

Ian S. Forrester, QC

White & Case –Brussels, Belgium



***Sector-specific Price Regulation
or Antitrust Regulation
A Plague on Both Your Houses?***

European University Institute
Robert Schuman Centre for Advanced Studies
2007 EU Competition Law and Policy Workshop/Proceedings



To be published in the following volume:
Claus-Dieter Ehlermann and Mel Marquis (eds.),
*European Competition Law Annual 2007:
A Reformed Approach to Article 82 EC*,
Hart Publishing, Oxford/Portland, Oregon (in preparation).

Please do not quote or circulate without permission
© Ian S. Forrester. All rights reserved.

12th Annual Competition Law and Policy Workshop
Robert Schuman Centre, 8-9 June 2007
EUI, Florence

Ian S. Forrester, QC*

Sector-specific price regulation or antitrust regulation – A plague on both your houses?
Revised 3 August 2007

Mercutio, a friend of Romeo, is stabbed by Tybalt as part of the endless feuding between the warring houses of Montague and Capulet in the Verona of Shakespeare's play, and before dying cries out, "*A plague on both your houses*".¹ My initial reaction to the choice posed in relation to remedies was similar to that of Mercutio. I had great reservations about sector-specific price regulation and its impact on competition, and great reservations about the fitness of competition law enforcers to be price-setters. In the process of reflecting in the past weeks on the specific problems presented by both routes, and in light of some personal experience, my views have shifted somewhat.

Enthusiasts of competition law generally believe it can do good and can remedy identified abuses. Are there areas where using currently available competition law remedies will simply do more harm than good, areas where it should not go? Al Gore, a now fondly-remembered political leader, suggested that government should modestly set as a goal doing no harm. The unintended benefits for the collectivity of private enterprise, and strong scepticism about the economic prudence of government, had long ago already been voiced by Adam Smith. He wrote:

"Every individual necessarily labours to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. By preferring the support of domestic to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was no part of it. By pursuing his own interest he frequently promotes that of the society more effectively than when he really intends to promote it."²

* Queen's Counsel at the Scots Bar; Visiting Professor, University of Glasgow; White & Case, Brussels. Warm thanks are expressed to Jacob Borum, Sandra Keegan, Tom Winsor and others unnamed for their contribution to this paper. The opinions expressed are wholly personal.

¹ Romeo and Juliet, Act III, Scene 1. Shakespeare wrote "A plague o' both your houses", rather than the today more easily understood "on".

² Adam Smith, *The Wealth of Nations*, Book IV, chapter 2.

The celebrated Scot concluded that:

“kings and ministers ... are themselves always, and without any exception, the greatest spendthrifts in the society.”

We cannot assume the state or the civil service or regulatory bodies to be any better than anyone else at identifying what will be the consequences of regulatory initiatives. The conclusions of the well-informed and well-intentioned officials can be completely wrong. Putting matters differently, I have no confidence whatever that, when public bodies regulate, they will do so successfully. This is not to be discourteous; not to deny the inevitability of regulation; and not to preach for an unregulated Stone Age. It is a reflection of experience: agencies can make mistakes; agencies advance their own interests as well as the public interest; agencies rarely dissolve themselves; agencies are slow; agencies too rarely look back to consider whether their intervention was, in the light of experience, useful; agencies may be captured by the industry for whose oversight they are responsible, or they will at least (legitimately) hesitate to assume the industry's *status quo* is wrong.³

I note an echo of this in an opinion of Justice Brennan,⁴ who rejected the argument of a city that its power-generating activities, being in the public interest, were entitled to a kind of immunity from the antitrust laws.

“[The City's] argument that their goal is not private but public service is only partly correct. Every business enterprise, public or private, operates its business in furtherance of its own goals ... the economic choices made by public corporations in the conduct of their business affairs, designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the organization and its shareholders.”

The question of whether *ex ante* regulation is preferable to the unforeseeability of *ex post* competition law, with specific reference to the telecommunications sector, was debated in the 1998 Workshop in this series.⁵ On that occasion I voiced the proposition that, at least in the context of the regulation of the telecommunications markets, it was very doubtful that the talents, care and regulatory comprehensiveness deployed by national regulators were usefully being deployed. I feared that these elements were oriented towards *regulating* the market (honestly, conscientiously, carefully) rather than creating a *competitive* market. That there

³ There is a whole area of enquiry called Public Choice Theory on this theme. For those who want the joy of reading an elegantly literate paper by a master theorist, I commend Richard Posner's paper on “Theories of Economic Regulation”, NBER Working Paper no. W0041, Center for Economic Analysis of Human Behavior and Social Institutions, National Bureau of Economic Research Inc., New York (May 1974). Also published in 5(2) *Bell Journal of Economics and Management Science* 335 (1974).

⁴ *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 403 (1978).

⁵ See Claus-Dieter Ehlermann and Louisa Gosling, eds., *European Competition Law Annual 1998: Regulating Communications Markets*, Hart Publishing, 2000.

have been constraints imposed on such an unfortunate outcome is a credit to the design and functioning of the regulatory framework put into place in 2002.⁶

So, I begin with a stern disclaimer, noting the imperfections and inescapable unreliability of public entities when facing regulatory choices. By regulating too closely they can prevent or discourage the emergence of something useful, profitable or enjoyable. It should not be assumed that entrusting matters to a public sector-specific body will achieve the desired good result. At a minimum, this should be a matter of regular *ex post* verification.

The situations where price control may be a useful option could include an evidently permanent monopoly which is not capable of being duplicated. The permanent way underlying a railway network with track and signaling devices is one example: price controls may be the best means to decide how much train services operators should pay for running a certain service three times per weekday on a certain route. Use of runways at an airport might be another, geographically much narrower example. Restaurants or car parks or bank-tellers at an airport may need protection against a greedy lessor seeking to capitalize on limited airport space. I am sure there are other situations in which price-setting may be appropriate.

Does Article 82 offer a better chance of getting things right?

The presence of Article 82 in European law (and other competition laws around the world modeled on that of Europe) distinguishes our law from US law. It is directed against two kinds of abusive conduct, exploitative and exclusionary. Modern antitrust theory holds that we should focus on the latter and generally leave it to the marketplace to remedy the former. It holds that competition enforcers should not be minded to help individual competitors, and should not see themselves as horse race handicappers whose notion of perfect competition is a robustly contended race whose winner is uncertain. Competition authorities, on this theory, should stay away from “price gouging” cases. They should be very reluctant to take on pure

⁶ 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 (Framework Directive); Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive); Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive); Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive); Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services (Text with EEA relevance); Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector. These Directives, which constitute the present telecoms regulatory framework, are available at: http://ec.europa.eu/information_society/policy/ecommm/info_centre/documentation/legislation/index_en.htm. See also Commission Communication on the Review of the EU Regulatory Framework for electronic communications networks and services (COM(2006)334), 29 June 2006; Implementation of the Regulatory Framework in the Member States 2005 - 11th Report, 20 February 2006; and Implementation of the Regulatory Framework in the Member States – 10th Report, 2 December 2004. All pertinent documents are available at: http://ec.europa.eu/information_society/policy/ecommm/info_centre/documentation/communic_reports/index_en.htm.

excessive pricing cases. As long ago as 1977, Mario Siragusa⁷ was suggesting that Article 82 should be directed mainly to exclusionary conduct and might be limited, with respect to exploitative abuses, to prohibiting a narrow range of conduct. He suggested limiting cases of abuse not involving distortions of competition to those enumerated in Article 82(b). So the notion is by no means new. However, we have to accept that the judgments of the European Courts on dominance do not commonly read as if they had been drafted by Chicago School lawyers or economists.

The classic definition of dominance is:

“A position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers.”⁸

And such a firm is burdened by a duty:

“A finding that an undertaking has a dominant position ... simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a *special responsibility* not to allow its conduct to impair genuine undistorted competition in the common market.”⁹

So even if we feel that Article 82 ought principally to be applied to exclusionary abuses and ought not to be used as a price control instrument, the European Court of Justice has made it clear that the Article applies to exploitative abuses.

