International Competition Network

Antitrust Enforcement in Regulated Sectors Working Group

Subgroup 2: Enforcement experience in regulated sectors

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CHAPTER 2

ENFORCEMENT EXPERIENCE IN REGULATED SECTORS

Regulation is a very general word covering many different types of public constraints on market behavior or structures.

Some regulations are applicable to all sectors and must be taken into account by competition authorities when they enforce competition laws. This is, for example, the case with intellectual property laws. Because these laws confer important legal rights to the innovators, they occasionally (but not necessarily) allow innovators to benefit from a dominant position on an economically relevant market. The extent to which antitrust law applies to the practices of the owner of an intellectual property may be open to discussion and possible conflicts between competition law and intellectual property law may arise.

Moreover, the scope, the intensity and the effectiveness of the enforcement of competition law is necessarily influenced by the general legal context of each country. To take just one example, although there is no particular reason why prosecutorial and administrative enforcement systems should differ on substantive grounds, the procedural differences between the two types of systems may yield interesting differences in the overall manner in which competition law is enforced.

In the rest of this brief overview we will limit ourselves to the analysis of the influence of sector specific regulations on the enforcement activity of competition authorities.

The first striking fact encountered when one surveys the situation in a number of jurisdictions is that sector specific regulations exist in a very large number of sectors such as: *Advertising, Agriculture and Food Products, Air Transport, Airports, Animal shelters, Ambulance Services, Archeological Services, Banking, Beauty parlors, Collective Management of Copyrights, Electricity, Distribution of oil, Environmental Services (such as waste collection), Film production and distribution, Financial Services, Funeral Homes, Harbor Services, Health Services, Insurance, Liquefied Gas, the Match Industry, Maritime transport, Mining, Natural Gas, Newspapers, Media Services, Ports, Services, Pharmaceutical Industry and Retail, Professional Services (such as lawyers, accountants, architects, doctors, surgeons, dentists, engineers, surveyors etc…), Retail Distribution, Road and Rail Transport, Shipping, Taxis, Travel Agencies, Telecommunications, TV and Radio Broadcasting, Water distribution etc..*

This list is not exhaustive and many more sectors are regulated in some countries. However this list gives a fairly good view of the types of sectors which are regulated in many jurisdictions. As is immediately obvious, a large number of services

are regulated whereas manufacturing industries are more rarely subject to sectoral regulation (with the notable exceptions of agriculture, mining, the food and the pharmaceutical industries).

As we shall see below, there are some instances in which sectoral regulations prevent competition authorities from enforcing competition law altogether. However, in many countries and in many regulated sectors competition law enforcement is possible to a certain degree. Thus, competition law enforcement in regulated sectors often represents a substantial part of the activity of competition authorities. For example, the Mexican FCC reports that over the three year period between 2000 and 2002 nearly 30% of the concentrations it examined occurred in regulated sectors, and about 40% of the monopolistic practices it investigated occurred in regulated sectors such as *telecommunications, financial services, ports, airports, railroads and liquefied petroleum gas*.

The goals of sectoral regulations differ considerably from sector to sector. In t*elecommunication, electricity, gas, and rail transport*, one goal of sectoral regulation is usually to open these sectors to competition. In other sectors, such as professional services, health services or environmental waste services, the goal of regulation is often to limit competition because of some perceived market failure. Finally, in some sectors the goal of the sectoral regulation is, at least in principle, not to promote or to restrain competition but rather to pursue some other social goal (for example to protect consumers against fraud or dangerous products as in the *food industry* or to ensure consumers that supplied services satisfy a minimum quality standard as in the *professions*).

Thus the ease or the difficulty of enforcement of competition law in regulated sectors will depend on which sector is involved. For some, sectoral regulation and competition law enforcement will complement each other while for others there will be a contradiction of goals between competition law and sectoral regulation leading to difficulties or limitations on the enforcement of competition law.

But the goal of sectoral regulation is only one of the dimensions which need to be taken into account when studying the interface between competition law enforcement and sectoral regulation. As we shall see below, sectoral regulations and competition law enforcement may be complementary even if they have different goals and they may sometimes contradict one another even when they share the same goal.

In the rest of this paper we propose to examine different categories of relationships between competition law enforcement and sectoral regulations and to illustrate the specificities of competition law enforcement in each category by looking at specific cases. The sources used are the contributions of the countries which actively participated in this sub-group as well as the contributions of the OECD Competition committee to various roundtables on competition law enforcement in regulated sectors. Cases from Canada, the European Union, Mexico, Norway, Sweden, the United Kingdom and the United States will illustrate the different categories.

A) The first category concerns situations where there is <u>complementarity</u> between sectoral regulation and competition law enforcement

<u>I) First there are cases in which the sectoral law and competition law have the same goal, i.e. the promotion of competition</u>.

The usual justification for the existence of sectoral regulations designed to promote competition when there is already a general competition law applicable to all sectors is that, in sectors which are just being exposed to competition, competition cannot yet work and there is a need to monitor the gradual development of competitive forces. This, it is often argued, is particularly true if the incumbent operator is vertically integrated and manages a particular facility its competitors have to use to be able to compete with it. In such an instance, there is a need to define and control the access price to the facility to allow market entry. Unlike what happens in the classical case of markets where the efficient price is the result of the competitive adjustment process, in markets which are just opening to competition and in which new entrants need access to a particular facility to compete with the former monopolist the setting of a (fair) and efficient price (for access to the facility) is a necessary although sometimes not sufficient prerequisite for the emergence of competition. Furthermore, it is sometimes argued that monitoring the timing of entry in the industry is also an important factor to ensure that entrants do not fail during the first years following their entry. Thus it is argued that there is a specific need to monitor the sector (at least concerning interconnection and the licensing of entrants).

The usual justification for the existence of sectoral regulations designed to promote competition when there is already a general competition law applicable to all sectors is that, in sectors which are just being opened up to competition, competition cannot yet fully deliver all its benefits and there is a need to monitor the behavior of the incumbent operator. This, it is often argued, is particularly true if the incumbent operator is vertically integrated and manages a facility its competitors have to use to be able to compete with it. In such an instance, there is a need to define and control the access price to the facility to allow market entry. Unlike what happens in the classical case of markets where the efficient price is the result of the competitive adjustment process, in markets which are just opening to competition and in which new entrants need access to a facility to compete with the former monopolist the setting of a (fair) and efficient price (for access to the facility) is a necessary although not sufficient condition for the emergence of competition. Furthermore, it is sometimes argued that monitoring the timing of entry in the industry is also an important factor to ensure that entrants do not fail during the first years following their entry. Thus it is argued that there is a specific need to monitor the sector (at least concerning interconnection and the licensing of entrants). Finally until competition is not fully developed it might be

necessary to protect final consumers from being excessively exploited by the incumbent operator, thus administratively fixing final pricing or establishing, through regulation, some sort of pricing rule (for example a price-cap mechanism).

