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Article 82 Guidelines—Missed Opportunities In the Telecoms Sector

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Article 82 Guidelines—Missed Opportunities In the Telecoms Sector

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I. INTRODUCTION

The telecommunications sector has constituted a key enforcement priority for the Commission, particularly in relation to the application of Article 82 EC. Thus, the Article 82 Guidelines[1] were generally anticipated to reflect relevant Commission's practice in the field of electronic communications and to integrate the most recent competition law and regulatory case law as appropriate. Commissioner Kroes had indeed indicated that the Article 82 Guidelines did not seek to radically shift policy, but rather

> to develop and explain theories of harm on the basis of a sound economic assessment for the most frequent types of abusive behaviour to make it easier to understand our policy, not only as stated in policy papers but also in individual decisions based on Article 82.[2]

However, we find that the Article 82 Guidelines fail to achieve this objective insofar as they: (i) fail to address the assessment of dominance on multisided markets; (ii) exclude exploitative abuses from the Commission's apparent priorities; (iii) only partially recognize the impact of exclusive and special rights in liberalized sectors for applying

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[1] GUIDANCE ON THE COMMISSION'S ENFORCEMENT PRIORITIES IN APPLYING ARTICLE 82 EC TREATY TO ABUSIVE EXCLUSIONARY CONDUCT BY DOMINANT UNDERTAKINGS, 3.12.2008, [hereafter "Article 82 Guidelines" or "Guidelines"].

[2] Neelie Kroes, Member of the European Commission in charge of Competition Policy, Preliminary Thoughts on Policy Review of Article 82 Speech at the Fordham Corporate Law Institute New York, SPEECH/05/537, 23.09.2005.

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Article 82; and (iv) fail to analyze discriminatory practices. These shortcomings are discussed below, following a short overview of innovative positions taken by administrative authorities and courts in the EU over the past decade in the field of electronic communications.

II. APPLICATION OF ARTICLE 82 EC IN ELECTRONIC COMMUNICATIONS

The Commission has always regarded competition law as the cornerstone of its liberalization policy. Article 82 EC was the legal basis upon which the Commission adopted its first liberalization Directive 90/388/EEC[3] in 1990. Ever since, great emphasis has been placed on the application of competition law in the field of electronic communications.

The Commission has contributed greatly to elaborating administrative practice in the field of electronic communications. This started with the adoption of *Guidelines on the Application of Competition Law Rules in the Telecommunications Secto*r in 1991,[4] followed by the adoption of an "Access Notice" in 1998 setting out the principles for applying competition rules to access agreements.[5] Both the Telecommunications Guidelines and the Access Notice have been critical to clarifying the Commission's view on the application of competition law in the telecommunications sector.

The Commission has also initiated various significant enforcement cases. In this regard, the Commission's recourse to sector inquiries has been a key feature of the

[3]Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services, OJ No L 192/10 of 24.7.1990.

[4]OJ No C233/2 of 6.9.1991. See in particular para. 7 highlighting the Commission's particular interest in the application of competition law in the field of telecommunications.

[5]Notice on the application of the competition rules to access agreements in the telecommunications sector, OJ No C265/02 of 22.8.1998.

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Commission's application of Article 82 EC in the telecommunications sector. In 1999, the Commission launched a formal inquiry covering three areas: (i) leased lines;[6] (ii) mobile roaming services;[7] and (iii) local loop.[8] Various enforcement initiatives followed these sector inquiries. The Commission's enforcement priorities essentially focused on (i) high roaming tariffs and (ii) obstacles to ensuring the development of competition for broadband services.

In relation to roaming, the Commission considered that (allegedly) high tariffs constituted an artificial restriction on cross-border trade. This became a key enforcement priority for the Commission.[9] After four years of investigation, the Commission sent a formal Statement of Objections to United Kingdom and German mobile operators, alleging that these operators had charged unfair and excessive wholesale prices having a "knock-on" effect on retail prices.[10] Politicians and Commission officials, however, became increasingly frustrated with the slow pace at which these cases were proceeding.[11] In response, in 2006, Commissioner Reding announced plans to adopt a

[6]Case COMP/IV/37.638. Sector inquiry/Leased Lines. For leased lines, the Commission focused on the practices of excessive and discriminatory practices which were restricting the roll-out of alternative networks. In November 2000, the Commission opened five own-initiative cases, which involved Belgium, Greece, Italy, Portugal, and Spain, but these proceedings were closed following significant tariff reductions.

[7]Case COMP/C1/37.639. Sector inquiry/Mobile Roaming.

[8]Case COMP/37.640. Sector inquiry/Local Loop.

[9]Moreover, at wholesale level, roaming tariffs are paid by foreign operators, and national authorities have little incentive to intervene at domestic level to address such concerns.

[10]See, for UK, Commission Press Release, IP/04/994, "Commission challenges UK international roaming rates" of 26 July 2004 and for Germany, Commission Press Release IP/05/161, "Competition: Commission challenges international roaming rates for mobile phones in Germany" of 10 February 2005.

[11]See Commission Staff Working Paper, "Impact assessment of policy options in relation to a Commission Proposal for a Regulation of the European Parliament and of the Council on Roaming on Public Mobile Networks within the Community," 12 July 2006.

