

Dominance in the TV sector

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Preliminary remarks: the relationship between pluralism, regulatory competition and competition law

The Guidelines on Article 82: refusal to supply in the TV sector

Final remarks

The relationship between competition law and the protection of pluralism in general [1]

- Competition law should aim at “*protecting an effective competitive process and not simply competitors*” (Commission Guidelines, § 6).
- On the contrary, protection of external pluralism aims at assuring the presence of a certain number of sources of information in the markets so that internal pluralism can be potentially assured as well.
- NCA protects competition law and NRA protects pluralism (external and internal component).

The relationship between competition law and the protection of pluralism (external component): the Italian framework [2]

- **AGCom (NRA) and external pluralism.**
 - Each Country can fix ex ante limits;
 - < 20% channels;
 - < 20% revenues on “SIC” or single market composing it;
 - Must-carry obligation (40% of MUX capacity).

- **AGCM (NCA) and competition law. No fixed limits:**
 - Decreasing role of “per se rule” and increasing role of the “rule of reason” (GlaxoSmithKline, T-168/01).

The relationship between regulatory competition and competition law [1]

- The goal of the New Regulatory Framework 2002 on electronic communication networks and services (“**NRF**”) was to foster competitiveness (competitive injection in the value chain) within regulated industries in a critical lapse of time (the IP converged Era) so that the latter could be progressively subjected to competition law only.
- Furthermore the NRF pursues public interest objectives which cannot be delivered through competition law, such as cultural diversity and media pluralism (i.e. external pluralism)

The relationship between regulatory competition and competition law [2]

- NRF builds on key features of competition law (market definition and concept of dominance, see Significant Market Power or SMP Guidelines)
- It does not mean that analysis carried out pursuant to NRF will always lead to the same result of competition law enforcement (e.g. definition of markets and of dominant firm may differ)
- First Recommendation on relevant market (2003), contained a list of markets that should be analysed by NRA for imposing *ex-ante* remedies upon SMP operators.

The relationship between regulatory competition and competition law [3]

- Procedure

Market identification: (i) high and non transitory entry barriers, (ii) structure that does not tend towards effective competition within the relevant time horizon and (iii) competition law remedies not sufficient (i.e. principle of subsidiarity) (“Three Criteria Test”).

- SMP firm: m.s. > 40%
- Notwithstanding point (iii) above, the Commission has acknowledged the possibility of parallel procedures under regulatory competition and competition law (SMP Guidelines, § 31 and note 15).

The relationship between regulatory competition and competition law: the Italian framework [4]

- With respect to TV sector, the list annexed to the 2003 Recommendation identified the “*Broadcasting transmission services, to deliver broadcast content to end users*” (market n. 18).
- Yet, AGCom (NRA) so far addressed the “*wholesale market for analog transmission services...*” (136/05/CONS, 544/07/CONS, 159/08/CONS).
- AGCM experience in so far (since 2003): upstream market of content acquisition (A362), upstream market of access to broadcasting infrastructure (C6161), downstream markets and all the so-called “emerging markets” (C7493). New alleged DP case (Conto TV)

Preliminary remarks: the relationship between pluralism, regulatory competition and competition law

The Guidance Paper on Article 82: refusal to supply in the TV sector

Final remarks

Refusal to supply: the concept [1]

The “center of gravity” test

- The refusal should be opposed by a vertically integrated dominant undertaking to buyer which competes on its “downstream” market.

Final remarks: actual v. constructive refusal to supply

- Notwithstanding Chapter IV.D of the Guidelines is titled “*Refusal to deal and margin squeeze*” very little attention has been given to the latter (§ 80).
- However, it is recognized that this practice could be one of the most pervasive in the TV sector since normally the dominant undertaking might decide to put in place a constructive refusal, especially *ex-post* margin squeeze (“margin squeeze”).
- Furthermore, § 80 deals only with discriminatory margin squeeze, while it is recognized that dominant firms face higher incentive to put in place non-discriminatory margin squeeze especially where firms are vertically integrated and upstream market is regulated.
- Finally, the Guidelines appear somewhat incomplete since a clear distinction between exclusionary and exploitative practices cannot always be drawn up in practice.