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***Competition Policy: Commercial And Consumer Paybacks. The
European Dimension.***

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Introduction

The communications industry is at the forefront of technological and social change and the competitive conditions underpinning the market are critical to the successful development of the sector. Overall, it is still one of the engines of growth for the European economy and in the telecommunications sector revenues last year still grew at between 5% and 7% as compared to growth of about 1% for overall EU GDP.

However, the picture is not quite so promising in all areas. Local loop unbundling - otherwise known as opening up of the 'last mile' of the fixed telecommunications network - is not taking off across the EU. As to development of broadband, we see in many Member State, dominance by the incumbent of the local fixed-line business being extended into the broadband market. Moreover, we see not only new entrants closing down their operations, but equally incumbents exiting overseas markets. For example, France Telecom sold its Belgian affiliate Wanadoo to Tiscali,

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Telecom Italia sold its French ISP ‘9 Telecom’ and Belgacom and KPN also sold off overseas operations.

In this talk, I will first discuss the EU’s ‘New Regulatory Framework’ and in particular explain how it brings about convergence between ex ante sector specific regulation and the EU antitrust rules. I will then turn to discuss the competitive outlook in broadband and local loop unbundling and explain how the Commission - through important antitrust precedents – is determined to ensure the development of competitive market structures. I will then briefly set how the Commission’s antitrust action is also contributing towards the growth of 3G technology and new media.

New Regulatory Framework

Let me now introduce you to the main features of the new regulatory framework by stressing that despite liberalisation and the availability of competition law instruments we have not yet reached market conditions in the electronic communications sector which would allow ex ante regulation to be abandoned. We are still in a transition period where we need to apply both, competition law instruments and sector-specific regulation. However, the latter is now based on competition law principles, and is thus consistent and complimentary with the application of antitrust instruments.

In fact, the new framework, which was adopted in March 2002 and entered into force on 25 July 2003, applies ex ante regulatory intervention using concepts and principles taken directly from standard competition law theory and practice. This is particularly true for the “potential scope

of sector specific regulation” and it applies equally to the “intervention threshold”.

Potential scope of sector specific regulation

The starting point is based on a fundamental principle: only markets where competition law remedies are not sufficient to remedy persistent market failures can be regulated. The Commission has adopted a Recommendation which sets out a list of markets whose characteristics may justify ex ante regulation. This Recommendation sets out three main criteria that NRAs have to apply when deciding whether or not to regulate an electronic communications market. These criteria are (i) high, non-transitory barriers to entry, (ii) the absence of a tendency towards effective competition, and (iii) that competition law cannot redress the perceived market failures. It is these three criteria, and especially the last one, which ensure that sector specific regulation only applies where it is strictly necessary.

Intervention Threshold

Under the old framework, NRAs could impose regulatory obligations on undertakings which had a market share of 25% or more. Furthermore, ex ante regulation was focused on certain markets which were not “markets” within the meaning of competition law but rather “market areas” based on specific policy considerations. As a result, the old framework was not technologically neutral and contained different rules for mobile, fixed, cable and other kinds of access networks despite the fact that all these alternative networks were or could be used for the provision of the same service.

Today, market definition is based on antitrust principles and, therefore, inter alia, technologically neutral. Moreover, SMP is no longer based on the former, static criterion of 25% market share, but on the competition-law based notion of « dominance ». This means that operators who are faced with ex ante regulation or ex post antitrust proceedings have the legal certainty that issues such as “relevant market” and “market power” will have the same meaning. In practice “convergence” will have the effect of raising the existing threshold for ex-ante regulation. The new framework thus limits ex ante regulation to what is strictly necessary and renders the regulatory process as transparent as possible.

Enforcement Procedures

The new framework also introduces important procedural changes. The most important are those concerning the obligation of NRAs to carry out an in depth market analysis for all markets listed in the Recommendation on relevant markets and to conduct both a “national” and a “Community” consultation on the measures they intend to take.

Pursuant to Article 7 of the Framework Directive, NRAs have to make their draft regulatory decisions accessible to other NRAs and the Commission, provided they affect trade between Member States. This is the so-called “Art. 7 consultation mechanism”.

Under this framework, the Commission may - at the end of a two phase procedure -require the NRA to withdraw the notified draft measure, if it comes, in particular, to the conclusion that the measure would not be compatible with EU law (for example in relation to market definition and the assessment of dominance) or would otherwise create a barrier to the single market. This is the so-called “veto power” of the Commission.

In other words: the new framework introduces a strong enforcement mechanism which ensures that the existing national sector specific regulations are completely reassessed, market by market, to a large extent on the basis of antitrust principles.

