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“REBATES AND LOYALTY DISCOUNTS SCHEMES IN EU: TOWARDS A MORE ECONOMIC APPROACH?”

“IL MARGIN SQUEEZE IN EUROPA DOPO LE SENTENZE
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Rebates and loyalty discounts schemes in EU: towards a more economic approach?

Introduction

Rebates, which consist in a lump sum discount to the customer at the end of a reference period, have been used for a long time in economic transactions. The ubiquitous use of rebates by many undertakings, both dominant and non dominant ones, gives an idea about the economic rationality of this practice. From an economic point of view, all different types of rebates have a common feature: they can be considered as a kind of price discrimination and, in common with this practice, they can have both a pro-competitive and an anticompetitive rationale and impact on the market.

Economics, in general, have a positive approach towards rebating practices: they can be an efficient way to make price competition; they can create efficiency gains for companies and increase welfare for consumers through lower prices and/or higher quantities.

However, the rebate schemes applied by dominant companies can be a cause of concern because of the risk of horizontal market foreclosure. In addition where rebates are applied by dominant companies in the intermediate markets, this can lead to the lessening of inter-brand competition at the downstream retail level. However, *“the potential for anticompetitive effects will depend upon the specific details of the programs and the market power of the firms involved.”*¹

For this reason is important to implement an economic approach in order to not the pro-competitive effects and efficiency gain linked to the rebates schemes.

This paper is aimed to asses the antitrust implication of rebates scheme on competition when they are applied by dominant firms, on the light of the approach designed by the Discussion Paper on the application of art 82(“Discussion paper”) and the main pronouncement of European courts, in order to evaluate how and if the economics of rebates are balanced whit the competition issue. In fact in Europe, according to Discussion paper and considering cases in EU countries, there is a tendency to consider rebates exclusionary only on the basis on their potential to exclude rivals, without considering the effective harm on competition that they produce. The paper is structured as follow: in the first section it analyzes the economics of rebates for the firms. In the second section it analyzes the antitrust implications that arise when the rebates are applied by a dominant firm. In the last section it analyzes the approach followed by court in some relevant cases in EU and the approach followed in US regarding the same issue.

¹ OECD Roundtable on Loyalty o Fidelity Discounts and Rebates (2002).

1. The economics of rebates

Loyalty rebates offer a reward, in the form of a rebate, free products, or lower prices, to customers that make sufficiently many purchases from a supplier.

The loyalty rebates are characterized by the fact that:

1. the discount is recognized only to the customers that purchase all at list a substantial portion of their total requirements from a supplier, whether manufacturer or distributor;
2. the discount generally applies to all purchases, rather than incremental purchases above a threshold;
3. the pricing scheme often leads to potentially discriminatory prices. In fact different customers that buy the same quantity from a seller may pay different prices.

The economics effects of rebates are ambiguous as it is significantly dependant on the specific features of the market in which they are applied. According to OECD report on Loyalty and Fidelity Discounts and Rebates “*because fidelity discounts have potentially significant pro- and anti-competitive effects, and both are highly dependant on specific features of the discounts and the markets they are found in, a case by case approach to fidelity discounts seems warranted*².”

The OECD documents seem to exclude the application on a “per se” rule to the rebates scheme suggesting a more price base approach in the light on the pro-competition effect and efficiency gains linked to rebates.

In fact, according to economic literature loyalty rebates are a common commercial practice that can generate production efficiencies from which society as a whole can benefit. In particular:

- loyalty discount increases sales stability and helps the manufacturer to reduce sales fluctuations and inventory costs.
- Rebates help to reach economies of scale for the supplier and economies of transaction for the buyer (i.e. when the buyer concentrates its purchase on a single seller).
- loyalty discounts is useful to identify the most price sensitive retailers and to offer this more elastic segment of demand lower prices for increased sales. This strategy is a rational behaviour and would benefit more elastic customers without harming others, with an overall positive impact on consumers.
- Rebates can be used by the supplier to incentivize efficient behavior by retailers and to favor the retailer’s efforts in promoting its good.

² Cfr pag 20 Loyalty and Fidelity Discounts and Rebates, 2002

- Loyalty rebates may promote a competition “level playing field”, by allowing large and small firms to benefit from the same discounts. This could enhance competition downstream because the downstream sellers would have a similar level of marginal cost (assuming discounts are not lump sum rebates).

3. Antitrust assessment of rebates in EU before the 2009 Guidance Paper: a form based approach

Loyalty rebates represent an important marketing tool that, as we have showed above, can produce very important pro-competitive effects. But the rebates, where are applied by firm that join a dominant position, can produced also anti-competitive effects. For this reason it is important to find a solid economic rule to evaluate the rebates schemes applied by dominant position, characterized by laying to the grey burden of economic and efficiency gains and potential anti competitive effects.

The pro-competitive effects of rebates scheme make difficult the application of a “per se” rules when the discounting is applied by dominant firm. OECD document recognize that *“Although these types of discounts can be used anticompetitively in some circumstances, they normally result in immediate benefits to customers in the form of lower prices. The challenge for competition policy is to develop rules that prevent the anticompetitive use of discounting but avoid overbroad or ambiguous restrictions that deter precompetitive price reductions”*. That means that is necessary to design a price test in order to assess the rebates scheme. This need is clearly recognized by the Antitrust Modernization Commission in his report and recommendations to the government in which it stated that *“there is a need for greater clarity and improvement to standards in two areas: (1) the offering of bundled discounts or rebates, and (2) unilateral refusals to deal with rivals in the same market. Clarity will be best achieved in the courts, rather than through legislation. The Commission recommends a specific standard for the courts to apply in determining whether bundled discounts or rebates violate antitrust law”*.

The necessity to adopt an economic approach in the evaluation of rebates scheme was recognized also by the European Commission that in 2005 published the Discussion Paper on the application of Art 82 of Treaty. The discussion Paper has conduct to the publication, in 2009 of a Guidance Paper on the application of art 82.

Before the publication of the Discussion Paper the EU decisional practice and the case-law³ of the Community courts with regards to rebate practices by dominant companies have been considered not only by economists but also by many competition lawyers as being unnecessarily strict, taking

³Michelin II Judgement, Commission Decision 2002/405 and Virgin/British Airways Judgement, Commission Decision 2000/74.

a **form-based approach**⁴. In particular, there is a tendency to consider them exclusionary only on the basis on their potential to exclude rivals without building a fact-based story on harm to competition and carrying out a detailed economic analysis of their negative impact on competition and consumer welfare⁵.

In fact, according to the case law, a per se rule seem to prevail on the antitrust assessment of the rebate.

In **Hofmann- La Roche** judgment the Court of Justice found that **certain discount granted by an undertaking in a dominant position were abusive in character**. In this judgement the rebates granted by the dominant undertaking were linked to the condition that co-contractor obtained its supplies over a given period entirely or mainly from Hoffmann-La Roche. The Court found such a discount system an abuse of a dominant position and stated that the granting of fidelity discounts in order to give the buyer an incentive to obtain its supplies exclusively from the undertaking in a dominant position was incompatible with the objective of undistorted competition within the common market

In **Michell II**, the Court of Justice judged a standardised progressive discounts calculated as a percentage of the value customer's purchases and with a one year reference period would be considered as abusive when granted by a dominant undertaking, unless that undertaking could show that the rebates in question were based on a countervailing economic advantage given by the customer i.e. that it "*rewards economies of scale made by the [dominant undertaking] because of orders for large quantities*"⁶.

In this sentence was stated that discount or bonus schemes of an undertaking in a dominant position give rise to an exclusionary effect when:

- goal-related discounts or bonuses are linked to the attainment of sales objectives defined individually⁷
- the commitment of co-contractors towards the undertaking in a dominant position and the pressure exerted upon them may be particularly strong where a discount or bonus does not relate solely to the growth in turnover in relation to purchases or sales of products of that undertaking made by those co-contractors during the period under consideration, but extends also to the whole of the turnover relating to those purchases or sales. In that way, relatively

⁴ See, e.g., Denis Waelbroeck, "Michelin II : A Per Se Rule against Rebates by Dominant Companies?", (2005) 1 *Journal of Competition Law and Economics* 149

⁵See, for instance, Kallaugher and Sher (2004) and Waelbroeck (2005).

⁶ See point Manufacture Française des Pneumatiques Michelin v. Commission, Case T-203/01, (para 98)

⁷ see Michelin, paragraphs 70 to 86

modest variations – whether upwards or downwards – in the turnover figures relating to the products of the dominant undertaking have disproportionate effects on co-contractors⁸

- the pressure exerted on resellers by an undertaking in a dominant position which granted bonuses with those characteristics is further strengthened where that undertaking holds a very much larger market share than its competitors⁹. By reason of its significantly higher market share, the undertaking in a dominant position generally constitutes an unavoidable business partner in the market. Most often, discounts or bonuses granted by such an undertaking on the basis of overall turnover largely take precedence in absolute terms, even over more generous offers of its competitors. In order to attract the co-contractors of the undertaking in a dominant position, or to receive a sufficient volume of orders from them, those competitors would have to offer them significantly higher rates of discount or bonus.

The above criteria was followed by the European Court of Justice in the judgment **Virgin/British Airways Judgment**¹⁰. In this decision Court of First Instance, after holding that the bonus schemes at issue produced an exclusionary effect, had to examine whether those schemes had an objective economic justification, stating that Assessment of the economic justification for a system of discounts or bonuses established by an undertaking in a dominant position is to be made on the basis of the whole of the circumstances of the case (see, to that effect, Michelin, paragraph 73). It has to be determined whether the exclusionary effect arising from such a system, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer. If the exclusionary effect of that system bears no relation to advantages for the market and consumers, or if it goes beyond what is necessary in order to attain those advantages, that system must be regarded as an abuse.

The same approach was followed by the Court of justice in the appeal sentence stated that, according to the previous case law **discounts or bonuses granted to its co-contractors by an undertaking in a dominant position are not necessarily an abuse and therefore prohibited by Article 82 EC**. Only discounts or bonuses which are not based on any economic counterpart to justify them must be regarded as an abuse.

4. The treatment of rebates scheme in Guidance Paper on art 82

On 9 February 2009 the European Commission published the final version of its Guidance Paper on the application of Article 82 EC Treaty to exclusionary abuses of a dominant position. The

⁸ see, to that effect, Michelin, paragraph 81

⁹ see, to that effect, Michelin, paragraph 82

¹⁰ See Commission Decision 2000/74

Guidance Paper is the result of a review process launched by the Commission staff's Article 82 Discussion Paper in December 2005 and included subsequent comprehensive public consultations and discussions with Member States' Competition Authorities.

As stated in the accompanying FAQ memo, the Guidance Paper "is intended to contribute to the process of introducing a more economics based approach in European competition law enforcement" and, as such, embodies a very welcome departure from the past Commission's approach to interpreting Article 82 EC, which has been often criticized as exceedingly formalistic.

The rebates notion

The Discussion Paper distinguishes between:

- *conditional discounts*: are granted to customers to reward a certain (purchasing) behaviour of these customers (e.g., meeting a sales threshold)
- *unconditional discounts*: are granted for every purchase of these particular customers, independently of their purchasing behaviour

The Discussion Paper recognizes that both types of discounts may be used for efficiency reasons or for anticompetitive motives, and both may have precompetitive and anticompetitive effects.

Regarding unconditional discounts, the Discussion Paper proposes to apply the usual rules on predatory pricing.

Concerning the treatment of conditional rebates, the Discussion Paper crucially distinguishes between *conditional rebates granted on all purchases in the reference period* (retroactive rebates) and *conditional rebates on incremental purchases above a given threshold* (incremental rebates). While both types of conditional rebates may cause exclusionary effects, the Discussion Paper takes the view that the former "may foreclose the market significantly, as they may make it less attractive for customers to switch small amounts of demand to an alternative supplier, if this would lead to loss of the retroactive rebates.

The rebates evaluation

The Guidance Paper specifies clearly that "*the Commission will normally only intervene where the conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking*¹¹" also if it is recognized that "*the Commission recognizes that in certain circumstances a less efficient competitor may also exert*

¹¹ Cfr para 23 Commission Guidance Paper on art 82

a constraint which should be taken into account when considering whether particular price-based conduct leads to anti-competitive foreclosure¹².

The cost benchmarks used by the Commission are **average avoidable cost (AAC)** and **long-run average incremental cost (LRAIC)**. In particular the failure to cover AAC indicates that the dominant undertaking is sacrificing profits in the short term and that an equally efficient competitor cannot serve the targeted customers without incurring a loss. Failure to cover LRAIC indicates that the dominant undertaking is not recovering all the (attributable) fixed costs of producing the good or service in question and that an equally efficient competitor could be foreclosed from the market.

According to the Guidance Paper a conditional rebate granted by a dominant undertaking may enable competitors to use the '**non contestable**' portion of the **demand** of each customer (the amount that would be purchased by the customer from the dominant undertaking in any event) as leverage to decrease the price to be paid for the '**contestable**' portion of demand (the amount for which the customer may prefer and be able to find substitutes)

In order to understand if the rebate system is capable of hindering expansion or entry even by that equally efficient competitors Commission estimate what price a competitor would have to offer in order to compensate the customer for the loss of the conditional rebate. The effective price that the competitor will have to match is not the average price of the dominant undertaking, but the normal (list) price less the rebate the customer loses by switching, calculated over the relevant range of sales and in the relevant period of time.

The relevant range over which to calculate the effective price in a particular case depends on the kind of rebate grants by the dominant firm (incremental or retroactive). For incremental rebates, the relevant range is normally the incremental purchases that are being considered. For retroactive rebates, it will generally be relevant to assess in the specific market context how much of a customer's purchase requirements can realistically be switched to a competitor (the 'contestable share' or 'contestable portion').

According to the Commission document, as long as the effective price remains consistently **above the LRAIC** of the dominant undertaking, this would normally allow an equally efficient competitor to compete profitably notwithstanding the rebate, as the rebate is not capable of foreclosing in an anti-competitive way.

If instead the effective price is below AAC normally the rebate scheme is considered capable of foreclosing even equally efficient competitors. Finally, when the effective price is between AAC and LRAIC, there is need to consider other factors in order to evaluate if the entry or expansion even by equally efficient competitors is likely to be affected. In this context, the rebate is capable of

¹² Cfr para 24 Commission Guidance Paper on art 82

foreclosing equally efficient competitors if competitors have not realistic and effective counterstrategies at their disposal to decrease the price for the relevant range.

In the evaluation of rebates the Guidance Paper takes in consideration also if the e rebate system is applied with an individualized (based on a percentage of the total requirements of the customer or an individualized volume target) or a standardized (the same for all or a group of customers threshold). According to the Commission document, an individualized threshold allows the dominant supplier to set the threshold at such a level as to make it difficult for customers to switch suppliers, thereby creating a maximum loyalty enhancing effect. By contrast, a standardized volume threshold may be too high for some smaller customers and/or too low for larger customers to have a loyalty enhancing effect. For the Commission is likely to consider that a standardized system of rebates may produce anti-competitive foreclosure effects.

The evaluation of efficiency

The dominant firm can demonstrate that its conduct produces substantial efficiencies which outweigh any anticompetitive effects. In this case, according to the Guidance Paper, the Commission will assess **whether the conduct in question is indispensable and proportionate to the goal allegedly pursued by the dominant undertaking**. In this context the dominant firm had to demonstrate that:

- the efficiencies have been, or are likely to be, realized as a result of the conduct
- the conduct is indispensable to the realization of those efficiencies: there must be no less anti-competitive alternatives to the conduct that are capable of producing the same efficiencies
- the likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare in the affected market
- the conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition
- that rebate systems achieve cost or other advantages which are passed on to customers

According to the Commission, standardised volume targets can reach transaction-related cost advantages better than with individualized volume targets. Similarly, incremental rebate schemes are in general more likely to give resellers an incentive to produce and resell a higher volume than retroactive rebate schemes

5. EU case after Guidance Paper: towards a more economic approach?

In the following section are analyzed some of the main case law after the publication of the Guidance Paper in order to understand if and how the economic approach launched by the European Commission has influenced the antitrust assessment of rebates schemes.

Tomra is the General Court's first decision on loyalty rebates since the Commission's adoption of an effects-based approach in its Guidance Paper on exclusionary conduct under Article 82 (now Article 102) in February 2009, followed by the decision on *Intel* in May of the same year.

This two decision, as showed below, seem to disappoint the effect-based approach proposed whit the Guidance Paper.

2. The TOMRA decision

The case

Tomra is a Norwegian group active in the area of collecting used beverage containers. Its main activity consists of the supply of so-called reverse vending machines (RVMs) that are used for the collection of empty drink containers.

Tomra had a very high market share: in the years before 1997 Tomra's market share continuously exceeded 70 %. Tomra's market shares have exceeded 95 % in Europe since 1997. In any relevant markets Tomra's market share was a multiple of the market shares of its competitors. Tomra's rivals, including those who had the potential to become strong competitors, were all small or very small companies, with a very low turnover and very few employees.

Moreover, there was no substantial countervailing buyer power which would have been able to challenge Tomra's dominance in any of the markets concerned. Tomra, therefore, is a dominant undertaking in the common market.

The European Commission found that Tomra had abused its dominance through the use of contracts that included exclusivity provisions, quantity commitments and retroactive rebates. The General Court of the European Union (the "General Court") upheld the Commission's decision in September 2010.

The Commission's Decision

According to the Commission Tomra's strategy was based on a policy that sought to preserve its dominance and market share through means such as:

- preventing market entry;
- keeping competitors small by limiting their growth possibility

- weakening and eliminating competitors, by way of acquisition or otherwise, especially those competitors that were deemed to have the potential to become more serious challengers.

To achieve this objective Tomra employed various anti-competitive practices, including exclusivity and preferred supplier agreements, as well as agreements containing individualized quantity commitments or individualised retroactive rebate schemes. The latter types of agreements or conditions usually relate to quantities representing the entire requirements of the customer or a large proportion thereof within a given reference period. They are often referred to as ‘high-volume block orders’.

Tomra's policy of blocking market access for competitors was pursued in particular by:

- concluding exclusivity agreements with a number of its customers for the supply of RVM solutions in five EEA countries (Austria, Germany, the Netherlands, Norway and Sweden) in the period of 1998-2002,
- concluding agreements with its customers in the period of 1998-2002 imposing upon them an individualized quantity target, that corresponded to the customer's total or almost total demand for RVM solutions in a specific period of time. The customers were granted discounts subject to their commitment to purchase the agreed target quantity,
- concluding agreements with the retail companies in the period of 1998-2002 in five EEA countries establishing individualised retroactive rebate schemes, thresholds of which corresponded to customers' total or almost total demand.

According to the Commission decision discounts granted for individualized quantities that correspond to the entire or almost entire demand, have the same effect as explicit exclusivity clauses, that is to say, they induce the customer to purchase all or almost all its requirements from a dominant supplier. The same applies to fidelity (loyalty) rebates, that is to say, rebates that are conditional on customers purchasing all or most of their requirements from a dominant supplier. It is not decisive for the exclusionary character of agreements or conditions whether the purchase volume commitment is expressed in absolute terms or with reference to a certain percentage thereof. In the Tomra's agreements the stipulated quantity targets constituted individualized commitments that were different for each customer regardless of its size and purchase volume.

Furthermore, they corresponded either to the customer's entire requirements or to a large proportion of them, or even exceeded them. Tomra had the necessary market knowledge for a realistic estimate of each individual customer's approximate demand.

The rebate schemes were individualized for each customer and the thresholds related to the total requirements of the customer or a large proportion thereof. They were established on the basis of estimated customer requirements and/or purchasing volumes achieved in the past, as is evident from the circumstances. The incentive for buying exclusively or almost exclusively from Tomra is particularly strong where thresholds are combined with a system whereby the achievement of the bonus or a more advantageous bonus threshold benefits all purchases made by the customer in the reference period and not exclusively the purchasing volume exceeding the respective threshold. Under a retroactive system, a customer who has started buying from Tomra, which is a very likely scenario given Tomra's strong market position, has a strong incentive to reach the threshold in order to reduce the price of all its purchases from Tomra. This incentive increased the closer the customer came to the threshold in question. The combination of a retroactive rebate system with a threshold or thresholds corresponding to the entire requirements or a large proportion thereof represented a significant incentive for buying all or almost all the equipment needed from Tomra and artificially raised the cost of switching to a different supplier, even for a small number of units.

