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Use of EC Competition Rules in the Liberalisation of the European Union's Telecommunications Sector

Assessment of Past Experience and Conclusions for Use in other Utility Sectors¹

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The liberalisation of telecommunications represents one of the most fundamental structural changes to which EU competition policy has contributed to date and forms now the backbone of the e-Europe policy, which has become a central Commission policy line. The question remains how far that experience could be transferred to other utility sectors where liberalisation and the introduction of effective competition have progressed at lower speed. With this objective in mind this report reviews the past experience of application of competition rules in the sector and addresses the question about a generalisation of this experience in its conclusions.

I. BACKGROUND

- In *British Telecommunications*², the Court of Justice confirmed that EU competition rules applied to the telecommunications sector. This established legal limits to the monopoly structure of the sector, as well as a requirement to act for the Commission, in order to pre-empt future complaints and lengthy legal procedures.
- From 1985 onwards, the 1992 Single Market Program provided a strong political incentive and framework particularly in the initial phase³.

The combination of these factors resulted in the issuing by the Commission of:

- The 1987 Telecommunications Green Paper which set a comprehensive policy framework for EU action in the telecommunications sector⁴.

The main subsequent stages were:

- The 1992 Review, resulting in the decision on full liberalisation by 1st January 1998. The results of this report later formed the core action of the Bangemann report ;
- the 1995 Telecom Reform Package, integrating full liberalisation into EU legislation, subsequently adopted during 1996-1997 ;

2 *British Telecommunications*, OJ L 360/36 (1983), on appeal in *Italy v Comm'n*, Case 41/83 1985 ECR 873 (C.J.).

3 A similar role is now being played by the e-Europe programme and the political cover by the Lisbon and Feira European Councils for the July 2000 telecom reform package.

4 European Commission, *Towards a Dynamic European Economy—Green Paper on the Development of a Common Market for Telecommunications Services and Equipment*, COM (87) 290 (1987). The Green Paper took a very comprehensive approach reaching from market and competition considerations to the establishment of a social dialogue and analysis of the social and employment impacts. This started an extensive process of public consultation and led within the subsequent twelve months to an agreement on a basic political framework with Parliament and Council. See Council Resolution of 30 June 1988 on the development of the common market for telecommunications services and equipment up to 1992 (88/C 257; OJ C257, 4.10.88).

- The Reform Package served as a basis for the Community's position in the WTO negotiations on the liberalisation of telecom services, agreed in 1997⁵. The requirement for Member States to spell out clear commitments in the context of the schedule set out in that agreement further stabilised the process ;
- full liberalisation on 1 January 1998 ;
- the convergence debate, starting fully with the Convergence Green Paper⁶ ;
- the Telecom Reform Package of July 2000, aiming at consolidating the acquis in telecom liberalisation and integrating convergence principles into the Community's legislative framework.

This latest development has culminated in the political agreement by Council on the Reform Package in April 2001 opening the way towards final adoption by the European Parliament and the Council in the second stage of the codecision procedure. This latest reform package integrates further competition law principles into the regulatory framework, in particular as regards the use of market definitions and the concept of dominant positions as developed under competition law as the basis for future regulation of the sector. The analysis of these aspects falls outside the objectives of this report.⁷

II. USE OF ARTICLE 86

A major innovation and a unique feature of the EU telecommunications liberalisation drive were the extensive use of Article 86 powers by DGCOMP.

Based on the positions set out in the 1987 Telecommunications Green Paper the Commission adopted in 1988 respectively 1990 two directives based on Article 86(3) with a view to implementing the major liberalisation goals of the Green Paper. On 16 May 1988 it adopted the Telecommunications Terminal Directive (88/301/EEC)⁸ which opened the markets for telecommunications terminal equipment on which most European telecommunication administrations enjoyed monopoly rights at that time. The Directive set out in particular the obligations for the Member States to withdraw all special and exclusive rights with regard to terminal equipment and to ensure that economic operators had the right to import, market, connect, bring into service and maintain terminal equipment.

5 Also setting the date for liberalisation for January 1998 and enacted in February 1998. Regarding Member States transition periods, see below.

6 Green Paper on the convergence of the Telecommunications, Media, and Information Technology Sectors and the Implications for Regulation, COM (1997) 623.

7 See however analysis elsewhere in this issue and Commission Working Document on Proposed New Regulatory Framework for Electronic Communications Networks and Services - Draft Guidelines on market analysis and the calculation of significant market power under Article 14 of the proposed Directive on a common regulatory framework for electronic communications networks and services, COM (2001)175, 28 March 2001.

8 Commission Directive 88/301/EEC, on competition in the markets in telecommunications terminal equipment, OJ L 131/73 (1988).

The opening of the telecommunications services market was initiated by the second Directive, the so-called Services Directive of 28 June 1990⁹. This Directive had a structure very similar to the Terminal Equipment Directive. It provided for the removal of special and exclusive rights granted by Member States for the supply of all telecommunications services other than voice telephony. By defining the term "voice telephony" for the purposes of this Directive narrowly¹⁰ the Directive also liberalised telephony services other than those provided for the general public, e.g. voice services for corporate communications or so-called closed user groups, and, in particular all data services—the very basis for the operation of independent Internet Service Providers (ISPs) and therefore the introduction of the Internet in the European Union later. In January 1998, the Commission confirmed in a Notice¹¹ that under the definition of the 1990 Services Directive, voice on the Internet could in principle not be considered as voice telephony because it did not match all the criteria set out in this definition. With this it confirmed that the Article 86 Services Directive would ensure a liberal regime for Internet services in the European Union.

Given the political significance of these directives as regards their substance, but perhaps even more as regards the nature of the legal act taken, both decisions were challenged in the Court of Justice by a number of Member States¹². In its Judgement of 19 March 1991 on the Terminal Equipment Directive¹³ and its Judgement of 17 November 1992 on the Services Directive¹⁴ the Court confirmed the legality of the Directives in all essential points.

