

*Antitrust and Regulation in the EU and U.S.* BY FRANÇOIS LÉVÊQUE AND HOWARD SHELANSKI, eds. [Cheltenham: Edward Elgar, 2009, xi + 207 pp. Hardcover: £65]

This book examines “various aspects of the evolving balance between antitrust and regulation in the European Union and the United States” (at p. vii) and contains papers originally presented at a conference in 2006 which focused on network industries. The contributors include distinguished economists and lawyers from Europe and the United States. As the editors point out, “the chapters span a range of related topics, some focusing on general observations about the relationship between antitrust and regulation in the respective jurisdictions and others tying those observations to particular industrial sectors” (at p. vii).

Judge Douglas Ginsberg looks at the history and role of regulation in industries that were formerly regulated monopolies in the United States. Introducing competition into these industries did not lead to free-market competition but rather, what he calls ‘synthetic competition’, where regulators preserved competitors rather than

promote allocative efficiency (i.e. consumer welfare)—the now accepted antitrust goal in the United States. Given this regulatory reality, Ginsberg argues that judges should not attempt to evaluate regulatory attempts to promote competition using the rigorous economic analysis used in antitrust (where the emphasis is on the impact on competitive outcomes). Rather, judges should limit themselves to simply ensuring the regulator had a proper basis for its decision and followed prescribed procedures.

John Temple Lang looks at the role of competition law in the liberalization of former statutory monopolies in Europe. Unlike the United States, Lang says, the role of competition law is broader in Europe. For example,

the principles of Community competition law do not merely promote competition between companies. They also serve to liberalize and integrate markets, to challenge the existence and extension of monopolies, as well as their behavior, and to question restrictions on freedom to provide services and freedom of establishment (at p. 23).

As Lang explains, the European Commission uses not only its formal competition law and enforcement powers but also non-binding ‘soft law’ techniques such as Notices (which have no legislative effect but nevertheless bind the Commission).

After describing differences between competition and regulatory authorities in Europe at both the national and European levels, Lang then looks at the undesirable consequences of failing to distinguish between competition law and regulation. He says an important problem is that competition authorities “may be led to improvise arguments from invented quasi-regulatory objectives instead of limiting themselves to carrying out a competition law economic analysis” (at p. 49).

Pierre Larouche compares the U.S. and European experiences in competition law and sector-specific regulation and the reasons why Europe and the United States might differ in regulatory outcomes despite the universality of economic principles. One major difference, Larouche argues, lies in the legal hierarchy of competition laws. While he acknowledges that the *Sherman Act* in the United States has a ‘quasi-constitutional status’, it is still a federal statute. In Europe, on the other hand, competition law is enshrined in the *EC Treaty*. As a result, the European Court of Justice “has never allowed any industry, especially a regulated one, to claim a complete exemption from EC competition law” (at p. 85). Thus, while in the United States, the Supreme Court could assume that sector-specific regulation can take the competition law function so as to render competition law outside the realm of regulatory disputes, in Europe, competition law always remains relevant and central to sector-specific regulation.

James B. Speta looks at whether competition law is sufficient in dealing with telecommunications markets. He argues that it is not sufficient for two main reasons. Firstly, many telecommunications markets continue to be characterized by direct network effects and so will continue to remain concentrated. Secondly, generalist competition law courts may lack optimal expertise, and case-by-case adjudication may not lead to sufficient uniformity of regulation. As he points out, “one’s attitude towards sector-specific regulation—or indeed any regulation—depends crucially on one’s perspective on the need, costs and possibilities of regulation” (at p. 120). He believes that competition regulators are “limited in their ability” to provide a substitute for telecommunications regulation and will so under-regulate. On the

other hand, he concludes that “the costs of a sector-specific regulator ... are probably worth the benefits” (at p. 121).

Weiser considers harmonizing competition law merger review with regulatory oversight. Weiser argues that competition law regulators should take the lead in analyzing a merger’s impact on competition but that regulators should take the lead in “imposing and enforcing regulatory remedies” (at p. 129). Accordingly, there is an urgent case for institutional reform.

Richard Gilbert and David Newbury present an economic study of the electric power industry in the United States and approaches to “evaluate and mitigate market power” (at p. 160). They consider a number of approaches and argue for ‘*Competitive Residual Analysis*’, which is a relatively simple approach that measures market power by examining the incentive of a firm to raise price above marginal cost when all other competitors are acting competitively.

Tommaso Valletti examines mobile telephony and the relevance of two-sided platform analysis to market definition and the identification of market power. He provides guidance to competition authorities on how to conduct a competition analysis in relation to mobile telephony. He warns that market definition is not a substitute for a full examination of anti-competitive impact.

Overall, the book contains interesting contributions on the balance of antitrust and regulation in the United States and the European Union in network industries (mainly telecommunications). The book is therefore a worthwhile addition to comparative competition law research—in particular, the role of economic regulation and competition law in the evolution of network industries from regulated monopoly to competition. However, given the focus on network industries, the title could have better reflected this more narrow emphasis.

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