

András Tóth

Relationship between competition law and sector-specific regulation regarding the abuse of dominant position

Introduction

As you know, the applicability of competition law requires market conduct. This market conduct must be part of the autonomous business policy of a company. Sometimes the autonomous conduct is influenced by regulation. This presentation is about the reasons of this influence and the scope of application of competition law in case of several types of regulation. First we look at the types of economic regulation, then we review the relationship between competition law and each mentioned type of regulation.

Regulation, re-regulation, deregulation

In a modern market economy there are several State policies for welfare. One of these is competition policy with the main purpose of protecting effective competition. Competition should be able to function without any restriction, because only this way it can maximize the welfare of consumers. Accordingly competition law triggered by competition policy isn't just administrative, but it is a market regulation form. The Structure-Conduct-Performance model describes the factors, which determine competition. According to this model, Structure (of the market) determines the Conduct of the market players, which in return affects the Performance. The State through competition law gets the Structure and Conduct under control, and this way ensures the welfare developing effect of markets. The instruments of competition law influence the Structure through the merger control and the regulation of restrictive agreements. The Conduct, on the other hand, is under control by way of the prohibition of the abuse of dominance.

Other policies may not affect competition at all or only as a "by-product" but not as a result of main purpose. These policies (so called sectors policies, e.g. telecommunication, transport and energy) are needed to avoid market failure. It means that the effective competition isn't able to ensure some welfare aims, although they are important for the State. There are two theories on what triggers market failure.

One of these is the normative theory. According to this market failures need correction for the sake of welfare. If there is a market failure and the competition isn't able to produce a positive outcome, then it is the task of regulation to simulate it mainly with regard to price and quality. In the normative theory the main reason for regulation (beyond other interests like State defence or universal services) is the existence of natural monopolies. Natural monopolies are the result of economies of scale and economies of scope. In case of telecommunication economies of scale means that where a network was already built there isn't worth building other parallel networks.

The other theory, positive theory is actually a criticism against normative theory. According to the positive theory, the normative theory chases the idea of perfect market. Regulation is justified by the fact that differences from this ideal typical picture are equal to market failure. The positivists attract attention to the cost of regulation and they consider that the regulation is a State failure and is directed by group interests. The positivists have established the Capture Theory, according to which market players of the regulated sector who have close contacts with the regulatory authority and its experts, dictate the regulation. The information required of regulation can be collected only from market players who so could influence the regulation favourably from their point of view.

Nevertheless it is all the same in terms of our topic why is there regulation. What matters is that it may exclude the applicability of competition law. The main point is that there are fields where the competition law cannot be applied in the case of lack of competition. In order to avoid these situations triggered by social deficit, the State applies economic regulation.

Looking at the most frequent reasons for regulating the natural monopoly, which evoke regulation in the network industries (e.g. telecommunication, transport and energetic) five characteristics of this regulation can be identified:

- permanent, competition simulating
- market players of a given sector are concerned,
- regulation instruments affect in particularly terms of price, quality, market entry,
- there is a single act, and
- independent authority

But the natural monopoly has a dynamic factor. Only a concrete technical development calls for regulation, and therefore the natural monopoly is a “snapshot”. (It can be defined only by present economic situations) This dynamic factor though promotes erosion of the natural monopoly and thus the regulation, which follows it. This has happened in the case of telecommunication in 1980’s. The demand boomed and the technical development ended the scarcity of capacity – being a bottleneck -. This further decreased the economies of scale together with the reason for regulation. So, deregulation could start, which aimed at decreasing the role of State in terms of economic regulation and property rights. In the case of light-handed regulation in New Zealand, it can well be seen that the single liberalization is not able to trigger effective competition. The liberalization is the main factor of deregulation, which particularly leads to the erosion of exclusive and special rights in the market. In New Zealand there is no sector-specific authority. This is because the starting point was that the market players were enabled to effectively solve the market problems by negotiation, therefore achieved the aims of deregulation. In New Zealand the competition authority and the courts carry out the tasks of regulation. Liberalization isn’t expected to trigger effective competition, especially not in markets where the significant market shares of incumbents don’t result in dominant position if there are no barriers and risks in terms of market entry. But in the case of telecommunication the barriers are very high because of (sunk) investment costs and the market entry for the newcomer is impeded by the incumbents’ market experiences (e.g. information about subscribers) of. The competition law is not able to demolish these significant market entry barriers because the competition law ensures only slowly and with difficulty applicable remedies in regard to incumbents. That’s why the European electronic communications regulation applies ex-ante (namely preliminary) remedies in an asymmetric way to prevent the abuses of incumbents operator which are able to jeopardize the success of liberalization and market entry of newcomers. The European liberalization regulation thereby ensures the level playing field.

The deregulation dating back from 1980’s in the case of telecommunication is promoted by a positive formation, the re-regulation. The purpose of re-regulation is (in contrast with regulation) not competition simulation but development of effective competition. Although the re-regulation is characterized by a given sector’s market players, concerned instruments, single act, and independent authority, it is not permanent so it cannot be regarded as a formal regulation. The re-regulation is first of all different from regulation in terms of purpose. This purpose in the case of re-regulation is about development of effective competition the applicability of competition law. In the developed countries evoked telecommunications regulation in the light of liberalization

- has ex-ante instruments in the interest of prevention of conducts, which may jeopardize the successful liberalization,
- that’s why it is asymmetric, opposite incumbents and in favour of newcomers,

- temporary because its frame will stay till crystallizing out of effective competition.