This type of regulation is generally not inconsistent with competition law. The enforcement of competition law may help ensure that the incumbent does not abuse its market power by engaging in anticompetitive strategies (such as predatory pricing or cross subsidization) when providing the services open to competition.

However, the question of who is in charge of enforcing competition law (and "which competition law" applies) may arise and be a source of tension or inconsistency. In some countries there is a clear division of labor between two complementary authorities (a competition authority and a sectoral regulator). In some other countries there may be a situation in which the sectoral regulator is also the competition law enforcer for the sectors it regulates (for example in the United Kingdom) or the competition authority is also the sectoral regulator (for example the ACCC in Australia). In yet other countries the "competition laws" applying to each sector (enforced by the sectoral regulators) may be specific to each sector and may differ from the general competition law.

The Canadian contribution illustrates the potential complementarity between sectoral regulations in sectors newly opened to competition and general competition law by stating :"*The purpose of Canadian competition law is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy and achieve other objectives. Sectoral regulation in Canada often complements this goal. This has particularly been the case in network industries such as telecommunications and energy where regulation of access to monopoly or near monopoly essential facilities has been instrumental in promoting open and effective competition in related markets. In certain sectors there has been a high degree of cooperation between sectoral regulators and Canadian competition authorities in detecting and preventing competition abuse".*

In a similar vein the Mexican contribution states: *"(…) In Mexico, The Federal Law of Economic Competition and competition provisions in sector regulations have been complementary in defending the public interest against monopolistic practices. Sector laws have focused on regulating industry structure and guaranteeing access to new entrants. The Federal Law of Economic Competition focuses instead on overseeing anticompetitive conduct of industry participants and in preventing the rise and strengthening of a dominant agent in the sector.*

Sector regulations generally establish that regulated services have to be provided in a non-discriminatory way and that cross-subsidies are prohibited. Some sector regulations and other legal orders include also an explicit prohibition to commit monopolistic practices.

Although sector regulators are not empowered to enforce the Federal Law of Economic Competition, most of them have the duty to promote or facilitate competition in the industries they regulate".

When sectoral regulation and competition law have the same goal, competition law enforcement may be facilitated in the sense that the competition authority may not have to intervene because the regulation alleviates potential competition problems.

For example, commenting on the electricity market, the Canadian contribution states: "*Where transmission and distribution mergers have raised potential concerns, they have been in regard to the role of the relevant utilities as the provider of regulated standard electricity supply and/or as an unregulated competitor in the retail electricity market. The Bureau has also examined a number of transactions raising similar issues that pertained only to the transfer of retail assets. The Bureau has not taken action under the Act in regard to any such merger. In this regard, an important consideration has been regulation requiring that regulated retail as well as distribution and transmission activities be separated from and not cross-subsidize unregulated activities*".

<u>II) Second, there are cases where the sectoral regulations have goals broader than the promotion of competition and are nevertheless consistent with antitrust law</u>

When sectoral regulators have to apply broader standards than competition standards, they may consider that some of the interests they must protect require that competition be mitigated. For example, the public interest standard may clash with the efficiency standard and lead a sectoral regulator to protect non efficient competitors to favor employment or cultural diversity. However, it is not necessarily true that broader standards will be considered to clash with competition standards. The promotion of competition and efficiency is a worthwhile goal in itself and an important part of a broader public interest standard.

Several United States cases illustrate the complementarity between broad sectoral regulatory frameworks and antitrust law. For example in the Hughes/Echostar merger (details provided in the following box) and in the ATT/Media One merger, the FCC, which applies broader standards (pluralism and public interest) rather than a pure competition standard, reviewed the merger and shared the competitive concerns of the DoJ and they acted consistently with one another. Similarly, in the airline sector , the US Department of Transportation is authorized to prohibit unfair methods of competition by airlines or travel agencies under the 49 U.S.C ' 41712, formerly section 411 of the Federal Aviation Act . It reviewed the creation of the Orbitz joint venture in the airline industry and authorized it as did the DoJ.

Box 1: The Hughes Echostar Merger in the United States

The proposed merger between Hughes and Echostar in the US in 2001 concerned the concentration of the two most significant nationwide direct broadcast satellite (DBS) companies offering multichannel video programming distribution (MVPD) services (also known as Pay TV) in the United States. It required approval from the Federal Communications Commission (FCC) for the transfer of licenses for DBS service and was subject to review by the Antitrust Division of the Department of Justice (DOJ).

After an investigation, the DOJ noted that millions of U.S. households do not have a cable option for Pay TV and that the merger would result in a duopoly in many areas of the country and would create a monopoly for millions of households. It filed a complaint to block the merger arguing that the combination of the nation's two most significant DBS firms would substantially lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. '18. The investigation showed that Hughes and Echostar fiercely compete with one another as well as with cable operators and that the merger would reduce benefits to consumers (better prices, as well as greater programming options) gained from competition between the two firms.

From the regulatory point of view, the spectrum allocated for high-power DBS service is limited by international treaties, and the FCC is responsible for assigning all U.S. satellite orbital positions and frequencies. By mid-1999, all frequencies were in the hands of either Hughes (46) or Echostar (50).

In December 2001, the parties filed an application for transfer of control of various licenses issued by the FCC that would be necessary for the merged firm to conduct business. The FCC issued a request for more information from the parties. Simultaneously, the DOJ conducted its own review of the proposed merger and issued a second request to the parties for additional information. The two agencies had informal meetings about the transaction, concerns arising from the merger, and the timing of the investigations. The FCC received a waiver from the parties and was able to view documents submitted by the parties to the DOJ and discuss them with the DOJ.

On October 18, 2002, the FCC, citing substantial competitive concerns, stated that it was noticing the license transfer application for a hearing. On October 31, 2002, the DOJ filed a complaint to block the merger. Although the two agencies employ different standards, both agencies identified similar concerns with the proposed merger, and each attempted to complete its review process as quickly as possible.

The parties terminated the proposed merger due to the DOJ=s decision to block the merger and the FCC=s decision to send the merger application to a hearing.

Soon after the Hughes/Echostar deal fell apart News Corp. announced that it had reached an agreement to acquire Hughes. Again the DOJ and FCC reviewed the proposed transaction.

As a condition for granting its approval of the transaction, the FCC imposed restrictions that will reduce News Corp.'s ability to withhold, or to threaten to withhold, its regional sports networks and granting of retransmission consent for its Fox Broadcasting network programming from cable television and DBS providers that currently compete with DirecTV (the subsidiary of Hughes. In light of the FCC's decision, which addressed the DoJ's most significant concerns about the proposed transaction, the DoJ decided to close its investigation.

