



EUROPEAN COMMISSION
DIRECTORATE-GENERAL IV - COMPETITION
Information, communication and multimedia
Telecommunications and Posts ;
Information Society Coordination

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Brussels, 9th February 1999.
IV/C1/HU/rdu

Managing the Strategic Impact of Competition Law in Telecoms

Keynote address
**Outlining EC Plans for the
Further Development of Europe's
Telecoms Regulation Framework**

I have been given an ambitious brief by the organisers of this conference :
outlining the EC's plans for the further development of Europe's telecoms
regulatory framework.

As you know, the Commission acting as a collegiate body has still not
officially launched the 1999 Review of regulation in the sector in the
European Union and it would be unwise to take a position on this before this
has happened.

You will therefore understand, I hope, that I will limit myself to reviewing,
from a competition point-of-view, the starting position of the sector, which
will set the reference point for any review - and for the regulatory goals for
this year.

I will then move on to throw some considerations of a more general nature
into the debate, which, no doubt, the sector will have to examine , by itself,
and also with its regulators and the Commission during the course of this
year.

Let us look at the record in Europe to date in more detail.

Let me go through the basic dates for full liberalisation.

- 1st January 1998 - 10 EU Member States.

- Remaining Member States :

1st December 1998 : Spain and Ireland,

Ireland has advanced the date by its own choice from 1st January 2000 to 1st December of last year.

1st January 2000 : Portugal.

31st December 2000 : Greece,

The last two dates both fixed by Commission Decisions under EC Competition Law.

Therefore, we are faced with an entirely new environment in Europe :

All of the EU Member States have now fully liberalised with the exception of only Portugal and Greece, which are soon to follow suit.

That means that 95% of the nearly 380 million people of the European Union now live in a fully liberalised telecomms market - a worldfirst and, without doubt, a major stabilising factor for worldwide liberalisation in the framework of the WTO.

However, as is well know, the devil is in the detail.

Let us therefore have a look at the current regulatory environment in the fifteen Member States, and their compliance with the EU Liberalisation Directives - issued under EU Competition Law - and the EU ONP and Licensing Directives, issued by the European Parliament and Council of Ministers.

A detailed balance has been drawn up in the (fourth) Implementation Report (COM(98)594) issued by the European Commission on 25th November of last year.

The report reviews the main features of the regulatory framework and their state of implementation, many of which are the subject of debate at this conference and at the centre of the 1999 Review debate :

- Regulatory authorities ;
- Licensing ;
- Interconnection ;
- Universal service ;
- Tariffs / accounting systems ;
- Numbering ;
- Frequency ;
- Rights of way ;

and

- Competition in the local loop.

Let me just quickly review some key elements because progress in these areas will determine the focus of debate during the year.

- The key and basis of the new regulatory system :
National regulatory authorities (the "OFTELs" of this world) have begun operations in all Member States.
- **Licensing** : national frameworks are generally in place.

- **Interconnection** : we see a significant number of interconnection agreements.

The benchmarking of interconnection rates across Europe, established by the Commission, has given some of the lowest interconnection rates in the world, with local call origination termination rates in the order of 1 Eurocent / minute.

- **Universal service** : schemes for financing universal service have been introduced or announced only by four Member States. All others believe that special schemes are not required at this stage.
- **Tariffs / accounting systems** : there remains substantial work to be done.
- **Numbering**: major progress has been made on equal access, and number portability, both due by 1st January 2000. There is no apparent lack of availability of numbers.
- **Frequency** : at least two GSM and one DCS 1800 licence, in each Member State.

The Commission has proposed a decision on the introduction of the third generation mobile system, aiming at licensing systems by 1st January 2000 and start of operations by 1st January 2002 throughout the EU.

- **Rights of way** : right to use public ways in virtually all Member States, even if problems remain at local levels in a number of cases.

Summarising, we have no areas in which significant failures have occurred, but we should also say that corrective action is required in a number of cases. The balance is therefore clearly positive but we are following any case of non-compliance with the appropriate legal procedures. To date, more than eighty such procedures have been launched by the DGIV/DGXIII task force (the "Joint Team") which has been created, a third of which have been closed in the mean time because the issue at stake has been adequately addressed.

