CULLEN INTERNATIONAL

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# Applying Competition Law in a Regulated Sector

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**The views expressed are purely those of the speaker and may not in any circumstances be regarded as stating an official position of the European Commission**

# Sector specific vs. Competition law

- Competition law ("horizontal rules")
  - A system ensuring that competition is not distorted is included in the internal market concept and
  - *"The Union shall have exclusive competence in (...) the establishing of the competition rules necessary for the functioning of the internal market". (*Article 3(1)(b) TFEU) but also implemented at national level
- The EU Directives aim :
  - fostering internal market, including entry
  - undistorted competition
  - Universal service and citizen's rights
  - harmonization
- National Sector specific rules in the EU Member States
  - Implementation of the EU framework
  - National objectives: e.g. coverage, investment, consumer interest (ex keeping retail tariffs low) etc

# In the EU "*asymmetric, ex ante*" regulation is the exception

Only markets where 3 criteria are met:

- Presence of high and non-transitory entry barriers
- Dynamic state of competitiveness - does the market tend towards effective competition ?
- Sufficiency of competition law alone to address the market failure

2007 Markets recommendation

# Regulation is not « lex specialis »

- Same conduct can breach both sector specific obligations and competition law (Judgment T 270/03 of 10 April 2008)
- Because Competition law may have different objectives than telecoms laws (Deutsche Telekom Judgment of 10 April 2008, para 113) and protect other legal interests, there are no *„legitimate expectations“* that regulatory approval excludes abuse of dominant position: no “carte blanche”, even if NRA examined possible margin squeeze.
- At the same time, Competition law is enforced taking into account obligations derived from Sector regulation.

# Why does ex ante not suffice ?

- Ex ante has limitations
  - NRAs use *ex ante* data, Commission/NCAs *ex post*
  - Regulators can only limit the risk of abuse, but not prevent it (*margin of maneuvre*)
- Not all markets are regulated ex ante
  - Cfr. Judgment 17 février 2011 in case C-52/09 *Konkurrensverket vs TeliaSonera Sverige AB*.
  - E.g. recent EU procedure against non-compete agreement between Telefonica and Portugal Telecom (IP/11/1241 of 25/10/2011 ).

# Regulation may foster M&A example : mobile consolidation

- roaming regulation and MTR recommendation are leading to substantial cuts in mobile revenues,
- while mobile penetration reached maturity (above 120 percent in the main MS).
- Efficiency depends on market share - savings can be achieved through mergers:
  - Austria, Holland and U.K. consolidated already
  - others to follow?

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# 1 March 2010

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  - T-Mobile was the fourth-largest mobile operator in the UK, with a 15% share of the market. O2 had a 27% share, followed by Vodafone (25%) and Orange (22%). The fifth was 3UK.
- market share of about 37%  with sales of 9.4bn Euros
- to address the competition concerns identified by the Commission,
  - the parties offered among other to divest 15 MHz of spectrum at the 1800 MHz level.
- Involvement of regulator may be required since spectrum management is regulated.

# State aid control

- The EU Commission took more than 50 decisions concerning broadband
- 17.9.2009 Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks
  - ***Open access*** for at least 7 years – an essential condition;
  - NRAs involved/consulted given their competences in the field – Where they have the competence, are the best placed to monitor open access.

# Competition Advocacy

- Most efficient intervention is at the stage of policy development
- Competition assessment essential part of regulatory impact assessment
  - OECD recommendation of 22 October 2009 on competition assessment
- NCA best placed to provide guidance and criteria
  - E.g. in case of competition for the market processes

# Goal: make regulation and competition fit together