



Antitrust Connections

Letter from the Chair

Welcome to the Spring 2009 edition of our newly renamed newsletter *Antitrust Connections*. The name change does not reflect any change in our commitment to providing you with a highest-quality in-depth analysis of the most recent developments in the communications industry, but rather an effort to select a catchier newsletter name.

This issue has a number of timely and interesting articles. Our lead article analyzes the DOJ's recently issued *Voice, Video and Broadband Report*. The newsletter then takes a notably international perspective with a related piece on "Convergence and Divergence: A Comparison of the Canadian Competition Bureau and the DOJ's Recent Statements Concerning Unilateral Conduct in the Telecommunications Sector." This article includes an analysis of the information bulletin released by the Canadian Competition Bureau on June 6, 2008 on the *Abuse of Dominance Provisions as Applied to the Telecommunications Industry*. We also have an article on the European regulatory approach to Next Generation Access. This access includes, among other things, the roll-out of fiber optics all, or part, of the way to customers' premises. Our Switched Packets column, focuses on two recent economics papers on interconnection charges between networks. And our regular "Plugged In" column will again keep you abreast of the most recent developments.

The entire Committee leadership looks forward to seeing you at the Spring Meeting and invites you to join us at our table at the Welcome Reception on Wednesday, March 25th, 5:15 p.m.-6:15 p.m. so that we can meet you in person, discuss your ideas and concerns, and see how you can become more involved in our Committee. I would also encourage you to visit our website at <http://www.abanet.org/dch/committee.cfm?com=AT310200>.

Thank you and I hope you enjoy this issue of *Antitrust Connections*.

Aryeh Friedman
Chair, Communications Industry Committee
February 26, 2009

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The Likely Face of Regulation in 2009

When this Issue went to publication the new leadership at the DOJ, FTC, and FCC had not been confirmed. Not surprisingly, there is no shortage of speculation in Washington, or in the Committee's leadership. The following provides a quick glance at the three individuals who are rumored to be the leading contenders for each agency.

PROSPECTIVE CHAIRMAN OF THE FTC COMMISSIONER JON LEIBOWITZ



Photo provided by Mark Murrmann, Mark@ickibod.com

Education:

- 1984, NYU School of Law
- 1980, University of Wisconsin, B.A.

Most Recent Position: Commissioner, FTC

Prior Appointments / Public Positions:

- 1997-2000, Democratic Chief Counsel and Staff Director, U.S. Senate Antitrust Subcommittee
- 1995-1996, Chief Counsel and Staff Director Senate Subcommittee on Terrorism and Technology
- 1991-1994, Chief Counsel and Staff Director Senate Subcommittee on Juvenile Justice

Private Sector Experience:

- 2000-2004, VP Congressional Affairs Motion Picture Association of America

Connections to, and Outlook on, the Telecommunications Industries

- **Broadband Services Provided by Municipalities.** Commissioner Leibowitz has spoken out against attempts to limit or prohibit municipalities from offering broadband service directly to their residents. At his request, the FTC staff issued its *Municipal Provision of Wireless Internet* report in September of 2006.
[Http://www.ftc.gov/speeches/leibowitz/050922municipalbroadband.pdf](http://www.ftc.gov/speeches/leibowitz/050922municipalbroadband.pdf);
[Http://www.ftc.gov/speeches/leibowitz/061010_V060021concurringstatewireless.pdf](http://www.ftc.gov/speeches/leibowitz/061010_V060021concurringstatewireless.pdf)
- **Net Neutrality.** Commissioner Leibowitz supported former FCC Chairman Powell's four "Internet Freedoms." In particular, Commissioner Leibowitz has focused on consumer's right to "receive meaningful information regarding their service plans" and has indicated that failure to disclose material terms about service should be considered 'unfair or deceptive' under the FTC Act. Commissioner Leibowitz believes that issues concerning net neutrality are "at the heart of precisely what the FTC does – both consumer protection and competition" and has suggested that the FTC should have a role in enforcing net neutrality rules.
[Http://www.ftc.gov/speeches/leibowitz/070213Navigating_Between_dystopian_Worlds.pdf](http://www.ftc.gov/speeches/leibowitz/070213Navigating_Between_dystopian_Worlds.pdf)
- **Common Carrier Exception.** Commissioner Leibowitz has joined the larger Commission in recommending that Congress remove the Common Carrier Exception from the FTC Act.
[Http://www.ftc.gov/os/testimony/P034101reauth.pdf](http://www.ftc.gov/os/testimony/P034101reauth.pdf)

ASSISTANT ATTORNEY GENERAL FOR ANTITRUST
CHRISTINE A. VARNEY



Education:

- 1986, Georgetown University Law Center, J.D.
- 1978, Syracuse University, M.P.A.
- 1977, SUNY Albany, B.A.

Most Recent Position: Partner, Hogan & Hartson LLP

Prior Appointments / Public Positions:

- 1994-1997, Commissioner, Federal Trade Commission
- 1992-1994, Assistant to the President & Secretary to the Cabinet

Other Experience:

- 2008-2009, Counsel to Obama/Biden Transition Project
- 1992, General Counsel, 1992 Presidential Inaugural Committee
- 1992, Chief Counsel, Clinton/Gore Campaign
- 1989-1992, General Counsel, Democratic National Committee

Connections to, and Outlook on, the Telecommunications Industries

- **Prior Representations.** Varney's prior clients have included eBay, DoubleClick, the Washington Post, Newsweek Interactive, AOL, and Netscape.
- **Relevant Civic Involvement.** Varney was the former Chair of TRUSTe's Board of Directors. In addition, Varney was an adviser to the Online Privacy Alliance, the Network Advertising Initiative, and the Liberty Alliance.

