

# Competition Law and Sector-Specific Regulation

## **Main issues and Challenges**

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# The Competition Law-Regulation divide

- Formal features
- Substance

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# Competition Law and Regulation: formal features

- Competition Law is generally understood to intervene (i) ex post; (ii) on a (ii) targeted and (iii) proscriptive basis
- Regulation, instead, would apply (i) ex ante and on a (ii) prescriptive basis by means of (iii) a generally applicable regime

# Competition Law and Regulation: formal features

	Ex ante/Ex post	Prescriptive/Proscriptive	Targeted/General
<i>UEFA Champions League</i> <i>Premier League</i>	Ex ante	Prescriptive	Targeted - Generalised
<b>Standard-setting agreements</b>	Ex ante	Prescriptive	General

# Competition Law and Regulation: formal features

- Presenting sector-specific regulation as applying ex ante and on a general, prescriptive basis, oversimplifies existing regimes
- Some regimes require targeted and flexible action to adapt to the features of particular markets and practices
- In rapidly moving industries, gaps in regulation need to be addressed by means of such instruments

# Competition Law and Regulation: formal features

- Telecommunications (electronic communications) regulation provides several valuable examples of targeted, proscriptive intervention
  - Attempt by the FCC to enforce net neutrality policy was a targeted case against Comcast, see *Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010)
  - Ofcom's pay TV regulation: In 2010, Ofcom required Sky to share its premium sports channels with rivals.

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<b>Standard-setting agreements</b>	Ex ante	Prescriptive	General
<i>Comcast v FCC</i>	Ex post	Proscriptive	Targeted
<b>Ofcom's pay TV regulation</b>	Ex ante/Ex post	Prescriptive	Targeted



# Competition Law and Regulation: formal features

- Where available, regulators express a preference for flexible and targeted sector-specific instruments
- This is not surprising. Competition law sets relatively strict substantive standards.
  - Ofcom's pay TV regulation: Ofcom would never have been able to establish (i) indispensability and (ii) elimination of competition as per *Bronner*
  - Digital Single Market Strategy: Competition law widely perceived to be inadequate. Is it simply that the bar under competition law is too high?

# Competition Law and Regulation: formal features

- Sector-specific quasi-competition law instruments might become increasingly popular
- Result: increased fragmentation in enforcement, reduced role for general competition law
- Pure competition law analysis would provide a very incomplete picture of intervention in some industries

