

Which Competition Policy For Regulated Industries ?

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Roundtable 3:

The Interaction between regulation and competition law in regulated industries

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İlmutluhan Selçuk

[*Views expressed in this presentation do not necessarily reflect the views of Herguner]

Hergüner | Bilgen | Özeke

to start with

- Telecommunications industry
 - Historically subject to monopoly regimes
 - Affirmative duties imposed on telecom operators (TO's) under different jurisdictions to “*create*” / “*inject*” competition
 - EC - Liberalisation Directives
 - US – 1996 Act
 - TR – Law No: 4502 amending Law No: 406

Since then- heavy workload of enforcement agencies

- Antitrust / Competition authorities (CA) / courts / telecommunications authorities (TA) increasingly busy in dealing with complaints against incumbent operators
- Entrants / rivals of incumbents seeking (“accelerated”) results
 - Cases brought before courts
 - Complaints filed before both CA and TA’s
 - Forum shopping (Dissenting opinions of former Turkish Competition Board Members)

Problems leading to uncertainties

- Stretching limits of antitrust / competition laws
- Clash of powers of different institutions,
 - Different agendas [Deutsche Telecom (2003)]; squeezed between regulators (Telefonica, press release)
 - TR_New Electronic Communications Law No 5803-concurrent (?) authority of TA and CA in enforcing competition law (although new Law does not include provisions like Article 81 & 82 or Section 1 & 2 leading to questions of “what” will be enforced?)
- State actions: legal weight / effect of approved tariffs: any liability attributable to the operators?

Complaints Warrant Careful Assessment

- Antitrust complaints mostly relate to failure of incumbent TO's to (duly) comply with “affirmative regulatory duties”
 - Duty to deal (access) “essential facilities”
 - Discrimination
 - Price squeeze
- Should these claims raise antitrust concerns ? Are they within the limits of antitrust law ? or mere regulatory issues?
 - Regulations, like other facts, need to be taken into consideration while conducting an assessment of a complaint however existence of regulations neither reduce nor extend the scope of antitrust liabilities (TR Cable TV Decision (2005))

Limits of Antitrust Law: Recent Cases

- US

- Covad (11th Cir 2004) Verizon vs Trinko (2004); Covad (D.C Cir. 2005); LinkLine vs Pacific Bell (2007) (pending before Supreme Court)

- EC

- Recently, France Telecom vs Commission (Wanadoo) (2007); Deutsche Telekom vs Commission (2008); COM_Telefonica (2007)

- TR

- Since 2000, ISP (2002); National Roaming (2003); Cable TV (2005); Tcell (2007); TTNNet interim measures (suspension of Summer Storm Campaign) 2007 (investigation still pending)

Limits of Antitrust Law :

EC / TR Cases (CRITICS)

- EC and TR : *“in search against unsatisfactory regulatory results (e.g. still high wholesale prices or prevailing access problems)”*
- HOW ? ___ automatic finding of antitrust liability for *“certain forms of conduct”* + no search for anticompetitive effects (existence of “conduct” suffices)
 - e.g: Essential facility + refusal to deal = ABUSE
(TR_National Roaming (2003): abuse by “collectively dominant” mobile operators for their individual refusals to provide roaming services to new entrants)

EC / TR Cases (CRITICS):

No search for anticompetitive effects

Although v1 of the “theory” applied before in other sectors...

- e.g: Price Squeeze (“*retail prices lower than wholesale charges OR if the spread is insufficient to enable an equally efficient operator to cover product specific costs*”) = ABUSE [Deutsche Telekom vs Commission (2008)]
 - Paragraph 237 “*margin squeeze will in principle hinder growth of competition in downstream markets*”; **DESPITE THE FACT** Paragraph 238 “*Admittedly, competitors will resort to cross subsidization, in that they will offset the losses suffered in retail markets with the profits made on other markets*”

EC / TR Cases (CRITICS):

No search for anticompetitive effects

- Price Squeeze (“*margin squeeze is a disproportion between an upstream and downstream price*”) = ABUSE [COM_Telefonica (2007)] (with efforts to provide more detailed explanations)
- Paragraph 283 “*there is no need to demonstrate that either the wholesale price is excessive in itself or that retail price is predatory in itself*” Paragraph 284 “*while margin squeeze needs not involve a loss for vertically integrated firm on an end to end basis, similarly efficient are obliged to incur losses*” Para 543- no actual effects needed, likely effects or establishing that the behavior capable of having such effect suffice (paragraph 195 France Telecom vs Commission (Wanadoo) (2007)- “*showing an anti-competitive object and an anti-competitive effect may, in some cases, be one and the same thing.*”); “harm to end users” = “diminishing level of competitiveness”, which can be argued as satisfied virtually all times

