

An evaluation of the telecommunications regulation in the European Union and The United States of America

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Abstract

The work presents an evaluation of the telecommunications regulatory models in the European Union and the United States of America. The drive is predicated upon the prevalent of antitrust models which seems to have become the global best practise in telecommunications regulation. The extant legislations and enabling regulations in the EU and USA are carefully explored and utilitarian values, differences and similarities are identified. The recommendations and conclusion therein is intended to further regulatory best practises in telecommunications for enhanced consumer protection. One of which is the urgent need to address the impediments to extra-territorial application of domestic laws.

Keywords: telecommunications, regulatory, European, domestic

Introduction

There is no single regulatory body in telecommunications at the EU level ^[1]. Regulatory policy is conducted in parallel by several relatively independent policy-making authorities that often pursue conflicting goals. The European Commission Directorate General IV (Competition) is responsible for EU competition policy. It has the task of ensuring fair competitive conditions for suppliers and users of goods and services. Directorate General IV is the main architect of the Commission's liberalization policy in telecommunications. The central instrument of Directorate General IV's liberalization policy is the Art.90 EC, Treaty ^[2]. The article allows the Commission to reverse policy measures passed by member states relating to exclusive or special rights (for example, monopoly rights) if the policy measures in question violate another article(s) of the EC Treaty.

In the USA on the other hand, there is a sector-specific regulatory regime with the regulatory effort centred on activities to minimize and control market power. This is reflected in the 1996 telecommunications Act (the 1996 Act) which is part of the Communications Act of 1934, as amended; and administered by the Federal Communications Commission ("FCC"). The ensuing work presents the regulatory models of the EU and USA.

The European Union Telecommunications Regulation

The telecommunications policy in the EU is based on the antitrust model and has four main policy areas which include: cartels, or control of collusion and other anti-competitive practices that effect the EU (or, since 1994, the European Economic Area). This is covered under Article 101 of the Treaty on the Functioning of the European Union (TFEU) Monopolies, or preventing the abuses of firms' dominant market positions. This is governed by Article 102 TFEU. This article also gives rise to the commission's authority under the Mergers, Control of proposed mergers, acquisitions and joint ventures involving companies that have a certain, defined amount of turnover in the EU/EEA. This is governed by the

Council Regulation 139/2004 EC (the Merger Regulation). State aid, Control of direct and indirect aid given by member states of the European Union to companies covered under Article 107 of the Treaty on the Functioning of the European Union ^[3].

The last point is a unique characteristic of the EU Competition Law regime. As the EU is made up of independent member states, both competition policy and the creation of the European single market could be rendered ineffective were members states free to support national companies as they saw fit. Primary authority for applying EU Competition Law rests with the European Commission and its Directorate General for Competition, although state aids in some sectors, such as transport, are handled by other Directorates General ^[4].

On May 1, 2004 a decentralized regime of antitrust came into force to increase application of EU Competition Law by national competition authorities and national courts ^[5]. One of the paramount aims of the founding fathers of the European Community was the establishment of a Single Market ^[6]. To achieve this, a compatible, transparent and fairly standardized regulatory framework for Competition Law had to be created. The constitutive legislative act was Council Regulation 17/62 (now superseded). The wording of Reg 17/62 was developed in a pre-VanGenden Loos period in EC legal evolution, when the supremacy of EC law was not yet fully established. To avoid different interpretations of EC Competition Law, which could vary from one national court to another, the Commission was made to assume the role of central enforcement authority.

The first major decision under Article 101 (then Article 85) was taken by the Commission in 1964. In *Consten & Grundig* ^[7]. they found that Grundig, a German manufacturer of household appliances, acted illegally in granting exclusive dealership rights to its French subsidiary. The European Court of Justice (ECJ) upheld the Commission's decision, expanded the definition of measures affecting trade to include "potential effects", and generally anchored its key position in Competition Law enforcement alongside the Commission. Subsequent enforcement of Art 101 of the Treaty on the

Functioning of European Union (TFEU) (combating anti-competitive business agreements) by the two institutions has generally been regarded as effective. Yet some analysts assert that the Commission's monopoly policy (the enforcement of Art 102) has been "largely ineffective", because of the resistance of individual Member State governments that sought to shield their most salient national companies from legal challenges. The Commission also received criticism from academic quarters. For instance, Valentine Korah, an eminent legal analyst in the field, argued that the Commission was too strict in its application of EC Competition rules and often ignored the dynamics of company behaviour, which, in her opinion, could actually be beneficial to consumers and to the quality of available goods in some cases ^[8].