First Experiences

I have repeatedly stressed the in-built tendency towards deregulation. That is more than “wishful thinking”. It is confirmed by our first experiences, which are based – as far as formal consultations are concerned - to a very large extent on OFTEL notifications. The first notification we received was a OFTEL notification regarding the UK wholesale market for mobile call origination. In this notification, OFTEL concluded that, on the basis of the new criteria, there was no longer any case for sector specific regulation and that existing regulation had to be removed. To give you a further example: the extent of future regulation of international direct dial calls from the UK will considerably decrease, in fact to less than 5% of the overall market for international calls.

Regulatory Convergence at work

To sum up: antitrust principles are already shaping regulation. Regulatory policy cannot be seen anymore as independent of competition policy. It is part of a broader set of tools of intervention in the market economy, based on competition analysis principles. Clearly, competition and regulatory instruments deal with the common problem that arises from the unlawful exercise of market power. Only through a combination of both instruments can we ensure that market power does not distort and hamper the development of competition in the electronic communications

markets. This approach will ensure that end users truly benefit from the new technology and services arising in the communications sector.

Developing competitive structures in broadband and the local loop

Market outlook

Broadband does not only allow consumers to use the Internet with greater ease and speed, it also allows the development of new uses, in particular for the distribution of premium content.

Although the actual take up of broadband in the European Union is very encouraging, the competitive environment in many of the Member States raises concerns. From July 2002 to July 2003, the number of broadband Internet connections doubled, growing from 8 million to 17.5 million. However, when one looks at the underlying picture, connections operated by the incumbents accounts for about three-quarters of DSL connections in the EU and just over half of all broadband connections (see annex - figures 1,2 and 3). Further, where there is no or only limited competition from alternative platforms such as cable, the situation is even worse (see annex – figure 4).

The position in respect of the local loop causes greater concern. National regulatory authorities have made large numbers of determinations to clarify the regulatory framework for local loop unbundling, but significant problems remain in particular with regard to pricing and non-discriminatory access to facilities. This is evidenced by the low uptake of the number of unbundled lines. In January 2003, only 0.68% of all EU

local loops were unbundled, this corresponds to 1.3 million unbundled lines and about 5% of the DSL market.

Antitrust enforcement

These figures explain why the Commission has recently intervened in these fields and has adopted two important decisions which are intended to act as precedents for further action by national antitrust authorities.

On 21 May 2003, the Commission adopted a decision¹ under Article 82 of the Treaty regarding *Deutsche Telekom's* pricing strategy for local access to the fixed telephony network. In that decision, the Commission found that Deutsche Telekom (DT) was engaging in a margin squeeze by charging new entrants higher fees for wholesale access to the local loop than what subscribers had to pay for retail lines.

On 16 July 2003, the Commission adopted a decision² relating to a proceeding under Article 82 of the Treaty regarding the retail ADSL pricing strategy of France Telecom's subsidiary *Wanadoo*. Wanadoo's predatory pricing strategy was designed to take the lion's share of the market for ADSL services in France, at the expense of other competitors. The Commission intervened against these foreclosure practices even if there was a risk that final customers might suffer in the short term. However in the case, a remedy was found – reduction of France Telecom's wholesale rates – that benefited both Wanadoo's competitors and the final customer.

¹ Commission Decision of 21 May 2003 in Case No. COMP38.451: 'Price Squeeze Local Loop Germany' - Commission Press Release IP/03/717.

² Commission Decision of 16 July 2003 in Case No. COMP38.233 – Wanadoo. 'High-speed Internet: the Commission imposes a fine on Wanadoo for abuse of a dominant position' - Commission Press Release IP/03/1025.

Antitrust contribution to developing new media, in particular in 3G

New technology platforms and services are important drivers of economic development. Antitrust authorities through precedent decisions can help foster the introduction of long-term competitive markets for such services. The Commission has recently adopted important decisions relating to 3G and to new media content.

3G network sharing agreements

The Commission adopted two important decisions concerning 3G network sharing agreements between mmO2 and T-Mobile in Germany and the United Kingdom³. The agreements provided for cooperation on the basis of site sharing and national roaming (one operator ‘piggy-backing’ on another operator’s network to provide its services). The Commission ruled that sharing of site infrastructure did not raise competition problems. National roaming, on the other hand, restricted competition on coverage, quality and on transmission speeds. However, the Commission granted a time-limited exemption since the agreements helped to speed up and widen 3G territorial coverage as well as hasten the development of new 3G applications and content.

