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## Competition Law and Regulation Law From an EC Perspective

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# Competition Law and Regulation Law From an EC Perspective

John Temple Lang

## **Abstract**

These comments look at the subject from a legal viewpoint, in contrast to the Essay by Professor Dr. Günter Knieps, which uses an economic approach. His Essay raises several issues concerning access: (1) who should be obliged to give it; (2) to whom; (3) in what circumstances; and (4) on what terms? In practice, the precise answers will depend on whether European Community ("Community" or "EC") competition law, national competition law, or national telecommunications law based on Community directives, are being applied. As far as possible, the same answer should be given in all cases.

# COMPETITION LAW AND REGULATION LAW FROM AN EC PERSPECTIVE

*Dr. John Temple Lang\**

These comments look at the subject from a legal viewpoint, in contrast to the Essay by Professor Dr. Günter Knieps, which uses an economic approach. His Essay raises several issues concerning access: (1) who should be obliged to give it; (2) to whom; (3) in what circumstances; and (4) on what terms?

In practice, the precise answers will depend on whether European Community ("Community" or "EC") competition law, national competition law, or national telecommunications law based on Community directives, are being applied. As far as possible, the same answer *should* be given in all cases. In this Essay, I am not discussing any substantive differences that there may be between Community competition law and national competition law.

Although there is no absolute boundary between competition law and regulation, there are important differences both in objectives and in methods:<sup>1</sup> Community competition law is limited to dealing with restrictive agreements and equivalent arrangements, mergers that create or strengthen dominant positions, and abuse of dominant positions that have significant anticompetitive, exclusionary, or exploitative effects. Regulatory regimes may have additional objectives. For example, by encouraging the construction of alternative networks, obliging companies to provide a universal service even in areas in which it is unprofitable to do so, or for non-economic objectives.

Regulators usually have powers to impose more detailed obligations, for example, specific prices for defined categories of services or specific conditions in contracts, than competition authorities would normally impose. Competition authorities may determine that a price is unfairly high or exploitative, or unfairly low,<sup>2</sup> but they do not normally have the power to fix a precise

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1. See generally John Temple Lang, *Community Antitrust Law and National Regulatory Procedures*, in 1997 FORDHAM CORP. L. INST. 279-334 (Barry Hawk ed., 1998).

2. That is, below cost, exclusionary.

price. Regulators can, therefore, impose new rules on categories of companies that can be precisely defined, so that there is no doubt about which companies are bound or precisely what they are required to do.

Regulators have rule-making powers, which allow them to change the substantive law. Competition authorities normally have powers only to make rules, which make clear the practical effects of already-existing substantive rules of law. Regulators can deal with problems before they arise by adopting clear new rules. Regulation is most needed when a newly liberalized market is still not competitive. It is needed to determine the relations between the ex-monopoly and new entrants that are in a weak position, and to prevent an ex-monopoly that is still dominant from preventing competition from emerging or from taking excessive advantage of its dominant position. As markets become more competitive, regulation<sup>3</sup> becomes less necessary, and regulation should be reduced. Regulators can require some behavior that otherwise would be contrary to Community competition law. For example, they can require a dominant company to discriminate in favor of competitors which themselves are investing in infrastructure, in comparison with others that are not.

In other words, regulatory measures should be taken when competition law cannot achieve the results that are needed, or when the results of using competition law would be too uncertain or would take too long to obtain. If competition law can achieve the desired results, then it should be allowed to do so. This acceptance is because competition law protects economic freedom and market mechanisms, and allows parties to negotiate terms corresponding to their view of the value of each agreement. Community competition law<sup>4</sup> applies only to agreements and practices that affect trade between European Union Member States, directly or indirectly, and to dominant positions in “a substantial part” of the European Union.

In general, competition law does not require companies to give their competitors access to their assets, networks, or intellectual property. This situation is the same under both Articles 85 and 86 of the Treaty establishing the European Community

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3. As distinct from competition law.

4. As distinct from national competition law.

(“EC Treaty”),<sup>5</sup> under the “essential facility” principle. This principle applies only if the refusal to give access has serious anticompetitive effects, if access is essential to enable competitors to compete,<sup>6</sup> and if there is no legitimate business justification for the refusal.

Even if these conditions are *not* fulfilled, a regulator *may* order the owner of a telecommunications network to interconnect its network with that of a competitor, to provide a more complete service to the customers of both companies, or to enable the competitor to develop its business more quickly without an insurmountable barrier or a serious handicap. Interconnection *may* be ordered by a regulator even if the network owner does not have a monopoly or dominant market power. In practice, regulators usually exercise more power than competition authorities to decide the conditions, including the price, on which interconnection must be given, and are more likely to order solutions that need supervision or dispute-settlement mechanisms.

The Commission is a competition authority, *not* a regulatory authority. Telecommunications regulation is achieved by national regulatory authorities implementing, among other Community measures, the Directive on Interconnection.<sup>7</sup> National competition authorities apply both Community competition law and national competition law. The Commission has published a Notice on the application of Community competition law to telecommunications access agreements.<sup>8</sup> This deals, among other things, with the relationship between Community competition law and Community telecommunications legislation.