Tomra's economic defence focused instead on whether an efficient competitor would have been able to compete against the rebates offered by Tomra, using an approach that was similar to the one eventually contained in the 2009 Guidance Paper.³

The General Court's Judgement

The General Court confirmed the Commission's decision, rejecting the need to analyse any actual foreclosure provided the conduct in question is capable of foreclosing competition.

In particular the Court stated that:

- a rebate system which has the potential to foreclose rivals will be regarded as contrary to Article 102 if it is applied by an undertaking in a dominant position;
- in order to determine whether exclusivity agreements, individualized quantity commitments and individualized retroactive rebate schemes are compatible with Article 102, it is necessary to ascertain whether, “following an assessment of all the circumstances,” those practices are “intended” to restrict or foreclose competition on the relevant market or are “capable” of doing so [para. 215] or, as the Court phrased it in para 287, whether the conduct in question “tended to restrict competition or ... was capable of having that effect.”

In rejecting Tomra's arguments that the coverage of its agreements was insufficient to be capable of foreclosing an as-efficient competitor, the Court concluded that:

- the agreements foreclosed, on average, about 39 percent of total demand in the market; and
- the foreclosure of such a substantial part of the market cannot be justified by showing that the contestable part of the market is still sufficient to accommodate a limited number of competitors because “competitors should be able to compete on the merits for the entire market and not just for a part of it

The Court did not address Tomra's argument, made at the Oral Hearing, that a proper foreclosure analysis would require an elaborate economic assessment, such as the As-Efficient-Competitor test, which the Commission appears to advocate in its 2009 Guidance Paper on the enforcement of Article 102. Nevertheless, the Court concluded in general terms that “only an analysis of the circumstances of the case” makes it possible to establish whether a practice is capable of foreclosing competition. Without such analysis it would be artificial to establish the portion of the tied market beyond which the practices of a dominant undertaking may have an exclusionary effect on competitors [para. 242].

The Court further stated that the Commission did not attempt to base its finding of an infringement on the actual effects of Tomra's agreements and practices on each of the national markets examined, but that it had merely “complemented” its finding of infringement with a brief examination of the effects of those practices [para. 288]. In this context the Court held that:

- for the purposes of establishing an abuse, it is not necessary to show that the conduct in question had an actual impact on the relevant markets;
- it is sufficient to show that the abusive conduct tends to restrict competition, *i.e.*, is capable of having that effect [see para 289];
- since the Commission's analysis of actual effects merely complemented its finding of abuse, any errors in that analysis cannot affect the legality of the decision [see para. 290].

In so ruling, the Court dismissed Tomra's arguments concerning the lack of actual foreclosure and reaffirmed the established case law relating to exclusivity and loyalty discounts, pursuant to which it is only necessary to establish that the conduct of a dominant firm has the potential to foreclose competition.

1. The Intel decision

Intel was fined by European Commission for abusing of its dominance position.

The case

Intel had a dominant position in the worldwide x86 CPU market (at least 70% market share).

The Commission found that Intel engaged in two specific forms of illegal practice: **conditional rebates and so called naked restriction.**

With regard conditional rebates the Commission found that Intel awarded major OEMs rebates which were conditioned on these OEMs purchasing all or almost all of their supply needs. In particular:

Intel rebates to Dell during the period ranging from December 2002 to December 2005, which were conditioned on Dell purchasing exclusively Intel CPUs,

- Intel rebates to HP during the period ranging from November 2002 to May 2005, which were conditioned in particular on HP purchasing no less than 95 % of its CPU needs for its business desktop segment from Intel (the remaining 5 % that HP could purchase from AMD was then subject to further restrictive conditions set out in section 2.3.2 below),
- Intel rebates to NEC during the period ranging from October 2002 to November 2005, which were conditioned on NEC purchasing no less than 80 % of its CPU needs for its desktop and notebook segments from Intel,
- Intel rebates to Lenovo during year 2007, which were conditioned on Lenovo purchasing its CPU needs for its notebook segment exclusively from Intel.

In the same way, Intel awarded payments to Media Saturn Holding (MSH), Europe's largest PC retailer, which were conditioned on MSH selling exclusively Intel-based PCs. These payments are equivalent in their effect to the conditional rebates to OEMs.

The Commission decision stated that the conditional rebates granted by Intel constitute fidelity rebates which fulfil the conditions of the Hoffmann-La Roche case-law. With regard to Intel's conditional payments to MSH, the Commission established that the economic mechanism of these payments is equivalent to that of the conditional rebates to OEMs, concluding that they also fulfil the conditions of the Hoffmann-La Roche case-law.

The economic analysis of Intel conducts

As efficient competitor analysis

The Commission conducted an economic analysis of the capability of the rebates to foreclose a competitor which would be as efficient as Intel, albeit not dominant. The test is aiming to establish at what price a competitor which is "as efficient" as Intel would have to offer CPUs in order to compensate an OEM for the loss of any Intel rebate. This analysis is in principle independent of whether or not AMD was actually able to enter.

The analysis takes into consideration three factors:

- the contestable share (the amount of a customer's purchase requirements that can realistically be switched to a new competitor in any given period),
- a relevant time horizon (at most one year) and
- a relevant measure of viable cost (average avoidable costs).

If Intel's rebate scheme means that given the contestable share, in order to compensate an OEM for the loss of the Intel rebate, an as efficient competitor has to offer its products below a viable measure of Intel's cost, then it means that the rebate was capable of foreclosing the as efficient competitor. This would thereby deprive final consumers of the choice between different products which the OEM would otherwise have chosen to offer were it to make its decision solely on the basis of the relative merit of the products and unit prices offered by Intel and its competitors.

The same kind of analysis has been conducted for the Intel payments to MSH. The analysis of the capability of these payments to foreclose an as efficient competitor also takes account of the fact that these payments are made at another level of the supply chain, and that their effect is additional to that of conditional rebates to OEMs.

The Commission concluded that Intel's conditional rebates and payments induced the loyalty of key OEMs and of a major retailer, the effects of which were complementary in that they significantly diminished competitors' ability to compete on the merits of their x86 CPUs. Intel's anticompetitive conduct thereby resulted in a reduction of consumer choice and in lower incentives to innovate.

The Intel arguments

- Intel submitted two different sets of arguments in order to attempt to justify its rebate schemes: by using a rebate, Intel has only responded to price competition from its rivals and thus met competition;
- that the rebate system used vis-à-vis each individual OEM was necessary in order to achieve important efficiencies that are pertinent to the CPU industry.

Regarding the latter argument, Intel argued that there were four different types of efficiencies that were attained by any exclusivity requirements of its rebates: lower prices, scale economies, other cost savings and production efficiencies and risk sharing and marketing efficiencies. Moreover, Intel claimed that conditions attached to the rebates were indispensable to attain these efficiencies and their impact on competition was minor since AMD grew during the investigation period.

The Commission found that Intel's arguments relating to objective justification are flawed because they relate more generally to conduct to which the Commission did not object (i.e. discounting/provision of rebates), and not to conduct to which the Commission did object (i.e.

conditions associated with the discounts/rebates) and none of the efficiency defences provide a relevant justification for the conduct in question.

In its decision, in fact, the Commission does not object to rebates in themselves but to the conditions Intel attached to those rebates. Because computer manufacturers are dependent on Intel for a majority of their x86 CPU supplies, only a limited part of a computer manufacturer's x86 CPU requirements is open to competition at any given time.

The decision contains a broad range of contemporaneous evidence that shows that AMD, essentially Intel's only competitor in the market, was generally perceived, by computer manufacturers and by Intel itself, to have improved its product range, to be a viable competitor, and to be a growing competitive threat. The decision finds that Intel's practices did not constitute competition on the merits of the respective Intel and AMD products, but rather were part of a strategy designed to exploit Intel's existing entrenched position in the market.

6. Conditional rebates after Guidance paper: is form enough?

Although the case law showed in the paragraph 6 are considered an important step in the implementation of the new economic approach of Article 82, they seem to confirm the traditional approach of the Community institutions, according to which the prohibition of loyalty discounts is justified by their mere *tendency* or abstract capability to exclude competitors.

In this paragraph the analysis is focused on the use of “as efficient competitor” test in the Intel decision.

The Commission explains that this test relies on three parameters: (i) the contestable share of a given customer's demand; (ii) the relevant time horizon on which the customer in question bases its decision on whether to change suppliers; and (iii) the relevant measure of viable cost for an as efficient competitor (in this case average avoidable costs or “AAC”).

Both Commission and Intel conducted an “as efficient competitor” test reaching the opposite conclusion. In fact despite both the Commission and Intel conceptually apply the “as efficient competitor” in the same manner, they strongly disagree over the ways in which the variables essential to the application of this test should be determined, in first instance the determination of the so-called “contestable share”. Regarding this point is important to underlay that a relatively broad “contestable share” will be favorable to the investigated firm as the test will probably be easy to pass, a narrow “contestable share” will make the test very hard to pass. According to the *ratio* of “as efficient competitor test” the determination of the contestable share should be based on

documents or data that the dominant firm had access to at the time it set its rebates, as a firm can only determine the legality of its price/rebates on the basis of information that is available to it. According to the Intel decision instead, the Commission relies on internal document of OED to calculate the share of contestable demand¹³.

This means that a fundamental variable of the test was calculated on the basis of documents that Intel had no access.

It is important to note that the failure to meet the “as efficient competitor” test does not necessarily mean that the firm has foreclosed its competitors, as clearly explained in the Guidance Paper in which the Commission stated that if: *“the data suggest that the price charged by the dominant undertaking has the potential to foreclose as efficient competitors, then the Commission will integrate this in the general assessment of anticompetitive foreclosure (see Section B above), taking into account other relevant quantitative and/or qualitative evidence.”*¹⁴. In Section B the Commission clarified that *“If the conduct has been in place for a sufficient period of time, the market performance of the dominant firm and its competitors may provide direct evidence about anticompetitive foreclosure; for reasons attributable to the allegedly abusive conduct, the market share of the dominant firm may have risen or a decline in market share may have been slowed; for similar reasons, actual competitors may have been marginalised or may have exited, or potential competitors may have tried to enter and failed.”*

Section B of the Guidance Paper seems to require an effect-based analysis that the Commission didn't consider in the Intel case.

7. The need of a “safe harbour” rule

As such, it is important to find a “safe harbour” rule based on solid economic grounds that would allow the authorities and dominant undertakings to find out which rebates are likely to be not abusive from an antitrust perspective. At the same time, the rule should respect the pricing freedom of all companies and not to cause many false positives which would prohibit pro-competitive discounts by the dominant companies only because they would appear to be against the form-based rule.

This kind of rule for rebates would consist of some cost-based test. It would assess whether the rebated price offered by the dominant undertaking is likely to lead to the exclusion of competitors by comparing the rebated prices with some relevant cost measure in a similar way to predation tests.

¹³ See for example para 1202-12 Commission Intel Decision regarding the calculation share of Dell's demand that was “contestable”

¹⁴ Guidance Paper, supra note , at para 27

Because both exclusionary rebate and predatory pricing cases by dominant companies would operate with elements of below cost pricing.

In order to find out how this can be tested, and more importantly, whether the offers that fail such a test can be deemed to be anticompetitive, it would be essential to understand how the dominant company's rebates can harm competitors. As the DG Competition Discussion Paper puts it, the core of the problem of rebates by dominant companies lies in the fact that: *"...the buyers, also without loyalty enhancing measures, will buy a large part or even most of their purchases from the dominant supplier. The dominant position usually implies that for a good part of the demand on the market there are no proper substitutes to the dominant supplier's product, because for instance its brand is a "must stock item" preferred by many final customers or because the capacity constraints on the other suppliers are such that a good part of demand can only be provided for by the supplier"*¹⁵..

Under these circumstances, other firms cannot effectively compete with the dominant undertaking for a substantial part of the market.

By contrast, if we are in a market where the product offered is homogeneous and there are no capacity constraints for competitors, then the latter would be capable of competing equally with the dominant undertaking for all customers and for each individual customer's entire demand. In such cases, the rebate scheme would not be capable of foreclosing the market to the competitors if the effective average price implied by the rebate is not found to be predatory by passing a cost-based predation test.

However, in the majority of the markets where rebates by dominant companies are applied competitors do compete for the contestable part of the customers' demand.

From an economic point of view, the most important antitrust concerns have arisen with regards to one particular kind called loyalty or fidelity rebates¹⁶. These are distinct from the simple rebating practices applied to all customers and to all quantities acquired by them or from selective price cuts

¹⁵ DG Competition Discussion Paper on art.82 (2005)

¹⁶ These rebate schemes are analysed by DG Competition Discussion Paper on art.82 under the category of "Conditional Rebates" which are the rebates granted to customers to reward a certain (purchasing) behaviour of these customers. Moreover, the Discussion Paper seems to analyse selective price cuts under the category of "unconditional rebates" that are granted to certain customers and not to others, and are granted for every purchase of these particular customers, independently of their purchasing behavior.

⁶ Faella (2008) gives a complete picture of this issue.

which apply only to some type of customers but to all quantities acquired by these customers. Loyalty rebate practices have potential anticompetitive effects similar not only to predatory pricing practices in foreclosing the market but they potentially include additional anticompetitive effects similar to exclusive dealing arrangements by making the application of the rebates conditional on customers exceeding certain sales targets within a certain reference period.

As a matter of fact, both the greatest need to find a “safe harbour” rule to distinguish between “bad” and “good” rebates and the biggest analytical difficulties in elaborating such a test that would give the authorities guidance in assessing the anti competitiveness of rebate scheme seems to arise with regards to loyalty rebate practices.

The aim of the test for loyalty rebates would be to assess whether in presence of the rebate system the “as efficient” competitors are foreclosed from the market in supplying the contestable part of customers’ demand¹⁷. For assessing this, three elements must be identified. These are (a) the effective price - which must be found by analysing in particular the loyalty enhancing effect; (b) the relevant cost measure to compare with the effective price; and (c) the relevant time period for assessing the rebate scheme. With regards to the first element one should understand the amount of products that customers would acquire from the dominant company in absence of the rebate scheme because the dominant company would use this amount as leverage to decrease the prices of the amount contestable by smaller competitors. It is also essential to know how the specific threshold works, whether it is structured as a standard quantity or as percentage quantity of the customers’ needs, and very importantly whether the rebate is granted to all purchased quantity or only to the incremental quantities above the threshold. Without understanding how many units the rebate should cover it cannot be possible to understand the effective price.

For instance, a threshold posed above the normal quantity that would be acquired by customers from the dominant firm independently of the rebate, could warn about the possible loyalty enhancing effect that the rebate implies. Moreover, the retroactivity of the rebate on all purchases once the threshold is met by the customer could indicate that the rebate will create a lock-in effect for consumers. In fact, the intensity of the loyalty enhancing effect would depend on the percentage of rebate and on where the threshold is posed.

The second element to identify is the relevant cost measure to use in comparison with the effective price such as the average avoidable cost or average total cost.

The third element would depend on the reference period over which the rebate applies. The right choice of the timeframe to assess the rebate scheme would be essential considering that it affects directly the structure of the relevant cost measure.

There is more than one test¹⁸ proposed by economists that while posing at the core of the analysis the loyalty enhancing effect they measure the effective price and compare it with some cost measure in different manners.

The first method, suggested in a report on fidelity rebates prepared by RBB Economics for OFT proposes to define an “assured base of sales” which is the amount for which the customer has a high willingness to pay for the dominant company’s product and lower willingness to pay for the competitors’ products. Afterwards, the test would consist in finding an exaggerated assured base of sales which is surely greater than the true assured base and to assess the effective price over the residual demand with regards to the exaggerated assured base of sales. Once this effective price is found, the report suggests comparing it with the average avoidable cost which is strictly connected to the concept of as efficient competitor. In fact, they argue that in case of the competition by means of an identical product and sunk investment costs necessary to produce the product already incurred by both companies, if the dominant firm wins share from the competitor by pricing the product at or above the average avoidable cost than the as efficient competitor should be able to win the lost share back. So, if the effective price is above the average avoidable cost then the as efficient competitor would profitably match the price, thus the rebate is not abusive.

The second method is proposed by the DG Competition Discussion Paper which is based on finding the effective price through calculating the “required share” and “commercially viable share”. The Paper firstly defines the required share as the average amount of the customers’ requirements that the entrant will need to capture for obtaining an effective price at least as high as the average total cost of the company. This cost measure is chosen because it would reflect better than the average avoidable cost the fact that in case of rebates the exclusion could occur also without a profit sacrifice of the dominant rebating company over a long time frame. Secondly, the paper defines the commercially viable share as the share that an efficient entrant or competitor can reasonably expect

¹⁸ RBB Economics, Selective Price cuts and Fidelity rebates report for OFT (2005) and Discussion Paper on art. 82 give two alternative approaches.

to capture. Then it compares these two elements to assess whether the required share exceeds the commercially viable share: if it does, it would mean that the rebate system would likely to have the foreclosure effect on the market. This is because it would be equivalent to say that the effective price applied by the dominant company is below the average total cost of the dominant company.

However, even in case a cost based test is applied to one of the most complex type of rebate such as loyalty rebates, the positive finding regarding the likeliness of the foreclosure will not be sufficient to state confidently that there is an abuse of dominant position by the dominant company.

Assessing the likeliness of the foreclosure of the rebate scheme, will not lead automatically to assess the market distorting foreclosure effect induced by that rebate scheme. It can be shown that a rebate failing to pass “safe harbour” test alone cannot confirm any of the charges against the dominant company with regards to the rebate applied unless it is complemented by evidence confirming the fact-based story of harm to competition and consumers identified at the beginning of the case.

This can be demonstrated through the case of a dominant company whose effective prices deriving from loyalty rebate scheme result to be under the relevant cost measure of one of the “safe harbour” tests already described. In this case, in order to assess the dominance abuse it would also be necessary to demonstrate the absence of the evidence regarding absence of a foreclosure effect. For instance, if in presence of a rebate scheme likely to induce foreclosure, there is also significant entry from other companies or expansion by the existent competitors in the market then it would not be possible for competition authorities to conclude that there is a market distortion depending on the rebate scheme. In other words, in presence of some important evidence which contradicts what foreseen by the harm to competition story, the abuse of dominant position cannot be confirmed.

On the other hand, in case the effective prices of the dominant company are found to be above the relevant cost measure, from an economic point of view, the conclusion would be no abuse of dominant position. However, DG Competition Discussion Paper states that there can be some extreme cases where market conditions would allow the dominant company to exclude the entrants that would increase competition, even if the effective price is above the relevant cost measure. So in these cases before clearing the abuse case, it could be necessary to analyse further the case in the light of the exceptional market conditions described in the harm to competition story.

Conclusion

To conclude, cost-based tests can generally constitute a “safe harbour” in case the effective price of the rebate is found to be above the chosen relevant cost measure. However, a below cost finding in such tests would not be conclusive of the foreclosure. Thus, these tests should anyway be taken into account as an important part of the puzzle which is the fact-based story of harm to competition which should also include the assessment of the dominant firm’s capability to foreclose competitors and the assessment of a likely market distortion effect by considering the extent to which the dominant company applies the rebate scheme in the market.

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Il margin squeeze in Europa dopo TeliaSonera e Telefonica

Recentemente la corte svedese ha comminato all'operatore incumbent una sanzione amministrativa per aver abusato della posizione dominante goduta nei servizi di accesso a banda larga. Tale sentenza è stata preceduta da una pronuncia pregiudiziale della Corte Europea sull'interpretazione dell'art. 102 TFUE in merito ai criteri alla luce dei quali si deve ritenere che una pratica tariffaria di compressione dei margini tra prezzo e costo costituisca abuso di posizione dominante. Sul solco di tale interpretazione la Corte di Giustizia Europea ha recentemente confermato la sanzione inflitta dalla Commissione all'operatore telefonico spagnolo (Telefonica) per violazione dell'art 102 del TFUE. L'interpretazione della corte segna una svolta in materia di margin squeeze che da un lato allarga il divario tra stati uniti ed Europa e dall'altro appare andare oltre l'approccio delineato dalla Commissione europea sull'applicazione dell'art 102 del trattato.