PROSPECTIVE CHAIRMAN OF THE FCC
JULIUS GENACHOWSKI



Education:

- 1991, Harvard Law School, J.D.
- 1985, Columbia University

Prior Appointments / Public Positions:

- 1996, Chief Counsel to FCC Chairman Reed Hunt
- 1995, Special Counsel to FCC Chairman Reed Hunt
- 1994, Special Counsel to FCC Chairman William E. Kennard
- Legislative Assistant and Press Secretary, Congressman Charles E. Schumer

Other Experience:

- 2008-2009, Obama/Biden Transition Project
- 1997-2005, various senior management positions IAC/InterActive Corp; co-founder and managing director of Rock Creek Ventures; co-founder and managing director of LaunchBox Digital
- 1991-1992, Clerk, Judge Abner J. Mikva, D.C. Circuit
- 1992, Clerk, Justice Brennan
- 1993-1994, Clerk Justice Souter

Connections to, and Outlook on, the Telecommunications Industries

- **Net Neutrality.** Genachowski was chairman of the working group that created president-elect Obama's Technology and Innovation Plan. The plan purportedly supports net neutrality principles.
- **Diversity in Media Ownership.** The plan also supports media-ownership rules that encourage more diversity, and expansion of affordable broadband access across the country.
- **Competition in Telecommunications.** While at the Commission, Genachowski helped devise and adopt the FCC's framework for digital television.

Evolving Competitive Issues in Telecommunications: DOJ's "Voice, Video and Broadband" Report

By Carl Willner¹

The marketplace for telecommunications services has been undergoing rapid transformation over the past decade, as a result of technological developments, regulatory changes, and mergers and acquisitions. In order to better understand the implications of these developments for competition policy and enforcement, the Department of Justice's Antitrust Division organized and hosted on November 29, 2007, a full-day public symposium in Washington, D.C.. The symposium examined the changing competitive landscape for multichannel video, broadband, and voice telephone services, and the impact of these changes on consumers. It consisted of four panels with a total of 19 speakers invited by the Antitrust Division, representing a wide variety of participants in and experts on the telecommunications sector, including:

- incumbent telephone companies and associations representing them (Verizon, AT&T, Qwest, and the National Telecommunications Cooperative Association)
- cable companies (Charter and Cox)
- other competing providers of telephone, broadband or video services and their associations (the Broadband Service Providers Association, Cavalier, Sprint Nextel, Clearwire, DigitalBridge, DirecTV, WildBlue and Current Group)
- economists (Hal Singer, Simon Wilkie, and Thomas Hazlett)
- an industry analyst (Blair Levin)
- a local cable regulator (Office of Cable and Communications Services, Montgomery County, MD).

Recognizing that there could be other relevant viewpoints that could not be accommodated in the one-day symposium, comments were also invited from members of the public and seven other parties made submissions.

The Antitrust Division had planned from the outset to follow-up on the symposium with a report, and within a year of the event, in November 2008, the Department of Justice issued its report on "Voice, Video and Broadband: The Changing

Competitive Landscape and Its Impact on Consumers."² This document, at over 100 pages counting a summary and appendices, represents an extensive review of the state of competition in telecommunications services for residential consumers and ongoing developments. Chapter I provides an overview of developments in the three industry segments addressed at the symposium – voice telephony, broadband and multichannel video services. Chapter II is a more detailed discussion of evidence from the symposium and other public sources of the competitive effects of entry in these three industry segments, including price and non-price effects, and specific concerns such as wireless substitution for wireline services, bundling of services, and new forms of broadband entry. Chapter III reviews possible obstacles to entry, including regulatory issues and conduct of incumbents. Finally, Chapter IV briefly addresses possible competition policy and enforcement issues going forward.

BACKGROUND OF THE SYMPOSIUM AND REPORT

The U.S. Department of Justice's Antitrust Division, either on its own or together with the Federal Trade Commission, has conducted a variety of hearings and workshops and issued several reports on antitrust policy issues in recent years, sometimes focusing on a specific sector of the economy (*e.g.*, real estate) and in other cases on general areas of antitrust enforcement (*e.g.*, unilateral conduct under Section 2 of the Sherman Act). The Department of Justice has also had long experience in the telecommunications sector, most notably with the breakup of the Bell System in the 1980s, and more recently with the implementation of key provisions of the Telecommunications Act of 1996, along with numerous other cases and consent decrees. It has often submitted comments to other government agencies, especially the Federal Communications Commission, on specific telecommunications competition issues.

However, this is the first time that the Antitrust Division has ever hosted a public symposium or issued a report focused on the telecommunications service sector, addressing it as a whole rather than just through comments on particular issues. The need for such a review has been heightened by the growing evidence of convergence in telecommunications services in recent years. Providers that traditionally operated in distinct areas, such as voice telephony and multichannel video, have begun to invade each others' domains. This type of competition first began to develop in broadband services offered by both telephone and cable companies, but now can be seen throughout the full range of telecommunications services. Accordingly, the Antitrust Division has recognized the need to rethink the applicability of traditional market definitions and competition analysis in telecommunications.

¹ Carl Willner is an attorney in the Telecommunications and Media Section of the U.S. Department of Justice's Antitrust Division. He has handled a wide variety of antitrust matters in the telecommunications sector for the Antitrust Division since 1990, and was one of the principal drafters of the Department of Justice's "Voice, Video and Broadband" report. Mr. Willner can be reached at carl.willner@usdoj.gov. Mr. Willner's views expressed in this article are not purported to reflect those of the U.S. Department of Justice.

² This report can be obtained electronically from the Department of Justice's web site at <http://www.usdoj.gov/atr/public/reports/239284.pdf>

At the same time, the public nature of the report, and the necessary corollary that only public information could be cited in it, meant that the Antitrust Division was limited in how far it could go in reaching conclusions about competition and market definitions in the telecommunications sector. More definitive conclusions on many of the issues addressed in the report will have to await enforcement actions where the Antitrust Division has access to the full range of non-public information in the possession of companies, and decides to file complaints in those cases and competitive impact statements relating to consent decrees.

AREAS IDENTIFIED BY DOJ FOR POSSIBLE COMPETITION ENFORCEMENT OR ADVOCACY IN THE REPORT

The “*Voice, Video and Broadband*” report addresses several areas where obstacles to competitive entry in telecommunications services markets may still exist, focusing on those of a regulatory nature or related to conduct of incumbents that could be affected by competition enforcement or advocacy, rather than inherent technical obstacles. As a general matter, the Department of Justice said in the report that it will continue to seek removal of regulatory barriers that impede competition.