There is another reason not to eschew the pursuit of exploitative abuses. The enforcement of competition law in such countries as Kenya, Albania and Burkina Faso (all members of the International Competition Network) will necessarily involve the occasional checking of attempts to price-gouge in such areas as milk, taxis, bread and other basic staples. Indeed, the Greek Minister of Economy showed that he was not immune to the populist charms of competition law when he called for an enquiry into the supposedly suspicious fact that a number of banks increased their lending rates one after the other. This may be a kind of abuse of the competition law process, but I suppose we are better off with an enquiry being opened, conducted and closed than with ministerially imposed bank rates. So even though we may be rather embarrassed by old cases like *United Brands*,¹⁰ we cannot escape the fact that, from time to time, complaints about alleged exploitative pricing abuses have to be investigated.

⁷ Mario Siragusa, “Application of Article 86: tying arrangements, refusals to deal, discrimination and other cases of abuse”, in *Regulating the behaviour of monopolies and dominant undertakings in Community law*, 1977 Bruges Week, *Cahiers de Bruges*, N.S. 36, De Tempel, Bruges (1977).

⁸ Case 27/76, *United Brands v Commission* [1978] ECR 207, para. 65.

⁹ Case 322/81, *NV Nederlandsche Baden-Industrie Michelin v Commission* [1983] ECR 3461, para. 57 (emphasis supplied).

¹⁰ *Supra* note 8.

The Court's statement that dominant companies are under a "special responsibility" suggests that, by virtue of their position, they have to pursue more pro-competitive behaviour (presumably in order to make life a little easier for competitors) than non-dominant players are required to do. When teaching students, I have commonly used the simile of the large jungle animal being obliged to tread warily lest it eliminate smaller creatures. Eleanor Fox considers such an image to be outdated: I fear she may be over-optimistic. This brings us to the debate on whether the competition rules or sector-specific rules are better adapted to achieving effective remedies.

To state what is obvious but fundamental, competition law enforcement should condemn and remedy and possibly punish breaches of the law, either existing ones or newly-recognized ones. It is not intended in the first place to change how the marketplace functions, although that will normally be a consequence of its invocation. As a general principle, parties to infringing conduct are free to choose how they will terminate their infringements. Sector-specific regulation is intentionally interventionist, prescribing precisely what operators must do.

The strengths and weaknesses of national regulatory authorities

I begin by considering certain features of how competition principles have been applied in two particular marketplaces, telecommunications and railways. In the field of e-communications, technological developments and Commission legislative pressure have eliminated many aspects of the monopolies formerly held by incumbents, but the level of much new telecoms regulation remains maximalist rather than minimalist (and in my humble opinion not sufficiently de-regulatory).¹¹ More specifically and more alarmingly, the forthcoming Roaming Regulation,¹² which has been the subject of final agreement between the European Parliament and the Council, cannot be reconciled with the supposedly de-regulatory philosophy of the rest of EU telecoms legislation. I suggest below that populism has on this occasion corrupted sound lawmaking.

I further suggest that sector-specific regulatory bodies should not use the pricing tool to protect the public interest without first considering how other tools could enhance competitiveness. The regulator could compel the monopolist (or holder of significant market power) to practise a policy of *transparency of terms, conditions and pricing*; or a policy of *non-discrimination in respect of commercial terms and conditions offered*; or to apply *separation of cost accounting rules* which accurately reveal the weighting of the various cost elements collectively exploited, thereby facilitating a transparent evaluation of specific cost elements and pricing strategies.

¹¹ There have been admirable statements from, for example, then-Commissioner Liikanen: "I hope regulators in applying these rules will remember that this regulatory framework is about rolling back regulation and promoting competition. The framework must work in a way which supports and does not stifle emerging markets and services. It is now up to national regulators to abide by this Common Position and to provide a sound justification whenever they deviate from it." Press Release IP/04/528 of 23 April 2004, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/528&format=HTML&aged=1&language=EN&guiLanguage=en>. I am not sure how much Liikanen has been heeded.

¹² Regulation 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC, OJ L 171/32.

Unfortunately, a pricing obligation is seen as more effective and precise, while telecoms experience suggests that once established, obligations are not readily dismantled. To quote Richard Posner (no less!), “[b]ehind each scheme of regulation could be discerned a market imperfection the existence of which supplied a complete justification for some regulation assumed to operate effectively and without cost”.¹³ Yet “regulation is not positively correlated with the presence of external economies or diseconomies or with monopolistic market structure”.¹⁴

I submit that we should not make the assumption that society functions better due to sector-specific measures applied by national officials on a standing basis. The permanence of such measures is one of their greatest drawbacks. Regulatory authorities are usually staffed by technicians, engineers and others more familiar with the technology than they are familiar with the consequences of the technology in the market.¹⁵

The regulators of electronic communications for a country are always much more numerous and better-funded than the regulators of competition for the entire economy of the same country. This may mean that we have invested too cautiously in competition regulation, or that we are spending too much on e-communications regulation. The e-communications regulators may be over-regulating in the drive towards competition.

Maybe it would be possible to draw conclusions about the utility of this regime by examining the market share, or diminution of market share, of the incumbent, or by observing the number of competing suppliers for these services. For example, on 7 February 2006, the Commission adopted the “Communication on Market Reviews under the EU Regulatory Framework - Consolidating the internal market for electronic communications”,¹⁶ which

¹³ Posner, cited in footnote 3 above: 5(2) *Bell Journal of Economics and Management Science* 335, 336 (1974).

¹⁴ *Ibid.*

¹⁵ For an illuminating appreciation of what regulators examine in coming their decisions, see:

http://ec.europa.eu/information_society/policy/ecom/article_7/index_en.htm. See also:

<http://circa.europa.eu/Public/irc/infso/ecctf/library>.

¹⁶ Commission Communication on Market Reviews under the EU Regulatory Framework: Consolidating the internal market for electronic communications, COM(2006) 28 final, 6 February 2006:

“The regulatory framework for electronic communications set up in 2002 involved a major overhaul in regulatory approach, linking sector-specific regulation and competition law in a novel way. The previous, more mechanistic approach to regulation was replaced by an **economic approach where regulation is based on competition law principles**. It requires national regulators to conduct “market reviews” in order to determine whether a particular market should be regulated. Where a given market is susceptible to *ex ante* regulation and a regulator finds one or more undertakings to have significant market power or ‘SMP’ (equivalent to ‘dominance’ under competition law) on that market, it must impose appropriate regulation. Conversely, regulation must not be imposed, or existing regulation must be withdrawn, where no undertaking is found to have SMP. The market review process is subject to scrutiny by the Commission under the Community consultation mechanism established under Article 7 of the Framework Directive.” (Paragraph 1. - Introduction) (emphasis in original)

“Article 7 of the Framework Directive requires national regulatory authorities (NRAs) to notify the Commission and other NRAs of their findings as to market definition and SMP analysis and the regulatory obligations they intend to impose (or remove) (their ‘proposed measures’). The Commission then has one month in which to assess the notification of the proposed measures (the ‘phase one’ procedure). The vast majority of cases are handled within this one month period by a letter to the NRA concerned, which may contain Commission comments as to how the measures in question could be further improved. In cases where the Commission considers that, in terms of market definition or SMP analysis, the proposed measures would create a barrier to the single market or if it has serious doubts as to the measures’ compatibility with

reflects the growing competitiveness of many of the markets that were formerly the object of monopoly. However, I suspect that the return on investment of official diligence in the cause of de-regulating telecoms markets might seem disappointing.

Regulators commonly have a preoccupation with costing which does not encourage them to take a non-cost approach to particular problems. In past years, they devoted much skill to eliminating cross-subsidies from the costs claimed by the incumbent operator for different kinds of services in the bundle of universal service. It was not so obvious that they were well adapted to fine-tuning their area of operations. I diffidently suggest that regulators have a reluctance to find that effective competition will be sustainable in the absence of regulation, and that they prefer to arrange matters so as to place the incumbent at some disadvantage.

There is also a problem of lack of expertise (and autonomy) in national telecoms regulators. Unfortunately, very few are as able, conscientious and independent as Ofcom in the UK or its counterparts in the Republic of Ireland or in France. The Commission has commented on this in its annual reports on the implementation of the regulatory framework (see, e.g., the 10th, 11th and 12th Implementation Reports, starting with the 12th¹⁷). The Commission has expressed concern about the “independence and impartiality” of the Polish authority, and about State influence in Slovakia. The quality of the analysis of reports and the rigour of the conclusions of a well-resourced expert agency and those of a small, weak agency will vary greatly:

“NRAs

Independence

In general the NRAs have consolidated their authority and independence. Doubts have been expressed, however, in the case of Slovakia regarding separation of regulatory functions and control of State ownership of market players. A fresh concern regarding the independence and impartiality of the new NRA has arisen in Poland, moreover, in the light of the abolition of its predecessor and the scope of the government’s powers of dismissal. The extent of political influence over day-to-day regulatory decisions in some Member States is an issue calling for further examination. New entry and cross-border investment will only reach their full potential where the independence and impartiality of the regulator can be relied on by the market.

