COMPETITION LAW AND PRO-COMPETITIVE REGULATION: AN UNSOLVED CONUNDRUM?

Alberto Pera, Andrea Pezza

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Abstract: The relationship between competition and regulation has long been at the center of debate. In this article the Authors highlight the different approaches followed by European and national courts with respect to regulatory measures aimed at fostering competition and those aimed at protecting other public interests. They then examine critically the way in which the criterion of complementarity between competition law and pro-competitive regulation is applied at the EU and national level and question the use of a homogeneous paradigm in the two instances. Finally the Authors suggest to review the use of the criteria of “autonomous decision” and “special responsibility” when applying competition law in presence of a pro-competitive regulation.

1. INTRODUCTION

During the last three decades an intense liberalization process - aimed at opening to competition utility sectors, traditionally considered as State-run monopolies – has dramatically impacted on the relationship between competition law and regulation in the EU and in its member States.

Before the beginning of these processes, the application of competition law was substantially separated from the application of regulation, as the latter was seen as basically directed to pursue public interest objectives, like the universal provision of the services, affordable prices, security of supply, safety, and quality levels. The instruments were technical and price regulation of local or State monopolies.

In this context, at least until 1985 - when in British Telecom the ECJ ruled that competition law could well be applied with respect to a regulated public service monopoly3 - it was generally understood that these concerns were largely sheltered from the application of competition law by article 106.2 of the TFEU

1 Lawyers.
2 Although the article is based on common reflections of the Authors, Alberto Pera wrote Introduction, conclusions and paragraphs 1 and 6, while Andrea Pezza wrote paragraphs 2-5.
(which was at the time art. 90.2 of the Rome Treaty), according to which "undertakings entrusted with the operation of services of general economic interest […] shall be subject to […] the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them". Therefore, restrictions of competition were admissible as long as they were necessary to implement the undertakings’ public interest mission.

Since British Telecom, however, two developments have taken place: (i) the derogation from competition law provided for in Article 106.2 TFEU has been interpreted in a very narrow way; (ii) utility sectors have been subject to the above mentioned wide ranging processes of liberalization and privatization induced by the EU legislation. These processes, which begun in telecommunications but were later extended to most utility sectors, like electricity, gas, the postal service and railways transportation, originated in fact from the perception that in many cases the competitive market could allow provision of the services on an efficient scale and at the best conditions, while fostering innovation.

Common feature of these processes, though, is that the opening to competition of these sectors could only be gradual, as they are characterized by the presence of indivisible

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4 The ECJ – helping the Commission to “dismantle” monopoly situations throughout the EU – interpreted in a first phase 106.2 TFEU in a restrictive manner, holding that such provision could have been invoked only when MS can demonstrate the impossibility of carrying out the service under normal competitive conditions (see case C-66/86, Ahmed Saeed, 17 January 1989 “a limitation of the effects of the competition rules [is admissible] in so far as it is indispensable for the performance of a task of general interest”). Subsequently, article 106.2 TFEU has been interpreted by the ECJ having regard to its “effet utile”: see for instance case C-157/94 Commission v Netherlands, 23 October 1997, where the Court – after having affirmed that “being a provision permitting derogation from the Treaty rules, Article 90(2) must be interpreted strictly” (§ 38) - held that in order to invoke Article 106.2 TFEU “it is sufficient that the application of […] [competition rules] obstruct the performance, in law or in fact, of the special obligations incumbent upon that undertaking” (§43).


assets; very relevant market positions due to the circumstance that such firms were former monopolies; vertical integration which allows the transfer of market power from one market to the others.

In this context, the role of regulation has changed over the time: in addition to (and sometimes in substitution of) the objectives of general interest, a specific mandate was given to regulatory authorities established at national level to direct their activity towards the development of competitive markets: to this end they have been given the task of taking a number of ex-ante decisions concerning the structure of the market and the conduct of firms with market power. These include defining markets relevant from a competition point of view; identifying the existence of situations of market power which may allow distortions of the competitive process; imposing conditions of access to infrastructure; dictating price and quality conditions, in order to allow entry and competition by firms with limited market power. The importance of their pro-competitive role has been even underlined by the provision, in the EU directives, that regulation authorities are autonomous entities, independent from government, so not to favor national or State controlled concerns.

The circumstance that the liberalization process is aimed at achieving a full and effective competition – and that to this aim a regulator has been appointed entrusted with specific powers - does not prevent the contextual application in these sectors of competition law provisions. In principle, the ontological difference existing between these two set of rules should be sufficient to avoid contrasts between these categories. In fact, according to the traditional view, competition law “essentially limit the set of choices available to a firm by indicating forbidden behaviours that cannot be adopted on the market […] sanctioning, ex-post, those firms that have violated the rules”, while sector specific regulation, instead, is “an ex-ante activity because it [indicates] […] what type of actions firms in a certain market are supposed to undertake”\(^\text{10}\).

However, in a number of jurisdictions problems appear to have derived from the fact that in liberalized sectors competition law may be applied with reference to the conducts of undertakings, which had been explicitly evaluated by the regulator. The assessment of undertakings’ conducts made by competition authorities on the basis of antitrust law could then be found inconsistent with ex-ante decisions by the regulators although these were adopted with the aim of fostering competition. Moreover, regulated undertakings while abiding with regulations were considered directly responsible for non-compliance with competition law and were sanctioned accordingly.

As a consequence, there is a widespread perception\(^\text{11}\) that the simultaneous application

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of competition law and sector specific regulation may give rise to a number of problems: prominent among them is the legal uncertainty, as firms cannot rely on approval of their conduct by regulators; then the waste of private or public resources, as regulatory processes are complex and costly; the risk of opportunistic behavior, as the parties of the proceedings, which would include the regulated firm and its competitors, could always invoke the lack of competence of the regulatory authority in favor of competition one or vice-versa; finally, the lack of efficiency in the enforcement of competition law, as – given the limited budget at disposal of the competition and regulatory authorities – for a conduct examined twice, there are others which are not investigated at all.

Therefore the application of competition law is subject to debate in those instances where there is a sector specific regulation; there is a regulator in charge of implementing those provisions; the regulator is entrusted with fining powers; those powers are effectively exercised.<ref>

In order to provide possible solutions, different jurisdiction have tackled the issue in different

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12 See in this regard Verizon Communications Inc. V. Law Offices of Curtis V. Trinko, llp (02-682) 540 U.S. 398 (2004), where US Supreme Court held that the plaintiff cannot state an antitrust claim in all the circumstances “where a state or federal agency has effective power to compel sharing and to regulate its scope and terms”. In fact - it is the Court reasoning - where “a regulatory structure designed to deter and remedy anti-competitive harm […] exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny”. In the Court’s view, “the [regulatory] regime was an effective steward of the antitrust function”. This position was justified on the basis of other two arguments (not properly legally-sound): (i) “applying the requirements of §2 can be difficult because the means of illicit exclusion, like the means of legitimate competition, are myriad”; this implies the risk of “mistaken inferences and […] resulting false condemnation”, which “are especially costly, because they chill the very conduct the antitrust laws are designed to protect”; (ii) a “conduct consisting of anticompetitive violations […] may be […] beyond the practical ability of a judicial tribunal to control”, as “effective remediation of violations of regulatory sharing requirements will ordinarily require continuing supervision of a highly detailed decree’’. This approach has been confirmed by the US Supreme Court in Credit Suisse (Credit Suisse Securities (USA) v. Billing, 551 U.S. 264 - 2007) and Linkline (Pacific Bell Telephone Co. v. linkLine Communications, Inc., 555 U.S. 438 - 2009). In this regard, it can be mentioned the concurring opinion delivered by Justice Breyer in Linkline, where it was held that “when a regulatory structure exists to deter and remedy anticompetitive harm, the costs of antitrust enforcement are likely to be greater than the benefits”.

In conclusion – as noted by T.J. Brennan, Essential Facilities and Trinko: Should Antitrust and Regulation Be Combined?, 61(1) Federal Communication Law Journal (2008) pages 141 – 142 - the new line of cases inaugurated by Trinko “reflects a declining influence of [the] view that regulation and competition are complements” and embraces the view that the two set of rules are rather “substitutes”; if regulation is present, the demand for antitrust falls.
ways: in particular, in the US in a number of cases the Supreme Court has ruled that the presence of effective regulation prevents the application of antitrust law\textsuperscript{13}; in the EU the decisional practice (concerning in particular abuses of dominant position) goes in a different direction, as the ECJ has ruled that EU antitrust law may well be applied in presence of effective regulation, as long as a margin of autonomy remains in the behavior of regulated enterprises. The EU approach has been adopted in a number of member States, including Italy: the results, however, have not been entirely satisfactory, and many Member States have been compelled to adopt new and different solutions aimed at solving the issue.

