize such a condition).

138 *See* Town of Norwood v. New England Power Co., 202 F.3d 408 (1st Cir. 2000) (holding that filed rate doctrine barred price squeeze claim when the two rates were regulated by the Federal Energy Regulatory Commission, and distinguishing other price squeeze cases involving dual regulation, i.e., federal regulation of wholesale rates and state regulation of retail rates). *But see City of Kirkwood*, 671 F.2d at 1179 (filed rate doctrine does not bar price squeeze because issue isn't whether rates are illegal but rather defendant's conduct in proposing an anticompetitive combination of rates).

avoid violating the competition law – is much narrower than the standard under U.S. law, which does not require, in effect, that an antitrust violation be compelled by state[139] or federal law.[140]

The narrow regulated conduct defense in the EU, as compared to the U.S., has been explained by the fact that, at least in the telecommunications sector, "the hierarchy of norms" is different in the EU.[141] As Pierre Larouche points out, EC competition law, enshrined in the EC Treaty (now TFEU), is "primary EC law," while sector-specific regulation is "secondary EC law."[142] Thus, Larouche maintains,

[W]hen the Commission stated in [Deutsche Telekom] that Article 82 EC remained applicable despite all the actions taken by the RegTP under German telecommunications law (which was largely based on EC directives), it did not merely issue a policy statement, it acknowledged the superior position of EC competition law in the basic architecture of EC law. The Commission could not take any other position.[143]

In contrast, under U.S. implied immunity doctrine, the conflict arises under two federal statutes. While there is much force to this argument,[144] it cannot be taken too far because under U.S. law, the traditional hierarchy of norms was that the federal antitrust law was the foundation or background law that always applied absent a "clear repugnancy" with another federal statute.

## 5. Conclusion

Antitrust and regulation have been viewed largely as complementary regimes, particularly in partially deregulated industries. However, recent American cases have broadened the implied immunity defense in way that suggests that antitrust law should not apply if regulatory remedies are available. In contrast, recent European price squeeze cases show that the regulated conduct defense is quite narrow under EU law. While the new U.S. approach has been driven in part by increasing concerns over "false positives" resulting from private antitrust enforcement, it also appears to reflect a greater faith in regulators' ability to perform the "antitrust function," which seems unwarranted. It remains to be seen whether the expansion of the immunity defense will be enduring, but one can predict that firms in regulated industries will be more likely to engage in anticompetitive conduct because the antitrust enforcement agencies' voice in regulated industries is weakened and deterrence reduced.

139 *See* Southern Motor Carriers Rate Conf., Inc. v. United States, 471 U.S. 48 (1985) (regulatory compulsion neither necessary nor sufficient for state action immunity).

140 *See supra* note 21.

141 *See* Larouche, *supra* note 125, at 10; Geradin & O'Donoghue, *supra* note 133, at 418.

142 Larouche, *supra* note 125, at 11.

143 *Id.*

144 Moreover, commentators have observed that the U.S. state action doctrine reflects federalism impulses that are stronger in the U.S. than in Europe, at least with regard to conduct that has a community impact. *See* Fox, *supra* note 124, at 473.

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# SUMMARY OF DISCUSSION

*By the Secretariat*

## 1. Introduction

The Chair, Alberto Heimler, opened the discussion on the regulated conduct defence by noting that a very similar roundtable took place at the Seoul conference of the ICN in 2004, but that the debate had substantially evolved since then. In general, the antitrust authorities intervene when firms enjoy some margin of discretion. Conversely, when the conduct is imposed by regulation, the antitrust authorities do not intervene. In some countries, however, the regulated conduct defence may go further and cover practices where the firm while heavily influenced by regulation still maintains a margin of discretion.

## 2. Possibilities and the conditions for intervening directly against anticompetitive regulations

The Chairman started the discussion by pointing out that in some jurisdictions antitrust statutes apply even when firms do not have autonomy. In most jurisdictions, however, a change of the regulatory rules would be the only possible solution leaving competition advocacy as the only tool available to antitrust authorities. Exceptionally and in a few jurisdictions, however, antitrust rules do prevail when there is a conflict between antitrust provisions and regulations. This possibility arises particularly in federal states or multi-level governance settings like the US and Canada and more importantly the EU. The legal arguments are similar although not always identical and are based on the relationship between rules at different hierarchical levels.

The Chairman dealt first with the US state action doctrine. The doctrine allows some rules, those undertaken by subordinate entities like commissions or municipalities, to be challenged while state level rules cannot be challenged. The Chairman asked whether it would be possible to challenge state measures directly instead of recurring to advocacy.

The US delegation explained that a two-part test applies to claims by private parties that their conduct is entitled to "state action immunity" from federal antitrust law. The conduct at issue must be, first, clearly articulated and affirmatively expressed as state policy, and second, actively supervised by the State itself. Accordingly, when a state action defence is asserted, the court must consider whether the regulatory statute makes clear that the legislature intended to displace competition and that it put in place machinery to actively oversee private action; the state legislature may not displace antitrust law by delegating regulation to private parties. A subordinate state entity (such as a municipality) may claim state action immunity for particular conduct only if the particular anticompetitive activities at issue were authorized by the State pursuant to state policy to displace competition with regulation or monopoly public service.

The US antitrust agencies urge the courts to reject state action defences that do not meet the applicable legal standards. The agencies also encourage state legislatures and regulators to enact and adopt pro-competitive policies and regulations and to reject or repeal regulations that would impede competition and consumer choice. Further, the agencies seek to educate consumers about the benefits of competition so that they can make informed choices through the political process.

The Chairman asked to whom such revision of the state action doctrine is proposed, the judges or the legislator.

The US delegation answered that the US antitrust agencies have not sought to change the basic principles of the state action doctrine as articulated by the Supreme Court. Rather, the agencies urge the courts to reject state action defences that do not meet the applicable legal standards, and encourage state legislatures and regulators to enact and adopt pro-competitive policies and regulations.

Then the Chairman asked whether states have an obligation to respond to antitrust agencies' advocacy initiatives or whether those can be ignored.

The US delegation answered that states are not obliged to listen to antitrust agencies; hence agencies can only succeed by persuasion. Antitrust authorities have promoted competition and consumer welfare by presenting at the state level strong, reliable, and evidence-based arguments about the likely effects and welfare costs of proposed state regulations, on such topics as contact lenses, real estate services, or legal services associated with the conveyance of real property. Given the federal nature of the US where there are many natural experiments in the different states, it may be convincing to use the actual experience of specific states as support.

The Chairman noted that the EU has greater powers in this respect, although paradoxically it is not a federal structure as the US. According to the case-law of the European Court of Justice (ECJ), EU law is superior to national laws and any national provision that contravenes EU rules has to be dis-applied by national courts or administrations without need to be annulled by the national parliament. Member States are not allowed to introduce or maintain measures that could deprive the competition rules from being effective. In the Italian Bar case (Arduino), the ECJ decided that the Italian law establishing minimum tariffs for professional services was not contrary to the Treaty because such tariffs were reviewed by the Minister and such review should pursue the general interest. However, the Court did not assess directly whether the general interest was pursued in practice. The question was raised whether the Court could change its position in the future and assess the discretionary appreciation of the objective of the law.

The EU delegation recalled the very specific circumstances of the Arduino case that render it unrepresentative. The Italian law required the National Council of the Bar to make a proposal for the criteria to determine minimum lawyer fees and these draft criteria had to be approved by the Minister of Justice upon advice of two public bodies. In answering the question asked by the Italian judge, the ECJ recalled its established case-law according to which the Treaty may be infringed by national legislation if the law requires or favours the adoption of anticompetitive arrangements, reinforces their effects or where it divests its own rules of the character of the legislation by delegating its task to a private economic operator. In Arduino, the ECJ established that there was no such delegation because the Minister could have changed the proposed draft and had to ask the opinion of public bodies. In this respect Arduino differs from an earlier Italian case concerning the National Council of Customs Agents where the law required the representative body to directly decide on the customs agents' tariffs. In any case, it is important to recall that the ECJ preliminary cases are always dependant upon the questions raised by the national courts and they are very case specific, hence it is difficult to turn them into general principles. In another case regarding professional services (l'Ordre des Pharmaciens), an association of pharmacists that set minimum tariffs for clinical tests was found guilty of cartel infringement. This is in line with the case-law and general practice.

The Chairman emphasized that in Arduino the public control on the minimum fees proposed by the Bar Association was wide but not very detailed. There were a number of formal controls by the Italian Council of State and other public bodies on this minimum tariff before they were approved, but the public

control was almost inexistent in practice. The ECJ limited itself to a formalistic review without investigating the practice.

He then referred to the recent Garland decision of Supreme Court of Canada, which identified a long list of elements that the Competition Bureau should consider before concluding that the conduct regulated by another law should be pursued under the Competition Act. He asked which authority, the Bureau or a judge, decides on whether the conduct is subject to the antitrust laws. He also asked whether the relationship between federal and provincial law is based on the principle of primacy or the principle of sharing responsibilities.

The Canadian delegation outlined that the regulated conduct doctrine is an important issue for the courts, regulators and competition law practitioners because the case law is underdeveloped, and there are many factors to consider when determining its scope and applicability. The Competition Bureau has aimed to provide clarity with its recent Bulletin on "Regulated" Conduct, which outlines the Competition Bureau's understanding of the current law, and its general approach to the enforcement of the Competition Act for conduct that is regulated by another law or legislative regime.

The Canadian delegation explained that the Competition Act is a framework law of general application and Canadian courts have said that Parliament "…is not presumed to depart from the general system of law without expressing its intention to do so with irresistible clearness." The regulated conduct doctrine is an exception to this and other important principles of statutory interpretation. Generally speaking, in determining whether a conduct regulated by another law will be pursued under the Competition Act, the Competition Bureau carefully considers factors such as the purpose of the Competition Act and any other laws applicable to the conduct, the interests sought to be protected by both laws, the conduct, the applicable provisions of the Competition Act and of the other law, the parties involved, the principles of statutory interpretation applicable to the case, whether the conduct is authorised or required by any other laws, and any other defences or doctrines available to the parties and the public interest. Ultimately, the Courts decide whether a conduct is subject to the antitrust law, but the Competition Bureau considers the doctrine when deciding how to exercise its enforcement discretion.

Regarding the division of powers between the levels of governments, matters of federal jurisdiction include trade and commerce and the criminal law whereas matters of provincial jurisdiction include property and civil rights. There may be overlap between federal and provincial legislation and Canadian courts have developed doctrines to give simultaneous effect to legislation from both levels of government. However, when the courts find an operational conflict between federal and provincial legislation either because it is impossible to comply with both laws, or compliance with one law would frustrate the purpose of the other, the federal law prevails, to the extent of the inconsistency, due to the doctrine of paramountcy. In practice, the doctrine of paramountcy is rarely applied because the courts strive to avoid finding an operational conflict.