Market Reviews

The process of notification and consultation of the Commission and other NRAs under Article 7 of the Framework Directive is a key tool for ensuring that the benefits of consistent regulatory policy feed through to all European users.”¹⁸

Community law (and in particular the common policy objectives that all NRAs should pursue), it can conduct a more detailed investigation lasting a further two months (‘phase two’). Following this in-depth investigation, should its concerns be confirmed, the Commission may require the NRA to withdraw the draft measures (‘veto’ decision) and possibly resubmit the market analysis in question at a later stage.” (Paragraph 2. - Article 7 Procedures: overview)

¹⁷http://ec.europa.eu/information_society/policy/comm/implementation_enforcement/annualreports/12threport/index_en.htm.

¹⁸ Commission Communication on European electronic communications regulation and markets 2006 (12th report), COM(2007) 155, 29 March 2007. The Communications is available from the Commission’s website at;

The competition and sectoral rules governing the electronic communications, information technology and broadcasting fields are a perpetual source of change and controversy as technology evolves. Rules developed in the context of scarcity (limitations on the number of available broadcast channels, the number of local telephone providers, and other natural monopolies) ought to be re-examined in the context of technological abundance to see whether the objective underlying the rule requires its continued application. This argument has failed to find much favour with the Member States, the European Parliament or Commission: hence the new TV Without Frontiers Directive. Many academic and commercial commentators debate the topic, most notably in internet space.¹⁹

In the realm of broadcasting we may distinguish between two kinds of intervention, namely, economic and cultural. Economic intervention is being gradually rolled back by Community law. The cultural specificity of public service broadcasting and audiovisual regulation at EU level (I speak as someone who from childhood has been informed, entertained and formed in different ways by the BBC, an extraordinary public service broadcaster) is a topic with which some Member States and regulators have difficulty in grappling. But that is for another day.

Regulatory agencies try to apply their abilities to settling precisely-defined controversies, such as the terms on which an incumbent must provide subscriber information to the publisher of a rival telephone directory. They are familiar with the market and very ready to decide individual problems with confidence. I believe they are approaching their roles without a consistent view of the pro-competitive environment which must be the overall goal.

When we look at the decisions taken by the 27 national regulators in telecoms, it would be my submission that they have a tendency to resort to pricing remedies as the first modality rather than as the last, reversing the apparent intent behind the Community legislation. Annex IV to the Commission's Communication on Article 7 gives an overview of the many remedies imposed around Europe.²⁰ I submit that there is a preponderance of remedies relying on the full suite of possibilities including price controls, rather than less intrusive remedies.

My concern is that, by failing to discern clearly the competitive trends in telecoms markets while faithfully trying to apply at local level to local controversies very detailed cost-driven solutions to fundamental or minor issues of competition, the National Regulatory Authorities, in the belief they are doing the right thing, are imposing their own rigidities and inflexibilities on a national basis. If we look at some of the published telecoms decisions,²¹

http://ec.europa.eu/information_society/policy/ecom/implementation_enforcement/annualreports/12threport/index_en.htm.

¹⁹ See, for example, the long list of public and private bodies that submitted comments in response to the Consultation on the European Commission's 'Communication on the Review of the EU Regulatory Framework for electronic communications networks and services' (adopted in June 2006): http://ec.europa.eu/information_society/policy/ecom/info_centre/documentation/public_consult/review_2/index_en.htm. See also the external expert studies in that respect for the European Commission: http://ec.europa.eu/information_society/policy/ecom/info_centre/documentation/studies_ext_consult/index_en.htm#2006.

²⁰ Commission Communication on market reviews under the EU Regulatory Framework consolidating the internal market for electronic communications, COM(2006) 28 final, 6 February 2006. This is a Communication under Article 7 of the Framework Directive, cited *supra* note 6.

²¹ See <http://circa.europa.eu/Public/irc/info/ecctf/library>.

using the market data that is published with the decisions, we may conclude that regulators have a bias towards regulation (over-regulation?) via price remedies rather than imposing the lightest possible obligation.

I further take the liberty of suggesting that the Commission itself is not immune to the temptation of controlling rather than liberating. Where national regulators consult the Commission, there may be a tendency within the Commission to recommend action or inquiry rather than recommending or demanding inaction. Thus, DG Competition may say “do not bless this practice”, when DG Information Society says “no problem”. To be fair, there are also cases where DG Competition says “do not regulate”,²² and officials correctly emphasize that the trend is clearly in the direction of discouraging regulation. But as with all tides, there are ebbs and flows.

There appear to have been at least a few cases where there were differing views, as the Commission’s comments on these cases seem to indicate that more than one opinion could be expressed.²³ Circumstances could arise where, for a number of reasons, the Commission’s services could be driven by different objectives. For example, DG Competition may be handling a competition enforcement action on a particular market that has been notified to the Commission for approval under Article 7 of the Framework Directive.²⁴ DG Competition officials will perfectly naturally wish to ensure that the outcome of the *ex ante* case is not at odds with their own position in the *ex post* case, regardless of the merits of the *ex ante* case. Another example could be where an intervention might be difficult to justify on the basis of competition law but where such an intervention might nonetheless be desirable in terms of enforcement goals. This might be the case for a joint dominance problem, where the burden of proof for *ex ante* intervention is thought to be not so high as under *ex post* interventions.²⁵

The relevance to my proposition of this phenomenon is that competition enforcement is not a neutral, abstract discipline. It is of course shaped by policy agendas. I will now describe a recent regrettable example where an established philosophy or policy was disregarded for

²² See http://ec.europa.eu/information_society/newsroom/cf/itemdetail.cfm?item_id=2190, news report of 29 September 2005, where the Commission announced that:

“The 52 alternative telephone network operators providing “call termination” services (meaning services operators buy from each other to enable their customers to make calls to different networks) within Germany have significant market power on their own individual networks, as does Deutsche Telekom AG, confirms the European Commission in a decision under Article 7 of the EU framework on electronic communications today.

The German regulator, Bundesnetzagentur (BNetzA), recently carried out a fresh market analysis, after the Commission found in May 2005 that the earlier BNetzA (then RegTP) analysis lacked evidence of the absence of significant market power of the alternative network operators. In the new notification, BNetzA took into account the arguments made by the Commission in the veto decision, in particular with respect to the effects of regulation on the incumbent.

As a result, BNetzA will regulate the termination market for fixed calls.”

²³ The Dutch wholesale broadband access letter was one such example (available at: http://circa.europa.eu/Public/irc/infso/ecctf/library?l=/nederland/registeredsnotificaties/nl20050281/files/serve_e_npdf/EN_1.0_&a=d), whilst the Spanish mobile communications letter (currently under appeal) is another (http://circa.europa.eu/Public/irc/infso/ecctf/library?l=/espa/registeredsnotificaties/es20050330/final_enpdf_1_5/EN_1.0_&a=d).

²⁴ See *supra* note 6.

²⁵ Once a firm or firms have been identified as dominant, there is no need to justify an intervention under the *ex ante* rules, where issues of abuse or consumer harm should not arise.

political ends. As of the beginning of June 2007, the European Commission, for the first time in fifty years, set the retail price of a commonly-used service.

The Regrettable Example of the Roaming Story: Populism and Pricing Remedies

In 1999 it was agreed that telecommunications price controls should gradually fade away, leaving market forces to take over.²⁶ But in the summer of 2007, we have heard that, in a new political “breakthrough”, the Commission and European Parliament have tackled the problem of “excessive” roaming charges. Who could be opposed to such a happy result? I submit that the intelligent consumer should have doubts, and the student of Community law should share those doubts.

Mobile telephone operators charge customers for originating calls but not for receiving calls in their own country in Europe. (Landline operators normally apply no charge for receiving calls.) “Roaming charges” apply when the customer goes to another Member State and makes or receives calls there. The consumer is charged not only for each call so made but also for all calls received. The charges imposed by mobile operators for providing these roaming services are considerably higher than the charges for “normal” domestic calls. For those wishing to check charges from Florence to home, I recommend “Europe’s Information Society Thematic Portal: Sample post-paid voice tariffs for travellers from Italy”.²⁷ The roaming charges have been a source of considerable profit for the mobile telephone companies.

