

Ofgem seminar: Competition law as a tool in regulated sectors

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Opinions, ten a penny, ...

- Strong supporter of CA 98.
- Opponent of aspects of the EA such as Market Investigations (MIs): idiosyncratic, overly regulatory and subject to deficient supervision.
- Swing voter on concurrency.
- More interesting to explore the knowledge base, particularly of the 'demand side': how do regulators view these competition law 'tools', and how do they use them?
- Focus chiefly on the economic evidence base that may be relevant for assessing concurrency.
- So, back to the lecture room ...

Historical studies (USA, electricity)

- Stigler and Friedland (1963)
Early State regulation had no effect on electric utility prices.
- Jarrell (1978)
Early State regulation had upward effect on prices, stifled competition.
- Lyon and Wilson (2010)
Early State regulation had negative effects on investment.

Similar conclusions in other contexts

- Vickers and Yarrow (1988)

“Bell’s main patents ran out in 1894, and numerous competitors entered the industry. ... Bell (now AT&T) restored its market dominance by mergers and by the advent of regulation at the state level, *which afforded it welcome protection from competition.*”
- Joskow and Rose (1989)

“The effects of economic regulation often differ considerably from the predictions of ‘public interest’ models, which assume that regulation is intended to ameliorate market imperfections and enhance efficiency.”
- More generally, regulation doesn’t do what it says on the tin, and not infrequently does close to the opposite.

Some implications

- Public regulation has a long and distinguished history of introducing restrictions of competition. It's in the cultural DNA.
- The longstanding OFT concern about the effects of government regulation on competition is well founded.
- The historical evidence indicates the very radical nature of UK utility regulation in the early years: with its very 'unusual' emphasis, in the conduct of regulation, on the promotion of competition.

Questions for the future

- The policy had great success initially, but can it be sustained in historical circumstances different from those that gave it birth? Can some of the chief culprits in the past murder of competition (public regulators) become successful police officers and prosecutors?
- There are inevitable tensions and conflicts of interest.
Examples:
 - Gas metering. Generally well handled and conflicts not, in my view, a major problem: high commitment within Ofgem to CA enforcement at the relevant time. But questions were still raised during the process, and doubts expressed.
 - Decker/Yarrow review of regulation in Guernsey. Competition-based complaint from Guernsey Gas about predatory pricing of off-peak electricity. How can a regulator legitimately deal with such a complaint when the regulator set the relevant price?

Ofgem and retail energy market supervision

- Waddams
 - *“Ofgem’s proposal to introduce an undue discrimination clause, particularly relating to prices charged in different geographical areas, is likely to stifle competition in the retail energy market.”*
- Vickers
 - *... I believe that the proposals are likely to be detrimental to consumers and therefore bad policy. Banning price discrimination stops important kinds of price competition – for example, regional incumbents challenging one another – and so perversely can blunt competition and help firms sustain higher prices to consumers in general.*
- Yarrow
 - *There is almost a consensus among economists familiar with competition and energy market issues that, on the basis of best available knowledge, Ofgem’s proposals to “address undue discrimination” can be expected to have harmful consequences for consumers and for competition.*

An awkward position under concurrency

- How can Ofgem legitimately review retail energy markets when one of the central propositions to be examined is that recent Ofgem restrictions on pricing have had the effect of softening price competition?
- Does concurrency potentially weaken/undermine competition law enforcement.
- Having competition law tools in the toolkit is not much good, if they are not much used.

... opinions

- CA98 is under-enforced. In the specialist competition bodies, there is too much attention on trying to make markets work better, and too little on attacking abuses of economic power. (See Peter Freeman's Denning Lecture.)
- There is a lack of adequate scrutiny and supervision of anti-competitive measures introduced by public regulators, including 'competition regulators' when the latter are acting in regulatory mode (e.g. working out MI 'remedies').
- Will the current review sort things out? History says no, but now and then UK governments do do surprisingly innovative and radical things ... just not usually.