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tariff regulation for retail and wholesale roaming services.[12] Following its adoption in 2007,[13] the Commission decided to close the United Kingdom and German roaming cases, which had failed to establish a violation of Article 82 EC.[14]

For broadband services, the Commission sought to apply competition law to address shortcomings in the *ex ante* framework in relation to local loop access. The Commission first relied on soft law approaches, adopting new explanatory notices in relation to the application of competition law and, in particular, the Communication on Unbundled Access to the Local Loop.[15] In the merger between Telia and Telenor,[16] the Commission also sought to impose a remedy requiring unbundling of the local loop, which resulted in withdrawal of the transaction. Again, enforcement initiatives were considered too slow, and a regulation imposing unbundled access to the local loop was adopted at EU level in 2000 (the "ULL Regulation").[17]

Following adoption of the ULL Regulation, the Commission continued to focus on potential abusive practices to secure the development of competition in these crucial markets. The Commission opened proceedings against France Télécom in relation to an

[12]Commission Press release, IP /06/386, "International Mobile Roaming: Commissioner Reding outlines proposal for an EU regulation to bring down prices and presents new figures", 28 March 2006.

[13]Regulation 717/2007 of 27 June 2007 on roaming on public telephone networks within the Community and amending Directive 2002/21/EC, OJ L 171/32, 29 June 2007.

[14]Commission Press Release, IP/07/1113, "Antitrust: Commission closes proceedings against past roaming tariffs in the UK and Germany," 18 July 2007. See also Commission Press Release, "EU Roaming Regulation enters into force across all 27 Member States on 30 June," 25 June 2007.

[15]Communication of the Commission, Unbundled Access to the Local Loop: Enabling the competitive provision of a full range of electronic communication services including broadband multimedia and high speed Internet, OJ C272 of 23.09.2000.

[16]Commission Decision of 13 October 1999, Case COMP/M.1439, Telia/Telenor.

[17]Regulation No 2887/2000/EC (OJ L 334, 31.12.2000).

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alleged predatory pricing strategy for high speed Internet access.[18] Commission proceedings were also opened against Deutsche Telekom[19] and Telefonica[20] relating to margin squeeze practices. These three cases led to the adoption of three decisions condemning the respective incumbents for abuse of dominant position.

It should be further noted that as a result of the decentralization policy, various Member States also undertook Article 82 EC enforcement initiatives, including the United Kingdom, France, and Italy. Two U.K. cases are particularly notable, as they significantly impacted the sector as a whole. First, the U.K. competition authorities became the first to scrutinize mobile termination rates on the basis of the "single network" monopoly argument.[21] Second, following a strategic review by Ofcom (acting on the basis of its competition law powers), BT consented to a commitment to implement a functional separation of its activities.[22]

Finally, it should also be mentioned that Article 82 principles have been incorporated in the *ex ante* regulation following the new regulatory framework's adoption in 2002. Pursuant to the new regulatory framework, markets must be defined and

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[18] Commission Decision of 16 July 2003, Case COMP/38.233, Wanadoo Interactive. Commission Press Release IP/03/1025, "High-speed Internet: the Commission imposes a fine on Wanadoo for abuse of a dominant position," 16 July 2003.

[19] Commission Decision of 21 May 2003, Case COMP/C-1/37.451, 37.578, 37.579, Deutsche Telekom AG. See also Commission Press Release, IP/03/717, "Commission fines Deutsche Telekom for charging anti-competitive tariffs for access to its local networks," 23 May 2003.

[20] Commission Decision of 4 July 2007, Case COMP/38.784, Wanadoo España v. Telefónica, 2008 O.J. (C 83) 5. See also Commission Press Release, IP/07/1011, "Antitrust: Commission fines Telefónica over €151 million for over five years of unfair prices in the Spanish broadband market."

[21] See "Cellnet and Vodafone: Reports on references under section 13 of the Telecommunications Act 1984 on the charges made by Cellnet and Vodafone for terminating calls from fixed-line networks", 1998, *available* at http://www.competition-commission.org.uk/rep_pub/reports/1999/421cellnet.htm#full.

[22] British Telecom has been split into BT and Openreach in 2005. See "Undertakings given to Ofcom by BT pursuant to the Enterprise Act 2002", *available* at ttp://www.ofcom.org.uk/telecoms/btundertakings/btundertakings.pdf.

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analyzed on the basis of competition law principles. The Commission Recommendation on Relevant Markets[23] and the "SMP Guidelines"[24] set out the principles upon which the National Regulatory Authorities ("NRAs") must conduct their analysis. The European Regulators' Group has also given further guidance on imposing remedies to address market failures in its Remedies Paper.[25] Individual guidance was also given in the context of the inter-institutional consultation process of the regulatory framework, which allowed the Commission to comment upon, and potentially veto, the market definition and analysis conducted by the NRAs. Cross-fertilization between competition law and the *ex ante* regulation resulted from the administrative practice that developed under this new framework.[26]

NRA administrative practice shows that Article 82 EC has been instrumental in securing the development of competition in the telecoms sector over the last decade. Competition law (and Article 82 EC in particular) has now become the principal basis for shaping *ex ante* regulation. We find it very surprising that the Commission's new Article 82 Guidelines have neglected to integrate these important lessons, drawn from several

[23]Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services *that revised the* Commission Recommendation of 11 February 2003.

