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Competition Law and Electronic Communications

**The prohibition of abuse of dominant position in the
electronic communications sector**

A perspective from a practitioner

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I. Introduction

- Has competition law become schizophrenic? Latest example: ERG Report on Transition from sector-specific regulation to competition law
- Originally : reliance on existing and well understood principles of competition law to regulate field of electronic communication services
- In practice: « apparent » divergences
 - ✓ e.g. market definition
 - ✓ entry support

II. The four Building Blocks as to the Specificity of Telecommunications Sector

A. Lesser risk of limiting innovation and investment

- **Pre-existence of special and exclusive rights:**

- KPN Denda (Case C-109/03): AG Poiares Maduro:

« 41. A refusal to supply by a dominant undertaking may amount to an abuse of a dominant position in the situation of a recently deregulated industry in which the necessary inputs for a derivative market were obtained by an undertaking as a direct result of its prior position as a statutory monopolist and where access to those inputs is not regulated by sector-specific legislation. Under those conditions, where the supplier has an advantage in the secondary market which it was able to acquire because it was previously shielded from competition, the potentially deterrent effect on investment and innovation resulting from the imposition of a duty to supply is minimal and is likely to be outweighed by the interest in promoting competition ».

– Mobistar v. Commune de Fléron, 8 September 2005, joined cases No C-544/03 and C-545/03: Discrimination context:

« 49. In the context of its examination, the national court will have to assess the effects of the taxes bearing in mind, in particular, the point at which each of the operators concerned entered the market. It may become apparent that operators which have or have had exclusive or special rights were able to enjoy, before other operators, a position allowing them to redeem their costs of establishing networks. The fact that operators entering the market are subject to public service obligations, including those concerning territorial cover, is likely to put them, in terms of controlling their costs, in an unfavourable position by comparison with traditional operators » .

– ISIS Multimedia, joined cases No C-327/03 and C-328/03):

« 55. If the allocation free of charge to the successor to the historic monopoly of an enormous proportion of that limited resource is accompanied by an obligation on new entrants to pay a sum far in excess of the costs of the administrative action involved in the allocation of numbers, it seems beyond doubt that a lending hand is being given to consolidation of the pre-existing dominant position, hindering the entry of other undertakings, to the detriment of the open competition sought by the Directive in general and by Article 11(2) thereof in particular. Deutsche Telekom not only has a considerable portion of the ‘cake’ but also obtained it for absolutely nothing, whereas the rest of those at the table have to pay a high price for their slices, so that the requisite equality of opportunity in marketing the product is undermined. »

– Commission Guidelines on Article 82 EC (C(2009) 864 final):

« 82. In certain specific cases, it may be clear that imposing an obligation to supply is manifestly not capable of having negative effects on the input owner's and/or other operators' incentives to invest and innovate upstream, whether ex ante or ex post. The Commission considers that this is particularly likely to be the case where regulation compatible with Community law already imposes an obligation to supply on the dominant undertaking and it is clear, from the considerations underlying such regulation, that the necessary balancing of incentives has already been made by the public authority when imposing such an obligation to supply. This could also be the case where the upstream market position of the dominant undertaking has been developed under the protection of special or exclusive rights or has been financed by state resources. In such specific cases, there is no reason for the Commission to deviate from its general enforcement standard of showing likely anticompetitive foreclosure, without considering whether the three circumstances referred to in paragraph 81 are present. »

- **Pre-existence of regulatory obligations**

- **Telefonica Decision of Commission of 04.07.2007:**

« 302. However, it should not be disregarded that the particular circumstances of this case fundamentally differ from those in Oscar Bronner.

303. In the present case, Telefonica has a duty to supply the upstream inputs GigADSL (since March 1999) and ADSL-IP (since April 2002). This duty has been established with a view to promoting competition and the consumer interest. It is clear from the considerations underlying both the EC and Spanish law and regulation that Telefonica's duty to supply the relevant upstream products results from a balancing by the public authorities of the incentives of Telefonica and its competitors to invest and innovate. This is because the need to promote downstream competition in the long term by imposing access to Telefonica's upstream inputs exceeds the need to preserve Telefonica's ex ante incentives to invest in and exploit the upstream infrastructure in question for its own benefit.