III) Third, there are cases where the sectoral regulation, although not designed to promote competition, is a useful complement **to competition law. In such cases sectoral regulation is a useful complement to competition law enforcement.**

At least three sets of cases fall in this category: cases where competition cannot function unless a sector specific regulation is in place; cases where competition law does not allow the competition authority to exempt practices which should be exempted and cases where competition law does not allow the competition authority to sanction some anticompetitive practices.

a) The fact that regulation can be a useful complement to competition law enforcement implies that the lack of adequate sectoral regulation in some sectors may prevent competition from emerging or from having the expected positive effects on efficiency in spite of the fact that competition law is applicable to those sectors.

The Snam-Carriage case in Italy (1999)

The Snam-Carriage charges case (1999) in Italy is an instance where the absence of a proper regulatory framework prevented the Competition authority from imposing competition in the distribution of natural gas.

In February 1999, the Autorithy completed an investigation into an alleged abuse of a dominant position by Snam in the markets for the transport of natural gas in the national gas pipeline network and the primary distribution of natural gas. The abuses of which Snam was accused concerned in particular Snam's refusal to grant Assomineraria (the natural gas producers' association) access to its national network for gas for uses other than those referred to in Article 12 of Law no. 9/1991 (i.e. for electricity generation and their own consumption).

In view of Snam's dominant position in the market for the transport of natural gas and the essential nature of its transport facilities, the Authority concluded that the

company was not justified in refusing access to its national network of gas pipelines to current and potential competitors.

However, in April 1999, at the request of Snam, the Administrative Court issued an interim injunction to suspend the effects of the Authority's decision, holding that under the legislative framework existing at the time of its decision (the EU gas liberalization directive had not been approved yet), Snam was entitled to turn down requests by gas users of carriage outside the scope of Act no. 9/1991.

There may be other circumstances in which the lack of a proper regulatory framework may limit the effectiveness of competition law enforcement. This may be the case, for example, in sectors in which consumers have very little information about their demand or the quality of the products or services offered by different providers and very little opportunity to reward efficient suppliers, because the product is not subject to repeat buying. In such cases competition law enforcement without sectoral regulation may lead to artificially increasing market power and to consumers being offered less than optimal quality service or products. Some sectoral regulations (in particular requirements on misleading advertisment) may contribute to making competition more effective and more efficient. However, it should be emphasized that whereas improving consumer information through sectoral regulation can make competition more useful, limiting competition between suppliers of services is unlikely to contribute to increasing consumer welfare.

b) The second set of cases in which sectoral regulation may be seen as a useful complement to competition law enforcement concerns particular sectors in which cooperation between firms is necessary to promote efficiency.

A classic example of this type of case is the insurance sector which is heavily regulated in most countries. As the OECD background paper to the CLP Roundtable on competition in the insurance sector states: "*Although, in most countries, competition law applies to the insurance sector, the nature of the business of insurance is such that in certain cases, co-operation between competing insurance companies can yield efficiency benefits. Examples are cooperation for the purposes of sharing information on the magnitude of risks, and cooperation for the sharing of large risks. These practices, to the extent that they promote competition and are beneficial to insurance policyholders and insured, should be allowed. This is not typically a problem for countries with modern or recently updated competition laws, which allow a case-by-case approach*".

For example, in Europe, the Commission has recognized that certain characteristics of the insurance sector require a degree of cooperation between insurers. Article 85.3 of the EC Treaty allows it to grant exemptions to agreements that would have otherwise been prohibited, when they improve economic conditions of a particular sector and provide benefits to consumers. Most of the Commission's work in relation to the application of competition rules to the insurance sector has been devoted to the

definition of the types of agreements that could benefit from this exemption. Under EU law, insurance companies are subject to exemption regulation n° 3932/92. This Regulation exempts under section 85(now 81), paragraph 3, of the Treaty:

(a) the establishment of common risk-premium tariffs based on collective statistics or on the number of claims;

(b) the establishment of standard policy condition;

(c) the common coverage of certain types of risks;

(d) the establishment of common rules on testing and acceptance of security devices

However, in countries where competition law does not easily allow the possibility of exempting anticompetitive practices which contribute to economic progress, a sectoral exemption from competition law combined with a sectoral regulation may be perceived to be necessary.

It should be noted that the risk is that the exemption from competition law will go far beyond what is strictly necessary to allow the necessary efficiency producing cooperation.

In some cases, amending competition law to allow some cooperation between firms may permit the progressive elimination of overly broad exemptions from competition law.

For example, in Germany, restraints of competition in the insurance industry have been subject to control under the antitrust law gradually and progressively. The crucial changes were associated with the 1990 revision of the antitrust law and the Block Exemption Regulation. As a result of the antitrust law revision Bundeskartellamt decisions must now be made in consultation with the Federal Supervisory Office for Insurance Companies instead of in agreement with this Office, as was formerly required.

The US contribution reflects the same point of view and states: "*In the US, Congress passed in 1945 the McCarran-Ferguson Act, which reserved to the states the power to regulate and tax the business of insurance. Under the Act, the Sherman, Clayton, and Federal Trade Commission Acts apply "to the extent that such business is not regulated by State Law," except that agreements or acts of boycott, coercion, or intimidation remain subject to the Sherman Act. The FTC has ruled, and two lower courts have held, that the McCarran-Ferguson Act does not exempt insurance mergers from antitrust review.*

The need for regulation to ensure the trustworthiness, solvency, and character of an insurance company, and the fairness of its practices, marketing, and disclosure, is well recognized. The need for broad exemption of the sector from the federal antitrust laws has been questioned over the years, however. There has been enormous development and increased sophistication of legal and economic analysis under the antitrust laws in the half century since the Act was passed. Consideration of

procompetitive effects and careful economic and competitive analysis is now deeply ingrained in the relevant jurisprudence. Not only do the cases provide guidance that joint ventures can be procompetitive, such as when they involve, for example, risk sharing or activities that cannot be undertaken as efficiently separately, but similar guidance is also reflected in business review letters issued by the DOJ and in DOJ/FTC antitrust guidelines relating to the health care sector.