From the Commission's point of view two conclusions could be drawn from these Judgements as regards the further development of European telecommunications policy:

- First, the Court had confirmed the Commission's power to adopt directives under Article 86(3) in order to clarify obligations of the Member States deriving from this article. It had also confirmed that the Commission could clarify the obligations of the Member States in a specific sector and that this power could go as far as requiring Member States to withdraw special and exclusive rights¹⁵.

9 Commission Directive 90/388/EEC, on competition in the markets for telecommunications services, OJ L 192/10 (1990).

It is interesting to note that the Directive was initially adopted by the Commission in June 1989 but suspended until the adoption of the ONP Framework Directive based on Article 95 by Council, in order to respect the basic balance between the two instruments.

10 According to the Directive 'voice telephony', "means the commercial provision for the public of direct transmission and switching of speech in real time between public switched network termination points, enabling any user to use equipment connected to such a network termination point in order to communicate with another termination point."

11 Status of voice communications on the Internet under Community Law, and in particular, under directive 90/388/EEC (OJ C 6, 10.1.1998). Reviewed and maintained in its essential points in December 2000.

12 France, with Germany and other Member States joining, tested the Directive in the Court.

13 France v. Comm'n, Case C-202/88, 1991 ECR I-1259 (C.J.).

14 Spain v. Comm'n, Joined Cases C-271/90, C-281/90 and C-289/90, 1992 ECR I-5833 (C.J.).

15 Going substantially beyond the approach in the first Transparency Directive - the first Commission Directive based on Article 86(3)

- Secondly, the Court had confirmed that where the withdrawal of special or exclusive rights can be required, the Commission could also set out the conditions in order to make the abolition of special and exclusive rights effective¹⁶. Examples for such conditions in the Services Directive are the provisions concerning the authorisation of services or the provisions on publication requirements. In political terms such conditions made it possible to link the liberalisation measures into the general policy measures for the sector and ensure the creation of a coherent framework at Community level.
- The Court ruling allowed taking a highly pro-active stance with regard to further application of Article 86(3) Directives for advancing liberalisation. Universal service goals ("services of general economic interest in the sense of Article 86(2)) were to be achieved with the "least restrictive means"¹⁷.

Without going into further detail, the adoption of the Article 86 Full Competition Directive establishing the date of full liberalisation on 1 January 1998 was the ultimate step and decisive for the success of the overall policy. The particular issue to be dealt with was the abolition of the derogation under Art. 86(2) for the public telecommunications network and for public voice telephony.

Article 86(2) allows derogation from Community Law where it would obstruct, either in law or in fact, the performance of the particular task assigned to undertakings entrusted with tasks of general economic interest. As mentioned, in its 1990 Directive, the Commission had granted a temporary exemption under this Article in respect of exclusive and special rights for the provision of voice telephony. The argument was that financial resources for the development of the network still derived mainly from the operation of the telephony service. The opening-up of that service could, at that time therefore, threaten the financial stability of the existing telecommunications organisations and obstruct the performance of the task of general economic interest assigned to them: "This task consists in the provision and exploitation of a universal network, i.e. one having general geographic coverage, and provided to any service provider or user upon request within a reasonable period of time"¹⁸.

The Directive contained a review clause. Subsequent to the review and the public consultation organised by the Commission in 1992 on the situation in the telecommunications sector, the Council in 1993 adopted the resolution on the

16 Laying in effect the foundations of what could develop into an "effects doctrine" for the application of Article 86

17 This prepared the ground for a highly pro-active approach in applying Article 86(3) in the telecom sector. From 1994 onwards, the Article 86 Satellite, Cable, and Mobile Directives were adopted—all of them as amendments to the original Services Directive, in order to minimise the political and legal risks to destabilise the process. These Directives can be seen as a logical extension of the original Telecommunications Services Directive, brought forward, however, in a rapid sequence and liberalising substantial parts of the EU telecommunications market. They also represented a major step in developing the procedural framework for the use of the Commission's right of issuance of Article 86(3) directives, by strengthening the transparency and accountability of the process and establishing the principle of transmission to Council and Parliament for their position and of a formal period for public comment.

18 Commission Directive on competition in the markets for telecommunications services, 90/388/EEC, ante, Recital 18.

liberalisation of all public voice telephony services by 1 January 1998¹⁹. In its resolution, the Council therefore recognised that there are less restrictive means than the granting of special or exclusive rights to ensure this task of general economic interest.

Subsequently, the Commission adopted the Article 86 Full Competition Directive. The Directive withdrew the Art. 86(2) derogation for public voice and the underlying network infrastructure. It lifted all remaining exclusive and special rights in the sector, in particular for public voice telephony and network infrastructure at the latest on 1 January 1998, with additional transition periods for a number of Member States²⁰.

- Defined the less restrictive means, which could be used to safeguard the services of general economic interest for which derogation therefore was no longer required. This meant the setting up of a universal service fund financed by all market participants or supplementary (access charges) to competitors by the incumbent Telecommunications Organisations but under strict control of the NRA's (the newly created National Regulatory Authorities for the telecommunications sector) and the Commission.
- The Directive specified in general terms the conditions which could be included in national licences: Member States could include in licensing or declaration procedures only those conditions aimed at compliance with: essential requirements as specified in the Directive; public service specifications relating to permanence, availability and quality of service; financial obligations with regard to universal service.
- Established a firm time schedule for the required national reforms, in order to allow market participants to plan for market entrance.

The main determinants for the success of the Article 86 approach therefore were:

- A general political framework had been established and a political consensus developed that full liberalisation was needed to build the Information Society. This was fundamental for setting the political climate both for Council and Parliament. This climate was further enhanced by the growing interests of the incumbents to be freed from government interventions and to have free access to capital markets.
- A consistent line of Directives and Court Rulings had been built up. A reform package was established that balanced Article 86 (Full Competition Directive) and Article 95 Directives (ONP Framework, Licensing, and Interconnection Directive). In this way, also the institutional balance in decision-making and rule setting (between Commission, Council, Parliament and Court) was maintained.

19 In its resolution of 1994, Council included network infrastructures.

20 Later shortened by Article 86 Decisions addressed to these Member States, setting the latest date (Greece) to 31 December 2000.

