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I. INTRODUCTION

The context of post-liberalization has led to different tensions between competition law and regulation in several markets such as telecommunications and electricity. Whereas certain segments of those markets remain considerably regulated, competition prevails in other sectors. However, competition law and regulation coexist in most segments and this interface has created new challenges for competition and regulatory authorities. For instance, the same matter can be under the scope of two different sets of rules and different authorities may be empowered to deal with the same issue.

Several questions arise from this interface between competition law and regulation. First, it is unclear to what extent competition law may be applicable in regulated markets. The second question is whether regulation can be used as a defense for a claim based on anticompetitive conducts. The answer to both questions is not an easy task.

If these challenges have been difficult to solve for U.S. and EU authorities, the situation has been more problematic for developing countries like Chile, whose competition and regulatory systems lack the strength and tradition of more developed regimes.

In chapter II I will show, based on relevant case law, that U.S. and EU competition law systems have approached this matter in different ways and this divergence might be explained (not only) by the objectives pursued by competition law in both jurisdictions.

In chapter III I will describe how Chilean authorities have approached to this problem and will conclude that those authorities have left a considerable scope for competition law even where detailed regulation exists. This particular view may be explained by a number of legal changes introduced since 2003 that have entailed a new design of the competition law system.

II. TWO DIFFERENT APPROACHES

A. Deutsche Telekom (2008) and The Preeminent Application of Competition Law in the EU

In 2003 the European Commission found that Deutsche Telekom had incurred a margin squeeze because the spread between the prices it charged its competitors for unbundled access to the local loop and the prices it charged its subscribers at the retail level was not enough to enable an equally efficient competitor to cover its product-specific costs of supplying retail access services. For the Commission such conduct constituted an abuse of dominance and violated what was then Article 82 EC (now Article 102 of the TFEU). Since Deutsche Telekom's local access tariffs had been approved by the national regulator in Germany, Deutsche Telekom argued that

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such tariffs could not be deemed abusive and the *ex ante* regulation would shield it from a claim based on anticompetitive behavior. The Commission rejected Deutsche Telekom's argument and imposed a fine for margin squeeze.[2]

Deutsche Telekom contested the Commission decision and applied for annulment to the Court of First Instance ("CFI"). In 2008 the CFI upheld the Commission decision and rejected the argument that Deutsche Telekom would not be subject to Article 82 EC as a result of the *ex ante* intervention by the national regulator in fixing Deutsche Telekom's charges.[3] For the CFI, the relevant question was not whether Deutsche Telekom charged the regulated tariffs but "whether the applicant had sufficient scope at the material time to fix its charges at a level that would have enabled it to end or reduce the margin squeeze at issue."[4]

As can be noted, as long as the dominant firm has enough discretion to modify its conduct once the regulation has been launched, it must adopt all necessary measures not to distort competition. This approach is consistent with the traditional European notion that dominant firms have a *special responsibility* that imposes a duty to behave *as if* they were not dominant.[5] According to this view, the regulation does not shield a dominant firm from the scrutiny of competition law, even if the regulatory agency has already considered whether the *ex ante* regulation is compatible with competition law rules.[6] Therefore, if sector-specific regulation fails to prevent violations to competition law rules, the European Commission can intervene even in cases of previous intervention by the regulator.

B. Trinko and The Small Benefits From Antitrust Law in Regulated Markets in the United States

The approach adopted by the U.S. Supreme Court in the *Trinko* case was different to what the European Commission and the CFI concluded in *Deutsche Telekom*.[7] In *Trinko*, Verizon Communications Inc. ("Verizon") was the incumbent local exchange carrier and enjoyed an exclusive license for the State of New York. In 1996 the Telecommunications Act compelled Verizon to grant unbundled access to its local network on just, reasonable, and nondiscriminatory terms. Some competitors complained that Verizon had violated such obligation and the regulatory authorities, the New York Public Services Commission ("PSC") and the Federal Communications Commission ("FCC"), started investigations that eventually led to a consent decree by the FCC and several orders by the PSC, including payments to Verizon's competitors. In this context Law Offices of Curtis V. Trinko, LLP ("Trinko"), a law firm which was a subscriber of AT&T, one of Verizon's rivals, filed an antitrust complaint based on the fact that Verizon had infringed Section 2 of the Sherman Act by granting access on discriminatory terms in order to prevent customers from dealing with the new entrants.