[24]Guidelines for market analysis and the assessment of market power OJ C 165/6 of 11.7.2002 ("SMP Guidelines").

[25]See Revised ERG Common Position on the approach to appropriate remedies in the ECNS regulatory framework of May 2006.

[26]See Commission Press Release, MEMO/07/291, "Electronic communications: the Article 7 procedure and the role of the Commission - Frequently Asked Questions", 12 July 2007. See also Communication on Market Reviews under the EU Regulatory Framework - Consolidating the internal market for electronic communications, of 7 February 2006, COM(2006) 28 final dd 6/2/2006.

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years of application of competition rules and specific regulation in the field of electronic communications.

III. GUIDELINES ON THE DOMINANCE ANALYSIS

The final version of the Guidelines is very brief in its dominance analysis.[27] It essentially retains three key criteria for assessing dominance, consisting of assessment of the undertaking's market position, ease of market entry, and countervailing buyer power. We believe that the Commission's Guidelines fail to enable the clear assessment of dominance, and, in particular, fail to take account of multi-sided markets which constitutes one of the most complex matters in a dominance analysis. The assessment of dominance for the provision of access and interconnection services constitutes a good illustration of the issues that, we submit, should have been examined.

The conclusion of access agreements in the field of electronic communications is almost always multi-sided, as access/interconnection agreements are often bilateral and serve no other purpose than to allow operators to provide electronic communications services at the retail level.[28] Therefore, wholesale and retail markets are largely intertwined. It is fair to say that the interrelation between retail and wholesale markets is the cornerstone of the Commission's current policy to regulate electronic communications. It is therefore artificial to limit the dominance analysis to the review of

[27] The Staff Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses of December 2005 was in fact more detailed especially as regards the calculation of market shares and the possible origins of barriers to expansion/entry. See paras. 28 to 40 of the Staff Discussion Paper.

[28] For example, two mobile operators arguably have no incentive to agree on high reciprocal rates, since such high rates will unavoidably translate into higher retail rates, which will, in turn, reduce consumption at the retail level for calls between mobile networks. Similarly, it has been argued that incumbent operators have reduced incentives to charge high ULL or Bitstream access conditions because they are forced to build their wholesale prices into their retail tariffs (failure to do so would subject them to a discrimination claim), which will also reduce consumption at the retail level if they are too high.

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the competitive constraints for the supply of one particular product and disregard the importance of the multi-sided dimension of the competitive constraints.

The dominance analysis in relation to wholesale roaming and termination services illustrates the shortcomings of such a rudimentary analysis. The Commission had purportedly based its market definition on a network-specific market definition,[29] leading to the finding of a monopoly position for each operator supplying roaming services on its network.[30]

Similarly, with respect to termination services, it has generally been considered that each network constitutes a separate product market in which each operator benefits from a *de facto* monopoly position.[31]

Such an approach fails, however, to recognize that wholesale roaming and call termination services are, in practice, always bilateral and that the supplier of wholesale roaming services also purchases wholesale roaming/interconnection services from its contract partners. Furthermore, analysis of wholesale markets should consider the multi-sided feature of the market. Revenues gained from one customer (at wholesale level) can, in fact, be used to fuel demand from other customers (for example, at retail level).[32]

[29]Case COMP/C1/37.639 . Sector inquiry/Mobile Roaming.

[30]See Commission Press Release, IP/04/994, "the existence of high market shares simply means that the operator concerned might be in a dominant position," 26 July 2004.

[31]See Recommendation of 17 December 2007, page 44: "[a] market definition for call termination on each mobile network would imply that currently each mobile network operator is a single supplier on each market. […]"

[32]This is generally known as the "waterbed effect": mobile operators justified the application of high mobile termination rates on the basis of the need to apply low retail tariffs in order to increase mobile penetration.

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Recent regulatory developments in the field of electronic communications have revealed the shortcomings of the Commission's approach. For various NRAs that endorsed the Commission's approach to the assessment of dominance, their dominance analysis of the termination markets was subsequently faced with actions for annulment. This is because their findings of dominance were found to be insufficiently motivated and too "mechanical." For example, in 2006, the Dutch *College van Beroep voor het Bedrijfsleven* annulled OPTA's (the Dutch NRA) market analysis because it failed to adequately address the argument that *"*there exists a certain interdependency among mobile operators*."* According to the *College* case, it cannot be excluded that mobile operators are *"*in a certain equilibrium," and *"*some and probably all mobile operators are [therefore] not genuinely able to behave independently of one-another."[33] Furthermore, *College* stated that OPTA took insufficient account of the interdependency existing between the mobile retail market and the wholesale termination market on each network.[34] Similar conclusions have been reached in the United Kingdom,[35] Ireland,[36] Finland,[37] and Austria.[38]

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[33]Decision of *College van Beroep voor het Bedrijfsleven* of 13 September 2006, against the OPTA decisions of 14 Nov 2005 and 31 May 2006 relating to the wholesale markets for voice call termination on individual mobile networks (Market 16 of the European Commission's Recommendation on Relevant Markets Susceptible to Ex-Ante Regulation), point 11.4.3.