Nel corso del lavoro si riassumeranno i punti di principali novità rappresentati dalla sentenza, gli elementi di rottura rispetto al passato e rispetto all'approccio statunitense e si cercheranno di delineare i possibili scenari futuri.

Introduzione

Le sentenze TeliaSonera prima e quella Telefonica dopo, collocandosi nel solco interpretativo già delineato dal caso Deutsche Telekom, rappresentano un punto di svolta nella valutazione del *margin squeeze* in Europa, ed un punto di rottura con l'approccio seguito in ambito statunitense.

Difatti tali pronunciamenti da un lato conferiscono al *margin squeeze* dignità di autonoma fattispecie abusiva, svincolandolo definitivamente dalla categoria del rifiuto a contrarre. Sotto questo profilo le sentenze in oggetto contribuiscono ad aumentare la distanza con quanto previsto per condotte simili dall'altro capo dell'oceano, dove, con le sentenze *Trinko* e *Linline* il *margin squeeze* perde significatività di fattispecie autonoma di abuso, in quanto sostanzialmente riconducibile al *refusal to deal* ed ai prezzi predatori.

I pronunciamenti comunitari appaiono altresì significativi per il già controverso rapporto tra regolamentazione ex ante e diritto della concorrenza ex post, evidenziando come ben sia possibile sanzionare un'impresa soggetta ad obblighi regolamentari per violazione dell'art 102.

Secondo quanto stabilito dalla giurisprudenza comunitaria e dalle Guidance sull'applicazione dell'art 102, la fattispecie abusiva del *margin squeeze* si verifica quando un'impresa verticalmente integrata e dominante in un mercato a monte stabilisce un divario (spread) tra il prezzo all'ingrosso di accesso all'infrastruttura (per i concorrenti) ed il prezzo al dettaglio applicato per il servizio a valle (per i consumatori) al di sotto del livello che permetterebbe ad un operatore concorrente, almeno tanto efficiente quanto l'*incumbent*, di recuperare i costi della prestazione del servizio.

Nel corso del lavoro si evidenzieranno i principali elementi di novità rappresentati dalle sentenze TeleSoniera e Telefonica, come questi si collocano nel solco già disegnato con i precedenti pronunciamenti comunitari nonché le differenze rispetto all'approccio nordamericano.

Una sezione verrà dedicata al complicato rapporto tra regolamentazione ed antitrust laddove la fattispecie abusiva del *margin squeeze*, riferendosi (e verificandosi) principalmente ad imprese verticalmente integrate già soggette a regolamentazione di settore, rappresenta necessariamente una terra di mezzo in cui la regolamentazione e la disciplina antitrust spesso si sovrappongono.

1. Il *margin squeeze* in EU: definizione ed evoluzione

Il *margin squeeze* è un comportamento abusivo escludente "di prezzo". Esso si realizza laddove un'impresa verticalmente integrata, contemporaneamente fornitrice di un servizio essenziale per un prodotto derivato (mercato a monte) ed attiva nei mercati del prodotto derivato (mercato a valle) pone in essere comportamenti volti ad escludere i concorrenti dal mercato a valle mediante una compressione dei margini. Tale compressione può realizzarsi:

- Tramite un aumento da parte dell'impresa dominante dei prezzi dell'input essenziale fornito nel mercato a monte, in modo da non permettere alcun margine di guadagno ai competitori nel mercato a valle.
- una diminuzione da parte dell'impresa dominante dei prezzi praticati ai propri clienti nel mercato a valle
- un'azione combinata sui due mercati

La compressione dei margini è considerata sicuramente abusiva se i margini sono negativi. Anche la presenza di margini non sufficienti, come si vedrà, può essere sintomatico di un comportamento escludente .

Secondo quanto previsto dalla disciplina europea in materia di diritto della concorrenza, un'azione di *margin squeeze* costituisce una violazione autonoma dell'art 102 del Trattato dell'Unione Europea e, dunque, un abuso della posizione dominante detenuta dall'impresa nel mercato rilevante identificato. Lo status di violazione autonoma si è via via consolidato nella giurisprudenza comunitaria sul tema.

La Commissione si è espressa per la prima in merito a condotte di *margin squeeze* nel caso National Carbonising. In una decisione ad interim la Commissione ha in particolare stabilito che il fornitore di un input essenziale ha “*an obligation to arrange its prices so as to allow a reasonably efficient manufacturer of the derivative a margin sufficient to enable it to survive in the long-term*”¹⁹. Successivamente, nel caso British Sugar/Napier Brown, la Commissione ha stabilito che: “[t]he maintaining, by a dominant company, which is dominant in the markets for both a raw material and a corresponding derived product, of a margin between the [prices of the two products], which is insufficient to reflect that dominant company's own costs of transformation ... with the result that competition in the derived product is restricted, is an abuse of dominant position”²⁰ ..

Dai casi sopra riportati si evince chiaramente come le condotte abusive riconducibili al *margin squeeze* vengano generalmente rilevate in mercati liberalizzati nei quali un'impresa in posizione dominante e verticalmente integrata fornisce un input essenziale sia alle proprie divisioni commerciali che ai propri concorrenti.

La compressione dei margini in tal caso può realizzarsi:

- Tramite un aumento da parte dell'impresa dominante dei prezzi dell'input essenziale fornito nel mercato a monte, in modo da non permettere alcun margine di guadagno ai competitori nel mercato a valle.
- una diminuzione da parte dell'impresa dominante dei prezzi praticati ai propri clienti nel mercato a valle
- un'azione combinata sui due mercati

che rende di fatto impossibile per i concorrenti dell'impresa dominate poter concorrere efficacemente nel mercato a valle²¹.

¹⁹ Cfr Commission decision of 29 October 1975, *National Coal Board, National Smokeless Fuels Limited and National Carbonising Company Limited*, O.J. L 35/6 (1976)

²⁰ Cfr Commission decision of 18 July 1988, Case IV/30.178, *Napier Brown/British Sugar*, O.J. L 284/41 (1988), § 66

²¹ Cfr L. Garzaniti & M. O'Regan, *Telecommunications Broadcasting and the Internet EU Competition Law & Regulation*, 3rd Edition, Thomson Reuters, UK 2010, p. 468

L'autonomia di fattispecie abusiva, sebbene ancor in qualche modo legata al refusal to deal si riscontra anche in quanto riportato nelle *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (Guidance)*.

In particolare la Commissione riconosce che:

“instead of refusing to supply, a dominant undertaking may charge a price for the product on the upstream market which, compared to the price it charges on the downstream market, does not allow even an equally efficient competitor to trade profitably in the downstream market on a lasting basis (a so-called ‘margin squeeze’). In margin squeeze cases the benchmark which the Commission will generally rely on to determine the costs of an equally efficient competitor are the LRAIC of the downstream division of the integrated dominant undertaking”.

Si precisa inoltre che:

“The Commission will consider these practices as an enforcement priority if all the following circumstances are present:

- *the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market,*
- *the refusal is likely to lead to the elimination of effective competition on the downstream market, and*
- *the refusal is likely to lead to consumer harm”.*

Secondo gli orientamenti della Commissione perché si verifichi una condotta di *margin squeeze* è necessario che l'impresa:

- detenga una posizione dominante nel mercato rilevante definito
- sia verticalmente integrata
- sia detentrica di un input essenziale per poter competere nel mercato a valle, il cui mancato accesso da parte dei concorrenti minerebbe la possibilità di competere nel mercato a valle, producendo un danno per il consumatore finale

Perché si verifichi l'abuso è dunque necessario che l'impresa identificata quale dominante nel mercato a monte sia detentrica di un input considerato essenziale per la fornitura del servizio nel mercato a valle.

I criteri per giudicare l'essenzialità dell'input, come evidenziato nelle *Guidance* sopra indicate appaiono essere i medesimi indicati dalla Commissione nel caso Bronner, ovvero i criteri e le condizioni richieste dalla casistica in materia di rifiuto di contrarre²².

Tuttavia già nell'ambito delle *Guidance* la Commissione specificava, al §82 che “*in such specific cases...* (ovvero quando ad esempio sussiste una normativa che impone già un obbligo di contrarre e quando la posizione sul mercato dell'impresa si è sviluppata grazie a diritti speciali o esclusivi o è stata finanziata mediante risorse statali).. *there is no reason for the Commission to deviate from its general enforcement standard of showing likely anti-competitive foreclosure, without considering whether the three circumstances referred to in paragraph 81 are present*”.

1.2 La definizione della condotta di margin squeeze nel caso *Deutsche Telekom e Telefonica*

La promozione del margin squeeze a prativa abusiva autonoma, sancita dalla Commissione nell'ambito delle *Guidance* sull'applicazione dell'art 82, è stata costruita nell'ambito di alcune importanti sentenze che hanno riguardato il settore delle telecomunicazioni. Si fa riferimento in particolare al caso *Deutsche Telekom e Telefonica*.

1.2.1 Il caso Deutsche Telekom

Nel 2003 la Commissione europea ha comminato a Deutsche Telekom (DT), l'operatore incumbent nel mercato delle telecomunicazioni in Germania, una sanzione per aver messo in atto, in maniera prolungata nel tempo, una condotta di *margin squeeze* volta ad escludere i concorrenti dal mercato dei servizi a banda larga e narrowband²³.

Nel corso di tale procedimento l'operatore tedesco ha più volte contestato l'intervento della Commissione, non ritenendo che potesse essergli contestata una violazione in materia antitrust.

²² Cfr Sentenza della Corte (Sesta Sezione) del 26 novembre 1998. - Oscar Bronner GmbH & Co. KG contro Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Meitungsvertriebsgesellschaft mbH & Co. KG e Mediaprint Anzeigengesellschaft mbH & Co. KG. nella quale la Corte afferma che “*non costituisce abuso di posizione dominante ai sensi dell'art. 86 del Trattato CE il fatto che un'impresa del settore della stampa che detiene una rilevatissima quota del mercato dei quotidiani in uno Stato membro e che gestisce l'unico sistema di recapito a domicilio di giornali su scala nazionale esistente nello stesso Stato membro neghi l'accesso a tale sistema, contro un adeguato corrispettivo, all'editore di un quotidiano concorrente che, a motivo della bassa tiratura del giornale, non è in grado di creare e di gestire in modo economicamente conveniente, da solo o in collaborazione con altri editori, un proprio sistema di recapito a domicilio*”.

²³ Cfr Cases COMP/C-1/37.451, 37.578, 37.579, *Deutsche Telekom AG*, O.J. L 263/09 (2003).

Difatti DT era soggetta a specifici obblighi di accesso alla propria infrastruttura e controllo dei prezzi sulla base della regolamentazione nazionale. In particolare, il fatto che le tariffe applicate da DT fossero state stabilite dal regolatore non lasciava all'operatore alcuna indipendenza nella scelta delle proprie pratiche commerciali, scelta alla base dell'abuso antitrust contestato dalla Commissione.

La Commissione, richiamando precedenti pronunciamenti su casi analoghi da parte della Corte di Giustizia europea, ha affermato espressamente che la disciplina della concorrenza deve essere applicata *“where the sector-specific legislation does not preclude the undertakings it governs from engaging in autonomous conduct that prevents, restricts or distorts competition”*.

Nel 2008 la Corte di Giustizia ha confermato la violazione comminata a DT riconoscendo che il *margin squeeze* costituisce una violazione autonoma dell'art 82 del Trattato. La corte ha inoltre respinto la tesi portata avanti da DT, secondo cui nel caso in cui le tariffe del servizio a monte siano regolamentate, l'abuso di prezzo può derivare esclusivamente dalla natura predatoria dei prezzi retail. A tal riguardo la Corte ha espressamente affermato che *“the abusive nature of a dominant undertaking's pricing practices, which take the form of a margin squeeze, is connected with the unfairness of the spread between its retail price for the derived product on the downstream market and its price for the raw material which it offers to its competitors on the upstream market if the difference between those prices is negative, or insufficient to cover the specific costs of its own derived product”*, precisando che *“in order to find that there has been such abuse, the Commission is not required to demonstrate that the retail prices are, as such, abusive²⁴”*.

La corte ha inoltre chiarito che la verifica della compressione dei margini deve essere effettuata mediante l'applicazione del cosiddetto *“imputation test”*: la divisione commerciale dell'operatore verticalmente integrato non avrebbe potuto trarre profitto se avesse dovuto acquistare gli input a monte allo stesso prezzo pagato dagli altri concorrenti a valle.

Il caso Deutsche Telekom (DT) determina dunque chiaramente gli orientamenti comunitari in materia di condotte abusive ascrivibili alla fattispecie di *margin squeeze* e fornisce una prima interpretazione del rapporto esistente tra regolamentazione ex ante ed applicazione del diritto della concorrenza ex post nei settori soggetti a regolamentazione.

In tale caso viene difatti sancito che:

- l'imposizione in capo all'impresa dominante di obblighi regolamentari ex ante non preclude l'applicazione della normativa antitrust ex post

²⁴ Cfr Case T-271/03 Deutsche Telekom AG vs Commission of the European Communities, para 166 (2008)

- il *margin squeeze* rappresenta una fattispecie autonoma di abuso
- Una pratica di margin squeeze è abusiva per se e dunque viola l'art 102 del Trattato a prescindere dagli effetti economici (eliminazione dei concorrenti e pregiudizio per i consumatori finali)

1.2.2 Il caso Telefonica

Nel 2007 la Commissione ha comminato una sanzione per abuso di posizione dominante simile a quello contestato a Deutsche Telekom all'incumbent spagnolo. In particolare, la Commissione ha ritenuto che Telefónica avesse violato l'articolo 102 TFUE per aver imposto prezzi iniqui ai propri concorrenti sotto forma di compressione dei margini tra i prezzi dell'accesso alla banda larga al dettaglio e i prezzi dell'accesso alla banda larga all'ingrosso a livello regionale e nazionale durante il periodo compreso tra settembre 2001 e dicembre 2006.

Tale decisione appare significativa rispetto a due differenti aspetti:

1. obblighi di accesso che la regolamentazione pone in capo a Telefonica in qualità di operatore dotato di significativo potere di mercato: Telefonica ha l'obbligo – fissato dal regolatore nazionale (CMT) - di fornire i propri prodotti all'ingrosso a condizioni eque .
2. metodologia di calcolo utilizzata per la verifica dell'abuso contestato: la commissione ha stabilito che la verifica della compressione dei margini andava effettuata mediante l'applicazione dei seguenti criteri:
 - utilizzo del metodo del concorrente altrettanto efficiente
 - valorizzazione dei costi mediante l'adozione dei costi medi incrementati a lungo termine
 - valutazione della redditività nel corso del tempo mediante l'applicazione di due differenti metodi, vale a dire secondo il cosiddetto metodo «*period by period*» e il metodo dei flussi di cassa scontati (DCF);
 - calcolo della compressione sui margini effettuato sulla base del portafoglio di servizi commercializzati da Telefónica sul mercato al dettaglio pertinente
 - le tariffe di Telefónica dovevano essere riproducibili da un concorrente altrettanto efficiente che utilizzi almeno un prodotto all'ingrosso di Telefónica su ciascuno dei mercati all'ingrosso pertinenti

L'applicazione dei criteri sopra indicati ha condotto la Commissione ad affermare che i prezzi al dettaglio di Telefónica non erano riproducibili sulla base dei suoi prodotti all'ingrosso nazionali o regionali nel periodo compreso tra il settembre 2001 ed il dicembre 2006. Ciò, a parere della Commissione ha avuto l'effetto di limitare la capacità degli operatori ADSL di crescere durevolmente sul mercato al dettaglio arrecando probabilmente pregiudizio agli utenti finali e producendo effetti concreti di esclusione dal mercato.

La Commissione ha infine affermato che Telefónica disponeva di un margine per evitare la compressione dei margini e che le decisioni di CMT relative alla compressione dei margini indirizzata a Telefónica non erano tali da escludere la responsabilità di quest'ultima, dal momento che Telefónica avrebbe potuto aumentare i suoi prezzi al dettaglio o ridurre i propri canoni all'ingrosso.

Nel marzo 2012 la Corte di Giustizia europea ha confermato la sanzione comminata dalla Commissione europea a Telefonica.

Tale sentenza appare significativa per una molteplicità di aspetti.

In primo luogo viene chiarito il rapporto tra regolamentazione ex ante e disciplina antitrust ex post. Difatti, uno dei motivi per i quali Telefonica ha richiesto l'annullamento era legato al fatto che i prodotti e servizi oggetto della pratica abusiva erano soggetti a regolamentazione ex ante da parte di CMT. Dunque l'intervento della Commissione non teneva conto della regolamentazione settoriale.

La Corte, nel solco della sentenza *Deutsche Telekom/Commissione* ha ribadito come controllo ex ante di un'ARN e il controllo ex post della Commissione hanno un oggetto ed una finalità distinti, poiché le norme in materia di concorrenza previste dal Trattato completano, per effetto dell'esercizio di un controllo ex post, il contesto normativo adottato dal legislatore dell'Unione ai fini della regolamentazione ex ante dei mercati delle telecomunicazioni²⁵. Inoltre la Corte specifica che la compressione dei margini può essere imputata ad un'impresa in posizione dominante verticalmente integrata nonostante la presenza di una normativa di settore, qualora questa disponga di un margine di manovra per modificare anche soltanto i suoi prezzi al dettaglio.

La Corte esprime inoltre una serie di considerazioni in merito alla "essenzialità" dei prodotti all'ingrosso oggetto dell'intervento della Commissione. Difatti, a parere di Telefonica:

- i prodotti all'ingrosso presi a riferimento non erano indispensabili per gli operatori che potevano avvalersi di altri prodotti per fornire le proprie offerte commerciali e non ricorrevano dunque i criteri sviluppati nella sentenza della Corte 26 novembre 1998, *Bronner* in materia di rifiuto di accesso

²⁵ Cfr punto 56 SENTENZA DEL TRIBUNALE (Ottava Sezione) 29 marzo 2012

- il calcolo dei costi specifici al dettaglio di ipotetici concorrenti di efficienza pari a quella di Telefónica non è corretto
- l'analisi degli effetti dei comportamenti anticoncorrenziali di Telefónica sul mercato spagnolo è errata

Sul primo punto la Corte, rifacendosi alla sentenza *TeliaSonera* ha chiarito che è la compressione dei margini che, tenuto conto dell'effetto preclusivo che essa può generare per i concorrenti di efficienza quantomeno pari all'impresa dominante, è di per sé idonea, in assenza di qualsiasi obiettiva giustificazione, a costituire abuso ai sensi dell'articolo 102 del Trattato. Difatti la valutazione del carattere abusivo di un comportamento consistente nell'assoggettare la fornitura di servizi o la vendita di prodotti a condizioni svantaggiose o alle quali l'acquirente non potrebbe essere interessato potrebbero essere di per sé essere costitutivi di una forma autonoma di abuso distinta dal rifiuto di fornitura per la quale appunto non è necessario verificare la presenza dei requisiti necessari per accertare l'esistenza di un rifiuto abusivo di fornitura. Peraltro, il fatto che Telefonica fosse destinataria di un obbligo di accesso imposto dal regolatore rendeva di fatto non necessario verificare la presenza delle condizioni stabilite nel caso *Bronner*²⁶.

Per quel che concerne invece l'analisi degli effetti della condotta abusiva contestata, la Corte, rifacendosi alla giurisprudenza sul tema, precisa che ai fini dell'accertamento della violazione dell'articolo 82 CE, è sufficiente dimostrare che il comportamento abusivo dell'impresa in posizione dominante sia inteso a restringere la concorrenza o, in altre parole, che il comportamento sia tale o idoneo a produrre un effetto di tal genere, specificando che l'effetto anticoncorrenziale della pratica sul mercato deve sussistere, ma non deve essere necessariamente concreto, in quanto è sufficiente la dimostrazione di un effetto anticoncorrenziale potenziale idoneo a precludere l'accesso al mercato a concorrenti di efficienza quanto meno pari all'impresa in posizione dominante²⁷.

²⁶ Alcuni studiosi non hanno ritenuto accoglibile la tesi della Corte. A tal riguardo si veda Geradin, *"Refusal to supply and margin squeeze: A discussion of why the "Telefonica exceptions" are wrong"* TILEC Discussion Paper secondo cui *"the imposition of an obligation to deal by regulators may serve to achieve objectives that are broader than those pursued under Article 102 TFEU.31 An obligation to deal may thus be imposed by national regulatory authorities in circumstances where the Commission would not be entitled to impose such an obligation. The Commission is not entitled to use Article 102 TFEU to enforce regulatory obligations"*.