The Commission took a pro-active line on developing Community law interpretation - taking a calculated risk of having its interpretation tested by the Court. In this way it expanded in principle also the legal options which were open to it in other fields²¹.

The application of Article 86 spearheaded the liberalisation of the EU telecommunications sector and with this, of a core sector of the information society. At the same time, the development demonstrated that the full effect of EU competition law in this respect could only be achieved by carefully correlating the measures with the development of the general regulatory framework and the build-up of a national "regulatory infrastructure". The approach was based on the conviction that the objectives at EU level of liberalising sectors must be internalised into the Member States political and regulatory structures to create the necessary base and the "political mass" required for major liberalisation exercises.

The very basis of action in the telecommunications sector was that the Commission recognised the objective of universal service in the sector, but that it strongly emphasised proportionality of measures to secure this goal. It generated, by broad consultation exercises, the general conviction that this task could be secured by less restrictive means than retention of monopoly rights, e.g. by financial contributions or the creation of universal service funds. The telecommunications sector is now seen as the best demonstration in the Community that the goals of competition and public service can therefore be complementary and mutually reinforcing²².

Another important result of the work was the clarification of procedures. Steps were taken to ensure measures in this area to have similar degree of transparency as other measures in the competition field. Particularly, the introduction of a two-month public comment period and the establishment of consultation procedures with the Council and the European Parliament were of critical importance.

III. THE GLOBAL ONE CASE

A major factor in the success of the liberalisation programme was the screening of the major strategic alliances which started to take shape during the mid-nineties in anticipation of liberalisation and which commanded substantial Member States interests and attention. At the time these alliances qualified as co-operative joint ventures and were subject to screening under Regulation 17, Articles 81 and 82, TEC²³.

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- 21 The legal results were substantial: recognition by Court of the Commission's power to act; confirmation that pursuant to Article 86 special and exclusive rights cannot only be modified, but abolished as far as they cause enterprises by their mere existence to infringe basic Treaty rules, e.g. freedom to provide services or abuse of dominant market power; confirmation by the Court that the derogation given under Art. 86(2) from Treaty rules must be interpreted in a narrow and proportionate manner. The undertaking in question must show that its entrusted task is made impossible, not merely more difficult or more complicated.
 - 22 The general approach of the Commission to public service goals was subsequently elaborated further in the two Commission communications on Services of general interest of September 1996 (JO C 281, 26.9.1996) and September 2000.
 - 23 Subsequent to the amendment of the Merger Regulation in 1997 and its extension to cover also joint ventures with cooperative effects, most of them would now qualify for review under that regulation (as do most of current alliances cases).

The basic situation was that in the existing pre-1998 market environment (with monopolies still persisting) these preparatory moves by the large incumbents would not have qualified for exemption under Article 81(3), given the potential of leveraging existing monopoly power into the new markets shaped by liberalisation and technological development. However, instead of taking a static approach, a dynamic solution was chosen. The Member States concerned were encouraged to change market conditions (by accelerating liberalisation), in order to make a clearing of the alliances (with conditions) possible. The dynamics of the process thus created a parallelism of interest (in accelerating liberalisation) between incumbents (in order to have their alliances cleared), Member States (in order to allow the development of the potential of their national markets) and the Commission (in order not to be obliged to block new services and new technologies). This was probably the turning point in the liberalisation exercise. It created substantial political impetus for rapid implementation of the legislative liberalisation framework by key Member States, both in Council and at national level for preparing national legislation in time and creating a national infrastructure of NRAs²⁴.

In this context, the Global One case stands out, both in its own right and as a precursor to other alliances, which followed.

The GlobalOne case concerned a combined alliance of DT (Deutsche Telekom) and FT (France Telecom), the first and second largest player on the European telecommunications market, and a global link-up with Sprint, one of the major US carriers, with a number of associated transactions²⁵. The objective of the venture was to offer advanced telecom services on a trans-European and global basis.

The details of the venture were set out in the Notices published in the framework of the procedures under Regulation 17, and in the final Decision by the Commission²⁶.

The details of the venture will not be reviewed here. The important points in the current context were:

- The link-up between the two most important actors of the European telecommunications market was clearly a dominating event in the run-up to the date of full liberalisation on 1st January 1998. It represented the departure in Europe from the traditional nationally focused telecom model towards a European and global perspective, and was a forerunner of the global Internet focused ventures under review later.
- It became during the analysis undertaken under Article 81 and 82 rapidly clear that a link-up of that magnitude would not be acceptable under (then still existing)

24 National Regulatory Authorities established according to the Article 86 Directives and the ONP framework. National Competition Authorities interact with the NRA, according to provisions of the respective Member States laws. See discussion Access and Interconnection.

25 GlobalOne is now entirely owned by FT.

26 European Commission Notice on Atlas, OJ C 377/9 (1994), the alliance between DT and FT; European Commission Notice on Phoenix, JC184/11 (1995), the global link-up between Atlas and Sprint; Commission Decisions 96/546/EC and 96/547/EC of 17.7.1996, Atlas and Phoenix (OJ L 239, 19.9.1996, p.23 / p.57), subsequently referred to as GlobalOne.

national monopoly market conditions. It was therefore up to the Member States regulating the national markets concerned to change those market conditions and to make firm commitments on accelerated liberalisation, as already mandated by the (then still draft) Full Competition Directive.

- The Commission took a firm position on these principles and obtained the necessary concessions. The case can be seen as ultimately tipping the balance in the European Union from monopoly markets towards full liberalisation.

The outcome of the case is well known. The global venture was approved with a number of stringent conditions²⁷. But the main modification of the market environment which made the approval possible were the commitments by France and Germany to agree to the liberalisation of alternative infrastructure by 1st July 1996²⁸ and to accelerate preparation of the full liberalisation by 1. January 1998.

With this outcome, synergies between Article 86 measures and scrutiny of cases under Article 81/82 played a determining role in the liberalisation of the European telecommunications sector.