The Chairman turned to France where the Council of State, in the Fédération Française de Sociétés d'Assurances case, decided that delegating the management of the non-compulsory retirement scheme for farmers to the body already in charge of the management of the compulsory retirement scheme violated the Treaty of the functioning of the European Union. He wondered whether such decision was possible in light of the fact that the attribution was based on an administrative act and whether it would also have been possible if the delegation had been based on a legislative act.

The French delegation responded that indeed the decision was only made possible because the attribution was based on an administrative regulation. He explained that France is characterised by a system of dual jurisdictions (judicial and administrative). The Council of State, which is the highest administrative court, may repeal administrative acts irrespective of whether they are of individual or

general application or emanate from a local or regional authority. In its review, the Council of State decides on the legality of the administrative act, which includes the conformity with the competition provisions of the EU treaty. Such review takes place *a priori* because it deals directly with regulation attributing the management of the retirement scheme. Thus it is not the abusive behaviour of the undertaking that is punished as the behaviour cannot yet be observed when the administrative judge decides. The Council of State may request the opinion of the competition authority. The delegation also mentioned that Fédération Française de Sociétés d'Assurances was a private action case.

## 3. The conditions for aregulated conducted defence

The Chairman then moved to the conditions for applying a regulated conduct defence and how widely such a defence is applied across jurisdictions. He referred to the Slovak contribution addressing the issue of *ne bis in idem* in case a conduct is subject to regulation and an antitrust violation. In a case against Slovak Telecom, the competition office argued that a margin squeeze was subject to competition law although some prices, but not the ones that led to the margin squeeze, were regulated. In this case, *ne bis in idem* does not hold since there was no intervention by the regulator. However, the competition office also prohibited tying between voice and access services and the Chairman asked whether the tying practice had been approved by the regulator.

The Slovak delegation explained that the competition office prohibited two types of tying: a tying of internet with voice services and another tying of voice services with network access for final customers. Regarding the first tying, the regulator had intervened in 2006. The competition office decided that it could not intervene after the action of the regulator, but then the Council of the competition office decided that it could have intervened even after 2006 because regulation and competition law have different objectives. However, it did not do so for matters of priorities. Regarding the second tying, the regulator had not intervened, hence there was no issue of *ne bis in idem*.

Then the Chairman mentioned that, in Turkey, the competition authority intervened successfully in a number of cases in regulated sectors. However, in one case involving the Bar Association, where a law required the Bar Association to set the minimum price for attorney fees, the competition authority did not go against the Bar Association (although it could have done so in some jurisdictions such as the EU) but instead went for advocacy. He asked whether there was a possibility of intervening directly against the Bar Association.

The Turkish delegation responded that the Attorneyship Law grants the Union of the Turkish Bar Association the right to determine the minimum level of fees, which has to be explicitly or tacitly approved by the Minister of Justice. In the Turkish legal system, an anticompetitive practice which is authorised by a specific (special) law cannot be prohibited because the specific law prevails over general law such as competition law. Thus when the Bar Union sets the minimum fee, the process of how it determines the fees and the level of fees do not matter. In other similar cases where the competition authority intervened against the Union of Chambers of Turkish Engineers and Architects and the Turkish Pharmacists' Association, the decisions of the authority were overturned in appeal because specific laws provide for the conduct, and prevailed over competition law. Thus, the only route is to rely on advocacy which the competition authority is using in particular with respect to professional associations.

Then, Prof. Brunell, director for legal advocacy at the American Antitrust Institute and adjunct professor of law at Boston College, presented his paper on the U.S. Supreme Court's new approach to implied immunity. He argued that the recent Trinko, Credit Suisse and Linkline cases led to a significant and troubling change in the way the Supreme Court treats the implied immunity doctrine. The Linkline case involved the complaint that the incumbent telephone company in California had engaged in a price squeeze against independent Internet Service Providers in order to monopolise an alleged market for DSL

internet service in California. The Court majority opinion suggests that in a regulated industry where the monopolist has a regulatory duty to deal there can be no antitrust liability under Section 2 of the Sherman Act for a price squeeze, refusal to deal or any other exclusionary conduct. In its minority concurring opinion, Justice Breyer upheld the dismissal of complaint because 'when a regulatory structure exists to deter and remedy anticompetitive harm the costs of antitrust enforcement are likely to be greater than the benefits'. This comes directly from the Court's 2004 Trinko case and was reasserted in the 2007 Credit Suisse case. Trinko creates a new form of antitrust immunity, a soft immunity, under which courts have to weigh the costs and benefits of antitrust enforcement in light of the particular regulatory context with a presumption that the costs will be high because generalist judges are likely to make mistakes and the benefits will be low because regulators can perform the antitrust function. Importantly the Justice Department did not support this expansion of the immunity defence and said so in the Solicitor General's briefs in Trinko, Credit Suisse and Linkline. The Antitrust Modernisation Commission suggests reading the immunity decision out of the Trinko case.

According to Prof. Brunell, the Court's new approach to implied immunity is a radical departure from long-standing precedents such as Philadelphia National Bank, and leads to several risks.

- First, the Court's new approach may reduce the antitrust government enforcement in regulated industries, and diminish the power of the overall federal government vis-à-vis regulatory agencies. To be sure, both Trinko and Credit Suisse were class action cases, but it is hard to see why immunity would not also be extended to government actions seeking injunctive relief. Indeed except in some rare cases such as the filed rate doctrine, the Court has been more inclined to find immunity in cases seeking an injunction rather than damages because injunctive relief is prospective and interferes more with the regulatory prerogatives than damages for past conduct. Moreover in both Trinko and Credit Suisse, the focus was on the cost side of the antitrust errors due to the inability of generalist US federal district court judges to decide appropriately in light of highly technical regulation, a concern that would apply regardless of who the plaintiff is.

- Second, the Court's new approach implies a mere formalistic review of the role of regulation without controlling whether the regulator has intervened in practice to solve the competition problems, thereby leaving the possibility of unsolved competition issues. Indeed, Trinko, Credit Suisse, and Linkline in Justice Breyer's opinion all mention the regulatory structure designed to deter and remedy anticompetitive harm. This suggests that it is not necessary that the regulatory agency has actually taken corrective action in order to confer immunity (although such corrective action was taken in Trinko) but only that a remedy is available. For example many internet service providers in the same situation as Linkline have complained to the FCC but apparently without success as, according to the critics, the FCC had a deregulatory broadband agenda even before it formally eliminated the DSL access rules. In the government's case against AT&T in the 70's and 80's the FCC's regulations surely created a structure to deter and remedy anticompetitive conduct, but the FCC had been largely ineffective in policing AT&T's abusive conduct. To be sure, any case-by-case analysis of the effectiveness of the regulatory agency does raise many administrability and predictability concerns and accepting a regulatory structure as adequate to prevent anticompetitive harm without analysing how it works in practice will lead to significant under-enforcement. Furthermore even if an agency does take action, it is not necessarily the case that it will be sufficient to deter or remedy anticompetitive conduct. If the agency merely changes a rate prospectively that will not deter wrongful conduct or imposes modest penalties, this may have little deterrent effect. In the US, outside regulated industries, it is normally not even expected that government antitrust enforcement itself is sufficient, as this is complemented by private actions for damages to provide compensation and additional deterrents.

- Third, the Court's new approach may slow down deregulation as regulatory agencies may be less likely to remove ex ante remedies without the back up of strong ex post competition rules. In that regard, Prof. Shelanski's recent article in the Michigan Law Review explores the welfare costs that result from removing antitrust remedies as a tool in a deregulatory process.

Prof. Brunell concluded by noting that this recent string of Supreme Court cases preceded the financial crisis of 2008 that many have attributed to a failure of financial regulation and regulators. It is possible that the courts will now be more sceptical in assuming that regulators can adequately perform the antitrust functions and that these cases will be seen as an aberration in what otherwise has been a long history of the US treating antitrust regulations as complements and narrowly construing the implied immunity defence.

The Chairman mentioned that, although there may have been under-enforcement in Linkline, this was not evidently so in Trinko as Verizon had been sanctioned under telecommunications regulation. He asked whether, in Trinko, a private party could have obtained damages under telecommunication regulation.

The US delegation answered that, although it is not entirely clear as a technical matter that the plaintiff could have obtained single damages under telecommunications regulation, the Supreme Court assumed he could have done so.

The US delegation also underlined the importance of advocacy in the courts, before federal regulatory agencies, and at the state level, as part of a coordinated effort to protect competition and consumers and to reconcile the antitrust laws with federal and state regulatory laws in a manner consistent with Congressional intent.

Finally, the US delegation mentioned some disagreement with the analysis in Prof. Brunell's paper. The issues presented for review in *Trinko* and *linkLine* involved the scope of the prohibition on monopolization under Section 2 of the Sherman Act, and the Court's decisions were largely consistent with the positions of the United States as amicus curiae in those cases.

Referring to implied immunity, the Chairman then asked how it is possible that a judge questions the ability of a regulator to perform its tasks as it involves a political discretionary evaluation.

The US delegation replied that the determination whether and to what extent regulation should displace competition remains a policy question to be decided by Congress. The factors the Court articulated in *Credit Suisse* are to be used by the courts to determine how the legislative choice applies in a particular factual context.

Prof. Brunell answered that when there is this relationship between the Sherman Act - which is very broadly written - and regulation, the courts have to construe both statutes together in a way that makes sense. There is certainly an inevitable policy content to it but if Congress does not like what the courts are doing, it may amend the statutes. In that regard, the AT&T case was unusual as there was a serious competition problem, the regulatory agency by its own admission had failed to deliver, and Congress had chosen not to get involved for many years. In this context, it made sense for the antitrust laws to apply. Once the Congress enacted the Telecom Act in 1996, the role of antitrust rules was reduced because of the practical implications that Congress had finally filled a void that antitrust had previously been trying to fill through the courts.

The Chairman wondered if one of the core issues is whether treble damages provide too much damage for rule violations especially in the regulatory field,and whether treble damages should, hence be removed.

Prof. Brunell responded that the Antitrust Modernisation Commission, having analysed the issue of treble damages, proposed to keep the status quo. In any case, the concerns of the Supreme Court in antitrust immunity relate more to the inability of lower judges to deal efficiently with certain issues than treble damages. Finally commenting on the difference of approaches between US and EU on antitrust immunity, he saw in the EU case-law more than a mere formalistic standard of autonomous behaviour as the European Commission and the EU courts pointed out ways in which the national regulator got things wrong and might not be attending to competition policy concerns effectively.

The US delegation explained that federal judges have jurisdiction in a wide range of cases, including antitrust actions brought by the government or by private parties. Congress determined that the antitrust laws should be enforced through a combination of remedies including treble damages as well as injunctive relief. As the Court made clear in *Trinko*, however, antitrust treble damages do not apply to violations of administrative rules, but only to violations of the antitrust laws.

