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BALANCING THE APPLICATION OF *EX POST* AND *EX ANTE* DISCIPLINES UNDER COMMUNITY LAW IN ELECTRONIC COMMUNICATIONS MARKETS: SQUARE PEGS IN ROUND HOLES?

Peter Alexiadis[*]

1. Introduction

Across all regulated network sectors in the European Union ('EU'), a significant policy tension arises as to the scope of the respective roles played by *ex ante* sector-specific regulation, on the one hand, and *ex post* competition rules, on the other. This tension is especially evident as regards the resolution of disputes arising from the interplay between the two legal regimes and the identification of the crucial factors that are to be accorded priority in the event of irreconcilable conflicts arising between the two regimes.

It is no surprise, however, that this policy tension is addressed most often by the European Commission in relation to the electronic communications sector. There are a number of reasons which underpin this particular dynamic:

- *First*, the pace and depth of liberalisation measures in the electronic communications sector has been faster and deeper than is the case for all other sector-specific liberalisation policies adopted across the EU. The general understanding that most parts of the electronic communications value chain could somehow be opened up to sustainable competitive options in terms of both infrastructure-based and services-based competition, has meant that the scope for tension has been greater because the *ex ante* measures are so comprehensive.

- *Second*, the dynamic nature of the electronic communications sector has resulted in a wide range of strategic commercial behaviour being engaged in by dominant firms, which raise as many competition issues as they do regulatory issues. Other network sectors, for example, might be more vulnerable to cyclical changes and shifts in capacity, but the fundamental nature of their services is relatively

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[*] Partner, Gibson, Dunn & Crutcher LLP/Brussels; Lecturer, Competition Law & Regulated Network Sectors course, King's College, London. Based on a paper delivered at the Jean Monnet Chair Conference 2011, University of Malta. The views of the author are personal, and do not necessarily reflect the views of the Firm's clients. Many thanks to Alvaro García-Delgado García and Slawomir Bryska of the Brussels office of Gibson Dunn for their invaluable research skills in assisting the author in the production of this paper. Any errors of judgement or interpretation remain exclusively those of the author. For a discussion in general terms of the role of *ex ante* and *ex post* regimes, refer to Hellwig, 'Competition Policy and Sector-Specific Regulation for Network Industries' Max Planck Institute for Collective Goods, July 2008. See also Alexiadis & Cave, 'Regulation and Competition Law in Telecommunications and Other Network Industries' (Ch 20) in Baldwin, Cave and Lodge (eds), *The Oxford Handbook of Regulation* (OUP 2010).

commoditised, thereby rather limiting the range of commercial options available to dominant firms keen on foreclosing competition.

- *Third*, the technological capabilities of electronic communications networks and services also means that they are best placed to be provided (through multiple access relationships), consumed (*e.g.*, international roaming) and demanded (at least by business customers on the demand side) on a trans-national basis.

- *Fourth*, the institutional dynamic between the European Commission and the respective National Regulatory Authorities ('NRAs') and National Competition Authorities ('NCAs') in the electronic communications sector is such that the resolution of many important policy tensions turns in large measure on the outcome of such institutional challenges. At a fundamental level, the system of competition law enforcement under Regulation 1/2003 is a decentralised model which challenges the ability of Community competition law to be applied in a harmonised, consistent manner, tempered by the participation of the Commission and the NCAs in the so-called European Competition Network ('ECN'). By contrast, the institutional regime which applies in the electronic communications sector respects the principle of subsidiarity insofar as decisions are taken at the local level by NRAs, but the Commission has an overarching ability to veto decisions with which it disagrees in fundamental respects (*i.e.*, market definition and market analysis), based on its desire to achieve harmonised results, while the creation of a new pan-European body of NRAs ('BEREC') is designed to promote a more harmonised approach among NRAs in the formulation of remedies.[1]

This chapter explores current Community practice in the resolution of the policy tensions that exist in the dual application of *ex ante* and *ex post* regimes that are fuelled by the above dynamics. It also explores the analytical basis upon which Community law enforcement has based its approach to reconcile policy disciplines which, at times, may appear to be irreconcilable.

[1] As regards the *ex ante* regime, refer to Regulation (EC) No 1211/2009 of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office; refer also to Article 8(3)(d) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services as amended by Directive 2009/140/EC and Regulation 544/2009 (hereinafter the 'Framework Directive') which introduces the duty of cooperation with BEREC, whereas Articles 3(3)(a), 3(3)(b) and 3(3)(c) impose broader duties of regulatory coordination, including the furtherance of BEREC's goals as well as following its opinions and common positions. As regards the *ex post* regime, Articles 11 and 12 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ('Regulation 1/2003') set out the fundamentals as well as the core principles of the ECN. The Commission also released the Commission Notice on Cooperation within the Network of Competition Authorities [2004] OJ C101/43 pursuant to Article 33(1)(b) of Regulation 1/2003 to further elaborate on this decentralised system of competence.

2. General principles of *ex post* and *ex ante* intervention

It is generally understood that *ex ante* and *ex post* regimes have a number of fundamentally different policy orientations, which may lie at the root of existing tensions in their dual application over the same subject-matter. In a nutshell, *ex post* competition rules are, in general:

- backward-looking (relying on historical evidence of abuse);
- adopting a relatively narrow view of product markets that is driven primarily by demand-side substitutability;
- focused on strategic behaviour that is ideally suited to retail level abuses (exploitative abuses, rather than foreclosing practices designed to foster inter-operator cooperation);[2]
- very fact-specific (as opposed to establishing broader criteria for market conduct);
- resulting in remedies which are essentially declaratory in nature (although the relatively recent advent of settlement agreements has broadened their effective scope) and 'neutral' in terms of the broader implications for industry of the remedies sought in a specific piece of competition litigation; and
- arguably best enforced through the civil courts (at least where the system reaches maturity).

By contrast, sector-specific *ex ante* rules are:

- forward-looking (insofar as they prescribe types of market behaviour regardless of particular circumstances, based on public policy priorities);
- likely to identify or to define 'markets' in broader terms than their competition law counterparts, based as much on the forces of supply as those of demand (on the understanding that the regulation of overly narrow segments is prone to creating a system of over-regulation, on the one hand, while incapable of keeping up with subtle shifts in technology and innovation, on the other);
- focused on addressing market failures driven by the logic of a certain industry structure, which are likely to occur because of a particular market dynamic affecting wholesale relationships between competitors rather than because of the specific strategic practices of any given operator at the retail level of competition;

[2] Wholesale access relationships would need to be driven, for example by the application of the doctrine of 'essential facilities' in order to justify why a firm – even where it is dominant – should be obliged to deal with someone with whom it does not seek contractual relations. As regards the essential facilities doctrine in general, refer to Hatzopoulos, 'The EU Essential Facilities Doctrine' College of Europe, Bruges, 2006, available at: http://www.europacolege.be.

- not fact-specific (precisely because they need to be forward-looking and capable of applying to a wide range of operators which satisfy certain criteria);
- very specific in their prescription of remedies (both in the terms of their prescriptive nature and granularity);
- characterised by very detailed remedies in terms of both price and quality parameters, many of which are based on cost estimations conditioned by presumptions of efficiency (rather than actual costs incurred by the dominant operator), and which are constructed with broader notions of consumer welfare and investment incentives in mind; and
- best enforced through independent sector-specific regulators (who are most likely to be able to address complex technical detail and the economic disciplines which characterise a specific industry).

As noted above, an additional point of demarcation in the EU between the two regimes lies in the fact that *ex post* rules are enforced through a decentralised system of institutional cooperation reflected in the various provisions of Regulation 1/2003, whereas *ex ante* regulation is applied through a centralised system of cooperation between regulators at national and Community levels. Moreover, many NRAs have competition powers which they wield in parallel with their sector-specific powers, or sweeping powers to intervene where dominant operators act in a manner which is 'anti-competitive'.[3] These institutional differences tend to exacerbate the analytical differences between *ex post* and *ex ante* regimes, given that the tensions between them are played out across a number of enforcement institutions with different powers, which are driven by different policy priorities and which are subject to different levels of judicial review upon appeal (even where the legal standard of review imposed under Community law is in theory the same).[4]

Accordingly, it is at face value difficult to imagine how compatible both regimes are likely to be in practice, and how the balance in their implementation and enforcement is to be achieved where their overarching goals are not identical.

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[3] For example, the United Kingdom Office of Communications ('Ofcom') and the Greek Telecommunications and Post Commission (Ethniki Epitropi Tilepikoinonion kai Tachydromeion or the 'EETT') enjoy both regulatory and competition law powers.

[4] See, for example, Article 4 of the Framework Directive, which recognises the right of appeal to an independent appeal body 'on the merits' against a decision adopted by an NRA. Furthermore, Article 4(1) stipulates that interim measures can only be granted by a Member State court against the adoption of an NRA Decision regulating a dominant operator where that relief is granted on comparable terms to those available under Community law. By contrast, in the limited circumstances in which the Commission would be subject to an appeal when acting under the EU Regulatory Framework for electronic communications, it would be subject to a much less onerous standard of judicial review, namely, that of 'manifest error' (see also discussion in Part 7 below).

