Introduction: balancing antitrust and regulation

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For most of the past century there has been a dichotomy across industrial sectors between those industries governed primarily by general competition policy – antitrust – and those governed primarily by sector-specific rules – regulation. In several sectors of the economy, notably telecommunications and energy but in some cases also including transportation, agriculture, and health care, regulation has been dominant, even if not always exclusive of general antitrust enforcement. The telecommunications sector in the United States is an example: AT&T's private monopoly was governed principally by a network of regulations imposed by individual state public utility commissions and by the Federal Communications Commission (FCC); but AT&T's monopoly was not immune from prosecution under the US antitrust laws for anticompetitive conduct. Indeed, it was antitrust prosecution that ultimately led to the break-up of AT&T in 1984. Over the past 20 years, several traditionally regulated economic sectors have been moving, to varying degrees, to competition. The past decade, for example, has seen substantial liberalization in both telecommunications and electricity generation. As this transition toward competition has progressed, the traditional balance of regulation versus antitrust comes into question. To what extent is sector-specific regulation still warranted as monopoly power erodes? Is antitrust law in a given jurisdiction up to the task of protecting consumers and promoting competition?

The chapters in this volume address various aspects of the evolving balance between antitrust and regulation in the European Union and the United States. They were originally presented at a conference jointly organized by CERN and the Berkeley Center for Law and Technology entitled “Balancing Antitrust and Regulation in Network Industries: Evolving Approaches in Europe and the United States,” held in January 2006 at the Ecole Nationale Supérieure des Mines in Paris. The chapters span a range of related topics, some focusing on general observations about the relationship between antitrust and regulation in the respective jurisdictions and others tying those observations to particular industrial sectors.

In Chapter 1, Chief Judge Douglas H. Ginsburg of the United States Court of Appeals for the DC Circuit explains how in recent years new regulatory regimes have emerged in the United States designed to foster competition in industries previously dominated by government-sanctioned monopolies. Rather than generate the authentic competition associated with free markets, however, such regimes engender what Judge Ginsburg terms “synthetic competition.” The overriding goal of the regulator promoting synthetic competition is not allocative efficiency or consumer welfare; rather, the aim is to ensure the continued success of multiple “competing” providers regardless of whether fewer firms, or even a monopoly, would be more efficient. Because the synthetic competition induced by regulators may bear little resemblance to competition in an unregulated market, Judge Ginsburg argues that, in reviewing the efforts of regulators to structure competition, a court should not demand the rigorous economic theory and evidence necessary to prove an antitrust case. Rather, the court should limit itself to policing the regulatory agency’s adherence to prescribed procedures and insisting the agency provide a reasoned justification for its action.

In Chapter 2, John Temple Lang compares and contrasts competition law and regulatory regimes under European Union directives. He also considers some procedural and substantive aspects of the co-existence of national regulatory regimes with European competition policy and competition law rules. Mr Lang’s chapter examines the consequences of Regulation 1/2003, the EC competition decentralization regulation, and concludes that while it has important benefits in terms of allowing the Commission to choose its enforcement priorities, the Commission could usefully provide more guidance on national compatibility with EC law and on regulation by member states of sectors not regulated by EC directives.

In Chapter 3, Professor Pierre Larouche follows the above discussions of the United States and European Union by bringing those respective jurisdictions into comparative focus. He argues that the free exchange of economic ideas across the Atlantic often leads to the mistaken idea that, because economic science is meant to be universal in its application, competition regimes should also be similar and in conformity with the prescriptions of economic theory. Professor Larouche observes that EC competition law and sector-specific regulation often tend to be dismissed by economists as inferior, outdated or even-irrational when they fail to conform to the outcomes that would be expected on the basis of economic science. His chapter aims to substantiate doubts about that conclusion by examining whether the universal applicability of economic science might not be limited by legitimate differences between EU and US competition laws and sector-specific regulations. To illustrate his proposition, Professor

Larouche examines three specific issues relating to competition law and telecommunications regulation: (1) the hierarchy in the application of competition law and sector-specific regulation, comparing the US Supreme Court decision in *Trinko* and the European Commission decision on the *Deutsche Telekom* price squeeze case; (2) the principle of technological neutrality and the place of competition law principles in sector-specific regulation, comparing the approach of the FCC under the Communications Act with that of the European Commission under the new electronic communications framework; and (3) the institutional architecture of competition law and regulation in a the EU's multi-level jurisdictional structure.