309. Therefore, in the light of the specific factual, economic and legal context of the case, in particular the fact that wholesale access at regional level is mandated since March 1999 and wholesale access at national level is mandated since April 2002 and the fact that the former monopoly's ex ante incentives to invest in its infrastructure are not stake in the present case, the legal test applied by the European Court of Justice in Oscar Bronner is not applicable in the present case. »

– Guidelines Article 82 EC:

« 82. In certain specific cases, it may be clear that imposing an obligation to supply is manifestly not capable of having negative effects on the input owner's and/or other operators' incentives to invest and innovate upstream, whether ex ante or ex post. The Commission considers that this is particularly likely to be the case where regulation compatible with Community law already imposes an obligation to supply on the dominant undertaking and it is clear, from the considerations underlying such regulation, that the necessary balancing of incentives has already been made by the public authority when imposing such an obligation to supply. This could also be the case where the upstream market position of the dominant undertaking has been developed under the protection of special or exclusive rights or has been financed by state resources. In such specific cases, there is no reason for the Commission to deviate from its general enforcement standard of showing likely anticompetitive foreclosure, without considering whether the three circumstances referred to in paragraph 81 are present. »

B. Differences in Economies of Scale. Is size a measure of efficiency?

– O2 Germany v. Commission, case T-328/03:

« 107. O2, which was the last operator to enter the German market, appears to be in the weakest competitive position. Even if O2 does have some infrastructure [...], its modest market share and its situation as the last entrant place it objectively in a less favourable position. [...] The dependence [...] thus stems from de facto inequality that the agreement specifically seeks to rebalance by placing O2 in a more favourable competitive position ».

– Mobistar v. Commune de Fléron:

« [I]n the context of its examination, the national court will have to assess the effects of the taxes bearing in mind, in particular, the point at which each of the operators concerned entered the market. It may become apparent that operators which have or have had exclusive or special rights were able to enjoy, before other operators, a position allowing them to redeem their costs of establishing networks. The fact that operators entering the market are subject to public service obligations, including those concerning territorial cover, is likely to put them, in terms of controlling their costs, in an unfavourable position by comparison with traditional operators »

– Court of appeal of Brussels, 4 April 2008:

« 21. It does not appear either that BIPT would have attempted to counter the view supported by BASE and Mobistar that the differences in market shares and/or the differences of costs as compared with Belgacom Mobile result from a range of exogeneous elements over which they have some control. Indeed, a small market share does not automatically demonstrates inefficiencies on the part of the smaller operator. It can also reveal the presence on the market of obstacles to the development of competition »

C. Unlimited struggle or equality of chances

- **Concept of equality of chance originated from regulatory case law**

- **Connect Austria (22 May 2003, C-462/99):**

- « 83. *The Court has consistently ruled that a system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators* »

- **ISIS Multimedia:**

- « *In that regard, a system of undistorted competition can be guaranteed only if equality of opportunity is secured as between the various economic operators* »

- **Concept of equality of chance integrated in competition case law: DT Jugement of 10 April 2008, T-27/03:**

« 198 & 1999. [A] system of undistorted competition between the applicant and its competitors can be guaranteed only if equality of opportunity is secured as between the various economic operators [...]. [E]quality of opportunity as between the incumbent operator and owner of the fixed network, such as the applicant, on the one hand, and its competitors, on the other, therefore means that prices for access services must be set at a level which places competitors on an equal footing with the incumbent operator as regards the provision of call services. Equality of opportunity is secured only if the incumbent operator sets its retail prices at a level which enables competitors – presumed to be just as efficient as the incumbent operator – to reflect all the wholesale costs in their retail prices. However, if the incumbent operator does not adhere to that principle, new entrants can only offer access services to their end-users at a loss. They would then be obliged to offset losses incurred in relation to local network access by higher call charges, which would also distort competition in telecommunications markets.»

- **ERG Report on discussion on application of margin squeeze test to bundle (ERG(09)07), March 2009:**

«52. One could argue that the equally efficient test derives from competition law principles such that only conduct that excludes firms that are as efficient as the vertically integrated firm should be considered as an abuse. Under competition law, the firm cannot be expected to set prices based on rivals' costs (which are unknown to them). Competition on the merits is thus consistent with the exclusion of less efficient competitors, but is not compatible with the unlawful exclusion of equally efficient rivals. Accordingly, using the dominant firm's costs as the basis for a MS test could be argued to be a test of competition on the merits and therefore the most relevant test from a competition policy perspective. Further, it is argued that a test based on the vertically integrated firm's costs takes into account any relevant advantages or disadvantages arising from vertical integration.

54. In a regulatory context, this reasoning may have merit where promotion of competition is the main regulatory principle. Specifically, regulators might find it justified to promote the entry of relatively inefficient operators in the short term in the expectation that they will become more efficient in the long run. Additionally, there might be efficiency benefits from having competitors in the market that although they might be less efficient, may still be able to constrain the pricing of the SMP operator.»

