inter media

www.iicom.org

Spring 2008 Volume 36 Number 2

By Francesco Maria Salerno

EU telecom regulation: a 'reverse colonization'?

Regulators should remember a saying from Horace: *'Graecia capta ferum victorem cepit'*

Antonio Catricalà is currently the head of the Italian Competition Authority, an agency with a distinguished record for applying competition law in the telecommunications sector[1]. In a hearing held in 2007 before a Parliamentary Committee in charge of a bill to reform regulatory authorities in Italy[2], he argued that sector specific regulators are time-sensitive institutions: once their mission accomplished by guiding the transition towards competition in the markets for which they are responsible, their raison d'être disappears. In all fairness, this view is also shared by the European Commission ("Commission") itself, which maintains that "ex ante regulation should only be imposed where competition law remedies are insufficient and should be rolled back when it is no longer needed"[3]. Thus, a myth has developed of a golden age, when markets will be freed from regulation, and competition law will be the only king in the realm of telecommunications.

Myths have always invited skepticism and there is little reason to make an exception for the one about the inevitable demise of telecommunications regulators. In the United Kingdom, where Oftel was created in 1984 on the assumption that its task would be merely to "hold the fort" until competition arrived[4], there are little signs of such arrival and, in fact, in 2003 Oftel has been replaced by an even stronger regulatory body, which assumed the tasks of five previously separate regulators, including Oftel. To those who would reply that this is a purely British matter and point to the obvious idiosyncratic nature of different national trajectories, and the UK one in particular, this article replies by arguing that the new regulatory framework enacted by the EU in 2002 provides an opportunity for re-defining the institutional structures for the telecommunications sector that is exogenous and common to all Member States[5].

More specifically, the main argument that is put forward is that, since the inception of telecommunications liberalization, competition law and telecommunications regulation at the EU level have followed a trajectory of convergence. This convergence has culminated with a 2002 new regulatory framework, to the point that there is a high degree of overlap between the two[6].

The article argues that this evolution provides an opportunity to tear down the institutional wall that currently divides the administration of these two contiguous bodies of rules and to have a single body, equipped with full, i.e. both competition law and sector specific regulation, powers to govern the telecommunications sector[7]. In light of their specialization, this trend may provide an opportunity for telecommunications regulators to claim sole jurisdiction over both competition law and sector specific regulation. In light of the historical trajectory, whereby competition law has traditionally been seen as colonizing the territory of telecommunications regulation, this would amount to "colonization by the colonized" or "reverse colonization", hence a singular application of the famous Horacian verse *"Graecia capta ferum victorem cepi"*.

A colonization by competition law

In a comparative study on European and American approaches to telecommunications regulation, Geradin and Sidak note that "[i]n the US ..., we saw that antitrust law was probably no longer the driving force in terms of shaping the telecommunications sector ...

The reverse situation is currently taking place in the EC"[8]. This statement provides an accurate description of the relationships between competition law and telecommunications regulation. In fact, one could go even further and speak about an "intellectual colonization" by competition law of telecommunications regulation.

However, even if colonization is the constant hallmark of the relationships between the two, it is also important to pay attention to the different nuances in the relationships between competition law and regulation through time to understand the reasons that may lead to an opportunity for reverse colonization. Thus, this sections briefly sketches the trajectory followed by competition law and telecommunications regulation until the new regulatory framework, while the next section shows how this trajectory has reached a point where there is an opportunity for reverse colonization.

The situation before 2002

If one had to assess the policy mix between competition law and sector specific regulation[9], one could say that it was a cocktail with 2 parts of competition law and 1 part of sector specific regulation. This was due to the following elements:

» There were liberalization directives based on Article 86 EC, i.e. one of the competition law provisions[10].

» There was enforcement of the core antitrust provisions, i.e. Article 81 EC, which was clearly aimed at producing market liberalization[11].

» Finally, there were also sectors specific rules, such as the ONP framework, based on Article 95 on approximation of laws for the purposes of the internal market[12].

All in all, competition law played the lion's share in the construction of the liberalized telecommunications market. Sector specific regulation, although a fundamental pillar, was clearly distinguishable from competition law and the relationship of complementarity was perhaps more easily identifiable. Through time, differences have been eroded.