In video services, three such areas of concern were identified. The first is local franchising requirements, which entrants have said lead to delays in entry and increase costs. This was a hotly contested area in the symposium, but the one on which the Antitrust Division’s conclusions in the report were most definite. While the Division recognized that local governments could continue to have a role in regulating cable providers to protect public safety and rights of way, it opposed restrictions that can make it more difficult to enter markets and tend to shield incumbents from competition. The Department of Justice has already sent letters to the FCC and several state legislatures supporting reduction of franchising entry barriers. The report also discussed the issues of access to multiple dwelling units and access to “must-have” programming, both of which the Antitrust Division has investigated in the past. While the Division recognized that antitrust problems could arise in both of these areas, it did not advocate specific actions now.

In local telephone services, the report addressed two issues, the effect of forbearance proceedings and requests to deregulate wholesale services offered by incumbents, and access to consumers in multiple dwelling situations. Continued access for competitors to unbundled network elements was another hotly contested issue in the symposium, with incumbents facing off against competitors and economists presenting perspectives on both sides. The Antitrust Division did not reach definite conclusions, but again recognized the potential antitrust problems in access to customers.

Finally, in broadband services, the report discussed the issues of spectrum access policies, prices for local private lines

offered by incumbent carriers that are needed for backhaul to wireless networks, and various other regulatory problems. While these may not be subjects for antitrust enforcement action, they could potentially be addressed through comments to the appropriate regulators.

The report’s conclusions also recognized the need for better public data to enable competitive analysis of convergence and increasing substitution among formerly separate services, which the Antitrust Division recognized it would have to devote more attention to in the future. For example, the way that regulators have normally reported data along traditional industry lines does not readily enable the extent of bundling and price competition among packages of services to be evaluated. The report also urged more study of the competitive implications of bundled pricing, substitution patterns, and quality-adjusted pricing trends.

SPECIFIC ISSUES OF INTEREST FOR COMPETITION POLICY DISCUSSED IN THE REPORT

The “*Voice, Video, and Broadband*” report addresses several specific areas in greater detail, based on information obtained during the symposium and other public data.

Wireless Substitution for Wireline Telephone Services

In the past, the Antitrust Division has not treated wireless mobile service as part of the same market as wireline telephone service.³ However, incumbent telephone carriers have urged in the symposium and elsewhere that this be reconsidered, and the symposium and report represent the Antitrust Division’s first open reevaluation of the issue. The report observes that based on the public data available to the Antitrust Division, wireless substitution for landline telephone service clearly has continued to grow, with a significant portion of the 30% or more of residential lines the incumbent carriers have lost since 2000 being attributable to cord-cutting. At the same time, more than 80% of residential consumers have continued to retain a landline telephone along with their mobile wireless phones, calling into question whether these products are really adequate substitutes for the majority of users. The report discusses the related but distinct issues of per-minute substitution, which is the more widespread type, and access line substitution, which can have more impact on landline carrier revenues. Significantly, the Antitrust Division explained in the report that the existence of some consumers willing to substitute does not demonstrate that products are in the same market; rather, that depends on the number of customers that would choose to substitute in response to a specific price increase compared with those who would continue to pay the higher price. The report stated that there are reasons to think that wireless is not an effective competitive constraint by itself today, including the lack of evidence of changes in access prices by incumbent telephone carriers in response to wireless substitution, or of any evidence

³ See, e.g., *United States v. Worldcom, Inc.*, No. 1:00CV01526, Complaint (D.D.C. filed June 27, 2000).

from econometric studies of the ability of wireless to constrain landline access prices, as pointed out by one economist during the symposium. However, the Antitrust Division acknowledged that wireless and wireline telephone services may become closer substitutes in the future.

Cross-Platform Competition in Voice, Video and Broadband

The “*Voice, Video, and Broadband*” report documents the development of competition between multiple facilities-based providers using different technology platforms in telecommunications services, and the extent of consumer benefits from this competition. Cable companies are now offering telephone services to over 80% of households. Telephone incumbents – Verizon particularly with its “FiOS” network, and to a somewhat lesser extent AT&T as well – have responded with large investments to enable them to provide multichannel video services and higher-speed broadband, which are still in the process of rolling out. Telephone company entry into video, in turn, has spurred some cable companies to improve their own broadband and video offerings. Other competitors such as broadband service providers with their own networks, and Cavalier making use of unbundled local loops, are also providing multiple forms of services to residential consumers in some areas. There are clear non-price benefits from this competition, in the form of higher-speed services and a greater range of offerings for consumers. But as the report observes, the price consequences of this competition are more ambiguous. Evidence was submitted in the symposium regarding the price-constraining effect of terrestrial competition on cable providers and the large benefits that could result from entry by telephone companies and other broadband networks, but also of continued increases in stand-alone cable prices and price increases for video offered by telephone companies as well. The report provides some detailed price comparisons of cable and telephone company offerings in various geographic areas, but also highlights the difficulties involved in analyzing the impact of competition with different types of offerings, promotions, and discounts.

The Growth of Bundling and Its Consequences for Competition

As a logical development from cross-platform competition, incumbent and competing telecommunications services providers have increasingly begun to offer bundles of services, including voice telephony, multichannel video, broadband, and sometimes wireless. The Antitrust Division has not previously identified bundled markets in a case related to telecommunications services, though it has occasionally done so in other technology-related matters.⁴ Probably the most significant body of new data in the “*Voice, Video, and*

Broadband” report, not otherwise gathered in a single public source, concerns the growth of bundled offerings and competition between them. This data indicates that bundled services are widely available and that most consumers are already buying bundles of two or more services, while some providers report more than 30% of their customers already taking the “triple-play” of voice, video, and broadband. The availability of bundled offerings has spurred competitive responses by other providers, either to offer facilities-based combinations of their own where possible or at least bundles partly involving resold services, though the report notes that some types of providers (satellite, broadband over power line) are not now able to offer full bundles of services over their own facilities. The primary reason for consumers to purchase bundled offerings of telecommunications services today, according to the report, is the substantial price discounts of as much as one-third offered on bundled services over stand-alone prices, while convenience may also play a role. Indeed, significant price cuts on service bundles were reported in response to competitive entry by other providers. However, the bundled services, as some symposium participants pointed out, are still not truly integrated with one another, though facilities-based providers, such as cable companies or Verizon’s “FiOS,” can gain economies from offering multiple services over a single high-capacity line to the home. Significantly, the report noted that one possible response of providers to bundled products competition, apart from lowering prices, is increased product differentiation in features and offerings, building on the observable advantage of bundling in reducing customer churn. The report observed that there was no consensus among symposium participants on whether these bundled products constitute a separate product market from stand-alone ones or will do so in the future, and that no full market analysis had been provided by any participant, but discussed the type of analysis that would be needed to show a distinct bundled market.