D. Obligation for new entrants to be cheaper than incumbent

– DT Judgement

« 202. In fact, the competitors, already at a competitive disadvantage by comparison with the applicant in relation to local network access, had to apply even lower call charges than the applicant in order to encourage potential customers to discontinue their subscription to the applicant and to subscribe to them instead. »

– Brussels Court of appeal, Judgement of 19 December 2007:

« 55. It is common knowledge that new entrants on the market are obliged to offer more significant advantages in order to attract the customers of an established enterprise »

III. Recent Developments in relation to Mobile

A. Introduction

- Belgian Competition Council: 26 May 2009:

Belgacom Mobile abused of its dominant position as a result of price squeeze, imposing on Belgacom imposition of fine of € 66 million.

- Commercial Court of Brussels: Judgement of 23 May 2007. Belgacom press release of 5 October 2003:

"Ce 2 octobre 2009 en soirée, les deux experts désignés en 2007 par le Tribunal de commerce de Bruxelles dans le cadre d'une procédure qui oppose Belgacom Mobile à KPN Group Belgium/BASE (Groupe KPN), et Mobistar (Groupe France Télécom), ont déposé un rapport préliminaire. Ce rapport conclut notamment sur base d'une méthode inédite et prospective, qui conduit au calcul d'une part de marché théorique des demanderesses sous des conditions de parfaite concurrence, que l'on pourrait considérer que l'impact allégué sur Mobistar et KPN Group Belgium des tarifs Proximus on-net au cours de la période 1999-2004 s'élevait à un montant de 1,182 milliards d'euros."

B. Price Squeeze as stand-alone form of abuse

Industrie des Poudres Sphériques	Deutsche Telekom	Linkline (US Supreme Court), Rejection of price squeeze
<p><i>« [I]n the absence of abusive prices being charged by PEM for the raw material, namely low-oxygen primary calcium metal, or of predatory pricing for the derived product, namely broken calcium metal, the fact that the applicant cannot, seemingly because of its higher processing costs, remain competitive in the sale of the derived product cannot justify characterizing PEM's pricing policy as abusive » (para. 179)</i></p>	<p><i>« The abusive nature of the applicant's conduct is connected with the unfairness of the spread between its prices for wholesale excess and its retail prices, which takes the form of a price squeeze. Therefore, in view of the abuse found in the contested decision, the Commission was not required to demonstrate that the applicant's retail prices were, as such, abusive » (para.167)</i></p>	<ul style="list-style-type: none"> - <i>“Cutting prices in order to increase business after is the very essence of competition. To avoid chilling aggressive price competition, we have carefully limited the circumstances under which plaintiffs can state a Sherman Act claim by alleging that prices are too low”.</i> - <i>“No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise”.</i>

C. Hypothetical v. reasonably efficient competitor test

- Origin of the two methodologies: Access notice, paras. 117 and 118
- Implications of DT case :
 - « in principle »
 - Reference to case law in *AKZO* and *Industrie des Poudres Sphériques*, where costs of dominant enterprises were assessed (paras. 189 and 190)
 - Reference to principle of legal certainty limiting ability to take into account costs of new entrants (para. 192)
 - Equality of chance (para 198 and 199)

– **OFT : The application of the Competition Act 1998 in the Telecommunications Sector.**

*« The vertically integrated undertaking could subject its competitors in the downstream market to a price or a margin squeeze by raising the cost of the key input (see paragraph 7.32 to 7.37 below on excessive pricing) and/or by lowering its prices in the downstream market. The integrated undertaking's total revenue may remain unchanged. The effect would be to reduce the gross margin available to its competitors, which might well make **them** unprofitable. In considering whether an undertaking is engaging in price squeezing in breach of the Competition Act, the Director General will consider whether the dominant undertaking would be profitable in the relevant downstream market if it had to pay the same input prices as its competitors. A dominant undertaking may try to conceal a price squeeze by allocating to its upstream activities costs that are actually incurred as a result of its downstream activities. The Director General will give close consideration to the method of cost allocation where he believes that it may be being used to aid anti-competitive behaviour.»*

– **ARCEP, Decision No 2008-0896 of 29 July 2008:**

« A service can be regarded as provided under eviction tariffs when it cannot be economically replicated by competitors which are as efficient dominant enterprise or by reasonably efficient competitors ».

D. Definition of basket of services

- Deutsche Telekom: all relevant access products
- *On-net* pricing cases:
 - Competition Council Decision of 26 May 2009:

« 264. & 265. For the evaluation of a squeeze, one should not start from the point of view of the consumer, but from the point of view of competitors wishing to duplicate and compete with the offer of the dominant operator. Indeed, [...] the key element in the analysis of a margin squeeze is the wholesale market and not the retail market. One must therefore start from the upstream market – i.e. the market for the termination of calls on the network of BMB – in order to compare the wholesale tariffs with the corresponding retail tariffs on the retail market ».