In light of the above, this paper will examine the current state of art of the fluid relationship between competition law and sector specific regulation in the EU, trying to explore some possible solutions aiming at bringing some clarity to a matter that is still uncertain.

In particular, after an overview of the principles governing the relationship between these two sets of rules (par. 1), we will examine the decisional practice of the European Commission and of the ECJ in cases involving the enforcement of competition rules in regulated sectors (par. 2). We will then move to examine the case law originated by Italian Competition Authority (“ICA”) decisions (par. 3), underlining how different criteria are depending on the public interest pursued by the regulation. We then question whether is it appropriate for national competition authorities (“NCA”) to follow the same approach as the European Commission. To this aim, we will also take into consideration the specific context in which EU decisions have been adopted (par. 4). We will then turn to the description of the (unsatisfactory) measures through which Member States have addressed the issue, that basically consist in the enhancement of the institutional cooperation between competition and regulatory authorities under different forms (par. 5); then, in the last part of the paper, we will try to give our contribution to the debate proposing a different solution (par. 6).

2. The interplay between (State) regulation and (EU) competition provisions

2.1 A “tension” between different rules

The tensions between competition and regulation are also the consequence of the different roles in the EU legal system\textsuperscript{14}.

Competition policy is one of the fundamental EU actions aimed at pursuing the objectives of

\textsuperscript{13} See above, note 10.

the European Union\textsuperscript{15}. Its implementation is ensured by Articles from 101 to 109 of the Treaty on the functioning of the European Union ("TFEU") and by their implementing measures.

Article 101 TFEU and, what matters most from our point of view, Article 102 TFEU are addressed to undertakings: companies should not enter into agreements, concerted practices or decisions of associations of undertakings, nor abuse of their dominant position. Therefore, if the company’s anticompetitive behavior derives from an autonomous choice, it will be the sole responsible for its conduct, and Articles 101 and 102 TFEU will apply.

According to the circumstances of the case, both companies and the Member States can be responsible for the violation of such EU primary provisions. In fact, although – as already stated – the provisions are formally addressed only to undertakings, Member States have to refrain from “introduc[ing] or maintain[ing] in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings”\textsuperscript{16}. Such prescription constitutes the application of two EU principles: the principle of primacy, according to which Treaty provisions (as well as their implementing regulation) take precedence over national measures inconsistent with them\textsuperscript{17}; and the principle of loyal cooperation, stemming from Article 4(3) TEU, according to which Member States should do nothing detrimental to the proper functioning of the European Union.

Regulatory provisions, instead, are generally set out in EU directives, which are then transferred into national legislation. National regulatory authorities - established by national law in accordance with the relevant EU provisions – are empowered to issue binding decisions for regulated firms.

In the light of the above, problems of coordination in the application of competition law and regulation may derive from the different objectives pursued by the two sets of rules or by the primacy attributed to one specific rule (and its implementation) for the pursuit of a common objective.

Given that EU competition rules are enshrined in the Treaties - primary source of EU law - provisions limiting their application must be considered incompatible with the EU law, whether they derive from EU secondary legislation (regulations and directives) or they derive from national legislation, unless these provisions find their justification in the

\textsuperscript{15} According to Article 3 of the Treaty on European Union ("TEU"), EU “shall work for the sustainable development of Europe based on […] a highly competitive social market economy”. However, since the Lisbon Treaty, the prevention of competition distortion is not an aim anymore, but has been subsumed into the notion of internal market: according to Protocol No 27, “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 change however does not seem to have any practical implications, as no changes have been made to the competition rules themselves.

\textsuperscript{16} See Joined cases C-94/04 and C-202/04, Cipolla and Others, 5 December 2006.

\textsuperscript{17} See Case C-6/64, Costa v Enel, 15 July 1974.
Treaties. In particular, ECJ has to annul EU secondary legislation (i) pursuing a policy objective not enjoying the same rank of competition and (ii) contrasting with other EU measures aimed at maintaining competition in the market. Similarly, national courts and administrative bodies (including competition authorities) have to interpret (as far as possible) national legislation and decisions by administrative authorities - pursuing a policy objective not enjoying the same rank of competition - in the light of EU competition provisions or set aside those provisions which are incompatible with EU competition law.

However, competition is not the only public interest which is considered in the Treaties: for instance the development of the so called “four freedoms” (i.e. free movement of persons, capital, goods and services), consumer protection, universal service and environment protection are also relevant.

When the rules aim at protecting one of these legitimate public interests give rise to restrictions to competition, it is not possible to

18 This is the case of the already mentioned provision on services of general interest (106.2 TFEU). Moreover, the Common Agricultural Policy (“CAP”) - another EU objective enshrined in the Treaty (see Articles 38-44 TFEU) - provides a good example of the possibility of limiting the scope of application of EU competition law. In particular, according to Article 42 (1) TFEU “rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the European Parliament and the Council”; such provision has been implemented by successive EU Regulations, the last of which is EU Regulation1308/2013 that at its Article 209 provides the list of “exceptions [from the application of competition rules] for the objectives of the CAP”.


20 According to Fratelli Costanzo (C-103/88, 22 June 1989 § 33) “Administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of [EU law] and to refrain from applying provisions of national law which are inconsistent with them”. In the light of the above judgement, in 2003 the ECJ ruled in CIF (C-198/01, 9 september 2003, § 58) that “a national competition authority, one of whose responsibilities is to ensure that Article 81 EC is observed has a duty to disapply a national legislation” which “legitimizes or reinforces the effects” of an anticompetitive conduct.

21 See Case C-106/89, Marleasing SA v La Comercial Internacional de Alimentacion SA, 13 november 1990.


23 See Article 12 TFEU, according to which “Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities”.

24 According to Article 106.2 TFEU “undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them”. It is worth mentioning that – as noted by AG Leger in its Opinion in Wouters case (AG Leger, case C-309/09, 10 July 2001) - the services covered by Article 106.2 of the Treaty are described by the ECJ “in terms which are virtually interchangeable: service of general interest, universal service or, quite simply, public service” (see in part. §161). Moreover, the Lisbon Treaty - reformulating Article 16 TEC (now Article 14 TFEU), stresses the joint responsibility of the Union and the Member States in the protection of services of general economic interest, thus providing a new legal basis for the EU to take action in this field.

25 See Article 11 TFEU, according to which “Environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development”.

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solve the antinomy through the application of the hierarchical principle, because the two contrasting objectives enjoy the same rank. Therefore, the ECJ has suggested a more nuanced approach, characterised by a balancing among the different goals involved. In particular, from the analysis of the case law it comes out that national regulations that are incompatible with EU competition law provisions cannot be set aside as long as the restrictions imposed are proportionate and necessary to the pursuit of these other objectives.

2.2 A “tension” between different enforcers

The criteria applicable to solve problems of coordination between rules could also be used for solving the contrast between decisions of different authorities (i.e., competition authorities ad sector regulators). In this regard, it can be observed that a regulator may be in charge of a variety of public interest objectives, the achievement of some of which may imply some form of restriction of competition. As a matter of fact, as we will see later, there have been instances in which regulators’ decisions – although restricting competition - have been deemed to be justified because the restrictions were considered necessary and proportionate to the achievement of the relevant public interest.

When regulators adopt decisions in order to promote competition, they clearly pursue the same objective of competition authorities, although following a different approach: regulators’ decisions are in fact based on an ex-ante prescription of the undertakings’ conducts, while competition authorities’ decisions are the result of an ex-post evaluation of the same conducts.

From this point of view, in EU regulation and competition are considered as “two complementary policies, both essentials for EU growth.” As recently declared by Alexander Italianer, former Director General of Competition at the EU Commission, “competition and regulation, too, go hand in hand. […] Competition enforcement can be adequate to safeguard competition. But often, regulation is necessary to open markets to competition in the first place.” A similar position has been also expressed by the ECJ in Deutsche Telekom case, where it held that “the competition rules laid down by the EC Treaty supplement […] by an ex post

26 See Case C-519/04, David Meca-Medina and Igor Majcen v Commission of the European Communities, 18 July 2006, § 42: “It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives and are proportionate to them”.

27 See Case C-309/99, J. C. J. Wouters and Others v Algemene Raad van de Nederlandse Orde van Advocaten, 19 February 2002, § 110: “a national regulation […] does not infringe Article 85(1) of the Treaty, since […] that regulation, despite the effects restrictive of competition that are inherent in it, is necessary for the proper practice of the legal profession, as organised in the Member State concerned”.

