First collective dominance cases under the European consultation mechanism on electronic communications

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In the first semester of 2005, the Commission dealt with two collective dominance cases in the electronic communications sector. Both cases were notified to it under the so-called electronic communications consultation mechanism (1). The first case related to the market for broadcasting transmission services in the UK. The second case related to the market for wholesale mobile access and call origination in Ireland.

Introduction — the consultation mechanism

The EU regulatory framework on electronic communications that was adopted in 2002, generated a new symbiosis between the EU competition rules and sector specific ex ante regulation in the telecommunications industry. Pursuant to the Framework Directive on electronic communications (2), national regulatory authorities (‘NRAs’) must analyse a series of 18 product markets that are predefined by the Commission, on the basis of competition law and economics, as relevant markets susceptible to ex ante regulation (3).

If a market is found to be effectively competitive, i.e. if no undertaking is found to have significant market power (‘SMP’) on that market, no sector specific ex ante regulation can be imposed or maintained. The behaviour of the players on that market will then be governed solely by the general competition rules. By contrast, undertakings that are found to have SMP on one of the 18 markets must be made subject to appropriate ex ante regulation (such as transparency, non-discrimination, accounting separation or access obligations or price control), which will apply in addition to the general competition rules. The concept of SMP is equivalent to ‘dominance’ as defined by the European Court of Justice in competition law cases. An undertaking is deemed to have SMP if, either individually or jointly with others, it enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers (4).

NRAs must notify the results of their market analyses and the regulatory obligations that they intend to impose (if any) to the Commission. In the context of the so-called electronic communications consultation mechanism, the Commission verifies the draft measures’ compatibility with Community law and their contribution to the single market. (5) Upon receipt of a notification, the Commission has one month to make comments on the notified draft measure, to make no comments or, if it has serious doubts concerning the proposed market definition or SMP analysis, to open a second phase investigation. At the end of the second phase investigation, the Commission can prohibit the NRA to adopt the notified draft measure (so-called veto decision). The Commission has received more than 185 notifications so far, from NRAs in 15 Member States. At the time of writing it had adopted 4 veto decisions (6), 67 comments letters and 32 no comments letters (7).

Broadcasting transmission services in the UK

On 11 November 2004, the UK regulator, Ofcom, filed a notification concerning broadcasting transmission services (market nr. 18 in the Recommendation). Broadcasting transmission services consist of carrying broadcast content over electronic

(1) A third collective dominance case is at the time of writing under investigation and will not be the subject of this article. The case concerns the market for mobile access and call origination in France (case FR/2005/0179).
(4) Pursuant to Article 14(2) of the Framework Directive.
(5) For a detailed description of the consultation mechanism on electronic communications see ‘The Article 7 consultation mechanism: managing the consolidation of the internal market for electronic communications’ by Reinald Krüger and Luca Di Mauro in the Competition Policy Newsletter, 2003, number 3, p. 33.
(7) Some comments letters and no comments letters deal with several notifications at the same time.
communications networks (cable, satellite, or terrestrial networks) to end users. Broadcasting transmission services are generally supplied to broadcasters (TV and radio content providers), who on their turn provide a full package service, including content and transmission, to the consumers.

**Market definition**

Ofcom's notification focussed on broadcasting transmission services over terrestrial networks, which in Ofcom's view constitute a different market from transmission services over cable and satellite networks. The UK market for TV and radio viewers and listeners has an overall reach of 24.5 million households corresponding to 59 millions inhabitants. All households have access to terrestrial TV and radio; 44% of households have only access to terrestrial platforms. There are essentially two companies operating terrestrial networks in the UK: ntl and Crown Castle. As regards terrestrial broadcasting transmission, Ofcom identified 2 layers of markets, one being upstream of the other. At the upstream level, it identified one market for the access to the masts and sites of Crown Castle and another market for the access to the masts and sites of ntl. Ofcom considered that access to Crown Castle’s mast and sites and access to ntl's masts and sites are complementary products, not substitutable products, as both are needed together to broadcast throughout the UK (the Crown Castle masts and the ntl masts indeed cover distinct regions dotted all over the country). Ofcom concluded that Crown Castle and ntl are individually dominant on the market for access to their respective masts and sites. The Commission did not object to that conclusion (1), and the relevant part of the notification will not be dealt with further in this article.

The more controversial part of the notification concerned the market for managed transmission services (MTS) over terrestrial networks in the UK, which is a market downstream of the markets for access to masts and sites (2). Both Crown Castle and ntl are active on the MTS market. The companies grant each other access to their masts and sites, so that they are both able to provide managed transmission services covering the entire territory of the UK. But will these companies effectively compete with each other? That was the relevant question in this case.