3. Parallel application of *ex ante* and *ex post* disciplines in electronic communications markets – an overview

Given the underlying tensions that exist between *ex post* and *ex ante* disciplines, it is not wholly surprising that jurists across the Atlantic have arrived at fundamentally different conclusions as to how best to manage the tensions between the two disciplines and the optimum means by which to balance the approach to be taken under either discipline.

3.1. Position in the European Union

The interplay between *ex post* and *ex ante* is most clearly illustrated in those situations where a dominant firm is alleged to have engaged in a 'margin squeeze'. More particularly, consistent with the principle that a dominant firm has a 'special responsibility' to avoid engaging in abusive practices, a number of precedents have been developed over the past few years in relation to margin squeezing practices in the electronic communications sector.

In the *Deutsche Telekom* case,[5] the Commission determined that there was a legitimate role to be played by competition rules where sector-specific regulation fails to prevent a dominant firm from engaging in abusive conduct.[6] Moreover, in the view of the Commission, competition rules would only be limited in their application where obligations imposed by *ex ante* rules in effect prevented the dominant firm from any freedom of commercial manoeuvre. In other words, *ex post* competition rules would only be prevented from achieving their full effect in circumstances which amounted to a successful State compulsion defence being raised. On the facts of the case, price controls imposed by the German NRA nevertheless provided the dominant fixed line provider a sufficient margin of pricing discretion to allow it to avoid engaging in an illegal margin squeezing strategy to the detriment of its competitors (provided that it remained within an overall price cap).[7] It was therefore found that the dominant firm had engaged in the abusive practice of a margin squeeze, and that its compliance with parallel wholesale regulatory pricing obligations did not provide it with an absolute defence to such an action.[8]

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[5] *Deutsche Telekom AG* (Case COMP/C-1/37.451, 37,578, 37.579), 21 May 2003; on appeal, see Case T-271/03 *Deutsche Telekom v Commission* [2008] ECR II-477**.** For a detailed comment on the case, refer to Alexiadis, '"Informative and Interesting": The CFI Rules in *Deutsche Telekom v. European Commission*',in the online magazine Global Competition Policy (May 2008).

[6] At para 54 of the Decision.

[7] Described as an abusive practice constituted by 'a disproportion between wholesale charges and retail charges for access to the local network', at para 57 of the Decision.

[8] The case was complicated by the fact that Deutsche Telekom's wholesale prices were set by the German national regulatory authority, the RegTP, at the national level, and Deutsche Telekom was subject to an overall retail price cap comprising a basket of retail telephony services. Deutsche Telekom took the view that there could not be abusive pricing in the form of a margin squeeze, because wholesale charges were imposed by RegTP. A margin squeeze, Deutsche Telekom contended, must be the result of excessive wholesale prices or insufficient retail prices, or a combination of the two, and it must be legally possible to end the situation by varying either set of charges. Because the wholesale price was fixed by RegTP,

On appeal, the General Court endorsed the view expressed by the Commission, holding that: 'If national law merely encourages or makes it easier for undertakings to engage in autonomous conduct, those undertakings remain subject to Arts 101 and 102 [TFEU]'.[9]

The General Court also confirmed that the Commission is not bound by decisions taken by NRAs in relation to their application of competition rules. Finally, the General Court noted that Deutsche Telekom could not benefit from a State compulsion defence given the facts of the case (voluntarily committed price abuse). In the words of one commentator: '[I]t is reasonably clear following *Deutsche Telekom* that the EC courts are comfortable with applying competition law in regulated telecommunications markets. […] In doing so, the [General Court] has greatly increased the burden on regulated firms and, although perhaps unintended, may also have reduced the overall effectiveness of regulation'.[10] In holding that Deutsche Telekom remained liable for any price squeeze that resulted from the difference between its wholesale and retail prices, the Court recognised that pricing can be exclusionary even if it is not loss-making.

The position espoused by the Commission in *Deutsche Telekom* was also subsequently confirmed in very similar circumstances in the Commission's precedent in *Telefónica*,[11] currently on appeal before the General Court.[12] This case is based in part on the regulatory failure of the Spanish NRA, insofar as it had imposed an *ex ante* price control based on incorrect forecasts provided by the dominant fixed line operator, Telefónica, and because it had ignored the spread between wholesale and retail prices being charged by that dominant firm. By contrast, Telefónica was said to be aware of its real costs and the effects of its margin squeeze strategy on the Spanish market. A regulatory gap in the regulation of wholesale prices meant that the dominant fixed line operator had a broad degree of freedom in its broadband pricing policy to alternative network operators, thereby allowing it to avoid a margin squeeze situation.

The appeal pending before the General Court includes, *inter alia*, a consideration of whether the Commission: breached its duty to cooperate with the Spanish NRA (under Article 10 EC and Article 7(2) of Directive 2002/21/EC); acted *ultra vires* in its application of Article 102 TFEU to a regulated sector; breached the principle of legal certainty, by subjecting the defendant to an *ex post* change in circumstances that were allegedly regulated in the context of an *ex ante* framework; and breached the principle of legitimate expectations.[13] The grounds of appeal appear to cover much of the ground already covered in the *Deutsche Telekom* appeal, although there do appear to be some additional issues raised in this latter appeal which deal with the nature of the cooperation

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Deutsche Telekom only controlled the setting of retail prices, which are in turn subject to review only as regards their compatibility with the principles of predatory pricing.

[9] At para 89.

[10] O'Donoghue, 'Regulating the Regulated: *Deutsche Telekom v. European Commission*' GCP Magazine 1 (May 2008), at 3.

[11] *Wanadoo España v Telefónica* (Case COMP/38.784), 4 July 2007 [2007] OJ C83/6.

[12] Case T-336/07 *Telefónica de Espana v Commission* [2007] OJ C269/55 and Case T-398/07 *Kingdom of Spain v Commission* [2008] OJ C8/17 (Notice of Appeal).

[13] ibid.

between the Commission and an NRA in arriving at a final resolution of a margin squeeze case.

The primacy of competition rules was given a further boost in the first half of 2011 by the Court of Justice which, in a reference from the Swedish courts in the *TeliaSonera* case,[14] ruled that: '…, a fortiori, where an undertaking has complete autonomy in its choice of conduct on the market, Article 102 TFEU is applicable to it. (…) It follows that the absence of any regulatory obligation to supply the ADSL input services on the wholesale market has no effect on the question of whether the pricing practice at issue in the main proceedings is abusive.'[15] The Court of Justice concluded that an obligation for a dominant firm to deal with a competitor could be deduced from a regulatory obligation to that effect on the operator in question, without the need for a comparable *ex post* obligation to have been imposed.

Accordingly, EU case-law and administrative precedents are clear that *ex post* competition rules have a residual role to play, even where extensive sector-specific regulatory obligations are in force, and can 'trump' *ex ante* sector-specific regulation in all situations other than those that would be tantamount to the raising of a successful 'State compulsion' defence by the dominant firm.

3.2. Position in the United States

By contrast, the position in the United States is very much driven by the understanding that the origins and motivations of antitrust law and sector-specific regulation are often heading in fundamentally different policy directions. As such, the co-existence between disciplines (or, more accurately, their dual application) envisaged by the European courts has given way to a clear trumping by *ex ante* regulation in the United States.

For example, in the *Trinko* case,[16] the Supreme Court explained that, absent exceptional circumstances,[17] incumbent operators should not be required to grant their competitors access to essential inputs under an *ex post* action brought pursuant to Section 2 of the Sherman Act. According to some commentators,[18] it was clear that 'the Court's refusal to apply Section 2 of the Sherman Act to the matter at hand was also strongly influenced by its view that, once a sector-specific regulatory structure designed to deter and remedy

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[14] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* (judgment of 17 February 2011 nyr) [2011] OJ C103/3 especially at paras 52 and 59. Contrary to *Deutsche Telekom* and *Telefónica*, TeliaSonera was not under any regulatory obligation to supply ADSL wholesale input services to alternative operators.

[15] ibid paras 52 and 59.

[16] *Verizon Communications Inc v Law Offices of Curtis V Trinko LLP*, 540 US 398 (2004). Refer also to Petit, 'Circumscribing the Scope of EC Competition Law in Network Industries? A Comparative Approach to the US Supreme Court Ruling in the *Trinko* Case', IEJE, available at: http://www.ieje.net; cf Geradin, 'Limiting the Scope of Article 82 of the EC Treaty: What can the EU Learn from the US Supreme Court's Judgment in *Trinko* in the Wake of *Microsoft*, *IMS*, and *Deutsche Telekom*?' (2005) 41 CML Rev 1519.

[17] See *Aspen Skiing Co*, 738 F2d 1509, 1520-21 (10th Cir 1984).