Nonetheless, the arrangements in place worked fairly well until the mid-1980s, when it became clear that with the passage of time, as the European economy steadily grew in size and anti-competitive activities and market practices became more complex in nature, the Commission would eventually be unable to deal with its workload. The central dominance of the Directorate-General for Competition has been challenged by the rapid growth and sophistication of the National Competition Authorities (NCAs) and by increased criticism from the European courts with respect to procedure, interpretation and economic analysis ^[9]. These problems have been magnified by the increasingly unmanageable workload of the centralized corporate notification system. A further reason why a reform of the old regulation 17/62 was needed was the looming enlargement of the EU, by which its membership was to expand to 25 by 2004 and 27 by 2007. Given the still developing nature of the East-Central European new market economies, the already inundated Commission anticipated a further significant increase in its workload.

To all these challenges, the Commission has responded with a strategy to decentralize the implementation of the Competition rules through the so-called Modernization Regulation. EU Council Regulation 1/2003 ^[10] places National Competition Authorities and Member States national courts at the heart of the enforcement of Arts 101 & 102. Decentralized enforcement has for long been the usual way for other EC rules, Reg 1/2003 finally extended this to Competition Law as well. The Commission still retained an important role in the enforcement mechanism, as the coordinating force in the newly created European Competition Network (ECN). This network, made up of the national bodies and the Commission, manages the flow of information between NCAs and maintains the coherence and integrity of the system. At the time, Competition Commissioner Mario Monti hailed this regulation as one that will 'revolutionize' the enforcement of Arts 101 & 102. Since May 2004 all NCAs and national courts are empowered to fully apply the Competition provisions of the EC Treaty.

In its 2005 report, the OECD lauded the modernization effort as promising, and noted that decentralization helps to redirect resources so the DG Competition can concentrate on complex, Community-wide investigations. Yet most recent developments shed doubt on the efficacy of the new arrangements. For instance, on 20 December 2006, the Commission publicly backed down from 'unbundling' French (EdF) and German (E.ON) energy giants, facing tough opposition from Member State governments. Another legal battle is currently ongoing over the LON-Endesa merger, where the Commission has been trying to enforce the free movement of capital, while Spain

firmly protects its perceived national interests. It remains to be seen whether NCAs will be willing to challenge their own national 'champion companies' under EC Competition law, or whether patriotic feelings prevail.

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The European Union Telecommunications Paradigm

The launch of the EU telecommunications policy dates back to the 1980's ^[13]. Three inter-related trends pushed the European Commission to start liberalising the telecommunications sector. First, it had become apparent that radical changes in technology were going to demand changes in the way that the telecommunications sector was managed. A monopoly control of telecommunications networks would not be the right way to unleash the new technologies to offer new services.

Second, globalisation of the world economy started to put pressure on the telecom sector. European businesses, such as banks and airlines, which were expanding to global markets needed permanent and seamless communications for payment and information systems. Third, there was an international trend towards liberalisation. In the US, the monopoly of the AT&T was broken and the so-called Baby Bells were created. In Europe, the Nordic countries were opening up competition. All in all, the European Commission came to the conclusion that opening up the competition in telecom markets is a key element for competitiveness of European economy. It was also realised, that the telecommunications sector would also be the foundation of the emerging Information Society.

Features of Telecoms Liberalization in the EU

The EU's telecom policy was – and still is – based on three basic elements.

- First, liberalisation of the sectors under monopoly. Starting in 1988, through a step by step approach, the EU liberalised all segments of the telecoms market: terminal equipment, value-added services, satellite equipment and services, cable TV networks and mobiles communications. This process culminated in 1998 with the liberalisation of voice telephony and infrastructures.

- Second, harmonisation of the European market. Common rules were needed to create a unified EU-wide telecoms market. This was done by the establishment of the so-called Open Network Provision – or ONP Framework. The purpose was to set the rules for open access to the networks of the old monopolies so that the new entrants could offer services in competition - on equal terms – with the ex-monopolies. This entailed the introduction of asymmetric regulation: ex-monopolies, or incumbent operators, faced obligations that new entrants did not face. These obligations included for example the obligation to offer an interconnection to their networks at cost-oriented prices. This was necessary to open up the competition. These rules are still in place, and to some extent are likely to remain in place for some time.
- Third, application of EU competition rules to liberalised segments of the telecoms market. The aim of the EU competition policy is to prevent collusive agreements or abuses of a dominant position, and to prevent the creation of dominant positions.

