

# **IBA/ABA, Communications and Competition: Developments at the Crossroads, 20-21 May, Washington D.C.**

**Overview of major developments in European  
competition policy affecting the communications  
industry**

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**20 May 2002  
Washington D.C.**

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*The views expressed in this presentation are purely those of the writer and may not in any circumstances be regarded as stating an official position of the European Commission.  
The author would like to thank Jonathan Denness (DG COMP – Directorate C) for his assistance in drafting this speech.*

Mr Chairman, Ladies and Gentlemen.

I am very honoured today to be able to speak in such distinguished company. The list of speakers on this programme is both a tribute to the prestige of the organisers and an acknowledgement of the ever-deepening co-operation amongst competition authorities across the world, and especially across the Atlantic Ocean.

My theme today is the major developments in competition policy affecting the communications industry. Obviously most of what I have to say will concern Europe, but I will also cover issues of wider interest.

I would like to divide my remarks on competition policy into two main sections:

- The work we have already done in the communications sector in recent years; and
- How we are improving the prospects for communications sector in the future.

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### **Recent developments**

1998 saw the full liberalisation of the telecommunications sector in most of the member states of the European Union. That process is now complete: all the additional transitional periods have now expired.

The existing regulatory framework has worked well. The Commission (with a very close cooperation between Commissioners Liikanen and Monti and their services) has been very active, following up on implementation and taking action against member states where that implementation was faulty. For example, we took action against the Italian and Spanish governments on the rebalancing of tariffs and against France to ensure a reduction of the universal service fund. National Regulatory Authorities, a new concept in many EU member states in the 1990s, have also been very active in policing their national markets. We have enjoyed a period of fruitful co-operation between the Commission and those regulatory authorities.

In 2000, we complemented the 1998 framework with a regulation on local loop unbundling. This required member states to ensure that incumbent operators made their local loops available as a separate product to others wishing to offer services to customers over the broadband local loop.

In November 2001, the Commission adopted the 7<sup>th</sup> report examining the state of implementation by EU Member States of the current regulatory framework for telecommunications. The key conclusion of the report is that the telecom services sector is buoyant (in contrast with the financial difficulties of major operators discussed in the financial press every day) and that the national regulatory authorities continue to make progress with liberalisation. The growth of the sector in Europe has reached 9,5 % in 2001. Competition between operators is bringing prices down overall. Prices for incumbents' long distance calls are down 11% since last year and down 45% since 1998 for a three-minute call in Europe, and by 14% since last year and 47% since 1998 for a ten-minute call. The average level of Internet penetration in EU households was around 36% in June 2001. On the other hand, a number of

regulatory bottlenecks remain which have to be removed rapidly to ensure continued growth in the telecommunications markets, notably in local loop unbundling. I understand that local loop unbundling has not been without its problems here in the United States.

### **Telecoms mergers and transatlantic co-operation**

With the liberalisation of markets, the role of competition law has become far more relevant to the telecommunications sector. We have applied competition law to a number of significant mergers that have taken place since 1998, many involving US companies, and we have also conducted own initiative enquiries I would like to consider a few of the most important cases now.

We have seen a number of major cases notified to the US authorities and to the Commission under the Merger Regulation. We have dealt with two cases concerning WorldCom: its merger with MCI which both authorities approved subject to conditions, and its proposed merger with Sprint which both authorities prohibited. In each case the Commission had to examine the effect on the market for top level Internet connectivity to ensure that WorldCom did not achieve a dominant position. In each case it was found that such a dominant position would be created, but that in the first case we believed a remedy was available to solve the dominance problem, but in the second case such a remedy was not available.

I would like to briefly mention at this point the transatlantic anti-trust relationship. All of the above cases involved close co-operation between the EU and US anti-trust authorities. As Commissioner Monti said when he visited the ABA last autumn, the EU and US see eye to eye on virtually all of the most important aspects of antitrust and merger policy. There will never be perfect convergence - we retain our own jurisdictions, laws and enforcement methods. But, EU/US co-operation in antitrust law enforcement has been a remarkable story nonetheless : over the past decade we have concluded two competition co-operation agreements, and staff level contacts, as took place in the cases I mentioned above, have become a daily reality. The important, practical role played by such co-operation should not be underestimated - in my view, it has substantially reduced the incidence of divergent or incoherent rulings on the two sides of the Atlantic.

Returning to Europe, the other major telecommunications merger that we had to assess was the aborted merger between Telia and Telenor. This merger between two incumbent operators in neighbouring countries was approved in 1999 subject to two major conditions. First was the divestment of the Telia cable network, which could form a local access infrastructure for a competing operator entering the Swedish market. Second, the companies offered to implement local loop unbundling on their telephony networks. This was the first time that the Commission had imposed local loop unbundling in any member state in the European Union.