²⁷ Cfr sentenze del Tribunale del 30 settembre 2003, *Michelin/Commissione*, T-203/01, Racc. pag. II-4071, punto 239; del 17 dicembre 2003, *British Airways/Commissione*, T-219/99, Racc. pag. II-5917, punto 293, e *Microsoft/Commissione*, punto 43 supra, punto 867

1.3 La sentenza TeliaSonera: un salto oltre Deutsche Telekom e Telefonica?

Il caso

TeliaSonera (TS) è l'operatore storico del mercato svedese, detentore della rete di accesso utilizzata dagli operatori a valle poter concorrere con lo stesso per la fornitura di servizi agli utenti finali.

TS è soggetta, ai sensi della regolamentazione vigente, ad un obbligo di accesso disaggregato alla propria rete di accesso. Congiuntamente a tale servizio di accesso l'operatore ha deciso di fornire ai propri concorrenti, su base volontaria, un ulteriore servizio a banda larga all'ingrosso.

L'autorità antitrust nazionale ha contestato a TS di aver abusato della posizione dominante detenuta nel mercato rilevante individuato, mediante una compressione dei margini dei propri concorrenti proprio in relazione a quest'ultimo servizio offerto su base volontaria.

Il caso TS è significativo in quanto, diversamente da quanto accaduto per i casi Deutsche Telekom and Telefonica, TS non aveva alcun obbligo regolamentare di fornitura del servizio all'ingrosso in relazione al quale è stato verificato l'abuso. L'essenzialità del servizio appare dunque contestabile. Per tale motivo l'autorità svedese ha richiesto alla corte europea un'interpretazione dei criteri da seguire per giudicare abusiva una pratica di compressione dei margini.

In particolare l'autorità svedese ha chiesto che la corte europea si esprimesse sui seguenti punti:

- 1) In presenza di quali condizioni sussista una violazione dell'art. [102 TFUE] derivante dalla differenza tra il prezzo che un'impresa verticalmente integrata pratica nella vendita di prodotti ADSL intermedi a concorrenti nel settore all'ingrosso e il prezzo che la stessa impresa pratica nel settore dei consumatori finali.
- 2) Se, per risolvere la prima questione, si debbano prendere in considerazione esclusivamente i prezzi praticati dall'impresa in posizione dominante nei confronti dei suoi consumatori finali o se occorra anche tenere conto dei prezzi praticati dai suoi concorrenti sul mercato dei consumatori finali.
- 3) Se abbia qualche rilevanza ai fini della soluzione della prima questione il fatto che l'impresa in posizione dominante non abbia obblighi legali di fornitura di servizi all'ingrosso, avendo al contrario deciso di effettuare tali forniture di propria iniziativa.
- 4) Se, per considerare abusiva la prassi descritta nella prima questione, occorra che essa comporti effetti restrittivi sulla concorrenza e, in caso affermativo, come possano essere determinati questi ultimi.

- 5) Se l'importanza del potere di mercato di cui gode l'impresa in posizione dominante abbia rilevanza ai fini della soluzione della prima questione.
- 6) Se, per considerare abusiva la pratica descritta nella prima questione, occorra che l'impresa che l'ha adottata detenga una posizione dominante tanto nel settore all'ingrosso quanto in quello dei consumatori finali.
- 7) Se, per considerare abusiva la pratica descritta nella prima questione, occorra che il prodotto (...) fornito dall'impresa dominante sul mercato a valle sia indispensabile per i concorrenti.
- 8) Se incida sulla soluzione della prima questione il fatto che si tratti di una fornitura ad un cliente nuovo.
- 9) Se, per considerare abusiva la pratica descritta nella prima questione, occorra che l'impresa dominante abbia una possibilità di recuperare le sue perdite.
- 10) Se incida sulla soluzione della prima questione il fatto che si sia in presenza di un cambiamento tecnologico in un mercato che richiede rilevanti investimenti, ad esempio, a causa dei probabili costi di lancio e dell'eventuale necessità di vendere in perdita nel corso della fase di lancio

L'opinione dell'Avvocato Generale Mázak

Nel mese di settembre 2010 l'opinione fornita sul caso TS da parte dell'avvocato generale Mazak sembra segnare un ripensamento rispetto all'orientamento seguito nei casi DT e Telefonica. Difatti secondo l'avvocato generale la compressione dei margini non è altro che una fattispecie di abuso riconducibile al "*refusalto supply*". In particolare l'avvocato generale afferma che in mancanza di un obbligo legale di accesso posto a carico di un'impresa in posizione dominante di fornire un prodotto non indispensabile, l'impresa in posizione dominante non possa essere accusata di aver compresso abusivamente il margine tra prezzo e costo. Un diverso approccio volto a vietare le compressioni del margine tra prezzo e costo sulla sola base di un calcolo astratto dei prezzi in mancanza di qualsiasi valutazione dell'indispensabilità del prodotto per la concorrenza sul mercato ridurrebbe le intenzioni dell'impresa in posizione dominante di investire e/o condurrebbe probabilmente ad un aumento dei prezzi al consumo piuttosto che ad una loro traslazione mediante la compressione del margine tra prezzo e costo. In conclusione, laddove per un'impresa in posizione dominante non esiste un obbligo a fornire i prodotti di cui trattasi, non le potrebbe essere contestata la fornitura di detti prodotti a condizioni che i concorrenti considerano non vantaggiose.

A parere dunque dell'avvocato generale neanche i due casi precedenti hanno disatteso i criteri fissati nella sentenza Bronner, dal momento che il carattere essenziale del prodotto era stato "certificato" dall'obbligo di accesso che la regolamentazione *ex ante* poneva in capo all'incumbent.

Le conclusioni della Corte di Giustizia Europea

Le conclusioni della corte di Giustizia europea appaiono distanziarsi da quelle raggiunte dall'avvocato generale, marcando definitivamente la condotta di margin squeeze come autonoma violazione dell'art 102 del Trattato. Due le conclusioni maggiormente significative su cui vale la pena concentrarsi.

In primo luogo la corte, nel rispondere al quesito relativo all'assenza, nel caso in esame di qualsiasi obbligo regolamentare di fornitura del servizio all'ingrosso oggetto della pratica di compressione dei margini, ha innanzitutto evidenziato come l'art. 102 TFUE riguarda soltanto comportamenti anticoncorrenziali adottati dalle imprese di propria iniziativa. L'art. 102 TFUE trova dunque applicazione in tutti i casi in cui la normativa nazionale lasci sussistere la possibilità di una concorrenza che possa essere ostacolata, ristretta o falsata da comportamenti autonomi delle imprese. Dunque, a maggior ragione qualora un'impresa disponga di piena autonomia nella scelta dei suoi comportamenti sul mercato. La Corte conclude che l'assenza di qualsiasi obbligo regolamentare di fornire le prestazioni ADSL intermedie sul mercato all'ingrosso non ha alcun rilievo per quanto riguarda il carattere abusivo della pratica tariffaria, costituendo, i comportamenti contestati a TeliaSonera, di per sé, una forma autonoma di abuso diversa dal rifiuto di fornitura.

Per quel che concerne invece il quesito relativo al carattere essenziale del servizio come *conditio sine qua non* per la verifica di una compressione abusiva dei margini, la Corte specifica che non si può escludere in base alla sola circostanza che il prodotto all'ingrosso non è indispensabile per la fornitura del prodotto al dettaglio che una pratica tariffaria che conduce alla compressione dei margini non sia in grado di produrre alcun effetto anticoncorrenziale, neppure potenziale.

In conclusione, la sentenza della corte europea sul caso TeliaSonera, andando oltre quanto stabilito nei casi precedenti che:

- la pratica di *margin squeeze* rappresenta una violazione autonoma dell'art 102 del Trattato
- al fine di verificare l'abusività della compressione dei margini perpetrata dall'impresa dominante non è necessario dimostrare il carattere essenziale del servizio fornito

dall'impresa integrale. Tale conclusione svincola ulteriormente la compressione dei margini da *refusal to supply*

- una volta comprovata l'abusività della pratica non è necessario verificare che la stessa abbia prodotto effetti anticompetitivi sul mercato

1.4 Le novità introdotte dalla Corte nella sentenza TeliaSonera: quale futuro per il *margin squeeze* in Europa?

L'interpretazione della Corte Europea segna la conclusione di un percorso evolutivo che dalle redazioni delle Guidance nel 2009, attraverso i pronunciamenti riportati, ha fatto assurgere la condotta di *margin squeeze* ad autonoma fattispecie abusiva, sottoposta ad una valutazione di tipo prettamente formalistico. Difatti:

- Nelle Guidance del 2009 la Commissione sembrava relegare il *margin squeeze* ad una fattispecie riconducibile al *refusal to deal*, imponendo dunque il rispetto dei requisiti previsti nell'ambito del caso *Bronner*. Tuttavia, come evidenziato in precedenza, già in tale ambito si lasciava uno spiraglio aperto prevedendo che in specifiche circostanze, quando la posizione sul mercato a monte dell'impresa dominante si è sviluppata grazie a diritti speciali o esclusivi o è stata finanziata mediante risorse statali la Commissione può dimostrare la potenziale preclusione anticoncorrenziale prescindendo dalla sussistenza dei criteri di cui al caso *Bronner*
- **Nelle sentenze Telefonica e Deuchte Telekom** la verifica circa i criteri di essenzialità seppur non verificati puntualmente venivano dedotti dagli obblighi regolamentari di accesso posti in capo agli operatori dominanti. Assumeva però rilevanza l'approccio formalistico volto a considerare la condotta di *margin squeeze* una violazione *per se* dell'art 102 del Trattato, in grado di produrre effetti anticompetitivi sul mercato.
- Infine nella pronuncia sul caso *TeliaSonera* la Corte specifica che la compressione dei margini è un abuso differente dal *refusal to supply* e, dunque svincolato dalla dimostrazione del carattere essenziale dell'imput in questione.

2 La sentenza TeliaSonera: distanza incolmabile rispetto all'approccio statunitense?

Le pronunce comunitarie hanno accresciuto la distanza tra Europa e Stati Uniti non solo in materia di valutazione del *margin squeeze*, ma anche nella valutazione stessa del rapporto tra concorrenza e regolazione. Nell'esperienza statunitense difatti il percorso evolutivo giurisprudenziale ha fatto sì che il *margin squeeze* perdesse gradualmente autonomia di abuso in se: difatti i prezzi predatori da un lato ed il rifiuto a contrarre dall'altro sono ritenuti sufficienti ad individuare i potenziali comportamenti abusivi posti in essere dall'impresa in posizione dominante. Se non si rinviene abuso riconducibile alle due fattispecie di cui sopra, non è possibile rinvenire alcun abuso per compressione dei margini.

Tale orientamento è rinvenibile nella sentenza *Trinko* e nel successivo pronunciamento della Corte Suprema sul caso *linkLine* il quale rappresenta, per alcuni studiosi la fine del *margin squeeze* inteso come autonoma condotta abusiva²⁸.

Nel 2005 la Federal Communications Commission ("FCC") impone ad AT&T un obbligo di fornire servizi di trasporto DSL all'ingrosso agli Internet Services providers(ISP), che, a loro volta, forniscono servizi DSL agli utenti finali. Oltre a fornire servizi all'ingrosso, AT&T compete con gli ISP nel mercato a valle. Quattro di ISPs hanno successivamente denunciato AT&T per aver fissato prezzi all'ingrosso eccessivamente elevati e prezzi ai propri clienti al dettaglio talmente bassi da non consentire loro di poter competere.

La Suprema Corte nella propria sentenza ha stabilito, sulla scia della sentenza *Trinko*, che AT&T non aveva violato l'art 2 dello *Sherman Act* in quanto non soggetta ad alcun obbligo antitrust di generale *duty to deal* e, dunque, a nessun obbligo di contrarre sulla base di termini e condizioni che gli stessi reputano economicamente vantaggiose», ben potendo AT&T anche semplicemente rifiutare l'accesso ai concorrenti senza per questo violare la disciplina concorrenziale.

Per quel che concerne invece la valutazione dei prezzi al dettaglio eccessivamente bassi, la Corte si rifà ad un precedente in tema di prezzi predatori (*Brooke Group*) nel quale si è stabilito che per considerarsi illeciti deve dimostrarsi che i prezzi applicati a livello *retail* i) sono al di sotto dei costi e ii) l'operatore ha la possibilità di recuperare le perdite in un momento successivo.

Per la Corte statunitense dunque il *margin squeeze* è in definitiva una condotta abusiva "vuota" in quanto non rappresenta altro che la somma di altre fattispecie abusive (rifiuto a contrarre in presenza di uno specifico obbligo antitrust in tal senso e prezzi predatori) che, se non provate singolarmente non conducono ad alcuna violazione antitrust

²⁸ Cfr Scott Martin, *The linkLine Decision: Section 2 Gets Squeezed Further*, 2009

3. Il rapporto tra antitrust e regolamentazione di settore: le due sponde dell'oceano

Come si è potuto dimostrare, sia in ambito europeo che in ambito nordamericano, la definizione e l'evoluzione nell'approccio antitrust verso condotte abusive riconducibili alla fattispecie del *margin squeeze* ha riguardato essenzialmente mercati in cui l'operatore dominante, verticalmente integrato, è sottoposto a specifici obblighi regolamentare imposti ex ante dall'Autorità di regolamentazione di settore. Più in particolare la condotta abusiva contestata sotto il profilo antitrust è stata riscontrata in quei mercati regolamentati in cui, appunto la disciplina della concorrenza ex post non è stata ritenuta sufficiente a contrastare eventuali comportamenti abusivi dell'incumbent e si rendeva dunque necessario un intervento del regolatore ex ante volto a mimare le dinamiche di un mercato effettivamente concorrenziale. Sotto questa prospettiva il rapporto regolamentazione/concorrenza appare di tipo sostitutivo, con la prima che *ex ante* pone i rimedi necessari al fine di impedire che potenziali abusi vengano effettivamente posti in essere sul mercato *ex post*. Si consideri a tal riguardo il quadro regolamentare definito a livello europeo per le telecomunicazioni: gli strumenti utilizzati (la definizione del mercato rilevante, la definizione di operatore dotato di significativo potere di mercato, la declinazione dei rimedi, gli strumenti utilizzati per la verifica della replicabilità delle offerte commerciali dell'operatore notificato) sono stati mutuati dalla disciplina antitrust e "adattati" ad una loro applicazione ex ante.

Dall'analisi delle giurisprudenza comunitaria pare invece emergere un rapporto di "coesistenza" e non esclusività dunque, tra le due discipline. Tale rapporto appare già ben chiaro nella sentenza *Deutsche Telekom* in cui si esplicita che ben può essere imputa una infrazione dell'art 102 del Trattato e, nella fattispecie di *margin squeeze*, anche in settori soggetti a regolamentazione ex ante laddove sussiste per l'operatore un "margine di manovra" nella determinazione dei prezzi. La Corte si esprime anche chiaramente sul rapporto tra regolamentazione e concorrenza affermando che le norme previste dall'Unione in materia di concorrenza "*completano [...], per effetto di un esercizio di controllo ex post, il contesto normativo adottato dal legislatore dell'Unione ai fini della regolamentazione ex ante dei mercati delle telecomunicazioni*".

Sull'altra sponda dell'oceano il caso *linkLine* ha condotto a conclusione diametralmente opposte. In tale ambito difatti i giudici hanno stabilito che "*the defendant has no antitrust duty to deal with its rivals at wholesale; any such duty arises only from FCC regulations, not from the Sherman Act*²⁹". Quindi "*Where there is no duty to deal at the wholesale level and no predatory pricing at the retail level, a firm is not required to price both of these services in a manner that preserves its rivals*'

²⁹ Cfr PACIFIC BELL TELEPHONE CO., DBA AT&T CALI-FORNIA, ET AL. v. LINKLINE COMMUNICATIONS, INC., ET AL., Opinion of the Court

*profitmargins*³⁰”. Medesime conclusion erano state raggiunte nel caso *Trinko*, nel quale la corte aveva chiarito che se l’impresa non ha un obbligo antitrust a contrarre con i suoi concorrenti a livello wholesale, certamente non ha un obbligo a contrarre a condizioni e termini commercialmente vantaggiose per i suoi rivali.

Appare dunque evidente come per la corte nordamericana il *price squeeze* diviene una questione prettamente regolamentare, al di fuori delle condotte lesive dell’art 2 dello Sherman Act e che l’imposizione di un obbligo a contrarre imposto dal regolatore non costituisce un prerequisito per la violazione della normativa antitrust.

Conclusioni

Gli ultimi pronunciamenti giurisprudenziali in materia di condotte di *margin squeeze* hanno definitivamente affrancato il margin squeeze dalla categoria di *refusal to deal*, trasformandolo in una autonoma condotta abusiva, sanzionabile ai sensi dell’art 102 del Trattato. Come mostrano chiaramente i casi Telefonica e TeliaSonera difatti l’abusività della condotta va riscontrata nella compressione stessa dei margini posta in essere dall’operatore dominante, a prescindere dunque dal fatto che:

- Il servizio fornito all’ingrosso risponda al requisito di input essenziale secondo i criteri definiti nel caso Bronner. Nel caso TeliaSonera il servizio a monte era fornito su base volontaria da parte dell’operatore incumbent
- I prezzi dei servizi forniti nel mercato a valle siano predatori

I pronunciamenti analizzati sono altresì significativi per quel che concerne la definizione del rapporto tra concorrenza e regolamentazione nei settori in cui l’operatore dominante è già soggetto a specifici obblighi di accesso e di definizione dei prezzi imposti dal regolatore di settore.

Nel caso Deutsche Telekom si afferma chiaramente che l’imposizione di obblighi regolamentari non esenta l’impresa dalle responsabilità imposte dall’art 102, laddove tali obblighi lascino alla stessa un margine di manovra nella definizione dei prezzi.

Tali orientamenti paiono aumentare inesorabilmente la distanza con l’approccio nordamericano in materia di *margin squeeze*. A tal riguardo si consideri come le sentenze *linkLine* e *Trinko* abbiano difatti relegato la condotta di *margin squeeze* ad una sottocategoria del *refusal to deal*, sancendo

³⁰ Cfr PACIFIC BELL TELEPHONE CO., DBA AT&T CALI-FORNIA, ET AL. v. LINKLINE COMMUNICATIONS, INC., ET AL, Syllabus

dunque la necessità che, al fine di dimostrare l'illecito antitrust, si verifichino le seguenti condizioni:

- che venga imposto all'impresa uno specifico obbligo a contrarre ai sensi dell'art 2 dello Sherman Act
- che i prezzi praticati dall'impresa nel mercato a valle siano predatori

Se l'impresa è soggetta ad un obbligo di accesso imposto dal regolatore, il margin squeeze diviene invece a *matters of regulation* ed è al regolatore che i concorrenti dovrebbero rivolgersi per chiedere un adeguamento dei prezzi che consenta loro di competere.

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REGULATORY IMPACT ASSESSMENT IN TELECOMMUNICATION INDUSTRY

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Introduction

Regulatory Impact Assessment (hereinafter, “RIA”) has gradually become a key economic tool used by governments to assure that regulations issued are effective and efficient, and are thus able to reach the objectives for which they have been issued at lowest possible cost. As observed by a number of international organizations and leading scholars, a careful and meaningful use of RIA makes it possible to avoid useless administrative burdens for businesses and public administrations; and to undertake policies that are capable of promoting economic growth, competitiveness and sustainable development³¹.

According to the European Network for Better Regulation definition, Impact Assessment is:

- A systematic, mandatory, and consistent assessment of aspects of social, economic, or environmental impacts such as benefits and/or costs;
- affecting interests external to the government;
- of proposed regulations and other kinds of legal and policy instruments;

to i) inform policy decisions before a regulation, legal instrument, or policy is adopted; or ii) assess external impacts of regulatory and administrative practices; or iii) assess the accuracy of an earlier assessment³².