Emerging Forms of Broadband Competition

The “*Voice, Video, and Broadband*” report also discussed the development of other forms of broadband competition, including upgrades to existing wireless mobile networks, newer wireless networks of providers such as the new Sprint-Clearwire joint venture and DigitalBridge offering WiMAX services, and alternative technologies such as satellite broadband and broadband over power line (BPL). All of these have been thought to offer promise as third sources of local telecommunications competition, countering the risk of a stable telephone-cable duopoly. There was, however, disagreement among symposium participants on how effective some of these technologies were likely to be at competing with the major terrestrial providers. Some of the alternatives, in particular satellite broadband, were acknowledged to be focusing primarily on niche markets such as rural areas, while BPL appears to have made little progress. Wireless broadband clearly has the potential to be more cost-efficient than terrestrial services according to the evidence offered in the symposium, with far lower costs per household passed, and the discussion in the report suggests that it is the most

⁴ See, e.g., *United States v. The Mathworks, Inc.*, Civil Action No. 02-888-A, Complaint (E.D. Va. filed June 21, 2002) (alleging relevant markets for suites of dynamic control system design software with integration distinguishing them from stand-alone products).

promising of the various alternatives considered. But it must overcome hurdles such as access to sufficient spectrum. As one industry analyst pointed out, there is a long history of failure of alternative technologies in telecommunications, and it is difficult for such new technologies to compete in increasingly mature product markets dominated by existing firms, unless they can offer a functional advantage; as a result, the newer broadband services could end up more as complements than as direct competitors to terrestrial providers. Given the limited amount of data available on competition from these newer providers, the report was not able to assess their competitive impact to date.

CONCLUSIONS

Because most of the *“Voice, Video and Broadband”* report is a factual and analytic survey of the telecommunications services sector, and does not stress controversial policy prescriptions, it can be expected to continue to have value in representing the Division’s understanding of this sector notwithstanding the recent change in administrations. Given that the organization of the symposium and preparation of the report combined required more than a year, it would likely be impractical for the Antitrust Division to try to conduct such a symposium and issue a report on telecommunications markets on an annual basis. Clearly, though, in the fast-changing field of telecommunications information about markets and technologies needs to be updated frequently. Therefore, it would not be surprising for the Antitrust Division to revisit this project in a few years’ time, when the trends identified in the report have had more opportunity to develop.

Unilateral Conduct and Canada's Telecommunications Sector: Recent Statements from the Canadian Competition Bureau

By Michelle Lally and Kevin Glass¹

Canada has recognized the important role that competition law plays in protecting the competitive process within the telecommunications industry and ensuring that the benefits of such competition accrue to consumers. Similar to the U.S. Department of Justice ("DOJ"), the Canadian Competition Bureau (the "Bureau") protects competition through its roles as both enforcer of the competition law, the *Competition Act*, and advocate before the Canadian Radio-television and Telecommunications Commission ("CRTC") for sound competition policy. As the Canadian telecommunications industry continues its transition from being governed by sector-specific regulation to laws of general application, the Bureau has provided the industry with guidance on how it intends to enforce the *Competition Act* for conduct and transactions in the telecommunications industry.

On June 6, 2008, the Bureau released an information bulletin on the *Abuse of Dominance Provisions as Applied to the Telecommunications Industry* (the "Bulletin"). The Bulletin provides guidance on the Bureau's approach to enforcing Canada's principal unilateral conduct provision, abuse of dominance, in the telecommunications industry.²

CANADA'S PRINCIPAL UNILATERAL CONDUCT LAW

Under Canadian competition law, the Competition Tribunal (the "Tribunal") has the exclusive authority to issue a remedial order against a dominant firm when the Commissioner of Competition has proven, on a balance of probabilities, the following three elements:

1. The firm(s) substantially or completely controls a market in Canada;
2. The firm(s) has or is engaged in a practice of anti-competitive acts, and

3. The practice had, is having, or is likely to have, the effect of substantially preventing or lessening competition in a market.

In the cases to date, the Tribunal's remedial orders have required the dominant firm(s) to refrain from specific conduct, provide access to certain facilities or services on reasonable terms, and vary contractual terms.³ However, it is worth noting that the Tribunal does have the jurisdiction to make any order, including the divestiture of assets or shares, as are reasonable and necessary to overcome the effects of a practice of anti-competitive acts but does not currently have the authority to impose financial penalties or fines. On February 6, 2009, significant new legislation was tabled that would grant the Tribunal the power to order administrative monetary penalties of up to \$10 million for violation of the abuse of dominance position provision (or \$15 million for a subsequent violation).

Canada's abuse of dominance provisions are similar to the Section 2 monopolization provisions of the Sherman Act. There are important differences between the United States and Canadian frameworks governing unilateral conduct, however. Most importantly, unlike Section 2 of the Sherman Act, abuse of dominance in Canada is not a criminal offence, and there is no private right of action for violations of the provisions.⁴

TELECOMMUNICATIONS REGULATION IN CANADA

Industry Canada, together with the CRTC, constitute Canada's equivalent to the FCC. The Minister of Industry is responsible for telecommunications policy and matters such as managing spectrum allocation and regulating certain technical matters such as preventing harmful interference. The CRTC is responsible for regulating and supervising telecommunications and broadcasting services in Canada. Similar to the FCC, the CRTC is an independent federal agency with quasi-judicial status capable of issuing binding decisions.

The Bureau's jurisdiction to review conduct in the telecommunications sector is restricted to circumstances where the CRTC has determined that it will refrain or forbear

¹ Michelle Lally and Kevin Glass practice antitrust law at Osler Hoskin & Harcourt LLP in Toronto, Canada. Lally can be reached at mlally@osler.com and Glass can be reached at kglass@osler.com.

² The Bulletin forms a subset of the Bureau's wider enforcement policies regarding unilateral conduct as set out under the Bureau's *Enforcement Guidelines on the Abuse of Dominance (Sections 78 and 79 of the Competition Act)* (Ottawa: Industry Canada, 2001) (the "General Guidelines"). The Bureau recently published for consultation a revised version of the General Abuse Guidelines which will be used to interpret the Bulletin. See <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02942.html>. For additional comments on the General Guidelines see *Competition Bureau Releases Updated Draft Abuse of Dominance Guidelines*, co-authored by one of the authors to this article. <http://www.osler.com/resources.aspx?id=16738>.