# The Competition Law-Regulation divide

- Formal features
- **Substance**

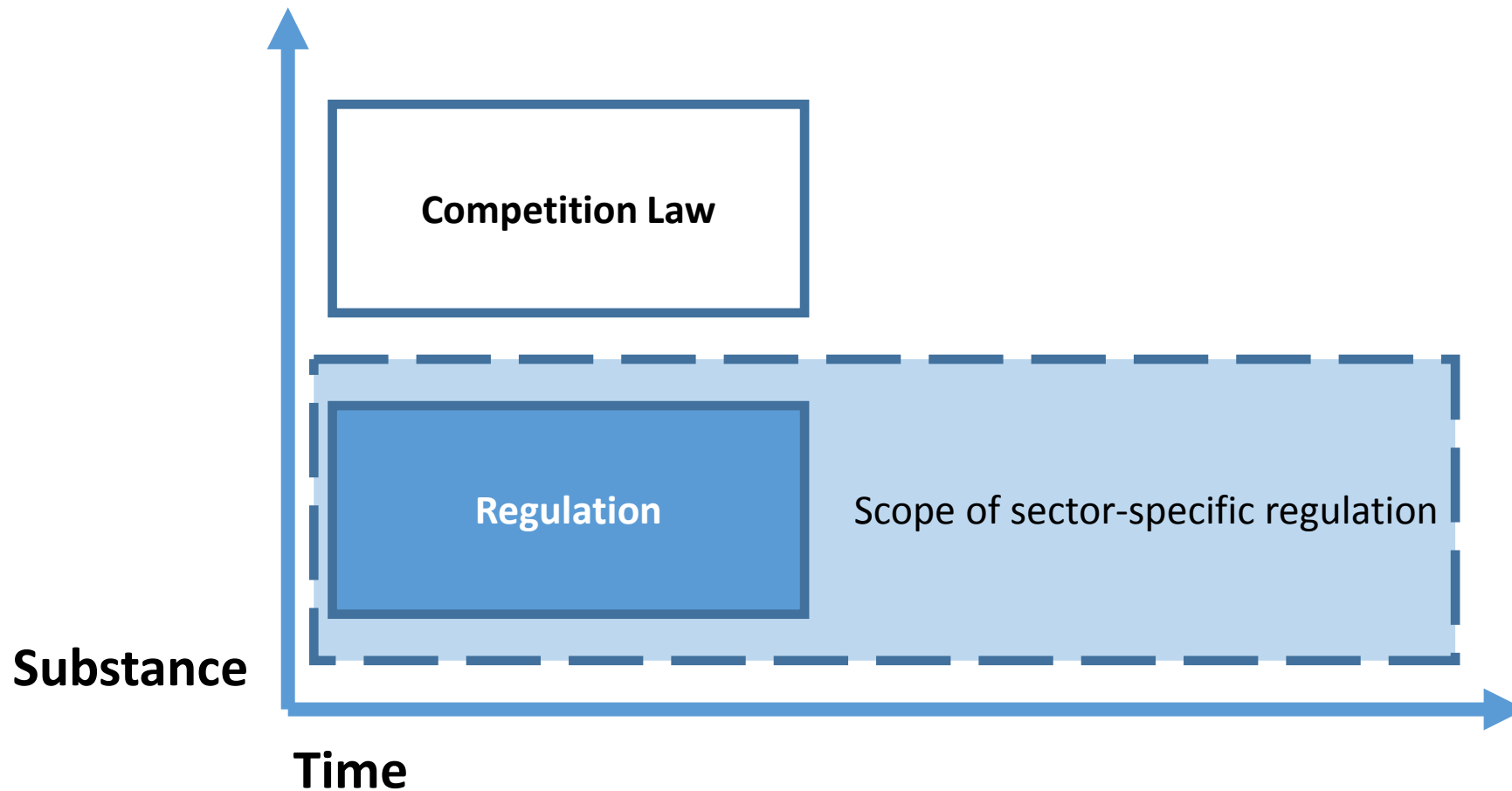
# Competition Law and Regulation: substance

- It is very difficult to draw a line between competition law and regulation in terms of substance
- It is undisputed that competition law is not ideally equipped to deal with certain questions
- At the same time, they do not seem to shy away from certain questions
  - Rate-setting: e.g. *Rambus* and Interchange Fees sagas
  - Gap-filling in regulatory regimes: e.g. *AstraZeneca*
- In many areas, competition law and regulation appear to be broadly interchangeable

# Competition Law and Regulation: substance

- When competition law is enforced in a way that mimics regulation, it may endorse the objectives of a sector-specific regime
- Such instances arise where there is a neighbouring regulatory regime (temporally or spatially)
  - The regulatory regime may not capture (or not yet) the complexity of the market
  - In the absence of an alternative, competition law assumes a gap-filling role at the expense of its own objectives

