



# The role of Competition Law in the liberalization of the Electronic Communications Industry

Christian Hocepiéd

# Summary

- Key role in consensus building process
- Competition Law is an enabler and inspires future regulation
- Competition law complements Regulation

# Vanitas vanitatum, Omnia Vanitas ?

## NATHALIE ET STACY :



# Vanity of vanities, all is vanity

Fear God, and keep His commandments:  
for this is the whole duty of man.

For God shall bring every work into  
judgment, with every secret thing,  
whether it be good, or whether it be evil

~ Ecclesiastes 12:8,14 ~

# Antoine de Saint-Exupéry ° 29/6/1900

*Les grandes personnes ne comprennent jamais rien toutes seules, et c'est fatigant, pour les enfants, de toujours leur donner des explications*

Grown-ups never understand anything by themselves, and it is tiresome for children to be always and forever explaining things to them

# Leadership of Commission

## ■ Principles (+ vocabulary)

- cost orientation
- Separation regulation & operation
- Relaxing organizational & financial constraints on TOs
- Mutual recognition
- Public procurements
- Frequency harmonization
- universal service

## ■ Mastering the agenda

- Green papers : satellite, infrastructure, mobile, convergence
- Reviews : 1992 review to build consensus to liberalise telephony and infrastructure, 1999, 2006

# Comp Law is the legal basis

for each step in the gradual liberalisation between 1988 and 2002

- 1st stage: 1988-1996
  - Directive 90/388/EEC and its amendments and Article 86 Decisions: gradual liberalisation of services other than public voice telephony, e.g. GSM mobile telephony via and Directives
- 2nd stage: 1998-2000:
  - Full liberalisation Directive : 1 January 1998
  - Competition inquiries and sector inquiries.
- 3rd stage : 2002: **Consolidated Competition Directive** (enshrines basic requirements)

# Competition Law instruments

- Parallel use of Article 86 directives and decisions
- Implementation reports
- Article 82 decisions in 2003
- Synergies between Article 86 and Articles 81 decisions: e.g. Global One case
- Collective use of own initiative procedures
- Sector enquiries
- State Aid instruments (Article 87)
- Mergers control (Telia/Sonera – Telia/Telenor)
- Monitoring NRA approaches under Article 7 FWD

# Market monitoring: an instrument to determine remedies

- Collective use of ex-officio procedures under Regulation 17
  - Target possible abuses which would have a major impact on the progress of the introduction of the competition
  - Examples:
    - Interconnection charges between fixed and mobile operators
    - Accounting rates for the termination of international calls
  - Substantial impacts
    - Methodology
    - Collective change of behaviour of market operators
- Sector enquiries
  - Leased lines ⇒ acceleration of application of 92/44/EEC
  - Local loop unbundling ⇒ May 2003 DT decision (margin squeeze)
  - Roaming ⇒ opening of 4 cases (excessive pricing)
- Article 7
  - competition law methodology to prevent excessive regulation

# Summary

- Key role in consensus building process
- Competition Law is an enabler and inspires sector specific regulation
- Competition law complements Regulation

# Art 86 Directives & Decisions

- Obligations imposed on Member States:
  - non-discrimination in assignment frequencies, numbers, rights of ways
- NRAs must impose obligations to prevent :
  - Denial of access → access obligations
  - Predatory pricing / cross subsidisation/ excessive charges → cost accounting obligations – supervision by NRAs
  - Tying and bundling → reference interconnect offer

# Inspiration for Article 95 Directives & regulations

- obligations 86 Directives are further detailed in Article 95 Directives : eg authorisation directive, interconnection Directive
- Investigations into termination rates ---) recommendation on interconnection pricing
- Unbundling : merger decision ---) regulation
- Sector inquiries ---) market assessments NRAs under Article 14 FWD
- Bitstream : french NCA ---) 2003 recommendation
- Roaming ?

# State aid decisions also set principles

- **Technology Neutrality**  
should not a priori favour any technology: neutral tender, cost-benefit analysis
- **Open Access**  
access at non-discriminatory conditions to all telecom operators and ISPs
- **Proportionality**  
minimum aid necessary to fulfil objective: open call for tender, no superior instrument
- **No strengthening of dominant position**  
Tender specifications and technical requirements should not favour dominant operators
- **Respect for existing private investment**  
allow fair return on investment, crowding-out of private investments should be avoided

# Two objectives of competition law

- **Maintain a level playing field for all companies in a liberalized sector**
- **Preserve benefits of competition: incentives to achieve efficiency and innovation**

# Network vs. Service competition

- **Analogy with make or buy decisions**
- **Argument that premium should be given to companies who invest**



since 1995

# Network vs. Service competition (II)

- **Allow entrants to decide whether to use own/ share infrastructure (GSM)**
- **Differentiated I/C rates**
- **Debate on unbundling and LLU pricing**
- **Network sharing decisions (Judgment 2 May 2006)**

# the Investment Ladder

- Former approach : access obligations to be removed once alternative operators have established own infrastructure
- Current approach : different rungs of the ladder must be offered in parallel + over longer period
- Increasing complexity margin squeeze tests: margin must cover the incremental costs of providing the 'higher rung' + average mix wholesale with average retail

# Summary

- Key role in consensus building process
- Competition Law is enabler of and inspires future regulation
- Competition law complements Regulation

# Balancing exercise

- Resource implications of parallel application Comp law and sector specific remedies but
- Need to avoid never-ending regulation (see criticism of structural separation in impact assessment review)
- Importance informal interaction NRA or NCA with incumbents to ensure that obligations are effectively implemented

# finding the right balance

## NRAs

- No need to prove abuse
- Can design new obligations
- Can take account of political expectations
- Can favour entry



## Safeguarding investment incentives

- **Art. 82:**
  - **Case-law**
  - **Rights of defendants**

# Conclusion ?

***Tu deviens responsable pour toujours  
de ce que tu as apprivoisé***

You become responsible, forever, for what you  
have tamed

Le Petit Prince