



Pros and Cons Seminar  
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“Co-ordinating Regulation and Competition  
Law – *ex ante* and *ex post*”



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# The traditional distinctions

Competition law: universal; generic proscriptions; application *ex post* (with *ex ante* incentive effects)

Regulation: sector –specific; prescription (eg. access price is 3.97 cents); applied *ex ante*

Yet the picture is more complicated. How and why?

Examples from new European telecoms regime and selected competition cases relating to regulated industries.

# The new telecoms regime

- ❑❑❑ Defaults to competition law absent dominance (significant market power)
- ❑❑❑ Eighteen markets recommended for consideration of *ex ante* regulation based on
  - ❑❑❑ persistent barriers to entry and competition
  - ❑❑❑ expected continuation of same
  - ❑❑❑ comparative advantage of *ex ante* regulation over competition law (based on high compliance costs, frequent intervention and need for legal certainty).

# Ex ante remedies

- ▣▣▣ transparency
- ▣▣▣ non-discrimination
- ▣▣▣ separated accounting
- ▣▣▣ mandatory access
- ▣▣▣ cost –oriented pricing

## Mandatory access and non-discrimination in regulation and competition law

- Vertically integrated incumbents have ample opportunities and motives for price discrimination and non-price 'sabotage'.

# An example – wholesale broadband access



Issues are:

- Where to mandate access (cf 'ladder to the stars')
- How to articulate relative prices

Divergent views of scope of regulation, but regulatory regime typically relies on prohibition of margin squeeze

# Some Competition Cases

- Global One

- BiB

- Marathon

Importance of forward-looking remedies

Negotiation, rather than enforcement (facilitated by  
Regulation 1 (2003))

No clear constraint set by 'proportionality' condition

Role of joint (DG Comp and other) policy  
statements

## Future questions

Is 'regulatory anti-trust' a response to deficient regulation (eg in energy)?

Can such interventions facilitate the euthanasia of the regulator?