# Competition Law and Regulation: substance



# Competition Law and Regulation: substance

Premium TV channels

*Telefonica/Canal+ Spain (April 2015)*

Telecoms network

Scope of sector-specific regulation

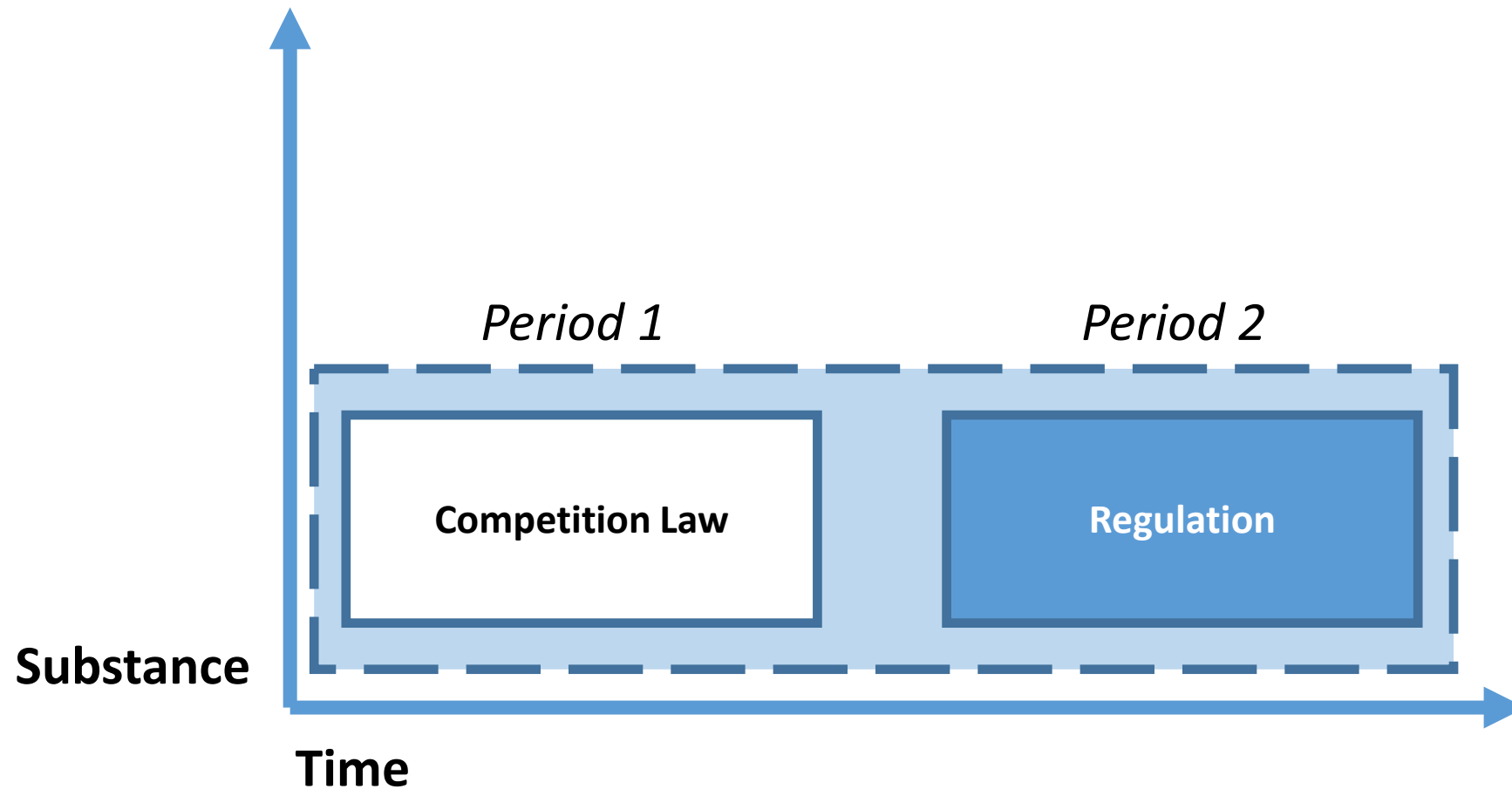
Pay TV bundles

# Competition Law and Regulation: substance

- In *Telefonica/Canal+ Spain* there are two competing logics
- The logic of sector-specific regulation: the promotion of competition
  - Sector-specific regulation seeks to undermine the dominant position of the incumbent over time
  - Intervention is triggered by a position of dominance
- The logic of competition law: the protection of competition
  - The point of merger control is to preserve the competitive constraints at the time of intervention, not to alter or increase them
  - The likelihood of foreclosure, not dominance, is what triggers intervention



# Competition Law and Regulation: substance



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- When competition law is applied ahead of planned regulation, it may be relied upon to further the objectives of the regime
- The recently launched sector inquiry into e-commerce illustrates this risk well
  - The inquiry is launched at a time when the Digital Single Market Strategy is a priority for the European Commission at large
  - The Commissioner stated clearly that the objective of the inquiry was to explore the contribution of competition law to legislative initiatives

# Competition Law and Regulation: substance

- A prominent aspect of the inquiry is the geo-blocking of content (inability to access content of choice from website of choice)
  - It is not obvious that geo-blocking is a consequence of a competition law infringement, but of the territoriality of copyright
  - Well-established principle in competition law: market partitioning is not prohibited if its purpose is to protect the essential function of copyright