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Seule le texte prononcé fait foi  
Es gilt das gesprochene Wort*

## **Electronic communications markets : current activities / objectives of DG Competition and review of recent cases**

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### **I. Introduction**

Ladies and Gentlemen, Mr Chairman, it's a pleasure to be here today to speak to you about the current activities and the objectives of DG COMP in relation to the electronic communications markets. There have been many developments over the last two years following the adoption of a new Regulatory Framework and within the context of our on-going antitrust enforcement under Articles 81 and 82 of the Treaty. Before I present in more detail what has happened these last two years allow me first to give you a brief overview of DG COMP's sphere of competences and area of activities as far as the electronic communications sector is concerned.

#### ***Main activities***

The main activities of DG COMP can be grouped under three main headings:

- DG COMP bears the primary responsibility of enforcing the antitrust rules to the electronic communications and postal sectors.
- Following the adoption of the new Regulatory Framework we are also jointly responsible with DG INFSO for implementing the so-called "notification mechanism" provided for in Article 7 of the Framework Directive. In that respect, two "Article 7 Task

Forces” have been set up, one by DG COMP and another by DG INFSO, which together deal with notifications by NRAs of draft proposed regulatory measures.

- We are also responsible for ensuring that Member States have fully implemented the Commission’s Liberalisation Directive and comply with its provisions. Although it is difficult to speak today about “exclusive” and “special” rights in the core area of telecoms, nevertheless, some Member States appear to still make a distinction between electronic communications networks used for the transmission of voice or data services and all other kinds of networks, contrary to the technology-neutral nature of the Liberalisation Directive and its all-inclusive scope of application. I refer here specifically to cable and other terrestrial networks used for TV or radio broadcastings. Although the actual activity of broadcasting falls outside of the scope of the Liberalisation directive and of the new Regulatory Framework, the underlying activity of network transmission does not. If in the past a kind of grey zone might have been allowed to persist, this is no longer the case. Member States that reserve the transmission activity of TV and radio broadcasting to one or more undertakings risk being in breach of the Directive’s provisions and of Article 86 of the Treaty.

There is also another area of activity to which DG COMP devotes quite a large amount of resources: the broader policy and legislative initiatives concerning electronic communications markets, such as the drafting of guidelines, recommendations or other services papers, often in close cooperation with our colleagues in DG INFSO. Moreover, we are closely involved in the drafting of the Annual Telecoms Implementation Report, again jointly with DG INFSO.

### ***The Antitrust activities***

As it becomes apparent from the above, in essence DG COMP's main areas of activities are twofold. On the one hand there is competition law enforcement and competition policy, and on the other hand, regulatory policy and what we may define regulatory enforcement, through the new "Article 7 notification mechanism".

As far as the antitrust enforcement is concerned, I think it is fair to say that to date most of the resources used are directed mainly towards the application of Article 82 rather than Article 81. As our recent decision-making practice illustrates, in a liberalised environment within which ex ante regulation continues to be centred on the incumbent's control of essential network elements, antitrust enforcement has more to do with pernicious forms of unilateral conduct than horizontal or vertical agreements between undertakings. The situation differs with regard to the mobile sector which is characterised by a relative absence of historical incumbency and an oligopolistic market structure, where is more likely to encounter horizontal agreements and other forms of benign or not so benign forms of cooperation between market players.

Having said that, as I mentioned before, we still invest resources for the purposes of ensuring compliance with the Liberalisation Directive and the prohibition of Article 86 on special and exclusive rights.

### ***The Article 7 Task Force and the ex ante notification process***

Turning now to the "Article 7 notification mechanism", our efforts aim to ensure that NRAs apply in a consistent and effective manner the competition aspects of the new Regulatory framework. That means that our attention is primarily focused on whether NRAs have correctly defined the relevant product and geographic market and whether they have carried out a correct assessment of the degree of

market power in the market under examination. Market power is measured in the new framework according to competition law principles: In fact Significant Market Power, or “SMP”, is merely the regulatory denomination of the antitrust concept of single or jointly dominant position.