The Chairman turned to the EU where, according to Article 21 of the Merger Regulation, EU Member States may take appropriate measures with respect to mergers notified to the European Commission in order to protect some other general interest objectives besides competition. He asked whether these measures are subject to the scrutiny of the Commission, and if so what type of evaluation the Commission is performing.

The EU delegation responded that Article 21 of the Merger Regulation can only be relied upon by Member States for non-competition concerns such as media plurality, public security or prudential control. It can not be relied upon for competition concerns as that would undermine the one-stop review established by the Merger regulation and allow protectionist measures by Member States. The Commission strictly controls the use of this exception by the Member States: the Commission checks whether the public interest objective invoked is not covered by the competition review and whether the national measure is appropriate and proportionate to achieve such objective. When that is not the case, the Commission does not hesitate to intervene as shown in the Endesa case where the Commission's approach was endorsed by the Courts. So far, there have been only few cases in which the Commission accepted explicitly a legitimate interest of a regulatory nature. There was one case in the water sector where the Commission allowed regulatory measures that complemented, as opposed to substituted, the EU merger review.

The Chairman then referred to the unique Chilean case where the competition authority tried to impose directly antitrust principles to the air transport regulator by requesting the regulator to adopt a pro-competitive procedure for the allocation of transport licenses. He asked whether the Chilean competition law can be applied to entities that are not commercial entities such a regulator.

The Chilean delegation explained that Competition Act applies to commercial and non commercial entities, profit or non-profit entities, public or private ones. This has led to several adversarial proceedings against different public bodies such as municipalities, state-owned enterprises, non-profit organisations and even regulators. Remedies include orders or injunctions or, more frequently, recommendations by the tribunal. However, the case mentioned by the Chairman is an exception to those principles due to the specificity of the case. The law provides for a tender process to allocate transport licences, and then an implementing regulation provides that this tender should be conducated through an auction. However, such type of auction may be anti-competitive and reinforce the position of the dominant operator. In a first case, the competition authority did not contest the auction but merely recommended a change in the implementing regulation as the law could have been interpreted differently, for example by providing for a beauty contest, or at least a sealed bid auction instead of sequential bids. In a second case a few years later the competition authority tried to impose a change in the auction process as the regulation had not been changed. However, the case was lost before the Supreme Court as the auction was provided by the

implementing regulation and the competition authority may only recommend changes to a law but not to inferior legal rules such as implementing regulations.

The Chairman then referred to the Hungarian contribution which seems to distinguish two scenarios under which a regulated conduct defence could be evoked: first when the conduct is imposed by regulation, and second, when the conduct is authorised by regulation. He asked whether it is possible to rely on a regulated conduct defence when part of a conduct is not strictly required by law.

The Hungarian delegation explained the two different cases of regulated conduct defence in the Hungarian law. The first case, the express exemption, applies when regulation clearly states that some conducts are exempted from competition law. This is for instance the case of the quantitative restrictions in agriculture. The second case applies when a regulation imposes or explicitly authorises a conduct, thereby removing the autonomy of the firms. The principles are identical to those developed by the European Court of Justice.

The Chairman turned to the Spanish contribution addressing the issue of legitimate expectation, a common issue in jurisdictions where the role of public administration in the economy is pervasive. Public officials often suggest particular behaviours to the firms and the administrative action should be taken into account as a mitigating circumstance in setting the fine. The question is then how to educate public administrations to respect, in their behaviours and not merely in the law, competition principles and not to induce firms to violate competition rules.

The Spanish delegation referred to a “carrot and stick” approach. The competition authority makes competition assessment of new rules of the parliament and the administration; has informal meetings with other public bodies to underline possible competition concerns, for example in the agricultural and energy sector; and publishes guidelines to support regulators and other public authorities, for instance guidelines on the drafting and the management of public procurement. If the “carrots” do not work, then the authority relies on “sticks”. The competition authority may fine public authorities when they act as undertakings. When this is not the case, the competition authority may issue a cease and desist order to stop the public authority from imposing anticompetitive behaviour through regulation. Finally, the agency may challenge anti-competitive legal rules provided the rules are at an inferior level than the legislative act. For instance in intercity passenger transport by bus, the competition authority adopted a report in 2008 underlining some competition concerns especially related to the concession tendering process. In 2010, the authority adopted a follow-up report showing that some recommendations were taken into account while others were not. Finally, the agency took two regions to Courts for having adopted anti-competitive tendering, in particular by providing for very long (30 years) monopoly concessions and automatic extensions.

The Chairman then referred to the Bulgarian contribution which addresses the problem arising when regulation is based on pre-defined relevant market definitions, while the violation of competition law might have taken place in a differently defined market. If the competition authority changes the market definition, would that be contrary to the principle of legitimate expectations?

The Bulgarian delegation responded that such a case did not take place in practice so far but emphasized that the market definition under regulation and competition law should be identical if the factual circumstances are the same. However, the competition authority should be able to address competition problems and define the market accordingly when they are not covered by pre-defined markets under regulation.

The Chairman noted that, in Korea, many regulatory sponsored cartels have been dismantled in recent years and the existence of some forms of administrative guidance was not sufficient to justify a regulated

conduct defence. He asked what an administrative guidance is and whether an administrative guidance can be considered as a mitigating factor.

The Korean delegation explained that administrative guidance, which are not law or regulation, are given in the form of instruction, recommendation or advice and may be in a written or oral form. Although they have no formal binding force on companies, regulators follow them within their margin of discretion hence firms comply with them. The KFTC accepts that the administrative guidance justifies a regulated conducted defence when two conditions are met: (i) when the guidance remains within the legal remit of the regulator and (ii) when the firms have to follow the guidance without any autonomy. Those conditions are applied on a case-by-case basis and may lead to difficult cases as illustrated with the Soju Liquor cartel case where the KFTC refused the defence because the guidance went beyond the remit of the national tax services (this case in on appeal), or with the automobile insurance case where the KFTC refused the defence because the guidance did not remove the autonomy of the insurance firms (however, the KFTC decision has been overturned in appeal). Given the complexities of administrative guidance, the KFTC take them into account as a mitigating circumstance leading to a fine decrease of 10% when they do not meet the two above mentioned conditions.

The Chairman referred to the Norwegian Tine case where the biggest milk and cheese co-operative has been condemned for exclusionary abuse of dominant position vis-à-vis one grocery chain but not vis-à-vis the other. He asked how Tine could be condemned with respect to one chain and not with respect to the other, whether the abusive behaviour was covered by the regulation, and how abusively high prices could have excluded competitors.

The Norwegian delegation explained that both the grocery chains Rema and Ica, each with around 20% market share oin a concentred grocery market, were buying cheese from Tine and Synnøve Finden, the only two cheese producers in Norway. In the Rema case, Tine paid Rema to stop buying cheese from Synnøve Finden and became the sole supplier of cheese to Rema. That practice was condemned. In the case of Ica, Tine offered Ica higher rebates if Ica chose not to buy cheese from Synnøve Finden but Ica refused and continued buying cheese from Synnøve Finden. That explained the difference between the two cases. In both cases, Tine argued that due to regulation the market was broader than national, hence it was not dominant. However, such defence was not accepted. Finally, one of the main explanations for the high prices were the regulatory quotas and the high import tariffs.

The Chairman then turned to the Japanese submission reporting that firms have only rarely claimed a regulated conduct defence in response to a JFTC cease and desist order. However, in one case in the transport sector, firms agreed not to compete at terms prohibited by other rules. He asked for a clarification of that case.

The Japanese delegation explained that, under the Road Transportation Act, chartered bus service operators need ministerial approval when they change their fares but under the approved fare system there was room for operators to freely determine fares within a certain range. Moreover in practice, the operators make large discounts from the approved rate because of the strong bargaining power of the tour operators that charter the buses and the weak demand during off-peak periods. It was against this background that the association of bus operators concluded the contested agreement on minimum fares.

## 4. The relationship between competition and regulatory authorities

Finally the Chairman moved to the third issue of the debate, which is more institutional, and concerns the relationship between competition and regulatory authorities. He turned to the Romanian submission which states that antitrust authorities and regulators consult each other to ensure consistency of their decisions and the proportionality of the sanctions. According to the **Chairman**, if the division of

responsibility between the regulator and the competition authority is based on the principle of functional separation, then each authority should impose a sanction in isolation. The cooperation should focus more on the technical expertise that the regulator may bring to the competition authority.

The Romania delegation explained that in order to alleviate the potential conflicts between the competition and the regulatory authority, regulation should be interpreted in light of competition policy principles. The delegation also explained the conditions of regulated conduct defence in Romania, which are similar to the conditions in the other EU Member States, and illustrated such conditions with cases in the postal sector. On the one hand, the regulated conduct defence applies when the behaviour of the firm is imposed by regulation possibly for the provision of universal service, thereby removing any possibility of autonomous conduct. These were the circumstances in the case against Posta Romana for excessive pricing in direct mail. In such a case, the competition authority may send a report and a binding opinion to the regulator to remove the anti-competitive effects of the regulation. If the regulator does not comply with the opinion, the competition authority may then initiate legal proceedings. On the other hand if the firms enjoy some margin of discretion, the competition authority may intervene against the dominant firms and imposes obligations to ensure effective competition, which should be - as much as possible - complementary to those imposed by the regulator. These were the circumstances in another case against Posta Romana for discriminatory discounts among its clients. In such circumstances, the presence of regulation may be a mitigating factor reducing the fine by 10%.

The Chairman then turned to Chinese Taipei where the financial regulator asked the bank association to draft guidelines on the criteria for financial service fees, and then, asked the opinion of the competition authority on those draft guidelines. Because the opinion of the competition authority was negative, the financial regulator decided not to publish the draft guidelines. The Chairman asked whether the request of opinion by the financial regulator to the FTC was voluntary or mandatory, and whether the guideline were made public by the banking association and whether the banks adhere implicitly to these guidelines.

After recalling the important Article 46 of the Fair Trade Act stating that ‘where there is any other law governing the conduct of enterprises in respect of competition such other law shall govern provided that it does not conflict with the legislative purpose of this law’, the Chinese Taipei delegation responded that the consultation of the competition authority by the financial regulator was voluntary and explained by the extensive advocacy and expertise of the competition authority. Because of the negative opinion of the competition authority, the draft guidelines have been removed and the financial regulator adopted administrative guidance reminding financial institutions to disclose service charge items and fees based on their reasonable costs and to disclose various items that are free of charge such as the issuance of bank passwords and ATM cards.

The Chairman then turned to the Russian submission which states that is inadmissible to exempt from the sphere of competition law actions of the addressees of sector regulation that lead or may lead to restrictions of competition. He asked for some examples in that regard.

