

1. Introduction

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This book is the final step of an initiative taken by the Directorate General for Competition of the European Commission to invite several distinguished economists to examine a number of economic issues related to antitrust in the telecommunications sector. They were asked to examine how standard economic theory could shed more light on what is primarily a legal assessment of certain forms of anticompetitive behaviour and practices. The idea was to gather around a table what often appear to be two ‘independent’ schools of thought, economics and antitrust law, and together to try to foster a mutual understanding of how modern economic thinking assesses market behaviour in technology-driven markets, and the fundamental legal premises upon which such an assessment should take place.

If one looks back to almost ten years of antitrust enforcement in the telecoms sector, when liberalization of the sector began, it becomes apparent that the Commission has not only applied competition law with sensitivity to the special characteristics of the telecommunications industry, but has also recognized that, as in all other sectors of the economy, competition plays an important role in spurring innovation and conveying the benefits of that innovation to consumers.

The telecoms sector is one of the most important sectors in today’s economy. It is a ‘network’ industry which directly affects the daily lives of each of us and plays a critical role in the economic development of Europe as a whole. It is, however, an industry that started as a monopoly and has gradually moved towards full liberalization. The importance of competition law and policy in making this transition a reality has recently been underscored by the adoption of a new regulatory framework for electronic communications which aligns regulation with the basic concepts of competition law.

2. COMPETITION RULES AND REGULATION: THE NEW EUROPEAN REGULATORY FRAMEWORK

Competition rules and sector-specific regulation are complementary tools to achieve a single objective: the promotion of competition. This is one of the main principles underlying the new regulatory framework for electronic communications. The application of fundamental competition-law notions, such as market definition and dominance, in an *ex ante* environment represents the best means to ensure a smooth transition towards a fully liberalized electronic communications market.

Sector-specific regulation is, however, indispensable today for certain areas where competition is not likely to arise from the mere application of competition rules. This is, for example, the case of the 'local loop', where incumbents enjoy an incontestably dominant position, built during former monopoly times. Competition law cannot always guarantee effective access to facilities which are crucial for the development of competition.

Under the new framework, regulation remains nevertheless the exception, while the application of antitrust rules is the rule. The imposition of regulation has to be justified on a case-by-case basis. This is why the new regulatory framework is flexible and limits regulatory intervention to those activities where it is (for the time being) necessary. However, as soon as a market becomes effectively competitive and regulation is no longer necessary to sustain competition, then regulation should be phased out.

In any case, it is important to note that the new regulatory framework does not affect the powers of the Commission under the competition rules of the Treaty and the Merger Regulation. The fact that undertakings are subject to regulation does not prevent the application of competition law to the electronic communications industry.

3. SHOULD ANTITRUST LAW APPLY TO FAST-MOVING, TECHNOLOGY-DRIVEN INDUSTRIES?

Given that the telecoms industry is largely innovation-driven, antitrust enforcement has not been exempt from criticism or controversy. Some have questioned whether the antitrust laws that were originally designed to apply to traditional manufacturing and distribution industries should be applied *mutatis mutandis* to fast-moving industries where products rapidly become obsolete and market shares may be ephemeral. Operators often claim that their market is an 'emerging market' and therefore forbearance from antitrust enforcement is warranted. Others complain that insufficient account is taken of the level of investment needed to roll out new advanced or alternative networks. What these voices are saying is 'leave us alone for a while and competition will flourish'.

Yet antitrust principles of general application must be applied to technology-driven industries as to any other industry. As was once said, 'the competitive struggle without effective antitrust enforcement is like a fight without a referee'.

It is also important to remember that competition principles remain valid irrespective of financial trends. Competition policy is primarily designed to benefit consumers who need protection regardless of 'business cycles' or 'stock market valuations'.

4. THE NEED TO APPLY CONVENTIONAL ANTITRUST THEORIES

Despite earlier promises that the miracles and wonders of technology would open the way for new competitors to overturn, overnight, the dominance of the incumbents, the situation we see today is somewhat different. In most 'electronic communications' markets, large sunk costs, high risks and other entry barriers may mean that, while product characteristics may change rapidly, the identity of the dominant players can remain unchanged for long periods of time.

Experience shows that anticompetitive practices such as ‘price squeezes’, ‘leveraging of market power’, ‘aggressive bundling’ have not yet been abandoned by incumbents. It is imperative therefore that antitrust enforcement remains vigilant and that entry by new competitors is not rendered illusionary. The importance of the communications industry to the economy requires an increased antitrust scrutiny in order to ensure that growth and innovation are not obstructed by market power abuses or other anticompetitive practices.

I do not mean to suggest, however, that the telecoms industry does not have distinctive features. What I mean is that sound antitrust enforcement in network industries requires careful attention to the particular characteristics of the industry. It is in this context that the use of economics can greatly enhance our understanding of how such industries work. To my mind, the real challenge of economic analysis in antitrust investigations is to shed light on evolving, often complex, issues of market definition, barriers to entry and competitive effects, to name but a few current important issues.

5. THE APPROPRIATE PLACE FOR ECONOMICS

Economics helps us to understand the fundamental and not always easy question of how markets work, a fundamental question any competition policy-maker should consider before planning any action. Economics is crucial for the analysis of the market’s structure and dynamics, and for the analysis of the market players’ behaviour and their incentives to behave in certain ways. These are fundamental issues in complex and dynamic markets, such as the electronic communications market, which involve a variety of elements needing sophisticated analysis (for example, the speed of technological innovation and the existence of network effects).

In the last few decades, we have seen a continuous increase in the role of economics in competition and regulatory policies. The Commission’s recent ‘Guidelines on market definition and the assessment of Significant Market Power’ for the purposes of *ex ante* regulation in the electronic communications sector should be seen as a concrete example of incorporation of tested and proven economic theory into standard competition analysis, be it for the purposes of delineating the boundaries of the relevant market or for assessing the existence of single or collective dominance.

6. CONCLUDING REMARKS

The Commission will continue its vigilance in enforcing the antitrust rules in the electronic communications markets; and, in doing so, it will always take into consideration the special characteristic of this sector and base its approach on sound, well-grounded economic analysis.

This book highlights the importance of balanced economic and legal analysis in the debate on the role of antitrust and regulation in the telecommunications industry.