In particular, through the various stages of the Article 7 procedure (pre-notification meetings, formal notification, second-phase proceedings) we want to make sure that the final outcome of these proceedings will not only be characterised by internal consistency, but will also safeguard the necessary consistency between *ex ante* regulatory intervention by NRAS and *ex post* antitrust enforcement by the Commission or the national competition authorities. Any kind of unwarranted contradiction between decisions taken by the NRAs and the Commission’s own antitrust practice and policy is bound to lead to unnecessary litigation either at national or at Community level, and ultimately undermine the effectiveness and credibility of either the NRAs’ or the Commission’s enforcement powers. Therefore we will not hesitate to use our “veto” powers against draft regulatory measures by NRAs which conflict with existing antitrust jurisprudence or our own decision-making practice.

Twice has so far used the Commission its veto powers and in both cases against draft measures notified by the Finnish Regulator.

The first veto decision concerned the markets for publicly available international telephone services provided at a fixed location for residential and non-residential customers in Finland. The Commission contested the methodology followed by the NRA (Ficora) for reaching the conclusion that there were no SMP operators in either the residential and the non-residential market segment. It concluded that the evidence provided by Ficora was not sufficient to support the conclusion that TeliaSonera had no SMP on either of these two markets.

The Commission recommended that Ficora conduct a fresh market analysis looking into a number of indicators such as the evolution of prices over time, the nature and intensity of barriers to entry and in particular whether a finding of lack of SMP in a defined retail market was due principally to existing regulatory obligations.

In the second veto decision, the Commission did not agree with Ficora's draft decision according to which TeliaSonera had significant market power in the market for access and call origination on public mobile telephone networks. The Commission found that the assessment of the competitive conditions prevailing on that market was not consistent with standard principles of antitrust law analysis and questioned the conclusive nature of the evidence relied upon by the Finish Regulator.

For the sake of completeness I will also add that the Commission is now completing its second phase investigation of the Austrian Regulator's draft decision concerning the fixed market for transit services. I will recall that when opening the second phase procedure, the Commission had expressed serious doubts as to the finding that there is no SMP on this market.

These two veto decisions constitute an illustrative example of the Commission's determination to ensure that whatever the measure proposed by the NRAs, it would accurately reflect the state of competition in the relevant market. Thus, in the case concerning the market for international lines, the Commission concluded that there was not enough evidence to justify rolling back existing regulation, whereas in the case of mobile access and call origination, the Commission intervened to prevent ex ante regulation being extended to a market where enough competition appeared to exist.

My colleague, Mr Krueger, will give you later on a more detailed overview of our first year experience of the Article 7 notification mechanism.

As far as the Article 7 procedure is concerned there is one particular aspect which is important in my view: the sustainability of the competitive conditions which we aim to create through regulatory intervention.

Remedies imposed under regulatory intervention have the specific remit to allow competition to develop, and to increase the competitive conditions in any market in a self-sustaining manner. Their aim is, or should be, to create a pro-competitive environment in the long term, while at the same time providing, in the shorter term, the benefits to end users which the market would offer if it were effectively competitive.

Antitrust remedies, on the other hand, have purely the objective of punishing forms of behaviour which have occurred in the past, and which are seen as detrimental for the welfare of citizens/users. They assume that competitive conditions are already developed and that market structures would not be automatically conducive to their degradation.

From my perspective, therefore, the relationship between antitrust and regulatory remedies is particularly significant because it informs policy decisions. In a way, the aim of regulatory remedies should be to allow antitrust remedies to be the only ones needed in the long term. For the parts of the industry which constitute natural monopolies, this may be difficult to achieve. However, as technology develops, regulatory intervention should increasingly play a smaller role.

There is therefore a fine balance to be found, between short-term needs and longer-term considerations, and service provision as a means to support infrastructure-based competition. My view is that there is not necessarily a contradiction between access-based and facilities-based competition. Access services are essential in opening up previously monopolistic market structures. Competition

would never be able to develop, in the short term, if entrants were not able to gain access to the incumbent operator's network to start offering services. In fact, the "liberalisation" of network industries, vigorously pursued by the Commission in a number of areas, would never have taken place without access obligations.