The Russian delegation responded that there is no such example as the Russian law does not provide for antitrust immunity. Competition law applies to all sectors of the economy, including the regulated ones, defence industries, natural monopolies, financial sectors or legal professions. It applies to all undertakings and to the executive bodies of the federal, regional and local levels including the sector regulators. When faced with repeated violation of competition law in some specific regulated industries, the competition agency proposes amendments to competition law and sector regulation (for instance for non-discriminatory access to infrastructures, structural separation, or price setting principles), or proposes reform of the public administration or the relevant sectors in general.

The Chairman then turned to the contribution made by BIAC and agreed that when company behaviour is induced by a regulator, the antitrust authority should take this as a mitigating factor and reduce the fine accordingly. However, he suggested to be more nuanced than BIAC and not exclude the possibility of a fine altogether as there are different degrees of inducement. He then asked whether the difference of approaches regarding anti-competitive state regulation on both sides of the Atlantic was due to constitutional divergences making the approaches difficult to reconcile.

The BIAC delegation submitted that when a firm mandated behaviour has been explicitly approved by a regulator following its own legal process, the competition authority may at most order some form of injunctive or directive relief but a fine is clearly not appropriate. Then regarding the difference of approach between North America and Europe, the BIAC delegation submitted that it cannot entirely be explained by constitutional divergences because in all three jurisdictions, the principle of primacy of federal law applies. However, BIAC submitted that federal supremacy is not a sufficient justification for a complete federal override without any means of trying to recognise and giving some effect to what the state did and business complied with. Indeed in US and Canada, contrary to the EU in Deutsche Telekom, enforcement authorities and courts have managed over the years to find a way to accommodate federal law and state action, hence business entities obtain relative certainty and are not caught in a federal/state cross-fire generating both national uncertainty and additional costs for business. BIAC encourages the OECD to continue this discussion, and will be very supportive of any approach trying to reduce anyfrictions between different jurisdictions.

The Chairman clarified that Deutsche Telekom was subject to a very general price cap regulation which allowed some flexibility in setting the different retail prices. Thus, the condemned behaviour was not mandated by the German regulator and there was no conflict between regulation and the Commission's antitrust decision. It is only when a behaviour is mandated by regulation that it cannot be sanctioned by competition law.

Prof. de Streel explained that if EU Courts may be more strict than other jurisdictions on the dis-application of a national laws violating EU competition rules, the EU Courts place a great weight on the protection of legal certainty as they allow a regulated conduct defence when a behaviour has been mandated by regulation and until the moment the national regulation has been explicitly judged contrary to EU law.

Prof. Brunell added that in Deutsche Telecom the Commission did reduce the fine because there was some implicit approval of the rates. Thus the Commission and the courts accept that there is less culpability when there is some approval but not total innocence when the behaviour is not mandated. The question is whether the Commission is properly taking into account the implicit approval and reliance by firms on their approval in reducing the fines and whether it should go further and have more standards.

The BIAC delegation explained that the issue of approvals, mandates andauthorisation is applied differently across jurisdictions. There could be further discussion among OECD in developing a recommendation with normative criteria for a regulated conduct defence. A discussion on whether it is necessary to have an approved mandated behaviour would be particularly welcome.

The Chairman concluded that in most countries reviewed the regulated conduct defence, if it ever exists, is extremely narrow. In principle, antitrust authorities can not intervene when the behaviour is mandated or dictated by regulation, but they can intervene when the behaviour is autonomously decided by firms. However, when a company is subject to administrative guidance and is induced to violate the competition law, such guidance should be taken into account as a mitigating factor to reduce, without necessarily suppressing, the fine. Furthermore there are instances in some jurisdictions where antitrust intervention is not required when regulation reduces sensibly the autonomy of firms or when firms are

obliged to provide services or products at conditions that would not prevail under normal commercial conditions. In such circumstances, the behaviour may be prohibited under regulatory rules but not under antitrust rules and the issue is how damages are considered and calculated. Moreover in federal states, there are some instances where antitrust rules may apply even when behaviour is mandated by regulation as state regulation should be dis-applied by judges or administrative authorities when they are contrary to federal antitrust rules. At the end, the Chairman thanked Alexandre de Streel, Richard Brunell, and all the participants for the success of the roundtable.

# COMPTE RENDU DE LA DISCUSSION

*Par le Secrétariat*

## 1. Introduction

Le Président, Alberto Heimler, ouvre la discussion sur la défense pour conduite réglementée en notant qu'une table ronde très semblable a eu lieu à la conférence de Séoul de l'ICN en 2004, mais que le débat a notablement évolué depuis lors. En général, les autorités antitrust interviennent quand les entreprises ont une certaine marge de liberté. Au contraire, quand la conduite en question est imposée par la réglementation, les autorités antitrust n'interviennent pas. Toutefois, dans certains pays, la défense pour conduite réglementée peut aller plus loin et couvrir des pratiques pour lesquelles l'entreprise, bien que sous une forte influence de la réglementation, conserve néanmoins une certaine latitude.

## 2. Possibilités et conditions pour intervenir directement contre les réglementations anticoncurrentielles

Le Président entame la discussion en notant que dans certaines juridictions les lois antitrust s'appliquent même quand les entreprises n'ont pas de liberté de choix. Cependant, dans la plupart des juridictions, un changement de la réglementation serait la seule solution possible, ce qui laisse comme seul outil à la disposition des autorités antitrust le plaidoyer pour la concurrence. Exceptionnellement et dans quelques juridictions, les règles antitrust prévalent néanmoins quand il existe un conflit entre les dispositions antitrust et la réglementation. Cette possibilité existe en particulier dans les États fédéraux ou les environnements de gouvernance à plusieurs niveaux comme les États-Unis et le Canada et, de manière plus importante, l'Union européenne. Les arguments juridiques sont similaires bien que non toujours identiques et ils reposent sur la relation entre des règles à différents niveaux hiérarchiques.

Le Président aborde d'abord la doctrine de l'action de l'État aux États-Unis. Cette doctrine permet de contester certaines règles, établies par des entités subordonnées telles que des commissions ou municipalités, mais non les règles au niveau des États. Le Président demande s'il serait possible de contester directement les mesures d'un État au lieu de recourir au plaidoyer pour la concurrence.

La délégation des États-Unis explique qu'un critère en deux branches s'applique lorsque des parties privées font valoir que leur conduite bénéficie de l' « immunité en vertu de l'action de l'Etat » prévue par la législation antitrust fédérale. La conduite en question doit être, premièrement, clairement définie et expressément énoncée comme politique de l'Etat et, deuxièmement, activement surveillée par l'Etat lui-même. En conséquence, en cas d'invocation de l'action de l'État, le tribunal doit déterminer si le cadre réglementaire précise que le corps législatif avait l'intention d'évincer la concurrence et a mis en place un dispositif en vue de superviser activement l'action privée ; le corps législatif ne peut pas se substituer à la législation antitrust en déléguant la réglementation à des parties privées. Une entité publique subordonnée (telle qu'une municipalité) ne peut revendiquer l'immunité en vertu de l'action de l'Etat pour une conduite particulière que si les activités anticoncurrentielles particulières en question ont été autorisées par l'Etat conformément à une politique délibérée d'éviction de la concurrence par la réglementation ou un service public en situation de monopole.

Les organismes antitrust des États-Unis demandent aux tribunaux de rejeter la doctrine de l'action de l'Etat lorsqu'elle ne respecte pas les normes juridiques applicables. Ils encouragent aussi les parlements et les régulateurs à promulguer et adopter des politiques et des réglementations proconcurrentielles et à rejeter ou abroger les réglementations qui entraveraient la concurrence et le choix des consommateurs. Par ailleurs, les organismes antitrust s'attachent à éduquer les consommateurs en leur exposant les avantages de la concurrence de façon qu'ils fassent des choix en connaissance de cause à travers le processus politique.

Le Président demande à qui une telle révision de la doctrine de l'action de l'État est proposée, aux juges ou au législateur.

La délégation des États-Unis répond que les organismes antitrust des Etats-Unis ne cherchent pas à modifier les principes fondamentaux de la doctrine de l'action de l'Etat tels qu'ils sont définis par la Cour suprême. Ils demandent plutôt aux tribunaux de rejeter les stratégies de défense fondées sur l'action de l'Etat qui ne respectent pas les normes juridiques applicables, et encouragent les parlements et les régulateurs des États à promulguer ou adopter des politiques et des réglementations proconcurrentielles.

Le Président demande ensuite si les États ont l'obligation de répondre aux initiatives de plaidoyer des organismes antitrust ou s'ils peuvent passer outre.

La délégation des États-Unis répond que les États ne sont pas obligés d'écouter les organismes antitrust ; ces derniers ne peuvent donc réussir que par la persuasion. Les autorités antitrust promeuvent la concurrence et le bien-être des consommateurs au niveau de l'État en présentant des arguments convaincants, fiables et fondés sur les faits concernant les effets et les coûts de bien-être probables des projets de réglementation des États, qu'il s'agisse de lentilles de contact, de services immobiliers ou de services juridiques associés au transfert de la propriété immobilière. Étant donné le caractère fédéral des États-Unis où il existe beaucoup d'expériences grandeur nature dans les différents États, il peut être convaincant de s'appuyer sur les enseignements tangibles recueillis par certains États.

Le Président note que l'Union européenne a de plus grands pouvoirs à cet égard, bien que paradoxalement ce ne soit pas une structure fédérale comme les États-Unis. D'après la jurisprudence de la Cour de justice européenne (CJE), la législation de l'UE prévaut sur les législations nationales et les administrations ou tribunaux nationaux doivent récuser toute disposition nationale qui contrevient aux règles de l'UE, sans qu'il soit nécessaire que le Parlement national l'annule. Il n'est pas permis aux États membres d'établir ou de maintenir de mesures susceptibles de priver d'effet les règles de la concurrence. Dans l'affaire du Barreau italien (Arduino), la CJE a statué que la loi italienne établissant des tarifs minimums pour les services de professions libérales n'était pas contraire au Traité parce que ces tarifs étaient soumis à l'examen du Ministre et que cet examen doit viser l'intérêt général. Toutefois, la Cour ne s'est pas prononcée directement sur le point de savoir si l'intérêt général était poursuivi dans la pratique. On demande si la Cour pourrait changer sa position dans l'avenir et se prononcer sur l'appréciation discrétionnaire de l'objectif de la loi.