The Effects of Liberalisation

The effect of liberalisation today is the emergence of a very dynamic market:

- Telecoms is – despite the current slowdown - a fast growing sector of the economy with an overall growth rate of more than 10 % in 2000 ^[14].
- Competition is intense: There are now hundreds of licensed local, long-distance and international operators for fixed voice telephony. There are also almost 60 ^[15] licensed mobile operators offering GSM services.

Tariffs have fallen dramatically, especially in international and long distance calls. And they are continuing to fall. Incumbents' tariffs fell by more than 10 % for business users, and almost 5 % for residential users for national calls ^[16]. For international calls, the same figures were 15 % for business users and 13 % for residential users ^[17]. In addition, the tariffs of new entrants are usually lower. Liberalisation is the key to achieve lower prices. As a result, the whole European economy has gained in competitiveness.

To sum up, competition has led to lower prices, more choice and better quality of service. In addition, liberalisation has a very positive impact on incumbent operators. In a matter of a few years, most of them have evolved from public administrations to innovative and competitive companies that expand internationally. It is clear that liberalisation and innovation go hand in hand.

There was also other type of regulation put in place, namely regulation applicable to all operators in order to achieve certain public policy objectives. The most important legislation was introduced on Universal Service and on data protection in telecommunications. Universal Service provisions were introduced to EU legislation to ensure that the liberalisation would not lead to a situation where some social groups would be excluded from enjoying basic telecom services. A defined set of basic services were to be offered to all users, independently of their geographical location, at affordable prices. The Member States of the EU had to designate at least one operator – in reality the incumbent operator – who had to provide these basic services. Member States also have an option to set up a fund to compensate the designated operator,

should the Universal Service Obligations represent an unfair burden.

Again, there are some administrative arrangements that were put in place, which are absolutely indispensable elements in a successful liberalisation. The most important is the existence of an independent regulatory authority in each Member State of the EU. When the telecommunications business is separated from State control, it is essential that the owner of the biggest company in the market is not the one who sets the rules of the game. The birth of independent regulators has not been without pains in the EU, but now they are recognised as essential building blocks of the EU telecoms regime.

EU Telecoms legislation in the Internet Age

Two years after full liberalisation, the European Commission proposed a new package of legislation to replace the old ones. Why is this happening? There are three basic reasons. Technological Convergence, the rise of the Internet, and the effects of the liberalisation itself. With respect to convergence, until recently, the communications industry was characterized by separate sectors specialised in the provision of distinct services: voice telephony, data transmission and broadcasting. Each of these services was delivered over a determined network. And the user accessed it via a given terminal: the telephone, the computer or the TV set. Digital technologies have changed all that. Today, any service can be offered over any network, and be accessed via any terminal. The reason is because the phone call we make, the data we receive on our computer, or the picture we see on TV can all be converted into the same digitised format: a string of 0s and 1s.

The proposed "mega-mergers" of the past, in particular between Vivendi and Seagram, and between America On-line and Time Warner, reflect the changing structure of the industry: content is coming together with delivery.

The focal point of this convergence process is the Internet. It is a platform which brings together all communications services and terminals. The Internet has emerged over the last year as the main vector of economic growth and innovation also in Europe. The Internet has a fundamental impact on telecommunications policy. Increasingly, telecom networks are carrying data, not only voice. And the transmission of data will be done increasingly by using Internet protocol and packet switching. This means that the end user can be always connected – anywhere, anytime.

The new legislation adopted in July, 2000 aims at creating a new framework for all electronic communications. It pursues three concrete goals:

- First, adapt the existing framework to the needs of communications industries in the Internet age.
- Second, boost competition in local access networks to stimulate widespread Internet take-up and high-speed Internet access in Europe.
- Third, ensure a high level of user rights and privacy protection.

eEurope Initiative and Information Society Policy

The European Commission launched in 1999 ^[18] its eEurope initiative in order to bring all relevant policy sectors under a coherent strategy. A strategy whose aim is to bring Europe fully into information age. To a society were new technologies are embraced not only for dynamic and innovative economy, but which brings benefits to all. One of the most important

political objectives is to fight the digital divide. The potential of new technologies, such as mobile communications and digital television should be exploited to address the digital divide. We believe that digital television can be an effective solution to connect a large share of the population to the Information Society. This could be the case also in South East Europe.