**Collective dominance?**

In its notification, Ofcom argued that Crown Castle and ntl held a joint dominant position on the MTS market in the UK, as both companies were in Ofcom’s view unlikely to compete effectively. Ofcom based this view essentially on a ‘check list’ review of the market characteristics that are enumerated in Annex II to the Framework Directive. The Commission services recognized that certain market characteristics indeed point towards the MTS market being conducive to collective dominance, in particular the high market concentration, barriers to entry, symmetric market shares, similar cost structures, structural links between the parties, low elasticity of demand and moderate growth on the demand side. However, other market features seemed to suggest a different conclusion, in particular the absence of transparency in the market (no transparent pricing).

More importantly, however, the Commission services considered in their preliminary analysis that if one were to look beyond isolated market characteristics at how the MTS market functions in practice, the finding of collective dominance was questionable. They considered that Ofcom in its notification had not provided sufficient evidence that Crown Castle and ntl were likely to collude (i.e. that they had the possibility and incentive not to compete amongst each other), nor that such collusion would be sustainable (i.e. that there was an effective retaliation mechanism in case one of them were to deviate from the collusion (3)).

Ofcom had not established, it seemed, a focal point on which Crown Castle and ntl could and would be likely to collude. As contracts in the MTS market are generally awarded through single round bidding procedures, prices and other contract conditions are intransparent, which make them difficult to collude on. There also seemed to be no indication of customer sharing, as both operators had competed in biddings for past contracts, even though few customers had actually switched supplier (4).

(1) See the Commission’s no comments letter of 28 January 2005 in case UK/2005/0111.

(2) In addition to access to masts and sites, significant investments in transmission equipment installed on these masts and sites, in engineering and customer services are required in order to be able to provide managed transmission services.

(3) As required by the CFI in Airtours.

(4) The Commission found that the absence of switching in the past could have been caused, at least partially, by legacy investments by the supplier which were customer specific. For future contracts it seemed however that these would not play such a major role as the switch over from analogue to digital transmission services that both suppliers are in the process of implementing, would require Greenfield investments anyway. In addition, as the main contracts would be concluded for a long period of time (10 years or more) and well in advance of implementation (up to 7 years ahead) customer specific investments did not seem to form an obstacle.
Moreover, the Commission services discussed with Ofcom that market players met each other infrequently: only 3 biddings for TV broadcasting contracts (with a duration of 10 years and more) and 3 biddings for much smaller radio broadcasting contracts were likely to be organised in the next 5 years. Under those circumstances, it was not clear how effective retaliation could occur. The 3 TV broadcasting contracts (with Digital 3 and 4, SDN and the BBC) were expected to be negotiated within a relatively short timeframe (between April 2005 and the end of 2005). The next foreseeable negotiations for major contracts would take place only 10 to 12 years later. Of the 3 contracts to be reallocated in 2005, 2 are currently held by ntl (the Digital 3 and 4 contract and the SDN contract) and 1 by Crown Castle (the BBC contract). As the BBC contract would most likely be negotiated first, once the bidding for this contract would be over, there seemed to be no incentive for Crown Castle not to compete effectively for the 2 remaining contracts as ntl would have no means of retaliation. This situation, known in economic theory as a ‘finite game’, seemed to undermine effective retaliation, which is an essential element to find collective dominance under EU competition law.

Withdrawal of notification

During the first phase of the consultation procedure, the Commission services discussed their preliminary concerns about the collective dominance finding with Ofcom. On the basis of these discussions, Ofcom withdrew its notification with regard to MTS. Throughout the entire consultation mechanism (first phase and second phase), an NRA has the possibility to withdraw a notification. Such a withdrawal terminates the consultation procedure, without the Commission adopting a decision. The withdrawal of a notification is publicised on the Commission’s dedicated website for the electronic communications consultation mechanism (\(^*\)).

The market for mobile access and call origination in Ireland

On 10 December 2004, the Commission received a notification by the Commission for Communications Regulation (‘ComReg’) concerning the wholesale market for access and call origination on public mobile telephone networks in Ireland (market nr. 15 in the Recommendation). Access and call origination services are provided by mobile network operators to independent service providers (resellers which do not issue their own SIM cards) or so called mobile virtual network operators (MVNOs — which issue their own SIM cards). Hence, independent services providers or MVNOs use the network of mobile network operators to offer mobile telephony services at the retail level in direct competition to the retail arm of the host network.