[18] See Geradin & O'Donoghue, 'The Concurrent Application of Competition Law and Regulation: the Case of Margin Squeeze Abuses in the Telecommunications Sector' GCLC Working Paper 04/05 (College of Europe) at 58.

anticompetitive harm' exists, there should be no further scope for antitrust intervention. In the view of the Court: '[a]ntitrust must always be attuned to the particular structure and circumstances of the industry at issue'. Moreover, '[o]ne factor of particular importance is the existence of a regulatory structure designed to deter and remedy competition harm. Where such a structure exists, the additional benefits 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'.[19]

In summary, the view of the Supreme Court in *Trinko* is that courts applying antitrust law should not act as 'central planners', given that issues such as access pricing are best addressed by specific sector-specific rules. In this regard, the generality of antitrust rules renders sector-specific regulation more appropriate to address sector particular market failures and to supervise the behaviour of firms in their interactions with competitors. Moreover, in exploring the scope of antitrust law, the Supreme Court was mindful of the general principle of the freedom of contract, as established in *US v Colgate,*[20] whose application means that an obligation to deal can only be imposed under antitrust law in exceptional circumstances. Such circumstances were found to be absent in *Trinko,* given that there was no proof of anti-competitive intent on the part of the defendant firm in light of the fact that it was no longer vertically integrated.[21] Accordingly, in the view of the Supreme Court, there was no room for the application of antitrust law where sector-specific regulation 'covers the field', as occurred in the circumstances in *Trinko*. In this situation, the Supreme Court found that the regulation imposed under the 1996 Telecommunications Act constituted an 'effective steward of the antitrust function'.[22]

In the even more recent case of *Pacific Bell Telephone Co DBA AT&T California v LinkLine Communications Inc*,[23] the Supreme Court's reasoning in *Trinko* was taken a step further, by effectively putting an end to stand-alone margin squeeze claims under US antitrust law other than in the most narrow of circumstances. In that case, the Supreme Court held that, since there was no antitrust duty to deal at the wholesale level, the defendant AT&T was free to set its price within the limits set for it by regulation. When it was also concluded that no predatory pricing had occurred at the retail level, there was no ground to support a margin squeeze claim. Under US antitrust law, in order to establish a margin squeeze, the defendant must either: (1) have an existing duty to deal with its wholesale consumers under the antitrust rules (the *Trinko* precedent); or (2) have engaged in predatory pricing at the retail level (*Brooke Group* precedent).[24] In the words of Chief Justice Roberts: 'If both the wholesale price and the retail price are independently lawful, there is no basis for imposing antitrust liability simply because a vertically integrated

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[19] *Trinko* (n 16) para 412.
[20] *United States v Colgate & Co*, 250 US 300 (1919).
[21] See especially, at 880.
[22] At 881-882.
[23] S Ct 1109 (Feb 25, 2009). For a more detailed discussion of the *Linkline* case, refer to Alexiadis & Shorthall, 'Diverging but Increasingly Converging: The US Supreme Court in *Linkline* – A European Perspective' in the online magazine Global Competition Policy (April 2009).
[24] *Brook Group Ltd v Brown & Williamson Tobacco Corp*, 509 US 209 (1993) at 222-224.

firm's wholesale price happens to be greater than or equal to its retail price (…) two wrong claims do not make one that is right*'*.[25]

Thus, Roberts J. rejected the approach adopted by the European Commission to focus on the spread between wholesale and retail prices as the basis for the antitrust offence, since the US courts would be aiming at a 'moving target' if they were to be focussing on the interaction between two sets of prices. Moreover, in doing so, he interpreted *Trinko* as establishing a 'straight forward' rule which estopped the use of *ex post* obligations where *ex ante* regulation was in place.[26]

Prior to its exploration of the specific roles of antitrust law and sector-specific regulation in the telecommunications sector, the Supreme Court had expressed similar views in the regulated financial services sector in the case of *Credit Suisse Securities v Billing.*[27] In that case, it had 'extended the potential-conflict rationale for immunity even to antitrust claims that, correctly construed, would not actually conflict with regulation'.[28] The *Credit Suisse* precedent goes beyond the previous implied immunity cases, by precluding the use of antitrust claims based on legitimate antitrust principles, even where they are consistent with securities laws, and are not potentially contrary to the regulatory framework in place, but where the underlying conduct is sufficiently similar to regulated conduct that a judge might confuse the two and create a conflict with a regulatory authority.[29] In so ruling, the Court's main concern was the potential for a flood of 'lawsuits through the nation in dozens of different courts with different non-expert judges and non-expert juries'.

Thus, if plaintiffs could 'dress what is essentially a securities complaint in antitrust clothing', they could bypass the expert securities regulators in favour of generalist courts more prone to errors and more likely to impose unwarranted costs on defendants. Seen in this light,

> [w]hile the prevention of unnecessary litigation costs and meritless suits is a sound objective, the flood of private suits that motivated the Court in *Credit Suisse* is not an issue in public antitrust enforcement. The fact that the case does not distinguish the private litigation context that was before the Court from public enforcement could lead to unnecessary limitations on beneficial actions by the federal antitrust agencies; it could block the FTC from bringing cases clearly within the scope of antitrust law yet that would be just beyond the reach of regulation.[30]

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[25] At para 17.
[26] Both *Trinko* and *Linkline* cite favourably the Judgment of Breyer J in *Town of Concord, Massachusetts v Boston Edison Co*, 915 F2d 17 (1990), which rejected a margin squeeze action by a vertically integrated electricity producer (refer to Judgment, especially at 20-21).
[27] 551 US 264 (2007).
[28] At para 279.
[29] The FTC Statement – 'Is there Life After *Trinko* and *Credit Suisse*? The Role of Antitrust in Regulated Industries' (Washington DC June 15, 2010), para 6.
[30] ibid.

In the words of a US commentator:[31] 'By its logic and likely practical effect, *Credit Suisse* contracted the scope of implied immunity in industries regulated by statutes that fail expressly to save the operation of antitrust law'. Consequently, in the respective virtual US 'vertical silo' worlds of competition law and sector-specific regulation, the latter discipline will usually always trump the former because of its very specific rule-making nature and where its subject-matter scope is comprehensive (antitrust rules have no role to play where sector-specific regulation 'covers the field'). That logic is at odds with the reasoning employed by the Commission, which insists that the two regimes work in unison with one another. In doing so, the Commission – supported by the European Courts – has also clarified the point that a 'margin squeeze' is a self-standing *ex post* infringement which is actionable regardless of whether the impugned conduct neither satisfies the requirements supporting an action for the refusal to deal, at one extreme, nor the conditions that would support an action for predatory (below cost) pricing, at the other.

4. Gaps in *ex ante* regimes and the misuse of regulatory procedures

Beyond those margin squeeze situations where a regulatory 'gap' has been identified which competition rules need to fill, there is a growing body of EU precedent which supports the view that *ex post* intervention can be used to address the more general weaknesses or failings of *ex ante* regimes, as well as the 'misuse' of those regulatory regimes. While not receiving as much critical attention as their margin squeeze counterparts, the recent cases involving *Telekomunikacja Polska* and *AstraZeneca* have seen the Commission explore these themes at some length as part of its broader assessment of the interaction between *ex ante* and *ex post* regimes.

4.1. Misuse of regulatory procedures

In *AstraZeneca,*[32] the Commission found that the misuse of regulatory procedures was abusive in the circumstances of the case. According to the Commission, the two distinctive forms of abusive behaviour consisted of the following:

(i) Submitting misleading information to several national Patent Offices in the EEA, through the concealment of the actual dates of marketing authorization, which resulted in AstraZeneca (AZ) gaining extended patent protection for its Losec drug through the issuance of supplementary protection certificates (SPCs). In this specific case, the Patent Offices in question had essentially relied on information supplied by AZ and they were not obliged – as would be usual in a patent assessment – to consider whether the products were innovative. AZ's misleading

[31] Shelanski, 'The Case for Rebalancing Antitrust and Regulation' (2011) 109 Michigan Law Review 683, para 708.

[32] *AstraZeneca* (Case COMP/A.37.507/F3), 15 June 2005; on appeal Case T-321/05 *AstraZeneca v Commission* (judgment of 1 July 2010, nyr) [2010] OJ C221/33; on further appeal, Case C-457/10 P *AstraZeneca v Commission* [2010] OJ C301/18 (pending).

conduct amounted to an abuse in Belgium, Denmark, Germany, the Netherlands, Norway and the United Kingdom.[33]

(ii) Misusing rules and procedures applied by the national Medicines Agencies which issue market authorisations for medicines, by selectively de-registering existing market authorisations for Losec capsules in certain Nordic countries, with the intention of blocking or delaying entry by generic firms and parallel traders. At the time, generic products could only be marketed and parallel importers only obtain import licences if there was an existing reference market authorisation available for the original corresponding product (Losec).

