

Regulating prices of communications services through antitrust and competition enforcement

Anne Vallery

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Price Regulation under Competition Law

- Concurrent application of *ex ante* regulation and *ex post* enforcement
- Anticompetitive pricing practices
- Unilateral conduct - Dominance prerequisite
- Types of pricing abuse
- Measure of costs
- Efficiencies and other defenses
- Effect on competition



Concurrent application of *ex ante* regulation and *ex post* enforcement

- The EU regime
 - *Ex ante* regulation when there are good grounds to assume that *ex post* enforcement will not suffice
 - *Ex ante* regulation does not preclude *ex post* enforcement (*Deutsche Telekom* and *Telefonica* cases)
 - *Ex ante* regulation can exonerate individual liability where regulation leaves no room for maneuver (*Ladbroke* and *CIF* cases)



Concurrent application of *ex ante* regulation and *ex post* enforcement

- The US
 - *Trinko*: Where regulation is designed to deter and remedy anticompetitive harm there is little room for antitrust enforcement
 - *Midcal*: Extension of *Parker v. Brown* State action doctrine to private actors - State action basis for immunity of prosecution under the Sherman Act provided State policy is clearly articulated and application of that policy is effectively supervised



Anticompetitive pricing practices

- Single firm conduct v. collusion
- Express or tacit collusion
 - Harmless parallel behavior
 - Cartel behavior
 - Tacit collusion – Collective dominance
 - Oligopolistic markets
 - Transparency



Unilateral conduct - Dominance prerequisite

- Detailed analysis of the actual market circumstances, including the regulatory context
- Limited precedent value
- Market definition
 - Broad or narrow markets depending on the circumstances
 - Impact of technology evolution
 - Examples of market definition (Telefonica, Deutsche Telekom, Wanadoo cases)
 - Business v. residential: supply-side substitutability v. demand side substitutability or chain of substitution effect



Unilateral conduct - Dominance prerequisite

- Absence of strict concordance between dominance market(s) and impacted market(s)
 - Impact on a different market
 - Impact on a segment of a dominated market
 - Single service or appropriate basket of services
- Specific issue for margin squeeze: single or double dominance (Telefonica case)



Types of pricing abuse

- Exclusionary v. exploitative
- Europe v. US
- Excessive pricing
- Price squeeze (as a stand-alone abuse)
- Predatory pricing
- Above-cost rebates
 - Fidelity rebates
 - Selective rebates
 - Range discounts
 - On-net/off-net differentiation – network effects
- Discrimination
- Links with other abuses: refusal to deal; tying



Measure of costs

- “As efficient” or “reasonably efficient” operator
- Fixed v. variable v. avoidable costs
- Network costs, commercial costs and business overhead costs
- Wholesale v. retail costs
- Common costs: LRIC; FAC (Ramsey pricing; EPMU; LRAIC)
- Benchmarking – Comparator approach
- Cost model – Accounting separation



Effect on competition

- Europe v. US
- Likelihood of anticompetitive effects and foreclosure effects
- Persistence of the infringement
- Possibility to recoup



Efficiencies and other defenses

- Predatory pricing as *per se* abuse?
- Efficiency defense
 - Investment for future profits (learning curve, new products introduction, complementary products)
 - Lower prices as a consequence of lower costs
- Meeting competition defense
- Objective necessity defense