[34]*Ibidem,* Point 11.4.3.

[35]In November 2005, the Competition Appeals Tribunal annulled the NRA's decision and ordered it to reconsider whether H3G has SMP in the market of voice call termination on individual mobile networks (see CAT, 29 November 2005, Hutchison 3G (UK) Limited v. The Office of Communications, N° 1047/3/3/04). On 13 September 2006, the NRA notified to the Commission a new measure replacing the annulled decision for the period up to 31 March 2007.

[36]ComReg, the Irish NRA, designated each operator with SMP in the wholesale market for voice call termination on their respective mobile networks and imposed SMP obligations on each. Hutchison appealed that decision and in 2005 the Electronic Communications Appeals Panel partially annulled the July 2004 decision leading to Hutchison's SMP designation being set aside (see Electronic Communications Appeal Panel, 26 September 2005, Hutchinson 3G Ireland v. Commission for

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Multi-sided markets could theoretically be taken into account under the Article 82 Guidelines. Such markets could be viewed as a factor influencing the existence of countervailing buying power, insofar as the Guidelines recognize the countervailing buyer power resulting from the other party's ability to vertically integrate.[39] However, the ability to integrate vertically only accounts for a small part of the issues raised by multi-sided markets. It does not adequately recognize all the implications of the mutual moderation theory[40] and, more importantly, the fact that dominant enterprises have no incentive to overcharge because such overcharging translates into higher retail tariffs. The Commission's omission is all the more surprising in view of its most recent positions in relation to the regulation of markets 4 and 5 of the new Commission Recommendation on relevant markets[41] (*i.e.*, wholesale broadband access), where the Commission emphasized the need for NRAs to assess the link between the ability to raise prices at the

Communications Regulation, N°02/05). Recently, on 12 January 2009, Hutchison 3G Ireland brought an appeal against the new decision of ComReg of 1 December 2008.

[37]In Finland, the Administrative Supreme Court decided that the Finnish NRA, FICORA, did not fully examine all the factors that must be taken into consideration when assessing the dominant position of a new entrant (i.e. Finnet Verkot) as regards the supply of termination services on its own network (see Finnish Administrative Supreme Court Decision of 28 October 2005 (Aff. N° 2738, published in the Yearbook No. KHL :2005 :67).

[38]The decisions by the Austrian NRA in the first and the second rounds of market reviews concerning the market for voice call termination on individual mobile networks were appealed by the MNOs, and subsequently annulled by the Administrative Court (VwGH). One of the main reasons for annulment was the insufficient examination of countervailing buyer power.

[39]Para. 18 of the Article 82 Guidelines.

[40]Supported by the Commission in its Telia/Telenor merger decision (Commission Decision of 13 October 1999, Telia/Telenor, Case No COMP/M.1439, para. 153.)

[41]See Recommendation of 17 December 2007.

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wholesale level and the likelihood that such wholesale price increases would be passed on to end users at the retail level.[42]

IV. ABSENCE OF GUIDELINES ON EXPLOITATIVE ABUSES

At the launch of the Article 82 initiative, the Commission indicated that the Guidelines would exclude exploitative abuses. It initially indicated, nevertheless, that these practices would be examined separately.[43] However, the final version of the Guidelines no longer explicitly refers to the parallel adoption of guidelines on exploitative abuses. The Commission explains this focus on exclusionary practices on the ground that "it is better to prevent than to cure." [44]

The Commission's practice in the electronic communications sector, however, demonstrates that the focus on exclusionary practices is unwarranted and that exploitative types of practices have been of repeated concern in the past.[45] These cases also show that

[42] See Commission's comments pursuant to Article 7(3) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, OJ L 108, 24.4.2002, p. 33 (the "Framework Directive"), Cases PT/2008/0850 and PT/2008/0851, 5 January 2009. See also Commission's comments pursuant to Article 7(3) of the Framework Directive, Case FI/2008/0848, 23 December 2008.

[43] When the Staff Discussion Paper was published, the Commission stated that "Other forms of abuse, such as discriminatory and exploitative conduct, will be the subject of further work by the Commission in 2006*"* (Commission Press Release IP/05/1626, Competition: Commission publishes discussion paper on abuse of dominance, 19 December 2005).

[44] See Commission Press Release MEMO/08/761, "Antitrust: Guidance on Commission enforcement priorities in applying Article 82 to exclusionary conduct by dominant firms—frequently asked questions," 3 December 2008: "The Commission, during its internal review, has discussed exclusionary conduct as well as exploitative conduct, such as charging excessively high prices or price discriminating between customers. However, the focus of its work thus far has been on exclusionary conduct. This is because it is better to prevent than to cure—i.e. if markets are not functioning properly, it makes more sense to prioritize the tackling of unilateral conduct which undermines the structure and functioning of the market itself than to address the symptoms. Therefore, for the time being the Guidance Paper only covers exclusionary conduct.*"*

[45] See e.g., paras 78 to 80 of the Commission Decision in AAMS, OJ, L252/47, 1998, paras 33 to 46, where unfair trading conditions were condemned by the Commission and upheld on appeal to the CFI (Case T-139/98, Amministrazione Autonoma dei Monopoli di Stato v Commission, E.C.R. II-3413). See also Commission Decision in 1998 Football World Cup, OJ, L5/55, 2000, paras 91, 99 and 100.