On the particular facts of the case, the Commission took the view that inadequacy or, as the case may be, the incorrectness of sector-specific regulation, was not relevant to its legal assessment, as the offence committed by AZ was based on its misrepresentations to national regulatory and competition authorities, courts and tribunals. Nevertheless, according to the Commission, reliance on intellectual property rights to restrict competition was not possible where it was the result of an abuse of public procedures and regulation. Thus: 'The use of public procedures and regulations, including administrative and judicial processes, may, in specific circumstances, constitute an abuse, as the concept of abuse contrary to AZ's arguments is not limited to behaviour in the market only'.[34] The Commission went on to explain that the fact that the SPC Regulation provides for specific remedies cannot exclude the application of the Treaty rules of competition and their corresponding remedies. As far as the Commission was concerned:

> Even if other remedies are available which address some aspects of the conduct under consideration, there is good reason why abusive conduct should not be limited to conduct which does not violate other laws or for which no other remedy is available. Competition law is specifically designed to control anticompetitive private conduct entailing restrictions of competition, in particular by excluding competitors. Where the conduct has anticompetitive objects and effects, it may give rise to liability under competition law, which is designed to prevent such effects, as well as under other laws intended to control such behaviour regardless of any anticompetitive effects it may have. The fact that other laws and remedies prohibit misleading representations or provide for remedies against them is irrelevant where the objective of competition enforcement is not to penalise such misconduct per se, but rather to prevent the anticompetitive effects of such misconduct in the marketplace. Such anticompetitive effects must fall within the scope of competition law, and the fact that otherwise prohibited means may have been used to achieve them cannot be decisive for the application of competition law.[35]

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[33] For a more detailed summary of AZ's strategy of 'misleading', see paras 626-630 of the Decision.
[34] At para 743.
[35] At para 744.

The Commission expressed the view that the only relevant remedy under sector-specific rules would have been the annulment of the relevant SPC, through the process of judicial review. In the view of the Commission, the scope of such a remedy was very limited, not only because it does not in any way punish the implementation of the exclusionary strategy when it did not result in the acquisition of an SPC (or an SPC of a longer duration), but also because such a remedy would not be able to take into account the anticompetitive object and effects of the conduct in question.[36] In any event, concluded the Commission, the 'special responsibility' imposed on dominant firms not to impair genuine undistorted competition on the common market also covers 'the possible use of public procedures or regulations with the clear purpose of excluding competitors, in particular where the authorities or bodies applying such procedures or regulations have no or little discretion'.[37]

Finally, as regards the second offence alleged to have been committed by AZ, the Commission explained that there was nothing in the terms of the relevant legislation that could justify its conduct in light of the actual motives underlying its exclusionary intent. This was because: (i) there was nothing in the relevant Directive (Directive 65/65/EEC) that could prevent the holder of a marketing authorisation from withdrawing that authorisation;[38] and (ii) the terms of any Directive cannot exclude the application of Article 102 TFEU (then Article 82 EC) for, in the words of the Commission, an 'act of secondary legislation, such as a Directive, cannot be construed as excluding the applicability of a provision of the Treaty itself'.[39]

On appeal,[40] the General Court rejected all the key elements of the appellant's pleas. In doing so, the Court held, as the Commission had observed, that:

> the fact that the regulatory framework offers an alternative route to obtaining a marketing authorisation does not remove the abusive nature of the conduct of an undertaking in a dominant position where that conduct, considered objectively, has the sole object of making the abridged procedure provided for by the legislature (…) unavailable and, accordingly, of keeping producers of generic products away from the market for as long as possible and increasing their costs in overcoming barriers to market entry.[41]

More specifically, the Court made three key observations. *First*, it pointed out that the impugned practices were based 'exclusively on methods falling outside the scope of competition on the merits'; as such, this constituted conduct which 'solely serves to keep manufacturers of generic products, wrongfully, away from the market by means of the acquisition of SPCs in a manner contrary to the regulatory framework establishing

[36] At para 745.
[37] At para 747.
[38] At para 832.
[39] At para 833.
[40] Case T-321/05 *AstraZeneca v Commission*, (judgment of 1 July 2010, nyr) [2010] OJ C221/33.
[41] Refer to para 829.

SPCs'.[42] *Second,* while it was also true to say that a dominant firm 'cannot [be deprived] of its entitlement to protect its own commercial interests when they are attacked', by the same token it 'cannot 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'.[43] *Finally*, the Court emphasised the fact that the illegality of abusive conduct under Article 102 TFEU is unrelated to its compliance or non-compliance with other legal rules. As noted by the Court: 'It must be observed, in this respect, that, in the majority of cases, abuses of dominant positions consist of behaviour which is otherwise lawful under branches of law other than competition law'.[44]

Thus, the General Court has stated rather emphatically that, in the absence of grounds connected with the legitimate interests of an undertaking engaged in competition on the merits and in the absence of objective justification, a dominant operator cannot use regulatory procedures solely in such a way as to prevent or make more difficult the entry of competitors on the market.[45] In the context of electronic communications, the defence of legitimate interests might relate, for example, to the safety and integrity of the network, concerns regarding copyright infringement, liability for regulatory obligations, and so forth. However, the onus would clearly be on the defendant to discharge the onus of proof that its actions were justified on such principles and that no more reasonable alternative was available in the circumstances.[46] The basis of the duty owed by the dominant operator stems directly from its duty of 'special responsibility' to the marketplace, the fact that competition should only be based 'on the merits', and the fact that obligations found in Treaty instruments such Article 102 TFEU should by definition override the effect of provisions derived from legal instruments of lower standing such as Directives. It now remains to be seen whether the European Court of Justice endorses in its entirety these views upon further appeal,[47] given the fact that there is clear appetite of both EU and Member State levels to explore the extent to which firms can legitimately exploit intellectual property licensing arrangements.[48]

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[42] Refer to para 608.
[43] Refer to para 672.
[44] Refer to para 677.
[45] At para 817.
[46] For example, refer to *Eurofix-Bauco v Hilti* (Commission Decision 88/138/EEC), 22 December 1987 [1988] OJ L65/19, where the Commission rejected the justification that the infringement of competition rules was a necessary means of ensuring that consumer protection (i.e., product liability) concerns could be pursued.
[47] Appeal brought on 16 September 2010 by *AstraZeneca AB, AstraZeneca plc* against the Judgment of the General Court, Case C-457/10 P [2010] OJ C301/18.
[48] See, for example, Commission Press Release, IP/11/1560 of 16 December 2011, 'Commission opens proceedings against two manufacturers of refrigerant used in car air conditioning' (referring to the alleged deceptive conduct under Art 102 TFEU of Honeywell in the evaluation of a refrigerant known as '1234yf' in the period between 2007 and 2009 through its failure to disclose its patents and patent applications during the assessment phase for 1234yf, and also for its failure to grant licences on FRAND terms). Refer also to discussion below in Section 5. Also refer to the Decision of the Italian Competition Authority of 11 January 2012 in Case A431 *Ratiopharm/Pfizer* (OJ of 30 January 2012, p 5, Provvidimento no 23/94), which appears to reflect a direct application of the *AstraZeneca* precedent insofar as an alleged

4.2. Lack of effective application of sector-specific rules

As can be illustrated in the recent *Telekomunikacja Polska* case,[49] it is now also clear that the *lack of effective application* of a regulatory regime, no matter how sweeping in its scope it might be in theory, can justify intervention on an *ex post* basis. In that case, an ineffective sector-specific enforcement policy in the hands of the Polish NRA, reflected in a weak fining policy and enforcement powers and coupled with a culture of what was tantamount to vexatious litigation, meant that the NRA was ill-equipped to enforce fundamental broadband access obligations. As a result, a 127 Million Euro fine was imposed by the Commission on the dominant fixed line broadband access provider in Poland (Telekomunikacja Polska, or 'TP') in proceedings brought under Article 102 TFEU for its failure to provide adequate access (through its policy of constructive refusal to deal). In the particular circumstances of the case, only *ex post* competition rules were capable of addressing the anti-competitive concerns that had been raised by Alternative Operators as regards the commercial practices of Telekomunikacja Polska. Given the fact that the sector-specific regulation in question purported to 'cover the field' and the fact that the particular abusive practice should otherwise have been addressed by *ex ante* rule-making, the Commission went into great detail to explain its rationale for *ex ante* intervention.

First, the Commission rejected TP's argument that the Commission had no competence to hear the case, given the existence of Polish regulation covering the relevant subject-matter. In doing so, it recalled European Court jurisprudence which upheld the application of competition rules where sector-specific regulation is in existence. It also noted that NRAs operate under national law which may, as regards electronic communications policy, have objectives which differ from those of Community competition law (citing *Deutsche Telekom*).[50]

Second, the Commission recalled that, despite the fact that the Decisions of the Polish NRA, the UKE, which TP cited in support of its arguments, contained no adverse findings under Article 102 TFEU, it had to be borne in mind that the UKE was not a competition authority, but a sector-specific regulatory authority.[51] Yet, even if in theory it held competition powers, the Commission would not be precluded from finding that the dominant firm was responsible for an infringement of Article 102 TFEU (citing *Deutsche Telekom*).[52] Moreover, the fact that proceedings had taken place before the Polish NCA (the UOKiK) did not alter this conclusion, since: (i) they concerned different subject-matter; and (ii) NCAs are not in a position to adopt decisions holding that the infringement of Article 102 TFEU has not taken place.[53]

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misrepresentation to the European Patent Office, on the particular facts of that case, constituted an abuse of dominance under Article 102 TFEU. Refer also to citations at n 83.