However, I also agree with those who are concerned about providing the right incentives to new entrants. In the longer term, the regulatory framework should privilege operators which base their competitive advantage on building their own infrastructure. The reason for this is simply that it is such operators who are more likely to best improve the competitive conditions of the market, by changing its structure.

The useful concept of "investment ladder" has been devised to highlight the main characteristics of this approach to regulatory policy. The new regulatory framework allows NRAs to take this approach, since both the objective of investment and the objective of the welfare of end users are explicitly mentioned. I am glad that the ERG and the Commission services have been able to put these considerations in an appropriate and coherent framework in the ERG Common Position on appropriate remedies under the new regulatory framework.

### ***Legislative and policy related initiatives***

Before I turn to the two main aspects of my presentation, I would like to also mention a number of recent policy and legislative initiatives in which DG COMP has been closely involved.

The first is the decision taken in June 2004 by the Commission not to proceed this year with the planned review of the Recommendation on relevant markets. The fact that a number of Member States had yet to implement the new RF, the absence of any evidence of significant market changes, and the risk of undermining legal certainty for NRAs who are still in the process of carrying out their first market reviews

were the main reasons for deciding to postpone this exercise for the end of the next year.

DG COMP has also been closely involved in the discussions and drafting of the “*Remedies*” paper by the ERG. Although the Commission under Article 7 of the Framework Directive can only comment upon draft remedies proposed by NRAs, this is without doubt an important aspect of the whole Article 7 procedure. It is clear that any remedy applied by NRA as a means to prevent future market failure has a direct bearing on the Commission’s own practice. Ineffective remedies are likely to require further action under the antitrust rules while disproportional remedies will stifle competition in the market by preventing the undertakings concerned to realise the full of their market potential. Furthermore were the remedy in question to be considered by the Commission in breach of the principle of proportionality, the Commission would most likely open up infringement proceedings against the Member States concerned. Therefore, it is important that NRAs and the Commission have a common understanding of the issues involved and the wider policy implications of choosing one set of remedies over another. The published remedies paper does precisely this and reflects the common understanding of both the NRAs and the Commission

## **II. Current Activities: A general Overview**

The Commission has taken decisive action over the last two years in two main markets: the first market is a fixed market and concerns the unbundling of the local loop and the provision of High Speed Internet access whereas the second is the mobile market for the provision of wholesale international roaming services. Both markets have been for the last 4 years at the centre not only of the Commission’s but also of the Community legislator’s attention. In particular, both markets have been the subject of a wide sector inquiry under the antitrust rules and both markets figure prominently in Annex II of the

Framework Directive as markets to be included in the first Commission Recommendation on relevant markets.

As far as the ULL and high speed internet market is concerned, the Commission adopted last year two Article 82 decisions: the “Deutsche Telekom” and “Wanadoo” decisions. DT is our first margin squeeze case whereas Wanadoo is a case of predatory pricing. Both cases are now pending before the Court of First Instance. Since both cases deal with some very important issues, we expect that the Court’s rulings will provide needed clarifications on a number of important legal issues and serve thus as a precedent for future similar actions by the Commission.

As far as the mobile market is concerned; as you may already be aware of, in July 2004 the Commission sent two Statement of Objections to two UK mobile network operators, Vodafone and O2, for having applied excessive wholesale roaming prices within the meaning of Article 82 of the Treaty.

What I plan to do next is to proceed with a brief presentation of these cases by highlighting their most important aspects. Needless to say, it is at this stage quite difficult to discuss in more detail the two roaming cases as the procedure is still going on and the Commission has not yet taken any final decision.

***In particular: the DT case***

In the DT case, the Commission found that 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. In effect, such practice discouraged newly established

competitors from entering the market and reduced the choice of suppliers of telecoms services as well as price competition for consumers. In particular, the difference between DT's retail and wholesale prices for the access to the local loop was either negative or slightly positive, but insufficient to cover DT's product-specific cost of providing the retail services.

