

Art. 82 in Telecoms

Some General Considerations

CLEC Conference

“The prohibition of abuse of dominant position in the electronic communications sector”

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** The views expressed are those of the author and do not necessarily reflect those of Ofcom.*

Outline

- The UK context;
- Application of Art. 82 in the UK telecoms;
- The past and current focus of Art. 82;
 - The margin squeeze examples:
 - *Linkline vs. Deutsche Telekom*;
 - The coexistence with sector regulation;
- Speculating on future focus;
- Limits to Art. 82 application: The example of the TSR.

Where does Art. 82 sit within Ofcom's Powers

- Ofcom powers:
 - ex ante regulatory (EU *ex ante* Framework); and
 - ex post competition law powers:
 - Art. 81/82 concurrency with the OFT; and
 - mergers only advisory to the OFT;
 - UK specific tool: Enterprise Act (Section 131):
 - Ofcom (and most UK regulators) can make a reference to the CC if:

“it has reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods and services prevents, restricts, or distorts competition”;

- Regulators can accept undertakings *in lieu* of a reference to the CC; and
- The CC has up to two years and not restricted as to which remedies it may suggest.

Use of Art. 82 in the UK Telecoms

- Several decisions, but no infringement, so far:
 - NCCN 500 - 1 Aug 08 (mostly margin squeeze):
http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ccases/closed_all/cw_823/NCCN_500.pdf;
 - BBC provision of access services - 30 May 07 (predation):
http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ccases/closed_all/cw_842/c4.pdf;
 - BT pricing of digital cordless phones – 1 Aug 06 (predation):
http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ccases/closed_all/cw_828/cordless_06.pdf;
 - Floe complaint against Vodafone regarding GSM gateways – 28 Jun 05 (discrimination): http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ccases/closed_all/cw_805/;
 - Complaint from Gamma Telecom Limited against BT Wholesale about reduced rates for Wholesale Calls – 13 June 05 (margin squeeze):
http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ccases/closed_all/cw_802/;
 - Other older cases: see http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ccases/closed_c_act/.
- Two (margin squeeze) cases still opened: *Freeserve* and *Thus Gamma Telecom*.

Past and current focus

- At the outset (prior to the implementation of *ex ante* EU regulation) Art. 82 was sometimes used in telecoms to open up the sector to competition: e.g. AT&T (1982);
- In the EU significant focus on margin squeezes in the last few years :
 - EU cases (*Deutsche Telekom, France Telecom, Telefónica*);
 - UK (previous slide);
 - National level across the EU; and
 - US (*Trinko, Linkline*).

Margin Squeeze - 1

- Different approaches in the US - *Linkline* (09) – and EU – CFI on *Deutsche Telekom* (08):

A. Coexistence of *ex ante* and *ex post* rules:

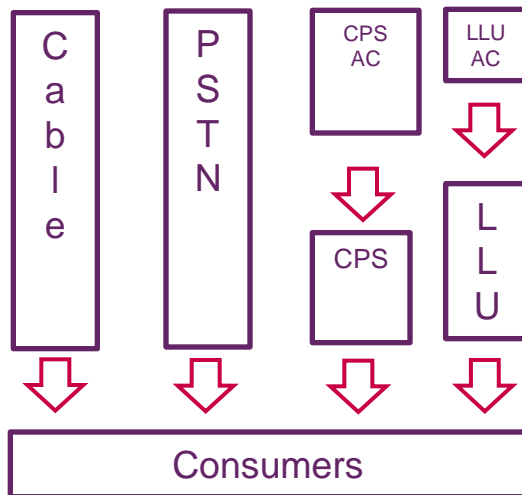
- CFI: NRAs' decisions based on *ex ante* rules do not affect the Commission's power to find competition law infringement;
- US Supreme Court: in regulated sector antitrust law cannot find price squeezes;
- EU Commission's Art. 82 Guidance on excessive (not exclusionary) pricing: intervene only when Art. 82 is the only way to protect consumers

B. The substantive test:

- a. *ex post* EU: $P^d - P^u < C^d$
 - b. *ex post* US: $P^d - C^u - C^d < 0$ (predation test)
 - c. *ex ante* EU: $AC = P^d - C^d$ (imputation test)
- } a. = b. if $P^u = C^u$

Margin Squeeze - 2

- Possible risks of false positives in applying margin test squeeze test in presence of regulated access at multiple points of the value chain (Briglauer et al., 2008).
- Example of voice calls (but could apply to broadband as well)



Examples of margin squeeze not necessarily anticompetitive:

1 – LLU operators offer retail call bundles (fixed fees), but CPS operators face ppm marginal cost leading to ppm retail call charges;

2 – PSTN retail call prices (fixed fees) constrained by cable or LLU, but CPS operators cannot compete because CPS AC is average ppm;

LLU AC is per line fixed charge } Lead to different retail price structures
 CPS AC is average ppm }

- This does not mean that anticompetitive price squeezes cannot occur, only that the risk of false positives should be taken into account.

Speculating on Future Focus

- So far, mainly margin squeezes and predation in fixed telecom (voice and broadband) in presence of dominant incumbent PSTNs.
- Future (purely speculative)?
 - Spectrum trading and liberalisation gradually introduced in the UK and elsewhere in EU (Norway, the Netherlands and Italy)

Is dominance in spectrum possible?

- Mobile consolidation taking place (*T-Mobile/Orange Neth; TPG IV/Apax/Q-Telecom; T-Mobile/tele.ring*; “Orange/T-Mobile” proposed in the UK) largely driven by the increased pace of technological development. On top of RAN sharing agreements;

Single or collective dominance in mobile?

- Will fixed and mobile still be in separate markets for voice and broadband?

Reduced risk of dominance (in spite of consolidation)?

Limits to the applications of Art 82: The TSR

- Art. 82 may not be useful/usable in certain circumstances. Example of the Telecom Strategic Review (TSR) in the UK.
- Conclusion: BT had the ability and incentives to engage in non-price discrimination (i.e. sabotage) against downstream rivals across many of the upstream inputs that it was required to provide (often at cost-based prices).
- Ofcom considered many remedies:
 - Strengthening non-discrimination obligations;
 - Strengthening punishment - i.e. fines;
 - Setting the level of upstream charges to moderate the incentives to engage in non-price discrimination is a possibility;
 - Structural separation; and
 - Functional separation is a less drastic form of separation which maintains the same ownership over both divisions but separates the management and partly the accountability of the two divisions.

Limits to the applications of Art 82: The TSR - 2

- Could functional separation be imposed under Art.82?
- Theoretically may be yes, difficult in practice
 - Affects all wholesale markets – i.e. WLA, WBA, CPs etc.;
 - Competition law is not appropriate and effective when:
 - there are strong incentives to engage in anticompetitive behaviour, making it likely to be recurrent with need for continuous monitoring; and
 - Detection (infringement needs to be observable and verifiable) is difficult;
 - Current *ex ante* non-discrimination obligations are ineffective as detection is difficult.
- **Problem:** regulated incumbent has strong incentives to behave anti-competitively, but *ex ante* and *ex post* obligations are ineffective. A reference to the CC could be made if:
 - Existing competition law and regulatory powers would not be appropriate;
 - The scale of the suspected problem in terms of adverse impact is significant;
 - There is a reasonable chance that appropriate remedies are available; and
 - Undertakings in lieu are not more appropriate.