[49] *Telekomunikacja Polska* (Case COMP/39.525), 22 June 2011.

[50] Refer to para 126.

[51] Refer to para 127.

[52] Refer to para 128.

[53] At para 129. Refer also to para 29 of Opinion of AG Mazak, confirmed by the ECJ in Case C-375/09 *President of VOKiK v Tele2* (judgment of 3 May 2011 nyr) [2011] OJ C186/4, paras 22-23.

Third, the Commission also rejected TP's assertion that the Commission had violated its rights of defence by not having taken into account in its Statement of Objections ('SO') the impact of a Settlement agreed between itself and the UKE on 22 October 2009 ('the 2009 Agreement'). The Commission's rationale was that:

> It should be noted that at the time of the SO's adoption (February 2010), it was too early to analyse whether the Agreement had an impact on TP's behaviour. Furthermore, the Agreement contains only voluntary commitments. The provisions contained therein do not constitute an enforceable resolution of the President of UKE and are not subject to execution in civil or administrative law proceedings. In addition, the Agreement is forward-looking. Certain commitments were not expected to be implemented immediately after the signature of the Agreement.[54]

By way of example, the Commission recalled that TP's commitment to provide Alternative Operators with critical IT applications which would facilitate access was only scheduled to occur by 31 March 2010, which was six months after the signature of the Agreement. In addition, each Alternative Operator had identified a number of specific issues in relation to which it considered that further improvements were required.[55] Moreover, even the UKE's quarterly assessment of the terms of the Agreement revealed that TP had not complied with the non-discrimination principle.[56] It was also relevant that TP had not even mentioned the existence of the Agreement prior to its receipt of the SO.

Fourth, the Commission rejected TP's argument that there existed no 'Community interest' in the Commission's intervention,[57] especially insofar as the Polish NCA had not ruled on the refusal to supply allegation considered by the Commission. According to the Commission's Article 102 TFEU Enforcement Guidelines,[58] such an offence is considered to be an enforcement priority. Moreover, it was particularly important that sector-specific regulation was insufficient to address the issues in this case. In the words of the Commission: '… despite the regulation in place and the sanctions imposed by UKE, TP did not change its anticompetitive behaviour, which negatively affected the development of wholesale broadband services in Poland'.[59] To this end, the Commission cited a passage from the UKE's market study of July 2009:

> The penalties, although being part of sanctions for non-compliance with the decisions of the President of UKE, are not capable of enforcing a change in TP's anticompetitive behaviour and have a positive impact on the development of the wholesale services. As described above, through the appeals and long-lasting court proceedings, these measures are not

[54] Refer to para 130; see also discussion at para 140.
[55] Refer to para 574.
[56] See para 577 in regards a number of unresolved issues; refer to discussion at paras 574 and 577.
[57] Refer to para 131.
[58] See Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty [now Article 102 TFEU] to abusive exclusionary conduct by dominant undertakings - Communication from the Commission [2009] OJ C45/7.
[59] Refer to para 131.

> severe for TP that anticipates their impact in advance in its business planning. Additionally, the profits from infringements and protection of economic interests potentially overrate the level and costs of sanctions.[60]

In support of its approach, the Commission cited the Judgment of the General Court in *Deutsche Telekom,* where it held that NRAs 'operate under national law which may, as regards communications policy, have objectives which differ from those of Community competition law'.[61] The Commission proceeded to note that the procedure conducted and the fines imposed by it, on the one hand, and the Polish NRA, on the other, clearly pursue different ends, in that:[62]

> The aim of the first is to preserve undistorted competition within the European Union, whereas the aim of the second encompasses other objectives such as 'development and use of modern telecommunications infrastructure', 'maximum benefits for users in terms of choice, price and quality of telecommunications services' and 'net neutrality'. In particular, while imposing access obligations the President of UKE has to ensure the balancing of the following broad criteria: 'the interests of users of telecoms infrastructure', 'promotion of modern telecommunication services', 'public interest including protection of environment', 'the integrity of network and interoperability of services' and 'non-discriminatory access conditions.' Hence, for example while imposing the first RBO in May 2006 President of UKE took into account the following factors: 'non-discrimination principle', 'minimum entry barriers', 'financial attractiveness for new operators', 'costs' neutrality for the incumbent', and 'adequate technical and organizational solutions'.

On the basis of the above observations, the Commission concluded that the respective proceedings of the Polish NRA and the Commission were not designed to protect 'the same legal asset'.[63] Even if there was significant overlap in the subject-matter at issue, there were sufficiently different policy considerations at play and different emphases in the criteria for remedy selection between the *ex post* and *ex ante* regimes to warrant the application of *ex post* competition rules. Nevertheless, in setting the level of the fine to be imposed, the Commission did purport to take into account the level of penalties already imposed on TP by the UKE 'via final decisions for infringements which partially overlap with the facts described in the present Decision'.[64] In other words, while it was unequivocally confirmed that competition rules would trump *ex ante* regulation, the practical effects of the latter would be a highly material consideration in the proportionality of any prescribed remedies formulated under *ex post* powers.

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[60] ibid, referring to p 88 of UKE Market Study of June 2009.
[61] Case T-271/03 *Deutsche Telekom* [2008] ECR II-477, para 113; cf Case C-280/08 *Deutsche Telekom v Commission* (judgment of 14 October 2010 nyr) [2010] OJ C346/4, paras 80-96.
[62] See para 138.
[63] At para139. In this regards, refer to Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland A/S* [2004] ECR I-123, para 338.
[64] Refer to para 142.

5. The treatment of self-regulation in the context of IP standardisation agreements

Another arena in which the tensions play out between *ex post* and *ex ante* regimes can be identified in a number of industrial sectors in which competitors establish (and are often encouraged by policymakers to establish) complex means of self-regulation of certain aspects of their industry, primarily with a view to establishing common rules of commercial operation. This is usually done in order to establish some form of common platform that will allow market actors not to be disadvantaged against one another in competing on the merits, especially where an essential industry input exists which is protected by intellectual property rights that would otherwise be held by one or a very limited number of industry actors. As a general rule, the Commission encourages the adoption of open and transparent technological standards, given their potential positive economic impact in promoting economic interaction in the internal market, or by encouraging the development of new markets and improving supply conditions.[65] Having said that, standard-setting associations might also be capable of providing fora through which competitors come together and agree to exclude certain products and technologies from the market.

In such situations, the importance of ensuring connectivity and/or minimum harmonised operating conditions[66] is essential to prevent the foreclosure of competitors, with market actors establishing mutually agreed licensing terms and conditions for the key intellectual property rights that underpin those functions. However, the establishment of private institutional arrangements among competitors to facilitate a fair means of sharing intellectual property rights has also been shown to provide no bar to *ex post* intervention where the manipulation of such collective decision-making might raise significant risks of anti-competitive outcomes. This is illustrated in the relatively recent competition actions entertained by the Commission in the action against Rambus for its alleged 'patent ambush' actions against fellow ETSI members to whom it had failed to provide disclosure, and also in relation to the level of IP royalties leveled by Qualcomm in the light of its FRAND (fair, reasonable and non-discriminatory) licensing obligations under an ETSI standard.

Consequently, the Commission has noted that pro-competitive benefits will only be realised, given the risk of anti-competitive outcomes, if particular attention is paid to the procedures used to guarantee that the interests of the users of standards are protected. For example, in its 1992 Communication entitled 'Intellectual Property Rights and Standardisation',[67] the Commission stated that:

> an intellectual property right holder would act in bad faith if it was aware that its intellectual property read on a standard in development and did not

[65] *Rambus* (Case COMP/38.636), 9 December 2009, paras 31-33. Refer also to the Commission's Horizontal Guidelines.
[66] In the electronic communications sector, for example, the European Telecommunications Standards Institute ('ETSI') plays a crucial role in the development of industry-wide standards for equipment.
[67] COM (92) 445 final (27.10.1992).

> disclose its intellectual property rights until after the adoption of the standard. This would force its competitors to accept higher licensing fees than those which could have been negotiated at an earlier stage before the adoption of the standard.

Thus, the Communication also states that, in order to ensure that a standard setting process yields its benefits, intellectual property rights holders should be required to identify and report any intellectual property rights reading on a standard in the development stage.[68] This approach is reinforced by the Commission's Horizontal Guidelines, which also stress the importance of 'non-discriminatory, open and transparent procedures'[69] to safeguard against anti-competitive outcomes.