La délégation de l'UE rappelle les circonstances très spécifiques de l'affaire Arduino qui la rendent non représentative. La loi italienne chargeait le Conseil national du Barreau de faire une proposition concernant les critères de fixation des honoraires minimums des avocats et ce projet de critères devait être soumis à l'approbation du ministre de la Justice après avis de deux organismes publics. Dans sa réponse à la question posée par le juge italien, la CJE a rappelé sa jurisprudence suivant laquelle la législation nationale peut être en infraction avec le Traité si la loi impose ou favorise l'adoption d'arrangements anticoncurrentiels, renforce leurs effets ou si elle retire à sa propre réglementation son caractère étatique en déléguant cette tâche à un opérateur économique privé. Dans l'affaire Arduino, la CJE a établi qu'il n'y avait pas de délégation de ce genre parce que le ministre aurait pu modifier la proposition et était tenu de

demander l'avis d'organismes publics. À cet égard, Arduino diffère d'une affaire italienne antérieure concernant le Conseil national des expéditeurs en douane où la loi demandait à cet organe représentatif de décider directement des tarifs des membres de cette profession. Dans tous les cas, il importe de rappeler que les décisions préjudicielles de la CJE dépendent toujours des questions soulevées par les tribunaux nationaux et qu'elles sont très spécifiques, et qu'il est donc difficile d'en faire des principes généraux. Dans une autre affaire concernant des professions libérales (l'Ordre des Pharmaciens), une association de pharmaciens qui fixait des tarifs minimums pour des tests cliniques a été reconnue coupable de pratiques anticoncurrentielles. Cela est conforme à la jurisprudence et à la pratique générale.

Le Président souligne que dans Arduino le contrôle public sur les honoraires minimums proposés par l'Association du Barreau n'était pas très détaillé, bien que confié à diverses entités. Il y avait un certain nombre de procédures formelles du Conseil d'État italien et d'autres organismes publics sur le tarif minimum avant qu'il soit approuvé, mais dans la pratique le contrôle public était presque inexistant. La CJE s'est limitée à un examen formaliste, sans investigation sur la pratique.

Il mentionne ensuite la récente décision Garland de la Cour suprême du Canada, qui énonce une longue liste d'éléments que le Bureau de la concurrence doit prendre en considération avant de conclure que la conduite réglementée par une autre loi doit faire l'objet de poursuites en vertu de la Loi sur la concurrence. Il demande quelle autorité, le Bureau ou un juge, décide du point de savoir si la conduite considérée tombe sous le coup de la législation antitrust. Il demande aussi si la relation entre la législation fédérale et la législation provinciale repose sur le principe de primauté ou sur le principe de partage des responsabilités.

La délégation du Canada indique que la doctrine de la conduite réglementée est une question importante pour les tribunaux, les régulateurs et les spécialistes du droit de la concurrence parce que la jurisprudence est peu développée et il y a de nombreux facteurs à prendre en compte pour en déterminer la portée et l'applicabilité. Le Bureau de la concurrence a cherché à apporter des éclaircissements avec son récent Bulletin sur la défense pour conduite réglementée, qui expose dans ses grandes lignes l'interprétation de la législation en vigueur faite par le Bureau, et son approche générale de l'application de la Loi sur la concurrence pour une conduite qui est réglementée par une autre loi ou un autre régime légal.

La délégation canadienne explique que la Loi sur la concurrence est une loi-cadre d'application générale et que les tribunaux canadiens ont déclaré que le parlement « … n'est pas censé s'écarter du régime juridique général sans exprimer de façon incontestablement claire son intention de le faire. » La doctrine de la conduite réglementée fait exception à cette règle et à d'autres principes importants d'interprétation des lois. Généralement parlant, pour déterminer si une conduite réglementée par une autre loi donnera lieu à des poursuites en vertu de la Loi sur la concurrence, le Bureau examine avec soin des facteurs tels que l'objet de la Loi et des autres lois éventuellement applicables à la conduite reprochée, les intérêts que les deux lois sont censées préserver, les principes d'interprétation des lois, la conduite en cause, les dispositions applicables de la Loi sur la concurrence et des autres lois, les parties en présence, les principes d'interprétation des lois applicables à l'affaire, la question de savoir si la conduite en question est autorisée ou exigée par d'autres lois, et toutes autres défenses ou doctrines dont disposent les parties et l'intérêt public. Enfin, les tribunaux décident si une conduite est soumise à la législation antitrust, mais le Bureau de la concurrence prend en considération la doctrine pour décider comment exercer son pouvoir de contrôle de l'application.

Concernant le partage des pouvoirs entre les différents niveaux de gouvernement, le commerce et le droit pénal sont du ressort fédéral et la propriété et les droits civils sont du ressort provincial. Il peut y avoir un chevauchement entre la législation fédérale et celle des Provinces et les tribunaux canadiens ont développé des doctrines pour donner des effets simultanés à la législation des deux niveaux de gouvernement. Toutefois, quand les tribunaux rencontrent un conflit entre l'application de la législation

fédérale et celle de la législation provinciale, soit parce qu'il est impossible de se conformer aux deux, soit parce que la conformité à une loi s'opposerait au but de l'autre, la loi fédérale prévaut, dans la mesure où les deux lois sont incompatibles, en vertu de la doctrine de primauté. Dans la pratique, la doctrine de primauté est rarement appliquée car les tribunaux s'efforcent d'éviter les conflits d'application.

Le Président passe à la France où le Conseil d'État, dans l'affaire de la Fédération française des sociétés d'assurances, a statué que la délégation de la gestion du régime de retraite facultatif des agriculteurs à l'organisme déjà chargé de la gestion du régime obligatoire était en infraction avec le Traité sur le fonctionnement de l'Union européenne. Il se demande si cette décision a été possible eu égard au fait que cette attribution reposait sur un acte administratif et si elle aurait aussi été possible si la délégation avait été établie par un acte législatif.

La délégation de la France répond qu'en effet cette décision n'a été possible que parce que l'attribution a été établie par un acte administratif. Elle explique que la France se caractérise par un système de juridictions dual (judiciaire et administratif). Le Conseil d'État, qui est le plus haut tribunal administratif, peut invalider les actes administratifs, qu'ils soient d'application individuelle ou générale ou qu'ils émanent d'une autorité locale ou régionale. Dans son arrêt, le Conseil d'État statue sur la légalité de l'acte administratif, qui inclut la conformité aux dispositions du traité européen relatives à la concurrence. Cet examen a lieu *a priori* parce qu'il porte directement sur l'acte qui attribue la gestion du régime de retraite. Ainsi, ce n'est pas un comportement abusif de l'entreprise qui est puni, étant donné que le comportement n'est pas encore observable au moment où le juge administratif décide. Le Conseil d'État peut demander l'avis de l'autorité de la concurrence. La délégation française indique aussi que l'affaire Fédération française des sociétés d'assurances est une action privée.

### 3. Les conditions d'une défense pour conduite réglementée

Le Président considère ensuite les conditions d'application de la défense pour conduite réglementée et l'étendue de l'application de cette défense d'une juridiction à l'autre. Il mentionne la contribution slovaque concernant la question *ne bis in idem* dans le cas où une conduite est soumise à une réglementation et tombe sous le coup de la législation antitrust. Dans une affaire intentée contre Slovak Telecom, le bureau de la concurrence a argué qu'un ciseau tarifaire tombait sous le coup de la législation de la concurrence bien que certains prix, mais non ceux qui produisaient l'effet de ciseau, fussent réglementés. Dans cette affaire, le principe *ne bis in idem* ne s'applique pas étant donné qu'il n'y a pas eu d'intervention du régulateur. Cependant, le bureau de la concurrence a aussi interdit la vente liée entre les services de communication téléphonique et d'accès et le Président demande si la pratique de vente liée a été approuvée par le régulateur.

La délégation de la Slovaquie explique que le bureau de la concurrence a interdit deux types de vente liée : l'un de services Internet avec les services téléphoniques et l'autre de services téléphoniques avec l'accès au réseau pour les clients finals. En ce qui concerne le premier type de vente liée, le régulateur est intervenu en 2006. Le bureau de la concurrence a décidé qu'il ne pouvait pas intervenir après l'action du régulateur, mais le Conseil du bureau de la concurrence a été d'avis qu'il aurait pu intervenir même après 2006 parce que la législation de la concurrence et la réglementation avaient des objectifs différents. Toutefois, pour des raisons de priorités, il ne l'a pas fait. Concernant le second type de vente liée, le régulateur n'est pas intervenu et la question *ne bis in idem* ne se pose donc pas.

Le Président mentionne ensuite le fait qu'en Turquie, l'autorité de la concurrence est intervenue avec succès dans un certain nombre d'affaires dans des secteurs réglementés. Toutefois, dans une affaire impliquant l'Association du Barreau, où une loi demandait à cette entité de fixer le tarif minimum des honoraires d'avocat, l'autorité de la concurrence n'a pas intenté de poursuites contre l'Association du

Barreau (alors qu'elle aurait pu le faire dans certaines juridictions comme l'UE) mais a opté pour le plaidoyer. Il demande s'il y avait une possibilité d'intervenir directement contre l'Association du Barreau.

La délégation de la Turquie répond que la Loi sur la profession d'avocat confère à l'Union de l'Association du Barreau turc le droit de fixer le tarif minimum des honoraires, qui doit être approuvé explicitement ou tacitement par le Ministre de la Justice. Dans le système légal turc, une pratique anticoncurrentielle qui est autorisée par une loi spécifique (spéciale) ne peut être interdite, parce que la loi spécifique prévaut sur la législation générale telle que la loi sur la concurrence. Ainsi, quand l'Union du Barreau fixe les honoraires minimums, le processus de détermination du tarif et le montant des honoraires n'ont pas d'importance. Dans d'autres affaires similaires où l'autorité de la concurrence est intervenue contre l'Union des Chambres d'ingénieurs et d'architectes turcs et l'Association des pharmaciens turcs, les décisions de l'autorité ont été invalidées en appel parce que des lois spécifiques autorisent la conduite en question et qu'elles ont prévalu sur la législation de la concurrence. Ainsi, la seule voie est celle du plaidoyer, que l'autorité de la concurrence utilise en particulier à l'égard des associations professionnelles.