The ultimate measure of success must be market impact. The Implementation Report has given a number of indicators to measure emerging competition in the marketplace. Looking at the number of operators authorised to offer national public voice telephony, we see that by August 1998 a total of 218 operators had been licensed across the EU. Three groups may be distinguished :

- The UK, Sweden, and Finland are, not unexpectedly, in the top group accounting for 41% of the licences.
- However, a firm second group is forming, with Germany, France, the Netherlands, and a number of other Member States catching up.
- There remains a third group of Member States which were either still monopolies or near-monopolies at the time : Greece, Portugal, Luxembourg, and - up to 1st December 1998 - Spain and Ireland. Luxembourg liberalised on 1st July 1998.

Another indicator is the number of operators authorised to offer international public voice telephony : by August 1998, a total of 284 licences across the EU.

Again, Sweden and the UK are far ahead, but some others like the Netherlands are catching up. This large number of operators shows the close interrelation between the workings of the EU and the WTO. Europe has a fundamental interest in full liberalisation under the WTO and further progress in the year 2000 Round, as it is opening its own market and fulfilling its obligations.

And, finally, tariffs for the consumer, the most important indicator of the objective benefits which we are trying to achieve. We have clearly made progress with international call charges. International call charges have fallen substantially across EU Member States, in some cases by up to 30%. The reductions have even been more striking in national long distance markets : in a number of Member States, in particularly in Germany, rates have dropped by up to 70%, i.e. have been cut by more than half.

This is then the starting position. One comment :

- We are starting the year on a firm regulatory base ;
- The market has responded ;

and

- Our success was due to close interaction between and the complementary roles of general Competition Law and sector-specific regulation.

We believe that the latter achievement must be maintained throughout the discussions of this year, as we will have to work out the future relationships between :

- Sector specific ;
- General Competition Law ;

- National and EU levels ;
- WTO ;
- Internet self-regulation.

We are faced with a number of concrete problems :

- We have not achieved to date real competition in the local loop. Only in some Member States has cable developed into a credible alternative in some areas. We are addressing this in the EU Cable Review - the Cable Directive is on the Commission's agenda - but we will have to see how sustainable competition in the telecommunications market can be without real unbundling in the local loop and the resulting credible competition.
- There is a seminal shift between mobile and fixed, most obviously borne out by some recent events such as the merger between Vodaphone / Airtouch – the merged company will be larger in terms of market capitalisation than many fixed operators. At current rates, mobile penetration will overtake fixed by the year 2005. This changes the fundamentals of regulation in the sector. That makes the future development of mobile a central issue. This year we will see the first 3G licences in the European Union : a large number of regulatory problems is bound to ensue, in particular in the field of access and roaming -.

- The integration of the world telecoms market is becoming a physical reality. The new gigantic alliances and megamergers, such as BT /AT&T in fixed telephony and Vodaphone / Airtouch in mobile, seem to be making traditional trading relationships, as well as the regulatory systems which have grown up around them, go rapidly out of date.

They are testing regulation to the limit, both sectoral regulation as well as anti-trust / general Competition Law.

And this leads us then to the points high up on the agenda for this year from a competition point of view, as they appear in the conference programme.

The immediate tasks ahead are :

- Fine tuning the EU's telecom regulatory framework : **the 1999 Telecomms Review.**

The Commission will make its starting position on the Review known soon. The aim is to take stock of , examine, consolidate, and fine-tune the EU's regulatory framework, including the issue of strengthening it where required.

- **Mobile / fixed convergence.**

Reconciling convergence with competition, bound to be a major issue of this year.

- Accommodating the **new worldwide alliances** : accepting more local competition as a quid pro quo for greater global integration. A number of cases are progressing. The issue will be how markets can be kept open when gigantic companies integrate worldwide.

Let me put forward some basic objectives, which the debate should address - fine tuning the EU's telecom regulation.

- This will mean, first of all, reviewing the ONP framework. ONP, in its current shape, was conceived for the transition from a monopoly to a competitive structure. A review is now timely.
- Generating agreement between national regulators on basic market concepts. I will say some more words on this.
- Dealing effectively with convergence and third generation issues. The major test here will be the creation of the right investment climate for the third generation mobile systems.

We need agreement between national regulators on basic market concepts.

Examples being :

- The regime applying to service providers vs. infrastructure providers. If there is a differentiation, which "dose" of infrastructure is needed to apply ?
- The interpretation of the "SMP concept", the concept of "Significant Market Power" : the basic concept underlying interconnection and price regulation under the current system ;
- And, as mentioned, the future treatment of mobile.

The latter very much addresses third generation issues. Apart from the current (hopefully transitionally) problems with the future standard for third generation mobile - the UMTS system -, the sector has to come to some sort of agreement on the future conditions to apply to attract the volumes of investment required. The issue of roaming obligations - or the arrangements under which roaming is negotiated, figures high up the agenda.