The European Union is willing to cooperate with countries of South East Europe to develop an Information Society. Political co-operation can happen through the Stabilisation and Association Agreements which are very similar to Europe Agreements with candidate countries. Economic co-operation will be provided through the CARDS programme. Support for regulatory development (transposition, implementation) and Institution Building (development of the NRAs) is foreseen as well as wider IS activities such as the legal basis for e-commerce, creating a better business environment for Internet.

The United Kingdom

Detailed sector-specific rules, set forth as conditions to each telecommunications carrier's Public Telecommunications Operator ("PTO") license, govern the provision of telecommunications services in the United Kingdom. The conditions of the standard PTO include a requirement to provide number portability, a financial disclosure obligation applicable to companies that have special rights to provide services other than telecommunications, and special conditions (including interconnection obligations) applicable to carriers determined by the Director General of Telecommunications^[19] ("DGT") to have significant market power. The incumbent British Telecom has a special license with additional conditions, including accounting separation and local loop unbundling requirements (imposed recently in light of disappointing results in achieving facilities based competition) and a prohibition on unfair cross-subsidies.

Licenses applicable to wireless services, granted by the Secretary of State for Trade and Industry and administered by the Radio communications Agency, include technical standards for equipment and interference levels. Since 1998, fees for spectrum use can be set by regulation or by auction. As of 2001, the Radio communications Agency was developing proposals to introduce spectrum trading^[20]. Antitrust law^[21] in the U.K. prohibits agreements or associations that have the object or effect of preventing or distorting competition in a U.K. market or of potentially affecting trade within the U.K. U.K. antitrust laws also prohibit conduct that amounts to abuse of a dominant position and may affect trade within the U.K. The antitrust laws may be enforced by the Director General of Fair Trading, by the DGT, or by private action in court.

OFTEL has relax some regulatory requirements to rely more extensively on its general powers to enforce the antitrust laws in order to regulate anticompetitive conduct in telecommunications.

Geradin and Kerf^[22] make three significant observations about the U.K. regulatory system in their comparative study of telecom regulations in some Courts. First, they note that although OFTEL initially focused on promoting full facilities-based competition, those efforts were disappointing. Accordingly, OFTEL has recently imposed requirements (such as local loop unbundling) designed to accommodate non-facilities based competition as well. Second, in an age of convergence, inconsistent decisions in the regulation of

different network industries by different institutions can lead to distortions in both capital and product markets. The authors expected that a then-pending proposal to create a single regulator for the entire communications industry (the Office of Communications or "OFCOM") would help to promote greater coherence^[23]. Third, it has been difficult to ensure consistency in competition decisions where both the antitrust regulator (the Director General of Fair Trading) and the telecommunications regulator (OFTEL) have authority to enforce the antitrust laws^[24].

The United States of America

According to Geradin and Kerf^[25], the United States of America has the most sector-specific regulatory regime. Regulatory efforts to minimize and control market power in U.S. telecommunications markets center on the detailed 1996 Telecommunications Act ("the 1996 Act"),^[26] which is part of the Communications Act of 1934, as amended ("the Act").^[27] The Act and its implementing regulations are administered by the Federal Communications Commission ("FCC"), a powerful, highly competent, independent regulatory body. The 1996 Act provisions allowed the Regional Bell Operating Companies ("RBOCs") to enter the long-distance market only upon a showing that their own local markets are open to competition; spectrum auction procedures; and proposals, being considered primarily by state regulatory bodies, to require structural separation (actual or functional) of the RBOCs into wholesale and retail entities. They also observed that the antitrust laws are fully applicable to telecommunications operators and that these laws often are enforced in the context of mergers of telecommunications providers^[28].

Controlling Market Power applies its evaluative criteria to the U.S. regulatory regime, making the following significant observations: as per competition and other efficiency incentives: Although Geradin and Kerf generally favour measures that more directly encourage facilities-based competition, they acknowledge the continued dominance of the U.S. local exchange market by incumbent local exchange companies ("ILECs") and recognize that "unbundling of the local loop may thus be a valid strategy to stimulate competition and innovation in at least some cases."^[29] On the other hand, they criticize the TELRIC pricing methodology adopted by the FCC to guide the pricing of unbundled network elements ("UNEs"), arguing that TELRIC pricing may preclude ILECs from recouping their investments and "is contrary to the language of the 1996 Act and thus illegal as has been recently confirmed by a judgment of the Court of Appeals of the Eighth Circuit."^[30] However, the Eighth Circuit decision was subsequently overruled by the Supreme Court in *Verizon Communications v. FCC*, which found that it was within the FCC's discretion to choose the TELRIC methodology to promote competition as mandated by the 1996 Act^[31].