28 The former Commissioner for Competition, M.me N. Kroes held at the Bundeskartellamt conference on ‘Dominant Companies – The Thin Line between Regulation and Competition Law (Hamburg, 28th April 2009) that “regulation and competition law only work when they work together”.

review, the legislative framework adopted by the Union legislature for ex ante regulation.\(^{30}\)

The qualification of the relationship between competition and regulation in terms of “complementarity” should exclude – at least in theory – the prevalence of one set of rules over another. From this point of view, the initial approach followed by the Commission was to identify some sort of deference of competition authorities to regulatory decisions of this kind, based on the “special” character of regulation with respect to the general competition law.\(^{31}\)

However, this approach has been soon superseded by the application of the hierarchical principle, according to which - because of the superior hierarchical position in the system of European law held by competition law – the latter should find application even if conducts of the undertakings had been subject to pro-competitive regulatory review.\(^{32}\) In this regard, it should be observed that the criterion used to solve the existing problems of coordination between the two sets of rules appears to be rather formalistic and open to criticism, in particular when EU competition law is applied by a national competition authority. While the Commission enjoys a special status in the enforcement of competition law (and we will argue later, in the supervision of regulation) the same is not true for national competition authorities. It would rather seem reasonable that when the regulatory authority pursues a pro-competitive aim, the decisions of the two authorities should be on an equal footing. As noted by a number of scholars, an approach which disregards the regulatory decisions may create problems, not only in terms of legal certainty and efficiency, but also because the ex-ante decisions of the regulator may derive

\(^{30}\) See for instance the O2 decision (Case COMP/38.369: T-Mobile Deutschland/O2 Germany, 16 July 2003 § 22), where the Commission affirmed that “subject to the principle of the primacy of Community law, the national regulatory framework and the EU competition rules are of parallel and cumulative application. National rules may neither conflict with the EU competition rules nor can compatibility with national rules and regulations prejudice the outcome of an assessment under the EU competition rules”.

\(^{31}\) European Commission, Notice on the application of the competition rules to access agreements in the telecommunications sector - framework, relevant markets and principles, OJ C 265, 22/08/1998 §§ 13-14: “The 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. The Commission cooperates as far as possible with the NRAs, and NRAs also have to cooperate between themselves in particular when dealing with cross-border issues. Under Community law, national authorities, including regulatory authorities and competition authorities, have a duty not to approve any practice or agreement contrary to Community competition law. Community competition rules are not sufficient to remedy all of the various problems in the telecommunications sector, NRAs therefore have a significantly wider ambit and a significant and far-reaching role in the regulation of the sector. It should also be noted that as a matter of Community law, the NRAs must be independent.”.

\(^{32}\) L. Hou, Reshaping market, competition and regulation in EU utility liberalisation: a perspective from telecom, 52 CMLR (2015) page 982 considers that the recourse to the hierarchical criterion provides an ”easy solution” “from a dogmatic point of view”.

\(^{33}\) See paragraph 4 of this Article.
from specific views about how the market works, or about the opportunity to encourage dynamic rather than static efficiency, which may be different from those held by the competition authority.\footnote{See ex multis L. Hou, Reshaping market, competition and regulation in EU utility liberalization: a perspective from telecom, 52 CMLR (2015) pp. 977-1008; G. Monti, Managing the intersection of utilities regulation and EC competition law, 4(2) The Competition law review (2008) pp. 123-145.}

2.3 What are the consequences of these tensions for undertakings?

An aspect which is related to the problems of coordination between the two kinds of interventions in the market is the one concerning the responsibility of regulated undertakings, when acting in accordance with the rules imposed by the regulator and still being considered in breach of competition law. In its CIF judgement the Court argued that the imposition of penalties should be excluded “when the [anticompetitive] conduct was required by the national legislation”\footnote{ECJ, Case C-198/01, CIF, 9 September 2003.}

In general terms, undertakings that are compelled to act in an anticompetitive way by a State measure can invoke the so-called “State-action defence” so that the State will be the only one liable for the conduct of undertakings\footnote{See ECJ, Case C-198/01, CIF, 9 September 2003. For a comment on the State action defence see F. Castillo De la Torre, State Action Defence in EC Competition Law, 28 (4) World Competition, (2005), pp. 407-431.}. However, it should be pointed out that the State action defence has been interpreted by the ECJ in a very restrictive manner, requiring that the undertaking are “deprived of all independent choice in its commercial policy”\footnote{See T-228/97, Irish Sugar Plc v Commission, 7 October 1999, § 129.} or that the national legal framework “eliminates any possibility of competitive activity”\footnote{See Joined Cases C-359/95 P and C-379/95 P, Commission and France v Ladbroke Racing, 11 November 1997, § 33.}; therefore, it is not so easy for undertakings to invoke it.

Transposing these general principles to the problem at issue, one may ask whether the undertaking’s conduct that has been examined and authorized by a regulatory authority and is subsequently considered anticompetitive by the competition authority should be exempted from the responsibility for the allegedly anticompetitive conduct: in theory only the regulator – and therefore the State – should be considered responsible for breaching competition rules. The question does not seem inappropriate, if one considers the position of the regulated undertaking with respect to the regulator: regulatory processes are long and demanding exercises, in which the enterprise situation is subject to thorough review, and often conditions and limits are imposed on the regulated firm against its will. Therefore, even if a generalised waiver of responsibility does not seem to be appropriate, in the sense that it should not regard all the conducts of the regulated firm, it seems however proper to define more precisely the criteria according to which conducts expressly authorized by the
The prevailing approach to the above issues has been set by the Commission and the European Courts in two well known cases in the telecommunication sector (Deutsche Telekom and Telefonica) – where the Commission decisions, subsequently upheld by the ECJ, ended up endorsing the power of competition authorities to review regulatory decision from a competition point of view, while attributing full responsibility for the infringement of article 102 TFEU to the concerned enterprise. As we will see, these decisions are based on two considerations: (i) the undertakings’ conduct is considered as autonomous even where it is fully compatible with (or prescribed by) the regulatory framework defined by the regulator; (ii) regulated undertakings – in consideration of the fact that they are former monopolists – enjoy a “special responsibility”: this consists not only in refraining from conducts capable of impairing competition, but also in requiring regulators to review their decision when they perceive that market conditions are changed.

Deutsche Telekom\textsuperscript{42} concerned a margin squeeze that was allowed by the conditions set by the regulator. In particular, the Commission found that Deutsche Telekom – which was dominant in both the wholesale and the retail markets for access to the network - had fixed the retail price of access to the local loop at a value so low as to give rise to negative margins for its competitors. The point is that during the investigation period (1998-2003) the telecoms market was under the control of the German regulator that exercised its competences by setting prices both at wholesale and retail level. Wholesale prices were set by the regulator based on costs, while at a retail level the regulator applied a price cap on a wide basket of services, leaving to Deutsche Telekom the determination of the level of charge for each service. The Commission argued that this allowed DT to practice very low (and predatory) prices, which it could compensate through the high margins in the other services included in the regulated basket. Therefore, despite the existence of effective regulation, the Commission considered the incumbent operator responsible for this antitrust responsibility as an undertaking in a dominant position, the applicant was therefore obliged to submit applications for adjustment of its charges at a time when those charges had the effect of impairing genuine undistorted competition on the common market”. See case T-336/07, Telefonica v Commission, 29 March 2012, § 335: “it was for Telefónica, in the context of the special responsibility which it bore as an undertaking occupying a dominant position on the market for the regional wholesale product, to apply to the CMT to adjust its tariffs when they had the effect of impairing genuine undistorted competition in the common market”;

\textsuperscript{40} See ECJ, C-280/08 P, Deutsche Telekom, §§ 84 ff, T-336/07, Telefonica v Commission, 29 March 2012, § 327-337.

\textsuperscript{41} See T-271/03, Deutsche Telekom v Commission, 10 April 2008, § 122, “in the context of the applicant’s special

\textsuperscript{42} Joined cases COMP/C-1/37.451, 37.578, 37.579, Deutsche Telekom AG, 21 May 2003.
infringement, as the use of a “price cap” mechanism left a “margin of discretion” to Deutsche Telekom in establishing access charges that gave rise to the squeeze\(^4\). According to the Commission, Deutsche Telekom should have based its retail prices on the specific costs for each service.

In this regard, the ECJ – which shared the Commission’s view - affirmed that “the mere fact that the appellant was encouraged by the intervention of a national regulatory authority […] to maintain the pricing practices which led to the margin squeeze of competitors who are at least as efficient as the appellant cannot, as such, in any way absolve the appellant from responsibility under Article 82 EC”\(^4^4\). The ECJ instead did not address the issue of the responsibility of the German regulator, merely affirming that “the national regulatory authorities may themselves have infringed Article 82 EC in conjunction with Article 10 EC [now article 4.3 TEU]”\(^4^5\).

The principle that competition law may well be applied even when the conduct has been mandated by a regulator was reaffirmed in Telefonica\(^4^6\), again a case of margin squeeze between two wholesale broadband access markets (i.e. the national and regional one) and one retail broadband access market.