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the distinction between exploitative and exclusionary abuses is, in fact, artificial. Exploitative practices have generally allowed dominant operators to distort competition on other (more competitive) segments. Various examples can be given to illustrate that exploitative abuses should remain, no less than exclusionary abuses, at the top of the enforcement agenda of competition authorities.

The roaming and mobile termination cases illustrate that the application of (allegedly) excessive tariffs has been a key concern high on the priority list of politicians and enforcers. These tariffs were considered as not only detrimental to consumers (*i.e.*, exploitative) but also distortive of competition: (i) new entrants did not benefit from the same volumes of traffic and were therefore unable to capture the same revenues from these services;[46] and (ii) alternative fixed operators complained that high mobile termination rates allowed vertically integrated incumbents to channel revenues towards their mobile affiliate. In other recently liberalized sectors—particularly in energy—similar exploitative practices have also often been alleged.[47]

Arguably, emergence of the regulation of roaming and termination services proves that competition law is inadequate to address exploitative market failures. Indeed, regulation can be seen as having achieved a reduction in wholesale roaming and termination charges across the EU that could not have been matched by the *ex post*

[46] As regards roaming traffic for example, new entrants have complained that they were initially confronted with refusals by incumbent network operators to establish roaming interworking, which prevented them from benefiting from the high wholesale roaming charges applicable to inbound roaming traffic. Similarly, as traffic direction techniques became more proficient, an alliance was created between the largest mobile incumbent networks ("Freemove Alliance") in order to allow these operators to "internalize" the traffic.

[47] See Commission Press Release, IP/08/1774, "Antitrust: Commission opens German electricity market to competition", 26 November 2008.

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enforcement of competition. We do not share such a view. Abandoning competition law enforcement as a tool against exploitative abuses transmits the wrong signal. It increases the likelihood for ad hoc, short-term, and politically motivated regulatory interventions, which can have significant distortive effects for competition and consumers. It also undermines the deterrent effect competition law enforcement is supposed to have on dominant enterprises. Neither consumer welfare nor industry will gain from a tightening of the scope of Article 82 EC offences. We therefore advocate in favor of the adoption of complementary guidelines on exploitative abuses.

V. ASSESSMENT OF EXCLUSIONARY ABUSES

The guidelines on exclusionary abuses, which constitutes the core of the Commission's analysis, also merits a number of remarks.

First, the Commission recognizes the now well-established case law that the application of stricter access obligations under Article 82 EC is justified when *ex ante* access regulation is in place or assets are a legacy of past special and exclusive rights. The Commission, however, stopped its reasoning half way, as the Guidelines' discussion on efficiencies does not recognize the fact that new entrants may suffer from higher costs as a result of past special and exclusive rights and must still have the ability to deploy their activities in order to develop competition. Second, the Commission has failed to address discriminatory practices, although this constitutes a key principle to ensure the development of competition.

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A. Impact of Exclusive and Special rights for the Assessment of ExclusionaryPractices

1. Evolution of the European Courts' Case Law

The case law of the European Courts in the telecommunications sector has gradually recognized that new entrants are objectively in a different position than incumbent operators and that these differences should be taken into account when applying *ex ante* regulation and competition law.

In *Connect Austria*, the ECJ ruled for the first time that assessment of the economic value of a mobile license was to take into account

> the date when the license was granted, the law in force at the time, a possible operating requirement and, where relevant, the economic value of that license, in particular as from the opening of the mobile telecommunications sector to competition.[48]

This was the starting point of an abundance of case law confirming that new entrants are objectively in a different position than incumbent operators.

In *Mobistar v. Commune de Fléron*, the ECJ confirmed that it was necessary to take into account past special and exclusive rights when assessing the discriminatory effect of the imposition of the same tax on mobile operators given that:

> It may become apparent that operators which have or have had exclusive or special rights were able to enjoy, before other operators, a position allowing them to redeem their costs of establishing networks. The fact that operators entering the market are subject to public service obligations, including those concerning territorial cover, is likely to put them, in terms of controlling their costs, in an unfavorable position by comparison with traditional operators.[49]

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[48]Case C-462/99 of 22 May 2003, Connect Austria v. TCK, para. 94. In *Bouygues Télécom*, the CFI, confirming its *Connect Austria* case law, stated that in order to analyze the economic value of the licenses concerned, national courts must take account "inter alia of the size of the different frequency clusters allocated, the time when each of the operators concerned entered the market and the importance of being able to present a full range of mobile telecommunications systems." See Case T-475/04 of 7 July 2007, Bouygues and Bouygues Télécom v. Commission, E.C.R. 2007, p. II-2097, para. 109.

[49]Joined Cases C-544/03 & C-545/03 of 8 September 2005, Mobistar SA v. Commune de Fleron, 2005 E.C.R. I-7723, at para. 49.