Every mobile operator follows a similar policy. There has been a lengthy competition enquiry into possible price coordination on roaming charges. Indeed, there were raids on most of the big mobile telephone operators in 2001 in search of cartel behaviour, and then there were enquiries as to domestic dominance and abuse. However, despite a lot of enquiry, it appears that the Commission has found no evidence. So why should mobile companies not be free individually and unilaterally to impose a higher tariff for certain services – as a reflection of commercially intelligent, self-regarding pricing strategies that take account of consumer demand and available alternative services? Read what the European Commission says about its breakthrough:

“What has the Commission done so far?”

In 1999, the Commission launched a wide antitrust sector inquiry into the level of retail and wholesale roaming prices in Europe because of concerns that they were excessive. This inquiry led to the opening of separate antitrust proceedings under EC Treaty rules on abuse of monopoly power (Article 82) against mobile operators in Germany and in the UK for excessive wholesale international roaming tariffs. These proceedings are still under way.

...

²⁶ See the Commission’s report of the 1999 Review of the then-Telecoms Package, available at: <http://europa.eu.int/ISPO/infosoc/telecompolicy/review99/com2000-239en.htm> (in particular, section 3, “Access and Interconnection”).

²⁷ See http://ec.europa.eu/information_society/activities/roaming/index_en.htm.

An update of the website (http://europa.eu.int:information_society/roaming) in March 2006 showed that not much has happened since October 2005. In some cases prices even went up.

...

The European Parliament voiced concerns and asked the Commission to develop new initiatives in order to reduce the high costs of cross-border telephony. It was against a background of complete lack of industry-drive progress over many years, that the Commission decided that action was required.

...

Operators have offered reductions in the form of various packages, but as these are too little, too late, the Commission tabled on 12 July 2006 an EU regulation which will cut the cost of using your mobile abroad within the EU. The proposed EU regulation would not fix an ideal price for roaming charges, but would ensure that mobile roaming charges are not unjustifiably higher than the charges at home.”²⁸

If this sounds nice, let us recollect some law. *Ex ante* burdens in the telecommunications sector can be placed only on companies that have been found to have significant market power.²⁹ In order to have significant market power in this context, a company must be deemed to enjoy dominance within the meaning of Article 82 read in conjunction with the Framework Directive.³⁰ In addition, three clear conditions have to be met: first, the market must be one that tends over time not to produce competitive outcomes; furthermore, it must be a market that exhibits high barriers to entry; and third, if the market is found to be uncompetitive, an intervention on the basis of competition law must be deemed to be inadequate.³¹

When we look at the outcomes of national regulators’ examinations of the market for roaming charges, we find that not one market player was found to have a dominant position. So *ex ante* obligations could not be imposed on mobile operators compatibly with the philosophy of the electronic communications regulatory framework. The Roaming Regulation itself³² produces some charming words incapable of being fitted comfortably into a competition law analysis. With my own comments interspersed, I quote:

“... Although some operators have recently introduced tariff schemes that offer customers more favourable conditions and lower prices, there is still evidence that the

²⁸ Excerpts from a European Commission Information Society and Media Fact Sheet 59 (“Switch on to a Eurotariff”) (July 2006).

²⁹ Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (“SMP Guidelines”), 2002 OJ C165/6, at para 5. See also Articles 14-16 of the Framework Directive 2002/21/EC, *supra* note 6.

³⁰ SMP Guidelines, cited in previous footnote.

³¹ 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, 2003 OJ L114/45, at para. 9. See also Articles 14-16 of the Framework Directive 2002/21/EC, *supra* note 6.

³² Regulation (EC) No 717/2007 of the European Parliament and of the Council of June 27 2007 on roaming on public mobile networks within the Community and amending Directive 2002/21/EC [on a common regulatory framework for electronic communications networks and services], 2007 OJ L171/32. Available at: http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l_171/l_17120070629en00320040.pdf.

relationship between costs and prices is not such as would prevail in fully competitive markets.”³³

“The creation of a European social, educational and cultural area based on the mobility of individuals should facilitate communications between people in order to build a real ‘Europe for Citizens’.”³⁴

[This is central planning law, not competition law!]

“This Regulation is not an isolated measure, but complements and supports [*in ways not explained or demonstrated*], insofar as Community-wide roaming is concerned, the rules provided for by the 2002 regulatory framework for electronic communications. That framework has not provided national regulatory authorities with sufficient tools to take effective and decisive action with regard to the pricing of roaming services within the Community, and thus fails to ensure the smooth functioning of the internal market for roaming services. This Regulation is an appropriate means of correcting this situation.”³⁵

[I respectfully disagree: the premise is that the market for roaming services is not competitive because there is excessive pricing; if there is excessive pricing but no one company is dominant, and we still see no competitive outcome, then perhaps there is an Article 81 problem. But DG Competition can find no such problem. This suggests that there is a lack of jurisdiction to use either Article 81 or Article 82.]

“The Eurotariff should be set at a level which guarantees a sufficient margin to operators and encourages competitive roaming offers at lower rates. Providers should actively offer a Eurotariff to all their roaming customers, free of charge, and in a clear and transparent manner.”³⁶

[Price-fixing for crowd-pleasing, I submit. Since when does the Commission have the right to set prices in an apparently competitive market? If the market is uncompetitive due to dominance or due to concertation, let action be taken.]

We are not told why the Commission considered that regulation was appropriate, proportionate and fulfilled the standards of better regulation (that is, only regulate when absolutely necessary). We are told that roaming prices were “excessive” even though all NRAs that examined their markets found no dominance.³⁷ I regret to have to suggest that this regulatory intervention was a case of opportunistic populism in the guise of consumer protection.

I have no professional interest in this particular battle, other than as a disinterested observer who believes in a more robust role for market forces in the regulation of market outcomes. I expect my family’s mobile telephone bills will slightly increase as prices *domestically* will go up. Roaming charges presumably cross-subsidized domestic calls. So the

³³ Regulation 717/2007, *supra* note 12, paragraph 1.

³⁴ *Ibid.*, paragraph 2.

³⁵ *Ibid.*, paragraph 4.

³⁶ *Ibid.*, paragraph 18.

³⁷ On 19 July 2007, it was announced that DG Competition had decided to close proceedings against Vodafone, O2 and T-Mobile, which had been accused of charging excessive prices for wholesale roaming charges. See <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1113&format=HTML&aged=0&language=EN&guiLanguage=en>. One may regard this closure as confirming the weakness of the Article 82 cases.

(maybe more prosperous) customers who travel abroad paid a bit more and the (maybe less prosperous) domestic customer paid a bit less.³⁸ The result of this triumph of the political process on roaming will presumably be to raise the overall costs for mobile communications, notably for poorer EU citizens who do not travel to other Member States as often as Members of the European Parliament.

I suspect that DG Competition tried to voice reservations about this new policy, and that its voice was disregarded. As noted above, political policy can override wise competition policy. As Chancellor Merkel observed:

“From this summer onwards, mobile telephone customers will already have the benefit of permanently reduced roaming charges. [...] To me, this is a good example of a Europe which achieves results, a Union whose action confers practical benefits on its citizens.

Sometimes technical legislation is hard for people to understand [...] but anyone who has one of these in their pockets [she took out a mobile phone] can grasp the benefits of this regulation.”³⁹

I submit that we may see in this episode a bad precedent for the remedying of supposed competition problems. The *ex ante* mechanism established to permit regulation in the event of a market failure indicated that no intervention was warranted; but thereafter another mechanism was invoked. The process was politicized, with copious use of the media to dramatize the debate. The Regulation was adopted despite legislative provisions to the contrary. It was intended to change the result which market forces were delivering. And the consumer advantages of the supposed remedy (cheaper prices for those who most need cheaper prices) are by no means evident.

The relevance for this gathering is that regulators may intend to do the right thing but do not always do so in the face of political pressure. And that is true at the stage of remedies as well as earlier in the proceedings.