The efficiency-oriented approach makes RIA very interesting from a law and economics perspective: RIA represents a pragmatic application of the law and economics theory, according to which a better understanding of the impact of the legal rules and of what kind of legislation is eligible to be issued can derive only by the application of economic concepts to ex ante assessment of the impact of legal rules. However, so far law and economics and RIA have mostly remained two

³¹ See OECD, *Regulatory impact analysis : best practices in OECD countries*, Paris, 1997, Radaelli C., The diffusion of regulatory impact analysis – Best practice or lesson-drawing?, *European Journal of Political Research* **43**: 723–747, 2004 and Radaelli C. and De Francesco F, Regulatory Impact Assessment, political control and the regulatory State, paper delivered to the 4th general conference of the European consortium for political research, Pisa, Italy, 6-8 September 2007, Jacobs, S. H, ‘Introduction’, in OECD, (1997a), *Regulatory Impact Analysis: Best Practice in OECD countries*, Paris, 1997, and Renda A., *Impact Assessment in UE, the State of the Art and the Art of the State*, Centre for European Policy study (CEPS), Brussels 2006

³² ENBR Project, RIA Handbook, available at www.enbr.org

worlds apart. In the past few years, some authors have observed that RIA is a “missed opportunity” for law and economics, and the two fields of study should be integrated further³³.

In the course of this work I analyze in-depth the way in which RIA has been applied by the policy-makers, in order to understand if the tool was implemented without exceptions and what kind of results the use of RIA was able to achieve. In particular, I try to explain if the RIA model was applied in order to reach an “evidence based” way to adopt decisions by policy-makers, assuring the issuing of regulations able to catch all the possible impacts on the market on one hand, and the choose of the normative tools able to lead to the highest net benefit for the society as whole.

In order to reach this objectives, the works is divided in two main parts. The first part focuses on the development of the RIA around the world, from the US experience to the European model of “Integrated Impact Assessment”, which captures the economic , social and environmental impacts of proposed new policies³⁴. In the course of this overview I show the different features of the RIA models according to the different institutional contest in which they have emerged, in order to demonstrate how the same instrument was used to solve different kinds of institutional problem, other than the explicit objective to help the legislator to issue an efficient and effective regulation.

In the second part of the work I provide an empirical analysis of three policy initiatives undertaken by the European Commission the telecommunications sector. This cases are related to regulation of roaming charges, the decision whether to institute an European Regulator for electronic communications and the recent Commission Recommendation on the regulation of Next Generation Access Networks

With the empirical analysis of this three cases study I aim to understand whether the Impact Assessment (IA) was really used by the Commission to reach the objective of a “Better regulation” able to promote the European economic growth. In particular, I will analyze if in this three cases the

³³ See Renda A, *Law and Economics in the RIA world*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1291032 and A. Ogus, *Regulatory Appraisal: A Neglected Opportunity for Law and Economics*, European Journal of Law and Economics, Volume 6, Number 1, July 1998 , pp. 53-68(16)

³⁴ See European Commission, *Communication on Impact Assessment*, May 2002

technical nature of RIA tool was preserved, and whether the IA exercise helped the regulator in taking in account the impacts of all possible regulatory options and their associated impact.

SECTION A

The Development of Regulatory Impact Assessment

I. What is Regulatory Impact Assessment?

It is important, in order to understand the importance of the RIA in the regulatory environment and its growing use by the governments, to give a clear definition of this tool.

According with the definition of the European Network for Better Regulation, RIA is:

- A systematic, mandatory, and consistent assessment of aspects of social, economic, or environmental impacts such as benefits and/or costs;
- affecting interests external to the government;
- of proposed regulations and other kinds of legal and policy instruments;

to i) inform policy decisions before a regulation, legal instrument, or policy is adopted; or ii) assess external impacts of regulatory and administrative practices; or iii) assess the accuracy of an earlier assessment³⁵.

RIA is essentially a technical tool used by policy maker in order to assure that regulation is made following efficient, effective and transparent criteria, assuring that all possible impacts of legislative options are taken into account. In this sense RIA is a useful tool through which the legislator can have a good understanding of who will be affected by the regulation and how.

What does effective and efficient regulation mean? A regulation is effective if it is able to achieve its planned goal and objectives and it is efficient if it is able to achieve these objective at the lowest total cost, for society as whole³⁶.

In order to reach the objective of a clear and transparent regulation, able to catch all the possible impacts on the reality, it is important that the RIA process is implemented in a proper way, that means that it must include a wide consultation of the relevant stakeholders and a transparent and

³⁵ ENBR Project, RIA Handbook, available at www.enbr.org

³⁶ OECD, *Introductory handbook for undertaking regulatory impact analysis (RIA)*, October 2008

correct evaluation of the costs and benefits of each regulatory option. If the RIA process is implemented following this steps, it can able avoiding the risk of inappropriate regulation, which might create unnecessary bureaucracy, inhibit competition, create barriers and generally disadvantage small organizations.

The OECD definition of RIA focus on the systematic nature of this tool and on its embedment in the institutional contest: “*RIA is a systematic policy tool used to examine and measure the likely benefits, cost and effects of new or existing regulation. A RIA is an analytical report to assist decision makers*”.³⁷ In particular, according to OECD the effectiveness of RIA relies on the capacity of the government to embedded the process for the preparation of analytical reports in a system or process for policy decision making.

The attention on the systematic nature of RIA process is also present in the definition of Kirkpatrick and Parker, according to which Regulatory impact Assessment provides a methodological framework for undertaking the systematic assessment of benefits and costs of regulation, and for informing decision-makers of the consequences of a regulatory measure.³⁸

It is important to highlight that RIA is never a tool that substitutes the policy-making process; in fact the main purpose of RIA is to inform the decision making process with empirical knowledge, making the regulatory process more transparent and accountable. For this reason RIA cannot be reduced to the document containing the data on cost and benefits and the choice of regulatory option, but it “*includes a range of methods that can be used flexibly to measure ex-ante the impact of proposed regulatory policies on social welfare or on selected target populations such as small businesses, companies, non-profit organizations and public administration.*”³⁹

³⁷ OECD, *Building an Institutional Framework for Regulatory Impact Analysis (RIA): Guidance for Policy makers*, Paris, 2008

³⁸ Kirkpatrick C. and Parker D., *Regulatory Impact Assessment: Towards Better Regulation?*, Edward Elgar Publishing Ltd, 2007

³⁹ Radaelli C. and De Francesco F, *Regulatory Impact Assessment, Political Control and the Regulatory State*, paper delivered to the 4th general conference of the European consortium for political research, Pisa, Italy, 6-8 September 2007

The European Guidelines on Impact assessment, updated on 2009, stressed the ancillary nature of RIA with respect the decision making process, that remains a political process. In the guidelines RIA is defined as “a set of logical steps to be followed when you prepare policy proposals”. The guidelines specified that RIA is “a process that prepares evidences for political decision makers on the advantages and disadvantage of possible policy options by assessing their potential impact”⁴⁰

The analysis of RIA process is not only important in terms of providing as output a more effective and efficient regulation but also because RIA is considered an important instrument in order to solve two different kind of problems: a principal agent problem and a legitimating of political institution problem. The first kind of problem, as I show in the following sections, seem to be present in the development of US RIA model, while the second one was widely present in EU context and seem to justify the particular features of this second RIA model.

1. The Development of RIA: the US Experience

US were the first country to understand the importance of economic analysis in order to evaluate the impact of current and proposed regulations. For this reason scholars who have tried to explain the growing expansion of RIA in the governments of the world have done it reasoning with the American political system in mind and it is important to describe the development of RIA in US in order to better understand the success of this method in the rest of the world⁴¹.

The earliest examples of calculation of costs and benefits deriving from the implementation of new regulations was dated back to the Nixon Administration and they refer only to the costs of regulations on business. In this period in fact the US known the period of major expansion of health, safety and environmental regulation. The growing amount of regulation made necessary a

⁴⁰ European Commission, SEC(2009) 92, *Impact Assessment Guidelines*, Brussels 2009

⁴¹ See Radaelli C. and De Francesco F, *Regulatory Impact Assessment, Political Control and the Regulatory State*, paper delivered to the 4th general conference of the European consortium for political research, Pisa, Italy, 6-8 September 2007, Troeger, V., Radaelli, C. M., & De Francesco, F., *Governing the regulatory state? The implementation of RIA in Europe*, Midwest Political Science Annual Conference, Chicago, 2007, Posner, E. A., *Controlling agencies with cost-benefit analysis: a positive political theory perspective*, University of Chicago Law Review, 68, 1137, 1997 and Lutter, R., *Economic analysis of regulation in the U.S. (What lessons for the European Commission?)*, Workshop on Impact Assessment in Member States Enterprise Directorate General, European Commission Brussels: AEI-Brookings Joint Center for Regulatory Studies, 2001

counter political development that leads to a companion program to evaluate the regulatory system. In order to evaluate the regulatory system the Nixon Administration established, in 1971, the so-called "Quality of Life review" program. The program was limited to analyzed the impact of environmental regulation on business and didn't take in account the cost-benefit analysis as a tool to evaluate the burden of regulation on the society as a whole.

The use of cost-benefit analysis was promoted instead by the Ford Administration. In particular the Executive Order 11,821 made the inflation impact assessment mandatory for the federal agencies. This procedure introduced an ex-ante assessment of the expected impact of new regulatory measures on the inflation rate. For this purpose was established also a new government agency, in the Executive Office of the President, called the Council on Wage and Price Stability (CWPS); the main task of this new agency was to monitor the inflationary actions of both the government and private sectors of the economy.

The inflation Impact assessment was considered the first version of Regulatory Impact Assessment, because the cost benefit analysis was gradually introduced as a methodology of analysis; in fact the economist of CWPS turned the inflation impact statement into a cost-benefit analysis stating that a regulation would not be really inflationary unless its costs to society exceeded the benefits it produced.

Another important shift toward the Regulatory impact assessment model was the Administrative Procedure Act, which introduced the consultation in the process of evaluation of the regulation, requiring the agencies to give the public and interested parties a chance to comment on proposed regulations before they are adopted in final form.

Under the Carter Administration was set up a new group, the Regulatory Analysis Review Group (RARG), which have the task to review up to ten of the most important regulations each year.

The efforts of the Carter administration leads to a process of institutionalization of the RIA process, through the regulatory review by the Executive Office of the President on one hand and the utility

of benefit-cost analysis for regulatory decision makers on the other hand⁴². The oversight role of the President was also recognized by the US Court of Appeals for the District of Columbia, according to which “a part of the President's administrative oversight responsibilities was to review regulations issued by his subordinates”⁴³.

During the Regan Administration the reform of regulation became one of the main issue of the political agenda, in order to promote the economic growth. The mains innovation of the Regan Administration regulatory program were: 1) the agencies were not only obliged to prepare cost-benefit analysis for major rules, but also to implement only that regulation that maximized net benefit; 2) a new entities, the Office of Information and Regulatory Affair (OIRA) was created within the office of Budget and Management to replace CWPS as the agency responsible for centralized review. OIRA had the power to suspend regulation without a satisfactory cost-benefit analysis sending them back to the sponsoring agencies. As a result of this reform OIRA became “*a sort of regulatory clearinghouse*”⁴⁴.

The main effort of the Regan Administration was to reduce substantial the regulatory burden. This objective was reached towards two different ways: on one hand the reduction of staffing and budgets of the regulatory agencies; on the other hand towards the statement of the Order Executive Order 12291 issued in February 1981, according to which “*Regulatory action shall not be undertaken unless the potential benefits to society from the regulation outweigh the potential costs to society.*”⁴⁵ The presidential directive required agencies to prepare a regulatory impact analysis for

⁴² OMB, “*The Role of Economic Analysis in Regulatory Reform*”, chapter 1 of OMB Report to Congress on the Costs and Benefits of Federal Regulations, available at <http://www.whitehouse.gov/omb/inforeg/chap1.html> – visited 10 July 2009

⁴³ See the District of Columbia in *Sierra Club v. Costle* (657 F. 2d 298 (1981))

⁴⁴ Renda A., *Impact Assessment in UE, the State of the Art and the Art of the State*, Centre for European Policy study (CEPS), Brussels 2006

⁴⁵ In particular the sec 2 of the Executive Order 12291 state that all the agencies, in promulgating new regulations, reviewing existing regulations, and developing legislative proposals concerning regulation, shall adhere to the following requirements:

- a) Administrative decisions shall be based on adequate information concerning the need for and consequences of proposed government action;
- b) Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society;
- c) Regulatory objectives shall be chosen to maximize the net benefits to society;

each "major rule" pending, subject to review by the OIRA. A federal agency could not publish a notice of proposed rulemaking until an OIRA review was complete and its concerns had been addressed.

In total, the Reagan regulatory reforms resulted in an estimated \$9 billion to \$11 billion in one-time savings and an additional \$10 billion in annual savings.

In 1985 President Regan issued another important executive order for the development of the regulatory reform, the Executive Order 12498, according to which agencies annually send OMB a detailed plan on all the significant rules that they had under development. OMB coordinated the plans with other interested agencies and could recommend modifications. It also compiled these detailed descriptions of the agencies' most important rules in one volume called the *Regulatory Program of the U.S. Government*⁴⁶.

Under the Bush Administration the main goal of the reform continued to be the minimization of regulatory burdens faced by the economy. The Task Force on Regulatory Relief was replaced by Council on Competitiveness, established in March 1989 and headed by the Vice president with the mission to provide regulatory relief.

The reform continued under Clinton Administration tried with the issuing of the Executive Order 12866, according to which OMB was reaffirmed as central agency in the review of proposed regulations. With the new executive order the president Clinton reaffirmed the supremacy of federal agencies in the decision making process and fixed the general principle that the benefits of intended regulations should justify the costs. In addition, the executive order try to respond to some criticisms of the previous regulatory reform: the OMB review was restricted to the most significant rules, assuring to OMB to add greater value to its review by focusing on the most important rules.

d) Among alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen; and

e) Agencies shall set regulatory priorities with the aim of maximizing the aggregate net benefits to society, taking into account the condition of the particular industries affected by regulations, the condition of the national economy, and other regulatory actions contemplated for the future.

⁴⁶ OMB, *"The Role of Economic Analysis in Regulatory Reform"*, chapter 1 of OMB Report to Congress on the Costs and Benefits of Federal Regulations, available at <http://www.whitehouse.gov/omb/inforeg/chap1.html> – visited 10 July 2009

Furthermore the order set up a mechanism for a timely resolution of any disputes between OMB and agency heads, establishing a 90-day period for OMB review of proposed rules. The order increased also the openness and accountability of the review process, requiring the availability to the public of all the documents exchanged between OIRA and the agency during the review process⁴⁷.

1.1. How Works RIA Process In US: The Executive Order 12866

As mentioned above, the Executive Order 12866 sets rules to improve the existing and the new regulation in accordance with believing that the private market is the “best engine for economic growth”. In the preamble of the order is in fact was specified that:

“The American people deserve a regulatory system that works for them, not against them: a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society; regulatory policies that recognize that the private sector and private markets are the best engine for economic growth; regulatory approaches that respect the role of State, local, and tribal governments; and regulations that are effective, consistent, sensible, and understandable. We do not have such a regulatory system today.”

The principal objectives of the order are:

1. to enhance planning and coordination with respect to both new and existing regulations;
2. to reaffirm the primacy of Federal agencies in the regulatory decision-making process;
3. to restore the integrity and legitimacy of regulatory review and oversight;
4. to make the process more accessible and open to the public

In order to reach this objectives the order requires that federal agencies have to promulgate only such regulation as are required by law, are necessary to interpret the law, or are made necessary by

⁴⁷ For a more deeply excursus of the development of the US regulatory reform see “*The Role of Economic Analysis in Regulatory Reform*”, chapter 1 of OMB Report to Congress on the Costs and Benefits of Federal Regulations, available at <http://www.whitehouse.gov/omb/inforeg/chap1.html> – visited 10 July 2009

compelling public need; the first step of the RIA model foresees that the proposing agency drafts a preliminary RIA form, assessing all costs and benefits of available regulatory alternatives, including the alternative of not regulating and an indication of the relevance of the expected impact of the proposed regulation. The agency have to choose those approaches that maximize net benefits.

In the framework designed by the Order, the federal agencies became the only responsible for developing regulations. In fact they are considered the repositories of significant substantive expertise and experience and for this reason able to assure that the regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order.

The RIA form is subjected to a 60-day notice and comment period. In this period the interested parties can file their comments and suggestions regarding the regulatory option chosen by the agency. After that the notice and comment period has expired, the OIRA has 90 days to approve or reject the proposal assessing the quality of cost-benefit analysis performed by the agency. If the proposal is approved by the OIRA the proceedings go forward; if it is rejected were agreed negotiations between OIRA and proponent agency.

The review function is assigned to the Office of Management and Budget. The order stated that *“Within OMB, the Office of Information and Regulatory Affairs (OIRA) is the repository of expertise concerning regulatory issues, including methodologies and procedures that affect more than one agency, this Executive order, and the President's regulatory policies. To the extent permitted by law, OMB shall provide guidance to agencies and assist the President, the Vice President, and other regulatory policy advisors to the President in regulatory planning and shall be the entity that reviews individual regulations, as provided by this Executive order”*.

In 1996 the Congressional Review Act prescribed that all sponsoring agencies were obliged to send their proposal to the Congress for an evaluation. The US Congressional Budget Office can repeal any draft regulation within 60 days.

2. The Development of RIA: the UK Experience

The development of EU Impact Assessment was strongly influenced by the UK experience. For this reason it is important to inform about the development of UK RIA, in order to better understand the features of UE RIA.

The introduction of RIA in the UK institutional context differs from the US experience and this gives to the UK models the peculiarity that subsequently will be absorbed by the European RIA. First of all, as we show in this section, the UK RIA procedure was introduced gradually in the institutional context, and at the beginning the procedure was focused mainly on the compliance cost borne by target firms and on the impact of regulation on small and medium-sized firms. Another important difference with respect the US model was the kind of regulation subjected to Regulatory impact analysis that was the draft bills presented in the Parliament⁴⁸.

The first sample of analysis of the possible impact of the draft-bill discussed by the Parliament went back to the Thatcher Administration, in 1985. It was focused only on the analysis of business compliance costs and did not take in account neither the cost for the whole society nor the comparison of the cost with the benefit deriving from the proposed regulation. The principal and only goal of the Cost Compliance Analysis (CCA) was in to reduce the administrative burden on the firm in order to promote the economic growth. CCA represent in fact an answer to the critiques raised to the government about the excessive burden that regulation placed in particular on the medium and small sized firms, that did not permit the development of a more entrepreneur business environment.⁴⁹

The following step of the regulatory reform was the creation of a central agency, the Enterprise and Deregulation Unit, within the Department of Employment, with the task to oversee and co-ordinate

⁴⁸Renda A., *Impact Assessment in UE, the State of the Art and the Art of the State*, Centre for European Policy study, Brussels 2006

⁴⁹ The initiative was realized within the broad project aimed to address the negative effect of over-regulation on business, as showed in the White Paper *Lifting the Burden*, Cmnd 9751, 1985. In this first document the department was not required to make a complete cost-benefit analysis but only a cost-effectiveness analysis

the effort of the other department in reducing red tape, to conduct CCAs and a review of that regulation that may have produced high burdens on business⁵⁰.

The process of regulatory simplification was re-launched in 1992, with the creation of a task force to combat excessive regulation.

In 1997 there was an important change in the aim of the regulatory reform, which principal goal shift from “deregulation” towards “better regulation”. This leads to a more emphasis on the consultation process with the involvement of all the possible subject affected by the proposal and more efforts made by the government in promoting self-regulation and self-enforcement. A “Better regulation Task Force” was established”, with the main task to delegate key responsibility for regulatory simplification to the departments, since the administration reportedly believed that “*administrative simplification did not depend on the enforcement of centrally set targets, but on the initiative of departments to develop best practice*”⁵¹

In 1998, under the Blair Presidency was introduced a complete Regulatory Impact Assessment that was based on the analysis of the cost and benefits of the regulatory options identified and that included also the “zero option”.

Most important in the process of regulation simplification was the Regulatory Reform Act, which came in force on 1 April 2001. According with the Act “*a Minister of the Crown may by order make provision for the purpose of reforming legislation which has the effect of imposing burdens affecting persons in the carrying on of any activity*”⁵². The Regulatory Reform Act was able to address the lack of standardized procedures for reviewing existing legislation⁵³.