Geradin and Kerf also criticize the 1996 Act's conditional grant of long distance authority to RBOCs who can demonstrate that their local markets are open to competition. Written when only a few Section 271 applications had been approved, they argues that RBOCs have been unenthusiastic about entering the long distance market (where revenues have been shrinking) and that long distance providers have had an incentive to stay out of the local exchange market to hinder the RBOCs' efforts to make the competitive showing necessary to gain the right to compete

in the long distance providers' core business ^[32]. To better promote local competition, the book suggests that full structural separation of the RBOCs' wholesale and retail businesses would reduce both the ability and incentives of monopoly local providers to exclude competitors from access to their local facilities. However, the authors acknowledge that this approach would be expensive to implement and would be hindered by protracted legal challenges, "a factor that cannot be overlooked in the particularly litigious [U.S.] system. ^[33]"

Geradin and Kerf also commented on the competitive status of the wireless and Internet services markets and noted that the U.S. wireless telecommunications market is increasingly competitive but characterized by one of the lower penetration rates among industrialized countries, due in large part to the "called party pays" pricing of wireless services. In the Internet services market, high penetration and usage rates driven by flat-rate local access charges raise concerns about congestion in the local network. Geradin and Kerf believe this congestion can best be remedied by encouraging adoption of broadband alternatives to dial-up Internet access. With respect to universal service, the authors approve of efforts to move toward explicit universal service support. However, they assert that the lack of competition for universal service support may inflate U.S. universal service costs, which are high by international standards.

As per specificity versus coherence, Controlling Market Power contends that the highly specific U.S. regulatory regime has some benefits but has resulted in rigid regulatory distinctions between communications technologies that are "poorly adapted to a context of convergence. Antitrust authorities or infrastructure-wide regulatory agencies, based on the model of the state utility commissions, would, be better positioned to regulate converging industries. ^[34]"

As per whether benefits of regulation should outweigh their potential costs: Significant regulatory costs are cited as a clear drawback of the U.S. regulatory model. These costs include: (1) administrative resources expended by both the FCC and state regulatory commissions; (2) carriers' investment of internal and external legal resources to ensure compliance with complex regulations; (3) costs created by regulatory inefficiencies, including costs of judicial proceedings to resolve disputes regarding the allocation of regulatory responsibilities between the FCC and state regulators and the costs to the economy at large of delaying regulatory reform while such disputes are resolved; and (4) costs of regulatory mistakes, which have a tendency to increase with the number and complexity of the rules ^[35].

Efficient allocation of regulatory resources: The authors argue that uncertainties and peculiarities in the allocation of responsibilities between the FCC and the Department of Justice ("DOJ") in the Section 271 and merger review processes generate harmful inefficiencies. The authors believe that efficiency could be improved with more Congressional guidance concerning the allocation of responsibility between the FCC and state regulators, and by assigning primary responsibility for Section 271 approval and merger review to the DOJ, with input from the FCC ^[36]. Beyond applying their seven criteria for effective telecommunications regulation, Geradin and Kerf do not make any overarching recommendations concerning the U.S. telecommunications regulatory model.

Comparative analysis of antitrust models in the USA and EU

The regulation of the telecommunications sector in the USA and the EU is founded on the antitrust model. As globalization and the wave of deregulation increasingly broaden the sphere of operations of companies, antitrust legislation has become very necessary in both developed and developing economies ^[37]. With regard to antitrust law between USA and EU, the similarities on both sides of the Atlantic outweigh the differences by far. This is held true, at any rate, today, after more than 100 years of legal development ^[38]. The central difference was initially that the relevant U.S.A law is much older. The Sherman Act dates from 1890, the Clayton Act, which introduced merger control, from 1914 (with a significant improvement by the Celler-Kefauver Act in 1950). These laws were not only existent on paper; they were rigorously enforced in practice ^[39]. National competition laws in Europe developed mainly after the Second World War. Their development was triggered by the introduction of the rules on competition in the European community in 1958. The Later induced many of the member States, e.g. Italy, to introduce laws against restraints of competition for the first time ^[40].