5.1. Patent ambushes

The first example of how the Commission sees the role of *ex post* intervention in the context of IP self-regulation by industry members can be found in the patent ambush proceedings brought against *Rambus*.[70]

Mindful of the policy considerations outlined above by the Commission, the JEDEC Solid State Technology Association ('JEDEC') required all of its members to disclose any and all issued or pending patents of which they were aware and which might be involved in the standard-setting work of JEDEC. The patent policy provided for a number of rules ensuring that the policy was effectively known to all JEDEC members.[71] The Commission confirmed that the JEDEC patent policy and the underlying duty of good faith were intended to provide members with an opportunity to develop open standards free from potential patent claims.[72] Rambus, as a member of JEDEC from 1991 to 1996, was found by the Commission to have been well aware of the obligation to disclose issued and pending patents relating to the standard-setting work of JEDEC.[73] Thus, the Commission concluded that pursuant to its business strategy, and notwithstanding: (i) its knowledge of the requirements of the JEDEC patent policy and of the underlying duty of good faith that is binding on a participant in a standard-setting process; and (ii) its awareness of the relationship between its patents, patent applications and JEDEC's standard-setting work, Rambus was indeed aware of the benefits of keeping its patent positions secret and intentionally did not disclose any patents or patent applications which related to the relevant JEDEC standards.[74]

In assessing whether the actions of Rambus amounted to an anti-competitive practice, the Commission noted that it would not be necessary to demonstrate a breach of the standard-

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[68] See *Rambus* (n 65) para 32.
[69] The Commission's Guidelines on the applicability of Article 81 of the EC Treaty [now Article 101 TFEU] to horizontal cooperation agreements [2001] OJ C3/2, 15. Note: At the time of the decision, the 2001 Guidelines were still in force.
[70] *Rambus* (n 65).
[71] Para 36 of the Decision.
[72] Para 38.
[73] Para 41.
[74] Para 42.

setting rules in order to find that an abuse had occurred, but merely the fact that the illicit conduct in question adversely affected the process. Thus:

> It should be noted, however, that while the Commission considered that Rambus may have breached JEDEC's patent policy in its preliminary assessment, an actual breach of the precise rules of a standard setting body would not be a necessary requirement for a finding of abuse in this context. The finding of abuse would rather be conditioned by the conduct that has necessarily influenced the standard process, in a context where suppression of the relevant information necessarily distorted the decision making process within a standard setting body.[75]

In fact, in the Commission's view, Rambus 'may have' been deliberately using its participation in JEDEC to revise and tailor its pending patent applications in an effort to gain control over JEDEC standard-compliant synchronous DRAM chips.[76] Furthermore, the Commission considered that, save for Rambus' deceit, JEDEC Members were likely to have designed a 'patent-free' standard around Rambus' patents.[77] Ultimately, the Commission considered that the industry was locked into the JEDEC DRAM standards and that there were substantial barriers to entry onto the market. For these reasons, the effects of the alleged abusive behaviour also extended to subsequent JEDEC standards.[78] In order to settle the action, Rambus undertook to subject its royalty rates for a period of 5 years to a worldwide cap for products compliant with the JEDEC standards. As part of the overall package, Rambus agreed to charge zero royalties for the SDR and DDR chip standards that were adopted when Rambus had been a JEDEC member, in combination with a maximum royalty rate of 1.5% for the later generations of JEDEC DRAM standards (DDR2 and DDR3), which is substantially lower than the 3.5% Rambus had been charging for DDR in its existing contracts.

The Commission's Decision confirmed that these commitments are adequate to address its competition concerns.[79] While the Decision does not expressly analyse the case through the prism of the primacy of antitrust law over sector-specific regulation, this line of thought permeates its ultimate conclusions. Thus, the Commission's intervention was said to be warranted because of the 'dilution' of the self-regulatory process, because a 'patent ambush', as had occurred on the facts of this case, was little more than a systemic failure which requires rectification. In this respect, antitrust remains the prime 'controller' in the standard-setting process. Thus:

> An effective standard setting process should take place in a non-discriminatory, open and transparent way so as to ensure competition on the merits and to allow consumers to benefit from technical development

[75] At para 39.
[76] Para 40.
[77] Paras 43-46.
[78] Paras 47.
[79] Schellingerhout & Cavicchi, 'Patent ambush in standard-setting: the Commission accepts commitments from Rambus to lower memory chip royalties' [2010-1] EC Competition Policy Newsletter 32.

> and innovation. Abusive practices in standard-setting can harm innovation and lead to higher prices for companies and consumers. For its part, *the Commission will vigorously enforce the competition rules in this area*, for the benefit of technical progress and European consumers.
>
> Standards bodies have a responsibility to design clear rules that ensure the standard setting process takes place in a non-discriminatory, open and transparent way and hence reduce the risk of competition problems, such as patent ambushes. *The role of the competition authorities in this context is not to impose a specific IPR policy on standards bodies, but to indicate which elements may or may not be problematic.* It is then up to industry itself to choose which scheme best suits its needs within these parameters.[80]

5.2. Exploitative licensing

Another example of Commission intervention under its *ex post* powers to rectify the shortcomings of a regime of self-regulation in the IP licensing context can be found in the complaint brought against *Qualcomm*, with respect to whom the Commission had initiated formal proceedings in October 2007.[81] This investigation concerned alleged exploitative licensing conditions, whereby a company abuses its dominant position by claiming excessive royalties for, or imposing unduly onerous conditions on the use of its patents, which have been incorporated into a standard on the basis that the patent holder has committed to contract on a FRAND basis.

Qualcomm was a holder of IP rights in the CDMA and WCDMA standards for mobile telephones. The WCDMA standard forms part of the 3G (third generation) standard for European mobile phone technology (also referred to as 'UMTS'). This followed complaints lodged with the Commission by competitors such as Ericsson, Nokia, Texas Instruments, Broadcom, NEC and Panasonic, all of whom are mobile phone and/or chipsets manufacturers. The complaints alleged that Qualcomm's licensing terms and conditions were not on FRAND terms and, therefore, in violation of Article 102 TFEU.

The complaints were based on the understanding of the complainants that the economic principle underlying FRAND commitments is that essential patent holders should not be able to exploit the extra power they have gained as a result of having technology based on their patent incorporated in the standard. It was also alleged that the charging of non-FRAND royalties could have led to end users paying higher handset prices, a slow-down in the further development of the 3G standard, and all the related negative consequences for economic efficiency associated with inhibited growth of the standard. In addition, the complainants alleged that this behaviour could have a negative impact upon the standard-setting process more generally, as well as the adoption of the future 4G standard by the mobile industry.

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[80] ibid 36 (emphasis added).
[81] See MEMO/07/389 dated 01/10/2007.

In a statement of 24 November 2009,[82] the Commission disclosed that it had not yet reached any formal conclusions despite its timely and costly investigations. Since all the complainants had ultimately withdrawn or had indicated their intention to withdraw their complaints on the basis of some settlements made between them, the Commission decided to close formal proceedings against Qualcomm.[83]

5.3. Conclusions

Both the *Rambus* and the *Qualcomm* cases concern antitrust intervention in the exploitation of the rights arising from self-regulation, as well as the compatibility of the self-regulatory process itself under competition rules. In the *Rambus* case, antitrust intervention was said to be warranted by the illicit behaviour influencing the (self-) regulatory outcome. Thus, competition law has been again used in the European Union to fill the 'gaps' which exist in regulation. In both *Rambus* and *Qualcomm* investigations, antitrust rules sought to regulate conduct by an IP holder once the IP rights in question had been incorporated into an industry standard. Both cases therefore arguably rest on a general principle that patent holders need to be open and honest as to what they intend to do prior to adoption of their technology into a standard. It is paramount that, in the formation and operation of industry standards based on the sharing of IP rights, the enforcement of competition law will be the 'controller' in the standard-setting process.

In the analysis performed in the context of self-regulation, the divergences in approach between the EU and US positions which characterised the respective treatment in those jurisdictions of the margin squeeze offence are no longer evident. Both of the cases under Commission investigation were tried in the US Courts also,[84] in *FTC v Rambus* (a government antitrust action), and *Qualcomm v Broadcom* (a private patent dispute). In *Rambus*, years of litigation in the Federal Trade Commission's most significant enforcement action for many years failed to produce any tangible results. The FTC was unanimous in finding Rambus liable for antitrust violations, but struggled to agree on a suitable remedy. The D.C. Circuit then ruled in favour of Rambus on appeal, with the Supreme Court denying the FTC's writ of *certiorari*, and after nearly seven years of litigation the Commission abandoned the case altogether in 2009. Qualcomm's private patent suit against Broadcom also was resolved on appeal in 2007, with the outcome

[82] See MEMO/09/516 dated 24/11/2009.

[83] The European Commission announced on 31 January 2012 that it had opened a formal investigation into whether Samsung Electronics (Samsung) had acted in breach of Article 102 TFEU. The Commission is investigating whether Samsung has abused its dominant position by seeking injunctive relief against competing mobile device makers, based on alleged infringements of certain patent rights which it holds that are essential to the implementation of European mobile telephone standards. The Commission expressed concern that Samsung is not honouring a commitment given to the ETSI to license any such standard essential patents on fair, reasonable and non-discriminatory terms, and that Samsung's actions could be distortive of competition in European mobile device markets. Refer to Commission Press Release, IP/12/89, of 31 January 2012. See speech of Commissioner Almunia, 'Industrial Policy and Competition Policy: Quo Vadis Europa?', Speech 12/83 of 10 February 2012 delivered at the 'New Frontiers of Antitrust 2012' conference of Revue Concurrences (Paris).