In 2005 Gordon Brawn launched an ambitious Better regulation Action Plan, following by the “Less is More” paper by the BRTF. The Action Plan imposed to the Departments to measure the total administrative burden they impose upon business.

⁵⁰ White Paper *Building Business-Not Barriers*, Cmnd 9794, 1986

⁵¹ OECD, *From Red Tape to Smart Tape, Administrative simplification in OECD Countries*, 2003

⁵² Regulatory Reform Act 2001, available on http://www.opsi.gov.uk/acts/acts2001/ukpga_20010006_en_1#pb1, visited on 11 July 2009

⁵³ Renda A., *Impact Assessment in UE, the State of the Art and the Art of the State*, Centre for European Policy study, Brussels 2006

In May 2007 was introduced a new system of Impact Assessments (IAs) that came in force in November 2007. BRE, now part of BERR (recently renamed BIS), according to this new procedure became responsible for the IA process.

2.2. The functioning of UK RIA Model

The UK RIA procedure is formed essentially by two steps:

1st step: the proponent administration perform an initial regulatory impact assessment; it has to contain the range of alternative regulatory options identified to solve the problem and the preferred regulatory option. The competent ministry decides if is the case to proceed with the drafting of the proposed new regulation. Then the RIA form is sent back to the proponent administration that have to identify the most appropriate methodology for the type of regulation. In this choose the administration is supported by the Better Regulation Executive and the Small Business Service, that represent the interests of small and medium-sized enterprises.

After that the methodology is agreed by the entities involved in this consultation phase, the proposed regulation is sent to the ministry that had to evaluate if there are the conditions for a Regulatory Impact Assessment Statement. The Regulatory Impact Assessment Statement is mandatory only if:

1. The expected impact is greater than £20 million;
2. The issue is of particular interest to the general public,
3. The proposal may exert a biased impact on different social group

2nd step: the so-called “partial RIA” is published. After the publication is open a consultation process and interdepartmental dialogue.

At the end of this second step, when the final RIA is drafted, the competent minister signed the form and sent it to the Parliament for the discussion and approval.

3. The Development of RIA: the European Integrated Impact Assessment

The first example of Impact Assessment in EU was the Business Impact Assessment, introduced under the United Kingdom Presidency in 1986. It provided an estimate of the impact of proposed legislation on business costs, but it did not take into account the social welfare as whole.

In particular this kind of tool was considered not able to reach the objective of Better regulation, considered essential by the Commission and the other European institutions to reach the Lisbon goals, in particular a sustainable economic growth . The main limitation of the BIA model lied in the fact that the procedure did not imply a preliminary identification of the alternative regulatory option; the impact analysis was made only in the moment in which the Commission had identified the preferred option. Furthermore the analysis implied only the business compliance cost and did not considered other costs nor the social impact of the proposed regulation. This features made the methodology of the procedure not very scientific and soundness.

To improve the quality of regulation the Commission in 2001 issued a White Paper on European Governance and the Lisbon Council established an advisory group, the Mandelkern Group, charged to draft an action plan for better regulation and to define a new model of impact assessment to be implemented at European level.

The White paper gives a definition of Better Regulation. There are seven dimension that identified Better regulation: proportionality, proximity, legal certainty, coherence, high standards, timeless and enforceability.⁵⁴ The BIA was defined as an inadequate tool to analyze the impact of the regulations.

A more appropriate model of RIA was designed by the Mandelkern Group in its final report⁵⁵. This new model had to be applied to all the Commission proposals with regulatory effect.

⁵⁴ European Commission, *White Paper on European Governance*, COM(2001)727, 25 July 2001

⁵⁵ In the Final report of Mandelkern Group on Better Regulation regulation was considered as a “*good in itself, enhancing the credibility of the governance process and contributing to the welfare of citizens, business and other stakeholders alike. High quality regulation prevents the imposition of the unnecessary burdens on businesses, citizens and public administrations that cost them time and money. It helps avoid the damage to firms’ competitiveness that comes from increased costs and market distortions (particularly for small firms)*”. For this reason better regulation is considered an essential tool to reach the European goal of becoming the most competitive and dynamic knowledge-

Regarding the new RIA model the Mandelkern Report foresees a “dual stage RIA”: a preliminary impact assessment is necessary for the analysis of the alternative regulatory options, while an extended impact assessment is made for the preferred regulatory option; this second stage of RIA contained a detailed cost benefit analysis of the impact of the preferred regulatory option.

The results of the Mandelkern Report was the launch by the Commission of a new Regulatory Impact Assessment model in 2003, the Integrated Impact Assessment model, according to which became mandatory to assess the economic, social and environmental impact of the major initiatives included in the Annual Policy Strategy or in the Annual Legislative Work Program.

3.1. How does the Integrated Impact Assessment Model works in Practice?

The new model of RIA was defined in details in one of the Communication following the launch of the Action Plan for Better Regulation in 2003.⁵⁶

According to the Communication the new approach to impact assessment “*is intended to integrate, reinforce, streamline and replace all the existing separate impact assessment mechanisms for Commission proposals*”.

Regarding the coverage, the Communication foresees that the Impact Assessment is applied to all major initiatives presented by the Commission. In fact “*The principle is that all Commission legislative and all other policy proposals proposed for inclusion in the Annual Policy Strategy or the Commission and Work Program as established in the context of the strategic planning and programming cycle will be subject to the impact assessment procedure, provided that they have a potential economic, social and/or environmental impact and/or require some regulatory measure for their implementation. The new model was based on an integrated impact assessment model and it was built on a two stage basis: a preliminary impact assessment was foreseen for all the*

based economy in the world. Within the better regulation two of the more important key areas are considered Policy implementation options, according to which “*EU and national policymakers should always consider the full range of possible options for solving public policy issues and choose the most appropriate for the circumstances*” and RIA, defined as “*an effective tool for modern, evidence-based policy making, providing a structured framework for handling policy problems. RIA should be an integral part of the policy making process at EU and national levels and not a bureaucratic add-on. It does not replace the political decision: rather it allows that decision to be taken with clear knowledge of the evidence*”.

⁵⁶ European Commission, *Communication on Impact Assessment*, COM(2002)276, including internal *Guidelines*

Commission initiatives included in the Annual Policy Strategy or the Commission Legislative and Work Program and requiring regulatory measures for the implementation. The proposal with a large expected impact are instead subjected to an “extended impact assessment”.

The Integrated impact assessment is essentially a two stage procedure:

1. **Preliminary Assessment:** it gives a first overview of the problem identified, possible options and sectors affected. The result of this first stage is a short statement focusing on the following points:
 - a) Identification of the objectives and desired outcome;
 - b) Identification of the main policy options available to achieve the objective;
 - c) Description of the preparatory steps already undertaken and foreseen

Extended Impact Assessment: On the basis of the preliminary assessment statement the Commission decides which proposals will require an extended impact assessment. In deciding the Commission take in account if the proposal will result in substantial economic, environmental and/or social impacts on a specific sector or several sectors and if the proposal represents a major policy reform in one or several sectors.

The main purposes of the Extended Impact Assessment are essentially: 1) To carry out a more in-depth analysis of the potential impacts on the economy, on society and on the environment; 2) To consult with interested parties and relevant experts.

In order to give more support to the Commission department in carrying out Impact Assessment, at the end of 2006 was created Impact Assessment Board (IAB), defined as a “*central quality control*”⁵⁷. The IAB works under the authority of the Commission President and it is chaired by the Deputy Secretary General responsible for Better Regulation.

The main tasks of the IAB are examining and issuing opinions on the quality of individual draft impact assessments prepared by the Commission departments and providing advice to the Commission department on the methodology adopted in the preparation of Impact Assessment.

⁵⁷ See the Commission website on Impact Assessment (http://ec.europa.eu/governance/impact/iab/iab_en.htm)

Despite the opinions of IAB, according to the Guidelines on Impact Assessment updated in 2009, have to accompany the draft initiative together with the impact assessment report, they are not binding⁵⁸.

4. The Application of the Efficiency Principle to the Regulation Process

The adoption of RIA both in US and EU was justified by the objective to reach a better regulation, that means an efficient regulation.

A growing number of country believed that the better way to reach improvements in regulatory process was to introduce the economic approach in the evaluation of the impact of proposed regulation according to a efficiency criterion. But what kind of efficiency have to conduct the decisions of policy-makers?

As mentioned above there are different concepts of efficiency and then, different way through which regulation can be considered efficient.

Efficiency can be analyzed from an allocative perspective that means that regulation hat to reach an optimal allocation of the resources. But in which way the allocation of resource can be optimal? If we use the Pareto criterion of efficiency, a situation is efficient if there is no way to rearrange things to make at least one person better off *without* making *anyone* worse off. This definition is very difficult to apply in policy word because sometimes it is difficult to compare the different outcomes and to evaluate which outcome is more worthy to be pursued. For this reason a more realistic criterion to reach the allocative efficiency in the issuing of regulation may be the Kaldor-Hicks criterion that looks to the net gain of a change: an outcome is more efficient than another one if the gainer of the change is so better off than can compensate the looser. This criterion, applied to the regulation process seem to find its practical application tanks the cost-benefit analysis used in the RIA method.

⁵⁸ European Commission, *Impact Assessment Guidelines*, SEC(2009) 92, 15 January 2009

But there is another aspect of the efficiency to be taken into account, that is the productive efficiency, that means that the desired outcome is reached by the lower amount of resources possible. Also in this case the main tool in the analysis of regulatory process is the cost-benefit analysis.

The efficiency criterion is difficult to pursue, especially when the regulation affected fields in which the costs and benefits are not quantifiable in monetary terms. In these cases some scholars questioning about the soundness of the economic approach in general, and CBA in particular, to the regulatory process, because a cost-benefit analysis can support also inefficient regulations.

The main critique is the incapacity of the regulatory impact assessment model to apply the economic approach in a correct way: at the foundation of the emergence and growing application of the Regulatory impact assessment there is the intention to solve other kinds of political problem that are not coherent with the efficiency principle.

In particular there are two different kinds of problem that the RIA could be able to explain and that can help to better understand the great success of RIA in the two main contexts of application of this economic method: RIA may be analyzed as a tool to solve the principal agent problem in US and a legitimating problem in the European context.

In the US the institutional context in which RIA has developed is designed in a way that leads to the rise of a typical agency problem. The main features of this context are: delegation to regulatory agencies, Presidential oversight, the presence of a special type of administrative law and judicial review of the rulemaking.

For Posner RIA is principally a device whose justification depends on its capacity to help authoritative institutions such as Congress, the presidency, and the courts to monitor subordinate institutions such as agencies⁵⁹. Within the RIA process the request to the agency to implement a cost-benefit analysis has not the scope to assure that regulations are efficient but instead to assure that elected officials maintain power over agency regulation. In fact, in the Posner view the cost-benefit analysis is able to change “*a relationship of asymmetric information to one of full*

⁵⁹ Posner E. , *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, University of Chicago Law Review, v. 68, 2001

information". This characteristic of CBA enables the President to rely less on the interest group that lose part of their capacity to influence regulatory power.⁶⁰

The main feature of RIA, that made this political tool unique, seem to be their capacity to assure to the principal an on-going control over the agencies: in fact, RIA produces control exactly when norm are being formulated.⁶¹

In the EU context the tool of RIA seem to respond to the need of legitimating its regulatory system. The history of EU was characterized by the ambitious to built a strongest and integrated institutional environment in which the European institutions could operate. To reach this goal the European Union, after the last disastrous tentative, tried the way of the economic approach, as it use at the beginning of its history market concept to built a political framework. From this perspective the use of Regulatory Impact Assessment procedure seem to be a tool used to reach the legitimacy so much desired in the past years. According to Radaelli politician want to adopt RIA for two reasons: 1) better regulation increases the legitimacy of the regulatory system, and this may have a positive impact on the popularity of the incumbent; 2) in open economies better regulation increases the competitiveness of a country. A good regulatory environment increases foreign direct investment and deters domestic firms from moving some high value functions abroad⁶².

In the course of the second part of the thesis, we will try to understand what kind of motivations there are for the adoption of RIA in EU context, in particular if on the basis of the RIA carried out by the European Commission there are the respect of the technical and economic nature of the tool or if it was used in order to justify other kind of motivations.

⁶⁰ Posner E., *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, University of Chicago Law Review, v. 68, 2001

⁶¹Radaelli C., De Francesco F., Troeger V., *The implementation of Regulatory Impact Assessment in Europe*, Paper delivered to the ENBR workshop, University of Exeter, Exeter 27 and 28 March 2008

⁶² Radaelli C., De Francesco F., Troeger V., *The implementation of Regulatory Impact Assessment in Europe*, Paper delivered to the ENBR workshop, University of Exeter, Exeter 27 and 28 March 2008

SECTION B

An Empirical Analysis of Three Policy Initiatives undertaken by the European Commission

In this section I will analyze, in an empirical way, three policy initiatives undertaken by the Commission in telecommunications sector.

In the last years the telecommunications sector was widely affected by the intervention of regulator. The European Commission had taken important decisions in order to promote the rising of competition in the sector and the consolidation of a Single Market for the provision of communication services.

This policy decisions, fundamental for the development of a competitive market for the provision of communications service, were supported by the implementation of Impact Assessment. In the analysis of the three cases study I try to understand whether the Impact Assessment was applied by the Commission in a correct way and whether it has helped the Commission to issue an efficient and effective regulations.

1. First Case Study – The IA on the Regulation on International Roaming Charges

In 2006 the Commission decided to issue a regulation in order to diminish the higher tariff of roaming in the single market. According to the Commission, the European framework for the electronic communication had failed to address the problem of international rooming tariffs that remained very high and represent an obstacle to the creation of an European single market for electronic communications. For the Commission the failure is due to the cross border dimension of the market of rooming that make the existing regulatory tool ineffective and a single market solution necessary. In 2006 was issued the first regulation on the international roaming charges; the regulation is about the call tariff, while the SMS traffic is not covered by the regulation.

In order to justify the implementation of further regulation in communications sector the Commission has implemented an Impact Assessment to evaluate the impacts of the different policy options. Has the use of IA promote the choose of the best legislative solution in term of efficiency and effectiveness of the option chosen?

1.1 The International Roaming in Europe: from the Inquiry of the DG Competition to the 2006 “Roaming I” Regulation

The international roaming issue was already object of the Commission analysis before the implementation of the regulatory framework for electronic communication of 2002. In fact, the typical cross-border nature of roaming services makes this services able to affect the European market for telecommunication and then the consumers welfare.

A first inquiry on the international roaming charges was carried out by the Competition DG in 1999⁶³. The main reasons for the inquiry were the price rigidity and lack of competition, both at wholesale and retail level.

According to the results of the inquiry, the market structure of international roaming could be able to favor the rising of a collective dominant position. In particular the DG competition, after defining the relevant market for wholesale international roaming and retail international roaming, both with a national dimension, had found that:

1. Cross-border nature of roaming leads to an “no-typical “ vertical relationship between wholesale and retail market in different country: in fact excessive wholesale price in one member state national market affects retail price in another member state national market.
2. The GSM Association’s Standard International Roaming Agreement (STIRA) reinforces the oligopolistic structure of the market⁶⁴.

⁶³ European Commission, DG Competition, *Working document on the initial findings of the Sector Inquiry into mobile roaming charges of 13.12.2000*

⁶⁴ The Standard International Roaming Agreement (STIRA) was the agreement according to which were regulated the tariffs between the operators in order to purchase roaming services. The agreement was issued by GSM Association, the Association that groups together the operator with GSM technology and foresee a reciprocity and non-discriminatory clause and the availability to all operators of Inter-Operators-Tariff (ITO).

With the adoption of New Regulatory Framework for Electronic Communications the wholesale market for international roaming was included in the Commission's Recommendation on relevant market.⁶⁵ The Recommendation includes all the markets for which an analysis by the National Regulatory Authorities(NRAs) is required. The NRAs concluded their analysis on the national wholesale market of international roaming in 2004. After the conclusion of the market analysis by NRAs, the European Regulatory Group(ERG) developed of a common position, according to which:

1. Retail charges were very high without clear justification;
2. Reductions in wholesale charges are often not passed through to the retail customer;
3. Consumers often lack clear information on the charges for roaming;
4. There are strong linkages between the markets in the different Member States

In 2006 the DG Commission started the Consultation to verify the possibility to introduce a regulation in order to reduce the high tariffs of roaming within the European Community. The operator and the related associations showed high skepticism about the Commission regulation and the Impact Assessment supporting it⁶⁶.

The Regulation was aimed to remove the market of international roaming from the domain of regulatory framework, designing for it a "special regulation" according to the "special nature" of the product provided. The Commission decision, also in this case, was supported by an IA that justify the costs of further regulation with the presumed benefits arising from it.

1.2 The Structure of Impact Assessment on the Roaming I Regulation

The IA on Roaming I is structured in the following way:

⁶⁵ See Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services, Official Journal of the European Union, 11 February 2003

⁶⁶ See Frontier Economics, *Evaluating the European Commission's proposed international roaming regulation, a report prepared for Vodafone*, March 2006 and *GSM Association's response to the second phase public consultation on a 'Proposal for a Regulation (EC) of the European Parliament and of the Council on mobile roaming services in the Single Market'*, 12 May 2006

a) Problem definition

The problem identified by Commission is the excessive price of the retail international roaming charges; it is not in a meaningful relation with the cost of providing the service; moreover this issue cannot be solved with the tools foreseen by the regulatory framework for electronic communication. The roaming services have a great relevance in the European telecommunication sector: according to the Commission estimates, they constitute around 5,7% of all the revenues of mobile industries in EU; moreover they have a direct impact on at least 147 million EU citizens.

b) Objectives

The main objective of the Commission regulation is to promote the development of a single market for the mobile electronic communication services.

c) Options and impacts

After having clarified that the regulation “*should always be used as a last resort and only when it is clear that market forces will not bring about the desired objective*”, the Commission IA analyzes five different options:

1. No policy change;
2. Self regulation;
3. Co-regulation;
4. Soft law
5. Targeted regulation:
 - a) wholesale regulation only;
 - b) retail regulation only;
 - c) wholesale and retail regulation

d) Evaluation of the impacts of regulatory options

The Commission evaluates the impacts of the different options according to a comparative static model focused on the impact of price changes on the aggregate EU market for mobile roaming services.

- **No policy change** (the so called “zero option”): according to the IA, this option does not contribute to strengthen the Internal Market and would not have a beneficial impact on competitiveness.
- **Self regulation option**: the Commission considers this option difficult to apply and not able to solve the problem: on one hand a self-regulation agreement may reflect the position of the larger operators that will continue to maintain a competitive advantage on the smallest ones; on the other hand it may not solve the problem of the different approaches that the NRAs could adopt with respect to the roaming market. Moreover it does not guarantee significant price reductions across all consumers segment. Furthermore the complexity of the roaming charge makes difficult to assure a high rate of compliance to the self-regulation.
- **Co-regulation option**: it is considered not able to reach the objective of reducing high roaming charges: the cross-border nature of the roaming services require an uniform application of the rules in the Single Market.
- **Soft law option**: it is considered to add only additional burden without provide certainty of outcome.
- **Price regulation only in the wholesale market**: it represents the approach shared by the ERG. It foresees a price regulation in wholesale market and the imposition of more transparency in the retail tariffs. A price regulation in retail market has to be imposed only if the retail roaming charges does not show sufficient reduction after the wholesale reduction of charges (the so-called sunrise mechanism)⁶⁷. For the Commission “*the main disadvantage of this option is the risk of negligible pass through of price reductions from wholesale level*”

⁶⁷ European Regulatory Group, *ERG common position on the coordinated analysis of the markets for wholesale international roaming*, ERG (05) 20Rev1

to retail level... past evidence and economic reasoning based on rational behavior of profit-maximising firms raises serious doubts about significant reductions in retail prices as a result of implementing this option”⁶⁸. In the Commission analysis retail regulation could have positive impacts for competition and consumers only in the short term, while in the long term it can lead to a restriction on competition, with the smaller operator not able to compete with the biggest one, because they are not able to negotiate lower wholesale rates. As consequence, the consumers can obtain a reduction of the roaming charges only in the short period.