EC / TR Cases (CRITICS):

- All three COM decisions, Wanadoo (2003); Deutsche Telekom (2003); Telefonica (2007) regard high wholesale tariffs NRA's not yet succeeded to bring down.
- Commission: Forcing incumbents to reduce wholesale prices through utilizing competition law.
- Why not handled between Commission and NRA?
- EC practitioners question whether the cases are *“surrounded by policy and politics rather than law”* (O'Donoghue, 2008)

Assessment of similar claims of entrants- Limits of Antitrust Law: US Comments

- Price Squeeze: US commentators (e.g. Pacific Bell vs LinkLine, Amici Curiae Professors and Scholars in Law and Economics) strongly oppose (lack of sound) economic reasoning and claim chilling effect on competition on the basis of
 - Trinko (2004); Covad vs Bell Atlantic (2005 D.C. Circuit) [that *“it makes no sense to prohibit a predatory price squeeze in circumstances where the integrated monopolist is free to refuse to deal”*],
 - Town of Concord (1990) [that (i) the primary level monopolist might carry out second level activities more efficiently than its competitors and elimination of less efficient competitors results in lower prices, (ii) elimination may prevent double marginalisation] and
 - Brooke Group (1993)

In need for sound principles, certainty and consistency (US)

- Supreme Court, in Trinko (2004), reminded general principles on exclusionary practices: limitations in duty to deal cases.
- Likewise, Supreme Court decision in LinkLine (pending) is expected to shed light on (introduce limitations?) price squeeze claims under US Law.

In need for sound principles, certainty and consistency

- Practitioners perhaps not surprised of COM_ Telefonica (2007) or CFI-Deutsche Telekom vs Commission decision (2008)
 - “price squeeze” concept arguably stretched (derivative issue; more focus on impact of price squeeze on entrants) compared to earlier Napier Brown (1988) and IPS (2000) Commission decisions
 - COM / CFI approach will likely result in greater discussion having regard (i) in general, policy issues behind and (ii) substantive assessment provided under para 237 of the CFI Decision

“margin squeeze will in principle hinder growth of competition in downstream markets”

In need for sound principles, certainty and consistency (TR)

- Interventions (arguably) driven by similar concerns with EC Commission
- Negative impact of National Roaming (2003) decision still heavily felt [TR_CNR (2007)] (duty to deal),
- No objection in principle against price squeeze claims (EC_Deutsche Telekom (2003) test applied)

In need for sound principles, certainty and consistency (TR)

- CA resolved in vast majority of complaints (particularly after 2003_ the introduction of full competition) that TA (and not itself) would be the right address,
- However, still doubts about the CA's intention after TTNNet (Summer Storm) interim measures Decision (2007) where CA suspended application of ADSL price reduction campaign by TTNNet, affiliate of the incumbent TO,
- TTNNet (Summer Storm) final decision will set standards for price squeeze together with Tcell (2007), if not conflicts with.
- In this environment, impact of the New Electronic Communications Law No 5803 in (dual headed) enforcement is yet to be seen

to conclude

- Difference between EC and US in perceiving “competition” and application of antitrust/competition laws remain valid also here.
- Differences arise because of the meaning attributed to “competition” and the role of “*antitrust/competition laws*”

to conclude

- Repercussions of EC decisions strongly felt in Turkey.
- Turkish Competition Law modeled on EC Law but practice may, to the extent permitted by law, benefit US approach in constructing the meaning of “competition” and the role of “antitrust/competition laws”.
- So far similar to EC but why not a change?

to conclude

- But perhaps Turkey is late in second guessing which practice to benefit more (at least for price squeeze cases).
- Price squeeze recently classified as “*a restriction of competition*” under Article 13 of the New Electronic Communications Law No 5803

“If it is determined as an SMP operator, TA shall review the practices [of the operator] and adopt necessary regulations to prevent tariffs restricting of competition such as price squeezes or predatory pricing”

Hergüner Bilgen Özeke

**AKARETLER 55,
BEŞİKTAŞ / İSTANBUL**

**TEL: 0 212 310 18 00
FAKS: 0 212 310 18 99**