New media content

Ensuring a level playing field as regards access to communication infrastructures is certainly a necessary condition for the development of competitive broadband services. Yet, this is not sufficient to guarantee that the potential of such services will be fully exploited to the benefit of consumers.

³ Commission Decision of 30 April 2003 in Case No. COMP38.370 - O2 UK Limited/T-Mobile UK Limited (‘UK Network Sharing Agreement’), OJ L200 7.8.2003, p. 59. Commission Decision of 16 July 2003 in Case No. COMP38.369 T-Mobile Deutschland/O2 Germany: Network Sharing Rahmenvertrag, not yet published.

Access to audio-visual content is a key factor for the roll out of new media. Premium sport, features films and music are generally regarded as classic examples of content which could boost the growth of innovative services through the Internet. Premium sport seems also to be particularly well suited for distribution via 3G mobile services.

However, media rights-holders for popular sport events such as football are often reluctant to grant licences to new media operators since they fear that this could undermine the value of their TV rights. In some instances they have applied restrictions in the form of holdbacks, embargoes or bundling of TV rights with Internet and/or UMTS rights, with appreciable foreclosure effects.

In the recent *UEFA Champions League* case⁴, the Commission challenged for the first time a joint selling scheme affecting competition on both the upstream market for the acquisition of football media rights and the downstream markets for the distribution of such a content via traditional media - TV and radio - and new platforms - UMTS and Internet. An exemption decision was adopted last July, following a settlement whereby UEFA undertook, *inter alia*, to make its rights available for Internet operators and 3G mobile services, allowing also individual clubs to retail club-focused products through new media services. This example demonstrates the importance the Commission attaches to opening up – equally for new media – the access to premium content. This is indeed a prerequisite for successful commercial development of broadband as well as 3G.

⁴ Commission Decision of 23 July 2003 in Case No. COMP38.398 – Joint selling of the commercial rights of UEFA Champions League.

Conclusion

In this talk, I have tried to highlight how the Commission is taking an active role in ensuring the development of a strong and competitive communications industry. Under The New Regulatory Framework the Commission ensures that sector specific regulation is limited to markets where it is strictly necessary. At the same time, the Commission, through its recent decisions, has shown that it will not hesitate to use its enforcement powers to help bring about a competitive market in particular in broadband and local loop unbundling. On the other hand, where we can provide guidance through our decisions in new technology and media markets such as 3G, where we can open access to premium content for new media, we will also do so. Such a policy, I think, is to the benefit of both, industry as well as consumers.