The focus on telecommunications continues in Chapter 4, in which Professor James B. Speta argues that because telecommunications markets are increasingly, even if imperfectly, competitive, once-dominant public utility regulation is on the way out while competition law and economics is on the way in. He examines the concern that, if freed from utility regulation, concentrated market structures might lead to fragmentation or to significantly higher prices for consumers. Professor Speta discusses whether competition law alone could stop either of these results and how pure antitrust principles and private litigation might be supplemented to improve the use of antitrust as the dominant regulatory mechanism in telecommunications. He studies this question through the lens of the Federal Trade Commission Act, legislation that was expressly designed to supplement antitrust and which outlaws “unfair methods of competition” and “unfair and deceptive trade practices.” The chapter examines the FTC's performance under these two standards, and attempts to clarify those standards. To bring the project around to telecommunications in particular, the chapter considers how the “unfair competition” standard might substitute for regulation in addressing the difficult problem of concentrated market structures in telecommunications.

In Chapter 5, Professor Philip J. Weiser argues that the challenge for competition policy in regulated sectors is to design a system where antitrust authorities play the central role in analyzing a merger's competitive effects and regulators play the central role in imposing and enforcing regulatory remedies. He contends that over the last decade, the FCC has vacillated in its approach to merger review. In the worst of cases, Professor Weiser contends, the agency “places harm on one side of the scale and then collects and places any hodgepodge of conditions – no matter how ill-suited to remedying the identified infirmities – on the other side of the scale.” In the best of cases, he finds the FCC imposes conditions that address competition policy concerns raised by the merger and enables the antitrust agencies to clear a merger that would otherwise pose potential objections. At present, the US system too often veers towards a “worst case” scenario

where federal antitrust authorities – the FTC and DOJ – impose regulatory remedies that overlap with regulatory policy and regulatory agencies perform duplicative merger reviews and impose remedies unrelated to the mergers themselves. In short, there is compelling need for institutional reform. This chapter explains the practice of the FCC in reviewing mergers involved regulated firms, discusses the practice of the DOJ, FTC, and European Union in reviewing mergers of telecommunications companies, and outlines some directions for reforming the US system of merger review and merger remedies in the telecommunications arena.

Continuing with the theme of mergers but departing from telecommunications, Chapter 6 is a study by Professors Richard Gilbert and David Newbery of the distinct challenges that electricity mergers pose for competition policy. They explain why a merger of electricity suppliers can affect prices in a very large number of relevant antitrust markets corresponding to different points in time and different geographic regions. As the authors discuss, following the approach to antitrust market definition in the DOJ/FTC Horizontal Merger Guidelines, a separate relevant product market exists if a hypothetical monopolist that is the sole supplier of the product would profitably increase its price above the pre-merger level. A region is a separate relevant geographic market if a hypothetical monopolist that is the sole supplier of the product in the region would profitably increase its price above the pre-merger level. Demand for electricity is highly inelastic and electricity is not easily stored, hence separate antitrust product markets can exist even at very close points in time. Furthermore, separate geographic markets can exist at points that are not distant from each other if transmission constraints limit the ability of a consumer to substitute electricity from a different location. For these reasons Professors Gilbert and Newbery explain, the analysis of mergers of electricity suppliers is often a daunting exercise. The authors discuss some of the approaches that may be used to evaluate the risk of price increases from electricity mergers and some shortcuts to simplify the analysis which might improve the effectiveness of antitrust enforcement in this critical industry.

In Chapter 7, Professor Tommaso Valletti takes the topics of market definition and market power explored in the previous chapter and discusses them in the context of the mobile telephony market. He examines how the market for mobile telephone service may have the characteristics of a “two-sided” market, and explains why those characteristics pose special challenges for defining markets and determining market power in the mobile communications market. Professor Valletti concludes that the preliminary step of market definition in the antitrust analysis of this market should not obscure or substitute for a more detailed analysis of the actual competitive effects of conduct by mobile telephone providers. His chapter

provides important guidance for how antitrust authorities or regulators should conduct that competitive analysis given the particular economic characteristics of mobile telecommunications.

Taken together, the chapters that comprise this volume provide both a general overview of relevant practices regarding the balance of antitrust and regulation in the United States and the European Union and more specific practices related to the competitive analysis and governance of the telecommunications and electricity sectors. Our goal has not been to be comprehensive, but to assemble a collection of important contributions that will advance the wider debate over how to govern industries in transition from regulated monopoly to competition. It is our hope that the assembled chapters succeed both in furthering the state of discussion and in expanding the debate in a more comparative direction.