Another difference is that the USA, being one country, the legal enforcement of the antitrust legislation is uniform and broader. Even today, it is often impossible to address competition issues in detail without referring to the USA. At the same time, USA case law is accompanied by an excellent academic discourse. Even today, the most important innovations come from the USA. For instance, the development of replacing a formal legal approach with a more economic approach originated in the USA. The same is true for leniency programmes in order to fight price-fixing more efficiently. In all, the USA Antitrust law can be understood to be a kind of "Original parent legal system" from which the other competition law regimes are derived ^[41].

Third, the American Antitrust law was initially more political, insofar as it could be made the subject of a public debate. It played a role in deciding elections. For example, in the beginning, the influence of farmers and their associations was decisive. The fact that USA Antitrust laws included criminal sanctions from the beginning was important as well. Even today, European competition law does not provide for this remedy. The availability of criminal sanctions influenced the public awareness. Today, antitrust law has lost much of its appeal even in the USA. Questions of constitutional interpretation, abortion, school prayers etc, dominate the public debate. In Europe, competition law is still a playing field for specialized experts.

Fourth ^[42], the difference between the legal systems lies in the role of the state. In the USA, antitrust is a matter for private actors. In Europe, the role of the state was inevitably major. This is due to the extensive involvement of the State in the economy in Europe as a whole: in the Banking and Insurance Sectors, in Telecommunications, in the Postal Services, in the energy sector, and in transport. This is reflected in provisions such as Article 86(2) of the Treaty. EEC, according to which the rules on competition do not apply to public services under certain circumstances. Political priorities to foster – or at least not to impede – so called national champions despite competitive concerns have to be seen in this context as well. In Germany ^[43], this is manifested in the instrument of the "Extraordinary Clearance" by the Secretary of Economic

Affairs in the area of merger control. For reasons of overriding public interest, every anticompetitive merger can be cleared by a political body. Connected to the role of the State is the independence of the competition authorities. In the USA, the independence of agencies is part of the system of checks and balances. Also, in the USA, the State gets involved in competitive issues. However, it does not usually do this under the guise of Antitrust Law.

Furthermore, a common feature of the competition law regimes in both the USA and Europe is that they claim for themselves a wide international reach^[44]. It suffices that a restraint of competition has effects within their own territories, regardless of where and by what enterprise, it is affected ('this is what is called the effects' or extraterritorial application of competition law"). Furthermore, the objectives pursued by the two legal regimes are, for most part, identical. It is the protection of competition that is at stake: so-called "populist goals", the elimination of "bigness as such", the maintenance of a kind of separation of powers between society and the State, do not play an immediate role. The difference, however, is of importance in a philosophical sense, less so in the day-to-day application of competition law.

The basic legal framework concerning restraints of competition is in essence the same. This is true for horizontal restraints (cartels) as well as for vertical restraints. The distinction between prohibited restraints of trade and legitimate cooperation is achieved in the USA by way of distinguishing between *per se* - cases and rule of reason - cases. The dogmatic approach in the EU is different - there is an outright prohibition with the possibility of an exemption - ; but in practice, the results hardly differ. The prohibition of the abuse of a dominant position in EU is more differentiated. In particular, the level of prices can be controlled, even though this is of marginal relevance in the practical application.

Sec. 2 of the Sherman Act in the USA^[45], the prohibition of monopolization and attempted monopolization, is heavy artillery by comparison, and it is used only in rare cases. But it can lead to the restructuring of an entire industry, as in the 1982 - divestiture case of AT & T. A remedy of this nature is unknown in the EU. With regard to the procedure, both legal systems build upon a rule of law, which is more pronounced in the USA than in EU. A remarkable difference consists in the fact that in the USA, approximately 75% of all antitrust cases are brought by way of private enforcement. In EU, private enforcement is hitherto practically non-existent. This has to do with certain peculiarities of the US legal system, which are absent in the EU and are widely regarded as undesirable.

What the foregoing comparison has shown is that EU and the US legal regimes use different approaches in trying to foster competition even though they address the same concerns. Both EU and US antitrust laws address competition in general and mergers in particular. For instance, Article 81 of the EU Treaty prohibits cartels and other concerted practices that distort competition. This is roughly comparable to section 1 of the Sherman Act which prohibits concerted action to restrain trade.