Perhaps one of the most interesting aspects of this case was the interrelation between antitrust law and ex ante regulation. DT's main argument was that the abuse in question was the result of the Regulator's imposed price cap system on it and accordingly it could not incur any antitrust liability. Although it is true that an undertaking cannot be held responsible for breach of the antitrust rules if such a breach occurs because of the State having imposed upon the company in question a specific course of action, nevertheless, in this case the Commission was able to show that within the imposed price cap system the company still enjoyed enough commercial freedom to have avoided the margin squeeze and the subsequent infringement.

It is perhaps encouraging to say that following the termination of the margin squeeze, the number of unbundled local loops newly rented out to new entrants has significantly increased and, at least as far as the first quarter of 2004 is concerned, this is likely to be the highest quarter since the liberalisation of the German telecommunications market. Overall, this market "take-up" appears to be positive as the competitive pressure from new entrants that base their services upon unbundled local loops has significantly increased during the same time-period because of the parallel introduction of local carrier (pre-)selection in Germany.

### ***The QSC Settlement***

As a follow up to the DT case, it is also worth mentioning the settlement reached in February 2004 with DT in a case concerning a presumed margin squeeze for broadband access in Germany

following a complaint by alternative ADSL provider, QSC. According to the complainant, the margin between DT's retail tariffs for ADSL and the corresponding wholesale tariffs for line sharing was insufficient to allow new entrants to compete with DT on the retail market. This in turn was supposed to have allowed DT to become the quasi-monopolist for ADSL services in Germany, ever since those broadband services were offered on the mass market.

The settlement followed preliminary investigations in accordance with the method for assessing a margin squeeze as developed in the Commission's DT decision. In the DT decision, however the scope of the abuse was considerably larger than in the settled case, since it referred to DT's pricing strategy for access to its local fixed telephony network whereas the QSC case referred to DT's pricing strategy for mere broadband access.

### ***In particular: the Wanadoo Case***

The other case that I would like to discuss today is the Wanadoo case. If the DT case concerned wholesale access problems, Wanadoo raised antitrust issues related to the company's retail marketing policy for ADSL services. During the period covered by the decision, nearly all ADSL lines in France were operated by France Telecom the owner of Wanadoo. Cable networks although a theoretical alternative platform for the provision of high speed internet services, had a limited geographic footprint and could not compete with France Telecom's nation-wide network.

This is the first decision where the Commission applied the concept of predatory pricing in a network industry. In doing so, the Commission followed closely the principles laid down in the jurisprudence of the Court. According to the existing case-law, two tests of predation are possible: **first**, where variable costs are not covered, an abuse is automatically presumed, and **second**, where

variable costs are covered, but total costs are not, the pricing is deemed to constitute an abuse if it forms part of a plan to eliminate competitors.

It is worth stressing that in this case, the Commission carried out a number of adjustments to costs and revenues by Wanadoo so as to take account of the characteristics of a strongly growing and dynamic market. For instance, non-recurrent customer acquisition costs such as advertising, promotions, sales network and connection kits were spread and written off over the customer lifetime (estimated at 4 years). The Commission also analysed which cost reduction could have been foreseen by Wanadoo at the moment of setting its prices but concluded that even taking into account the foreseeable decrease in costs, prices were still predatory.

More particularly the Commission found that during the critical take off period of ADLS services in France, Wanadoo had fulfilled both test of predation. Initially, its retail prices did not even cover its variable cost. Then, its prices started being equivalent to its variable costs but did not cover total cost. In addition, there was clear evidence showing that the company was still following a deliberate policy of eliminating its competitors and “pre-empting the market”. The abuse came finally to an end in October 2002 with the entry into force of new wholesale access prices charged by France Telecom, which were more than 30% lower.

Among the many interesting questions raised in the Wanadoo case, one concerned the recurrent question in antitrust law of whether it was opportune for the Commission to intervene on a market which is supposed to be at a nascent or “emerging” state. The Commission’s answer was clear and straightforward: nothing in Article 82 of the Treaty provides for an exception to the application of the competition rules to sectors which are not yet fully mature or which are considered to be emerging markets. In particular, in liberalised industries, it is important to ensure that the former monopolists cannot extend their strengths into newly created markets, thus

perpetuating their market power. In these situations, it must be possible to condemn predatory pricing whenever there is a risk that competition will be eliminated.