In this case the Commission made explicit reference to the regulatory context: Telefonica had argued that the margin squeeze constituted a constructive refusal to supply and therefore the Commission should have proved that wholesale and regional broadband offers represented an “essential facility”\(^4^7\). The Commission however considered that Telefonica’s duty to deal stemmed from the fact that the national regulator mandated access at regional and national level, which implied the obligation to supply wholesale access. Moreover, the circumstance that Telefonica was subject to such a duty implied that the public authority had already evaluated the essential character of wholesale access, as well as made a balance between the incentives to invest and innovate of Telefonica and its competitors and the need to promote downstream competition\(^4^8\).

However, despite the fact that the Commission relied on the regulator evaluation concerning the duty to deal, the fact that wholesale regional prices were regulated in the form of maximal prices by Spanish regulator was not considered sufficient to exclude Telefonica’s responsibility:

\(^{43}\) EC, Deutsche Telekom, cit. § 105.

\(^{44}\) ECJ, Deutsche Telekom, cit. §84.

\(^{45}\) ECJ, Deutsche Telekom, cit. §91.

\(^{46}\) Case COMP 38.784, Wanadoo Espana v. Telefonica, 4 July 2007.

\(^{47}\) According to Oscar Bronner (Case C-7/97, 26 November 1998, §§ 43-46), a monopolist holding an infrastructure can be required to deal with its competitors if the following conditions are met: (i) the use of the infrastructure should be indispensable for the production on the downstream market; (ii) the infrastructure cannot be reproduced, for technical or economic reasons; (iii) the refusal to deal eliminates competition; (iv) there are no objective justifications for the refusal. On the essential facility doctrine in telecoms sector see A. Renda, Competition-regulation interface in telecommunications: what’s left of the essential facility doctrine, 34 Telecommunications policy (2010), pp. 23-35.

\(^{48}\) EC, Telefonica, cit., § 303.
the Commission argued that the latter knew that the data on which the national regulator relied did not reflect the company’s business plan and its actual costs.\footnote{See EC, Telefonica, cit. § 727: “CMT only calculated maximum regional wholesale prices on the basis of forecasts made by Telefónica itself in response to a questionnaire sent by CMT on 19 October 2001”.

\footnote{Case C-295/12 P, Telefonica and Telefonica de Espana v Commission, 10 July 2014 § 128.}

\footnote{Case COMP/39.525, Telekomunikacja Polska, 22 June 2011.}

The Commission decision was upheld by the ECJ which argued that the circumstance that Spanish regulator had exercised its control over the prices fixed by Telefónica was considered not sufficient to exclude (or limit) Telefónica’s liability, as “Article 102 TFEU is of general application and cannot be restricted [...] by the existence of a regulatory framework adopted by the EU legislature for ex ante regulation of the telecommunications markets.”\footnote{Case C-295/12 P, Telefonica and Telefonica de Espana v Commission, 10 July 2014 § 128.}

If Deutsche Telekom and Telefónica show that the Commission is ready to sanction an undertaking, even if it is in line with the regulatory provisions, the recent Telekomunikacja Polska\footnote{Case COMP/39.525, Telekomunikacja Polska, 22 June 2011.} goes a step forward.

The case concerned conducts which had been already subject to a concurrent review by the regulator, which had solved most of the competitive problems. The Commission found in fact that the incumbent operator (now Orange Polska) – the only supplier of wholesale broadband access and wholesale network infrastructure access at a fixed location – refused to give competitors access to its network, thus abusing of its dominant position.

As incumbent operator, Telekomunikacja Polska was also subject to the access obligations imposed by the regulatory framework and enforced by Polish regulator, which in this case, – differently to Deutsche Telekom and Telefónica – had opened formal proceedings against the incumbent operator. The proceedings leading to commitments to respect the telecoms regulatory framework and to sanctions. Despite this circumstance, the Commission sanctioned the conduct of Telekomunikacja Polska, although admitting that the regulator intervention had “ceased the majority of anti-competitive practices”.\footnote{Case COMP/39.525, Telekomunikacja Polska, 22 June 2011, §578.}

The Tribunal, confirming in full the Commission decision\footnote{Case T-486/11, Orange Polska S.A. v. European Commission, 17 December 2015.}, endorsed the choice of prosecuting conducts for which the national regulator had already imposed regulatory penalties. In fact, although this issue was not

\footnote{It should be highlighted that the Commission rejected the defendant’s allegation that the presence of a sector-specific regulation excluded the application of competition law (Telekomunikacja Polska, cit. § 126).}
object of a specific plea, the Tribunal incidentally recognized “that [Telekomunikacja Polska] was aware of the illegality of its conduct, both in regulatory terms […], and in terms of competition law, where its practices were designed to prevent or delay the entry of new entrants into the product markets concerned”\(^\text{56}\), thus indirectly supporting the Commission view.

It is impossible to underestimate the relevance of these cases, as they have set the criteria according to which national competition authorities across Europe tend to apply competition law to restrictive conducts irrespective of the fact that they are compliant with regulatory decisions.

4. NATIONAL DEVELOPMENTS: THE ITALIAN CASE

Experience shows that NCA have usually followed the example of the Commission, sanctioning conducts by dominant undertakings on the basis of competition law, and in particular of art. 102 of the Treaty, irrespective of whether they had been previously authorized by the regulatory authorities.\(^\text{57}\) This is also the experience in Italy, to which now we turn.

\(^\text{56}\) Orange Polska, cit. § 180.


a) the decision of the Slovenian Competition Authority, adopted on February 2015, concerning an abuse of dominant position put in place by Telekom Slovenije (Telekom) which raised the entry costs on the wholesale markets for broadband bit-stream access and for access to physical network infrastructure. Although formally Telekom was not in breach of obligations deriving from regulatory decisions, according to the national competition authority the exploitation of regulatory deficiencies for weakening the position of alternative operators is prohibited due to essentiality of access to Telekom’s network. See Slovenian Competition Authority, *The Slovenian Competition Protection Agency sanctions a telecom company for abuse of dominance on the wholesale markets for broadband bit-stream access and for access to physical network infrastructure (Telekom Slovenije)*, in e-Competitions | N° 72198, www.concurrences.com.

b) The decision of the French Competition Authority, adopted on December 2012, according to which the two largest French mobile network operators Orange France and SFR were liable for the implementation of pricing practices which favoured calls made within their own networks over calls made to rivals’ networks. The national competition authority did not exclude the responsibility of the parties by virtue of the fact that the regulatory framework did not fix an appropriate upper cap on termination charges (thus, creating a temporary financial interest for operators with a large subscriber base to limit the extent of calls made towards competitors’ networks); however, in setting the fine, the national competition authority acknowledged that the French regulatory framework encouraged the practices, and accepted to reduce the basic amount of the fine by 50%. See Daniel Vasbeck, *The French Competition Authority imposes fines totalling € 183.1 M on two leading mobile operators for implementing abusive rate differentiations (Orange, SFR)*, in e-Competitions | N° 50852, www.concurrences.com.

c) The decision of the Portuguese Competition Authority (Autoridade da Concorrência) adopted on September 2008, concerning discount practices of PT Comunicações, which is part of the Portugal Telecom Group, the former monopolist operator in the Portuguese electronic communications sector. In that case, the national competition authority sanctioned the undertaking for its anticompetitive practice, although the scale of charges practised by PT Comunicações had been proposed by this undertaking to the sectoral regulator (ICP-ANACOM), which decided “not to oppose” its coming into effect. See Luís D. S. Morais, *The Portuguese Competition Authority fines the telecom incumbent for abuse of a
In general terms, the ICA has always interpreted in a restrictive manner the possibility of exempting from liability the undertaking in presence of a regulation which dictates its conduct.

On their part, Italian Administrative Courts (i.e. TAR and Council of State) have adopted a slightly different approach. In presence of pro-competitive regulation, they have in general aligned their decisions to the practice of the European Courts, arguing that in principle “the alleged contrast between antitrust rules and sectoral regulations does not exist”, and regulatory decisions do not prevent the application of competition law.\(^{58}\) However, in presence of a regulation aimed to reach objectives different from competition, they have recognized the existence of specific limits to ICA intervention.

d) The decision of the Slovak Competition Authority (Rada Protimonopolného úradu Slovenskej republiky), adopted on December 2005, concerning an alleged abuse of dominant position put in place by Slovak Telecom (ST), liable for not granting access to the essential facility of a local network. In the course of the proceeding, ST objected that the Office did not have the competence to investigate the case and that the activities of ST fell within the scope of the Telecommunication Office. The Antimonopoly Office stated that this circumstance was not capable of excluding the competence of the Antimonopoly Office: in fact an undertaking with a significant impact on the market which falls within the scope of the Telecommunication Act is obliged to respect the Competition Act as well. See Robert Neruda, The Slovak Council of the Competition authority imposes significant fine for repeated abuse of dominant position by not granting access to essential facilities (Slovak Telecom), in e-Competitions | N° 21310, www.concurrences.com.