³⁸ Consider another example of “differential pricing”. Restaurants commonly charge less for lunch, when everyone must eat, than for dinner when a smaller number choose to eat. The food is often the same. Those who eat in the evening may be thought better able to pay than those who eat out at noon. Restaurants individually lack significant market power but they very likely observe each other’s pricing patterns with satisfaction. Should we be shocked and try to correct matters by adopting a unique legislative initiative, or even by applying the competition rules? I suggest not. Among other considerations of consumer welfare, if the price of dinner is forced down, the price of lunch will very likely rise.

³⁹ http://www.europarl.europa.eu/news/expert/infopress_page/008-8367-178-06-26-901-20070626IPR08366-27-06-2007-2007-true/default_en.htm. For further references to the saga, see the Commission’s press releases: “International Mobile Roaming: how will the new “Eurotariffs” reduce the cost of using a mobile phone in the European Union?”, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/251&format=HTML&aged=0&language=EN&guiLanguage=en>, and “EU Roaming Regulation enters into force across all 27 Member States on 30 June”, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/870&format=HTML&aged=0&language=EN&guiLanguage=en>.

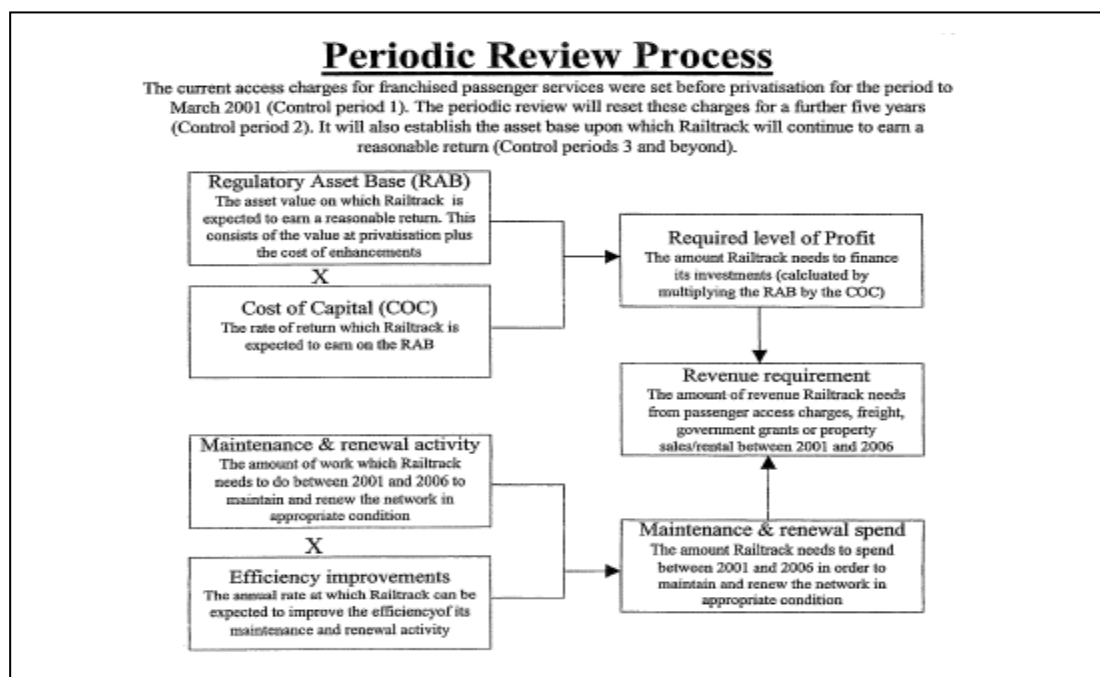
An alternative regulated sector: railways

In order to have a basis for comparison from a completely different industry, let us consider the railways in the UK. Some sixty years ago, the various UK railway companies were nationalized into a vast industrial empire run by the British Railways Board, which employed, managed or coordinated transport police, luxury hotels, ferries, steelmaking and engineering, as well as owning track, rolling stock and locomotives. The railways were spared the rigour of privatization during the Thatcher years (although the size of the empire was trimmed), and it was only in 1992 (after Mrs Thatcher had passed from office) that the railways themselves were to be transferred to private hands. Under the 1993 Railways Act, what used to be “British Rail” was broken up into a large number of separate, newly-created operations. The track itself as well as the signals and the stations went to Railtrack, with the maintenance of the track and signals going to British Rail Infrastructure Services. The Office of the Rail Regulator has the role of supervising competition-related aspects of the newly constructed rail industry. The Rail Regulator was an economic regulator (questions of safety were not then part of the Regulator’s remit), with powers to supervise the contractual terms under which access could be granted to the track, for example. The UK regime is endowed (in railway matters as well as in others) with large resources and great technical expertise. In other Member States, rail regulatory authorities may not be independent or may be merely advisors of a minister of transport; making reliable and well-founded decisions would be very challenging for a less well-funded regulator.

The complex history of the privatization and regulation of the UK freight and passenger railway industry is not for this paper. Relevant for our purpose is that the Office of the Rail Regulator had both *ex ante* price control powers and *ex post* competition powers, which allowed it to react to complaints. I asked Tom Winsor, who was then Rail Regulator, to compare his Office’s experiences in using these two kinds of power. He felt that his *ex ante* powers were highly preferable to his competition law enforcement powers. This conclusion deserves some explanation. The Rail Regulator was under a duty when licensing under the Railway Act 1993 to consider whether to proceed under the Competition Act 1998. Although the competition powers looked strong, and although the detailed statutory instruments had been prepared by masters in the art of drafting from the Rail Regulator’s point of view, they led inexorably into an arena dominated by clever lawyering which seemed never to reach a conclusion on the merits. For example, in 2001, Enron (then in its heyday) complained that the freight operator EWS had abused its dominant position in charging for the rail transport of petrochemicals. That investigation consumed an inordinate amount of time and legal fees, and was finally concluded in November 2006. So the only completed competition case in the UK railway sector pursuant to the new legislative regime consumed more than five years and involved platoons of lawyers and economists, arguments over access to the file and the whole procedural apparatus of courteous-sounding combat which characterizes British public sector enquiries into weighty matters.

By contrast, the regulatory regime established in the rail sector involved a large element of price control which worked successfully. This was done via access contracts, unlike the telecoms or water industries. (The Regulator could also establish the terms of

access to the network for dependent users. For example, particular stations were leased to the train operator which made the most use of the station; it was then necessary to regulate what and how that facility owner charged the tenant.) There was a very wide margin of appreciation for the regulator in establishing and enforcing licence terms. Thanks to Tom Winsor, I include below a chart (in the public domain) showing how access charges for railway services were established.



The table demonstrates that the criteria were understandable and the outcome of the calculations was a known and transparently-arrived-at figure. Fare control was not left to the Rail Regulator, except in the case of open access operators⁴⁰ who were able to gain access to the network without elaborate government approval (although in practice no fares were prescribed in this context). The Department of Transport regulators do have power to set standard class peak hour tickets. (There was a complaint about Virgin Trains, as to London – Manchester fares, but it was concluded that Virgin was not dominant.) Car parks and their charges were the subject of other complaints: local monopolies are not infrequently the occasion of controversy.

Thus, the Regulator could consider the condition and capacity of the network, the likely intensity of use of the network and the works necessary to improve performance, and it then could set charges for access to the rail network. The train operators were not opposed to a pricing mechanism. They needed to know what they would have to pay and needed to have rapid solutions to problems, including very specific questions about unreasonable charges.

⁴⁰ See Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways, 1991 OJ L237/25, requiring all EU Member States to separate the management of railway operation and infrastructure from the provision of railway transport services, the idea being that the track operator would charge the train operator a transparent fee to run its trains over the network, and anyone else could also run trains under the same conditions (i.e., open access).

The Railways Act 1993 provided that every contract between Railtrack and the train operators for the use of the network must be approved by the Rail Regulator. Only in quite trivial cases was there an exemption. These rules were made more rigorous by a so-called Work Code with detailed rules about liability, quality of service and the like. The Regulator prescribed detailed pricing rules.⁴¹ The quality of the stewardship by Railtrack of its responsibilities was closely supervised and train operators were empowered to seek prompt, adequate and effective remedies. So the train operators, some of whom might have been nervous about making a competition law complaint, favoured the transparency, reliability and predictability of the regulatory regime over the competition regime. As already noted, the competition route was slow, painful, lawyer-dominated, and had all the formal apparatus of modern litigious combat. The regulatory regime was thorough, predictable, quite swift and reliable. So it is not the case that a pricing regime will necessarily be capricious, rigid or unfair. I find this admittedly anecdotal example to be instructive.