IV. COLLECTIVE USE OF CASE PROCEDURES

While the application of Article 86 directives established the very base for the liberalisation of the telecommunications sector in the community, and the full use of the synergy between the review of the alliances of the major market operators and the liberalisation goals was most striking in the screening of the GlobalOne alliance, four other instruments available under competition rules played a major role:

- the use of Article 86 Decision directed at individual Member States, in order to reduce the transition periods ;
- the opening of Article 86 procedures to progress the liberalisation of the mobile sector ;
- the use of own initiative procedures under Regulation 17 in a highly focused manner
- the "rediscovery" and launching of sector inquiries under Article 12 of Regulation 17

Transition periods

Once the basic liberalisation dates were established under the Article 86 Full Competition Directive, the market distortions introduced by the transition periods for a number of Member States—without which political agreement and the passing of the 1995 package could not have been achieved—became a major issue. The use of

27 See Decision, above.

28 The exemption under the Decision was made dependent on the actual issuing of infrastructure licences.

Article 86 Decisions directed at individual Member States turned out to be a highly efficient means of reducing these distortions.

The Full Competition Directive foresaw that the Commission would review the justification for the transition periods politically agreed in Council²⁹. In consequence the Commission initiated procedures with regard to the five Member States concerned to establish in how far the application of the exception provided for under Article 86(2) could be applied to justify these transition periods. This was done with the tacit support of the other Member States which wanted to see the market distortions reduced which were the consequence of the unequal progress in liberalisation—as is the case currently in other utility sectors.

In the case of telecommunications, the Commission addressed Decisions based on Article 86(3) to the five Member States concerned that shortened the transition periods very substantially³⁰. It thus demonstrated that individual Decisions can be used successfully to reduce market distortions when they are caused by the maintenance of exclusive and special rights no longer justified under the test of Article 86(2).

Mobile communications

Mobile communications developed during the nineties into a main driver of liberalisation of the entire telecommunications market—with an immediate major impact on consumer awareness of the advantages of liberalisation—and became a major factor in strengthening the European technology position on the world market. While the early development of the advanced GSM digital technology throughout the eighties was one major factor in this success, the other one was the rapid introduction of the new technology into the marketplace by competition in Member States markets. The market introduction under competition led to the rapid attainment of economies of scale for the new technology—a major advantage with regard to other competing technologies on the world market.³¹

At a time when there was still no general Directive on the liberalisation of mobile communications issued, the launching of a number of individual procedures³²—directed at Member States that lagged the liberalisation of mobile markets in the other Member States—led to a substantial acceleration of liberalisation respectively to the establishment of non-discriminatory procedures for mobile licences. Most of the procedures could be terminated before the issuance of a Decision because the

29 Five years for Greece, Ireland, Portugal and Spain, and two years for Luxembourg.

30 Decision Irish Telecom OJ L 41, 12.2.1997; Decision Derogation request Portugal OJ L 133, 24.5.1997; Decision Derogation request Luxembourg OJ L 234, 26.6.1997; Decision Derogation request Spain OJ L 243, 5.9.1997; Decision Derogation request Greece OJ L 245, 9.9.1997.

The transition periods were shortened for Spain from 2003 to December 1998, for Ireland and Portugal from 2003 to 2000, for Greece from 2003 to end of 2000 and for Luxembourg from 2000 to mid 1998.

31 The early opening of the German mobile market and the licensing of Mannesmann as Germany's second mobile operator—beside the incumbent DT—on the basis of the GSM technologies (in the frequency bands reserved by EC Directive 87/327/EEC for the introduction of GSM in the European Union) played a major role in this development. During the early phase of market introduction of GSM in the early nineties, Mannesmann accounted for some 90% of all digital phones deployed at that time in the Community.

32 Individual Article 86 procedures were initiated with regard to Austria, Belgium, Ireland, Italy and Spain.

Member States concerned complied. Two cases gave rise to formal Article 86 Decisions³³. The two decisions aimed at ensuring fair entry conditions for the new mobile entrants and thus contributed decisively towards efficient market opening of mobile communications in the markets concerned.

The effect of the combined use of individual procedures was largely equivalent—and to a certain degree superior in political acceptability—to the use of the instrument of an Article 86 Directive in the initial phase of market opening of the mobile markets. The Mobile Directive of January 1996 consolidated this acquis³⁴.

Collective use of own initiative procedures under Regulation 17

During the liberalisation exercise the own initiative powers of the Commission under Regulation 17 were used extensively³⁵ and in a focused manner to target possible abuses which would have had a major impact on the progress of the introduction of competition. The procedures aims particularly at passing on rapidly the advantages of liberalisation in terms of price reductions and service development to the consumer—a major objective in order to show as rapidly as possible effective consumer benefits and to secure sustained public support for liberalisation.

Major examples were the Mobile Interconnect proceeding and the Accounting Rate proceeding.

In January 1998, the Commission launched an investigation into interconnection charges between fixed and mobile operators opening fifteen cases, i.e. one for each Member State due to growing concern about persistently high prices for mobile communications particularly for fixed to mobile calls. The objective of the Commission's investigation was to check whether: prices charged by the incumbent fixed network operator for terminating mobile calls into its fixed network were excessive or discriminatory; termination fees charged by mobile operators, which have joint control among themselves over call termination in their networks, were excessive, and, the revenues retained by the incumbent fixed network operator on fixed to mobile calls were excessive.

The Commission concluded that at least fourteen cases warranted in-depth investigation given preliminary indications of possibly excessive or discriminatory prices. The fourteen cases comprised: four cases of mobile-to-fixed termination, which would be suspended for six months in favour of action by national regulators; two cases of termination fees charged by mobile operators in Italy and

33 Decision GSM radiotelephony services in Italy OJ L 280, 23.11.1995; Decision GSM radiotelephony services in Spain OJ L 76,18.3.1997.

34 The Article 86 Mobile Directive 96/2/EC was adopted in January 1996 and consolidated essentially the progress in liberalisation already achieved by then. It did however also initiate the second wave of digital mobile licences in the Community based on the use of the GSM technology in higher frequency bands (obligations of Member States to issue licences in the 1900 MHz frequency bands based on DCS1800). The third wave of mobile licences (the current UMTS licences) was undertaken under a framework based exclusively on Article 95. As is well known, that licence process has led to substantial discrepancies between Member States and subsequent problems.

