

CONTENTS

<i>Acknowledgements</i>	<i>page</i>	ix
<i>Tables of cases</i>		xi
1 Introduction		1
I. Market failure and the pursuit of efficiency		6
II. Mechanisms to address market failure (I): the concept of competition law		14
(i) Theories of competition and monopoly		14
(ii) The structure of competition law: the US and EU systems of competition		18
(iii) The goals of competition law: outcomes or processes?		26
III. Mechanisms to address market failure (II): the concept of economic regulation		33
IV. A comparison of competition law and regulation		41
V. Conceptualising the interface between competition law and regulation		48
(i) Competition law and regulation as substitutes		49
(ii) Competition law and regulation as complements		54
VI. The interface in practice: the evolution of US telecommunications regulation		60
VII. Concluding remarks		65
2 Competition law as regulation		69
I. Competition law as substitutionary or gap-filling regulation		71
II. Doctrinal regulatory competition law: procedural and substantive dimensions		78
(i) Distinguishing regulatory competition law from competition law's established core		79
a. Administrative/technocratic enforcement		79
b. <i>Ex ante</i> enforcement		81
c. Prescriptive competition law doctrines		82

d.	Regulatory remedies	83
e.	Mandating 'best' solutions	84
f.	Regulatory competition law: jurisdictional variations	86
(ii)	The pros and cons of regulatory competition law	87
a.	Separation of powers	89
b.	Legitimacy and the rule of law	91
c.	Error costs and bad bargains	93
d.	Politicisation	95
e.	Assessing the pros and cons of regulatory competition law	96
III.	Procedural regulatory competition law: negotiated settlements	97
(i)	The American experience: consent decrees in US antitrust	98
a.	The nature of consent decrees: accommodating bargains, novelty and regulation	102
(ii)	Commitment decisions within EU competition law	108
a.	Commitment decisions and policymaking in the EU energy sector	112
(iii)	Negotiated settlements as regulation: a critical assessment	116
IV.	Doctrinal regulatory competition law: excessive prices and essential facilities	119
(i)	Excessive prices under competition law	120
a.	Antitrust approaches to excessive prices: the apparent US/EU dichotomy	123
b.	Excessive prices, regulation and the role of competition authorities	127
(ii)	The essential facilities doctrine	129
V.	Conclusions	136
3	Regulation, deregulation and the space for competition law	139
I.	Regulation absent competition law	141
II.	Critiques of regulation – the public-choice movement	143
III.	Public choice in practice: deregulation and privatisation	146
(i)	Deregulation in practice: the US and UK experiences	151
(ii)	Deregulation and the role of competition law	155
IV.	Reforming regulation: 'better regulation'	161
(i)	Better regulation and the role of competition law	168
V.	Regulation's substantive core: non-economic values and structural inefficiency	173
(i)	Distributional justice and other non-economic values	174
(ii)	Structural market inefficiency	175

(iii)	Regulating in lieu of antitrust: the EU Roaming Regulation	179
VI.	Conclusions	185
4	Concurrent application of competition law and regulation	187
I.	Conceptualising concurrency	188
(i)	Concurrent application of competition law in regulated markets: conceptual issues	188
(ii)	Competition problems in regulated markets: the example of margin squeeze	191
(iii)	Concurrency: conceptual approaches and criteria for application	193
II.	Concurrency in practice: The US and EU law positions	198
(i)	US antitrust and state regulation: the significance of sovereignty	199
(ii)	US antitrust and federal regulation: substance- and policy-focused approaches	203
a.	The conventional approach: a presumption of concurrency	203
b.	From concurrency towards preclusion: the <i>Trinko</i> and <i>Credit Suisse</i> decisions	205
c.	A holistic approach to concurrency and critiques of the new direction: the decision in <i>Town of Concord</i>	209
(iii)	Concurrent application under EU law: prioritising effectiveness, compromising legitimacy?	212
a.	Concurrent application of EU competition law and regulation: general principles	212
b.	Concurrency: the EU constitutional dimension	214
c.	Concurrency and ‘State action’ in EU law	215
d.	The EU approach: analysis and critique	221
(iv)	Analysis: differing approaches to concurrent application in practice	227
III.	The parameters of concurrency: economic, rule-of-law and institutional concerns	228
(i)	Analytical and economic concerns	228
a.	Accounting for the impact of regulation on markets and behaviour	229
b.	Risks of competition enforcement: false positives and inefficient outcomes	232
c.	Duplication of market supervisory functions	234
(ii)	Rule-of-law concerns	236
(iii)	Institutional concerns	243
a.	Private enforcement	243

b. Remedies	246
IV. Market circumstances where concurrency arises: policy implications	251
(i) Unrelated competition abuse arising in regulated markets	252
(ii) Regulation in pursuit of non-economic goals	254
(iii) Broken regulation: design inefficiency or regulatory capture	256
(iv) Regulatory gaming	258
V. Conclusions	261
5 Institutional issues at the interface of competition law and regulation	263
I. Allocation and sharing of powers between public-enforcement agencies	264
(i) The UK model: concurrent competition enforcement by regulators	267
(ii) The Australian model: an antitrust ‘super-regulator’	272
(iii) Resolving conflicts within the conventional division of labour	275
II. Institutional gateways to competition law and regulation (I): market studies	279
(i) Sector inquiries in the European Union	280
(ii) Market investigation references by the UK’s Competition and Markets Authority	285
a. The BAA airports inquiry	290
(iii) Market studies: analysis and concluding remarks	293
III. Institutional gateways to competition law and regulation (II): ‘hybridisation’	294
(i) Concretising competition principles: access to infrastructure regulation	296
(ii) Section 5 of the Federal Trade Commission Act	304
IV. Conclusions	314
6 Analysis and conclusions	316
I. The central role of the concept of competition law	319
II. Delimiting the interface between competition law and regulation: recurring issues	327
(i) General welfare <i>versus</i> individual rights	328
(ii) The role of efficiency	329
(iii) Democratic accountability <i>versus</i> political interference	330
III. Concluding remarks	332
<i>Bibliography</i>	335
<i>Index</i>	360