The 2002 Regulatory Framework

As it is well-know, the new regulatory framework of 2002 has produced a hybridization of competition law and sector specific regulation[13]. More specifically, as argued elsewhere[14], the "competition law-ization" of EU telecommunications regulation has meant that, since the new regulatory framework, EU telecommunications regulation has heavily borrowed from competition law in terms of

» Key concepts, due to the use of "dominance" as the key regulatory concept, which is equivalent to the concept of dominance for the purposes of competition law[15].

» Structure of enforcement, where the mechanism of Article 7 resembles the European Competition Network.

» Involvement of private parties, because the use of competition law concepts means that there is an opportunity for private enforcement, similarly to what is envisaged under competition law[16].

Interestingly, competition law-ization has come at the price of sometimes confusing competition law and sectors specific regulation. Indeed, Temple Lang notes that this development is also due to the way in which competition law is evolving after Regulation 1/2003[17]. In particular, this is due to an emerging practice of adopting Commitment decisions, whereby the parties propose remedies to the Commission, which in turn closes the investigation without any finding of infringement. This practice contributes to blurring the lines between 'traditional' competition law enforcement, which is based on a finding of violation of a conduct that took place in the past, and regulation, which is mainly about giving rules for future conduct[18].

Moreover, since the creation of a catalogue of remedies, which is based on the experience of competition law[19], remedies in competition law and in sector specific regulation seem to share several features, to the point of sometimes becoming indistinguishable.

All in all, therefore, after the 2002 regulatory framework, what used to be a cocktail of different, complementary parts,

has changed. Complementarity, hence differences, still remain, but the area of overlap has significantly increased. Thus, the relationships between the two can be describe as a sliding scale of rules, stemming from a common root.

Opportunities for a reverse colonization

Latin poet Horace elegantly portrayed the evolving nature of the relationships between the military might of Rome and the cultured Greece in his famous verse *"Graecia capta ferum victorem cepi"*. Assuming that competition law is the force that has colonized telecommunications regulation, the current state of their relationships could well provide an opportunity for telecommunications regulators to turn from colonized into colonizators.

As noted, since the 2002 new regulatory framework, competition law and telecommunications regulation seem set on a convergent trajectory where there is a single body of rules, albeit with different degrees of intensity. This raises an institutional question. What are the merits of having two separate administrators for a single set of rules? The experience of the Commission is illustrative.

After the enactment of the new regulatory framework, one may say that an "Article 7 task force" exists, which draws on officials from the Directorate Generals for Competition (DG COMP) and Information Society and Media (DG INFSO). Anybody wishing to discuss issues related to Article 7 will meet such a group of officials. The discussion may be based on sectors specific regulation, but anybody can readily appreciate the immediate significance of these discussions from a competition law perspective. If a company is found with SMP (or Significant Market Power, the regulatory jargon equivalent for competition law "dominance"), is it not the more reasonable position to assume that, in deciding on its commercial behavior, this company should start from the assumption that a competition authority would regard it as a dominant undertaking, hence it must avoid, e.g. predatory below-cost pricing?

This example shows that the Commission is already operating to a significant degree as an integrated regulator. It is impossible to distinguish whether the officials are wearing their DG COMP or DG INFSO hat and, for all practical reasons, such distinction would be unhelpful. The reality is that a regulatee is facing a single regulator, with powers to apply both competition law and sector specific regulation. There are other reasons to believe that the current status of the relationships between competition law and telecommunications creates opportunities for reverse colonization. Insights from the Deutsche Telekom case can also illustrate this point[20].

As it is well known, the case raised fundamental issues about the relationships between competition law and sector specific regulation since the price squeeze that constituted the allegedly wrongful conduct took place when charges for wholesale prices were regulated by the German competent body. Deutsche Telekom has therefore argued that Article 82 EC was not even applicable in the case at issue. This view has been rejected by the Commission and, recently, by the Court of First Instance. However, the case raises at least three problematic questions: (i) uncertainty for regulatees, that remain exposed to antitrust liability even if they comply with regulatory obligations; (ii) duplication of proceedings between competition law and regulation; (iii) consumer protection, because the ultimate goal of controlling price behavior is to protect consumers and this warrants an institutional structure which can provide a quick response, whereas uncertainty in the allocation of competencies and/or lengthy antitrust proceedings certainly are not conducive to this result.