35 During certain periods the own initiative procedures in the telecom sector accounted for more than 50% of all own initiative investigations in DGCOMP.

Germany respectively; eight cases regarding the retention on fixed-to-mobile calls by public switched telecommunications networks (PSTN) operators. The Commission would suspend a further case given an on-going inquiry by the UK Monopolies and Mergers Commission (MMC) on this issue. The approach of close co-operation with national regulators turned out to be largely successful. In May 1999, the Commission announced that it had decided to conclude the EU-wide investigation. This followed an assessment of the substantial price reductions of more than 80% in some cases, in response to the investigation. The Commission recalled that "in conducting the inquiry, launched in February 1998, the Commission co-operated closely with national competition agencies and national regulatory authorities (NRAs) in the EU Member States."

The Commission stated however on the occasion that it intended "to pursue the scrutiny of competitive conditions within an overall sector enquiry of telecoms on key issues, including current roaming conditions between mobile operators."

In the Accounting Rate proceeding the Commission opened procedures in the Autumn of 1997 concerning European operators with a potentially dominant position, regarding the accounting rates (transfer prices) charged to terminate international calls—a major factor in high international call charges for the consumer. Following a preliminary assessment, the Commission announced that it appeared that "the international accounting rates charged within the EU by seven operators may result in excessive margins". The Commission concluded that it would further investigate on the prices for international phone calls paid to these operators. On the occasion, the Commission stated that "the issue... may also be tackled under the ONP rules (Open Network Provision). In line with its general approach of co-operation with national regulatory authorities it informed the NRAs of the findings of its first phase of investigation. In those cases where the relevant authority decided to pursue the issues under its own jurisdiction, the Commission stayed its own proceedings, and announced a reassessment in six months whether it should continue its proceedings.

By April 1999, the Commission stated that "following the swift action by the national regulators", it could close its investigation in respect of a number of the operators concerned.

Both the Mobile Interconnect and the Accounting Rate investigation showed that the collective use of individual own initiative procedures—well targeted—can have substantial impact and will in many cases lead to a collective change of behaviour of market operators.

Sector inquiries.

The ultimate measure available under Regulation 17 to survey development of competitive structures and behaviour across whole sectors is the instrument of a Sector Inquiry³⁶ as defined in Article 12 of the Regulation.

36 Sector inquiries have been very rarely used by DGCOMP in the past. Before their use in the telecom sector, only two sector inquiries are recorded, one of them resulting in a block exemption.

The instrument was used for the first time in the telecom sector in the post-1998 period, with a triple investigation announced in July 1999 (and subsequently launched during 1999/2000)³⁷ Sector Inquiries by their basic vocation should result in measures remedying the structural and behavioural problems leading to the anti-competitive effects which may be discovered.

The current Sector Inquiries are still ongoing.

V. ACCESS AND INTERCONNECTION : INTERPLAY OF COMPETITION LAW AND SECTOR REGULATION

Given that liberalisation of a monopoly sector does not create a "green field" situation (if divestiture measures cannot be taken) and generates a situation characterised by one (or very few) powerful players holding bottleneck positions on the network, the handling of access and interconnection is the most crucial factor, in telecoms as in other utility sectors, for the creation of an effective competitive situation. During the telecom liberalisation exercise this issue was tackled from the start in a systematic manner³⁸.

At the same time, it was on this crucial issue that the Commission decided its strategic orientation concerning the relationship between Community competition rules and sector specific regulation. This orientation was spelt out in the Telecom Access Notice³⁹.

Open Access to the incumbent's network had already figured centrally in the 1987 Green Paper. Subsequently, and particularly since the telecom liberalisation package of 1995, the interconnection and access framework was developed to substantial detail, a decentralised national regulatory infrastructure was built up to police access agreements at the Member State level, and the relationship of sector specific law (derived from the ONP framework) and competition law (both EU and national) was defined.

Three aspects should be emphasised:

- *Firstly*, with EU full liberalisation and the emerging sector-specific EU framework, the definition of access and interconnection within the ONP framework acquired more and more importance. This was particularly refined with the adoption of the ONP Interconnection Directive 1997.
- *Secondly*, under the sector-specific framework, specific tasks and powers were granted to the independent National Regulatory Authorities (NRAs) being

37 The sector inquiries launched concern the competitive conditions in the leased line market, in the roaming (mobile communications) market, and in the local loop.

38 This distinguishes the approach in the telecom sector substantially from the liberalisation exercises in other sectors where the issue was only gradually addressed.

39 Commission Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector, OJ C 265, 22.8.1998. Hereunder "Access Notice".

established in all Member States, acting as a decentralised regulatory implementation structure but within an EU-harmonised framework⁴⁰.

- *Thirdly*, originally due to developments in other sectors, there were attempts to define more explicitly an *essential facilities concept* in the context of EU competition law, based on an interpretation of existing Article 82 case law. This concept found its current, most explicit formulation in the *Access Notice*, which drew its conclusions from a range of Commission decisions on access to bottlenecks under Competition Rules, and from Court Rulings in this context.

The definition of the relationship of the working of sector-specific regulations under the ONP framework and general Competition Law in the *Access Notice* became crucial. It is worthwhile to look at this aspect in some detail.

The *Notice* states that a party concerned with access to a telecommunications network or another critical bottleneck network resource in the European Union faces essentially two main choices:

- specific national regulatory procedures now established in accordance with Community Law and harmonised under Open Network Provision ; and
- An action under national and/or Community Law, in particular Competition rules, before the Commission, a national court, or a national competition authority.

In the *Notice*, the Commission recognises that Community Competition rules are not sufficient to remedy all the various problems in the telecommunications sector. The (sector-specific) *NRAs* therefore have a significantly wider ambit and far-reaching role in the regulation of the sector.