The recent Telecom Italia decision is exemplary. In that case, the Italian competition authority (“ICA”)\(^{59}\) found that the incumbent operator abused of its dominant position in the market of wholesale access to the local network and broadband, with the aim of hindering the expansion of competitors in markets for voice telephony services and broadband internet access. More in detail, the ICA identified two different abusive conducts, consisting in: (i) adopting a procedure for access to the network which discriminated against competitors; (ii) squeezing the margins, by making discounts to big business clients for retail access to the fixed public telephone network, which did not allow a competitor, equally efficient, to operate profitably and on a lasting basis in the same market.

The peculiarity of the case is that at least the first practice was largely compliant with the instructions by the sectoral regulator. In particular, Telecom Italia, challenging the ICA decision before both the TAR\(^{60}\) and the Council of State\(^{61}\), asserted – inter alia - that its conduct was substantially “prescribed” by law and also validated by the national regulatory authority (“AGCOM”), which already supervised the market. The Council of State – recalling the Deutsche Telekom judgment - rejected this argument, holding that the two authorities (ICA and AGCOM) are in a complementary relationship and thus the

\(^{58}\) TAR Lazio I, 8 May 2014, n. 4801.

\(^{59}\) ICA, A428 – Abusive conducts of Telecom Italia, 9 May 2013.

\(^{60}\) TAR Lazio I, 8 May 2014, n. 4801.

\(^{61}\) Council of State VI, 15 May 2015, n. 2479
application of the regulatory framework does not prevent the enforcement of competition law. In this regard, the judgement operated a distinction “between ex ante regulation, intended to achieve progressively a structure of the market as much as possible advantageous for users, and ex-post control abuse of competition”\(^{62}\); according to the Court, the compliance with ex ante regulation (which, indeed was very detailed), did not exclude the risk of abusive conducts\(^{63}\) and the ICA decision was upheld on both counts.

In the Telecom case both competition and regulatory Authorities were pursuing the same interest, the establishment of competition. However, in other cases the Italian Courts have tended to specify the limits to the intervention of the competition authority when regulation aims to reach objectives different from competition. In this respect, it is interesting to briefly recall the cases Posta elettronica ibrida, Postatime and Arenaways\(^{64}\).

In Posta elettronica ibrida, the ICA\(^{65}\) ascertained a number of anti-competitive conducts on the part of Poste Italiane, directly or by way of its subsidiary Postel, which were intended to exclude potential new competitors or limit the activities of existing operators in the liberalized market for hybrid e-mail. As of interest here, the ICA found that the conditions to access to the delivery – set by a Ministerial Decree – were abusive, and set aside the act of State\(^{66}\).

The Administrative Court of First Instance (“TAR”)\(^{67}\), reviewing the decision, agreed on the qualification of the conducts as restrictive. However, the Court noted that the “unjustified and discriminatory” conditions applied on access to the delivery network represented only the implementation of a national regulation ex se characterized by a foreclosing effect, and thus Poste Italiane could not be considered responsible on this account. Therefore, the Court - making application of the state action defence, according to which the imposition of penalties should be excluded “when the [anticompetitive] conduct was required by the national legislation”\(^{68}\) - recalculated the fine imposed to Poste Italiane, granting a 20% reduction.

In Posta Time, the ICA\(^{69}\) sanctioned Poste Italiane for having abused of its market power

\(^{62}\) Council of State VI, 15 May 2015, n. 2479

\(^{63}\) The absence of conflict between regulation and competition was further confirmed – in Court’s opinion – by the circumstance that in 2014 the AGCOM already highlighted some critical issues related to the KO procedure, as well as by the fact that the regulatory authority expressed a positive opinion on the conclusion of the antitrust proceeding.

\(^{64}\) Two of these cases – namely Posta elettronica ibrida and Posta Time are also discussed in M. Siragusa and F. Caronna, A reassessment of the relationship between competition law and sector-specific regulation, in J. Drexl and F. Di Porto, Competition Law as Regulation? (2015) pp. 158-161.

\(^{65}\) ICA, A365 - Posta elettronica ibrida, 29 March 2006.

\(^{66}\) Moreover, according to the ICA, Poste Italiane (i) maintained for an important part of the market, and in particular for a number of important customers, a delivery charge which was lower than the hybrid e-mail charge, conduct which discriminated against competitors; (ii) gave huge advantages - economic, informational and financial - to its Postel subsidiary.

\(^{67}\) Tar Lazio I, 9 January 2013, n. 125.

\(^{68}\) ECJ, CIF, cit.

\(^{69}\) ICA, A413 – Posta Time, 21 February 2012
with the aim of excluding competitors from the market for 'guaranteed time and date' delivery and messenger notification services. More in detail, as of interest here, Poste Italiane hindered the service provided by its competitor (TNT) through the interception of its customers' mail.

On appeal, the TAR and the Administrative Court of last instance (“Council of State”) quashed the ICA decision. In particular, the TAR Lazio held that “in relation to some of the conducts [i.e. the procedures for handling mail items] which have also been contested by the ICA, Poste Italiane has only applied the regulations in force” thus excluding the responsibility of the company. Similarly, the Council of State – confirming the TAR reasoning – noted that: (i) the monitoring and reporting of the correspondence may be explained otherwise (i.e., not as part of an anticompetitive win-back strategy), such as by the “need to identify violations, by competitors, of the legislation applicable to postal services and the postal network” and to prevent prejudice the proper operations of the universal service; (ii) the analysis of the costs – necessary to define the existence of predatory prices – was realized without expunging “the higher charges that are known to arise from the activity related to the postal network, linked to the performance of the obligations relating to the universal postal service”.

Therefore, the Courts considered that the incumbent conduct was dictated by a public interest different from competition, i.e. the sustainability of the universal service, and that the alleged restrictions to competition should be balanced against the attainment of this interest.

In Arenaways, the ICA found that Ferrovie dello Stato (“FS”) – through its subsidiaries Rete Ferroviaria Italiana and Trenitalia (respectively, the manager of the railway sector and the incumbent operator in the railway passenger transport market) – had put in place a complex strategy aimed at keeping Arenaways, the first competitor of Trenitalia, out of the profitable route between Milan and Turin from 2008 to 2011. According to the ICA, FS was liable for two anticompetitive conducts, consisting in: (i) dilatory activities, as FS – before giving Arenaways access to the network - started a long (and unnecessary) consultation procedure with the concerned Regions (Lombardy and Piedmont) and the Ministry of Transport and Infrastructures, and then referred the matter to the Office for the regulation of railway services (URSF) on the ground that the request could have had a public interest.

Moreover, according to the ICA, Poste Italiane (i) offered its service – directly competing with the one offered by TNT - at a predatory price; (ii) adopted a predatory price strategy during tenders launched by some local Authorities.

For a comment of the decision (and of the judgement) see M. D’Amico, La complementarietà delle funzioni affidate all’antitrust e all’URSF nell’ambito del servizio di trasporto ferroviario, 2 Giornale Dir. Amm. (2015), pages 262 ff.
negative economic impact on the public service agreement signed by Trenitalia; (ii) provision of misleading information to the URSF, as Trenitalia had allegedly provided the latter with a description of the facts (and of its sustained costs) which had the effect of swaying the URSF’s decision in its favour.

The Administrative Court of First Instance (“TAR”), however, quashed the ICA’s decision 77, holding that – although the existence of a sector specific regulation in the railway sector does not prevent the application of competition rules – it is not possible for ICA to replace its own assessment to the one made by the URSF, the latter concerning again the sustainability of the universal service. In fact, according to TAR, Trenitalia has abided to the rules set by the regulator, but the ICA carried out a parallel proceeding to the one made by the URSF, providing its own interpretation on how the USRF should have carried on the regulatory analysis aimed at assessing the impact of Arenaways on the public service agreement signed by Trenitalia. In doing this, the ICA “defined at the same time both the abusive character of the conducts of the sanctioned companies and the technical rules on which basis making such assessment. Thereby subverting the principle that the definition of the rule, basically heteronomous, precedes the evaluation [… of the conduct]” 78. Therefore the TAR concluded holding that the ICA – carrying out a parallel proceeding to the one of the URSF and making its own evaluations conflicting with the ones of the URSF – replaced the URSF in the exercise of competences attributed to the latter directly by the law.

In the three examined cases – Posta elettronica ibrida, Posta Time and Arenaways – Administrative Courts of first instance have therefore argued that the existence of regulation may well limit the responsibility of the regulated enterprise, or the extent of the application of competition law, requiring the ICA to evaluate whether the restrictive conduct is imposed on the undertaking, and whether it is justified by a public interest objective pursued by regulation.