There are three mobile network operators active in Ireland, namely Vodafone (since 1985), O2 (since 1997), Meteor (since 2001). The 3G operator ‘3’ has not yet launched services in Ireland. Currently none of these MNOs offers wholesale access and call origination to third parties. Since there are no transactions on the merchant market ComReg considered all sales to be captive and used market shares in the retail market as a proxy for market shares in the relevant wholesale market. The market shares of the operators in terms of subscribers in September 2004 were 54% (Vodafone), 40% (O2), and 6% (Meteor). In terms of revenue the distribution of market shares was 58% (Vodafone), 39% (O2), and 3% (Meteor).

Collective Dominance — structural characteristics of the market

ComReg identified a number of structural characteristics of the Irish market which it found to be conducive to coordinated behaviour between Vodafone and O2, most notably the structure of the market, the incentive to coordinate, the ability to coordinate, the ability to detect cheating, the enforceability of compliance and actual and/or potential market constraints.

As far as market concentration is concerned ComReg stated that Vodafone and O2 together held in September 2004 94% of the market in terms of subscribers and considered the third operator Meteor unlikely to alter the high degree of concentration in the market over the period of the review. The incentive to coordinate is in ComReg’s view strong since there are only two firms to share the proceeds from coordination and while the two market shares are not identical (symmetric) their absolute size gives a strong enough incentive to coordinate. Further to that, frequent interactions between the two players common to a network industry, steadily increasing demand, lack of drastic innovation favouring one of the two network operators, in ComReg’s view all positively impact on the incentive to coordinate.

The ability to coordinate depends in ComReg’s view on the existence of a simple and transparent

\(^*\) http://forum.europa.eu.int/Public/irc/infso/ecctf/home.
focal point. ComReg identified a focal point with two dimensions, one being price, the other being the denial of access to independent service providers or MVNOs. ComReg believes that Vodafone and O2 offer broadly the same portfolio of services whose complex tariffs can be made transparent by the method of Minimum Monthly Bills (MMBs), a measure used by operators to monitor rivals’ tariffs. The analysis of pricing data revealed relatively stable mobile prices particularly for post pay high volume users. The other dimension of the focal point, denial of access to independent entities, has the potential to lessen competition in the retail market and is both simple (access is either granted or denied) and transparent. The fact that there are currently no independent service providers in Ireland must be, in ComReg’s view, due to such denial of access (1). ComReg indicated that there is ‘pent-up demand’ (i.e. unfulfilled demand) of service providers seeking access to MNOs’ networks.

The ability to detect cheating means that members of the oligopoly can quickly find out about a deviation from the common policy either in terms of price or access granted to third parties. As outlined above, ComReg stated that price movements are easily detectable through MMBs. Similarly, the denial of access to third parties (the second dimension of the focal point) would, according to ComReg, be immediately visible through the appearance of a service provider or MVNO on the Irish market.

Enforceability of compliance means that deviation can be effectively punished and hence coordination between undertakings more easily upheld. In the Irish context if one firm tried to acquire a significant increase in the number of customers through a price decrease then this would result in the other firm also lowering its prices and a new market equilibrium featuring lower prices overall. Similarly, if Vodafone or O2 were to grant access at the wholesale level, which would allow a service provider to acquire a significant number of customers, the other firm could retaliate by also granting access.

ComReg stated that neither Vodafone nor O2 are subject to actual and/or potential market constraints. The fringe competitor in the Irish market is Meteor whose past record in attracting subscribers does not seem to pose a serious threat to Vodafone and O2. Despite its lower prices Meteor has until November 2004 not made an impact on Vodafone’s and O2’s prices particularly in the post paid segment of the market. In this segment Meteor has only been able to gain a market share in terms of subscribers of 1% since its launch in 2001 while it has a share of 8% in the pre paid segment.

**SMP finding and regulatory obligations**

ComReg concluded that on the basis of the market characteristics there is evidence of a jointly held position of dominance between Vodafone and that this position is sustained by the refusal to grant access to wholesale airtime or access to an MVNO. As a consequence, ComReg designated Vodafone and O2 as being jointly dominant on the wholesale market for mobile access and call origination. ComReg plans to impose an obligation to provide network access following a reasonable request, a non-discrimination obligation, an obligation of price control by way of cost orientation, an obligation to prepare separated accounts, and an obligation to implement appropriate cost accounting systems. ComReg will allow SMP operators a period of time to meet their obligations regarding access and non-discrimination during commercial negotiations. Only if these are unsuccessful ComReg will direct SMP operators to implement those obligations relating to price control and cost orientation.

**The Commission’s comments**

The Commission did not object to this finding of joint dominance. It considered that ComReg had demonstrated that the characteristics of the market make it conducive to collective dominance and that such form of coordination is sustainable; the oligopolists apparently have no incentive to deviate from the coordinated outcome (considering the ability of the non-deviators to retaliate), and fringe competitors do not (currently) appear to have the ability to challenge the coordinated outcome.