The Commission intervention was all the more necessary since Wanadoo was taking, illegally, a significant and clear first-mover advantage. This year, the Commission conducted one more inspection to assess whether the company has complied with the decision.

Overall, it is encouraging to see that following the adoption of our decision, the French ADSL market has grown more rapidly and in a more balanced way. In fact, France has now taken the lead for broadband LLU connections according to latest ECTA Broadband scorecard. Moreover, the latest figures from the French NRA show that shared access is growing very fast placing France on top of all other EU countries, with more than 450 000 shared lines. As far as full ULL is concerned if only 13 000 lines have so far been fully unbundled, this figure represented an increase of 160% just for the first three months of 2004.

### ***The UK Roaming investigation***

As far as the mobile sector is concerned, on 26 July 2004, the Commission sent two separate “statements of objections” to two UK mobile network operators (MNOs), O2 and Vodafone. Both SOs target the excessive wholesale roaming tariffs that O2 and Vodafone charged foreign MNOs for international roaming services. The high roaming fees were considered detrimental to consumers travelling to the UK.

In particular, the Commission's investigation has revealed that Vodafone, since 1997 through at least until the end of September 2003, exploited its dominant position in the UK market for the provision of **international roaming services at wholesale level** on its own network. The abuse consisted in charging foreign MNOs unfair and excessive "Inter-operator tariffs", otherwise known as IOTs. The Commission has come to the same conclusions as regards the IOTs charged by O2 but for the period beginning 1998 and running at least up until the end of September 2003.

Two are to my mind the main legal issues raised in the UK roaming investigation, one is the definition of the relevant market and the other the assessment of the excessive character of the IOTs charged by both Vodafone and O2.

The Commission's conclusion as regards the market definition was that at least up until the end of September 2003, each UK MNO was dominant on its own network. The Commission reached its conclusion having examined very closely roaming traffic patterns and most importantly, network technology related aspects as well as traffic direction issues. The relevant views of almost all GSM MNOs in Europe weighted heavily in that respect.

With regard to the excessive nature of the IOTs, the investigation revealed that the roaming services in question yielded profits several times higher than other comparable services supplied by MNOs. In particular, the pricing of roaming calls exceeded by far the prices that Vodafone and O2 had applied during the above mentioned period for similar calls made on their respective networks by UK subscribers of "Independent Service Providers" (ISPs) to whom both O2 and Vodafone had supplied wholesale airtime access.

Both Vodafone and O2 will now have the opportunity to respond to the Commission's preliminary findings. Needless to say, these

preliminary findings do not in any way prejudice the outcome of the investigation.

Moreover, the Commission is in the process of carrying out an assessment of its parallel investigation of the German wholesale roaming market and should soon be able to make public its preliminary findings

That being aid, it seems that some MNOs have started revising their roaming tariffing strategies. Already this summer we witnessed MNOs running summer promotions whereby in certain cases the costs of roaming calls were halved, sometimes by half, compared to the standard roaming tariffs, an illustrative indication of the possible margins that exist for further price reductions. It remains to be seen however whether such initiatives will remain limited in time or whether they herald more permanent tariff reductions for all mobile users.

Within this context, the Commission has also been following closely the recent market developments with regard to the creation of two strategic alliances among a number of European mobile operators, that is the Starmap and the Freemove alliance. Our aim is to ensure that such forms of cooperation are actually beneficial for the end-users and serve as an effective means for introducing more competition in the wholesale and retail international roaming markets.

The wholesale market for the provision of international roaming services is also one of the market into which NRAs will soon have to carry out a market analysis pursuant to the Commission's Recommendation on relevant markets. The Commission is therefore in close cooperation with the NRAs in order to ensure that a coherent and well-coordinated approach is adopted by Regulators in line with the conclusions and findings of our own antitrust investigation.

That being said, I would like to emphasize that it is our intention, in case international roaming prices do not at the end come down, to launch further investigations into other national markets where high roaming prices still persist.

### **III. Objectives: *Main concerns***

I will now turn to the last part of my presentation, and give you an overview of our main objectives and priorities for the future.