For the reason above, the Commission believes that the only way to reach the objective of reducing the roaming tariff is to regulate both wholesale and retail markets.

Once the preferred option was identified, the problem is not yet solved: how does the market regulate? Three different options are taken into account by the Commission:

1. **Visited country approach:** the customer has to be treated in the same way as one on the visited network;
2. **Home pricing principle:** it equates the calls go back home to international call. Under this principle the wholesale regulation would be based on cost-orientation/capping in order to assure that the service are not offered above costs.
3. **European home market approach:** it foresee the use of safeguard capping mechanism both at wholesale and retail level.

This last approach is the preferred approach: according to the IA it is able to guarantee the double advantage of price reductions for all consumers segment, including business and a relative easy implementation and monitoring.

1.3 The Dynamic Impact of the Regulation: Why are Commission missing to analyze it?

⁶⁸ European Commission, *Impact Assessment of policy options in relation to a Commission proposal for a regulation of the European Parliament and of the Council on roaming on public mobile networks within the community*, 12 July 2006

The document of Commission gives very few room to the analysis of more wide-ranging impacts related to the regulation; in particular the Commission has missed to analyze in-depth all the possible impacts that the regulation may have on the other communication services and on the structure of the communication sector in general. The model according to which the impacts of the regulation are evaluated assumes as a basis hypothesis, despite roaming is a service provided in a bundle of other services, that the regulation affects only the roaming market and according to this first hypothesis the impacts are evaluate. In the following the main impacts not taken into account by the Commission IA:

a) Impact on investment incentives

In the Impact Assessment the Commission analyzes the possible impact of the regulation on investment incentives by market players stating that: *“Substantial price reductions for consumers obviously mean a decline in industry profits. This in turn will have an impact on investment. The magnitude of this impact is not easy to determine, however, it can be argued that reduction in profits from roaming charges (both wholesale and retail) will not have a substantially negative impact on the overall level of investment in the whole mobile industry”*. Also, while it is *“reasonable to assume some reduction of investment incentive”*, for the Commission the reduction of investment is more reasonable to be *“targeted cut-backs rather than across the board”*.

b) Spill-over effect - the Commission’s treatment of the waterbed effect

The roaming services are supplied as part of a bundle of services that includes other mobile services such as domestic voice and data. This means that there is a strong interrelation between the tariff structures of the different services: a change in one specific tariff, due to a regulatory imposition, can lead to a change in the structure of other tariffs.

In particular the IA carried out by the Commission underestimates the possible arising of the so-called “waterbed effect”, that is the possibility that the regulation of one of the product of a

multiproduct firms could lead to a change in the price of the unregulated product as consequence of the profit-maximizing behavior of the firm⁶⁹.

In the last part of the IA the Commission recognizes the possibility of spillover effect, but does not analyze in-depth the problem, stating that in the domestic market the level of competition is enough high to avoid an increase of the tariffs.

This last point seem to be in contradiction with the guidelines of the regulatory framework that requires regulation only when the structure of market is not competitive and for this reason is impossible to apply with success the ex-post competition law. In the specific case of international roaming is difficult to find through the tools of economic analysis, as it are designed in the regulatory framework, a market failure able to justify the application of a more stringent regulation; it instead possible to see a regulatory failure, with the regulatory framework unable to address the problem arising from the provision of cross-border service.

e) Redistributive effects

In the analysis of the costs and benefits related to the regulation the Commission does not take properly in account the different degree with which the regulation will affect the consumers: in fact the regulation will affect mostly high frequency roamers, while the cost of regulation (also in term of spillover effects and reduction of investments) will affect all the segment of consumers and mobile industry as whole.

1.4 What is wrong in the Impact Assessment on the Roaming I Regulation

The Impact Assessment of the Commission, which main task is to analyze all the possible impacts of the different legislative option, seem not take into account properly all the potential impacts related to the regulation. The main shortcoming are in a superficial analysis of the possible indirect effects of the regulation and in a not properly analysis of the dynamic effect of the regulation. In the

⁶⁹ For a more detailed analysis of waterbed effect see Schiff A., *The 'Waterbed' Effect and Price Regulation*, Institute of Economic Research Hitotsubashi University, 31 October 2007

following are summarized the main problems resulting from a critical analysis of the Commission Impact Assessment:

1. The Commission analysis is mainly focused on the too high international roaming charges but does not analyze in-depth the dynamic process that leads to the definition of this prices. Already the DG Competition, in their inquiry identified in the Inter-Operator Tariff at the wholesale level the main competitive problem⁷⁰.
2. The Commission does not properly consider that roaming is one of a bundle of services that a customers buy from a mobile operator. This means that a change in the tariff of one of this service can cause a rebalancing of the tariffs of other, more important services; in particular it can affect the market for domestic calls. A restructuring of the tariff in this sense imposes a cost to the majority of consumers, while the benefit of the proposal are reserved only to a minority of consumers. This wrong way to consider the cost and benefit of the proposal could hide the intention to use a economic tool to address a different problem respect that of an efficient regulation: the wiliness to create a pan-European market for electronic communications.
3. Roaming I regulation appears out of context because it does not take into account the real dynamics of the market that it affects. For example, in imposing a wholesale price regulation the IA did not take into account the fact that the international roaming traffic is mainly internalized within pan-European groups.
4. The Commission did not analyze correctly the possible reduction of total welfare: in fact a price cap on retail charge may be reduce the welfare if the reduction in firm profits is not offset by increase in consumer surplus.

⁷⁰ In the *Working document on the initial findings of the sector inquiry in mobile roaming charges* the DG Competition considered the IOTs as an element able to promote a jointly dominant position in the wholesale market for international roaming services; the DG required for this reason a more deeply analysis of the market, in order to evaluate if there are other structural element able to strengthen this hypothesis.

These errors highlight the necessity in conducting an IA, especially with regard the proposal that represent a newness, to take proper into account the assessment of how alternative form of economic regulation are likely to affect the incentives and conduct of consumers and market players. The IA, if properly used, is a useful tool to understand the dynamics of the market and the correct and efficient way to address them.

2. Second Case Study – the Impact Assessment related to the Creation of an European Regulator for Electronic Communications

In this second case study the IA was implemented by Commission in order to evaluate, in the general review of the Regulatory framework for electronic communication, the need of an European Regulator for electronic communication able to assure a more degree of compliance to the European legislation. The idea to create a new entity was analyzed in two different IA and with two different result: the first document considers the new entity unable to reach the objective of more compliance at lowest cost possible, while for the second document the European Regulator was the best option in order to consolidate the Single market.

The questions which I try to answer in this section is: how is it possible that the use of the same economic method produces a different outcome about the same option in two different documents within a 12-month timeframe? In which way this tool was used in the specific context? It is a tool for “evidence-based policy decision” or an instrument to justify decision adopted against the evidence? The tool that I use in order to answer these questions is a strict analysis of the Impact Assessment conducted by the Commission, taking in account the contest, both institutional and economic, in which this IA was implemented.

2.1 The Regulatory Model for Electronic Communication in EU

The 2002 framework for electronic communication is aimed to create a single market for the provision of communication services thanks to the creation of an institutional context able to favor the cross-border investment and the development of new technologies.

The electronic communications sector is one of the most productive in EU; according to the 14th Implementation Report, in 2008 the EU's telecoms sector continued to grow, at 1.3% in real terms, which compares to a 1% real increase in GDP for the economy overall; the prices of most standard communications services have continued to fall and in the average European consumer of electronic communications services was better off in 2008 than the year before. This result is to impute also to the regulatory model of 2002 and its peculiar construction that combine the centrality of the rules with the decentralization of their application.

In fact, the ex-ante regulation is deputed to the NRAs, National Regulatory Authorities, independent and impartial, that have the advantage to be closest to their market and for this reason in a better position to regulate them. In order to guarantee a uniform application of the framework, the NRAs have to analyze the market and to impose remedy according to the Recommendation on relevant market.

Furthermore, to assure a high degree of compliance around the single market, is instituted *ad hoc* entity, the European Regulatory Group (ERG), which main task is to guarantee the right coordination between the Commission and the single NRAs.

The review of regulatory framework of 2006 is aimed to understand if institutional model built in 2002 is able to achieve a high degree of consistency around the single market. In fact, according to the 12th Implementation report, a number of inconsistencies have emerged in the remedies imposed in a given market situation by different NRAs. Example of inconsistent application of remedies are showed in the second Commission Communication on market reviews under the EU Regulatory Framework and the accompanying Staff Working Document.⁷¹

For the Commission the lack of coherent regulatory approach can affect the competitiveness of the European market for electronic communication because:

⁷¹ European Commission, *Impact Assessment accompanying document to the Commission proposal for a Directive of the European Parliament and the Council amending European Parliament and Council Directives 2002/19/EC, 2002/20/EC and 2002/21/EC Commission proposal for a Directive of the European Parliament and the Council amending European Parliament and Council Directives 2002/22/EC and 2002/58/EC Commission proposal for a Regulation of the European Parliament and the Council establishing the European Electronic Communications Markets Authority*, 2007

1. It impose different cost on the operators in different country, affecting in this way the quality and the price of the retail services provided by the operators;
2. It negatively affects the growth of cross-border services that generate around one third of the operators revenues;
3. It penalizes the new entrant, undermine the global level of competition in the single market;
4. It undermines the growth of that service with a pan European potential or with a cross-border dimension, that have need to a uniform regulatory approach to affirm their benefit effects on the competitiveness of single market;
5. It imposes heavy cost on innovation and development in the area of allocating spectrum rights, the right managing of which is fundamental to the growth of the European electronic communication market.

Summarizing, the current regulatory framework, built to favor the born of a competitive European market for electronic communication, with a flexible structure able to take in account the peculiarity of the member state national market, had failed to address the problems of consistency, efficiency and speed of regulation, arising for the different application of the framework by the NRAs.

2.2 Why the Idea of a New Entity

The successive review of 2007 was aimed to solve the problem of consistency showed by the regulatory framework and “*to find the best regulatory model delivering a single market in e-communications through consistent and effective regulation while respecting the principles of subsidiary and proportionality*”⁷².

- ⁷² European Commission, *Impact Assessment accompanying document to the Commission proposal for a Directive of the European Parliament and the Council amending European Parliament and Council Directives 2002/19/EC, 2002/20/EC and 202/21/EC Commission proposal for a Directive of the European Parliament and the Council amending European Parliament and Council Directives 2002/22/EC and 2002/58/EC Commission proposal for a Regulation of the European Parliament and the Council establishing the European Electronic Communications Markets Authority*, 2007

In order to reach this objective the Commission analyzes the possible impact of three different regulatory options:

1. The creation of a Single European Regulatory Authority with discretionary decision-making powers in market reviews and in charge of managing EU aspects of spectrum;
2. The creation of European Regulatory Authority without discretionary decision-making powers assisting in the implementation of reinforced Community procedures;
3. A better co-ordination between the Member States

a) Analysis of Option 1 - creation of a Single European Regulatory Authority with discretionary decision-making powers in market reviews and in charge of managing EU aspects of spectrum

According to this option the market review should be placed at a centralized level, while the national NRAs should be transformed in national offices of the European Authority responsible for data collection and implementation of the centralized decisions. The markets analysis should be undertaken directly by the European Authority which would also impose regulatory remedies; appeals against the decisions of the European Authority should be dealt with by the European Court of Justice.

Benefits related to this option:

- 1) It is able to remove the national influences that very often had affected the decisions of National NRAs;
- 2) It is able to promote consistent regulation across the EU;
- 3) It may accelerated the development of services with pan-European potential and international competition among operators thank to the building of one-stop regulator system that lowered the administrative burden and compliance costs

Disadvantage related to this option :

- 1) An European Regulator may not be able to regulate appropriately the national market where services are predominant respect to the cross-border ones;
- 2) Institutional problems can arise from the creation of a European regulatory authority with strong decision-making powers involving discretion.

b) Analysis of Option 2 - creation of European Regulatory Authority without discretionary decision-making powers assisting in the implementation of reinforced Community procedures

According to this second option, the coordination mechanism at EU level should be strengthened, conferring additional powers to the Commission and creating a new entity, an independent European Authority, with the task to provide primarily technical expertise and advice in market review procedures and in authorization of services with pan-European potential impact.

In particular, this option foresees:

- a) Commission oversight of remedies and advisory role of the European Authority in Article 7 procedures;
- b) improved procedures for analysis of trans-national markets with advisory role of the European Authority;
- c) stronger powers for the Commission to act when an NRA does not carry out a market analysis within a given time limit;
- d) involvement of the European Authority in new EU level procedures for authorization and regulation of services with pan-European potential;
- e) more consistency in the criteria that justify suspension of NRA decisions by national appeal bodies.

Benefit related to this option:

- 1) it is able to guarantee more regulatory consistency and a level playing field for operators and service providers across the EU;

- 2) this would have a positive impact on big operators and providers of services in multiple jurisdictions (including specialized SMEs) that may benefit from a reduction of the cost of doing business across Europe;
- 3) the NARs could be induced to adopt more effective remedies and a less divergent regulatory environment in each Member State by the threat of Commission's requirement to withdraw draft remedies;
- 4) this is able to create incentives for operators to invest outside their domestic territories.

Costs related this option:

- 1) the new power of oversight assigned to the Commission requires an additional amount of resources devoted to the analysis of remedies;
- 2) also the European Authority would be financed from the Community budget. Around this specific point the Commission has made a specific cost-benefit study in order to examine the cost-effectiveness of the creation of this new regulatory entity: it is showed that the Authority has the potential of bringing economic benefits exceeding its budgetary costs by a factor of around 10-30 times (i.e. € 250 – 800 million)⁷³. This is due to the reduction in the regulatory risk, reducing the cost of capital for industry.

c) Analysis of Option 3 - A better co-ordination between the Member State

This 3rd option represent the so-called “option zero”. It does not required any change of the regulatory framework and relies only on the voluntary co-ordination without any transfer of power to a central authority, thought:

- a) Co-ordination role of the ERG in the Article 7 procedures and co-ordination of NRA’s remedies policy through a Commission Recommendation on remedies;

⁷³ This data are obtained by a study commissioned by Commission to the European Evaluation Consortium. For a more deeply analysis see “*Cost-Benefit Analysis of Options for Better Functioning of the Internal Market in Electronic Communication*”, Final Report prepared by European Evaluation Consortium, 22 October 2007

- b) Coordinated introduction of services with pan-European potential;
- c) Better co-ordination between national courts in national appeals matters.

Benefits related this option:

The benefits linked to this option depend of the real degree of coordination among the NARs; if the NRAs have the incentive to coordinate their action in the light to guarantee a consistent application of regulatory framework, the benefits will be similar to that of option 2.

In conclusion comparing the option 2 and 3 (the first option is considered unrealistic), the preferred option, according to the analysis of the Commission seem to be the option 2 that better address the problem of consistency of regulation preserving at the same time the decentralized nature of the regulatory system. In fact the option 3 required that the NRAs commit themselves to follow common guidelines and voluntarily agreed on pursuing the objective of more consistent application of remedies. At the same time the option 2 is able to improve the provision of services with pan-European potential, assuring a right regulation also for domestic services thank the presence of a decentralized structure.

In the table below a summary of the principal impacts and risks related to the option 2 and 3, as showed by IA of Commission

IMPACTS AND RISKS	Option 2 – European Authority, stronger Community powers	Option 3 – Better co-ordination between Member States
	ECONOMIC	
Investment and innovation	+/O Facilitates launching of cross border services and services with pan-European potential → more investment. Concerning approval of remedies, more regulatory consistency should facilitate investment across national border.	In principle Option 3 could improve consistency in market reviews, but uncertainty as to whether voluntary co-ordination will lead to more consistency. Does not facilitate cross-border investment and deployment of new innovative cross-border services.
Competition	+/O Level playing field for operators where competition can develop. Facilitates cross-border competition and encourages competition from new cross-border services. Outcome depends on implementation (especially concerning national appeals and remedies).	Uncertainty as to whether voluntary co-ordination will lead to more consistency. Competition would continue to develop predominantly in national markets, limited cross-border competition and difficulties for services with pan-European potential to compete across the EU.
Internal market, regulatory consistency	+/- Improvements in regulatory consistency of remedies, more efficient, harmonized procedures and conditions for services with pan-European potential, less differences in national appeals. Implies more co-ordination and transfer of some powers to the EU level;	No material changes to institutional balance. Lower probability of achieving regulatory consistency; lengthy and cumbersome procedures for authorization of services with pan-European potential.
EU competitiveness	+Could enhance competitiveness by facilitating deployment of new cross-	Risk of fragmented regulatory approach and

	border services and creating favorable environment for investment.	cumbersome procedures for services with pan-European potential put Europe in a disadvantaged position vis-à-vis third countries. A Recommendation on remedies would guide NRAs and inform them of best practice in the area
Economic operators' costs and benefits	+Positive impact on service providers operating in several MS, or those offering services with pan-European potential, less divergent regulatory environment, more legal certainty.	Some improvements in legal certainty and the overall regulatory environment for operators due to better co-ordination of market reviews. Providers of services with pan-European potential could not benefit from a more consistent regulatory environment.
Administrative costs, simplification	+/O Overall reduction due to streamlining measures, fewer markets in the Recommendation and a common authorization conditions for services with pan-European potential. More time and resources needed for Commission approval of remedies and for setting up the European authority, but strongly positive cost-benefit assessment. Integrating ENISA to the new entity would provide operational efficiencies and reduce overall admin costs	Overall reduction due to streamlining measures and fewer relevant markets in the Recommendation. No major simplification for providers of services with pan-European potential
Consumer benefits	+/O Indirect impact on consumers. Increased availability of new innovative products and services across the EU, positive impact on consumer choice. Better and cheaper connectivity for business customers across borders.	Indirect impact on consumers. Outcome depends on the efficiency of voluntary co-ordination. Slow up-take of cross-border services and services with pan-European potential.
SOCIAL		
Social and digital inclusion	+/O Impact will depend on accompanying measures, such as the upcoming review of the universal service concept. Positive impact of co-ordination on regulatory consistency should have positive effect on digital inclusion across the EU. Increased effectiveness of ENISA in the interests of citizens.	Impact will depend on accompanying measures, such as the upcoming review of the universal service concept. Digital divide may persist in some countries if voluntary co-ordination is not effective.
Employment and labor market	+/O Difficult to determine. Stronger EU powers could lead to some consolidation of the market but positive spill-over effects on other sectors can be expected due to innovation and deployment of cross-border services.	No significant change on labor markets, positive spill-over effects rather limited.

Source: European Commission, *Impact Assessment on the review of regulatory framework, 2007*

2.3 The Analysis in the IA of 2006: What has changed in One Year?

The possibility to introduce a single European regulatory body for electronic communications is already present in the Impact Assessment implemented by the Commission in 2006. This option is taken into account in order to assure consistency to the NRAs different approach to the European regulatory framework, consolidating in this way the European Single Market for electronic communications.

In particular the 2006 IA evaluates the possible impacts of three different option:

1. The so-called “option zero”, that means no policy change;
2. the creation of European Regulator;
3. the strengthening of Commission powers: this option foresees the attribution to the Commission of a veto power on remedies imposed by NRAs and a Commission approval of

actions taken by NRAs with regard to access and interconnection, in order to contribute to a more harmonized approach across the EU⁷⁴.

In the evaluation of the impacts, the Commission recognizes that the introduction of an European Regulator means a complete centralization of electronic communication regulation at EU level; from an institutional point of view this means a revolutionary change in the current regulatory system and the possible arise of strong national resistances due to the fact that a trans-national body was regulating domestic issues.

In the 2006 IA the Commission rejected the option of the European Regulator considering the institution of the new body as *“another layer of regulation which would increase the overall administrative burden”*⁷⁵, stating that *“the option of a European regulator may offer the best prospects for creating a truly single market in e-Communications, but until Europe had truly pan-European electronic services, it is unlikely that a pan-European regulator will be justified”*⁷⁶.

What has changed in one years to justify the complete change in the evaluation of the options present in 2007 Impact Assessment?

The new approach followed by the Commission in the 2007 IA found an economic justification in the cost-benefit-analysis commissioned by the DG for Information Society and Media to European Evaluation Consortium, in order to better evaluate the potential cost and benefit to institute the new regulatory body⁷⁷.