The ONP Directives impose on TOs (Telecommunications Operators) having Significant Market Power⁴¹ certain obligations of transparency and non-discrimination that go beyond those that would normally apply under Article 82 of the Treaty. ONP Directives lay down obligations relating to transparency, obligations to supply, and pricing practices. These obligations are enforced by the *NRAs*, which also have jurisdiction in ensuring effective competition⁴².

However, the *Notice also* states that "if interim injunctive relief were not available, or if such relief was not likely adequately to protect the complainant's right under Community Law, the Commission could consider that the national proceedings did not remove the risk of harm, and could therefore commence its examination of the

40 Based on Article 95, this framework was defined, inter alia, in the ONP Interconnection Directive to substantial detail. European Parliament and Council Directive 97/33/EC, OJ L 199, p. 32, 26.7.1997.

41 The concept of Significant Market Power (SMP), central in ONP, originally mainly associated with a share of 25% of the relevant market, is being redefined in the context of the telecom 2000 reform package. This redefinition is central to the reform package. According to the new approach, the definition of SMP will be based on the concept of market dominance as developed under competition law.

42 Most of these obligations will be maintained under the new post-2000 regime, once the reform package 2000 adopted.

case [or examination could be started by the National Competition Authorities or be brought before the Courts] under EU competition rules"⁴³.

This means that the current EU framework for obtaining access to telecommunications facilities and services rests on two competing concepts for remedying anti-competitive effects resulting from the existence of bottleneck structures:

- enforcement of access and interconnection provision under sector-specific regulation, essentially by the NRAs at the State level, within an EU harmonisation framework ;
- Enforcement of access, as far as a plaintiff party can claim access under EU competition law, essentially under a European version of the essential facilities doctrine, as far as it applies.

Under sector-specific regulation (the "ONP" framework), a general obligation to supply access is imposed on public network operators with Significant Market Power (the "SMP" operators).

However, it is interesting to note that the full and speedy enforcement of fair interconnection and access under this regime of sector specific rules was mainly achieved by combination with Recommendations ("soft legislation"⁴⁴), and the threat of intervention under EC competition rules, in case that a satisfactory situation would not be achieved.

The main approach in practice was "benchmarking" of interconnection rates. The method was first used in the DT discount case of 1997 where the three lowest interconnection rates were taken as a benchmark and used as a test regarding unfair pricing under Article 82. The subsequent ONP Recommendation on Interconnection Pricing was based on the same benchmark principle and established price ranges for interconnection rates across the EU, based on the "best practice" of the three Member States with the lowest interconnect rates at the time of the issuing of the Recommendation.

These ranges have largely determined the incumbents' interconnection offerings submitted to and approved by the national regulators in the Member States. This benchmarking of interconnection pricing against "best practice" has made the EU an area with some of the lowest interconnection rates in the world market, with local access in the range of 0.5-1 Eurocents / minute. It was successful for mainly two reasons:

43 The Notice also states that the Commission may also intervene if, for example, the issue is of sufficient pan-European interest to justify immediate action. More generally, if it appears necessary, the Commission can also open own-initiative investigations or launch sector inquiries where it considers this necessary.

44 Soft legislation are measures non-binding on Member States under the EU Treaty: in general Recommendations and Resolutions. See in this context *Commission Recommendation 98/195/EC on Interconnection in a Liberalised Telecommunications Market: Interconnection Pricing*, as amended. OJ L 228, 15.8.1998, p.30.

- DGCOMP made it clear that it would use the benchmark set in the Recommendation as a major indicator of potentially abusive interconnection pricing under Article 82
- "Regulatory competition" developed between NRAs. In the decentralised structure created, regulators started to compete for the creation of the best market conditions⁴⁵.

Therefore, it seems that the best effect in achieving access to bottlenecks was reached through a close correlation between sector regulation derived from the ONP (internal market) framework and the application—or the credible threat of application—of competition rules. This close correlation was made possible by the strategic choice made in the *Access Notice* of giving priority to sector regulation and action by the sector National Regulatory Authority (NRA) in that framework where that action was pro-competitive and terminated competition problems in a speedy manner.⁴⁶

The dual regime in the EU concerning access to telecommunications bottlenecks was highly successful as regards its basic purpose: making full EU-wide liberalisation of telecommunications networks and services since 1 January 1998 a rapid success. The rapid establishment of a decentralised but harmonised access and interconnection regime under the Member States' oversight, combined with soft legislation by recommendations and the ultimate threat of intervention under antitrust powers if sector regulation would not resolve issues, led to an effective opening of core segments of the telecommunications network infrastructure, which was just emerging from monopoly control. It allowed rapid development of competition in both long distance and international services, and in the long-distance network backbone, by reassuring market entrants and investors about access and interconnection with the incumbents dominating the networks in the local access market.

However, looking at the record of unbundling in the local loop, the balance is less convincing.

In July 2000—subsequent to an extensive debate on the impact of convergence started with the Convergence Green Paper published in 1997⁴⁷—the Commission

45 To some extent this has taken the form of benchmarking regulatory performance—a major function and effect of the periodic implementation reports by the Commission

46 This orientation was subsequently applied by the Commission in a more general manner. In a number of cases, the Commission systematically stayed procedures under competition law in favor of sector-specific proceedings under ONP or derived national regulations that were likely to resolve the issue. See e.g. Mobile Interconnect proceeding and the Accounting Rate proceeding (supra), where proceedings were terminated or suspended because of effective action inter alia by RegTP (the German regulator, acting in cooperation with the Bundeskartellamt), OPTA (the Dutch regulator), the Monopolies and Mergers Commission (acting under sector specific regulation), and the Italian NRA. In other cases, the French regulator (ART) and the Conseil de la Concurrence played a similar role.