All of these are crucial questions where we hope the debate this year will bring some clarification. From a competition point of view, we will be watching this debate closely, and we will be applying Competition Law to those cases which crop up in the marketplace against this background and against the consensus on market definitions, which may emerge.

But let me make a more general point on mobile / fixed convergence. Given the dramatic speed at which mobile has developed during recent months, it now seems legitimate to ask : which will lead the way into the future : mobile or fixed. The answer to this question will give a basic guide to future directions for European regulation in the sector :

- Fixed has grown over a long time period under a regime of price regulation in the local loop.
- Mobile has grown over a very short time essentially without price regulation, leading to substantial investment incentives but also higher prices.

The major issue ahead in the immediate future will be how far price regulation will apply - or be extended.

This will be the subject of hot debate, particularly in the context of interconnection and mobile termination charges. It leads me to make some more detailed remarks on the relationship between sector-specific and general competition law as we set out in the Access Notice on the application of Competition Rules .

ONP is, in principle, a much sharper tool. The core provision is that Member States "ensure" cost-orientation which gives a general mandate for rate approval and regulation for those where this applies - essentially operators with Significant Market Power - the famous SMPs.

Competition Law allows action against excessive, predatory, or discriminatory pricing only.

Sector-specific regulation, therefore, is a more powerful tool, but also a deeper intervention in market mechanisms and investment incentives, a tool that I believe should be used with caution and be reduced in scope, as competition grows.

Competition Law only penalises abuse, and is therefore a weaker instrument ; but it has the advantage that it applies horizontally and is sector independent, with the intervention automatically reduced as competition grows.

The basic test of the efficiency of the two approaches will be how far the two basic objectives can be reached by either of them : openness of markets and fair pricing, and investment. Only if we attain both objectives at the same time can we achieve the consumer benefits, which we are seeking.

This brings me to my third point : worldwide alliances, central from a competition point-of-view. How to balance market power emerging from worldwide integration by more local competition.

This, of course, rings a bell with the competition lawyers in the room. For the others, a short recap .

Screening under EU Competition rules concerns :

- **Article 85** : anti-competitive agreements ;
- **Article 86** : abuse of dominant position, including issues of unfair pricing and refusal of access and interconnection ;
- **Merger Regulation** : market power of new mergers and joint ventures.

As is well known, we have successfully dealt with a first generation of global cases :

- Concert ;
- GlobalOne ;
- Unisource / Uniworld.

We are now faced with a new generation of Internet-related cases, an example being the Worldcom / MCI Decision.

In all these cases, as in the multi-media emerging from the trend towards “convergence”, Commissioner Van Miert has made it clear that we will take a favourable attitude towards market restructuring. But, we have not, and will not, accept that competition can be sacrificed on the altar of convergence and globalisation.

Therefore, the basic precondition is that markets are not closed off and that competitive opportunities remain.

This, applies in particular to the future development of the Internet and e-commerce. We recognise that the Internet is at the centre of the future revolution. We are carefully following reforms of the system. We have welcomed the establishment of ICANN, the new numbering and domain name authority in the Internet context, but we have made it clear that we will not accept the creation of new monopoly positions.

Our participation in the global communications system must be based on a competitive market in Europe.

We will fully use Competition Law to back up the 1999 Review. Our main task will be to review, from a Competition Law point-of-view, potential bottlenecks, which may prove a temptation to anti-competitive behaviour - as we see in the cases emerging.

Given the rising numbers of cases, we plan Sector Inquiries into competitive conditions under EU Competition Law, as foreseen under Regulation 17, Art. 12. We plan the start of an Inquiry into the telephony / mobile market for March 1999 and one into the Internet / e-commerce in September 1999 if required.

The debate on the Review itself will have to be carried on by those concerned, once the Commission has set it in train : sector players, public interest organisations, regulators - these are the organisations that will have to work out how far they are prepared to move towards a European regulatory system for the sector, and how to absorb the lessons from the debate on convergence, the second phase of consultations of which is now drawing to an end.

The ultimate word will rest with our Institutions : the European Parliament and the Council.

As I said at the start, it seems too early to go into the detail of the Review, given that the Commission has still not adopted a Communication. But let me just make a few general comments at this stage, prompted by observations on the debate in the Union which we observe :

- I believe we should avoid some misconceptions about the current regulatory framework, such as making an artificial distinction between the so-called "ex-ante" character of sector-specific regulation and the "ex-post" character of Competition Rules. Let me be clear. Competition Rules, according to the Treaty, set the basic ground rules for the sector, as for any other liberalised sector and are, of course, valid "ex-ante" for any company operating in the sector.