The DOJ historically has been on record in support of narrowing the McCarran-Ferguson antitrust exemption. Indeed, in 1977 the DOJ issued a report which concluded that "the insurance industry should be able to conduct its business within the federal antitrust laws without any special exemption. Antitrust precedent indicates that insurance companies could pool their loss experience consistent with federal antitrust standards. Moreover, the federal antitrust laws would not prohibit the trending of future losses on a composite basis by advisory organizations that were independent of the companies they were serving. Likewise the antitrust laws would not prohibit those voluntary risk-sharing arrangements, such as insurance pools and reinsurance agreements, that were either necessary to the conduct of business or served some other legitimate business purpose without substantially lessening competition." Over the past twenty years, Congress has considered numerous proposals to repeal or narrow the exemption".

c) The third set of cases in which the sectoral regulation can be a useful complement to competition law enforcement concerns situations where the sectoral regulator has more operational tools at its disposal to eliminate broadly anticompetitive practices than the competition authority. Regulation may, for example, facilitate the treatment of oligopolistic industries where firms can collectively limit competition without entering formal agreements, prevent dominant firms from cross subsidizing their competitive activities with the profits from their monopolistic activities and activities open to competition or set interconnection prices or conditions for essential facilities.

In its contribution, the Canadian Competition Bureau states *: "The Bureau has examined a substantial number of electricity as well as natural gas complaints involving allegations that transmission and distribution companies are leveraging their monopolies to provide a competitive advantage to their unregulated affiliates in downstream or related markets. The cases have dealt with, among other things, alleged:*

- leveraging the brand-name of the regulated company to promote its unregulated activities;

- cross-subsidization by various means of unregulated activities from regulated activities;

- preferential access to essential facilities; and

- preferential access to competitor information in unregulated markets resulting from regulated transmission and distribution activities.

None of these cases has resulted in formal action under the Competition Act. An important contributing factor has been regulation of the essential facilities in order to prevent cross-subsidization, the sale of goods and services below fair market value or another measure and regulatory constraints or codes of conduct on the sharing of information with competitors.

In these cases, regulation has not only been largely consistent with competition law but has often applied a more stringent competitive effects test than might apply under competition law".

The Mexican contribution provides us with a case in which concerns of the Federal Competition Commission about the possible monopolization of the air transport market following a concentration led the Federal Competition Commission to ask the sectoral regulator to establish price controls.

Right after Aeromexico and Mexicana were put under the control of Cintra, the competition process in the air transportation market and other markets related to it (tourism for example) deteriorated. For example, Aeromexico and Mexicana jointly agreed to reduce the percentage paid to the travel agencies for the air tickets sold by them, from 10% to 7%.

Regarding air transportation, fares reached excessive levels in 26 commercial routes compared to fares offered in routes served also by other airlines. The Federal Competition Commission found agreements between the two airlines which included non competition clauses, market segmentation and price fixing. Furthermore, it learned that Aeromexico and Mexicana were transferring assets between each other without previously notifying to the FCC.

Cintra had undoubtedly infringed the FCC's 1995 resolution, which authorized the creation of Cintra subject to the condition (among others) of keeping its subsidiaries as competitors. The airlines were operating in some degree as a merged agent, affecting the competition process in several routes and related markets. Thus, the FCC asked the SCT to establish price controls.

In another Mexican case, cooperation in enforcement between the competition authority and the sectoral telecommunication regulator enabled the competition authority to gain access to information that it could not get using its own powers. The legal provisions of the Federal Telecommunication Law (FTL), regarding the duties of a concessionaire to provide access and interconnection services in terms of reciprocity and non-discrimination, does not provide for a specific role for the Federal Competition Commission. However, any such conduct representing a refusal to supply, is addressed by article 10 of the Federal Law on Economic Competition which forbids practices related to the denial of access to other agents into the market.

Given the high barriers of entry into the network operation market, Telmex is practically the only telecommunications network operator, therefore it has the power (if not to restrain or deny the interconnection services) to significantly limit and delay the supply of interconnection services to other telecommunications providers.

In this context, several complaints have been filed before the Federal Competition Commission that Telmex had abused its dominant position in the provision of inter urban transport and interconnection services.

In 1999, Avantel, Marcatel and Alestra (all of them long-distance services providers) filed a complaint against Telmex for relative monopolistic practices consisting in the double payment of inter urban transport services; the discriminatory treatment on prices in comparison to commercial clients and interconnection restrictions, among other. In July 2002, the Federal Competition Commission decided that Telmex was responsible for relative monopolistic practices and was ordered to immediately eliminate the practices. A fine was also imposed. The Mexican contribution states that: *"An important aspect of competition law enforcement in this case is the close collaboration between the sector regulator, Cofetel, and the Federal Competition Commission for the sharing of critical information, which was denied to the Federal Competition Commission by the defendant several times during the investigation process"*.

IV) Fourth are the cases where competition law enforcement is a useful complement to sectoral regulation.

Four types of cases fall in this category.

a) First, there are cases where the enforcement of competition law helps defeat private anticompetitive practices which undermines the object of a sectoral regulation .

Such practices can, for example, happen in sectors where the incumbent monopolist or dominant firm attempts to defeat the purpose of a regulation designed to open the sector to competition by engaging in practices which prevent entry into the industry. Numerous examples of this type were presented in the contributions to the enforcement working group.

For example, in Italy, in the Blugas-Snam case (2002), the Autorita considered that Eni Divisione Gas Power EDGP (resulting from the merger of Snam into its controlling company, Eni Spa) had abused its dominant position in the market for the sale of natural gas by engaging in practices impeding the entry of competitors and thus defeating the purpose of the Legislative Decree no. 164/00 of 23 May 2000 which transposed Directive 98/30/EC containing common rules for the internal natural gas market

In Italy, the Autorita ordered Eni to produce, within 90 days after the closing of the inquiry, a report detailing the measures it intended to take to end its abusive practices, in particular what would be done to foster the entry of new independent operators on the Italian market;

Another example from Italy of a case where competition law enforcement sanctioned anticompetitive practices by a dominant firm trying to counteract market

opening regulations concerns the air transport industry. Community Regulation No. 95/93, governing the allocation of slots for takeoff and landing, explicitly refers to the principle that the Co-ordinator supervising the allocation of slots (airport clearance) must be able to act with total impartiality as a third party. In Italy, however, the implementation of European Union regulations is incomplete, since Alitalia was given the role of clearance co-ordinator for all national airports. The Italian authority found that in performing its duties as co-ordinator Alitalia had adopted strategies to conserve and consolidate its own position on the domestic market by obstructing the entry of new competitors. However, in the course of the investigation Alitalia gave up its role as clearance co-ordinator.

In Mexico, the Federal Competition Commission dealt with similar cases in a number of sectors. One of these cases concerned the liquefied gas sector. The Program for the Development and Restructuring of the Energy Sector 1995-2000 outlined the need to implement a regulatory scheme that would allow the transition towards a liberalized and competitive market of LP gas. The LP Gas Regulation (GLPR) came into force in June of 1999. It divided the country into 16 regions. The construction of facilities for the distribution of liquefied gas in each region requires a permit. On July 17, 2002, the Federal Competition Commission held that a number of related gas companies had conspired to provoke the filing of complaints concerning an alleged breach of safety provisions against Gas Supremo, a competitor which had obtained a license to build a storage plant in the state of Morelos, in an effort to delay construction of the plant.