³ Importantly, the Tribunal is not a price regulator; however, the access price may be a relevant factor in determining compliance with the order to provide access on reasonable terms. See *Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc.*, [1997] 73 C.P.R. (3rd) 1 (Comp. Trib.) at 177 [*Tele-Direct*] (noting "the Competition Tribunal does not exist to regulate industry practices generally. Rather, it has jurisdiction only to remedy the substantial prevention or lessening of competition and where this has not been proved, no remedy can be ordered.")

⁴ Bill C-10, *An Act to implement certain provisions of the budget tabled in Parliament on January 27, 2009 and related fiscal measures*, 2nd Sess., 40th Parl., 2009 (first reading in the House of Commons on 6 February 2009).

from regulating a service or market. That said, the actual extent of the Bureau's practical jurisdiction is a matter of some debate. At present, the CRTC often exercises its power to forbear from regulation of rates and other terms but retains its powers (under section 27 of Canada's Telecommunications Act⁵) to intervene in respect to conduct that is unjustly discriminatory. Such an approach to forbearance leaves the service or market in question at least partly or potentially still subject to CRTC regulation. The CRTC also continues to regulate facilities that it considers essential.⁶ To the extent that the CRTC has chosen to forbear in respect of any market, it may be argued that no dominant firm or essential facility exists. This has led some to argue that the Bulletin is theoretical and unnecessary.

KEY ISSUES ADDRESSED BY THE BULLETIN

Market Definition

As the DOJ noted in its November 2008 report, *Video and Broadband: The Changing Competitive Landscape and Its Impact on Consumers* (the "2008 Report"), "[b]ecause of the rapidly changing telecommunications landscape, including the advent of new technologies and services, expansion by existing providers into new geographic areas and services, and changes in how consumers purchase these services, when evaluating future mergers the Department will need to assess whether these past conclusions continue to be true."⁷ The Bulletin also recognizes that market definition in the Canadian telecommunications industry is an ongoing challenge because the sector is shaped by constant and rapid technological change.

Despite these difficulties, the Bulletin provides some insight on how the Bureau intends to define markets in the telecommunications industry. The Bulletin indicates that the Bureau will employ the classic SSNIP ("small, but significant non-transitory increase-in-price") test in defining the relevant product and geographic markets but recognizes that the potential for the cellophane fallacy complicates considerably the market definition process.⁸

Using a hypothetical example involving residential local telephone service, the Bulletin explains that the Bureau would first assess the willingness and ability of consumers to substitute to other local residential telephone services provided by different technologies (including circuit switched, Voice over Internet Protocol ("VoIP"), and wireless) to determine whether the services provided by these services are in the same product market. The analysis would involve considering characteristics of the services to determine whether there are sufficient differences such that customers are unlikely to switch in response to a SSNIP. The Bureau would also look at whether there are costs involved in switching that would make switching less likely in response to a SSNIP (such as contract termination penalties, service charges, and cost of new equipment).⁹

It is interesting that both the DOJ and the Bureau have concluded that currently wireless services are not an effective constraint on wireline services and therefore are not part of the same product market.¹⁰ However, both agencies leave open the possibility of revisiting this conclusion in the future.

Greater convergence of service offerings by incumbent telecommunications and cable companies has led to these players increasingly relying on bundled service offerings to attract and/or retain their customer base.¹¹ The Bulletin and the DOJ's 2008 Report discuss the market definition challenges posed by bundling of multiple communications services (*i.e.*, a triple-play or quad-play bundles which involve wireline, wireless, video and broadband services). Both suggest that a bundle could form a separate product market if consumers were to not switch to separate services upon the bundled price being increased by a SSNIP.¹² However, the DOJ's 2008 Report notes that there is significant divergence of opinion among experts regarding whether bundled products

be defined too broadly resulting in a failure to identify market power where it in fact exists.

⁹ The Bureau's comments regarding how it would assess the residential local exchange services market should be considered in light of the extensive deregulation or forbearance that has already occurred in that market segment as a result of a directive issued by the Federal Cabinet (Order-in Council P.C. 2007-532, April 3, 2007). That directive established that the presence of two alternative facilities-based service providers, one of which may be an unaffiliated wireless provider, capable of serving at least 75% of the market is *ipso facto* sufficient to grant forbearance. Most of the residential local market in Canada has now been forborne on the basis of these criteria.

¹⁰ *Supra* note 7 at 61-67, 88. See also Competition Bureau Technical Backgrounder, *Acquisition of Microcell Telecommunications Inc. by Rogers Wireless Communications Inc.* (12 April 2005) available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00257.html>.

¹¹ Microcell, *ibid.*

¹² *Ibid.* Note that, in Microcell, the inability to compete by bundling services was a factor considered relevant in the Bureau's analysis.

⁵ *Telecommunications Act*, S.C. 1993, c. 38.

⁶ See, e.g., CRTC, *Regulatory Policy - Revised regulatory framework for wholesale services and definition of essential service* (3 March 2008), Telecom Decision CRTC 2008-17, available at <http://www.crtc.gc.ca/eng/archive/2008/dt2008-17.htm> (the CRTC held that non-confidential subscriber listing information produced by local exchange carriers was an essential service for publishing directories and providing operator directory assistance. These would continue to be supplied on a mandatory basis at regulated tariff rates).

⁷ U.S. Department of Justice, *Voice, Video and Broadband: The Changing Competitive Landscape and Its Impact on Consumers* (November 2008) available at www.usdoj.gov/atr/public/reports/239284.pdf.

⁸ This is a problem of market definition whereby overly broad markets may be defined through a failure to appropriately consider prevailing pricing levels absent anticompetitive acts. In other words, defining markets based on monopolistic prices can cause markets to

constitute a separate product market from stand-alone services.¹³

What is Dominance?

The term “substantial or completely control” has been interpreted as being synonymous with “dominance.” Consistent with the Bureau’s *Enforcement Guidelines on the Abuse of Dominance* (“General Guidelines”), the Bulletin equates the statutory phrase with market power which, in turn, is defined as “the ability of a firm to profitably cause one or more components of competition to significantly deviate from competitive levels for a sustainable period of time (*i.e.*, impose a SSNIP).” The Bulletin does not wrestle with the critical issue of what degree of market power is required to meet the dominance threshold.¹⁴

Recognizing the inherent difficulty in measuring market power directly, the Bureau relies on a number of qualitative and quantitative indirect indicators of market power including market share, barriers to entry, technological change and innovation, and countervailing power.

