From Ordered Competition – Towards a New Competitive Order?
The Role of the UK Competition Commission at the Interface between Sector Regulation and Competition Law

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Abstract. This article examines the interface between sector regulation and competition law, through the example of the experience of the UK Competition Commission. It reviews recent experience in relation to regulatory investigations, market investigations and merger control and considers the relevance of this experience to the future design and implementation of policy and practice where sector regulation and competition law overlap.

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1. Introduction and Overview
The interface between sector-specific regulation and competition law has been covered extensively in the academic and empirical literature. This article does not propose a comprehensive synthesis of all the literature and experience to date but rather, to explore the workings of the system in practice with a focus on the UK.

The title of this article: “From ordered competition – towards a new competitive order?” echoes a theme in an article by John Burton (1997) over a decade ago contrasting the principles and prescriptions behind the UK model of

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utility regulation in the post-privatization period with its workings in actual practice. Burton found that the system had not evolved into the rule – where feasible – of competition in UK utility industries. Instead, he found that the system had metamorphosed into a different system that Hayek termed *ordered competition*. The conclusion was that a fundamental policy choice remains to be made as to the basic form of the system in the future: whether it should continue as a system of ordered competition, or whether it should become a regime characterised by open and effective competition.

Now in 2009, this article seeks to revisit the theme of the interface between sector regulation and competition law. Rather than making a preferred choice for one or the other, the central theme of this article is that, to draw a rigid distinction between sector regulation and competition law, is a stylized view and ignores what is happening in practice – in the UK at least, which forms the reference point for this article.²

The UK Competition Commission’s (CC) experience is particularly interesting for these purposes, in that its work regularly straddles the dividing line (if indeed there is one) between sector regulation and competition law. The UK Parliament evidently thought that there was some logic in having regulatory and competition work performed by one authority and, presumably, thought that the CC could contribute to both.

This article examines the CC’s activities in cases where: 1) the CC is carrying out a strict regulatory function such as a licence modification; and 2) applying mainstream competition law to regulated industries, such as in the context of a market investigation reference or merger control.³

There are general lessons to be learned from the cases covered, which form the basis for general conclusions. While the workings of the CC are not offered as a blueprint for other regulators and systems, there is much in the CC experience that may be informative for other contexts.

2. Sector Regulation and Competition Law: the Interface

A discussion about the interface between sector regulation and competition law must begin with an explanation of these concepts and how they interact. This section presents a brief statement of what are traditionally considered to be the differences

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² Kroes (2009) stated: “it is essential to understand from the beginning that regulation and competition law are parallel processes, not competing processes. […] There are valuable roles for both regulation and competition law in helping markets work better […] Our experience is that regulation which respects competition principles is the most efficient type of regulation. When that regulation succeeds in enabling a competitive market, there is less to worry about both for the consumers and for the enforcers of competition rules. But even the most perfectly designed regulation will not eliminate the risk of abuses, so there will always be a role also for competition enforcement”.

³ This article reflects the law and practice as of April 2009.
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