The contribution from the US FTC reports on an interesting administrative complaint[1] suggesting that a US firm may have attempted to use a newly established regulation to derive an unfair personal benefit through an anticompetitive and deceptive practice.

In 1988, the legislature of the State of California enacted a law that required California's Air Resources Board (CARB) to reduce car emissions by regulating standards for automotive fuels. After much study, CARB adopted regulations requiring a certain form of reformulated gasoline (RFG) to be sold in California. After CARB's RFG regulations were published, Union Oil Company of California (Unocal) announced that it held a patent that covered an important component of the RFG technology (and later obtained additional related patents). According to the FTC complaint, Unocal had withheld from public notice the fact that it had begun seeking the patents in 1990 and had received notification from the U.S. Patent and Trademark Office that its claims would be allowed at the same time CARB was conducting its studies and while other

[1] The contribution warns us that this matter has not yet been tried. However, the Federal Trade Commission has reason to believe that all facts alleged in the complaint are true. The respondent Unocal may be expected to contest the accuracy of some of the facts alleged. The Commission has pending before it motions to dismiss the case based on Unocal's arguments that (a) its communications to CARB are immunized from antitrust review and (b) that the Commission lacks jurisdiction over a complaint whose resolution requires the FTC to make decisions concerning the strength and novelty of patents. Should the FTC deny those motions, the case would still need to be tried

refiners were investing in technologies to make RFG that complied with the CARB order. Moreover, in 1991, while it was pursuing patent claims, Unocal had given its RFG research to both CARB and an association of gasoline refiners, telling both that the research was Anon-proprietary and in the Apublic domain. It was only in 1995, after the CARB regulations were final and after refiners had sunk very significant costs into building CARB-compliant facilities, that Unocal announced that it had patent claims on an important component of the RFT technology and would demand royalties. Based upon a jury's determination that it was entitled to royalties, Unocal demanded royalties from some refiners amounting to 5.75 cents per gallon on automotive gasoline sold in California.

The FTC alleged that Unocal had a monopoly because it controlled the only technology that could produce CARB-compliant RFG. Further, that monopoly was not obtained by legal or efficient or unavoidable reasons. Rather, the monopoly was obtained only because of the deliberate effort to deceive CARB and, as a separate ground for liability, because of its deceit toward the refiners. Had CARB not been misled, it would not have calculated the cost/benefit ratio of its regulations as it did. Had the other refiners not been misled, they would have taken steps to avoid Unocal's monopoly, for example by investing in alternative technologies. Therefore, the FTC argued, the Unocal monopoly was unlawful under the U.S. antitrust laws.

The FTC could not challenge CARB's regulations (which are acts shielded from federal antitrust review by the U.S. state action doctrine). Further, the Commission had no authority to nullify Unocal's patents; only the U.S. Patent and Trademark Office could determine that a patent issued by that Office was invalid. Thus, what the FTC sought was an order requiring Unocal to cease and desist from seeking royalties on its patents from refiners who were complying with CARB. Such a remedy would not interfere with the CARB regulations or deny Unocal its patents. Unocal would lose only the ability to exercise illegal acquired monopoly power, which antitrust law is designed to remedy.

<u>b) Second, there are instances where competition law enforcement complements (the insufficiencies of) regulation in meeting competition concerns</u>.

For example, the EU Commission offers the following comment about the Marathon case (EU Case 36246 — Marathon): " *At the moment in which the alleged infringements were committed, the European gas market was still unregulated at European level. National markets were dominated by dominant operators. Competition law, however was applicable. In this case, the Commission decided to tackle the refusals to grant access by those companies as a potential abuse of a dominant position and a restrictive concerted practice (in the latter case when the refusal is carried out jointly).*

The situation changed in 1998 with the adoption of the European Gas Directive (amended in 2003). This directive provides for a so-called Third Party Access regime

(TPA), i.e. a regime allowing third parties (mostly gas suppliers and shippers) to use the existing gas pipelines owned by the other operators. (…)Refusals to grant access to gas pipelines may now also be incompatible with the European gas directives if the reasons for the refusal are not among those foreseen in the directive (e.g. lack of capacity etc.)".

c) Third, are cases in which competition law enforcement (or advocacy) leads to an improvement in regulation (or diminishes the anticompetitive effect of a regulation).

The Italian contribution to the OECD Roundtable on regulation and competition in airport services states that the Italian Antitrust Authority has dealt with a number of competition issues which have arisen in the context of airport activities, with regard to both the market for air transport services and the markets for ground-handling services. The Authority acted to enforce competition law where Alitalia or the airport operator abused their dominant position as well as to advocate a change in rules and regulations where existing ones unduly restricted competition and favored anti-competitive behavior by incumbents. The main results of the Authority's interventions were to prompt pro-competitive changes in the regulatory environment and to contribute to greater market access by new entrants.

Overall, six abuses of dominant position were found, of which two were by the flag carrier on the Milan-Rome city-pair route, three by the operator of the Rome airport system and one by the operator of the Milan airport system on markets for airport services. In addition, three advocacy reports concerning the regulation of airport activities were presented to the Italian Government and Parliament.

Investigations concerning the flag carrier dealt, among other things, with abuses of its dominant position on the Milan-Linate/Rome-Fiumicino route connected with its control over a large share of slots at the Milano-Linate airport and with the strategic use of the mandate to perform clearance coordination, conferred to it by the Ministry of Transportation. In the first case, terminated in 1994, the flag carrier was found to largely under-utilize its share of slots on the Milan-Rome route, by systematically cancelling flights, in order to occupy existing slots and foreclose entry by new carriers on the same route. The Authority's judgment prompted the Ministry of Transportation to issue new regulations embodying some of the previously ignored provisions of EC regulation no. 95/93, such as the creation of a scheduling coordination committee at the fully-coordinated Milan-Linate airport and the so-called use-it-or-lose-it rule, according to which grandfathered rights over slots are lost when they are used less than 80 per cent of the time.