In spite of the general similarity of Articles 81 and 82 of the EU Law, to the USA law, their applications to the business world have not been comparable. According to Baumgardner^[46], the USA antitrust law is "aimed more at promoting competition, while EU law is more concerned with protecting competitors." Nowhere do these contrasts show up as much as

they do in the Microsoft cases^[47]. The EU challenged Microsoft's domination of the PC Software market and said that Microsoft should share more information that would enable rivals to develop compatible products. Microsoft, according to the E.U. needed to produce a version of its Windows operating system that did not have an integral Windows Media Player to buttress the charge that it was killing competition. As a result, the EU Competition Commission ordered Microsoft to pay £497 million fine when Microsoft did not comply, the EU imposed a further fine of £280.5 million in July 2006 and then topped it with a £680 million penalty. When one considers this scenario, it is clearly far removed from the consumer concerns that both systems claim to protect. The analysis of antitrust model of regulation in the USA and EU shows that in the two settings, the end users are put at the centre of any economic activity and the purpose of anti-competition laws is to protect the economic and territorial integrity of any country and save consumers within the territorial jurisdiction of that country from monopolies. What has remained a disturbing phenomenon in the antitrust model of regulation is the vexed issue of the impediments to extraterritorial applications of domestic laws.

Conclusion

It can be safely argued and concluded that the telecommunications regulatory model applicable in the European Union and the United States of America is founded basically on antitrust model with noticeable sector-specific rules. However some sector-specific rules is desirable when a country first attempts to open formerly monopolized telecommunications markets competition.

Desirable rules may include an interconnection regime, local loop unbinding obligations, removal of restrictions on resale, a guarantee of number portability and preselection, and the imposition of vertical separation between different activities in the local wholesale and retail activities in the local loop. Antitrust regulation can be used to review mergers between telecommunications operators, to prohibit collusive practices among competitors, and prevent anticompetitive cross-subsidies between regulated and non-regulated activities. Antitrust rules also help to fill gaps in sector-specific regulatory regimes.

The effectiveness of the regulatory regime depends on the selection of the institutions charged with overseeing telecommunications regulation. Here, specialized entities are needed to deal with the more complex telecom regulatory issues. There is growing convergence between countries toward the adoption of some of the "best practices"; however, the degree of convergence possible in telecom regulation is limited by different policy objectives and factual circumstances existent in different countries.

Finally, a proceeding currently pending before the FCC offers another example of the circumstances in which a comparative investigation of other countries experiences can be helpful. In that proceeding the FCC is considering regulatory measures to promote competition in the market for retail directory assistance services^[48]. It would therefore be recommended that to achieve the overall objective of anti-trust model of regulation, it will be necessary to address the impediments to extra-territorial application of domestic laws.

Again, there is absolute need for the USA and the EU to carry out a comparative investigation of other countries experience

and ensure the applications of competition regime for the overall interest of consumers of telecommunications services and products.