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In *ISIS Multimedia*, the Court of Justice also confirmed that this obligation goes further than the principle of nondiscrimination, since the Member States are asked to encourage the entry of new operators in the liberalized market.[50]

It is noteworthy that the obligation to ensure equality of opportunity is not limited to the regulatory case law, but has been confirmed in competition law cases. In *KPN Denda*, Advocate General Poiares Maduro stated that basic competition law principles should take into account the fact that in the telecommunications sector, new entrants are competing with operators who enjoyed past special or exclusive rights:

> [W]here the supplier has an advantage in the secondary market which it was able to acquire because it was previously shielded from competition, the potentially deterrent effect on investment and innovation resulting from the imposition of a duty to supply is minimal and is likely to be outweighed by the interest in promoting competition.[51]

Similarly in *O2 Germany v. Commission*, the CFI determined that for the purpose of assessing the counter-factual situation under Article 81(1) EC, the Commission should have taken account of O2's weaker competitive position as a result of its later market entry.[52]

[50]Case C-327/03 of 20 October 2005, ISIS Multimedia and Firma, E.C.R. 2005, p. I-08877, paras. 45 and 46.

[51]Opinion of Advocate General Poiares Maduro in Case C-109/03 of 25 November 2004, KPN Telecom BV v. OPTA, 2004 E.C.R. I-11273, at para. 41.

[52]"O2, which was the last operator to enter the German market, appears to be in the weakest competitive position. Even if O2 does have some infrastructure, "[…] its modest market share and its situation as the last entrant place it objectively in a less favourable position. […] The dependence […] thus stems from de facto inequality that the agreement specifically seeks to rebalance by placing O2 in a more favourable competitive position," Case T-328/03 of 2 May 2006, O2 (Germany) GmbH & Co OHG v. European Commission, 2006 E.C.R. II-1231, at para. 107.

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In *Deutsche Telekom*, the CFI explicitly referred to the fact that competition law would have to ensure that pricing conditions for access to a bottleneck facility would achieve "equality of opportunity" and that

> [e]quality of opportunity is secured only if the incumbent operator sets its retail prices at a level which enables competitors—presumed to be just as efficient as the incumbent operator—to reflect all the wholesale costs in their retail prices. […].[53]

2. Partial Reflection of the Case Law in the Guidelines

In the Guidelines, the Commission has only partially reflected the case law referred to above. At para. 81, the Guidelines recognize that the criteria for assessing the abusive character of a refusal to supply must take account of past special or exclusive rights, as well as the existence of existing regulatory obligations to supply services.[54] The possible deterrence on investments does not carry the same weight as compared to other sectors, whereas the need to ensure the market entry is considered critical. On balance, a more rigid application of the obligation to supply is therefore warranted.

It is noteworthy that the balance between protection of investment and access obligations has also recently been examined in discussions regarding access conditions for next generation networks ("NGN"), with incumbents arguing that access obligation

[53] *Deutsche Telekom*, at para. 199.

[54] Para. 81 of the Article 82 Guidelines: "In certain specific cases, it may be clear that imposing an obligation to supply is manifestly not capable of having negative effects on the input owner's and/or other operator's incentives to invest and innovate upstream, whether ex ante or ex post. The Commission considers that this is particularly likely to be the case where regulation compatible with Community law already imposes an obligation to supply on the dominant undertaking and it is clear, from the considerations underlying such regulation, that the necessary balancing of incentives has already been made by the public authority when imposing such an obligation to supply. This could also be the case where the upstream market position of the dominant undertaking has been developed under the protection of special or exclusive rights or has been financed by state resources. In such specific cases there is no reason for the Commission to deviate from its general enforcement standard and it may show likely anticompetitive foreclosure without considering whether the above three cumulative circumstances are present."

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would undermine NGN investments. In the Recommendation it issued on this matter, the Commission emphasized the need to devise remedies to promote competition while maintaining investment incentives. To that end, the Commission highlighted the need to ensure that price control measures take account of the incumbent operator's specific position. Accordingly, price control

> should reflect the characteristics of different assets (existing or new ducts, for example) such as asset lifetimes and levels of risk in terms of uncertainty of demand and technological obsolescence. Access conditions should thus in some cases reflect historic costs and in other cases the value associated with the new investments.[55]

A very detailed and granular analysis of the network and assets is therefore required in order to assess the fair compensation that the incumbent is entitled to receive.

It is, however, surprising that the Commission did not follow the same logic when discussing the issue of efficiencies of new entrants. Indeed, at various occasions, the Guidelines assess efficiencies solely by reference to the dominant enterprise' cost structure.[56] More generally, it is also noteworthy that the only reference to competition contained in the Article 82 Guidelines is negatively worded as a duty to ensure that "the conduct does not eliminate effective competition."

We submit that under the current status of the case law, efficiencies should be assessed not only in order to ensure that the conduct does not eliminate effective competition, but also more importantly to ensure that it effectively promotes competition. If promoting competition is the ultimate goal of competition policy in the field of

[55] Draft Commission staff working document, Explanatory note on the Commission Recommendation on regulated access to Next Generation Access Networks, p. 11.

[56] Paras 27 to 29, 88 and 89 of the Article 82 Guidelines.