I therefore come to the question of whether price regulation can be better than the use of the competition rules.

Regulation, antitrust and consumer protection legislation

The purpose of sector-specific regulation for present purposes is to shape the marketplace in such a way that competition can develop and become sustainable. Regulation is an *ex ante* process, aiming at dictating conduct and commercial behaviour, as a substitute for real competition until the market can work properly. Competition law aims at forbidding and punishing anticompetitive conduct. It applies *ex post* (except of course for merger control).

Article 82 should condemn specific acts deemed abusive that have occurred in the past. Regulation imposes a particular course of conduct on an undertaking (dominant or non-dominant) on the theory that this will ensure the better development of competition. The reality of experience is that regulation becomes permanent, and that regulators may inadvertently handicap the market forces that they are trying to release. And as competition law is used in more novel and complex fields, it becomes difficult to say whether an intervention is meant to punish an identified abuse, or whether it aims instead to adjust the manner in which a market functions. So the *ex ante* and *ex post* regimes can overlap.

Consumer protection legislation should imply that customers are sufficiently informed to take decisions about competing offers based on knowledge and value for money, and thereby to obtain the benefits promised by unrestricted competition. Free competition maximizes consumer welfare. Consumer protection legislation aims, among other things, at safeguarding interests that competition alone would not ensure, and at removing the asymmetry of information and of bargaining power between producers and consumers.

⁴¹ One notable difference between the rail and telecoms sectors relevant to the appropriateness of price regulation is the “replicability” of the regulated asset. Price controls have a particular ability to affect the “make or use” / “build or buy” decisions of competing firms where replication of the asset is possible. Should a new telecoms firm rent services over the infrastructure of the incumbent operator, or should it build its own infrastructure? This will depend crucially on traffic volumes and the price charged for renting as against the cost of building its own infrastructure. Where the underlying asset is plainly not replicable, as in the case of a rail network, errors in setting the price would have less serious consequences.

Consumer legislation tends to be contract-focused. It focuses on the rights of the consumer in connection with the purchase of a product or service. I submit that Community rules on consumer protection appear to be quite fragmented. It is not easy to see overarching big principles.

“The concern for uniformity and effectiveness of Directive 93/13 in procedural matters as opposed to the lack of interest as to the substantive definition of fairness may suggest that the ECJ does not see a need for uniformity in the substantive concepts of the Directive; this is equivalent to stating that ... the ECJ does not see Directive 93/13 as a measure of market integration, but simply as one of consumer protection: in order to ensure consumer protection, effectiveness and uniformity of remedies are far more important than the uniformity of substantive concepts.”⁴²

All three types of regulatory measures are meant to maximize consumer welfare. However, whereas *consumer protection legislation* focuses on the individual consumer and contractual rights, *competition law* and sector-specific *regulation* generally focus on enhancing consumer welfare higher up the chain by ensuring that the market is characterized by healthy competition.⁴³ Conventional Commission logic is that, as long as there is competition, benefits such as lower prices and better products will flow down to the consumer automatically. Although this is often the case, it is not always so. The Commission has been accused of focusing on competitors (i.e., maintaining a certain number of competitors in the market) without convincingly showing that its intervention *actually* benefits the consumers. Recently, the Commission has indicated that consumer welfare will play a more prominent role in Article 82 enforcement policy.⁴⁴

The complainant has a very important role in driving forward new Article 82 cases. It must often be hard for Commission officials to be sure whether they are helping complaining competitors (known, bleeding, lamenting, well-resourced) or victim customers/consumers (unknown, probably unaware of the controversy, not easy to poll, largely silent). This leads to the question of the adequacy of pricing remedies under Article 82.

Pricing remedies in previous Article 82 cases

The Commission has established price-related remedies in a number of refusal-to-supply cases. In *Zoja/CSC - ICI* (“*Commercial Solvents*”),⁴⁵ the Commission imposed two different obligations on Commercial Solvents (“CSC”) and Istituto Chemioterapico Italiano (“ICI”) when ordering them to end their infringement of Article 82 EC:

⁴² Paolisa Nebbia, “Unfair Contract Terms in European Law: a Study in Comparative and EC Law”, in *Modern Studies in European Law*, Volume 15, Hart Publishing 2007, p. 171.

⁴³ Sector-specific legislation is not without its own specific consumer protection measures. See, for example, Chapters II and IV of Directive 2002/22/EC (the Universal Service Directive), cited *supra* note 6.

⁴⁴ See Press Release IP/05/162 of 19 December 2005: “The Commission wants to concentrate its resources on those anti-competitive practices that are most likely to cause harm to consumers. [...] The proposals made in the Discussion Paper on Article 82 would in a similar way imply a strong focus on those abuses of dominant positions most likely to harm consumers.”

⁴⁵ 1972 OJ L299/51.

- One obligation was precise and could be implemented immediately. This was the obligation to supply products to satisfy Zoja's most urgent needs without further delay. Article 2 ordered CSC/ICI to "immediately furnish 60,000 kg of nitropropane or 30,000 kg of aminobutanol at a price not exceeding the maximum price they charged for these two products".
- The second obligation, less precise, was the obligation to supply Zoja on a long-term basis. Article 2 of the Decision ordered CSC/ICI to "submit for the approval of the Commission, within a period of two months from the notification of the present decision, proposals relevant to the subsequent supply of Zoja".

This same procedure was applied in *Hugin/Liptons*,⁴⁶ concerning a refusal to supply spare parts for Hugin cash registers to Liptons. The Commission noted in its Decision that "[t]he price for such spare parts should be an appropriate market price between that which is currently charged by Hugin AB to Hugin UK and that which is currently charged by Hugin UK to end users in the United Kingdom and which allows to Hugin UK an adequate margin of profit and to Liptons a reasonable trade discount". Article 3 of the Decision then required Hugin to submit proposals relating to the resumption of supplies of spare parts for Hugin cash registers to Liptons.

In *Magill TV Guide/ITP, BBC and RTE* ("*Magill*"),⁴⁷ the Commission ordered ITP, BBC and RTE to supply each other and third parties, on request and on a non-discriminatory basis, their individual advance weekly programme listings, and to permit reproduction of those listings by such parties.

"ITP, BBC and RTE shall bring the infringements as mentioned in Article 1 to an end forthwith by supplying each other and third parties on request and on a non-discriminatory basis with their individual advance weekly programme listings and by permitting reproduction of those listings by such parties. This requirement does not extend to information in addition to the listings themselves, as defined in this Decision. *If they choose to supply and permit reproduction of the listings by means of licences, any royalties requested by ITP, BBC and RTE should be reasonable.* Moreover, ITP, BBC and RTE may include in any licences granted to third parties such terms as are considered necessary to ensure comprehensive high quality coverage of all their programmes, including those of minority and/or regional appeal, and those of cultural, historical and educational significance. The parties are therefore required, within two months from the date of notification of this Decision, to submit proposals for approval by the Commission of the terms upon which they consider third parties should be permitted to publish the advance weekly programme listings which are the subject of this Decision."⁴⁸ (emphasis added)

⁴⁶ 1978 OJ L22/23.

⁴⁷ 1989 OJ L78/43.

⁴⁸ Article 2 of the Commission's Decision in Case IV/31.851 – *Magill TV Guide/ITP, BBC and RTE*, 1989 OJ L78/43.

In *NDC Health/IMS Health: Interim Measures* (“*IMS Health*”),⁴⁹ the Commission ordered IMS Health to grant a licence to undertakings wishing to use the 1860 brick structure (a map of Germany drawn up for the convenience of the pharmaceutical industry). In Recital 215 of its Decision, the Commission noted that it was important to ensure that any fee charged by IMS Health was “reasonable”, and stated: “The order therefore provides for any royalties to be paid for these licences to be determined by mutual agreement between IMS and the party requesting the licence or failing that, by a Decision of the Commission on the basis of a determination by one or more independent experts.” The Commission instructed IMS Health to seek an agreement on the “reasonable” royalties to apply, failing which the royalties would be set by a further Commission Decision.

The *Commercial Solvents*, *Hugin/Liptons*, *Magill* and *IMS Health* Decisions therefore show that, where a Commission Decision imposes an imprecise obligation (such as an obligation to supply something on “reasonable” terms), the Decision sets up a procedure to translate the imprecise obligation imposed by the decision into a more specific obligation. Article 5 of the 2004 *Microsoft* Decision⁵⁰ follows the same approach.