The Supreme Court refused to apply Section 2 of the Sherman Act on the ground that where a regulatory structure designed to deter and remedy anticompetitive harm exists, "the additional benefit to competition provided by antitrust enforcement will tend to be small, and it

[2] See Case COMP/C 1/37.451, 37.578, 37.579, OJ 2003 L 263/9.

[3] *See* Case T-271/03 Deutsche Telekom AG v. Commission.

[4] *Id.* at ¶ 121.

[5] *See* Case T 228/97 Irish Sugar v. Commission [1999] ECR II 2969, ¶ 112; and Case T 203/01 Michelin v. Commission [2003] ECR II 4071, ¶ 97.

[6] Deutsche Telekom AG v. Commission, *supra* note 3, ¶ 120.

[7] Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

will be less plausible that the antitrust laws contemplate such additional scrutiny."[8] For the Supreme Court, where such a structure exists, the benefits of antitrust intervention need to be balanced with its costs. Such costs tend to be high and include the risk of false condemnations and the natural limitations for any court to become a day-to-day enforcer of sector-specific regulatory obligations.

Damien Geradin & Robert O'Donoghue suggest that the different approaches adopted in *Trinko* and *Deutsche Telekom* may be explained by several factors and not only by different views of what competition policy should pursue.[9] They remark that the sector-specific regulation applicable to telecommunications in the United States was much more intrusive than in the EU and, therefore, there would be greater scope and need for the application of competition rules in the EU. They also point out that whereas the U.S. regulators had adopted an appropriate remedy to deter the anticompetitive harm in *Trinko*, the German regulator had failed to prevent Deutsche Telekom's abusive behavior. Finally, they note that while EC competition rules are based on primary legislation in the EC Treaty, the regulatory framework on telecommunications is contained in secondary legislation.

Whatever the reasons, by comparing the *Trinko* and *Deutsche Telekom* decisions, we can conclude that the European Commission seems to be more willing than U.S. courts to apply competition rules where they coexist with sector-specific regulation. This approach was confirmed in the *Telefónica* case, in which the Commission concluded again that "competition rules may apply where sector specific legislation does not preclude the undertakings it governs from engaging in autonomous conduct that prevents, restricts or distort competition."[10] In this case the Commission also considered that sector-specific regulation and competition law may seek different policy objectives and, therefore, the Commission would be entitled to apply Articles 81 and 82 EC, even where a practice has already been the subject of a decision by a national court or regulatory agency.

As can be noted, while the U.S. Supreme Court seems to be more skeptical of its own ability to apply antitrust laws where an appropriate regulatory structure exists, the EU authorities have left a greater scope for competition law in the context of regulated markets.

III. THE INTERFACE BETWEEN COMPETITION LAW AND REGULATION IN CHILE

Although the origin of competition law in Chile dates back to 1973, when the first statute on competition law ("Decreto Ley 211") was enacted to protect "free competition," it was not until the legal changes introduced in 2003 to the Decreto Ley 211 that Chilean competition law system started to take a clear shape. Since then the new Competition Court has issued a number of decisions in which the conflicts between regulation and competition law have been a central concern for the court.

Arguably, the most controversial decision was *OPS et al v. Telefónica Móviles*, in which the Competition Court imposed a fine to Telefónica Móviles de Chile ("Telefónica")[11] for price

[8] *Id.* at p. 12.

[9] Damien Geradin & Robert O' Donoghue, *The Concurrent Application Of Competition Law And Regulation: The Case Of Margin Squeeze Abuses In The Telecommunications Sector*, The Global Competition Law Centre Working Papers Series, Working Paper 04/05, *available at* http://www.coleurop.be/content/gclc/documents/GCLC%20WP%2004-05.pdf.

[10] *See* Case COMP/38.784, OJ 2008 C 83/6, at ¶ 666.