Relationship between competition law and economic regulation

The regulation of natural monopoly, which is a monopoly, does regard single abuses, not collective actions. So the special relationship between economic regulation and competition law emerges in connection with abuses of dominant position.

Once again, the applicability of competition law requires an autonomous market conduct, business policy.

The market conduct could be deprived of its autonomy by State measures if these allow or oblige undertakings to violate competition. Regulation can be described as simulation of competition, the re-regulation as encouragement of competition. The aim of the re-regulation is the promotion of the applicability of competition law, and eventually the phasing out of itself. The relationship between competition law and regulation or re-regulation depends on the concrete extension of regulation and re-regulation. As it was mentioned earlier the Structure-Conduct-Performance model, describes the factors, which determine competition. On the basis of this model both regulation and re-regulation affect Structure and Conduct: effect on the Structure may be for example restriction of market entry (e.g. exclusive rights), on the Conduct it may be for example price regulation, which affect directly market behaviour. These effects restrict the scope for the application of competition law. There is also difference between regulation and re-regulation in terms of intensity or power of their effects. As regards regulation the rules are very strict because of the competition simulating character. Some of these strict rules even allow for conducts, which violate the competition law. (e.g. in terms of market entry) However, in the case of re-regulation the sector specific regulation is supported by several principles in favour of the development of competition. These principles ensure the flexibility of re-regulation rules. The relationship between re-regulation and competition law is even more complex. It can be described in terms of two aspects: applicability and character.

Let's have a look at the applicability of regulation and re-regulation. The re-regulation (in contrast with regulation) is a competition motivating temporary regulation. That's why the re-regulation overlaps with competition law with respect to the purpose of the two regulatory tools. The re-regulation protects the development of competition. The competition law protects the competition regardless grade of its development. In principle, it is impossible that the re-regulation allows or obliges such conduct, which may be contrary to competition law. It's all the more possible that a concrete market behaviour violates both re-regulation and competition law. In this aspect, the relation between re-regulation and competition law is can be characterized as parallelism. Because of this parallelism the competition authority has to consider whether the procedure of regulatory authority remedies efficiently and completely the violation of competition law. Also, the competition authority has to keep in mind that a duplex punishment must be avoided. Market players of other sectors may disapprove the privileged situation of market players of such regulated sectors. This can arise when the regulatory authority remedied the violation of law but it could not impose so high fines as competition authority.

Now, let's look at the character of both re-regulation and competition law. The temporary character of re-regulation evokes a mechanism, which ensures flexible reaction on dynamic development of the market. Re-regulation should only be applied in the proper field and only to the extent necessary. The measurement of this necessity requires special mechanism, which has been evoked in frame of European telecommunications regulation as ideal for other regulation of liberalisations. A modern re-regulation ensures the development of competition by flexible rules in order to impose needless obstacles. These aims are achieved through the

concept of significant market power of European electronic communication. The re-regulation tools are addressed to market players, which are able to jeopardize the success of liberalization. These market players with market power are the significant market power providers. The European electronic communications regulation identifies these operators in the same way as the dominant position in competition law. The competition law ensures ex-post (namely after abuses) intervention except for the ex-ante merger control the aim of which is the prevention of damaging market structures for competition. The European electronic communications regulation applies competition law's ex-post market definition, determination of dominant position and remedies but in an ex-ante way. So there is ex-ante sector specific regulation where there is dominant position and the remedies are applied only to a certain degree, and as long as market power gives reason for them.

Conclusion

The task of states task in modern economy is only to provide a frame for competition. The competition law, which isn't administrative but like market regulation form, materialize this aim. It can be illustrated on structure-conduct-performance model, which shows, that tools of competition law affect structure and conduct in the interest of maximization of welfare. There are markets, which are unable to trigger outputs of welfare. In these cases we talk about market failure, which requires added state intervention beyond competition law in order to protect public interest. So accordingly intervention is justified by natural monopoly. In this is about regulation with competition simulation. Five character of this regulation can be identified:

- permanent, competition simulating
- market players of a given sector are concerned,
- regulation instruments affect in particularly terms of price, quality, market entry,
- there is single act, and
- independent authority

The natural monopoly has been proven a 'snapshot' mainly in the innovative market. In these markets liberalization has been evoked in interest of deregulation. The liberalization isn't expected to trigger effective competition that's why additional regulation was needed, re-regulation, which is temporary and which instruments aren't so strict so that it could follow changing market situation.

The relationship between competition law and regulation or re-regulation depends on the concrete extension of regulation and re-regulation. The regulation often gets into conflict with competition law. The re-regulation overlaps with competition law in terms of purposes of the two regulations therefore there aren't conflict between them. Moreover the re-regulation may be similar to competition law due to its characteristics. The applicability of this temporary liberalisation regulation depends on market definition and dominant position, which determination according to competition law to detention the changing market situation. The trigger of European electronic communications regulation is the concept of significant market power, which is similar to dominant position in competition law. The difference between the concept of SPM and dominance is that the market definition, the determination of dominant position and remedies according to re-regulation in telecommunication are applied ex-ante similarly to merger control aw.