However, ComReg’s analysis focused to a large extent on transactions occurring at the retail level of the market because all supply on the relevant market is captive, i.e. provided internally by vertically integrated mobile network operators. In such a case the structure of supply at the wholesale level — at least market shares of the undertakings active on the relevant market — can be derived from supply at the retail level. Other characteristics of the market and competitive conditions at the retail level can also be relevant to assess whether the corresponding wholesale market is conducive to tacit collusion. However, the Commission has in its decision commented that a company’s performance on the retail market does not automatically mirror its position and conduct on the upstream

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(1) A national roaming agreement was signed between O2 and Meteor in August 2004. A national roaming agreement is, however, not the same as an MVNO agreement because it only concerns occasional roamers in those areas of the country where Meteor has not yet rolled out its own network.
wholesale market, even if there are currently no market transactions taking place. In principle the smallest operator can offer wholesale access (and has the strongest incentive to do so) and can become the most important player on the merchant market. The retail market conditions may inform an NRA of the structure of the wholesale market, they may and need not in themselves be conclusive as regards the finding of SMP at the wholesale level.

The letter sent to ComReg also includes a comment on the degree of uncertainty as far as the performance of fringe competitors on the Irish market is concerned. Especially in the fourth quarter of 2004 Meteor appears to have been able to benefit from its national roaming agreement with O2 and could now be in a position to attract a larger proportion of customers than anticipated in ComReg’s analysis. This may also indicate the possible emergence of a constraint on Vodafone and O2’s ability to behave independently of their competitors. Hence the Commission requested ComReg to monitor the developments of the emergent competitors Meteor and ‘3’ very closely. In case these competitors prove capable of gaining retail market share (including in the post-paid segment) rapidly and at the expense of Vodafone and O2, one of the criteria which currently imply collusive behaviour by these two operators may no longer be met.

Even if fringe competitors were not able to exert a competitive constraint at the retail level, they may be able to do so at the wholesale level. As far as Meteor is concerned, as a result of the national roaming agreement concluded with O2, one of the fundamental conditions to be able to offer national coverage to an MVNO may now have been fulfilled. Indeed, in order for tacit collusion to be sustainable, it must be shown that fringe competitors do not have the ability to challenge any anti-competitive coordinated outcome. In this context it must also be stressed that for a competitor to be able to disrupt tacit collusion, it is not necessary to be a strong competitor of the tacitly colluding parties. (1) It is sufficient if customers can foster the emergence of other leading players by contracting with the existing smaller competitors.

The Commission has therefore asked ComReg to closely monitor the behaviour of fringe competitors on the wholesale market for mobile access and call origination. Any concrete evidence that these companies act as credible access provider alternative to Vodafone and O2 would cast doubt on the sustainability of the collectively dominant position.

Conclusion: how high is the standard for proving collective dominance in the electronic communications sector?

The Court of Justice has set the standard for proving collective dominance cases high in any sector, not just electronic communications. Under the electronic communications consultation mechanism, the Commission aims to ensure (i) that the NRAs market analysis is compatible with the EU competition rules, (ii) a coherent and harmonized approach throughout the EU and (iii) that ex ante regulation is only imposed on undertakings for which it has been duly demonstrated that they have significant market power.

This implies that the Commission, while recognising that NRAs enjoy certain discretionary powers, which reflect the complexity of all relevant factors that must be assessed when determining the existence of undertakings with significant market power, will continue to scrutinise carefully under the electronic communications consultation mechanism whether an NRA’s finding of collective dominance is supported by sufficient evidence. To support a finding of collective dominance, NRAs must prove that the requisite legal standard set out by the case law of the Community Courts and in line with the Commission’s SMP Guidelines (2) that the characteristics of the market make it conducive to collective dominance and that such form of coordination is sustainable. For the coordination to be sustainable, regulators must show on the basis of a cogent and consistent body of evidence that (i) none of the oligopolists have the ability and incentive to deviate from the coordinated outcome, because in case of such deviation the non-deviators would have the ability and incentive to retaliate and (ii) that no buyer, fringe competitor or potential entrant has the ability and incentive to challenge any anti-competitive coordinated outcome within the timeframe of the review.

In the Irish case covered by this article the Commission found that ComReg has not exceeded its margin of discretion by concluding that at the


stage of market analysis, even in a forward looking review, developments of emergent competitors to Vodafone and O2 were too uncertain to affect its collective dominance findings. In the UK case, the Commission services preliminarily concluded that the requisite legal standard of proof had not been met, although the Commission did not formally express its views, as Ofcom withdrew its notification concerning MTS in the UK in the course of the first phase of the investigation.