In *Magill* and *IMS Health*, the question of reasonable royalties in effect became unimportant, as in each case the Commission Decision was suspended by interim measures. My impression is that pricing problems were not crucial in *Commercial Solvents* or *Hugin/Lipton* (the latter of which was overturned on appeal⁵¹).

Excessive pricing cases

Although even the earliest drafts of what became Articles 85 and 86 (now Articles 81 and 82) of the Treaty contemplated condemnation of the exploitation by dominant players of abusive price demands,⁵² examples of the interpretation of the concept and the prosecution of excessive pricing cases have been rare. *General Motors Continental*⁵³ and *British Leyland*⁵⁴ involved demanding high prices for the issuance of a certificate whose denial had the effect of delaying the registration of a car imported from another Member State, a special case. In *United Brands*, we heard that “charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied ... is an abuse”.⁵⁵ This method of comparing costs and prices has been used in other cases, such as *Deutsche Post*,⁵⁶ perhaps more confidently than in *United Brands*, an early case where the Article 82 analysis was perhaps tainted by the zeal to achieve market integration.

⁴⁹ 2002 OJ L59/18.

⁵⁰ Available at: <http://ec.europa.eu/comm/competition/antitrust/cases/decisions/37792/en.pdf>. On appeal: Case T-201/04, not yet decided.

⁵¹ Case 22/78, *Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission* [1979] ECR 1869.

⁵² See Ian Forrester, “The Modernisation of EC Antitrust Policy: Compatibility, Efficiency, Legal Security”, in Claus-Dieter Ehlermann and Isabela Atanasiu, *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy*, Hart Publishing 2001, p. 115.

⁵³ Case 26/75, *General Motors Continental NV v Commission* [1975] ECR 1367.

⁵⁴ Case 226/84, *British Leyland plc v Commission* [1986] ECR 3263.

⁵⁵ Case 27/76, *United Brands Co & United Brands Continental BV v Commission* [1978] ECR 207, para. 250.

⁵⁶ Commission Decision 2001/892, *Deutsche Post AG* OJ 2001 L331/40.

Two very interesting cases arrived as references from national courts. First there was *Bodson v Pompes Funèbres*,⁵⁷ concerning the grant by a municipality of exclusivity over certain funeral services. In that case, in order to determine the reasonableness of the price the Court envisaged a comparison by the national court between prices charged where concessions had been granted and prices charged in other municipalities where there was open competition. Shortly thereafter the Court decided *Lucazeau v SACEM*,⁵⁸ where a significant difference in price between Member States was said to be an indication of an abuse which the enterprise should be in a position to justify on the basis of objective differences between the Member States concerned.

It is beyond the scope of this paper to give any comprehensive account of the competition cases on excessive pricing. I do submit, however, that the authorities are few and not easy to assemble into a single coherent body of law. It is very difficult to predict how a modern excessive pricing case could be brought in the abstract, without very helpful and pertinent comparative factors. That is not a criticism but rather a recognition of the very great difficulty a competition agency must experience in confronting conflicting opinions on whether a price is fair or unfair. Hence my uneasiness about the likely consequences of using a competition authority to intuit the appropriate level of a price.

Microsoft: a painful example of disagreement over pricing as a remedy

I have personal knowledge of a celebrated controversy concerning a pricing remedy in an Article 82 case, *Microsoft*.⁵⁹ The judgment of the Grand Chamber of the Court of First Instance in Case T-201/04 will be announced in the near future, and it will no doubt be long and interesting. The merits of the case will be argued for some years to come, in this venue and others. I have no wish to venture into those merits, other than to note some of the pricing and remedy difficulties encountered, as a source of guidance on pricing remedies.

On 24 March 2004, the Commission issued a decision condemning Microsoft for having unlawfully exploited its near monopoly in the market for PC operating systems. The Commission imposed the highest fine ever imposed on a single company: 497 million euros.⁶⁰

According to the Commission, Microsoft had abused its dominant position on the market for PC operating systems in two ways. First, by refusing to license certain “interoperability” technology to its competitors so they could develop “work group server” operating systems which would compete directly with Microsoft’s server operating systems (commonly called the “interoperability” or “refusal to supply” infringement). The infringement lay in not acceding in September 1998 to a request for technical divulgation from a competitor. Second, by bundling together two products which supposedly ought to have been offered separately, namely the PC operating system and an enhanced media player, Windows Media Player (commonly called the “product integration” or “tying” infringement).

⁵⁷ Case 30/87, *Bodson v Pompes Funèbres* [1988] ECR 2479.

⁵⁸ Joined Cases 110, 241 and 242/88, *Lucazeau v SACEM* [1989] ECR 2811.

⁵⁹ Case T-201/04, *Microsoft v Commission*, judgment pending.

⁶⁰ See *supra* note 53.

The infringement lay in bringing out an upgraded version of Windows that incorporated video streaming without offering a version of Windows that did not include that enhancement.

As a remedy for the “tying” infringement, the company was ordered to prepare a special version of the Windows operating system without the functionality referred to as Windows Media Player, and then to launch it in commerce. This task was accomplished without a pricing controversy: the Commission had confirmed that Microsoft could offer the fully functioning version at the same price as the version without Windows Media Player.

As to the interoperability abuse, Microsoft was obliged to draw up a “complete and accurate specification” of certain technology. This description of the characteristics of how Microsoft’s server operating systems provided certain services to other computers in a network would then be licensed to other companies who would write their own software in accordance with the specification. The goal of the licence was to endow competitors with the capacity to build software which could serve as a “drop-in replacement”, a perfectly operational alternative to Microsoft’s server operating system. The company entrusted the drawing up of the specification to several hundred engineers, many of whom had retired after creating the software in the early 1990s. There have been disagreements, irrelevant for present purposes, about the scope of the specification to be prepared and about what format should be adopted for the specification.

As to the terms of disclosure, Article 5 of the Decision states:

“(a) Microsoft Corporation shall, within 120 days of the date of notification of this Decision, make the Interoperability Information available to any undertaking having an interest in developing and distributing work group server operating system products and shall, on *reasonable and non-discriminatory terms*, allow the use of the Interoperability Information by such undertakings for the purpose of developing and distributing work group server operating system products;” (emphasis supplied)

Regarding the level of royalty, the Decision states:

“The requirement for the terms imposed by Microsoft to be reasonable and non-discriminatory applies in particular: [...] (ii) to any remuneration that Microsoft might charge for supply; such a remuneration should not reflect the ‘strategic value’ stemming from Microsoft’s market power...”⁶¹

These broad notions were then amplified by so-called “pricing principles” to which Microsoft acceded upon the Commission’s request in June 2005. The pricing principles were intended for use by the Trustee in resolving any dispute that might arise with a prospective licensee about the appropriate level of royalties for the specification.⁶² In the event of dispute, the Trustee could consider four factors:

⁶¹ *Ibid.*, para. 1008.

⁶² The WSPP Pricing Principles are available for download from the Microsoft website. See: <http://www.microsoft.com/downloads/details.aspx?FamilyId=5A9CACB3-E823-4522-967C-A6EE3CD3995D&displaylang=en>.

- whether the protocols represent Microsoft's own creation;
- whether the creations by Microsoft constitute innovation;
- a market valuation of comparable technologies; and
- any other factors deemed appropriate by the Trustee.

Even though there have not been any disputes with licensees about royalty rates, the principles have given rise to a number of points of debate. For example, the Commission holds that it need consider market comparators only if the technology has been found to be innovative in the sense that it is superior to all other technologies on the market. In addition, it has been argued that no royalty should be paid for technology which solves problems particular to Microsoft software as opposed to problems of general applicability. Further, it has been argued that the price should be set at a level which permits viable competition between the licensee and Microsoft: on this theory, since the licensees could need as long as two years to implement the specification by building their own software, the price of the licence should - it is argued - be set low enough to make that effort worthwhile.

The pricing principles were intended to guide the Trustee in the event of a specific dispute about what would be a reasonable royalty. No such dispute has arisen. Some ten licensees have agreed on the royalties they will pay without recourse to dispute resolution procedures. However, the principles are being used as an absolute over-arching standard against which to judge the royalty rates put up for negotiation by the company.