According with the results of the CBA, the new entity has the potential to produce economic benefits exceeding its budgetary cost by a factor of 10-30 times. In the next page the table with

⁷⁴ The previous Article 7 procedure assigns to the Commission only a veto power on the market definition and assessment of Significant Market Power notified by the NRAs, while on the remedies it foresees only the possibility to comment.

⁷⁵ European Commission, *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the Review of the EU Regulatory Framework for electronic communications networks and services, Impact Assessment*, 29 June 2006

⁷⁶ European Commission, *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the Review of the EU Regulatory Framework for electronic communications networks and services, Impact Assessment*, 29 June 2006

⁷⁷ See European Evaluation Consortium, *“Cost-Benefit Analysis of Options for Better Functioning of the Internal Market in Electronic Communication”*, Final Report prepared for the Commission, 22 October 2007

costs and benefits related to the establishment of the new regulatory body, as evaluated in the European Evaluation Consortium.

EECMA contribution in the various policy areas	Direct Costs of EECMA	Other Regulatory Costs	Possible benefits (orders of magnitude)	Key Assumptions
Oversight of NRA remedies	€ 0.7 mn	€ 1- 2 mn	€ 50 – 120 mn	<ul style="list-style-type: none"> • EECMA reduces by 10% regulatory risk across EU • In addition, there are some yearly 40 NRA remedies with hidden unexploited deadweight effects - potential benefit € 150 - 600 mn
Replacement of NRA not carrying market analysis in time	€ 2.7 mn	€ 10.8 mn	€ 20 - 80 mn	<ul style="list-style-type: none"> • 1-2 delays in carrying out market analysis are experienced on a yearly basis
Authorization and regulation of services with pan-European potential	€ 7.9 mn	In theory none	€ 180 - 600 mn	<ul style="list-style-type: none"> • Every three years the launch of one pan-European market is shortened by one year bringing one-off benefits
Other operational and management activities	€ 16mn			
TOTAL COSTS AND	€ 27 mn	€ 12 mn	€ 250- 800 mn	
Potential additional costs /benefits				
Procedures for analysis of transnational markets		€ 24 mn	€ 300 - 600 mn	<ul style="list-style-type: none"> • If 1-2 transnational markets were identified and regulated in the period

Source: Cost-Benefit Analysis of Options for Better Functioning of the Internal Market in Electronic Communication, Final report of European Evaluation Consortium, 22 October 2007

As showed in the table, the imputation of costs and benefits are made in a strategic way, in order to justify a decision already taken: the economic approach is used only to give a “numerical” evidence to the potential benefit arising from the institution of a new body that, according to the result of the analysis, seem to have a *per se* magic power to lead to the so much deseeded single market for European electronic communication. As showed on the table, in the column of the costs the analysis

carried out by the European Evaluation Consortium puts all the cost arising by the institution of the new body, while, on the column of possible benefits, it puts all the possible advantages arising from the potential development of the single market, as the only obstacle of the consolidation of internal market was the lack of an European Regulator.

The European Consortium recognizes the speculative nature of the benefits related to the establishment of a European regulator, because *“results in a number of areas ultimately depend on external factors that are uncertain”*. Also because the Authority *“is expected to produce results in areas - regulatory risk and transaction costs, where economic measurement issues are also controversial”*⁷⁸.

In the IA of the Commission there is no evidence about the speculative nature of the data quoted, but only the reference that the evidence of the economic analysis promotes the option of the European Regulator, an option that seem to assume the status of preferred option before the analysis conducted could demonstrate the efficiency of the option chosen.

⁷⁸ See footnote n.26, page 34 of *“Cost-Benefit Analysis of Options for Better Functioning of the Internal Market in Electronic Communication”*, Final Report Prepared by European Evaluation Consortium

3. Third Case Study - The Commission Recommendation on Regulated Access to Next Generation Access Networks (NGA)

In the last case study analyzed, the news is that the legislative initiative undertaken by Commission is not supported by any IA.

In the course of this work I have showed how the economic tool of RIA has become an indispensable instrument in order to adopt decisions able to satisfy the efficiency and effective criteria; this is true especially with regard the telecommunications sector, where, in the last years, the Commission has implemented very important measures for the development of the market, always with the support of a related IA. Why the Commission has abandoned this fundamental tool in the issue of the Recommendation of Next Generation Access (NGA)?

According to the Impact Assessment Guidelines an IA is necessary for all *“all legislative proposals of the Commission's Legislative and Work Program (CLWP) and for all non-CLWP legislative proposals which have clearly identifiable economic, social and environmental impacts”*.⁷⁹

The recommendation of NGA, despite has not binding effects, represents a legislative proposal with “identifiable economic impacts”: it will represent the European guidelines according to which the NRAs will address the access problem in the Next Generation Network environment. Moreover, it will affect a market not yet developed; this makes the lack of a related IA very interesting to analyze, especially because the Recommendation foresees the application to NGA market of the remedies designed in the regulatory framework for electronic communication, without comparing the potential impacts of alternative options.

3.1 The Object of Recommendation: What is NGA?

Before to analyze in depth the Recommendation we had to explain what is NGA.

Next Generation Access is a different issue with respect the Next Generation Core Network: the second refers to the replacement of the old multiple legacy core networks with a single IP-based

⁷⁹ European Commission, *Impact Assessment Guidelines*, 15 January 2009

network through which it possible to provide all type of services. The NGA refers instead to the deployment of next generation infrastructure in the access network. The problem of access was already a crucial issue in the 2002 regulatory framework for European communications, constituting a bottleneck able to distort the competition: it represents in fact an “essential facility” owned by the incumbent and without that the alternative operators are unable to provide services. For this reason, the Access directive gives the NRAs the power to impose on Significant Market Power operators the obligation to provide access at cost-oriented-price to the alternative operators⁸⁰. The directive, as showed the data of the 14th Implementation report, has worked very well, especially with regard to the Fixed broadband penetration: in 2008 the average fixed broadband penetration was 22.9%, confirming the world leadership of EU countries in the world. According to the Report the main tool used to reach this high degree of penetration was the unbundling of local loop (ULL) that represents 69.3% of all DSL lines used by alternative operators⁸¹. This data demonstrate that the alternative operators have made many investment in ULL and that the regulation of access was a key tool to address the bottleneck problem arising from the presence of a facility owned by the incumbent and not replicable by the alternative operators. The development of technology has led to the born of a new facility with the potential rise of the same bottleneck problem. How does regulate them?

⁸⁰ Directive 2002/19/EC of the European Parliament and of the Council, 7 March 2002, Official Journal of the European Communities. In particular, the art 12, paragraph 1 of the directive stated that “A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations on operators to meet reasonable requests for access to, and use of, specific network elements and associated facilities, inter alia in situations where the national regulatory authority considers that denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-user's interest”. Moreover, the art 18 paragraph 1 specified that: “A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations relating to cost recovery and price controls, including obligations for cost orientation of prices and obligations concerning cost accounting systems, for the provision of specific types of interconnection and/or access, in situations where a market analysis indicates that a lack of effective competition means that the operator concerned might sustain prices at an excessively high level, or apply a price squeeze, to the detriment of end-users. National regulatory authorities shall take into account the investment made by the operator and allow him a reasonable rate of return on adequate capital employed, taking into account the risks involved”.

⁸¹ EUROPEAN COMMISSION, *Communication from the commission to the European parliament, the council, the European economic and social committee and the committee of the regions. Progress report on the single European electronic communications market 2008 (14th Report)*

According to the ERG Common Position on NGA “*The introduction of NGN and NGA may give rise to new bottlenecks while old ones may disappear allowing to remove regulation accordingly*”⁸².

The introduction of the new infrastructure will necessary affect the market structure of electronic communication.

Also OFCOM, the English NRA, recognize the great impacts and the potential benefits arising from the development of the NGA, but, at the same time, it is worried about the kind of regulation to apply to the new technology, because it is important “*to provide clarity on the regulatory regime for next generation access networks in a timely manner, so that any lack of regulatory clarity is not a contributory factor in the timing of future investments*”⁸³.

According to NRAs and ERG positions, in regulating NGA it is needed to balance two different goals: on one hand the need to avoid the rise of a new bottleneck able to restrict the competition in the market and, on other hand, the necessity to encourage investments in a technology that presents an high degree of risks, because both demand that supply are not well defined.

For this reason how to regulate the new facility become fundamental in order to avoid the implementation of ineffective or ill-informed regulation, imposing useless burden on the market. It is even more fundamental that the regulation are subjected to a properly Impact Assessment able to take in account all possible impacts of the chosen option.

In the following section we are going to reconstruct the structure of Recommendation, which essentially suggest an extension of the current regulatory framework remedies on NGA.

3.2 Structure of Draft Recommendation on Regulated Access to Next Generation Access Networks (NGA)

The main scope of the Recommendation is to guide National Regulatory Authorities in developing their regulatory responses in an NGA context, in order to promote consistent regulatory responses throughout the EU in the relevant markets.

⁸² ERG, *ERG (07) 16rev2, ERG Opinion on Regulatory Principles of NGA*, 2007

⁸³ OFCOM, *Regulatory challenges posed by next generation access networks*, 23 November 2006

In the preamble of the Recommendation the Commission specifies that:

“Mandating access to civil engineering will only be effective as a remedy if the SMP operator provides access under the same conditions to its own downstream arm and to third-party access seekers. NRAs should build on their experience in developing procedures and tools for local loop unbundling (LLU) to put in place the necessary business processes concerning ordering and operational access to civil engineering facilities. In principle mandating the publication by the SMP operator of an adequate reference offer specifying the conditions and procedures of access to the civil engineering infrastructure, including the access prices, within a short time-frame is proportionate to the objective of encouraging efficient investment and infrastructure competition.”

Furthermore it considers *“Cost-oriented prices are a useful indicator for efficient investment decisions by potential access seekers. Where regulated prices do not accurately reflect the underlying cost of the civil engineering infrastructure of the SMP operator, they will distort investment signals. If regulated prices for access to ducts are not cost-oriented, but are set at a higher level, efficient fibre investments will be replaced by other wholesale access possibilities”*⁸⁴.

The Commission considers essential for the investment of the alternative operator the extension of the current regulatory framework to the NGA: *“Alternative operators, some of whom have already deployed their own networks to connect to the unbundled copper loop of the SMP operator, need to be provided with appropriate access products in order to continue to compete in an NGA context. For FTTH these may consist of access to civil engineering infrastructure, to the terminating segment, to the unbundled fibre loop or of wholesale broadband access as the case may be. On Market 4, it is thus important that in principle the whole range of different physical access products, including backhaul, is available as remedies. Where remedies in this market lead to effective competition in the corresponding downstream market, other remedies could eventually be phased out”*. For the Commission *“Obligations imposed under Article 16 of Directive 2002/21/EC are based on the nature of the problem identified, without regard to the technology or the*

⁸⁴ European Commission, *Draft Recommendation on regulated access to Next Generation Access Networks (NGA)*, 12 June 2009

architecture implemented by an SMP operator. Therefore the fact of whether an SMP operator deploys a point-to-multipoint or point-to-point network topology should not affect the choice of remedies”.

In order to avoid that the alternative operators continue to use the unbundling local loop tool in providing their services, instead to invest in the new technology, the Commission Recommendation suggest to extent to the NGA the current regulatory framework, including the fibre access in the market 4 and 5.

In particular, with regard to the market 4 the Recommendation states that *“Where NRAs find that one or more operators have SMP in Market 4, they should assess the availability of civil engineering infrastructure including ducts owned by the SMP operator for the purpose of allowing alternative providers to deploy NGA networks. NRAs should use their powers under Article 5 of Directive 2002/21/EC to ensure that the SMP operator provides all appropriate information for the purposes of access, in particular on duct location and duct capacity”.* NRAs should ensure that access to existing civil engineering infrastructure is provided at cost-oriented prices. If the SMP deploys fibre-to-the-home (FTTH) *“NRAs should, in addition to mandating access to civil engineering infrastructure, mandate access to the terminating segment of the access network of the SMP operator, including wiring inside buildings”.* NRAs should ensure that access to the terminating segment is provided at cost-oriented prices.

In the case of FTTH the Recommendation extend the unbundled access also to the fibre loop. According to the Commission document in fact, *“NRAs should mandate unbundled access to the fibre loop irrespective of the network architecture and technology implemented by the SMP operator”.* Also in this case the price of access to the unbundled fibre loop should be cost-oriented.

With regard to the market 5, the market for wholesale broadband access, the Recommendation states that *“Where SMP is found on Market 5, wholesale broadband access remedies should be maintained or amended for existing services and their chain substitutes. NRAs should consider wholesale broadband access over VDSL as a chain substitute to existing wholesale broadband*

access over copper-only loops". Also in this case NRAs should in principle impose cost orientation on mandated wholesale broadband access products. The cost-orientation obligation does not apply if the SMP operator has jointly with at least one other provider of electronic communications services competing on the downstream market deployed an FTTH network based on multiple fibre lines.

Finally the Recommendation foresees that *"Existing SMP obligations in relation to markets 4 and 5 should continue and should not be undone by changes to the existing network architecture and technology, unless agreement is reached on an appropriate migration path between the SMP operator and operators currently enjoying access to the SMP operator's network"*.

3.3 Pursuing the Rational for the missing of the IA related to the Recommendation

The analysis of the Recommendation on NGA shows that the missing of an appropriate IA matters. The idea to extend the regulatory framework on NGA is in contradiction with the regulatory framework for electronic communication and the principles according to which the remedies have to be imposed. Moreover the NRAs analysis of NGA issue suggest the implementation of a more deeply market analysis before to issue a legislative proposal in the NGA environment, given the newness that the NGA represent for the market and consequently for the regulator.

The Ofcom analysis recognizes the need to follow a strict economic approach to regulate the NGA; in fact NGA represents a market with not so clear borders: for this reason the regulator has to pay more attention, evaluating in a correct way all possible impacts of the different regulatory options. In his analysis Ofcom states that the "equality of access" promoted by the current framework represents the most appropriate approach to address the problem of enduring economic bottlenecks, like the access one; it can be useful also to address the problem of access in NGN environment; at

same time Ofcom believes that this approach has to be correct in order to reflect the peculiarity of NGA⁸⁵.

The NGA represents a new technology not completely developed and for this reason more sensible, in its future developments, to the regulator intervention. It is important that any intervention in this area was accompanied by a deeply analysis of the potential effects, that means by a proper RIA.

⁸⁵ In his report Ofcom states that NGA “*may display a number of unique characteristics that mean the current approach to regulation is not appropriate. For example, historically, current generation local access network investments have faced low demand uncertainty and were considered a sunk cost for bottleneck asset owners – this may not be the case for next generation access investments*”. And moreover: “*It is not the role of Ofcom to provide operators with incentives to make particular investments. Rather, we should endeavour to ensure that the incentives for efficient investment are not distorted, particularly as a result of disproportionate regulation. In determining the most appropriate approach to regulation for investment in any risky bottleneck asset, and its implications on incentives, it is important to reflect adequately the level of risk incurred at the time of investment*”.

Conclusions – Lessons learned

In this thesis I focused my attention on the use of Regulatory Impact Assessment by the policy makers in order to achieve a better understanding of all the possible impacts of the regulation. The growing use of this tool is due to the wiliness of policy makers to reach the so called “better regulation”, that means a regulation able to promote the competitiveness and the development of the market, without impose useless burdens to business and public administrations.

The analysis of RIA is very important from a Law and Economics perspective: RIA, for many aspects, may be considered the pragmatic and policy application of what many scholars of Law and Economics have said: the legislations, to be eligible of application, have to consider the costs and benefits belonging to their application and have to be implemented only and only if the benefits of their implementation are more than the costs. A correct understanding of RIA process can be useful in order to introduce the Law and Economics concepts into the policy-making process. To achieve this objective is necessary to analyze in which way RIA was performed by policy-maker. In particular, it is important to understand if it was implemented in order to evaluate all possible impacts related to the different options taken into account by legislator, or, on the contrary, if it was adopted in order to justify the achievement of other kind of goals.

In the first part of the work I have analyzed the born and the development of RIA tool around the world. This overview is important to understand the different features that the tool has assumed according with the different institutional contest in which it was implemented.

This different features are particular wide in comparing the US and EU RIA model: this differences are due to the different goals pursued by the governments: in the US context the RIA tool was used to address a typical principal agent problem: RIA has become a tool through which the govern can have an ongoing control on the regulation issued by the agencies in order to verify if the legislations adopted was effective and efficient. Instead, in EU context the RIA model seem to be used in order to solve a legitimating problem: in fact it seem to be used to build the same institutional context in which it should explicate their beneficial effects.

In order to understand how the RIA model was implemented by EU institutions, I have analyzed three specific initiatives undertaken by the European Commission in communications sector. I have chosen the communications sector as a field of analysis since it represent the sector in which the Commission has taken very important decisions for the development of the market. This decisions were always supported by a related Impact Assessment in order to evaluate the impacts of the different options taken into account. In the specific cases study analyzed, I tried to verify if the model of IA used by the Commission was able to achieve the goal of better regulation.

In the first case, the Regulation of the international roaming charges, the related IA analysis seem to be conducted in order to justify the objective of European legislator to promote the development of single market for electronic communication. And around this objective seem to be implemented the whole IA. In particular:

1. The model according to which are evaluated the possible impacts of the different options assumes that the regulation will affect only the roaming market, not taking into account the potential externality of the regulation on the other services provided by the operator and on the investment incentives;
2. The IA states that the regulation will improve the welfare of consumers as whole, not taking in account that the costs and benefits of regulation will be distribute in different way among the different segment of consumers: in particular, the high roamers consumers will enjoy most all the benefits arising from the proposal, while the costs of regulation will be bears also by consumers that do not use roaming services;
3. And last, but most important consideration, the regulation is in contradiction with the principles of the regulatory framework for electronic communication, according to which the imposition of further regulation is justified only if the analysis of market shows the presence of operators with a significant market powers. In the case of international roaming charges, the Commission decision to implement the regulation is due to the particular cross-

border nature of roaming services, that does not permit the well functioning of the regulatory framework in addressing the problem.

The same *iter* seem to be followed with regard the institution of the European Regulator for the market of electronic communications. The related IA, implemented for the review of regulatory framework to address the lack of compliance in the remedies adopted by the NRAs, does not evaluate, in a proper way, the costs and benefits linked to the different options. Moreover the evaluation of the options changes in the two IA implemented for the review, respectively in 2006 and 2007.

It is very interesting the imputation of costs and benefits according to which, in the 2007 IA, the introduction of the new entity becomes the preferred one in order to achieve the goal of more compliance: on the side of potential benefits, the Commission analysis puts all the benefits arising from the development of the single market, as the institution of the new body magically will lead to the consolidation of the Single Market, while, on the part of the costs, it puts only the budgetary cost of instituting the new Regulator. This imputation of costs and benefits shows how it is possible a strategic use of the data, in order to justify a prior political decision also with the use of a technical tool like IA.

In the last case study, that is the Recommendation on NGA, the news is that there is no IA to support the Recommendation. NGA represents the most important technological development in communication services in the last years; in this sector the Commission has adopted IA in order to support the main decisions undertaken; and it is strange that the Commission does not adopt the IA in order to address this important development of the market. Despite the Recommendation tool has not binding effects, appears important to evaluate, with a proper IA, the provisions of this legislative tool: it has however an important political weight and it is able to affect the further NRAs decisions in the NGA environment; in this sense it has the high potential economic impacts that require the support of the IA.

What is possible learned from the analysis of this cases study? Surely than RIA constitutes an important tool in the hands of regulators; this tool can helps the policy-maker to understand the evolution of the markets and to regulate them according with this evolution, avoiding useless regulation and achieving the goal of a sustainable economic growth .

In order to preserve the efficacy of RIA tool is necessary does not use it in a strategic way, to justify other kind of goals pursued by the legislators. This risk is highly present in the EU contest, where the legislator is continually in search of a source of legitimacy. The legitimacy of European institutions was historically found in the consolidation of a Single Market that represents the *condition sine qua non* the legislator can justify his action. However it is important does not sacrifice the economic nature of RIA model to this goal, in order to avoid that this important tool for the development of an economic approach to the regulation could become unable to achieve its main task, that is to support legislator in the adoption of efficient and effective legal rules, able to assure the maximum net benefit for the society as whole.

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