



The relationship between NRAs and NCAs

Competition Law and Electronic Communications

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Scope

- Country coverage: Big Five + BE, DK, NL and SE

- Outline:
 - EU Framework on cooperation between NRAs and NCAs
 - Cooperation between NRAs and NCAs
 - Role of the Commission
 - Price squeeze in electronic communications markets
 - NRAs' methodologies to assess price squeeze ex ante
 - Infringements and fines
 - Concluding remarks and open issues

EU Framework on cooperation between NRAs and NCAs

- Access Notice
 - Access agreements may be subject to both competition rules and ex ante regulation (no application of “*ne bis in idem*”)
 - NRAs must ensure consistency with EU competition law
 - No specific provisions on NRA – NCA cooperation
- Framework Directive
 - Regulation adopts a more competition based approach (through market definition and analysis)
 - NRAs must carry out market analysis in collaboration with NCAs “where appropriate”
 - Member States must ensure general cooperation NRAs – NCAs on matters of common interest
- Review of the 2003 EU Framework maintains these principles of NRA-NCA cooperation (the focus of discussion has been on the relationship NRAs – Commission)

Cooperation between NRAs and NCAs

- In all researched countries (except UK) NRA is different from NCA
- In all these countries the NCA issues a report on NRA market analysis
 - Report is not binding
 - NCA not always followed, but all NRAs state the reasons
- Different levels of NRA involvement in NCA action in electronic communications markets
 - Exchange of information upon request: BE, SE
 - On-going cooperation: DE, DK, ES
 - Mandatory (non binding) NRA report: DE, ES, FR, IT, NL
 - NRA duty to inform NCA of competition infringements: FR, ES
- UK
 - OFCOM applies competition law to electronic communications
 - OFCOM and OFT consult with each other to determine who is best placed to act ('concurrency procedures')
 - OFCOM used its competition powers to accept BT's 'Openreach' undertakings leading to voluntary functional separation

Role of the Commission

- The Commission has powers under the EU regulatory framework and also under EU competition law
- Clear rules on the application of EU competition law and cooperation Commission – NCAs in Council Regulation 1/2003
- Relationship Commission – NRAs under the EU 2003 Regulatory Framework is a sometimes delicate balancing exercise
- The EU Roaming Regulation, an interesting case study
 - Commission sector inquiry under competition law in 2000
 - Inclusion of Market 17 in 2003 Commission Recommendation
 - Roaming regulation adopted by EP and Council on a Commission's proposal based on Art. 95 EU ('approximation of laws')
 - Legal basis of the Roaming I Regulation challenged (preliminary ruling of ECJ pending)

Price squeeze in electronic communications markets

- A case where concurrent NCA and NRA action is likely (but does not always lead to a similar outcome)
- An abuse where the regulatory context is all the more relevant
- Principles set by the Commission in cases Deutsche Telekom (2003, confirmed by CFI in 2008) and Telefónica (2007, CFI ruling pending)
 - Regulated prices do not prevent a price squeeze finding unless the dominant firm has no margin of manoeuvre (narrowly interpreted by Commission and Court)
 - Margin squeeze is more likely to be abusive if there is a regulated duty to supply the upstream input
 - Competition law and NRA assessment need not reach the same conclusions
 - ‘As efficient operator’ test: profitability assessed on the basis of the dominant company’s downstream costs (*“the dominant company’s own downstream operations could not trade profitably on the basis of the upstream price charged to its competitors”*)

Price squeeze in electronic communications markets

- Absent a regulatory obligation to supply and when the dominant upstream position is not due to past special/exclusive rights, a more stringent test would apply (Commission guidance on Art. 82)
 - Price squeeze as a ‘constructive refusal to supply’
 - Objective necessity of the input: no actual or potential substitute (no alternative source of ‘efficient’ supply) in the foreseeable future
 - Elimination of effective competition in downstream market immediately or over time
 - Consumer harm outweighs the negative effects of imposing an obligation to supply

- In a SE NCA price squeeze case against Telia Sonera the Stockholm Court referred some of these questions to the ECJ (ruling pending):
 - Price squeeze in the absence of a regulatory obligation to supply
 - Indispensability requirement

NRAs' methodologies to assess price squeeze ex ante

- More than half of the NRAs in the researched countries assess price squeeze arising from retail offers ex ante (BE, DK, ES, IT, NL)
- Methodologies developed in several SMP markets
- Preferred methodology is a combination of Tests 1 and 2
 - Test 1 'As efficient competitor'
 - Test 2 'Reasonably efficient competitor'
- Promotions are generally assessed as a retail cost, although sometimes only scrutinized ex post
- Tests also generally performed on bundles, with some variations
- Methodologies published, but their individual application remains non transparent (ANOs not involved, tacit approval, retail offers confidential)
- Outcome difficult to predict both for the SMP operator and ANOs

NRA's methodologies to assess price squeeze ex ante

NRA	Retail offers	Test 1	Test 2	Promotions	Bundles	Other
BE	Fixed access Calls Leased lines	✓		--	✓	Tacit approval ANOs not consulted DCF can be used
DK	Broadband (under consideration)		✓	--	✓ Joint replicability	
ES	Fixed access Broadband	✓		✓ Assessed ex post	✓ Joint replicability Individual implicit price test	Tacit approval ANOs not consulted DCF
IT	Calls Broadband Leased lines *Fixed access *(proposed)	✓	✓	✓	✓ Individual replicability	AGCOM decision not published ANOs not consulted
NL	Non residential fixed access and calls (until Jan 2010)	✓		✓	✓	KPN performs test itself and notifies OPTA ANOs not consulted

Infringements and Fines

- Some NCAs are particularly active in fining competition law infringements in electronic communications markets: FR, IT
- Most infringements are abuses of dominance (although one collusion case in FR and one in NL in mobile communications)
 - Dutch NCA collusion decision was annulled. Appeal against annulment pending, but interesting ECJ preliminary ruling on the test for ‘concerted practices’.
- NRA intervention against regulatory infringements leading to fines
 - Frequent in ES (LLU infringement), NL (illegal discounts)
 - Some recent cases in IT (number portability)
 - Rare in DE, DK, SE, UK
- Some Commission fines for pricing abuses in DE, ES and FR
 - Deutsche Telekom: €12.6m (confirmed by CFI)
 - Telefónica: €151.8m (CFI ruling pending)
 - Wanadoo Interactive: €10.35m (confirmed by CFI)

Concluding remarks and open issues

- Conduct of dominant providers of electronic communications services may be subject to both NRA and NCA scrutiny
- While it is legally admissible that regulation and competition law lead to different results, consistency is generally desirable
- Cooperation between NRAs and NCAs is generally mandated today in both directions, but is this cooperation effective in practice?
- Greater consistency requires increased cooperation between NRAs and NCAs but also between NRAs and the Commission. What future role for the Commission and BEREC in ensuring this consistency?
- Progressive deregulation of electronic communications markets may increase the scope for competition law enforcement. What will be the applicable test for price squeeze abuses?
- What future use of Art. 95 EU in case of alleged cross-border market failures?