[84] Refer to a full discussion of the *Rambus* litigation in Royall, Tessar & Di Vincenzo, 'Deterring "Patent Ambush" in Standard Setting: Lessons from *Rambus* and *Qualcomm*' (2009) 23(3) Antitrust 34.

turning on Broadcom's allegations of patent ambush. Applying the doctrine of implied waiver, a patent defence raised by Broadcom, the Federal Circuit ruled Qualcomm's patents to be unenforceable not only against Broadcom, but against all products that comply with the relevant Standard Setting Organisation standards. Thus, Broadcom was able to use a common law defence in a two-party patent dispute to secure broad and definitive relief to the benefit of an entire industry. In short, it was able to achieve in substance what the FTC had sought but had failed to achieve in the *Rambus* proceedings.

6. Reconciling EU and US approaches

The adoption of what appear to be diametrically opposed approaches by the European Commission and the various European Courts, on the one hand, and the US courts, on the other, when the resolution of the tension between *ex ante* and *ex post* approaches is at issue, appears at one level to be a clash in fundamental philosophy across the Atlantic about the role of the two respective regimes. Yet, when one scratches the surface of that trans-Atlantic philosophical dispute, it becomes clear that the position espoused in Europe is very much justified in the context of the Community legal order. This is especially the case in the context of the electronic communications sector, where the regulatory framework established for that sector lends itself to the approach adopted by the various European institutions.

There are a number of sound reasons which underpin the approach taken in the EU, namely:

- The EU Regulatory Framework for electronic communications endorses a so-called cumulative 'three-criteria test',[85] as the basis upon which to justify the adoption of *ex ante* regulatory measures on dominant operators in the sector.[86] The third criterion listed is one which presumes that *ex ante* regulation on dominant operators should be imposed only where *ex post* competition rules are not able to address fully the particular market failures identified. Thus, there is an express link between the rationale for regulation in light of the reach of competition rules. By the same token, satisfying the third criterion does not mean that the *ex post* regime is excluded where *ex ante* regulation has been imposed; rather, it signifies that the two disciplines need to work in harmony together, as the *ex post* regime cannot on its terms alone address all foreseeable market failures (which usually occur at the wholesale level). By contrast, there is no explicit or implicit basis upon which both regimes co-exist in the US.

- The market analysis approach adopted under the EU Regulatory Framework,[87] whereby dominance is identified in 'markets' which are defined in comparable

[85] See Article 2 of the Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, C(2007) 5406 rev 1 ('the Recommendation').
[86] Referred to specifically as holders of Significant Market Power ('SMP').
[87] See Articles 14, 15 and 16 of the Framework Directive as well as the Recommendation (n 85).

circumstances to their competition law counterparts, is the critical analytical tool which underpins the system of asymmetric regulation in the electronic communications sector. This is a significant step forward in comparison to previous regulatory models adopted around the world, as electronic communications services and networks were previously the subject of regulation with scant regard to the role played by competitive alternatives, whether expressed in terms of the 'substitutability' of networks and services or the concept of 'technology neutrality'.[88] In this way, by subjecting both *ex ante* and *ex post* disciplines to a common reference point for analysis, decision-making under either regime is, in principle, unlikely to distort or to disregard the impact of the other regime. They are thus better positioned to play a complementary, rather than an antagonistic role *vis-à-vis* one another. There is no such complementarity in the US, where the two regimes have developed along very independent paths, creating vertical 'silos' in their approach. Although recent rule-making in the US takes into account the effects of 'multi-modal competition',[89] there are many aspects of the US regulatory framework which do not comport with an approach which seeks to attach regulatory obligations to 'markets', as that concept is understood in antitrust terms.

- All things being equal, there is a presumed migration that can take place from *ex ante* to *ex post* regimes in the electronic communications sector if and when the forces of market competition are shown to be effective and sustainable.[90] By contrast, the US position reflects two legal regimes constructed independently of one another, with no understanding that one might wholly supplant the other over time.

- Unlike the situation in the US, which involves the application of two Federal level Statutes of equal legal weight (the Sherman Act and the Communications Act respectively), the situation in the EU is one that is characterised by a provision of what is tantamount to a constitutional law principle embodied in a Treaty (Article 102 of the TFEU) that overrides legal principles found in secondary legislation (*e.g.*, sector-specific legislation in the form of liberalisation and harmonisation

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[88] As regards the application of the EU Regulatory Framework to regulate dominant operators, refer generally to: Nihoul & Rodford, *EU Electronic Communications Law – Competition and Regulation in the European Telecommunications Market* (2nd edn, OUP 2011) esp at Ch 3; Buiges & Rey, *The Economics of Antitrust and Regulation in Telecommunications – Perspectives for the New European Regulatory Framework* (Edward Elgar 2004) Chs 2-8; Coates, *Competition Law and Regulation of Technology Markets* (OUP 2011) esp at Ch 4; see also Alexiadis, 'Key Legal Issues Under New EU Regulatory Framework for Electronic Communications Networks and Services', Autorita per la Garantie nelle Communicazioni (Italy, 2004); Alexiadis & Cole 'The Application of the Concept of Technology Neutrality under the New ECNS Regulatory Framework', ECTA Review 2004.

[89] For example, refer to http://www.fcc.gov/document/technical-advisory-council-issues-technology-policy-recommendations-spur-jobs-innovation.

[90] Recital 16 of the Recommendation. See also Recital 5 of Directive 2009/140/EC of the Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services [2009] OJ L337/37.

Directives). This principle has been most recently endorsed in the *AstraZeneca* case (see above). In such a situation, the primacy of competition rules as compared to secondary legislation is a clear endorsement of the principle of the hierarchy of laws.

- It should not be forgotten that the private litigation cultures of the US and the EU Member States are markedly different, leading to radically different results when the decisions of regulators are appealed to the courts. The availability of treble damages in the US for antitrust infringements means that the courts are reluctant to take an expansive approach to antitrust liability, especially if they consider that the enforcement of the regulatory framework provides some protection for complainants. While policy initiatives are currently being considered to make the existing litigation environment before EU Member State courts more conducive to private litigation in antitrust matters,[91] the bogey of private litigation in the EU does not hold the same fears as its US counterpart for those firms found to have infringed competition rules. In such an environment, the spectre of antitrust enforcement in addition to the satisfaction of regulatory obligations does not loom as large, nor can it be considered to render any given practice subject to a realistic 'double jeopardy' defence.[92]

- EU regulatory principles, unlike their US counterparts, do anything but 'cover the field' of regulation. The main legislative vehicle for liberalisation and harmonisation measures is the Directive, which leaves ample scope for Member States to interpret the terms of relatively broadly formulated principles into their national legal traditions. In addition, the majority of the policy materials available to NRAs take the form of Guidelines, Recommendations or Notices, all of which are 'soft law' instruments which, in theory, have no binding effect as a matter of law on national judges in the EU. Accordingly, the *minutiae* of US regulatory detail gives way to the sweeping statement of EU principle which can be implemented according to every Member State's individual legal culture. Given that the competition law precedents to date have been delivered by the European Commission and supported by the European Courts, their frame of reference appears to do anything but 'cover the field' when interpreting the effect of EU legislation in the electronic communications sector.

There is thus ample scope to support the approach taken in the EU, as opposed to that taken in the US. That is, of course, not to say that one approach is 'better' than the other, nor that one approach is 'right' and the other is 'wrong'. The evidence does suggest,

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[91] See, for example, Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2008) 165 final.

[92] The principle of *non bis in idem* prohibits not only the imposition of two disciplinary measures for a single offence but also the holding of disciplinary proceedings more than once with regard to a single set of facts. Consistent with the principles espoused in Case 14/68 *Wilhelm v Bundeskartellamt* [1969] ECR 1, 15, however, the principle does not prohibit parallel proceedings pursuing different ends. Having said that, should both proceedings result in the imposition of sanctions, the first decision must take into account the second decision when determining the scale of any sanctions to be imposed. See also Lasok & Millett, *Judicial Control in the EU: Procedures and Principles* (Richmond 2004) para 644.

however, that the approach taken in the electronic communications sector in terms of the balancing of *ex ante* and *ex post* regimes under Community law is rational and soundly based on legal principles and policy dictates.