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electronic communications (as opposed to avoiding eliminating the competition), this necessarily means that efficiencies must be appraised not only by reference to the incumbent's position, but also by reference to new entrants' ability to compete. By the same token, we cannot understand why the Commission would seek to limit the test of price squeeze to the as efficient competitor test and to the exclusion of the reasonably efficient competitor test.

In the NGN Recommendation, the Commission explicitly recognized that new entrants were restricted in their ability to deploy NGN because they lacked the economies of scale and scope benefiting incumbents.[57] However, the Commission has still refused to consider that this implies that this sector would constitute a natural monopoly, indicating that the promotion of infrastructure competition still constitutes the objective to be achieved. If it is accepted that economies of scale are clearly influenced by the existence of past special or exclusive rights, then this must be considered accordingly when assessing the ability for a new entrant to deploy its own network (and internalize certain costs). It would be profoundly discriminatory to take into account the incumbent's actual economies of scales, as achieved from past exclusive or special rights, while refusing to assess a new entrant's ability to compete on the basis of its own costs or vertical integration. This is why we submit that efficiencies cannot be limited to assessing the incumbent's conditions of operation, but must also take into account new entrants' own costs.

[57]The Commission recognizes that local access is indeed "subject to considerable economies of scale and density" (at p. 16).

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It is true that in *Deutsche Telekom*, the CFI added a cautionary note with regard to the reasonably efficient competitor test, indicating that such a methodology could undermine the principle of legal certainty.[58] We do not believe, however, that such *obiter dicta* supports any conclusion that the CFI actually sought to exclude application of the reasonably efficient competitor test because it would imply reference to the costs of new entrants, which would be opaque to an incumbent. The CFI's position is much more nuanced insofar as it only indicated that the reasonably efficient competitor test "could be contrary to the general principles of legal certainty."

Moreover, various precedents confirm that price squeeze methodologies have been devised with the objective of creating a sufficient margin to allow new entrants to develop on the market. ARCEP (the French regulatory authority) rejected the assumption that a new entrant was less efficient than an incumbent operator in its Decision No. 05-1103 of 15 December 2005.[59] ARCEP, in particular, assessed France Telecom's tariffs for its bitstream offer (the *DSL Entreprise* offer) on the basis of a price squeeze test by adding to the local loop unbundling costs the various other costs for the provision of DSL bitstream of an efficient operator. The U.K. Office of Communications has also conducted such analysis in appraising the competitive margin between British Telecom's ATM interconnect access offer (corresponding to wholesale bitstream access) and IP

[58]*Deutsche Telekom*, para. 192: "[A]ny other approach [including the reasonably efficient competitor test] could be contrary to the general principle of legal certainty. If the lawfulness of the pricing practices of a dominant undertaking depended on the particular situation of competing undertakings, particularly their cost structure—information which is generally not known to the dominant undertaking—the latter would not be in a position to assess the lawfulness of its own activities."

[59]*See*, *e.g.*, ARCEP Recommendation No. 05-0089 of Feb. 8, 2005; ARCEP Recommendation No. 05-0397 of May 12, 2005; and ARCEP Decision No. 05-1103 of Dec. 15, 2005.

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stream access offer (corresponding to the wholesale resale product).[60] Interestingly, in its *Telefónica* decision, the Commission stated that "all national regulatory authorities agree that the process of climbing of the ladder of investment can only be effective if there is a margin between all the steps of the ladder,"[61] which confirms the similarity of focus of the application of sector specific regulation and the application of Article 82 of the EC Treaty. Consequently, there are ways of ensuring that incumbent access products do not prevent market entry.

From a practical standpoint, we also have trouble understanding how the principle of legal certainty could stand in the way of applying the reasonably efficient competitor test. Dominant enterprises, by virtue of their long-standing market positions, tend to have unparalleled market knowledge.[62] The relative similarity of costs incurred by the various players is another key element to take into account. Minimum common sets of public service specifications, applicable to all operators, tend to drive the costs of competing operators at a similar level. This is true, for instance, in the case of mobile services, where mobile operators tend to be subject to relatively high minimum coverage and quality requirements on a nationwide basis.[63] In this context, an operator would have difficulty claiming ignorance of new entrants' costs. The key differentiating factor would

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[60]U.K. Office of Communications, Direction Setting the Margin between IPStream and ATM Interconnection Prices, 28 August 2004.

[61]*Telefónica,* para. 393.

[62]Various models exist, which can be used to that end. For example, certain national regulatory agencies have developed price squeeze methodologies to assess and compare the margins resulting from each type of access, precisely in order to allow new entrants to effectively compete.

[63]In this regard, it must be recalled that the *Deutsche Telecom* case involved the fixed local access market. The size and scope of the activities of the incumbent significantly differed from those of new entrants. This was probably an important factual element considered by the CFI when referring to the principle of legal certainty.

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not be the overall cost base, but the difference in scale (*i.e.*, fundamentally, the market share), which an incumbent operator can easily factor into its pricing policies.

B. Absence of Discussion on Discriminatory Practices

The Guidelines do not discuss discrimination as a stand-alone abuse, only referring to refusal to supply (independently of the discrimination) and the price squeeze practice (which, as reduced to the "*as efficient competitor-test*," could be considered as a form of price discrimination).