Figure 1: DSL lines market share by operator

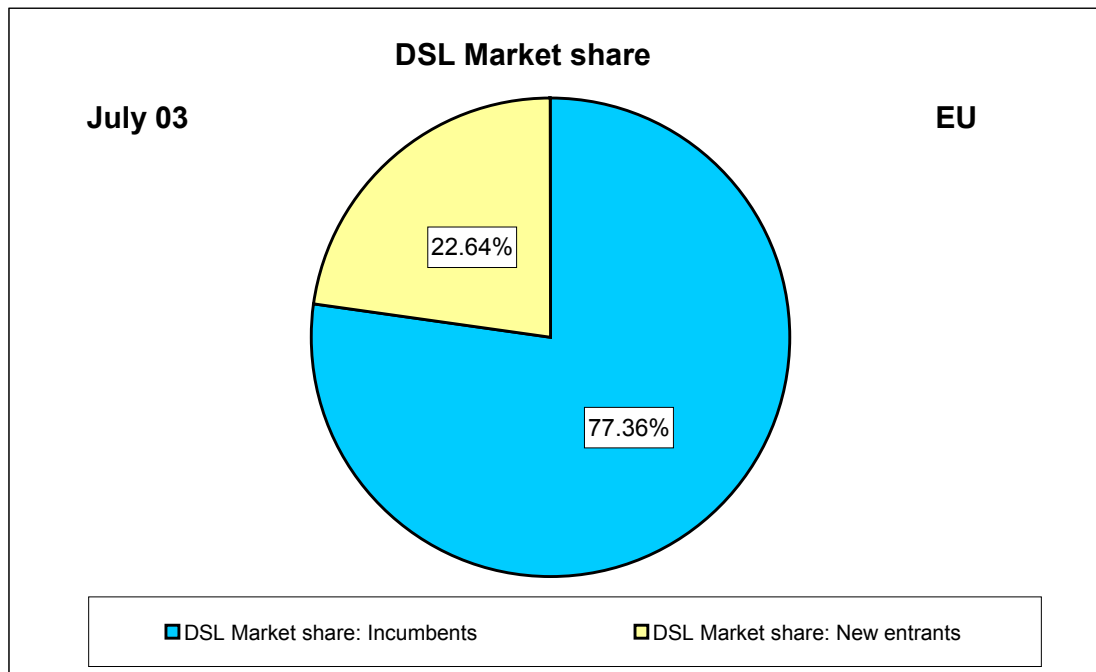


Figure 2: Trend in the % of DSL lines provided by incumbent fixed operators

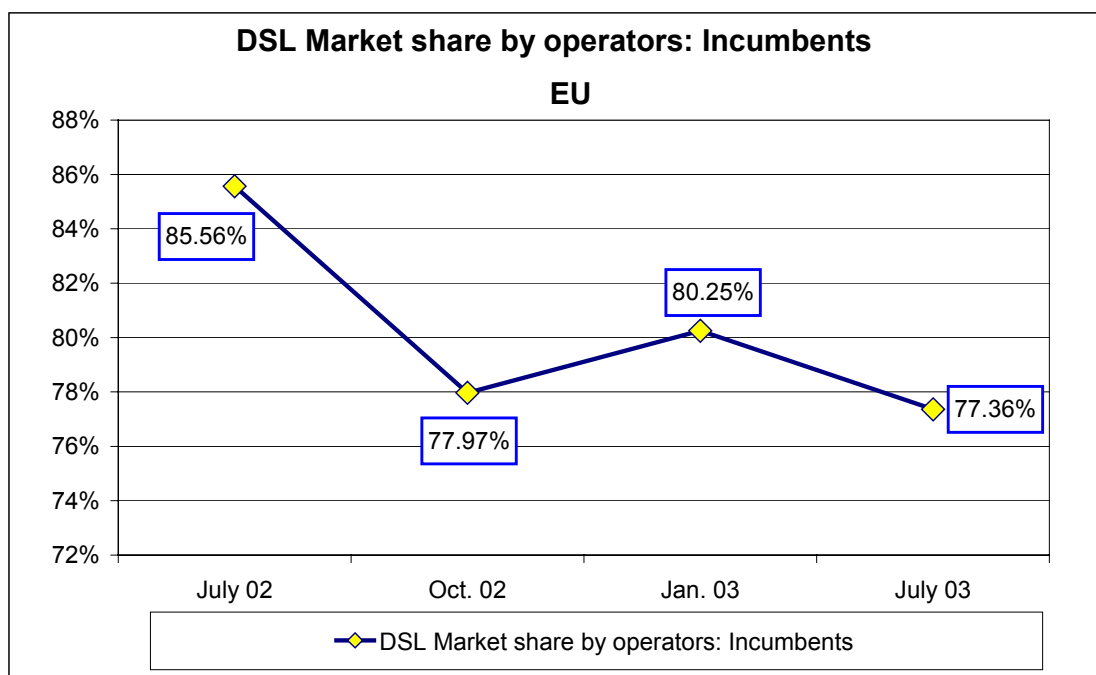


Figure 3: Trend in the percentage of broadband lines provided by the incumbent fixed operators