### **Sector Inquiry**

In applying competition rules to communications, we have also identified areas of failure in the market. In reaction to this, in 1999 we launched a sector inquiry - a rarely used instrument which allows us to question all the relevant market players -

into three aspects of telecommunications markets: leased lines, mobile roaming and the local loop.

### *Leased lines*

In the case of leased lines we produced a report of our investigation and held a public hearing in the summer of 2000. Leased line prices were found to have been high in some areas. Since then we have worked with national authorities to tackle this issue. The national regulatory authorities have concentrated on issues related to national leased lines with a view to cost-orientation, whilst the Commission has addressed the problems related to international leased lines and opened five own initiative cases on international leased lines in Belgium, Greece, Italy, Portugal and Spain. The sector inquiry and the efforts of regulators have certainly paid off: leased line prices have fallen by up to 40% since 1998. However, we will keep monitoring the situation, especially with respect to non-price factors, which we understand may be becoming more of a problem as prices fall.

### *Roaming*

The second leg of the sector inquiry was into mobile roaming. Mobile services in Europe have in general been a great success, not least because of the use of a single standard and prices for most services have fallen over time. However, roaming prices have not come down in the same way. As we found in the sector inquiry into roaming last year, prices for roaming remain high, among other reasons because of the lack of incentives to reduce prices in the current system.

I would like at this stage to return to the issue of roaming. Since we published the sector inquiry on mobile roaming, we have not seen significant falls in mobile roaming prices. That is why we conducted inspections in July 2001 at the premises of the mobile operators in the UK and Germany on the basis that the mark up from wholesale to retail prices was a uniform 35% in the UK and 25% in Germany for roamed calls. In addition, we had suspicions that excessive prices were being charged in Germany both at wholesale and retail level.

Our cases are ongoing, so I will not comment further on them at this stage. However, I still see problems in roaming markets, which are not being solved by the new single rate schemes that are currently being introduced. I would prefer to use competition law to address this issue and not to introduce new regulations. But, if roaming prices do not fall soon, there may be no alternative.

### *Local loop*

In March of this year, the Commission published the study that it had commissioned into the progress of competition in the local loop. I would like to recall some of the key observations that that document makes about the issues that have arisen since the adoption of the Regulation imposing local loop unbundling across Europe<sup>1</sup>. Progress in the development of competition in local broadband access markets is not satisfactory, and should be speeded up on the basis of hands-on monitoring by NRAs,

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<sup>1</sup> Regulation (EC) No. 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop (OJ L 336, 30.12.2000, p.14)

binding deadlines and credible penalties. The implementation of the *Unbundling Regulation* has thus far been very disappointing. The lack of pro-activity and/or powers on the part of NRAs was highlighted in nearly all Member States. The number of fully unbundled lines represents a small percentage of the total access lines in Europe, and, in two Member States, no lines had been unbundled.

In most Member States, the number of high-speed access lines held by new entrants is not comparable to the number of the incumbent's retail access lines. Other issues of concern included co-location and cost-orientation of tariffs.

We are currently receiving comments on this report and we will reflect on those comments before proceeding further.

Nevertheless, we are already taking action under competition law to tackle issues in the local loop as can be seen in the case involving Wanadoo.

On 21 December 2001 the Commission sent to Wanadoo Interactive, a subsidiary of France Télécom, a statement of objections concerning its charges to the general public for ADSL Internet access services. The Commission takes the view in the statement that these services are currently being charged below cost, which could represent abuse of a dominant position under Article 82 of the Treaty. ADSL (Asymmetric Digital Subscriber Line) technology offers high-speed access to the Internet. But this technology will, before very long, be carrying an increasingly wide range of content. It is therefore essential, during this growth phase, that no single operator should be allowed to capture the market and discourage new entrants.

### **Other cases**

In June 2001, the Commission issued a negative clearance comfort letter to Intelsat for its restructuring from an intergovernmental organisation into a commercial company. Intelsat was formed as a government co-operative to provide satellite communications around the world in a time before telecommunications liberalisation. As telecommunications markets have developed and other satellite operators entered the market, Intelsat's structure became less appropriate both in commercial and competition terms. The Commission's investigation and analysis revealed that the restructuring did not give rise to an appreciable restriction of competition noting that Intelsat would carry out an IPO within two years of privatisation. This finding was in line with the conclusions of previous cases involving other intergovernmental satellite organisations: namely the maritime satellite organisation Inmarsat and the European satellite organisation Eutelsat

In July 2001, the Commission cleared agreements between a number of major European and non-European banks creating a global network ("Identrus") for the authentication of electronic signatures and other aspects of e-commerce transactions<sup>2</sup>. The Commission has concluded that the Identrus system will not lead to any appreciable restriction of competition. In particular, it entails no foreclosure risk, it will face competitive checks from competing systems, and participants are free to join other such systems. The Commission's clearance decision illustrates the importance it attaches to the development of competitive e-commerce-related markets.