[11] Decision 88/2009 (October 15, 2009), *available at* http://www.tdlc.cl/DocumentosMultiples/Sentencia%20_88_2009.pdf.

discrimination, margin squeeze, and refusal to deal. OPS provided a service known as the "celulink system," which basically consisted of converting mobile "off-net" phone calls into "on-net" phone calls. As a result of this service, those mobile phone calls originated on a mobile network different to the network of destination were processed as on-net phone calls, thus avoiding the payment of charges for the access to the mobile network belonging to the other mobile company. To provide this service OPS subscribed to mobile phone plans with Telefónica and other mobile phone companies. Telefónica raised the prices it charged OPS for the mobile phone plans they had subscribed to and OPS complained that the new prices were discriminatory, since it paid much higher prices than other users who demanded lower volumes of minutes.

The case was brought to the Competition Court and one of Telefónica's defenses was based on the alleged illegality of OPS's conduct. For Telefónica, OPS only sought to avoid the payment of charges for the access to the mobile network. According to the sector-specific regulation, Telefónica was entitled to charge for such access at a regulated price.[12] The Competition Court requested the expert opinion of the Secretary of Telecommunications, the national regulatory agency, which informed the Court that OPS's activity was illegal since it only sought to avoid the payment of charges for the access to Telefónica's mobile network.

The Competition Court defined two separate markets—the upstream market of mobile telephony services and the downstream market for the conversion of mobile off-net phone calls into on-net phone calls. The court concluded that the access to the mobile network was essential for the provision of services in the downstream market and that Telefónica enjoyed a dominant position in the upstream market. Since the prices charged by Telefónica for the mobile phone plans did not enable OPS to compete in the downstream market, the Competition Court concluded that Telefónica had abused its dominant position and had incurred a margin squeeze.

The Competition Court had to struggle to define a relevant market separate from the market for mobile phone services in order to find an abuse of dominance. Since OPS was not present in the market for mobile phone services, then there must have been another market affected by Telefónica's behavior—the market for the conversion of mobile off-net phone calls into on-net phone calls.

It is interesting to note that the Competition Court rejected the sector-specific regulator's opinion that deemed OPS's conduct illegal. For the Competition Court, the goal of the sector-specific regulation in this case was to avoid a tariff distortion due to the difference between actual incomes from access charges and the expected incomes at the moment those charges were regulated. Since the sector-specific regulation does not force mobile operators to charge different prices for on-net and off-net phone calls, it would be disproportionate to use the regulation just to avoid a tariff distortion whose origin was such divergence.

As can be noted, in *OPS et al v. Telefónica Móviles* the Competition Court not only applied competition rules where sector-specific regulation existed but also sent a clear message to the regulatory authorities that it disliked the discrimination between on-net and off-net phone calls, a matter which exceeds its competence. Most incredibly, the Competition Court reached its decision in spite of the national regulatory agency's opinion according to which the plaintiff's

[12] In Chile, while retail prices of mobile phone calls are unregulated, access charges to the mobile network are regulated.

activity was illegal. Although the case is still pending before the Supreme Court, the Competition Court has clearly shown that is willing to intervene even if a regulatory structure exists.

Independently of the result and the cogency of the court's arguments in *OPS et al v. Telefónica Móviles*, one can reasonably ask why the Competition Court has adopted this apparent intrusive approach and even contradicted the explicit opinion of the regulatory agency. This might be explained by the fact that the last amendments to the Decreto Ley 211 have explicitly been designed to strengthen the institutional design and to provide competition authorities with stronger powers to fulfill their tasks. An example was the very creation of the Competition Court as an independent court consisting of five full-time, professional judges—two economists and three lawyers. Another example was the introduction in 2009 of a leniency program and the strengthening of the investigative powers of the National Economic Prosecutor, the national competition agency, in collusion cases.

Since all these new amendments started to be introduced, Chilean competition authorities have become more active in the enforcement of competition rules, and they probably feel more confident with their increased powers. Competition law is no longer a specific issue monopolized by small elites of academics and highly skilled professionals but it has become a matter of public interest.

Yet the transition from an old-fashioned system based on unclear goals and an intuitive approach to a system based on sound competition policy and clear decision-making will probably entail certain tensions, as those described above, and we can expect some adjustments in the future.