In light of these three decisions, the approach followed by the Courts in Telecom above is rather puzzling, in so far as the fact that the company was abiding with the instructions of the regulator in order to insure a competitive market was considered irrelevant by the ICA, even when, as in the case of the regulation on access to the telecom infrastructure, this procedure was extremely detailed, and approved after a detailed and time-consuming analysis by the NRA 79. It is difficult to distinguish the situation of Telecom with respect to the communication regulator from the one of Trenitalia with respect to the railways regulator. The real difference is that the interest pursued by the intervention of the communication regulator was the establishment of

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79 As it was seen, Telecom was fined by the ICA for conducts that were already regulated: in this regard, it is sufficient to mention that the AGCOM Decision no. 718/08/CONS expressly approved – after a market test – the conduct at (i).
and maintenance of a competitive market, while the intervention of the railways regulator was aimed at a different public interest, extraneous to competition.

The doubt however remains whether this way of proceeding is in line with efficiency considerations and good administration of public resources, as well as of legal certainty, especially where – as in the case at issue – the complainants have already had the opportunity to express their doubts to the sectoral regulator.

5. A DIFFERENT INTERPRETATION OF EU COMMISSION DECISIONS

While the judicial basis for the intervention of the NCA in presence of pro-competitive regulation have been set by the Administrative Courts – recalling on this point the ECJ case law - one may have doubts from the point of view of the opportunity of such an approach, given the different roles and the different position held by the Commission in respect of National competition authorities in the EU legal system.

The Commission – unlike the national authorities – plays in fact more than one role within the European legal framework. It is not only the European competition authority, but also the “guardian of the Treaties” and engine of liberalization processes carried out in EU. This is essential to understand the reasons that have pushed the Commission to act in a certain way, and that – as it will be seen below - strictly relate to the good functioning of the regulatory process.

Moreover, also the position held by the European Commission within the EU system is different from the one held by national competition authorities. In fact, while - according to the ECJ settled case law - European Commission is in a position of preeminence in respect of all national authorities (both competition and regulatory ones), national competition authorities are instead at the same level of the regulatory ones. This would suggest caution in transposing the principles affirmed by the ECJ at national level.

These considerations seem particularly relevant when considering that the Commission interventions (i.e. decisions delivered in Deutsche Telekom, Telefonica, Telekomunikacja Polska) seem to follow specific criteria.

80 According to Article 17 TEU “The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union”.
81 In the field of telecommunications, Article 7 of the EU’s Electronic Communications Framework Directive (2002/21/EC) provides a consultation and notification mechanism that requires national telecoms regulators to inform the Commission (and telecoms regulators in other EU countries) about measures they plan to introduce to solve market problems.
82 See in particular Regulation 1/2003 recital 22 according to which “It is therefore necessary to clarify, in accordance with the case-law of the Court of Justice, the effects of Commission decisions and proceedings on courts and competition authorities of the Member State”. See also ECJ, Case C-344/98, Masterfoods, 14 December 2000.
In Deutsche Telecom the conflict between competition and sector-specific regulation was due to the “different economic approaches” held by the European Commission and the German regulator in the determination of the retail price for granting access to the local loop. As it was already explained, the German regulator made use of the “price cap” system in the determination of such prices, thus allowing Deutsche Telekom a margin of discretion in the determination of tariffs that would have been precluded if the regulator had already implemented a price regulation based on costs, as required by the European Commission.

At the time it was taken, the decision of the Commission to open proceedings against Deutsche Telecom was subject to a heated debate among scholars. DT appeared in fact to have set its conduct within the limits set by the regulator. The point was that the Commission did not share the regulator view about the appropriate way to regulate retail prices: but in this case it should rather have opened an infringement procedure against the German Government for failing to implement a Community regulation, instead of a competition proceeding against the incumbent provider of the service. Probably the European Commission – by sanctioning Deutsche Telekom - wanted to send a “political” message to German Authorities: further delays in adapting the national regulatory framework to new rules would not have been tolerated.

In Telefonica, instead, the EU Commission and the Spanish regulator adopted the same methodology for determining the prices of incumbent operators. In this case, however, the sanctioned conduct depended on the fact that regulation was based on Telefonica’s historical data that did not reflect the costs of the company. In fact, as the Commission held “Telefónica could not have been unaware that the estimations made ex-ante by the CMT were not confirmed in reality by market developments, which Telefonica was in a position to observe”: therefore, it abused of the inefficiency of the regulatory aiming at obtaining a high level of efficiency in the provision of ADSL services. See inter alia L. Hou, Reshaping market, competition and regulation in EU utility liberalisation: a perspective from telecom, 52 CMLR (2015), p. 995.


84 An early aim of the Community based regulation was in fact the rebalancing of services rates and asymmetric price regulation based on costs, in order to establish equal opportunities of access to the market to new competitors. In particular, Article 4(3) of Directive 90/388/EEC on competition in the markets for telecommunications services, as amended by Directive 96/19/EC with regard to the implementation of full competition in telecommunications markets, states that: “Member States shall allow their telecommunications organisations to re-balance tariffs taking account of specific market conditions and of the need to ensure the affordability of a universal service, and, in particular, Member States shall allow them to adapt current rates which are not in line with costs and which increase the burden of universal service provision, in order to achieve tariffs based on real costs” (see EC, Deutsche Telekom, cit. § 121).

85 A number of commentators have argued that the use of a cap was a conscious decision of the regulator, aiming at obtaining a high level of efficiency in the provision of ADSL services. See inter alia L. Hou, Reshaping market, competition and regulation in EU utility liberalisation: a perspective from telecom, 52 CMLR (2015), p. 995.


87 EC, Telefonica, cit. § 728.
procedure – which did not require updated data – to weaken competition and increase earnings. The sanctioned conduct was then the consequence of two faults: one by the regulator, which did not exercise fully its powers, and one by Telefonica, which abused of regulatory proceedings.\(^88\)

Finally, in Telekomunikacja Polska the European Commission sanctioned a conduct of the incumbent operator that was already sanctioned by the Polish regulatory authority. Given the identity of the facts (as well as of reached conclusions) the only difference between the two proceedings concerned the level of the fine: € 8.5 million for the Polish regulator and was € 127.5 million for the European Commission. The only possible interpretation can be that the Commission considered necessary to intervene in order to preserve the deterrent effect of the fine.

The above considerations indicate that at the basis of the Commission intervention in these three cases was in fact dissatisfaction, in whole or in part, with the conduct of the regulator, and the intervention with respect to the undertaking represented a shortcut. However this approach could be justified by the special role of the Commission that we have sketched above.

On the contrary, NCAs are not in the same hierarchical position as the Commission with respect to NRAs. Both are administrative authorities, so that from the point of view of the undertaking concerned their orders or decisions are equally binding. It would then seem reasonable to find some form of balance between regulatory and antitrust decisions.

6. THE AWARENESS OF THE PROBLEM: MORE COORDINATION BETWEEN COMPETITION AND REGULATORY AUTHORITIES

The commonality of objectives between competition law and sector specific regulation as well as the growing awareness of the legal uncertainty and waste of resources which could derive from their lack of coordination has led to a number of proposals and measures in

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\(^88\) See also Case COMP/37.507, Astra Zeneca, 15 June 2005. In that case, the Commission ascertained that AstraZeneca (i) made misleading representations before the patent offices or courts of several Member States of the EEA, to induce them to deliver a supplementary protection certificate for its drug (Losec) and (ii) it deregistrated the marketing authorisations for Losec in some other countries. The ECJ – upholding the decision (Case C-457/10 P, Astra Zeneca v Commission, 6 December 2012) – stated that “an undertaking which holds a dominant position has a special responsibility […] and […] it cannot therefore use regulatory procedures in such a way as to prevent or make more difficult the entry of competitors on the market, in the absence of grounds relating to the defence of the legitimate interests of an undertaking engaged in competition on the merits or in the absence of objective justification” (§ 134).

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\(^89\) At least, this is the prevailing view of the NCA in the Italian legal system, despite the NCA does not have conformative powers, outside of the area of merger control, so that it could rather be considered parajudicial, as argued by a minority doctrine. In this regard see G. Amato Autorità semi-indipendenti e autorità di garanzia, 3 Rivista trimestrale di diritto pubblico (1997), pp. 645-64 and A. Pera, Appunti sulla riforma delle Autorità: regolazione e concorrenza, 2 Mercato Concorrenza Regole (2002) pp. 329-346.
various jurisdictions. In this respect, the solutions adopted at national level go from a closer coordination between competition and regulatory authorities - realized through legislative provisions or protocols - to the merger of competition and regulatory institutions into a single entity.