Ensuite, le Professeur Brunell, directeur de l'action juridique à l'American Antitrust Institute et professeur adjoint de droit au Boston College, présente son document sur la nouvelle approche de la Cour suprême des États-Unis à l'égard de l'immunité implicite. Il pense que les affaires récentes Trinko, Crédit Suisse et Linkline ont entraîné un changement important et préoccupant dans la façon dont la Cour suprême traite la doctrine de l'immunité implicite. L'affaire Linkline concernait une plainte suivant laquelle la compagnie de téléphone historique en Californie avait pratiqué un ciseau tarifaire contre les fournisseurs d'accès Internet indépendants afin de monopoliser ce qui était présenté comme le marché du service Internet DSL en Californie. D'après l'opinion majoritaire de la Cour, dans une industrie réglementée où le monopoliste a une obligation réglementaire de vendre, un ciseau tarifaire, un refus de vente ou toute autre conduite d'exclusion ne peut tomber sous le coup de la législation antitrust au titre de la Section 2 du Sherman Act. Dans son opinion minoritaire concordante, le juge Breyer soutient le rejet de la plainte parce que « quand il existe une structure réglementaire pour dissuader et réprimer les agissements anticoncurrentiels, les coûts de l'action antitrust l'emporteront probablement sur ses avantages ». Cela a pour origine directe l'affaire Trinko traitée par la Cour en 2004 et ce point de vue a été réaffirmé dans l'affaire Crédit Suisse en 2007. La décision Trinko crée une nouvelle forme d'immunité à l'égard de la législation antitrust, une immunité légère, selon laquelle les tribunaux doivent peser les coûts et avantages de la répression antitrust à la lumière du contexte réglementaire particulier, avec une présomption que les coûts seront élevés parce que les juges généralistes risquent de commettre des erreurs et que les avantages seront faibles parce que les régulateurs peuvent accomplir la fonction antitrust. Il importe de noter que le ministère de la Justice ne s'est pas déclaré en faveur de ce développement de l'immunité et qu'il l'a dit dans les conclusions du Solicitor General dans les affaires Trinko, Crédit Suisse et Linkline. L'Antitrust Modernisation Commission pense qu'il faut lire l'arrêt Trinko dans son contexte particulier.

D'après le Professeur Brunell, la nouvelle approche de la Cour à l'égard de l'immunité implicite s'écarte radicalement de précédents de longue date comme l'affaire Philadelphia National Bank et comporte un certain nombre de risques.

- Premièrement, la nouvelle approche de la Cour peut réduire l'activité gouvernementale antitrust dans les industries réglementées et diminuer le pouvoir du gouvernement fédéral en général vis-à-vis des organismes de régulation. Certes, aussi bien Trinko que Crédit Suisse étaient des actions de groupe privées, mais on ne voit pas pourquoi l'immunité ne s'étendrait pas aussi aux actions publiques pour l'obtention d'injonctions. En fait, à l'exception de quelques rares cas comme la « doctrine des tarifs enregistrés », la Cour a été plus encline à statuer pour l'immunité dans les affaires où une injonction, et non des dommages-intérêts, était demandée parce que l'injonction est tournée vers l'avenir et interfère plus avec les prérogatives des régulateurs que les dommages-

intérêts pour une conduite passée. En outre, dans Trinko et Crédit Suisse, l'argumentation a insisté sur le coût des erreurs susceptibles d'être commises dans les actions antitrust du fait de l'inaptitude des juges généralistes des tribunaux de district fédéraux des États-Unis à prendre des décisions adéquates au regard d'une réglementation hautement technique, préoccupation qui s'appliquerait quel que soit le demandeur.

- Deuxièmement, la nouvelle approche de la Cour comporte un examen purement formaliste de l'activité de régulation sans contrôler si le régulateur est intervenu dans la pratique pour résoudre les problèmes touchant à la concurrence, laissant ainsi la possibilité de questions non résolues à cet égard. En fait, les arrêts Trinko, Crédit Suisse et Linkline dans l'opinion du juge Breyer font tous état de la structure de régulation conçue pour dissuader et réprimer les agissements anticoncurrentiels. Cela semble indiquer qu'il n'est pas nécessaire, pour conférer l'immunité, que l'organisme de régulation ait effectivement pris une mesure correctrice (bien qu'une telle mesure ait été prise dans Trinko) mais seulement qu'un remède est disponible. Par exemple, beaucoup de fournisseurs d'accès Internet dans la même situation que Linkline se sont plaints à la FCC mais apparemment sans succès étant donné, aux dires des critiques, que la FCC avait un programme de déréglementation pour le haut débit avant même d'avoir officiellement supprimé les règles d'accès DSL. Dans l'affaire opposant le gouvernement à AT&T dans les années 70 et 80, les règlements de la FCC formaient certes une structure tendant à dissuader et réprimer les conduites anticoncurrentielles, mais la FCC avait été en grande partie été inefficace dans son action contre les pratiques abusives d'AT&T. Assurément, toute analyse cas par cas de l'efficacité de l'organisme de régulation soulève de nombreuses préoccupations d'administrabilité et de prévisibilité et, si l'on se contente d'admettre qu'une structure de régulation est adéquate pour empêcher les agissements anticoncurrentiels sans analyser son fonctionnement dans la pratique, il en résultera une insuffisance notable de l'action répressive. En outre, même si un organisme agit, cela ne sera pas nécessairement suffisant pour dissuader ou réprimer une conduite anticoncurrentielle. S'il se contente de modifier un tarif pour l'avenir qui n'empêchera pas les mauvais comportements, ou s'il impose des pénalités modestes, l'effet dissuasif peut être faible. Aux États-Unis, en dehors des industries réglementées, on ne s'attend même pas, normalement, à ce que l'activité antitrust gouvernementale soit suffisante en elle-même, étant donné qu'elle est complétée, pour l'obtention de réparations et comme dissuasion supplémentaire, par les actions privées en dommages-intérêts.

- Troisièmement, la nouvelle approche de la Cour peut ralentir la déréglementation du fait que les organismes de régulation peuvent être moins enclins à supprimer les mesures ex ante sans le soutien de fortes règles pour la concurrence ex post. À cet égard, l'article récent du Professeur Shelanski dans la Michigan Law Review examine les coûts de bien-être résultant de la suppression des remèdes antitrust pouvant servir d'outils dans un processus de déréglementation.

Le Professeur Brunell conclut en notant que cette série d'affaires récente devant la Cour suprême a précédé la crise financière de 2008 que beaucoup ont attribuée à la défaillance de la régulation et des régulateurs financiers. Il est possible que les tribunaux auront maintenant plus de doutes sur la capacité des régulateurs d'assumer adéquatement les fonctions antitrust et que ces affaires apparaîtront comme une aberration dans ce qui a été par ailleurs une longue histoire de complémentarité de la législation antitrust et de la réglementation aux États-Unis, avec une interprétation restreinte de l'immunité implicite.

Le Président remarque que, bien que l'action répressive ait peut-être été insuffisante dans l'affaire Linkline, ce n'est pas évident dans Trinko étant donné que Verizon a été sanctionné en vertu de la réglementation des télécommunications. Il demande si, dans Trinko, un plaignant privé aurait pu obtenir des dommages-intérêts dans le cadre de la réglementation des télécommunications.

La délégation des États-Unis répond que, si le point technique de savoir si le plaignant aurait pu obtenir des dommages-intérêts simples dans le cadre de la réglementation des télécommunications n'est pas entièrement clair, la Cour suprême a supposé qu'il l'aurait pu.

La délégation des États-Unis souligne aussi l'importance du plaidoyer dans les tribunaux, devant les organismes fédéraux de réglementation et au niveau des Etats, dans le cadre d'un effort coordonné de protection de la concurrence et des consommateurs et d'harmonisation des lois antitrust avec les réglementations fédérales et des Etats, conformément à l'intention du Congrès.

Enfin, la délégation des États-Unis mentionne un certain désaccord avec l'analyse du document du Professeur Brunell. Les questions soumises pour examen dans *Trinko* et *linkLine* touchaient à la portée de l'interdiction de la monopolisation en vertu de la section 2 du Sherman Act, et les décisions du tribunal ont été en grande partie conformes aux positions des Etats-Unis en tant qu'*amicus curiae* dans ces affaires.

S'agissant de l'immunité implicite, le Président demande ensuite comment il est possible qu'un juge mette en question l'aptitude d'un régulateur à accomplir ses tâches, eu égard au caractère politique et discrétionnaire de son évaluation.

La délégation des États-Unis répond que, pour ce qui est de déterminer si et dans quelle mesure la réglementation doit évincer la concurrence, il s'agit d'une question relevant des pouvoirs publics et que c'est le Congrès qui en décide. Les facteurs que le tribunal a exposés dans *Crédit* Suisse doivent être utilisés par les tribunaux pour déterminer comment le choix législatif s'applique dans un contexte factuel particulier.

Le Professeur Brunell répond qu'en présence de cette relation entre le Sherman Act – qui est rédigé en termes très généraux – et la réglementation, les tribunaux doivent interpréter ces deux régimes conjointement avec un résultat cohérent. Cela comporte certainement un contenu politique inévitable mais, si le Congrès n'aime pas ce que font les tribunaux, il peut modifier les lois. À cet égard, l'affaire AT&T a été inhabituelle, du fait qu'un sérieux problème se posait en matière de concurrence, que l'organisme de régulation avait, de son propre aveu, échoué et que le Congrès avait durant de nombreuses années choisi de rester à l'écart. Dans ce contexte, il était raisonnable que la législation antitrust s'applique. À partir du moment où le Congrès a adopté le Telecom Act en 1996, le rôle des règles antitrust a diminué, du fait que dans la pratique le Congrès avait finalement comblé le vide auquel l'action antitrust s'efforçait auparavant de remédier par le biais des tribunaux.

Le Président se demande si une des questions centrales serait de savoir si les dommages-intérêts triples ne constituent pas une réparation excessive des infractions aux règles, en particulier dans le domaine réglementaire, et s'il faudrait donc les supprimer.

Le Professeur Brunell répond que l'Antitrust Modernisation Commission, qui a analysé la question des dommages triples, a proposé de conserver le statu quo. Quoi qu'il en soit, dans l'immunité antitrust, les préoccupations de la Cour suprême concernent, plus que les dommages triples, l'inaptitude des juges des tribunaux inférieurs à traiter efficacement certaines questions. Enfin, au sujet de la différence d'approche entre les États-Unis et l'Union européenne en matière d'immunité antitrust, il voit dans la jurisprudence européenne plus qu'une simple norme formaliste du comportement autonome, étant donné que la Commission européenne et les tribunaux de l'UE ont indiqué les points sur lesquels le régulateur national s'est trompé et en quoi il ne répond peut-être pas adéquatement aux préoccupations de la politique de la concurrence.

La délégation des États-Unis explique que les juges fédéraux ont compétence dans un large éventail d'affaires, notamment les actions antitrust soumises par l'administration ou par des parties privées. Le

Congrès a établi que les lois antitrust doivent être appliquées au moyen de diverses sanctions, y compris les dommages triples ainsi que le redressement par voie d'injonction. Comme le tribunal l'a précisé dans *Trinko*, toutefois, les dommages triples antitrust ne s'appliquent pas aux infractions relatives aux règles administratives, mais seulement aux infractions relatives aux lois antitrust.

Le Président considère ensuite l'Union européenne où, aux termes de l'Article 21 du Règlement sur les concentrations, les États membres de l'UE peuvent prendre des mesures appropriées à l'égard de concentrations notifiées à la Commission européenne pour assurer la protection d'intérêts légitimes autres que la concurrence. Il demande si ces mesures sont soumises à l'examen de la Commission et, dans l'affirmative, quel type d'évaluation la Commission effectue.