The case law confirms, however, that discriminatory practices constitute an abuse of dominant position in and of themselves.[64] Based on our experience in the telecoms sector, we consider that more attention should have been given to such abuses. The reference to the refusal to deal and price squeeze practices do not suffice.

First, the Commission fails to address price discrimination practices that can have exclusionary effects and create artificial barriers to entry, but without necessarily resulting in a price squeeze. The Access Notice contained, in fact, a much broader description of price discrimination, determining that it was prohibited unless it was objectively justified by costs, for technical reasons or because customers operate on different levels of the market.[65]

[64]See, *e.g.,* Case T-228/97 of 7 October 1999, Irish Sugar, para. 114.

[65]See point 120 of the Access Notice: "(…)This discrimination could take the form of imposing different conditions, including the charging of different prices, or otherwise differentiating between access agreements, except where such discrimination would be objectively justified, for example on the basis of cost or technical considerations or the fact that the users are operating at different levels. (…)." See also Case T-229-94, 21 October 1997, *Deutsche Bahn*, , E.C.R. II-01689, para. 114, and Décision 05-0280 of the French NRA (ARCEP) of 19 May 2005. Finally, see ERG Remedies Paper, *Id*, p. 36: "Price discrimination: The problem of price discrimination to foreclose the market pertains mainly to the M2M situation. The incumbent operator(s) may seek to foreclose the retail market by charging a high (above-cost) termination charge to other networks whereas implicitly charging a lower price internally. This leads to high costs for off-net calls for other operators at the wholesale level and thus to high prices for off-net

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National competition authorities have also intervened to prohibit discriminatory pricing practices creating artificial barriers to entry. Orange Caraïbe was, for example, forced to withdraw the tariff differentiation for *on net* and *off net* calls.[66] Both the Competition Council and the Court of Appeal of Paris found that the higher charges applied for *off net* calls acted to artificially prevent Bouygues, the new entrant in the French overseas territories, from gaining new customers in the market.[67] This constitutes a good illustration of a case where, independently of a price squeeze analysis, a finding of price discrimination in the retail market was considered to have exclusionary effects and distort competition.

Furthermore, the Guidelines fail to take account of the existence of non-price discrimination practices, even if such practices could also have exclusionary effects for competitors relying on a wholesale product provided on the network of a vertically integrated competitor. In practice, non-price discrimination practices have forced NRAs to adopt detailed and sophisticated rules in reference to offers for access to bottleneck facilities (by imposing Service Level Agreements, or Key Performance Indicators). Competition law could arguably be less efficient in securing such detailed access

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calls at the retail level. On-net calls, on the other hand, are associated with lower costs and thus with lower retail prices. Such a price structure creates network externalities (‘tariffmediated network externalities’) and thus puts small networks with few participants at a disadvantage. The disadvantage is larger the higher the termination charge and thus the higher the difference between the price of an on-net and an off-net call is."

[66]On-net calls are calls between subscribers of a same network; off-net calls are calls made to subscribers of another network.

[67]Court of Appeal of Paris, judgment of 28 January 2005, upholding the decision 04-MC-02 of 9 December 2004, of the Competition Council, Bouygues Telecom v. Orange Caraïbe and France Télécom, p.8: "Considérant que cette pratique de discrimination tarifaire non justifiée par une différence objective de situation, appliquée par un opérateur en position dominante, est de nature à renforcer ce dernier par un effet de réseau ou "effet de club" dans la mesure où les clients sont incités à restreindre le volume des appels destinés à l'opérateur concurrent et, lors du premier achat ou d'un renouvellement, à tenir compte du réseau auquel appartiennent leurs principaux correspondants."

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conditions. However, we submit that competition law enforcement still could (and, in fact, has) play a significant role in view of the specific powers conferred to competition authorities, including the Commission, to impose structural remedies. Conversely, in most EU Member States, NRAs have no such explicit powers on the basis of the *ex ante* framework. The ability to order a divestiture of specific network assets can obviously constitute an adequate measure to address discriminatory access practices. In the United Kingdom, for example, BT has implemented functional separation for its bottleneck facilities in order to ensure "equivalence of inputs," albeit on a voluntary basis.[68] It is therefore surprising that the Guidelines overlook such harmful discriminatory practices.

VI. CONCLUSION

In conclusion, we find significant discrepancies between (i) the evolution of case law and administrative practice of competition law and NRAs in the field of electronic communications and (ii) the Commission's apparent intentions in applying Article 82 EC. A general enforcement notice, of course, cannot be relied upon to foresee all possible sector-specific approaches. Nonetheless, we feel that the Commission's Article 82 Guidelines have overlooked key issues that have been clearly identified in the field of electronic communications. These include, in particular, taking into account the multi-sided nature of the market and recognizing that new entrants should not be penalized for lacking the same economies of scales that benefited dominant operators through past special and exclusive rights.

[68] Equivalence of inputs (EoI) were part of the undertakings given by BT in September 2005 (see "Undertakings given to Ofcom by BT pursuant to the Enterprise Act 2002", available at http://www.ofcom.org.uk/telecoms/btundertakings/btundertakings.pdf). Other NRAs are now actively looking into this remedy, including in Italy, Poland, and Sweden.

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