The Bureau notes that, in the contested abuse of dominance cases to date, the market shares of firms deemed to be dominant were very high (*i.e.*, in excess of 80%). The Bulletin emphasizes that, without barriers to entry, any attempt by a firm with high market share to exercise to market power will likely be unsuccessful. However, the Bulletin observes that telecommunication markets are generally characterized by a number of significant barriers to entry, including, sunk costs, economies of scale, scope and density and network effects, IP rights, regulatory barriers, long-term contracts and market maturity/firmly entrenched players.

A number of these barriers were the subject of discussion in the DOJ’s 2008 Report. In particular, the report discusses the implications of the traditional sunk-cost model on entry into telecommunications markets. While noting that the difficulty in recouping sunk costs is likely to deter entry where the new entrant intends to compete successfully against an incumbent by offering a product identical to the incumbent’s existing offerings, the DOJ’s 2008 Report highlights the fact that new technologies have reduced the sunk cost of installing last-mile facilities and have allowed for the provision of multiple services over the facilities.¹⁵ These developments have enabled new entrants to challenge incumbents in their traditional markets. Certainly this is evident in Canada today where cable telephony has become the main facilities-based alternative to the ILECs for residential customers, though it is also now recognized that, for a growing segment of the

residential market, wireless services are an effective substitute for ILEC wireline service.¹⁶

With regard to regulatory barriers, it should be recognized that the Bureau has long advocated for the liberalization of Canada’s foreign ownership restrictions in the telecommunications sector given their significant competition distorting effects. Currently, a foreign-based company is limited to a minority position in any facilities-based telecommunications company.¹⁷ Such restrictions constitute an absolute barrier to entry to many potential entrants and place other potential new entrants at a cost disadvantage relative to incumbents.¹⁸ The Bureau also indicates that the presence of unused capacity or the ability of an incumbent to add capacity and thereby discipline competitors or deter potential entrants are particularly important to the assessment of market power in telecommunications industry.¹⁹

Most importantly, the Bulletin recognizes that change and innovation may trump a finding of dominance based on high market share and high barriers to entry. A firm may not have market power or that market power may be short lived if there is rapid technological change. The stage of market growth is informative since entry into a growing market is less difficult and time consuming and the dynamics of competition generally change more rapidly than in mature markets. Consistent with previous guidance, evidence that firms may be able to “innovate around” or “leap frog over” an apparently entrenched position by the incumbent firm is also recognized as an important consideration (*e.g.*, VoIP services such as Vonage).²⁰

Practice of Anti-Competitive Acts

The second element of an abuse analysis under Canadian law concerns whether the firm(s) has engaged in or is engaging in a “practice of anti-competitive acts.” A practice may consist of one occurrence that is sustained or systematically pursued over a period of time or of a number of different acts taken together. Canadian courts have defined an “anti-competitive act” to mean “one whose purpose is an intended negative effect on a competitor that is predatory, exclusionary or disciplinary.”²¹ The Bulletin cites a number of anti-competitive acts which may be common or unique to the

¹⁶ *Supra* note 9.

¹⁷ *Supra* note 5 at s. 16. See also *Compete to Win: Final Report June 2008* (26 June 2008) at 49 available at http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/eng/h_00040.html.

¹⁸ See Bureau letter *Submission to the Competition Policy Review Panel* (11 January 2008) at 14 available at http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/eng/h_00030.html; Microcell, *supra* note 10.

¹⁹ The existence of alternative capacity capable of serving at least 75% of the market is now the basis for granting forbearance in local exchange markets. *Supra* note 9.

²⁰ See also *Intellectual Property Enforcement Guidelines* (Ottawa: Industry Canada, 2000) at 14 available at <http://www.competitionbureau.gc.ca>.

²¹ *Commissioner of Competition v. Canada Pipe Company Ltd./Tuyauteries Canada Ltée*, 2006 FCA 233 at para. 77.

¹³ *Supra* note 7 at 60.

¹⁴ See Paul S. Crampton, “Abuse of Dominance in Canada Building on the International Experience”, 73 *Antitrust L.J.* 3 (2006) at 803 for discussion of this issue.

¹⁵ *Supra* note 7 at 31–34.

telecommunications industry. Examples include acts to raise rivals' costs (or reduce rivals' revenues), predatory and targeted pricing, bundling (which depending on circumstances may be considered to be a way to raise rivals' costs or engage in predation), and market foreclosure.²²

Market foreclosure can occur when a firm raises rivals' costs by engaging in practices that hinder or deny current or potential rivals access to the inputs necessary to compete. An important example of market foreclosure in the telecommunications sector is the denial of access to a facility which is not subject to regulation by the CRTC (*i.e.*, not deemed to be essential by the CRTC). The Bulletin indicates that the following three conditions must be present in assessing whether such a denial amounts to an anti-competitive practice:

- There must be a vertically integrated firm that has market power in the downstream (or retail) market for which the facility is an input in the time period following the denial;
- A denial of access to the facility has occurred for the purpose of excluding competitors from entering or expanding in the downstream market or otherwise negatively affecting their ability to compete, and
- The denial has had, is having or is likely to have the effect of substantially lessening or preventing competition in the downstream market.

The inquiry focuses on the downstream market. It appears clear from the Bulletin that, where there is a competitive downstream market, the Bureau will not intervene in favour of a complainant seeking access to an upstream facility. The Bulletin notes that, where alternative downstream providers that do not rely on the facility in question are able to serve the downstream market, this would be a factor that tends to negate the argument that the facility is "essential" or that a firm has market power or is dominant.

Interestingly, the Bureau's test does not include the condition that competitors lack the ability to effectively duplicate the facility when determining whether the denial of access to a facility raises an issue. This factor is considered by the European Commission, and the DOJ in the United States.²³

It is unfortunate that the Bulletin's discussion of essential facilities fails to mention the CRTC's recent decision in

Wholesale Telecommunications.²⁴ This omission is significant due to the different approach taken by the CRTC to the definition of an essential facility (*i.e.*, focusing on upstream market power) and adds to the potential confusion associated with the jurisdiction of the CRTC and the Bureau.