On top of these general rules, we have built sector-specific regulation, particularly for the transition period, in order to break monopoly power and to protect the consumer, for example through the requirement for tariff approval by the regulator for these operators. Once we have competition, it may be sufficient to fall back to the basic ground rules - though we will have to be careful to safeguard public interest objectives in the sector such as universal service.

- We should be careful about the use of concepts, which everybody would agree *prima facie*, but which need careful application to avoid unwanted side-effects. Most actors of the sector would agree that regulation should be "technology neutral", but we must make sure that this can only apply when markets are completely converged and the same type of regulation makes sense. The concept, if not used with caution, could easily lead to extending a regime which was designed for a different purpose, to a sector which has developed well under its own lighter regime. The fixed and the mobile sectors are a case in point. At a time when mobile may take the leadership, it may be that fixed regulation can learn more from mobile than the other way around : a crucial issue to watch.

- *Finally*, we should clearly have both goals in mind : fair prices for the consumer, as well as returns which maintain a sufficient investment incentive. The future's sectors mobile / cable / Internet require substantial investment. Just the upgrading of the Cable networks alone into full grade broadband Internet capability will require some 10 to 20 billion € over the next 2 or 3 years. Again, any additional regulation, particularly of prices, may have a heavy cost in investment incentives.

Regulation will be required to keep networks open. ONP has been a success story to date, and we are all proud of it. But we should make sure that ONP does not become the prisoner of its own success. The European Court of Justice has established demanding tests concerning the opening of networks under a pure Competition Law based "essential facilities" approach, and that makes ONP all the more necessary. But we should also not forget that the Court has put high thresholds in these rulings - such as in the recent Bronner / Mediaprint Judgement later discussed during this conference - , not in order to discourage application of Competition Law, but in order to protect the ability to use one's own investment for one's own benefit - an issue that will have to be carefully thought through by regulators ; as will also be the case after the recent FCC Decision not to impose access conditions on cable.

Let me then conclude on this one point.

Important as the Review is, the primary goal for this year must be to maintain, build on and expand the achievements to date. This brings me back to my starting point.

1999 goals must be :

- Consolidating competition in long-distance and international, our major achievement to date, but an achievement which is still built on a fragile basis ;
- Developing competition in the local loop, where we still fall far short of expectations ;
- Expanding worldwide liberalisation, because Europe's opening of its own markets must be matched by the opening of others', be it in the WTO framework or elsewhere.

Let us not forget that the major test for sustainable competition in Europe's telecommunications sector is still not here - competition in the local loop. We have mobilised - via the Cable Review - Europe's cable networks and we expect a substantial transformation of Europe's cable networks during this year. The European Parliament will today vote on the new Cable Directive which requires, under Competition Law, the legal separation of cable interests and the incumbents' telephone networks where there is cross-ownership. This should bring a substantial potential of competition in the local loop in a number of Member States.

But the focus of 1999 will have to be the **unbundling of the local loop**.

We saw a major decision yesterday with the unbundling of the local loop by the German Regulator fixing the price of the unbundled subscriber line at some 13 € / month. We also saw in this instance a prolonged confrontation of the incumbent - DT - with its competitors and the regulator, with requests by the incumbent at some stage as high as 24 €, i.e. nearly the double of what was ultimately found cost-justified by the regulator.

It is too early to take position on the price which has now been fixed. We will have to see if, at that price, competition in the local loop can develop, not only for business users, but also for private households. And we will have to wait for the reaction of competitors. Given the original requests by the incumbent way above the price finally set by the regulator, this will inevitably reinforce the calls of those who believe that in the current stage of development strict regulation of the incumbents by the sector regulator is required.

Competition in the local loop will remain a topic of central concern for European Competition Law, as well as of the Review. It also shows that a broad debate is needed to agree the right basis for the future regulation of the sector. This brings me to my final statement.

I believe that the most important issue will be to generate a broad debate and launch a broad consultation process. We are not just talking about the future of an industry, but about the broader prospects of Europe in the future Internet economy - a network which is now doubling its traffic every 100 days and where major new growth opportunities now appear in the cross-over of the two - the Internet *and* wireless. Just look at the announcements of the last two days.

I believe this conference can make a major contribution to this debate.