In the second case, terminated in 1996, the flag carrier was found to have used its position as clearance coordinator , over the 1988-1995 period, to increase its share of slots at the Milan-Linate airport while at the same time rejecting requests for slots by new entrants. Right before the end of the investigation, the flag carrier resigned its mandate as clearance coordinator, prompting the Ministry of Transportation to take

interim responsibility for coordination, while a new regulatory framework, involving the creation of a specific agency, was put into place. In this connection, an advocacy report by the Authority urged the Ministry of Transportation to design membership and funding of the new agency in order to ensure independence from incumbent carrier

Interventions by the Italian Authority in markets for ground-handling services at Rome and Milan airports, are of particular interest because they were instrumental in affirming the right of carriers to self-provision. The right to self-provision in legal monopoly markets is explicitly stated in the Italian competition law. Using this provision, the Italian competition authority judged that the refusal, by airport operators in Rome and Milan, to sign self-provision contracts with some foreign carriers constituted an abuse of dominant position, even though the current licensing regime assigns airport operators exclusive rights over the provision of airport services. An advocacy report to the Italian Government and Parliament was also successful in preventing the approval of a draft law aimed at limiting the scope of self-provisioning of ground-handling services.

In the same OECD roundtable on competition and regulation in airport facilities Norway reported that on four occasions its Competition Authority has dealt with the problem of car rental firms getting access to parking and barrier facilities at Norwegian state-owned airports which are operated by the Norwegian Civil Aviation Administration (CAA). The CAA decides who will be allowed to perform services and/or rent property at these airports. In 1979 and 1983 a total of four car rental firms complained to the Norwegian antitrust authority that they had been denied access by the CAA to three major airports. Prior to the CAA's decision there had been a tender and the number of winning firms had been limited to 4 at each of the three airports in question. The Norwegian antitrust authority made a decision prohibiting the CAA from denying access to the complaining firms. According to the Norwegian antitrust authority limitations on such facilities should be regulated individually at each airport and not be set at a uniform number for all three airports. The Norwegian antitrust authority also found the entry fee excessive and entry deterring. The high level of the fees and commissions was considered to further contribute to an upward pressure on prices paid by consumers renting cars at airports.

Following these cases, in 1985 the CAA put forth new guidelines regulating access for rental car, firms at 3 major airports and asked for a prior approval from the Norwegian antitrust authority. The guidelines were not approved on the ground that they still maintained a uniform rule of no more than 5 car rental firms at each airport and retained an admission fee and commission which the Norwegian antitrust authority already had found to be too high in the previous specific cases. The Norwegian antitrust authority stressed that the CAA should see to it that as many companies as possible be able to compete on car rental services and that because of the way the limitations and other conditions had been set, the guidelines could have a detrimental effect on competition.

The US contribution to the OECD Roundtable on regulation and competition in the financial industry provides an interesting case of how complementary enforcement of antitrust law and a sectoral regulation of the financial market result in improvements in the sectoral regulation.

In 1994, an investigation of quoting conventions in the Nasdaq market was undertaken by the Justice Department and the SEC which regulates the National Association of Securities Dealers operating the Nasdaq market. The quoting convention required market makers to update the prices they quoted to buy and sell Nasdaq stocks on the Nasdaq screen by a quarter (25 cents), rather than an eighth (12.5 cents), whenever their individual "dealer spreads" were 75 cents or more per share.

The Antitrust Division of the DoJ focused on determining whether the quoting convention constituted an agreement among market makers fixing prices in violation of Section 1 of the Sherman Act, while the SEC focused on the adequacy of the NASD's oversight of the Nasdaq market and whether the NASD had enforced its rules and the requirements of the federal securities laws. The Antitrust Division and the SEC coordinated their investigations.

In July 1996, the Antitrust Division filed a civil antitrust suit charging 24 major Nasdaq market-makers with violating the Sherman Act by adhering to and enforcing the quoting convention. The Antitrust Division alleged that the quoting convention had the effect of inflating transaction costs when investors bought or sold a substantial number of Nasdaq stocks, resulting in investors having to pay more to buy or sell those stocks than they would have in a competitive market. At the same time, the Division settled the case with a proposed court order forbidding the firms from continued adherence to the quoting convention and from harassing or intimidating other market makers for quoting stocks contrary to the convention. The settlement also put in place procedures to ensure that similar conduct would not occur, including the appointment of an antitrust compliance officer and the mandatory recording of a portion of the telephone conversations of their Nasdaq traders. Other provisions of the settlement allowed the Division representatives to listen in on traders' conversations and established procedures to educate traders on their obligations under the decree.

In August 1996, the SEC issued a report in which it found that the NASD had failed to adequately carry out its obligations under the Exchange Act to oversee the Nasdaq market and the conduct of its market maker members. That was followed by administrative proceedings against 28 market making firms and 51 individuals in January 1999. Finally, in the aftermath of the investigation, the SEC initiated several regulatory initiatives to improve market transparency and the operation of securities markets. As a result of the Nasdaq investigations, the costs of trading Nasdaq stocks have decreased dramatically and investors have saved billions of dollars.

d) Finally are cases where competition law enforcement prevents firms from using regulation in one sector to engage in anticompetitive practices in another sector

A wealth of cases of this type is reported in the OECD roundtable on competition and regulation in airport facilities.

For example, in 1994, a number of complaints were received by the Swedish Competition Authority concerning market access for providing ground services dealing with handling of passengers, luggage and freight, loading and unloading aircraft as well as services connected with ground stops at national airports in Sweden. The Swedish Board of Civil Aviation (Lfv) operates and manages the national airports and at the same time is one of the largest players on the market for the provision of ground services. As a result, Lfv controls access to the market for ground handling services at the same time it runs its own activities on this market. The applications of the complainant companies to provide ground handling services in a number of airports were dismissed by Lfv on weak grounds.

The Swedish Competition Authority stated that abuse of a dominant position had taken place if Lfv failed to allow companies access without objectively acceptable reasons. After discussions with the Competition Authority, Lfv agreed to apply competitively neutral and transparent criteria to determine how other ground handling agents should be granted access. In addition Lfv undertook to allow at least one independent ground handling agent access to the two most important airports in Stockholm and Gothenburg and to explore conditions for market access at other airports

A somewhat similar case occurred in Norway with respect to the operation of public phones at state-owned civil airports. At the time, mobile telephones were not as wide-spread in Norway as they presently are. In September 1994, the Norwegian Competition Authority prohibited the Civil Aviation Administration (CAA) from entering into an agreement giving a firm exclusive access to install and operate pay phone at civil airports owned by the Norwegian state. Limitations on the number of operators would only be allowed when it was indefensible to have more than a certain number of firms operating at the specific airport in question.

Prior to April 1994, the state-run Norwegian company Televerket had been operating coin operated pay phones at the airports, whereas the private company 3C Communication had run card operated pay phones.

On 1 April 1994, the CAA entered into an exclusive agreement with Televerket. Prior to the exclusive agreement, the CAA had entered into protracted negotiations with several companies. The process used was not an open tender with predefined descriptions of terms and simultaneous bids from the parties. The CAA decided to have only one concessionaire at all 19 airports. It was never argued that constraints on space warranted this. The CAA demanded a commission ("royalty rate") on the revenue from telephone calls. The Competition Authority was worried that the CAA maximised its profit by establishing a de facto monopoly at the airports. Televerket's call rates at airports already exceeded the rates of their ordinary public call boxes by 50 per cent.