Substantial Lessening or Prevention of Competition

The final element in an abuse analysis is whether the practice by the dominant firm is likely to give rise to a substantial lessening or prevention of competition. The focus here is on the impact of the practice on competition, not competitors. In making this assessment, the Bulletin indicates that the Bureau applies a "but for" test: "but for" the practice in question, would there be substantially greater competition in the relevant market, in the past, present, or future? This test involves examining the impact of the practice on entry and whether prices would be materially lower or whether non-price benefits of competition would be materially higher in the absence of the practice.

As an example, the Bulletin indicates that, where there has been denial of access to a facility which is a source of market power in an downstream market, the Bureau's "but for" analysis would focus on whether the denial of access likely leads to substantially less competition downstream than would occur absent the denial. If, absent the denial, the dominant firm would sell access to the facility because it has no credible business justification for denying access, the "but for" analysis would entail assessing the competitive conditions that would prevail if the dominant firm were charging the profit-maximizing price to downstream competitors. The profit-maximizing access price would be that at the time of the denial (assuming the downstream market structure absent the denial). Although conceptually clear, the many complex factors associated with determining the profit-maximizing price may be very difficult to consistently apply in practice.

CONCLUSION

Given the current level of telecommunications-specific regulation in Canada, the Bulletin is somewhat premature. Having said that, the Bureau should be commended for sending a clear message in the Bulletin that its positions on important matters, such as market definition and anti-competitive practices, will be re-assessed regularly given the dynamic nature of the industry and the dramatic impact of continued innovation. The Bulletin itself has both further enhanced the dialogue between the Bureau, the industry, and the CRTC and strengthened the Bureau's voice as a competition advocate in a industry where government regulation continues to significantly shape competition.

²² Note that the Bureau has issued separate enforcement guidelines with respect to predatory pricing. See *Predatory Pricing Enforcement Guidelines* (Ottawa: Industry Canada, 2008) available at <http://www.competitionbureau.gc.ca>.

²³ See European Commission, *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, available at <http://ec.europa.eu/competition/antitrust/art82/guidance.pdf>. See *MCI Comm'ns Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1132-1133 (7th Cir.), cert. denied 464 U.S. 891 (1983).

²⁴ *Wholesale Telecommunications*, *supra* note 6.

The European Regulatory Approach to NGAs

Blanca Escribano¹

It is well known that early signs of congestion are now emerging in first generation broadband networks, most noticeably in the shared portions of fixed networks (access and backhaul). As a result, an increasing number of European governments are including Next Generation Networks (“NGNs”) in their development agendas. Increased focus on NGN’s have initiated debates throughout Europe (and elsewhere) on the way NGN deployment should be approached by regulators.

WHAT DOES NGN/NGA MEAN: A PRIMER FOR NON-ENGINEERS

Traditional telecommunications networks were developed to carry a single type of service, such as voice calls. In contrast, NGNs carry all types of services, including voice, video and e-mail, on a common platform. The fundamental idea of NGNs is “network convergence” – the ability of NGN operators to provide all kind of services through a single network platform. The introduction of NGNs has been described as “the most significant change to telecoms networks since competition was introduced two decades ago.”²

The term NGN covers both modernization of the “core” part of a network (*i.e.* moving to an all-IP architecture) and the “access” part of a network. Modernizing the access part of a network, often referred to as Next Generation Access (“NGA”), refers to, among other things, the roll-out of fibre optics all, or part, of the way to customers’ premises.

Operators like BT in the UK, Telefonica in Spain, FT in France, Deutsche Telekom in Germany, or Telecom Italia in Italy are currently investing in NGA.³ Incumbents and former

legal monopolists are not the primary investors in NGA in Europe, however. As EC Commissioner Viviane Reding stated a few months ago, “currently they are in third place coming after both alternative operators and municipalities.”⁴

AN OVERVIEW OF THE EUROPEAN REGULATORY FRAMEWORK.

The current EU regulatory Framework, which is based on EU antitrust principles, is a collection of mechanisms and concepts that attempt to adapt to the economic and technological environment in order to provide simple, flexible, and durable regulation.⁵ The current framework is a hybrid of regulation since it uses competition law principles to assess the necessity of regulating or to preventively intervene in markets. Hence, an *ex ante* competition analysis is mandatory prior to any decision imposing, amending, or withdrawing regulations.

The EC Commission guides the market review as it pre-defines markets to be analyzed, supervises the market review (departure of the pre-defined markets, geographic market definition, dominance assessment and draft measures, if any), and has the authority to ask the National Regulatory Authority (“NRA”) to re-notify the draft measure decision, that is to say, to exercise a “veto power” on market definition, Significant Market Power (“SMP”), and dominance assessment. It does not have the authority to ask the NRA to take remedial actions nor to modify or withdraw the existing remedies, however. The EC Commission predefines⁶ markets and remedies in order to achieve greater harmonization within the European Union. The relevant issue when considering whether to

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² Next Generation Networks: developing the regulatory framework. Ofcom 7 March 2006. <http://www.ofcom.org.uk/consult/condocs/nxgnfc/statement/> POSTnote December 2007 Number 296 Next Generation Networks. Parliamentary Office of Science and Technology. <http://www.parliament.uk/documents/upload/postpn296.pdf>

³ The UK is the EU country where NGN plans are more developed. In 2004 BT announced that it would deploy an NGN known as the 21st Century Network (21 CN) across the UK and the first few customers had their phone service switched from the PSTN to 21 CN in November 2006. That refers to the core network, but additionally, in July 2008 BT announced plans to invest 1.5bn Pounds in NGA over five years. The transition to NGNs is happening worldwide but the UK will be the first country to replace completely the incumbent operator’s telephone network with an NGN. An independent body has been set up in the UK, known as NGNuk, with a view to creating an improved framework for industry engagement. Its mission is to act as a coordination forum in which key investors in NGN infrastructure and services will discuss, research, consider and, where possible, agree on the direction for NGNs in the UK and

communicate such direction to other players in the telecommunications industry and the general public. NGNuk has a two way relationship with other industry bodies, such as Consult 21 and NICC taking input to enable its commercial work to succeed and providing policy output to enable them to undertake their functions. See <http://www.ngnuk.org.uk/>

Very recently, January 2009, the Department for Culture, Media and Sport and Department for Business, Enterprise and Regulatory reform of the UK (Digital Britain) published an Interim Report http://www.culture.gov.uk/reference_library/media_releases/5783.asp

⁴ Speech/08/355, 25 June 2008.