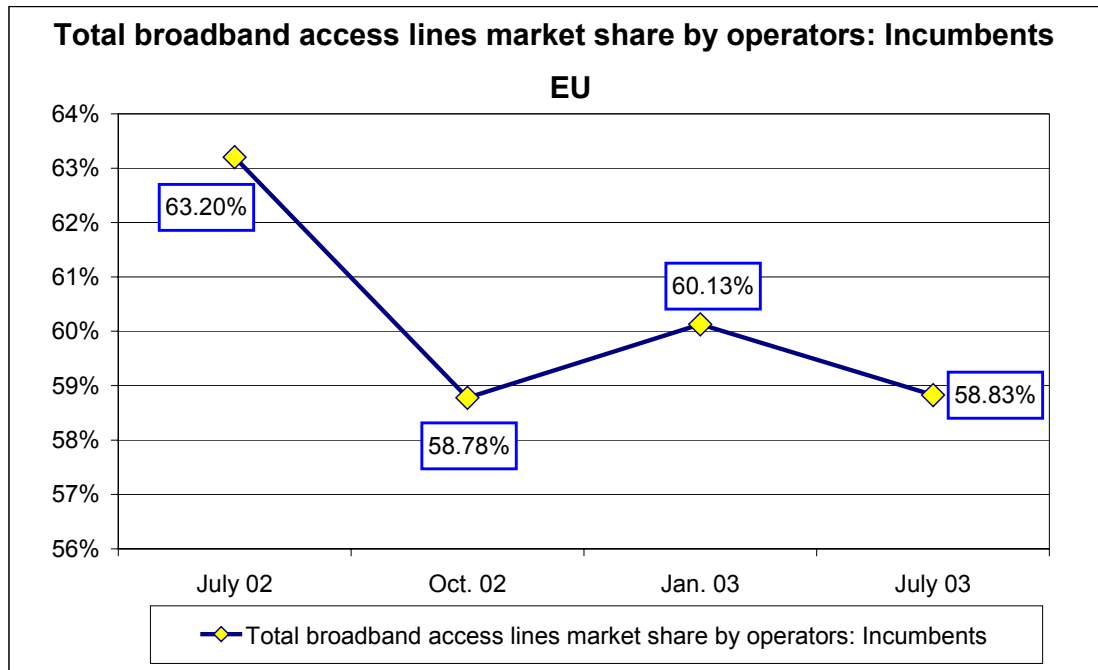


Figure 4: EU countries by number of broadband lines

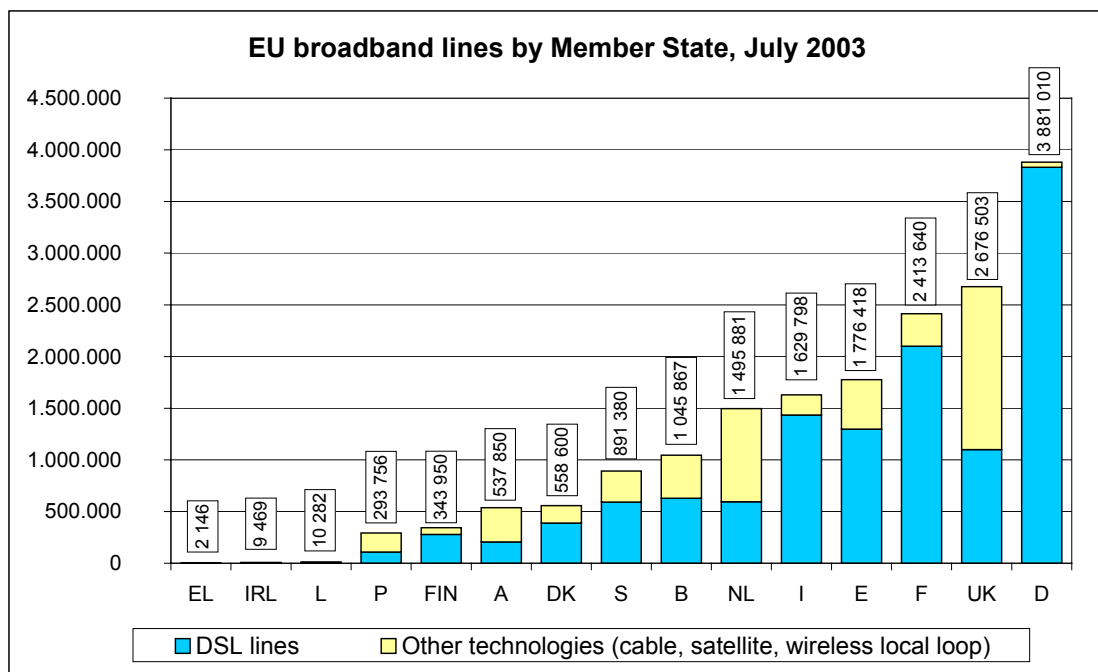


Table 1 shows how the broadband lines in the EU were distributed between the 15 Member States at 1 July 2003, 1 January 2003, 1 October 2002 and 1 July 2002

Table 1 Broadband lines in the EU by Country

	Jul-02	Oct-02	Jan-03	Jul-03
B	691 970	753 834	877 364	1 045 867
DK	396 081	428 750	448 981	558 600
D	2 733 611	3 376 013	3 240 240	3 881 010
EL	450	686	1 689	2 146
E	814 337	985 339	1 304 770	1 776 418
F	735 944	1 126 695	1 656 288	2 413 640
IRL	1 344	3 476	6 456	9 469
I	549 716	740 630	976 019	1 629 798
L			7 455	10 282
NL	1 016 704	1 050 783	1 213 861	1 495 881
A	359 050	359 876	407 100	537 850
P	128 460	128 460	267 892	293 756
FIN	257 200	206 500	274 700	343 950
S	404 000	404 000	656 389	891 380
UK	963 630	1 226 343	1 559 056	2 676 503
EU	9 052 497	10 791 385	12 898 260	17 566 550

3G subscriptions are estimated at around 300 000 in Italy, 155 000 in the UK and 10 000 in Austria.⁵

⁵ Source: Hutchison