References

1. <https://en.wikipedia.org/.../body-of-European-Regulators-of-Electronic-communication-visited-on-26/04/2017>
2. *Ibid*
3. [http://en.wikipedia.org/wiki/.European Competition Law](http://en.wikipedia.org/wiki/.European_Competition_Law). Last accessed on 6th July 2011.
4. *Ibid*.
5. *Ibid*.
6. *Ibid*.
7. (1966) (France).
8. *Ibid*.
9. *Ibid*.
10. Council Regulatory (EC) no. 1/2003 of 16 Dec. 2002 on the implementation of the rules on competition laid down in Art 81 & 82 of the treaty.
11. (1966) (France).
12. *Ibid*.
13. Liikanen E. The European Union Telecommunications Policy, Telecom Seminar, Sarajevo, 2001.
14. www.repository.law.indiana.edu/csi?article=/369 visited 26/04/2017
15. *Ibid*
16. *Ibid*
17. *Ibid*
18. E. Liikanen, op. cit. p8
19. The DGT is the administrator of the Office of Telecommunications ("OFTEL"), the United Kingdom's sector-specific regulatory agency.
20. Efforts to introduce spectrum trading in the U.K. have progressed since 2001. For example, the Communications Act of 2003 expressly authorizes the promulgation of regulations allowing the transfer of spectrum licenses and access rights. *See* Communications Act, 2003; 21:168 (Eng.).
21. Many European, Australian and other policymakers and regulators outside the U.S. use the term "competition law" to refer to laws and regulations described as "antitrust" in the U.S. However, Geradin and Kerf use the term "antitrust law" throughout their book, apparently for the sake of consistency. This review will do the same.
22. Controlling Market Power in telecommunications: Antitrust vs. Sector-Specific Regulation, Oxford Univ. Press, 2003, 64.
23. This proposal has since taken effect. The Office of Communications Act of 2002 established OFCOM, which will assume its full powers and responsibilities at the end of 2003. Office of Communications Act, 2002, 11 (Eng.). The Communications Act of 2003 assigned additional responsibilities to OFCOM. Communications Act, 2003; 21:1. (Eng.).
24. The Communications Act of 2003 resolved many of the problems arising from this concurrent jurisdiction. *See* Communications Act, 2003; 21:5 (Eng.).
25. Geradin and Kerf, op.cit
26. Telecommunications Act of. Pub. stat. 56 (codified at scattered sections of 47 U.S.C). 1996; 104-104:110.
27. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at scattered sections of 47 U.S.C.) 1934.
28. But see *Trinko v. Bell Atlantic Corp.*, 305 F.3d 89 (2d Cir., 2002), *cert. granted sub nom. Verizon Comm. Corp. v. Trinko*, 123 S. Ct. 1480 (2003), *argued* Oct. 14, a case in which the RBOCs are seeking to establish that antitrust laws cannot be used where the only violation supporting the antitrust claim is of the FCC's rules, 2003.
29. Controlling market power, *supra* note 2, at 100.
30. *Id.* at 100 (citing *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *overruled in relevant part sub nom. Verizon Comm., Inc. v. FCC*, 535 U.S. 467, 2002).
31. 535 U.S. 467, 508. The authors' reliance on a subsequently overruled court case points out a significant (though unavoidable) weakness of *Controlling Market Power* or any book-length analysis of current regulatory activity in the telecommunications arena. The constantly evolving regulation of telecommunications, combined with inevitable delays between the writing and publication of a book, make it difficult to discuss current telecommunications regulation in that medium. For example, *Controlling Market Power* was published in 2003, but the most recent developments cited in the book occur in the 2000-2001 time frame. A number of significant regulatory developments occurred during the intervening period, 2002.
32. Controlling market power, *supra* note 2, at 101 (footnotes omitted). Like the comment concerning the legality of TELRIC pricing, this comment is woefully outdated, as the RBOCs now have Section 271 authority in all 48 continental states and the District of Columbia. *See* FCC, "News Release: Federal Communications Commission Authorizes Qwest to Provide Long Distance Service in Arizona; Bell Operating Companies Long Distance Application Process Concludes; Entire Country Authorized for 'All Distance' Service," Dec. 3., Moreover, long distance companies like AT&T and MCI are among the more active competitive local exchange carriers ("CLECs"). 2003.
33. Controlling market power, *supra* note 2, at 110.
34. *Id.* at 111
35. The authors contend that Section 271 may have been one of these mistakes, perhaps delaying the arrival of competition in the local exchange market by discouraging long distance providers from playing a role in bringing competition to that market. As noted *supra* note 9, this contention is based on an outdated assessment of the status of the RBOCs' Section 271 applications.
36. *Id.* at. The authors acknowledge that the FCC is probably best qualified to determine an ILEC's compliance with its Section 251 interconnection obligations, but they also argue that "it is a competition authority such as the [DOJ], with experience in assessing the degree of competitiveness of different markets across the economy, which should be entrusted with the task of determining whether the local [communications] market is sufficiently open to competition." *Id.* at 116. Similarly, they contend that "it would be preferable to concentrate merger review in the hands of the [DOJ] which has the advantage of reviewing mergers across different fields of activity." *Id.* at 117, 116-17.

37. *Ibid.*
38. *Ibid.*
39. *Ibid.*
40. *Ibid.*
41. *Ibid.*
42. *Ibid.*
43. *Ibid.*
44. *Ibid.*
45. *Ibid.*
46. Larry Baumgardner. Antitrust Law in the European Union. The Federal Communications Law Journal. 2005; 8:3.
47. The foregoing is based on information taken from Wikipedia-[http://en.wikipedia.org/wiki/ European Union Competition Law](http://en.wikipedia.org/wiki/European_Union_Compensation_Law). Last accessed on 12/12/2011.
48. See Provision of Directory Listing Info. Under the Comm Act of 1934, As Amended. Notice of Proposed Rulemaking. 17 F.C.C.R. 1164, 2002.