In the Italian markets for catering and security services at the Rome airport, the airport operator denied access to the airport premises and discriminated against companies wishing to compete for airline catering and supplementary security. In both markets the licensee held a dominant position (a *de facto* monopoly in catering and a 70 per cent share in security). The Italian Authority argued that an operating license did not confer to the airport operator an exclusive right to provide catering and security services.

In the case of catering, despite the defendant's claim that access was not technically feasible, no objective justification was found for the refusal to deal and the defendant was charged with an attempt to extend its monopoly power in contiguous markets, hindering competition and damaging users of catering services due to higher prices and lower quality of services supplied by the incumbent to airlines. An interesting aspect of this case is that the cost structure of the incumbent firm in the catering market was heavily influenced by extremely high labor costs, presumably due to rent sharing with unionized workers. Entry by a competitor would therefore seriously jeopardize the market share of the incumbent. The existence of a rent sharing phenomena was later confirmed by the strong opposition of unions to attempts by the airport operator to sell part of its catering activities on the airport premises to a private firm, in spite of guarantees by the buyer that it would keep employment levels unchanged.

In the case of security services, the defendant was charged with unduly extending its exclusive rights over the infrastructure for using the licensing process to acquire sensitive commercial information concerning potential competitors and by granting licences to supplementary security companies in a discriminatory way. As in the catering case, no objective justifications were found for refusals to deal. In addition, fees charged to licensees were found to discriminate among security companies, by applying different contractual conditions to companies providing similar security services.

B) We now turn to cases where the existence of a sectoral regulation creates a difficulty for the enforcement of antitrust laws

I. <u>First, are cases where regulation limits the scope of application of antitrust laws</u>

Anticompetitive regulations limiting the scope of competition law enforcement exist in many sectors such as agriculture, defense, the banking industry, the audiovisual sector, the professions etc….

For example, in its contribution to the OECD working group on competition and regulation, Canada states that : "*Activities that are regulated are not directly subject to the Competition Act due to the "Regulated Conduct Defence" (the "RCD") under Canadian competition law. The RCD protects conduct which would otherwise be*

subject to the Act, if the conduct is specifically authorized by valid provincial or federal legislation. Broadly speaking, the RCD is an interpretive tool developed by the courts to resolve apparent conflicts between two different laws. The Bureau's approach to the RCD is to determine where the Act and a statutory regulatory regime are in conflict. The RCD applies, and the Act becomes inoperative where there is clear operational conflict between the regulatory regime and the Act, such that obedience to the regime means contravention of the Act. When determining the application of the RCD, it is the specific conduct rather than the industry as a whole that is examined.

Due to the RCD, the scope for application of competition law in highly regulated sectors is limited. However, there are many sectors where there is some form of oversight or potential regulation by sectoral regulators or governments where competition law also potentially applies".

The Mexican Federal Law of Economic Competition applies to all areas of economic activity within the Mexican territory, and make no distinction between national and foreign, or public and private economic agents. However, the Mexican competition law also provides that functions exercised by the State in "strategic areas", labor unions, intellectual property rights and some kinds of export cooperatives are not considered monopolies and, therefore, are not prohibited. The "strategic areas" currently defined by the Mexican Constitution are: postal services; telegraphs and radio telegraphy; petroleum and other hydrocarbons; basic petrochemicals; radioactive minerals and generation of nuclear energy; electric power and the functions of the central bank in producing coins and paper currency.

In the US, the Federal Reserve Board (FRB) is the primary regulator of bank mergers and may not consider that there is a competitive concern even in some cases in which the DoJ (which reviews the merger and conducts a separate investigation /analysis of the competitive effects of the transaction) fears that there may be a restriction of competition.

For example, in 1999 when the Fleet Financial/Bank Boston merger was examined, the DoJ and the FRB staff's reached different conclusions on the remedy needed to address competitive concerns and that the FRB did not require divestitures in a limited number of markets favored by the DoJ.

II. <u>Second, are cases where regulation does not preclude competition law enforcement but makes it more difficult to enforce the law:</u>

a) <u>because it creates a structure which is not conducive to competition</u>

As should be clear from previous remarks related to the situation in various European countries, regulations under which a firm is licensed to operate an airport or a harbor do not facilitate the exercise of competition.

In the US, the Pacific/Enova merger provide us with an interesting example of how sectoral regulation in the transportation of natural gas and in the electricity sector

made competition law enforcement more complex. Part of the competitive concerns of the DoJ was actually due to the regulatory environment. Indeed, in 1996, Pacific Enterprises, a California natural gas utility company, was planning to merge with Enova, a major provider of electricity in southern California. .

The state of California had granted Pacific a monopoly on the transportation of natural gas within southern California. By virtue of its monopoly over natural gas transportation and storage, Pacific had the ability to increase the overall price of electricity in California, when electricity from gas-fired generators was needed to supplement less costly electricity. Pacific also had a monopoly on all natural gas storage services throughout California. Pacific was virtually the sole provider of natural gas transportation and storage services to plants in southern California that used natural gas to produce electricity, including many electric power plants operated by Enova's competitors. Pacific, although regulated by the California Public Utilities Commission (CPUC), thus had the ability to restrict the availability of gas transportation and storage to consumers, by limiting their supply or cutting them off entirely, which would have the effect of raising the price they pay for natural gas.

By restricting gas-fired generators' access to gas, Pacific had the ability to increase the cost of electricity from gas-fired plants, thereby increasing the prices they bid into the pool and ultimately the price of all electricity sold through the pool. But before the merger Pacific lacked such incentives, as it owned no electricity generation plants that would benefit from an increase in the pool price for electricity. Enova, on the other hand, controlled a significant amount of electricity capacity, some from lower cost plants that function most of the time, and as a consequence, would have benefited from an increase of the price of electricity sold through the pool. However, Enova had no ability to increase the price of electricity by raising the costs of competing electric utilities because it did not control any input, such as gas.

Once Pacific's control of gas was combined with Enova's low-cost electricity generation under the proposed merger, Pacific/Enova would have both the incentive and ability during high electric demand periods to use its monopoly to limit the supply of natural gas, which would thereby increase the costs of competitive, gas-fired electric generating plants lessen competition and increase prices for all electricity in California. Pacific/Enova's incentive to raise costs to certain competing firms arose out of the fact that Enova was a low-cost producer of electricity and would therefore stand to profit from any increase in the price of electricity.