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<sup>2</sup> Case COMP/37.462, OJ L 249, 19.9.2001

We have also recently sent out another statement of objections to a major EU telecommunications operator.

In April 2001, the Commission sent to the Dutch incumbent telecommunications operator KPN a statement of objections alleging that KPN, through its subsidiaries KPN Mobile (mobile traffic) and KPN Telecom (fixed traffic), has violated the competition rules of the EC Treaty. Specifically, we suspect that KPN has abused its dominant position regarding the termination of telephone calls on the KPN mobile network through discriminatory or otherwise unfair behaviour.

The case stems from a complaint by MCI WorldCom, a US based fixed telecommunications network operator who is a new entrant in the European Union market. Studies show that fixed to mobile termination rates in Europe can be ten times higher than the average charge for fixed to fixed interconnection. This results in undue barriers for newcomers to the market and high prices for consumers. Originally, WorldCom's complaint also concerned mobile operators in other EU countries, namely Sweden and Germany, but the complaint against Germany was withdrawn after the German operators reduced their termination rates by 50% and in Sweden the national competition authority is dealing with the issue.

In early May, we opened formal proceedings under Article 82 against Deutsche Telekom AG by sending out a statement of objections. We have come to the preliminary conclusion that the German incumbent telecommunications operator has abused its dominant position through unfair pricing regarding the provision of local access to its fixed telecommunications network (local loop). We are in particular concerned about DT's practice of charging new entrants higher fees for wholesale access to the local loop than what DT's subscribers pay for retail access. This discourages new companies from entering the market and, therefore, creating new jobs, and reduces the choice of suppliers of telecoms services as well as price competition for consumers.

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### **Prospects**

As I said at the beginning, I would now like to turn to the prospects for the communications sector in the light of the new legislative framework and the increased role for competition rules in this framework.

#### *eEurope*

The Lisbon European Council in the spring of 2000 set the objective for the EU to become "the most dynamic knowledge based economy in the world by 2010". This was complemented by an action plan that included inter alia the adoption of a new legislative framework for electronic communications. The Barcelona summit this spring reviewed the progress of that action plan to date on the basis of a benchmarking report.

This first benchmarking report indicates that progress has been made, but that there are still areas to be tackled. Internet penetration growth is slowing down but more

competition in Internet access is driving prices down. On broadband, I think the report summarises the situation very well: "Internet is slowly becoming faster"! ADSL technology is being introduced and cable networks are also offering high-speed access. But, as I said earlier, unbundling is not progressing as fast as we had hoped, and it is the incumbents who have been offering the majority of the ADSL services so far.

### *New regulatory framework*

Probably the most important major project which we are looking forward too in Europe over the coming years is the implementation of the new regulatory framework for electronic communications which has been adopted by the Council and the European Parliament in February 2002 and which will be implemented by mid-2003. My colleague Christian Hocepiet will cover this topic more extensively this afternoon, so I do not propose to pre-empt his remarks. However, I would like to outline the general orientation of the new framework, and some of its main features. The new general orientation is : "more competition, less regulation" for two reasons :

- firstly, telecom markets have become more competitive since 1998 ;
- secondly, the convergence of technologies and infrastructures obliges us to apply similar rules to all subsectors of the information society.

In this context, we have replaced the specific definition of "significant market power" with the more general concept of dominance. The advantage of using dominance as a criterion is that there is 30 years of jurisprudence defining it. We are backing this up with guidelines for national regulatory authorities that will help them to apply the dominance test.

Second, we will only regulate where we do not believe competition remedies will be sufficient to remedy persistent market failures.

Third, the Commission will have veto powers over regulators' decisions which do not define markets correctly or which apply the notion of dominance, whether single or collective, incorrectly.

Finally, the new framework will mean that the Commission and national regulators – who already have a very good relationship between them - will need to work as part of a network in applying the new legislation. This mirrors the network that forms the heart of the Commission's proposals to modernise competition law.

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### **Conclusion**

The communications sector is vital to the growth of the EU economy - and that of the United States as well. A more competitive - and of course competition orientated - communications sector will improve living standards on both sides of the Atlantic.

In Europe we have set out a new framework and we are putting together a network of relationships between the Commission and national regulatory authorities. I firmly

believe that the new system will work well, to the benefit of market actors and, above all, consumers.

But we are always open to outside influences or ideas. American companies are key players in the communications sector in Europe. We also have an excellent relationship with the US authorities - last month for example we had the most recent Information Society dialogue in Brussels that covered many topics of mutual interest, including our common view for "less regulation, more competition" and our ambitions for the development of broadband.

The communications sector remains a dynamic and fast moving one. As a result, we are in the process of adapting the regulatory instruments to suit the sector now that liberalisation of telecommunications is behind us and competition is firmly established. I believe that this framework will serve very well to achieve an increasingly efficient and competitive communications sector in Europe in the coming years.