47 The recent review process started with "Green Paper on the convergence of the telecommunications, media and information technology sectors and the implications for regulation", COM (1997) 623, and a series of subsequent communications by the Commission. It culminated with the Commission's issue of "Towards a New Framework for Electronic Communications Infrastructure and Associated Services: The 1999 Communications Review", COM (1999) 539, and "The Results of the Public Consultation on the 1999 Communications Review and Orientations for the new Regulatory Framework", Communication from the Commission, COM (2000) 239 on 26 April 2000.

published the telecom 2000 package of proposals⁴⁸ aiming at consolidating the legislative telecom framework and integrating competition law principles into the determination of Significant Market Power, in order to adjust the framework to convergence between telecoms, Internet and media. A discussion on the impact of this package falls outside the objectives of this report. However, the measure with the most immediate impact was the proposal of a regulation to unbundle the local loop. The press release published on that occasion stated that "it had become increasingly apparent that, despite progress made in some Member States, non-binding measures were unlikely to achieve local loop unbundling on a sufficiently harmonised basis across the EU by 31 December 2000."

In summary, the strategic orientation taken in the *Access Notice*—the principle to give priority to action under a (strong) national sector specific regulatory framework as long as that action terminated competition problems in an efficient and pro-competitive manner and to stay or suspend procedures under Community competition rules to that extent⁴⁹—and a resulting close correlation of the application of competition rules and sector specific interconnection regulation in a defined manner was highly successful in establishing pro-competitive access in the EU's liberalised telecom market, and fundamental for the success of the overall liberalisation exercise. It made close networking with the (sector specific) National Regulatory Authorities—the NRAs—and the National Competition Authorities crucial and proved the merits of the concept of decentralised enforcement. However, the critical issue of unbundling of the local loop also demonstrated the limits of the approach⁵⁰. While in the telecom sector it was possible—in a favourable political climate—to resort to a specific Article 95 regulation on local loop unbundling, this remains a major problem in other utility sectors where sector specific regulation is still not as developed or which are still not covered by such regulation to the same extent.

48 The package of legislative proposals of 12 July 2000 followed these lines. The package aims at consolidating the existing EU telecommunications legislation into a more limited number of directives. The press release published on that occasion stated that the new regulatory framework would "significantly simplify and clarify the existing regulatory framework..." The proposed consolidated framework comprises :

- Five harmonisation Directives, including a Framework Directive and four specific Directives on authorisation, access and interconnection, universal service and user rights, and data protection in telecommunications services [essentially consolidating the current ONP directives, and including the Standards Television Directive and the Telecommunications Data Protection Directive].
- A Regulation on the unbundling of the local loop [below]
- A Decision on Community radio spectrum policy.

On the occasion, a draft Commission Liberalisation Directive was submitted to consolidate the existing Article 86 Directives discussed previously into one single Article 86 Directive but essentially without change of substance or interpretation.

See COM (2000) 393 (Framework), COM (2000) 386 (authorisation), COM (2000) 384 (access and interconnection), COM (2000) 392 (universal service and user rights), COM (2000) 385 (data protection and privacy), COM (2000) 394.

49 Subject nevertheless to the reservations set forth in the *Access Notice*.and discussed above.

50 It should be noted that the Commission to date has not adopted a formal Article 82 (former Article 86) Decision on a case of abuse of bottleneck power in the telecom sector—though it ensured critical access rights in a number of Article 81 cases, either in the context of Decisions or through settlements, many of which were of crucial importance (see the major alliances cases, the DT discount case and rights of way cases such as the SNCF-Cegetel agreement dealing with access rights to laying cable along railway tracks.). The Commission has also successfully settled a number of Article 86 cases in the pre-decision phase (see e.g. ITT Promedia vs Belgacom concerning access to subscriber data in the telephony directory market)

VI. CONCLUSIONS

The objective of this review of past experience in the application of competition rules in the telecom sector was to assess in how far lessons could be drawn from the success of the telecom liberalisation exercise and how far that experience could be used to support the liberalisation of other utility sectors - such as the electricity sector, railways and postal services, all high on the European Union's agenda and where major new policy initiatives for accelerated liberalisation have now been taken. In order to respond to that objective, it seems therefore useful to summarise the main factors of the success in telecom liberalisation and the contribution made by competition law action as identified in this Report:

- The success of competition policy in the liberalisation of the telecom sector was mainly due to a carefully designed inter-institutional process which was led in a consistent manner by the Commission over a period of ten years and which generated broad political backing.
- The policy objectives of the exercise were clearly expressed (innovation, new markets) and were acceptable both to Parliament and Council and to the European public, once re-assurance about universal service was given. A major element was without doubt the amount of new technology and innovation entering the sector which led to high growth rates—again made possible by the progressive liberalisation—and absorbed to a large extent initial concerns about the cost of adjustment, in particular market share losses by incumbents and loss of jobs. In the second half of the nineties privatisation was an additional driving force.
- High priority was given early in the process to developing a decentralised sectoral regulatory enforcement structure, with the creation of the sector specific National Regulatory Authorities (the NRAs), supported in many instances by the National Competition Authorities (the NCAs).
- The Commission policy in this sector was developed in a uniquely close co-operation between the Commission's sectoral policy approach and its application of competition rules, symbolised since 1997 by the Joint Team (JT) between the two DGs most concerned (DGINFSO and DGCOMP) and the joint implementation reports issued at regular intervals. This led to the design of a highly consistent regulatory scheme that deals with questions such as access to the incumbents network—a key issue in any liberalised utility sector.
- Within that framework competition policy played a central part in the success of the overall exercise, with on the one hand extensive use of its Article 86 powers and on the other hand, substantial synergies between the main instruments applicable under competition law—particularly concerning synergies between liberalisation measures and the screening of the large alliances/mergers, with the GlobalOne investigation standing out as a major example.

Those factors must be kept in mind when assessing if the policy mix chosen at the time could be re-applied under current circumstances. This reflection must be a first

step in an assessment of the possibility of use of the approach in other sectors—which anyway will be characterised by very different situations.

Clearly the environment has evolved as far as application of competition instruments is concerned:

- The Commission has since reviewed and defined further the framework concerning the use of its powers under Article 86⁵¹. In other sectors —e.g. electricity, railways and postal services—the liberalisation schedules, generally much more open-ended, are based on Article 95 respectively Article 71.