Protocols aimed at avoiding the risk of overlaps between regulation and competition and exploiting the opportunities of cooperation, are common in the jurisdictions where competition and regulatory authorities are distinct entities.\(^\text{90}\) In Italy, for a longtime intervention by the NCA in the communication and insurance sector was subject to a legally mandated non-binding opinion from the regulatory authority on the draft decision prepared by the NCA. This opinion is still required in relation to antitrust intervention in the communication sector. Moreover, the ICA has stipulated memoranda of understanding (“MoUs”) with various national regulatory authorities.\(^\text{91}\)

MoUs usually provide for a permanent exchange of information between the ICA and the regulatory authorities on the issues that are relevant for the exercise of the competences conferred by law to each one. However, such cooperation can also result in the joint realization of sector-specific enquiries, as well as other joint operations, like enforcement activities and market surveillance.\(^\text{92}\) MoUs may also include provisions aimed at coordinating the application of competition law and regulatory powers, in particular through the exchange of non-binding opinions.\(^\text{93}\) However, this “mere coordination” model appears rather weak, and to leave a substantial degree of uncertainty about how the enterprise conduct will be evaluated (in Italy, the above mentioned Telecom decision was taken in presence of a non binding opinion mandated by the law).


\(^\text{91}\) The ICA signed MoUs with telecoms authority (“AGCOM”), the transport authority (“ART”), the Bank of Italy, and the Insurance Supervisor (“IVASS”). The text of the agreements are available on the websites of the ICA (www.agcm.it) and of the relevant authorities (www.ivass.it; www.bancaditalia.it; www.autorita-trasporti.it; www.agcom.it).

\(^\text{92}\) G. Pitruzzella, I servizi pubblici economici tra mercato e regolazione, 6 Federalismi.it (2014), p. 10.

\(^\text{93}\) In Italy, the MoUs signed by the NCA with the Communication Authority and the Bank of Italy requires ICA to ask telecoms authority for a non-binding opinion on its draft decisions related to agreements between undertakings, abuses of dominant position and mergers and acquisitions, when a regulated sector is concerned; vice versa, AGCOM is required to ask the ICA for a non-binding opinion on a number of matters that require an antitrust approach. As for the MoU signed with the Bank of Italy, it expressly establishes that – when the ICA opens a merger control proceeding – the Bank of Italy has to provide the former with a detailed list of information that allows the ICA to make its assessment.
In other instances the improvement of the coordination between competition and regulation has been realised by merging competition and regulatory authorities. As underlined by some Authors, this radical approach – known as “full integration” model\(^94\) – “designs a strategy of convergent regulation aimed to re-establish competition in all the special sectors that cannot be left immediately to market forces”\(^95\).

In Spain, in 2013 the Spanish Parliament instituted the National Competition and Market Commission (“CNMC”)\(^96\) that has taken the place of the previous regulatory agencies (telecoms, energy, gambling, postal and transportation) and of the National Competition Authority\(^97\). The new entity essentially aims at increasing the level of legal certainty\(^98\), by avoiding overlaps between competition and regulatory enforcement (which – however – in the past have been quite significant, especially in telecoms sector\(^99\)). This is possible as the CNMC – through its four DGs (competition, telecoms and audiovisual, energy, transports and postal mail) - performs both competition and regulatory tasks, “promot[ing] and defend[ing] the proper and correct operation of all markets in the interests of citizens and commercial businesses”\(^100\). The full integration model has been also implemented in the Netherlands and in Estonia. More specifically, in the Netherlands the Authority for Consumers and Markets (“ACM”) was created in 2013 as a result of the merger between the competition Authority, the Post and telecoms Authority and the consumer protection Authority; in Estonia the competition Authority is responsible – since 2008 - for energy and water regulation.

Legal certainty may be more secured under a fully integrated system, because the competition side of the Authority will be more

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\(^95\) See P.J. Parcu, “The surprising convergence of Antitrust and regulation in Europe”, Concordenca e Mercato (2013), pp. 321 ff. According to the Author, other important advantages deriving from a merger of the Authorities are: i) improvement in homogeneity of procedures, which allows companies to benefit from sizable savings in time and cost of the regulatory process; ii) simplifying the application of modern regulation to those sectors were the resistance of vested interests has been mantled with consideration about the elevate costs of creation of new authorities successfully delaying innovation.

\(^96\) Law no. 3/2013.

\(^97\) For a comment on the CNMC see P.C. Garcia, Ever doubted the “convergence” of competition and regulation? Spain integrates its sector regulators and the Competition Authority under a single agency roof, 34 ECLR (2013) pp. 642-645.

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\(^98\) The reform was inspired by three main principles, expressed in the preamble of its founding law (No. 3/2013): (i) respect for the rule of law and the value of institutional reliability; (ii) the ability to reap the benefits form the economies of scale; (iii) greater adaptation of the regulatory bodies to technological change. See also R. Xifré, Competition and regulation reforms in Spain in 2013: the CNMC – an international perspective, IESE working papers (2014).

\(^99\) Garcia, cit., p. 642.

\(^100\) See CNMC, Strategic plan of Spain’s national Authority for markets and competition: competition, market supervision and efficient economic regulation (2014) available at www.cnmc.es.
likely to take into account the decisions of the regulatory side. However this is not achieved without costs.

Even if regulation is geared towards fostering competition, antitrust and administration of regulation imply different cultural attitudes, one being based on ex-ante control of administrative character, the other one aiming at ex-post removal of obstacles to competition, through a process more similar to a judicial activity. In addition, regulation may be influenced by other public interests, different from competition in the market; finally regulation is highly sector-specific, while administration of competition law tends to be based on general criteria, applied in different markets. The experiences in some of the countries that have adopted the “full integration” model seem to confirm that the different cultures struggle to stay together, with negative effects on efficiency. Furthermore the process of balancing the different aspects may be non-transparent, as there are not anymore different institutions representing the different interests to balance.

The difficult relation between administration of competition law and administration of regulation may be at the basis of the move towards a less integrated system in the UK, where until 2013 regulatory authorities were also entrusted with powers to apply competition law on an equal footing with the OFT, the UK competition authority. In that year the UK Parliament introduced however significant changes to the institutional structure of the UK competition law by merging the two pre-existing competition authorities (the Office of fair trading – “OFT” and the Competition Commission – “CC”) into the CMA and strengthened the role of the CMA in regulated sectors in two main ways: (i) allowing CMA to take upon the cases on which the regulators are already working on if this will be beneficial for consumers; and (ii) empowering CMA to decide which body (regulators or CMA) should lead a case.

Europe”, Concorrenza e Mercato (2013), pp. 321 ff. In detail, the Author identifies three possible shortfalls, namely: i) a possible loss of clarity and transparency in tradeoffs: a decision process fully internal to a single authority will clearly result less transparent, both for the companies involved and for the controlling jurisdictions, than if the different elements could be "represented" by different institutional authors; ii) a multi purpose authority could lose some of the nuances of the mandates of single specialized regulators, leading to some "good for all cases cure"; iii) an excess of centralization that could have negative consequences if the efficiency of the new authority is not outstanding.


102 It is the case to highlight that – with regard to Spain - some newspapers have specifically mentioned the existence of “internal conflicts” within the CNMC between the Competition direction and the Regulatory Direction. See in this regard: http://cincodias.com/cincodias/2016/01/08/empresas/1452278550_1683992.html.

103 Other minor issues have been highlighted by P.L. Parcu, “The surprising convergence of Antitrust and regulation in
7. WHICH KIND OF DEFERENCE TO REGULATORY DECISIONS?

In the light of the above discussion, one may wonder whether the issues of legal certainty and efficient use of resources may be solved without sacrificing the effective enforcement of competition law by an authority which has this as a sole task.

Our opinion is that this result may be obtained within the legal tradition of the EU, by taking into account the stated complementarity between competition law and regulation in the establishment and maintaining of a competitive market. It is in fact evident that the declared “complementarity” existing between competition law and regulation does not imply the simultaneous application of two different sets of rules to the same situation, nor the constant deference of one set of rules over another. It could instead be argued – and this is our view – that the effective application of the complementarity requires the recourse to the set of rules which is considered to be more adequate to face the specific issue. In other words, it seems to us that the aim of regulation is to establish the conditions for the working of competition in liberalized markets, and therefore competition law should be applied taking account of the decisions directed to this end.

In particular, this implies that the criteria of autonomous conduct and special responsibility, on the basis of which the existence of abusive conduct may be established, should be applied by taking into account the character of regulatory decisions and the position of the regulated undertaking.