La délégation de l'UE répond que les États membres ne peuvent se fonder sur l'Article 21 du Règlement sur les concentrations que pour des questions en dehors du domaine de la concurrence telles que la pluralité des médias, la sécurité publique ou les règles prudentielles. Il ne peut s'appliquer pour des questions relatives à la concurrence, ce qui porterait atteinte au système de « guichet unique » établi par la réglementation des concentrations et permettrait aux États membres de prendre des mesures protectionnistes. La Commission contrôle strictement l'utilisation de cette exception par les États membres : la Commission vérifie si l'objectif d'intérêt public invoqué ne relève pas de l'examen au titre de la concurrence et si la mesure nationale est appropriée et proportionnée à cet objectif. Quand ce n'est pas le cas, la Commission n'hésite pas à intervenir, comme dans l'affaire Endesa où l'approche de la Commission a été confirmée par les tribunaux. Jusqu'à présent, il n'y a eu que quelques affaires dans lesquelles la Commission ait explicitement accepté un intérêt légitime de nature réglementaire. Il y a eu une affaire dans le secteur de l'eau où la Commission a autorisé des mesures réglementaires qui complétaient l'examen de la concentration par l'UE, sans s'y substituer.

Le Président mentionne ensuite une affaire exceptionnelle au Chili où l'autorité de la concurrence a essayé d'imposer directement des principes antitrust au régulateur du transport aérien en demandant à ce dernier d'adopter une procédure proconcurrentielle pour l'attribution des licences de transport. Il demande si la législation de la concurrence chilienne peut s'appliquer à des institutions, telles qu'un régulateur, qui ne sont pas des entités commerciales.

La délégation du Chili explique que la Loi sur la concurrence s'applique aux entités commerciales ou non commerciales, à but lucratif ou non, publiques ou privées. Cela a conduit à un certain nombre de procédures contentieuses contre différentes entités publiques, telles que des municipalités, des entreprises d'État, des organisations sans but lucratif et même des régulateurs. Les mesures correctrices revêtent la forme d'ordonnances ou d'injonctions ou, plus fréquemment de recommandations du tribunal. Toutefois, l'affaire mentionnée par le Président est une exception à ces principes due à la spécificité de l'affaire. La loi prévoit un processus d'offres concurrentes pour l'attribution des licences de transport et un règlement d'application stipule que cela doit se faire sous la forme d'enchères. Cependant, ce type d'attribution aux enchères peut être anticoncurrentiel et renforcer la position de l'opérateur dominant. Dans une première affaire, l'autorité de la concurrence n'a pas contesté l'attribution aux enchères mais a simplement recommandé une modification du règlement d'application étant donné que la loi aurait pu être interprétée différemment, par exemple en prévoyant une sélection comparative (« concours de beauté ») ou au moins des offres sous pli scellé au lieu d'enchères séquentielles. Dans une deuxième affaire quelques années plus tard, l'autorité de la concurrence essaya d'imposer un changement dans le processus d'enchères étant donné que le règlement n'avait pas été modifié. Elle n'eut pas gain de cause devant la Cour suprême parce que le processus d'enchères était établi par un règlement d'application et que l'autorité de la concurrence peut seulement recommander des modifications de la loi mais non d'actes subordonnés comme les règlements.

Le Président mentionne ensuite la contribution hongroise qui semble distinguer deux scénarios suivant lesquels une défense pour conduite réglementée pour être invoquée : premièrement, quand la conduite est imposée par la réglementation et, deuxièmement, quand la conduite est autorisée par la réglementation. Il demande s'il est possible de recourir à une défense pour conduite réglementée quand une partie de la conduite en question n'est pas strictement exigée par la loi.

La délégation de la Hongrie explique les deux différents cas de défense pour conduite réglementée dans la législation hongroise. Le premier cas, l'exemption expresse, s'applique quand la réglementation stipule clairement que certaines conduites ne sont pas soumises à la législation de la concurrence. C'est par exemple le cas pour les restrictions quantitatives dans l'agriculture. Le second cas s'applique quand une réglementation autorise explicitement ou impose une conduite, supprimant ainsi l'autonomie des entreprises. Les principes sont identiques à ceux développés par la Cour de justice européenne.

Le Président considère la contribution espagnole qui aborde la question des attentes légitimes, courante dans les juridictions où l'administration publique a une influence importante dans l'économie. Les responsables publics suggèrent souvent tel ou tel comportement aux entreprises et cette influence administrative doit être prise en compte comme une circonstance atténuante pour la fixation de l'amende. La question est alors d'apprendre aux administrations publiques à respecter, dans leur comportement et pas simplement en droit, les principes de la concurrence et de ne pas induire les entreprises à enfreindre les règles de la concurrence.

La délégation de l'Espagne fait état d'une approche par « la carotte et le bâton ». L'autorité de la concurrence évalue les nouvelles règles en préparation par le Parlement et l'administration ; elle tient des réunions informelles avec les autres organismes publics pour signaler les préoccupations possibles en matière de concurrence, par exemple dans l'agriculture ou le secteur de l'énergie ; elle publie également des lignes directrices pour aider les régulateurs ou autres autorités publiques, par exemple sur la formulation et la gestion des marchés publics. Si la « carotte » n'est pas efficace, l'autorité recourt alors au « bâton ». L'autorité de la concurrence peut infliger des amendes à des organismes publics quand ceux-ci agissent en qualité d'entreprises. Quand ce n'est pas le cas, l'autorité de la concurrence peut prononcer une injonction de cessation pour que l'organisme public cesse d'imposer un comportement anticoncurrentiel par le biais de la réglementation. Enfin, elle peut contester les règles légales anticoncurrentielles à condition que celles-ci soient stipulées par un acte de niveau inférieur à celui des lois. Par exemple, dans le transport interurbain de passagers en autocar, l'autorité de la concurrence a produit un rapport en 2008 soulignant certaines préoccupations en matière de concurrence concernant notamment les appels d'offres pour les concessions. En 2010, l'autorité a produit un rapport de suivi montrant que certaines recommandations avaient été prises en compte et d'autres non. Enfin, elle a intenté une action en justice contre deux régions pour avoir adopté un dispositif d'appel d'offres anticoncurrentiel, prévoyant en particulier des concessions de monopole de très longue durée (30 ans) et des prolongations automatiques.

Le Président mentionne ensuite la contribution bulgare concernant le problème qui se pose quand la réglementation repose sur des définitions préexistantes des marchés pertinents, alors que l'infraction à la législation de la concurrence peut avoir lieu sur un marché différemment défini. Si l'autorité de la concurrence change la définition du marché, cela porte-t-il atteinte au principe des attentes légitimes ?

La délégation de la Bulgarie répond que le cas ne s'est pas produit dans la pratique jusqu'à présent mais elle souligne que la définition du marché dans le cadre de la réglementation et dans celui de la législation de la concurrence devrait être identique si les circonstances factuelles sont les mêmes. Toutefois, l'autorité de la concurrence devrait avoir la possibilité de traiter les problèmes relatifs à la concurrence et de définir le marché en conséquence quand ces problèmes n'entrent pas dans le cadre des marchés prédéfinis par la réglementation.

Le Président note qu'en Corée beaucoup de cartels approuvés dans le cadre réglementaire ont été démantelés ces dernières années et que l'existence de certaines formes d'orientations administratives n'a pas été suffisante pour justifier une défense pour conduite réglementée. Il demande ce qu'est une orientation administrative et si une orientation administrative peut être considérée comme une circonstance atténuante.

La délégation de la Corée explique que les orientations administratives, qui ne sont pas des lois ni des règlements, sont données sous la forme d'instructions, de recommandations ou de conseils et peuvent être écrites ou orales. Bien qu'elles n'aient pas formellement de force obligatoire sur les entreprises, les régulateurs les appliquent dans la limite de leurs pouvoirs et, en conséquence, les entreprises s'y conforment. La KFTC admet que les orientations administratives justifient une défense pour conduite réglementée quand deux conditions sont réunies : (i) les orientations restent dans le champ de compétence légal du régulateur et (ii) les entreprises doivent suivre les orientations sans aucune autonomie. Ces conditions s'appliquent au cas par cas et elles peuvent conduire à des affaires difficiles comme dans le cas du cartel de la liqueur soju où la KFTC a refusé la défense parce que les orientations dépassaient le champ de compétence des services fiscaux nationaux (cette affaire est en appel), ou le cas de l'assurance automobile où la KFTC a refusé la défense parce que les orientations ne privaient pas les compagnies d'assurance de leur autonomie (toutefois, la décision de la KFTC a été révoquée en appel). Étant donné la complexité des orientations administratives, la KFTC en tient compte comme circonstance atténuante entraînant une réduction de l'amende de 10 % quand les deux conditions susmentionnées ne sont pas remplies.

Le Président mentionne l'affaire Tine en Norvège dans laquelle la plus grande coopérative laitière et fromagère a été condamnée pour abus de position dominante à effet d'exclusion dans le cas d'une certaine chaîne d'épiceries mais non d'une autre. Il demande comment Tine a pu être condamné dans le cas de la première chaîne mais non de l'autre, si le comportement abusif était couvert par la réglementation et comment des prix abusivement élevés auraient pu exclure les concurrents.

La délégation de la Norvège explique que les deux chaînes d'épicerie Rema et Ica, qui ont chacune une part de marché d'environ 20 % sur un marché de l'épicerie concentré, achetaient du fromage à Tine et à Synnøve Finden, qui sont les deux seuls producteurs de fromage en Norvège. Dans le cas de Rema, Tine a payé Rema pour que celui-ci cesse d'acheter du fromage à Synnøve Finden et il est devenu le seul fournisseur de fromage de Rema. Cette pratique a été condamnée. Dans le cas d'Ica, Tine a offert à Ica des rabais plus élevés si Ica cessait d'acheter du fromage à Synnøve Finden, mais Ica a refusé et a continué à acheter du fromage à Synnøve Finden. Cela explique la différence entre les deux affaires. Dans les deux cas, Tine a argué qu'en raison de la réglementation le marché avait une étendue plus que nationale et qu'ainsi il n'était pas dominant. Cette défense n'a pas été acceptée. Enfin, une des principales explications du niveau élevé des prix est l'existence de quotas réglementaires et de droits à l'importation élevés.

Le Président considère ensuite la contribution japonaise qui indique que les entreprises n'ont que rarement invoqué une défense pour conduite réglementée en réponse à une injonction de cessation de la JFTC. Toutefois, dans une affaire concernant le secteur des transports, des entreprises se sont entendues pour ne pas se faire concurrence dans des conditions qui étaient interdites par d'autres règles. Il demande des éclaircissements sur cette affaire.