This would seem to make the future use of Article 86 Directives and Decisions subject to careful review within that new framework. However, it does not exclude the use of Article 86(3) Decisions as a viable option per se—particularly with a view to remedying one of the major problems in those sectors, the market distortions resulting from large variations in the progress of liberalisation of those sectors in the Member States⁵².

The Communication on services of general interest does not exclude future action in this area—nor the emphasis on the principle of proportionality⁵³, which was the very foundation of the approach in telecom liberalisation. It announces that the Commission's approach to the use of Article 86 "will be further clarified"⁵⁴.

- With the extension of the Merger Regulation to cover full function co-operative joint ventures, the framework for the review of alliances/mergers has changed. This has to be taken into account.
- Regulation 17 itself is undergoing substantial change with the current reform process. On the one hand this offers the opportunity to substantially strengthen the use of competition law in the Member States on telecom cases—where sector-specific regulation is currently more and more also penetrating into the pure competition field. On the other hand, the imminent decentralisation requires the build-up of a network of National Competition Authorities in this area and the reviewing of the ways of operation, particularly in own initiative cases, which have been a major instrument in the liberalisation process. Without doubt, the reform of Regulation 17 can open substantial opportunities for work sharing with the national level.

51 See second report on Services of General Interest in Europe, Communication from the Commission, 20 September 2000.

52 See experience in the mobile communications sector, *supra*.

53 The Communication on Services of General Interest in Europe of 20 September emphasises three basic principles: "Neutrality with regard to the public or private ownership of companies; Member States' freedom to define services of general interest, subject to control for manifest error; and *proportionality* requiring that restrictions of competition and limitations of the freedoms of the Single Market do not exceed what is necessary to guarantee effective fulfilment of the mission" (emphasis added).

54 "...the Commission will endeavour to further clarify the scope of the application and the *criteria* for compatibility with EC rules" (emphasis added).

- The current telecom 2000 reform package⁵⁵—integrating competition law elements into the sector specific framework particularly as regards market definitions—will bring a growing importance of the application of competition principles for the sector in principle. Experience will have to be gathered in the future development of these principles and the future balance between sector specific regulation and competition law.

All of this means that the current approach to the application of competition rules in the telecom and media sectors may itself have to be substantially reviewed, both in a European and global context. It also means that the telecom liberalisation exercise—itself changing—can only serve to a limited extent for drawing lessons for other sectors.

Other sectors—such as electricity, railways, and postal services—have all their own and different characteristics and need their own tailored approach. However, subject to these caveats, major common determinants remain, and can be used to draw lessons for successful acceleration of liberalisation. Factors for success clearly are:

- Requirement for extensive preparation and convincing arguments for the objectives of liberalisation, in order to win public support and create the political base for liberalisation
- Agreement on a firm liberalisation schedule.
- Establishment of a firm political framework, covering authorisation schemes for new entrants and universal service safeguards.
- Implementation of an operational regime for the regulation of access to the dominant stake-holders' network
- Creation of a positive investment climate and incentive regulation, which avoids the vicious circle of under-investment in capacity and high access, rates.

The policy mix for different sectors will be different. But competition policy instruments can make a critical contribution to overall Community policies for these sectors, if their use is correlated and synergies are allowed to develop, as the telecom exercise has shown. Competition policy must establish the right organisational structures in order to allow this to happen, instead of using each instrument in isolation.

Competition policy should also take clear position on a number of essential points, all lessons from the telecom experience:

- Supporting the ongoing process of progressively integrating firm liberalisation schedules into the Article 95 respectively Article 71 frameworks of these sectors—but at the same time keeping the option of action under Article 86 open.

55 See supra

- Insisting on the principle of proportionality⁵⁶ as the basis for addressing the issue of universal service (accessibility, quality, affordability)—with this central issue being preferably resolved by authorisation schemes and compensation funds instead of maintenance of monopolies that in most cases will entail serious market distortions.
- Supporting the establishment of strong sector regulators, in order to regulate access in an ex-ante manner—as long as a watertight essential facilities doctrine and instruments with the necessary clout are still not developed.
- Benchmarking national regulatory performance in a systematic manner ("best practise" approach) and establishing necessary mechanisms like scoreboards of performance—now also used in other areas of competition policy and a major factor of success in the telecom sector with the establishment of the Joint Team DGINFSO/DGCOMP and the implementation reports developed by that team.

European competition law should also develop further its instruments for the future environment of the network-based economy:

- Clarify interpretation and procedures applying to action under Article 86—as an ultimate safeguard to prevent serious market distortions between Member States in the network based industries. Such possible clarification has been announced by the Commission in the Communication on services of general interest. It could accommodate Member States' continuing concerns by a clearer interpretation.
- Develop principles further for ensuring access to bottleneck facilities under competition law wherever the refusal to an essential bottleneck facility would significantly impede effective competition in the common market or in a substantial part of it and could be found incompatible with the development of the common market.

This may be the only way of tackling bottleneck situations that are not covered by sector specific regulators in a comprehensive and operationally efficient manner.

- More extensive use of Sector Inquiries to be undertaken when situation in the respective sectors so require—and defining the objectives and procedures applying to those inquiries in a clearer manner.
- Develop a strong de-centralised enforcement structure—by closely networking with national regulators and competition authorities in the key priority sectors.

Many of these conclusions resulting from the telecom liberalisation exercise are reflected in the new proposals and the decisions for the accelerated liberalisation of other utility sectors and related action under competition law. The actual policy mixes for the sectors concerned will be different and depend on the special characteristics of those sectors. But as this review of past experience in the telecom sector has shown,

56 And particularly applying the second test under Article 86(2) "...the development of trade must not be affected to such an extent as would be contrary to the interests of the Community".
See Communication on services of general interest, supra.

one main conclusion can be drawn from the telecom liberalisation exercise: European competition policy can achieve substantial change and make a major measurable contribution to economic growth and consumer benefit in the Community when the different instruments of competition law and the rights of initiative available under those rules are applied in a pro-active and co-ordinated manner with the strategic objectives of the European Union in mind. This is the global lesson to be drawn from the telecom experience.