As for the autonomy – that is an essential condition to attribute an undertaking the responsibility for its anticompetitive conduct - we consider appropriate to apply such criterion taking into consideration the regulatory context. As explained above, regulatory decisions are likely the result regulatory processes that are long and demanding exercises, in which the enterprise situation is subject to thorough review, and often conditions and limits are imposed on the regulated firm against its will, as shown by the fact that regulators’ decisions are often challenged before the Courts. Furthermore, effective regulation implies that the regulator has the power to enforce its decisions and sanction infringements to the decisions. In this context, if the prescribed conduct is sufficiently detailed, and the enterprise is compliant with the prescription, the criterion of absence of autonomy should be considered fulfilled.

As for the principle of “special responsibility” of undertakings holding a dominant position, in our opinion it should be applied without extending excessively its scope of application. We consider surely appropriate that dominant firms – in reason of their market powers – are required to refrain from conducts capable of impairing competition, thus contributing themselves to the enforcement of competition law. However, the undertakings’ contribution could not be interpreted as requiring firms to make a continue self-assessment of their conducts and – in case of doubts – to solicit the regulator to
review its decisions. This would in fact lead to the inadmissible consequence that every conduct of the undertakings — even if imposed by regulatory authority — is source of responsibility for the undertaking (and not for the regulator).

These suggestions are not in line with the Commission approach in the cases discussed above; but it seems to us that the rationale of those cases was largely different, as the Commission was questioning not only the conduct of the undertaking, but rather the way the regulator was applying regulation.

This degree of deference with respect to the regulators decisions, seems also to be in line with Italian legal tradition. A similar principle — the so-called “case by case specialty” — has been in fact used by the Plenary session of the Italian Council of State in another context, namely to solve tensions in the field of unfair commercial practices, between sector specific regulator and competition authority, charged in Italy of the application of applying consumer protection legislation. In that case, the Court concluded that the application of the general legislation should take place only where the conduct is not specifically covered by the sector specific provisions.

The advantages deriving from the application of the above principles to the described tensions existing between competition law and regulation are evident, as it would avoid a (de facto) unilateral application of competition law above.

106 A different interpretation is proposed by P. Larouche and M.P. Schinkel, Continental drift in the treatment of dominant firms: Article 102 TFEU in contrast to section 2 Sherman Act, in R. Blair and D. Sokol The Oxford handbook of international antitrust economics vol. 2 (2015) pp. 166-167, according to which the “special responsibility” principle is fully consistent with current institutional choices in EU competition policy. In fact, with Regulation 1/2003 the enforcement of Article 101 has passed from an administrative control to a self-enforcement system; similarly, the principle of special responsibility “[signa]ls to dominant firms that they are expected to contribute to the enforcing of the law, along the same lines as under Article 101”.

107 As noted by J. Tapia and D. Mantzari, The regulation/competition interaction, in I. Lianos and D. Geradin Handbook on European competition law: substantial aspects (2013), p. 625, “it is difficult to maintain that an undertaking has sufficient scope for autonomous conduct, when it is subject to ex ante regulation”. See also G. Monti, Managing the Intersection of Utilities: Regulation and EC Competition Law, 8 LSE Working Papers (2008), p. 5, which considers that a similar approach leads to the consequence that “the regulator is regulated by the regulated firms. That is, when the regulated firms are aware that the choices of the national regulator allow them to breach EC competition law, they should go back to the regulator and secure an alteration of the obligations imposed by the regulatory authority”. Moreover, as noted by J. Tapia and D. Mantzari, The regulation/competition interaction, in I. Lianos and D. Geradin Handbook on European competition law: substantial aspects (2013), p. 625, “the rule requiring the dominant firm to intervene in the regulatory process and protect the market position of its competitors by adjusting or negotiating its retail prices with the regulator runs contrary to the fundamental premise of EU competition law, which is concerned with the protection of the competitive process and not of the competitors”.

108 It is the case to highlight that when the Plenary Session analysed this issue in 2012, it concluded for the application of the “principle of specialty by sectors”, according to which the enforcement of the provisions on unfair commercial practices was precluded in those sectors where — on ex ante evaluation — the regulatory framework offered already protection to consumers. See Council of State, Plenary session, 11 may 2012 numbers 11, 12, 13, 14, 15, 16.


110 Council of State, Plenary Section, 9 February 2016, no. 3 and 4.
by competition authorities, which nullifies the role of the regulatory authority and risks to lead to decisions that do not take in appropriate consideration the regulatory context.

This approach could also bring some clarity on the liability of undertakings for conducts that are allowed under the regulatory framework. More in particular, it seems to us that – in line with the already examined State action defence - if a regulation imposes undertakings a specific conduct which will turn be anticompetitive – and the regulator enjoys effective enforcement powers - the undertakings should not be considered responsible for that infringement, as the latter is the consequence of a faulty regulation, for which should be responsible only the regulatory authority, and therefore the State. This however does not mean that every undertakings’ conduct taking place under regulation could be exempted from liability, but it is necessary to evaluate each case, taking into account the three following elements.

First, the application of the State action defence requires the absence of a margin of discretion on the undertaking in defining its conduct: therefore, responsibility should not be excluded if regulation leaves undertakings a substantial margin of discretion. This is the case, for instance, when regulation does not impose the undertaking to adopt a certain pricing policy: granting differential discounts to certain key clients may then be examined in order to evaluate if they lead to anticompetitive results.

Secondly, regulatory decisions should not be the consequence of faulty action by the regulated enterprise. In this regard, it seems useful to recall the criterion set out in Astra Zeneca, according to which if undertakings have tampered with regulation, by consciously providing faulty information in order to shape regulation to their advantage, they should considered liable: they have in fact used regulation in a way that is against the aim it was established for\(^{111}\).

Finally, it is well possible that the competition authority considers that the regulation is not able to meet its pro-competitive objectives and may lead to a restriction of competition. In this case, if the consultation process illustrated above is not effective, it could decide to set aside the regulation: although this solution seems in line with the general principles of EU already examined, one can argue that this would require the competition authority to become itself the regulator.

8. CONCLUSIONS

The analysis of the relationship existing between competition law and (pro-competitive) sector specific regulation both in Italy and in the EU has shown that – despite a formal “complementarity” – between these two sets of rules there is an evident supremacy of competition law over regulation. Such situation contributes to increase legal uncertainty both for the undertakings – that are continuously subject to the review of their conduct by two authorities – and for national regulatory authorities – whose decisions are often

\(^{111}\) See supra footnote 87.
challenged before the Courts. Moreover, it is undeniable that this situation also determines a waste of resources each time that the two authorities – acting with the same objective – investigate the same conduct.

In this context, the solutions put in place by Member States to avoid tensions between these two sets of rules - while demonstrating the consciousness of national bodies for a problem that significantly impact on the life of undertakings - are surely not appropriate to solve the tensions existing between competition law and regulation. As it is clear from the previous analysis, while the subscription of MoUs between different authorities is surely useful, it does not appear appropriate to solve the issues; on the other side, the tendency to the merger between national competition authorities and regulatory authorities risks to attribute too much weight to the regulation, while weakening competition enforcement in non-regulated sectors.

We consider therefore appropriate that national competition authorities re-consider their enforcement policy taking into account their different role with regard to the EU Commission. In fact, the European Commission pursues different objectives due to the peculiar role that it has in the EU legal system (guardian of the Treaties and engine of the liberalization processes throughout the EU), and in addition it is also in a position of preeminence in respect of all national authorities (both competition and regulatory ones).

In this regard, we suggest to take into consideration the implications of the stated complementarity existing between competition law and regulation. In particular, we consider appropriate for national competition authorities to be more deferent in those instances where some conditions are met: there is a sector specific regulation; there is a regulator in charge of implementing those provisions; the regulator is entrusted with fining powers; those powers are effectively exercised. In particular, this implies that the criteria of autonomous conduct and special responsibility, on the basis of which the existence of abusive conduct may be established, should be applied taking into account the character of regulatory decisions and the position of the regulated undertaking.

As for the autonomy – that is an essential condition to attribute an undertaking the responsibility for its anticompetitive conduct - we consider appropriate to apply such criterion taking into consideration the regulatory context. As for the principle of “special responsibility” of undertakings holding a dominant position, in our opinion it should be applied without excessively extending its scope of application: it would be in fact inconceivable (and contrary to the principles of competition law!) to require dominant firms to intervene in the regulatory process and protect the market position of its competitors by adjusting or negotiating its retail prices with the regulator.

In this scenario, undertakings would be considered responsible at the conditions established by the ECJ for the State action defence: in particular, it would be necessary to demonstrate that the alleged anticompetitive conduct is the result of an autonomous choice of the undertaking and not imposed by the regulatory framework. If however a regulatory measure “prescribes” an anticompetitive conduct, we consider appropriate for
competition authority to set aside such provision, and at the same time to exempt the undertaking from liability, as the only responsible for the infringement should be considered the regulator, and thus the State.

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