Under Community competition law, a single company is required to give access only to an “essential facility” and only if the company is in a dominant position. If that is so, then there is a

5. Treaty establishing the European Community, Feb. 7., 1992, art. 85, 86, O.J. C 224/1, at 28-29 (1992), [1992] 1 C.M.L.R. 573, 626-28 [hereinafter EC Treaty], *incorporating changes made by Treaty on European Union (“TEU”) amending the Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty], as amended by Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA].*

6. Because they cannot obtain the goods and services elsewhere and cannot be expected to build, produce, or invent them for themselves.

7. Council Directive No. \_\_\_, O.J. L 199/32 (1997); *see also* Commission Directive No. 90/388/EEC, O.J. L 192/10, art. 4 (1990).

8. *See* Commission Notice, O.J. C 265/2 (1998).

duty to give access to competitors on non-discriminatory terms, that is, on the terms on which the corresponding operations of the dominant company obtains access. This duty may make it necessary to produce separate accounts for the two parts of the dominant company or to impose a regulatory solution. In some cases, joint ventures controlling important facilities may have similar duties imposed on them under Article 85 of the EC Treaty.<sup>9</sup>

This principle is “asymmetrical” in the sense that competition law imposes no duty on non-dominant companies, or on dominant companies not controlling essential facilities. It is, however, “symmetrical” in its effects because it puts the activities of the competitors on the same basis as the corresponding “downstream” activities of the dominant company owning the essential facility. Professor Knieps’s conclusion is that only bottleneck facilities should be regulated, whether the owner is the incumbent or a newcomer.<sup>10</sup> As I understand it, Professor Knieps uses the word “bottleneck” to mean substantially the same thing as “essential facility.” Therefore, Community competition law is consistent with his economic principles.

His second conclusion is that local cable-based networks are likely to be “bottlenecks.” This conclusion raises a legal issue. If there was a serious doubt about whether the locality was “a substantial part” of the European Union, or whether the refusal to interconnect affected trade between Member States, then it would be easier to apply national law—either competition law or telecommunications law.

Professor Knieps’s next point, which is worth discussing, is his statement that the fact that granting access would reduce the owner’s profit is not a “valid business reason” for refusing access. This point is of course correct, but terms on which access must be provided are influenced by the financial consequences for the monopolist: (a) the monopolist cannot expect to be repaid its monopoly rents; (b) the monopolist is not required to subsidize its competitor or discriminate in its favor; (c) the monopolist may recover its expenditure on providing access and may ob-

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9. EC Treaty, *supra* note 5, art. 85, O.J. C 224/1, at 228 (1992), [1992] 1 C.M.L.R. at 625.

10. In fact, it is unlikely in practice that a newcomer would have control of a bottleneck.

tain a normal return on its invested capital from the competitor; (d) the monopolist is not required to do anything that is likely to damage the safety or reliability or efficient use of its facility; and (e) the interests of third parties, which already have contacts with the monopolist, must be taken into account. Companies with “significant market power”<sup>11</sup> have obligations on network access, non-discrimination, publication of interconnection conditions, cost-based prices, and cost accounting, under the Interconnection Directive, the Voice Telephony, and Leased Lines Directives.

It is useful to compare dominance under Community competition law and significant market power under the Telecommunications Interconnection Directive. “Significant market power” is: (a) determined by National Regulatory Authorities; (b) determined in advance and reconsidered at intervals; (c) disputable in national administrative courts; (d) presumed on the basis of a twenty-five percent share of the “market”—other elements may be taken into account, for example, excess capacity; (e) listed and limited in number concerning obligations: to give access, not to “discriminate,” to publish prices, to have “cost-based” prices, and to keep separate accounts. They can be wider than duties under competition law. They can, therefore, supplement competition law and make it unnecessary to apply such law, for example, by requiring separate accounts, or by making it easier to apply such law, for example, on cross-subsidizing.

There are still unanswered questions about “significant market power:” (1) how can it be defined more precisely, and what tests can be or must be used to measure it; (2) does it apply to the telecommunications licensee company in a group of companies or to related companies as well; (3) can the National Regulators look at market shares in markets not mentioned in the Interconnection Directive; (4) how should market share be measured: by turnover or number of minutes, by number of subscribers, or by calls terminating in the company’s network; (5) how far is it necessary to harmonize the way National Regulators apply the rules on significant market power—is it necessary only to exchange analyses, to save time, or avoid mistakes; (6) for how long will these rules be needed, and when can they be ended

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11. This observation is presumed if a company has more than 25% of market share.

and competition law applied without them;<sup>12</sup> and (7) what does “cost-based” mean in practice?

It is generally considered that regulation, as distinct from competition law, is needed primarily during the transitional period until liberalized markets become competitive. After that, they are needed only to provide a technical framework—as Professor Knieps says, for allocating frequencies, adopting standards, and ensuring number portability, and perhaps to ensure public interest objectives such as universal services.

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12. Presumably, this time will be different in each national market.