7. Identifying residual tensions in the EU approach

The co-existence of *ex ante* and *ex post* disciplines under Community law, and the ultimate ascendancy of *ex post* over *ex ante* in the event of their conflict, does not mean that there are no unresolved tensions in this relationship. At a glance, the vigorous enforcement of parallel legal regimes in connection with the same sectoral conduct has raised a number of analytical concerns in practice, including:

- Institutionally, *ex ante* is administered (in theory) under a centralised command-and-control mechanism operated by the European Commission under its so-called 'Article 7' powers (and more, recently, also by BEREC operating under its own mandate). By contrast, competition rules are highly decentralised under the process of 'modernisation' associated with Regulation 1/2003. Ultimately, both institutional regimes suffer insofar as they both have serious shortcomings when it comes to the 'effective application' of Community law.[93] In the case of *ex ante* regulation, the Commission's veto over NRA decisions only covers the elements of the decision which include findings about market definition and market analysis, but does not extend to the critical issue of remedy selection.[94] In the case of *ex post* enforcement, there are also real question marks as to whether cooperation through the ECN network is sufficient to deliver the effective application of competition rules, given that the Commission is the ultimate guardian of competition rules under the Treaties, especially where the NCAs of small EU Member States are confronted with complex technical and economic issues and where they are pitted against large multinational operators with significant resources.[95] As noted earlier, these differences are exacerbated by the fact that Community institutions are usually subject to a different (i.e., less onerous) standard of judicial review than the national counterparts.

- In determining the scope of particular market failures, regulators across the *ex ante*/*ex post* divide might often need to have recourse to the principle of non-discrimination as the basis for an appropriate remedy. However, the nature of the non-discrimination remedy varies significantly across that divide. For example, the remedy is relatively 'blunt' and undifferentiated in an *ex ante* context, as it is

[93] The principle of effectiveness underlies a series of developments in the sphere of judicial protection which has been recognised as a general principle of Community law by the Court of Justice. Refer to discussion of *Factortame* and other cases in Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2009) Ch 9.

[94] For example, refer to Case T-109/06 *Vodafone España* [2007] ECR II-5151 and Case T-295/06 *Base* [2008] ECR II-28. The Commission's lack of a veto power with respect to remedies has not changed, even as a result of the procedure introduced in the 2009 amendments to the Framework Directive in the form of a new Article 7a.

[95] This situation is being considered in the pending appeal before the General Court in Case T-201/11 *Si.mobil v Commission* [2011] OJ C160/24, action brought on 4 April 2011.

regularly applied in practice to signify 'treat all competitors equally' in the context of a range of access relationships.[96] By contrast, a much more subtle variant of discrimination is employed under competition rules, which take into account that not all operators are equivalent in terms of their commercial impact[97] and, increasingly, the application of the 'effects doctrine' to condone behaviour which differentiates in treatment between operators but which reflects more complex notions of consumer welfare.[98] Given the fundamental importance of vertical integration in the electronic communications sector and the role which the non-discrimination obligation plays in addressing market failures arising from such vertical integration, the absence of a common standard for the concept of non-discrimination can only result in a lack of legal certainty, especially as the electronic communications value chain broadens over time to incorporate aspects of the Internet and media.

- Lying at the heart of all access requests to a dominant operator is the need for a regulator to determine the appropriate costs that are borne by the dominant operator to grant access to its network or services. However, cost models developed in an *ex ante* context are designed to inject discipline into the business dealings of an ex monopolist (*e.g.,* the LRAIC model),[99] while access requests for non-fundamental services are usually associated with other costing formulae (*e.g.*, 'retail minus'). This sits rather uncomfortably with the traditional *ex post* idea that costs are operator–specific in the world of antitrust.[100] A related problem occurs with the concept of 'single network' markets identified in the *ex ante* context, which also sit quite uncomfortably with traditional ideas of the types of broader relevant product 'markets' that might be identified from an antitrust law/competition rules perspective.[101] When one is identifying single network

[96] This is a byproduct of the fact that wholesale access relationships in the electronic communications sector are unlikely to generate the sorts of capacity benefits or restraints that would otherwise justify customer differentiation based on volumes purchased. By way of departure from this difference in application of the non-discrimination obligation across both regimes, the Commission's views on the regulation of newly deployed fibre networks suggests that the more flexible competition law approach may be entering the sector-specific regime in this limited respect: see Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (NGA) [2010] OJ L251/35.

[97] For an excellent general discussion on the topic, refer to Bishop & Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (3rd ed, Sweet & Maxwell 2009) Ch 11.

[98] ibid.

[99] LRAIC represents the standard of Long Run Average Incremental Cost, which is said to be the cost standard which best reflects the costs borne in relation to the particular service in question by a hypothetically efficient operator in a competitive market.

[100] For example, given that a dominant operator can only know its own costs, it would appear to be the case that it is inappropriate under competition rules to base its pricing policies on costs that are not borne by itself.

[101] A classic case in point, for example, lies in the identification of call termination markets under *ex ante* regulation with respect to all individual networks. While such an *ex ante* approach arguably has support in a decision adopted by the UK's Competition Commission under UK competition rules, it nevertheless fails to take into account the fact that competitive constraints might be forthcoming from other operators and from other functional levels of the overall market; this broader approach under a competition analysis would at least be capable of undermining a conclusion that each network operator enjoys market power

markets, the dilemma of imposing a LRAIC cost standard on all operators appears to be counter-intuitive, especially where Community case-law suggests that regulators have a degree of flexibility in their choice of cost model[102] and in the determination of whether pro-competitive results might result from different cost bases being identified.[103] By contrast, the ongoing issue of more broadly constructed *ex ante* markets, as opposed to more narrowly drawn *ex post* markets is easier to reconcile.[104]

- Although not as yet an intractable problem, sector-specific regulators are increasingly developing 'screening' mechanisms to determine whether service bundles are likely to result in margin squeezes or predatory prices. In doing so, they are by and large adopting formulae for this screening exercise which are based on hypothetically efficient operators.[105] However, the traditional test for a margin squeeze under competition rules considers that the test be established by reference to an operator which is 'as efficient' as the dominant firm.[106] As long as a regulator has dual competence over *ex ante* and *ex post* matters, this difference in treatment need not be problematic in practice. However, where competences are split, it might become exceedingly difficult for NRAs and NCAs to have a common understanding of the costs that they consider to be relevant from the standpoint of evaluating margin squeezes and predatory pricing claims.

- Although Regulation 1/2003 and the revised Framework Directive are instruments that establish their own specific rules for functional and structural separation remedies, the question must be asked about the likelihood of NCAs or NRAs respectively adopting such a remedy under either regime. Perversely, the functional separation model pioneered by the UK NRA, Ofcom, in 2006 with respect to the commercial affairs of the dominant fixed line operator BT occurred in a unique setting in which *ex ante* regulation at Community level was silent on the matter, while the appetite for such radical measures under EU competition rules was not seen as being likely. Thus, neither *ex post* nor *ex ante* regimes seemed likely to offer a remedy brokered uniquely by a British regulator with

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over the termination of calls to its own network, even where the relevant market definition might remain narrow from a demand side perspective.

[102] See Case C-55/06 *Arcor AG & Co KG v Bundesrepublik Deutschland* [2008] ECR I-2931, esp at paras 153-156 ('In carrying out those regulatory functions, the NRAs have a broad discretion in order to be able to determine the need to regulate a market according to each situation on a case-by-case basis').

[103] For example, many NRAs have long held the view that smaller operators can only finance their retail operations (thereby creating a more competitive environment) through the imposition of higher wholesale call termination tariffs than larger operators. In such circumstances, it is argued, obliging a smaller operator to charge a lower wholesale call termination price based on a LRAIC model might not actually reflect its actual costs (which are often much higher than a dominant operator at the retail level).

[104] As noted above, the adoption of a forward-looking approach justifies the application of a more supply-side driven approach to market definition, thereby broadening the scope of the market, whereas a competition action for abusive practices will initially focus on a much narrower range of competitive options that are dictated by the demand requirements of an access seeker.

[105] ERG (09) 07 Report on the Discussion of the Application of Margin Squeeze Tests to Bundles (BEREC).

[106] See earlier discussion on the *Deutsche Telekom* and *Telefónica* cases, *supra*.

> mixed competences crossing the *ex ante*/*ex post* divide. In other words, there is still significant scope for regulatory inaction in controversial areas despite the existence of two separate legal regimes that might otherwise be relied upon to address a competitive concern.

While the resolution of the tension between *ex ante* and *ex post* regimes in the Community legal order may have been dealt with recently by the Commission and the European Courts in a coherent fashion with logical outcomes, the fact remains that issues such as those outlined immediately above will continue to arise in practice across the EU. The net result will be that dominant firms, and their legal advisors, will continue to tread warily in their determination of which commercial practices are problematic under the umbrella of 'special responsibility', which all dominant firms in the EU are obliged to respect. What will be fascinating over the next decade will be to see whether the complementarity in approach between the two regimes leads to a fusion in the manner in which the competition Bar and the regulatory Bar think about certain common competitive concerns or market failures, or whether the internal coherence of both regimes becomes somehow blurred in the pursuit by policymakers of common goals or outcomes. In other words, are we likely to be lurching to a destiny which the US courts are very eager to avoid? Is that necessarily a bad thing in a European legal environment? Time will tell.