La délégation du Japon explique qu'aux termes de la Loi sur le transport routier, les opérateurs de services d'autocars à la demande doivent obtenir l'approbation du ministère quand ils changent leurs tarifs mais que, dans le cadre du tarif agréé, les opérateurs sont libres de fixer leurs prix à l'intérieur d'un certain intervalle. En outre, dans la pratique, les opérateurs consentent des rabais importants par rapport au tarif agréé à cause du fort pouvoir de négociation des organisateurs de voyages qui affrètent les autocars et de la

faible demande pendant les périodes creuses. C'est dans ce contexte que l'association des compagnies d'autocars a conclu l'accord contesté sur les prix minimums.

## 4. La relation entre les autorités de la concurrence et les autorités de régulation

Enfin, le Président aborde le troisième thème du débat, qui est plus institutionnel, concernant la relation entre les autorités de la concurrence et les autorités de régulation. Il mentionne la contribution roumaine qui indique que les autorités antitrust et les régulateurs se consultent mutuellement pour assurer la cohérence de leurs décisions et la proportionnalité des sanctions. D'après le Président, si la division des responsabilités entre le régulateur et l'autorité de la concurrence repose sur le principe de la séparation fonctionnelle, chacune des deux autorités devrait imposer une sanction séparément. La coopération devrait s'axer davantage sur l'expertise technique que le régulateur peut apporter à l'autorité de la concurrence.

La délégation de la Roumanie explique qu'afin d'atténuer les conflits potentiels entre l'autorité de la concurrence et l'autorité de régulation, la réglementation doit être interprétée à la lumière des principes de la politique de la concurrence. La délégation explique aussi les conditions de la défense pour conduite réglementée en Roumanie, qui sont similaires à celles en vigueur dans les autres États membres de l'UE, et elle illustre ces conditions par des exemples d'affaires dans le secteur postal. D'une part, la défense pour conduite réglementée s'applique quand le comportement de l'entreprise est imposé par la réglementation, par exemple la fourniture du service universel, ôtant toute possibilité de conduite autonome : ce sont les circonstances des poursuites contre Posta Romana pour des prix excessifs dans le publipostage direct. Dans ce genre d'affaire, l'autorité de la concurrence peut envoyer un rapport et avis contraignant au régulateur pour mettre fin aux effets anticoncurrentiels de la réglementation. Si le régulateur ne se conforme pas à l'avis, l'autorité de la concurrence peut alors engager une procédure judiciaire. D'autre part, si les entreprises possèdent une certaine liberté d'action, l'autorité de la concurrence peut intervenir contre les entreprises dominantes et imposer des obligations pour assurer une concurrence effective, qui devraient être – autant que possible – complémentaires de celles établies par le régulateur : ce sont les circonstances d'une autre affaire contre Posta Romana pour des rabais discriminatoires entre ses clients. Dans ce genre de cas, l'existence d'une réglementation peut être une circonstance atténuante réduisant l'amende de 10 %.

Le Président considère ensuite le Taipei chinois où l'autorité de régulation financière a demandé à l'association des banques de rédiger des lignes directrices sur les critères des tarifs des services financiers et a ensuite demandé l'avis de l'autorité de la concurrence sur ce projet de lignes directrices. L'avis de l'autorité de la concurrence ayant été négatif, le régulateur financier a renoncé à publier le projet de lignes directrices. Le Président demande si la sollicitation de l'avis de la FTC par le régulateur financier était facultative ou obligatoire, si les lignes directrices ont été rendues publiques par l'association des banques et si les banques adhèrent implicitement à ces lignes directrices.

Après avoir rappelé l'important Article 46 de la Loi sur la loyauté du commerce qui stipule que « quand il existe une autre loi gouvernant la conduite des entreprises en matière de concurrence, cette autre loi s'appliquera à condition qu'elle ne soit pas contraire au but législatif de la présente loi », la délégation du Taipei chinois répond que la consultation de l'autorité de la concurrence par le régulateur financier était facultative et s'explique par l'importante action de plaidoyer et par l'expertise de l'autorité de la concurrence. L'avis de l'autorité de la concurrence ayant été négatif, le projet de lignes directrices a été retiré et le régulateur financier a adopté des recommandations administratives rappelant aux établissements financiers de publier des tarifs détaillant les services et les prix, établis en fonction de leurs coûts raisonnables, ainsi que les divers éléments qui sont gratuits comme la délivrance de mots de passe bancaires et de cartes de retrait d'espèces.

Le Président considère ensuite la contribution russe qui déclare qu'il n'est pas admissible d'exempter du champ de la législation de la concurrence les agissements des entités soumises à une réglementation

sectorielle qui entraînent ou peuvent entraîner des restrictions de la concurrence. Il demande quelques exemples à ce sujet.

La délégation de la Russie répond qu'il n'y a pas d'exemple de ce genre étant donné que la législation russe ne prévoit pas d'immunité antitrust. La législation de la concurrence s'applique à tous les secteurs de l'économie, y compris aux secteurs réglementés (industries de la défense, monopoles naturels, secteur financier ou professions juridiques). Elle s'applique à toutes les entreprises et aux organes exécutifs publics au niveau fédéral, régional ou local, y compris aux régulateurs sectoriels. Quand elle se trouve en présence d'infractions répétées à la législation de la concurrence dans des industries réglementées particulières, l'autorité de la concurrence propose des modifications de la législation de la concurrence et de la réglementation sectorielle (par exemple, pour l'accès non discriminatoire aux infrastructures, la séparation structurelle ou les principes d'établissement des prix) ou elle propose une réforme de l'administration publique ou des secteurs concernés en général.

Le Président passe ensuite à la contribution du BIAC et il reconnaît que, quand le comportement d'une entreprise est induit par un régulateur, l'autorité antitrust doit le considérer comme une circonstance atténuante et réduire l'amende en conséquence. Cependant, il suggère d'être plus nuancé que le BIAC et de ne pas exclure complètement la possibilité d'une amende étant donné qu'il existe différents degrés d'induction. Il demande alors si la différence des approches concernant les réglementations d'État anticoncurrentielles des deux côtés de l'Atlantique est due à des divergences constitutionnelles qui rendent ces approches difficiles à concilier.

La délégation du BIAC pense que, quand le comportement obligé d'une entreprise a été explicitement approuvé par un régulateur de manière conforme à son propre processus légal, l'autorité de la concurrence peut au plus prononcer une forme d'injonction ou d'instruction, mais qu'une amende n'est sûrement pas appropriée. Ensuite, concernant la différence d'approche entre l'Amérique du Nord et l'Europe, la délégation du BIAC pense qu'elle ne peut pas entièrement s'expliquer par des divergences constitutionnelles parce que, dans les trois juridictions considérées, le principe de primauté de la législation fédérale s'applique. Toutefois, d'après le BIAC, la primauté fédérale ne justifie pas une suprématie fédérale complète excluant toute possibilité de reconnaître et de donner un certain effet à l'action d'un État, à laquelle les entreprises ont obéi. En fait, aux États-Unis et au Canada, contrairement à l'Union européenne dans l'affaire Deutsche Telekom, les autorités et les tribunaux ont réussi au cours des ans à concilier la législation fédérale et l'action de l'État de telle sorte que les entreprises bénéficient d'une relative certitude et ne soient pas prises dans un feu croisé fédéral/ étatique créant à la fois une incertitude nationale et des coûts supplémentaires pour les entreprises. Le BIAC encourage l'OCDE à poursuivre ce débat et il apportera tout son soutien à une approche tendant à réduire les frictions éventuelles entre les différentes juridictions.

Le Président précise que Deutsche Telekom était soumis à un plafonnement des prix très général qui lui laissait une certaine flexibilité dans l'établissement des différents prix de détail. Ainsi, le comportement condamné n'était pas imposé par le régulateur allemand et il n'y avait pas de conflit entre la réglementation et la décision antitrust de la Commission. C'est seulement quand le comportement est imposé par la réglementation qu'il ne peut être sanctionné par la législation de la concurrence.

Le Professeur de Streel explique que si les tribunaux de l'UE sont peut-être plus stricts que d'autres juridictions sur la récusation des lois nationales qui enfreignent les règles européennes de la concurrence, ces tribunaux accordent une grande importance à la protection de la certitude légale en admettant une défense pour conduite réglementée quand le comportement en cause a été imposé par la réglementation, jusqu'au moment où la réglementation nationale est explicitement jugée contraire à la législation de l'UE.

Le Professeur Brunell ajoute que dans l'affaire Deutsche Telecom la Commission a effectivement réduit l'amende parce qu'il y avait une certaine approbation implicite des tarifs. Ainsi, la Commission et les tribunaux admettent une moindre culpabilité quand il y a une certaine approbation, mais non l'innocence totale quand le comportement n'est pas imposé. La question est de savoir si la Commission prend convenablement en compte dans la réduction des amendes l'approbation implicite et la confiance des entreprises dans cette approbation et si elle devrait aller plus loin et appliquer des normes supplémentaires.

La délégation du BIAC explique que la question des approbations, des obligations ou de l'autorisation générale s'applique différemment d'une juridiction à l'autre. On pourrait poursuivre les débats au sein de l'OCDE pour l'élaboration d'une recommandation comportant des critères normatifs pour une défense pour conduite réglementée. Une discussion sur le point de savoir s'il est nécessaire d'avoir un comportement obligé et approuvé serait particulièrement bienvenue.

Le Président conclut que, dans la plupart des pays examinés, la défense pour conduite réglementée, quand elle existe, est extrêmement restreinte. En principe, les autorités antitrust ne peuvent intervenir quand le comportement en question est imposé ou dicté par la réglementation, mais elles le peuvent quand le comportement résulte d'une décision autonome de l'entreprise. Cependant, quand une entreprise est soumise à l'influence d'orientations administratives et est induite à enfreindre la législation de la concurrence, cette influence devrait être prise en compte comme une circonstance atténuante entraînant une réduction de l'amende, sans nécessairement la supprimer. En outre, il existe des cas dans certaines juridictions où l'intervention antitrust n'est pas requise quand la réglementation réduit sensiblement l'autonomie des entreprises ou quand celles-ci sont obligées de fournir des services ou des biens à des conditions qui n'existeraient pas dans une situation commerciale normale. Dans ces circonstances, le comportement peut être interdit en vertu de dispositions réglementaires mais non des règles antitrust et la question est de savoir comment on envisage et on calcule les dommages. En outre, dans les systèmes fédéraux, il existe certains cas où les règles antitrust peuvent s'appliquer même quand le comportement est imposé par la réglementation, du fait que la réglementation d'un État doit être récusée par les juges ou les autorités administratives quand elle est contraire à la législation antitrust fédérale. À la fin de la séance, le Président remercie Alexandre de Streel, Richard Brunell et tous les participants pour le succès de la table ronde.