In this regard it is important to bear in mind that under the new Modernisation rules, the Commission is expected to focus its resources on substantial cases with a clear European dimension. Therefore, it will be mainly for the NCAs to deal with competition issues limited to their own geographical territory, save of course for cases where there is a clear Community interests for the Commission to get involved and take the lead.

That being said, there are two main areas which raise to date important policy considerations: broadband markets and the mobile sector.

As far as broadband markets are concerned, the importance of this sector for the economy as a whole cannot be underestimated. We can see today that the benefits of a thriving broadband market cannot be confined only to electronic communications but have obvious positive effects to the creation of an information and knowledge-based society.

This is why prompt action on this market is considered a priority for DG COMP. Two main types of action are possible: first, ensuring that NRAs create the necessary conditions for competition to develop on the basis of a decisive and swift intervention on the wholesale broadband access and local loop unbundling markets, through the

Art 7 implementation process. And second, ensuring that incumbents do not leverage unfairly their network dominant position on the service provision market. In principle, *ex ante* regulation should prevent incumbents from exploiting their dominant position at the infrastructure access level in order to influence the competitive conditions prevailing downstream.

When *ex ante* regulation fails to remove the likelihood of anticompetitive behaviour taking place on the downstream retail markets, the Commission will intervene on the basis of antitrust rules, as it has already shown it is ready to do.

As far as the mobile sector is concerned, the focus is on ensuring that consumers benefit from real competitive offerings and low prices. As you may have seen in the press, some consumer associations have already complained of anticompetitive behaviour in the SMS market, with NRAs and NCAs in France and in Spain taking a closer look into the behaviour of the mobile operators. In this respect, we are currently looking into a number of notifications by the GSM Association concerning standardized international roaming arrangements for GPRS SMS and MMS communications. What we need to avoid is that the problems we already have encountered in the voice roaming market, essentially high prices, reappear in the growing data roaming market. The other front is mobile voice call termination where we expect termination rates to be effectively regulated and the relative benefits to be passed on to end users.

This implies that there is a need for close cooperation with NRAs to ensure the effective application of both *ex ante* regulation and *ex post* antitrust enforcement.

It is clear that in order to make antitrust enforcement effective, it is necessary not only to be able to apply existing rules, but also to push the boundaries of regulatory and competition knowledge further. This is why there are also some policy issues which will continue to

be at the centre of our attention. One such issue is the analysis of price discrimination strategies. This issue, and in particular the discrimination between off-net and on-net prices, has been at the centre of much attention lately at a number of policy *fora*. A number of antitrust cases are as we speak under way in different countries and focus on the possible consequences of such strategies. My services will look into this issue to assess whether in some instances certain forms of price discrimination may have anticompetitive effects.

Although it could be argued that off-net / on-net pricing is an inherent element of the strategy followed by networks trying to expand and gain more market share, this is also a strategy which, when used by a dominant operator within a context of strong network effects in order to exclude competitors from the market could give rise to an antitrust claim under Article 82 of the Treaty.

Finally, another area which will take up our attention in the near future is the revision of the Recommendation on relevant markets. As I mentioned earlier, the review of the Recommendation's list of markets is due to start at the end of the next year and my services will be closely involved in this exercise.

#### **IV. CONCLUSIONS**

In conclusion, I would like to make the following personal remarks. The first remark is that the Commission intends to continue playing a leading role in ensuring that antitrust enforcement remains meaningful and effective. The new Regulatory framework and the new Modernisation rules have led to an optimum of competence allocation both in relation to *ex ante* regulation and antitrust enforcement. In a Europe composed of 25 Member States it is of paramount importance to ensure that action by NRAs and NCAs alike

is consistent with the Community's policy objectives and provides the needed legal certainty to market players.

Faced with a multitude of competition and regulatory means, our aim is to use each time the most appropriate and effective course of action in order to achieve the best outcome for all end users of electronic communications products and services. Although regulation and competition may follow different routes to achieve the same end, it is the end that matters: maximising the welfare of users/citizens.

Thank you very much for your attention.