Let us know consider what could have been the outcome of the case, had the institutional structure been different, i.e. under the hypothesis of a single body equipped with competition law and regulatory powers. For this purpose, let us consider the perspectives of regulatees, authorities and consumers.

Regulatees. If a single body is competent for both ex ante and ex post enforcement, a regulated company should be more confident that a decision to approve certain regulated charges (ex ante regulation) would not be easily overturned by the same authority at a later stage, unless, of course, the regulatee

has given cause for this behavior, e.g. by concealing evidence and/or departing fundamentally from the terms under which its conduct was authorized. Thus, a single body structure would likely enhance confidence of regulatees and better protect them against "surprise" antitrust liability.

Authorities. In Deutsche Telekom, the Court argued that, since the regulator was not obliged to take into account Article 82 EC and/or it applied it incorrectly, the Commission was entitled to start competition law proceedings. If one body is competent for both competition law and regulation, this risk should be lessened. As a consequence, this could create the conditions for a European version of the Trinko doctrine and reduce the scope for duplication of proceedings[22].

Consumers. Price regulation ultimately should benefit consumers. If a single body can (i) decide about charges ex ante and (ii) has effective powers to monitor and punish deviant behavior ex post, this may induce a more compliance oriented behavior for regulatees. The benefit for consumers are obvious: regulators are less afraid of making mistakes and therefore their rate-setting ability improves. At the same time, regulatees too are less afraid of regulatory mistakes and therefore may be encouraged to compete more aggressively (without the fear that the regulator/competition authority would mistake episodes of competition with illegal monopolization attempts). Both factors should lead to prices in the market that are more responsive to consumer needs.

It is clear that inferences from a single case should be taken with care. Likewise, some of the benefits that may flow from a single regulator could be more difficult to achieve than others. Nevertheless, both the emerging practice at the Commission level and the above mentioned inferences from an indisputably test case seem to indicate that there is at least a potential for a reverse colonization by telecommunications regulators.

Conclusion

As it is happens with real life, the nature of the relationships between competition law and sector specific regulation in telecommunications is continuously evolving. Through time, the intellectual might of competition law has come to nurture an offspring of regulators with a sophisticated understanding of competition law issues and an acute awareness of the risk and opportunities of concurrent application of competition law and regulation.

After being colonized by competition law, this article argues that the time may be ripe for reverse colonization by telecommunications regulators. Indeed, an institutional restructuring seems long due, since the increasing degree of overlap between competition law and regulation call into question the need for having two separate bodies. However, as all opportunities, this one too has a limited shelf-life. Nothing would prevent the competition law authorities to claim that telecommunications should just become one of their provinces and that telecommunications regulation should simply be a department within a competition authority[23]. Certainly, that would suit Mr. Catricalà, who may find himself with more powers than he asked for.

This should probably be a good reason to include Horace in the curriculum vitae of telecommunications regulators.

Francesco Maria Salerno is an Avvocato at Cleary Gottlieb Steen & Hamilton LLP in Brussels, Belgium as well as an academic practioner and can be contacted on fsalerno@cgsh.com

1. See, e.g., OCED Reviews of Regulatory Reform (Paris: OECD, 2001), ch 6 ("The Italian competition law applies to the telecommunications sector without exemption, and the competition authority has been actively involved in the sector").
2. See Audizione del Presidente dell'Autorità Garante della Concorrenza e del Mercato Antonio Catricalà presso la I Commissione Permanente del Senato della Repubblica sul Disegno di Legge n. 1366 recante Disposizioni in materia di regolazione e vigilanza sui mercati e di funzionamento delle Autorità Indipendenti preposte ai medesimi – 10 Maggio 2007 (Ore 12), available at www.agcm.it.
3. See SEC(2007) 1483 final, Explanatory Note accompanying the new 2007 Recommendation on relevant markets, p. 7 (available at http://ec.europa.eu/information_society/policy/ecomm/doc/library/proposals/sec2007_1483_final.pdf).
4. See S. Littlechild, Regulation of British Telecommunications' Profitability (London: HMSO, 1983), p. 7.

Footnotes 5-23 continue on page 39.