There was sharp debate over the level of innovation reflected in the licensed technology. The company said that it had 73 patents either already granted to it or pending. The Trustee and the Commission's experts, TAEUS, concluded that the technology embodied little innovation, and that only a few small pieces of the specification merited any compensation at all.⁶³ PricewaterhouseCoopers supplied evidence to the effect that the royalty rates proposed by Microsoft were 30% below market norms for similar technology. Microsoft recalled that the proposed royalty rates were merely a starting point for negotiation, and that it was "open for business" in dealing with prospective licensees; and that in fact it had concluded licences with several companies. The Commission nonetheless has taken the view that the proposed maximum royalty rate of 5% was not "reasonable" since, according to the Commission, there was no "significant innovation" in the licensed material. Thus, the asserted infringing conduct consisted of proposing as a basis for negotiation a royalty rate of 5% of the licensee's selling price for whatever product the licensee made based upon the licensed technology.⁶⁴

⁶³ See Press Release IP/07/269 of 1 March 2007: "Competition: Commission warns Microsoft of further penalties over unreasonable pricing as interoperability information lacks significant innovation".

⁶⁴ In August 2006, Microsoft submitted a proposal on licensing terms for the protocol specifications after several discussions, stating that Microsoft was "willing to entertain any reasonable price offer from any potential licensee, and that we are willing to be flexible to meet any unique business needs of potential licensees". See Microsoft Statement on European Commission Action on Protocol Pricing, available at: <http://www.microsoft.com/presspass/press/2007/mar07/03-01PricingProtocolPR.mspx>. The relevant licensing arrangement may simplistically be outlined as follows. The four options are: (i) a licence for all intellectual property rights in the WSPP protocols and the protocol specifications ("All IP"); (ii) a licence limited to Microsoft's patents on the WSPP protocols ("Patent Only"); (iii) a licence limited to Microsoft's trade secrets disclosed in the protocol specifications ("Trade Secret Only"); and (iv) a licence limited to the IDL files ("IDL Only"). Microsoft further divided the protocols into Gold, Silver and Bronze price categories based on the

Indeed, the Commission's position (adopted after the Decision of March 2004) is that the technology should be made available free of charge, or for a nominal fee, on a worldwide basis. (In a separate controversy, the Commission is demanding that the disclosure be effected on an Open Source basis, that is, without imposing any confidentiality constraints upon the licensee and thereby ensuring that Microsoft's technology is placed in the public domain.⁶⁵) The Commission's view is that there is virtually no innovation in the 51 protocols (but that they are essential to remain viably in the market). According to the Trustee, "all of the described features were considered either to have been Microsoft implementations of prior developments by others, or to have been anticipated by prior developments and to be immediately obvious minor extensions to that prior work". The company disagrees with these factual conclusions, pointing to the amount of time and effort deployed in creating the technology whose characteristics must be divulged in the licensed specification.

Nevertheless (and now we reach the point relevant to this Workshop at the European University Institute), the company said it was willing to charge lower royalties so as to avoid being penalized, and accordingly it asked what lower figures would be acceptable and not unreasonable or excessive. The Commission was unwilling to prescribe a figure, on the grounds that it is not a price regulator.

The procedural twists of the Commission's proceedings pursuant to Article 24 of Regulation 1/2003 do not for present purposes need to be described in detail. Suffice it to record that on 1 March 2007 the Commission issued a Statement of Objections, threatening a daily penalty, backdated to 16 December 2005, in an amount which was initially 500,000 euros per day, then 2,000,000 euros per day during 40 days ending 30 July 2006, then 3,000,000 euros per day from 31 July 2006 to date.⁶⁶ As of this week (beginning 3 June 2007), the threatened penalty would total more than 1,100,000,000 euros. The company is thus threatened with the largest penalty in world competition law history for proposing as a basis for commercial negotiations a royalty rate which is higher than the public authority deems appropriate.

The company says its technology is the fruit of hundreds of person-years of effort and that it is covered by a number of patents from various jurisdictions and contains valuable know-how,⁶⁷ so it is valuable.⁶⁸ The Commission says that the technology is not innovative in the sense of being superior to other technologies, and that – to the extent innovation is present – the technology is oriented to solving problems unique to Microsoft technology. This is where matters stand. There are hundreds of pages of expert evidence on the licensed technology (which is itself thousands of pages long), on the pricing principles to apply, on the

degree of innovation. (A fourth category includes protocols, not necessarily innovative, for which there will be no royalty.)

⁶⁵ This is the subject of Case T-313/05, *Microsoft v Commission*, not yet decided.

⁶⁶ Press Release IP/07/269 of 1 March 2007.

⁶⁷ Roger Milgrim, "Commission Proposed Capital Punishment – By Definition – for Trade Secrets, A Uniquely Valuable IP Right", 88 *Journal of the Patent and Trademark Office Society*, No. 11, November 2006, at 919 *et seq.*

⁶⁸ See Microsoft Statement on European Commission Action on Protocol Pricing, 1 March 2007, available at: <http://www.microsoft.com/presspass/press/2007/mar07/03-01PricingProtocolPR.mspx>; and Brad Smith, News Conference Transcript Regarding European Commission Action on Protocol Pricing, 1 March 2007, available at: <http://www.microsoft.com/presspass/exec/bradsmith/03-01-07ECProtocol.mspx>.

patents, on commercial norms, and on the parties' negotiations. Despite all this material, the parties are far apart but locked in a painful embrace.

The episode seems to be very regrettable. What can we infer from it for the purposes of this gathering? The dispute seems to confirm the limits of the ability of competition authorities to reach convincing decisions on very specific, very detailed questions of price-setting. It is impossible for any normal person to know whether a royalty of 9%, 5% or 0% is appropriate for the delivery of a mass of details about how to build a "drop-in replacement" for a large and hugely complex product. The authority understandably will not wish to be a price regulator, yet the company understandably wants to be told what figure above zero will not be regarded as excessive by reference to the level of creativity revealed in the compulsory divulcation.

We must suppose that in a future case a dominant player, faced with a duty to license certain material by way of a remedy, may confront a huge discrepancy of opinion as to the value, utility and technical significance of that material. The company believes that its technology is valuable. The Commission thinks it ought to be delivered without charge or for a nominal fee. Complainants are vocal. From the target company's perspective, it has the worst of both worlds. It is essentially subject to price regulation, but is not informed of what is the regulated price. It is exposed to hefty fines if it gets the figure wrong. Since it will often be impossible to guess what can be accepted as a "reasonable rate" – a necessarily rather subjective determination – the dominant company may be forced to set its royalty rate below a competitive market level in order to avoid the risk of a gigantic fine. The Commission may feel unable to name an acceptable royalty precisely because it refuses to see itself as a price regulator.

Imposing or threatening to impose a fine of over 1,000,000,000 euros for proposing as a basis for negotiation a royalty rate which is deemed excessive can hardly be interpreted as a sign that pricing remedies are apt for handling by competition authorities in a hotly-contested Article 82 case.

CONCLUSIONS

Article 82 is available in cases of both exploitative and exclusionary abuses. That duality of function may seem strange in light of modern antitrust theory in sophisticated jurisdictions, where for the moment it is unfashionable to pursue excessive pricing cases. Fashions can change.

Article 82 is capable of being used improperly, or at least imprudently, with the goal of altering how a marketplace is working. Article 82 should be used for the repression of abuses, for the prohibition and punishment of serious economic crimes. I submit that there may be cases where the "crime", objectively viewed, does not look like a foreseeable category of prohibited activity. The underlying motive of the public authority may be an understandable reluctance to let market forces remedy the problem. I have mentioned occasions where the competition concerns of the European Commission seem in effect to be pursuing sector-specific adjustments.

I have personal experience of the very unsatisfactory outcome when a pricing remedy is used by a competition authority in a complex case where there is a mass of evidence about the price parameters which should be used.

I began this paper with the expectation that sector-specific regulators were too focussed on narrow details and not on broad questions of competition, too permanent and prone to survive the proper end of their mission; and that competition enforcers were ill-equipped to achieve success in handling price-related remedies if these became controversial. My experience of the controversy last mentioned gives me the opinion that there is less risk of arbitrariness and passion if the matter is entrusted to a sector-specific regulator. *Ex ante* price regulation will be based on market practice and known market parameters. I therefore find myself endorsing the proposition that such a mechanism may be a less bad alternative than an Article 82 remedy.