Thus, the DoJ competitive concern was partly due to the regulatory environment of the sector and in particular to the monopoly granted to Pacific and the fact that utilities could, from the standpoint of the regulatory environment, be vertically integrated thus raising the risk that a competition problem would arise in the proposed merger.

The Division ultimately reached a proposed settlement under which Enova agreed to sell all generation assets that would likely give Pacific/Enova the incentive to raise electricity prices (two low-cost gas generators, representing over half of its

electricity generating capacity). Because these low-cost generators operated almost non stop throughout the year; if Pacific/Enova were to own them, it could have earned substantial profits by restricting the supply of natural gas which would increase the overall price for electricity in the pool and thus the price Pacific/Enova would receive for electricity. Enova was not required to divest other (generally higher-cost) generation assets that were not likely to provide an incentive to raise pool prices.

b) because it creates an ambiguity (for example when there is an overlap between competition law and sectoral regulation)

The Spanish contribution to the OECD Roundtable, held a few years ago in the Competition Committee, concerned the relationship between regulators and competition authorities. It was argued that, at the time, the competition authority and the telecom regulator had overlapping responsibilities which created serious problems for the enforcement of competition law. That same round table suggested that a mandate driven division of labor between competition authorities and regulators was necessary to avoid such problems. Yet in some countries and some sectors there can still be overlapping responsibilities that create severe problems for competition law enforcement, particularly when a Minister has the discretion to suspend the enforcement of such a law in particular cases.

The US FTC reports on the Schering-Plough case involving drugs used to treat patients with low potassium or hypokalemia in which various regulatory considerations made competition law enforcement particularly complex .

Upsher-Smith Laboratories, Inc. (Upsher) developed a potassium chloride pharmaceutical that it asserted was the bioequivalent of a particular tablet of potassium chloride, known as K-Dur 20 for which Schering possesses a formulation patent on K-Dur 20 that expires on September 5, 2006.

In 1995, Upsher filed an application with the FDA to sell a bioequivalent version of Schering=s pioneer drug, K-Dur 20. At the same time, Upsher certified that Schering=s patent was either invalid or was not infringed by the Upsher generic product. Schering then sued Upsher for patent infringement. In 1997, as the case was about to go to trial, the parties settled the lawsuit. In the settlement agreement, Schering (the incumbent pioneer) promised to make payments to Upsher (the potential entrant generic) of $60,000,000. Upsher agreed (a) not to market any generic version of Schering=s drug before September, 2001 and (b) to license Schering to market six other Upsher products in prescribed territories.

The Federal Trade Commission (FTC or Commission) was concerned that the settlement was anticompetitive because it was designed to delay Upsher's generic version's entry into the marketplace without any offsetting efficiency benefits. However, two kinds of regulatory issues affected the analysis in this case.

First, Schering held a formulation patent from the U.S. Patent Office. If Schering proved infringement, Schering was entitled to exclude Upsher, and anyone else, from entering until 2006. The settlement permitted Upsher to enter in 2001.

Second, this case was complicated by the particular regulatory regime that governs "follow-on" or "generic" drugs. A U.S. law, known as the Hatch-Waxman Act, permits a company to file an abbreviated new drug application, which will receive expeditious review, if the company proves that its drug is bioequivalent to the pioneer's already approved drug product. Under such an application, the later generic need not duplicate the expensive and time-consuming safety and effectiveness studies ordinarily required by the FDA drug approval process. To balance equities somewhat, the Hatch-Waxman Act grants the pioneer who files a patent infringement action an automatic stay of up to 30 months before the FDA can approve the generic's application.

Thus, the settlement was affected by two regulatory realities. First, Schering had a patent until 2006. Second, Schering had a 30-month stay that would keep Upsher off the market in any event until 1998.

The FTC has no authority to prescribe the conditions under which new drugs are approved for sale within the U.S. Nor may the Commission issue patents or declare the validity or invalidity of a patent that has been issued. On the other hand, the FTC (together with the United States Department of Justice, Antitrust Division) is charged with policing against "unfair methods of competition", which includes restraints of trade. Neither the FDA nor the Patent Office is expressly charged with policing anticompetitive agreements. In December 2003, the FTC unanimously declared, , that the settlement was illegal because it represented a payment from a dominant firm to induce a probable entrant to delay its entry and was not ancillary to any procompetitive purpose or effect. The transaction could be profitable for both sides because the payment allowed them to share in the monopoly level returns achieved by Schering's pioneer drug in a market with no competitive substitutes. Consumers were harmed because the payment prevented Upsher's entry before 2001, which had the effect of preventing potassium chloride drug prices from falling before 2001. The Federal Trade Commission explained that it was not undermining the patent or assessing its validity. The issue was not whether Schering could have delayed Upsher's entry until 2006, but rather whether the payment was used to preclude a different settlement: a settlement that would have included an Upsher entry date earlier than the one agreed upon, 2001. Even if no settlement would have occurred without some monetary payment, the agreed-upon entry date provides less competition than would be expected if the parties litigated. Schering alleged that any trading of money for delayed entry would have been merely ancillary to the main procompetitive purpose of the agreement, which was to resolve a lawsuit. However, the Federal Trade Commission found that Schering and Upsher could produce no evidence that the payment was reasonably necessary to achieve a pro-consumer settlement.

Accordingly, the FTC concluded that the settlement agreement was illegal. In so doing, it exercised its own authority and avoided trespassing upon the authority of either the Patent Office or the FDA[2].

c) <u>because it allows firms to avoid sanctions</u>

In cases where both competition law and sectoral regulation apply simultaneously and where some ambiguity exists as to the legality of a practice, when the competition authority considers that a violation of competition law has occurred , it may not be able to apply sanctions if the violators can reasonably argue that they could not have known that the practice was illegal.

III) Third, there are cases in which the goal of regulation is to limit (or even eliminate) competition, possibly because of a perceived market failure.

Few cases of this kind were reported in the contributions to the ICN working group in spite of the fact that there are many such regulations in various countries, particularly in the service sector. In France, for example, lawyers, architects, public notaries, doctors and surveyors have legally binding self-regulations enforced by their respective professional associations. These self regulations limit competition by restricting entry, freedom of establishment, advertising and, in certain cases, price competition. The official justification for these restrictions on competition is usually that consumers would be unable to exercise their choice because of lack of information, all the more so that consulting such professionals is usually not an often repeated experience, and therefore consumers need to be protected against unfair practices. In many countries little attention is paid to the question of whether other means, and less anticompetitive means, could be used to protect consumers.

[2] The Commission decision reported above is subject to appeal to U.S. courts. The above report is not an official description of the FTC's decision but rather a summary prepared solely for the purpose of distribution within the International Competition Network. The full, official 88-page FTC decision can be found on the Commission's website at www.ftc.gov