⁵ 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 (Framework Directive). OJ L 108 of 24.4.2002.

⁶ Recommendation of 17 December 2007, on relevant product and service markets within 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. OJEC L 344/65 of 28.12.2007; Access Directive 2002/19/EC, Authorisation Directive 2002/20/EC, Universal Service Directive 2002/22/EC, Privacy Directive 2002/58/EC.

intervene *ex ante* in a certain telecom market is the state of competition within that market.⁷

The current Framework is in the middle of legislative reform. Reform initiatives have NGN in mind, but do not propose a major overhaul of the Framework as it was made open and technologically neutral so as to deal with technological deployments. As part of the legislative process, the Council and Parliament have made some comments to the current version of the Proposed Directives to the effect that technologically neutral regulation of local access networks should be assured wherever there is dominance in local access.⁸ In their opinion, NRAs should also retain explicit powers to seek information on NGA deployments.

WHAT IS THE CURRENT REGULATORY DEBATE ON NGN ABOUT IN THE EU?

One feature of NGAs which do not apply to current networks is that for the most part they do not yet exist, so incentives to deploy them must be guaranteed by regulation. From a regulatory point of view, deployment of NGA networks raises complex challenges on how to maintain a 'level playing field' for all competitors while not preventing investments on NGNs. On the one hand, substantially more investment is needed; on the other hand, there is an increased danger for re-creating even stronger dominant positions now in an NGA context. This is why long term legal certainty is required for investors, whether for incumbents or new entrants.

A year and a half ago, the EC Commission noted that

[b]ecause of the large investments in NGNs, some incumbents have called for a firm date to be set for the withdrawal of sector-specific *ex ante* regulation; others for 'regulatory holidays' for major new investments. Incumbents particularly criticise mandated access to their infrastructure and the price at which this is imposed (which they usually consider to be too low). On the other hand, new entrants fear that incumbents would be able to limit the availability

⁷ Though both are able to be redefined by NRA as long as prior consent is given by the EC Commission.

⁸ Amended proposal for a Directive of the European Parliament and of the Council amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and services, and 2002/20/EC on the authorisation of electronic communications networks and services - COM(2008) 724 final ; Amended proposal for a Directive of the European Parliament and of the Council amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sectors and Regulation (EC) No 2006/2004 on consumer protection cooperation - COM(2008) 723 final ; Amended proposal for a Regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority (EECMA) - COM(2008) 720 final.

of access, undermining existing investment. They therefore see that *ex ante* regulation and open access provisions on incumbents' networks correlate strongly with increased investment and innovation.⁹

These points clearly reflect the current debate in Europe concerning regulation that the deployment of NGNs is bringing about.

WHY DOES THE REGULATION OF NGAs HAVE AN IMPACT ON THE CURRENT REGULATORY FRAMEWORK?

Deployment of NGA networks modifies the competitive environment in a number of those predefined markets, in particular Local Loop Unbundling ("ULL", market 4 of the 2007 EC Commission Market Recommendation) and wholesale broadband access (market 5 of the 2007 EC Commission Market Recommendation). Both markets are predefined by the EC Commission and consequently have to be reviewed by the 27 NRAs in order to assess the level of competition and, if the outcome is negative (existence of SMP operator(s), to intervene *ex ante* by imposing remedies on those SMP operators, thus regulating the market.

HOW ARE NRAs APPROACHING THE REGULATION OF NGNs?

Today, there is a patchwork of regulations across Europe. On one side of the spectrum, the Irish NRA has stated that NGA investments have no additional risk attached to them compared to any other investment and so they should get the same return,¹⁰ on the other side of the spectrum, the German NRA has rewarded investment with a partial "regulatory holiday" under which an investor can effectively set its own rate of return.¹¹

⁹ Brussels, 13/11/2007 SEC(2007) 1483/2 COMMISSION STAFF WORKING DOCUMENT EXPLANATORY NOTE Accompanying document to the Commission Recommendation 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 (Second edition) {(C(2007) 5406)}.

¹⁰ "That said, the uncertainties regarding the precise nature, composition, size, timing of NGN/NGA33 investments as well as the types or impact of any new services supplied prospectively over such infrastructure, makes it difficult to assess the precise level or degree of systematic risk, if any, associated with NGNs on a forward looking basis. As noted above, actual committed NGN investment may be limited at this stage. It should, in any case, be noted that potential competition risks referred to above (in 4.18) are not necessarily systematic risks, and therefore it is not evident that they should result in a higher WACC." Consultation paper. Review of Eircom's Cost of Capital. ComReg 07/88- 1 November 2007 <http://www.comreg.ie/fileupload/publications/ComReg0788.pdf>

¹¹ Germany made some amendments to the German telecoms law that entered into force on May 2007. These amendments led to an effective exemption of Deutsche Telekom AG's fast internet access network (VDSL) from competition. Such 'regulatory holidays' seemed to be granted without consulting the Commission and

So far, only a few NRAs have regulated NGAs: France,¹² Belgium,¹³ Germany,¹⁴ Austria,¹⁵ Portugal,¹⁶ the Netherlands,¹⁷ and Spain.¹⁸ Regulation has been accomplished through the markets 4 (ULL) and 5 (wholesale broadband) reviews, including NGAs within the market definition. It is remarkable that the EC Commission exercised its veto power on the Spanish market review on wholesale broadband access. Consequently, the CMT had to re-notify a new measure on the broadband market. But within the new CMT measure, the EC Commission's objection on the exclusion from the market definition of speeds above 30 Mb/s was bypassed by the NRA. What the CMT did was to remove the limitation to those speeds within the market definition, but maintained the limitation within the remedies section, on which the EC Commission has no competences. Thus, the fact that the Spanish NRA has disregarded the EC Commission's recommendations (which are not mandatory on remedies) has highlighted the need to increase the EC Commission's competences in supervising NRAs' *ex ante* measures, so that the European Union can achieve a more harmonized legal framework.¹⁹

The common approach followed by NRAs which have gone through the market review is to include access to civil works (or primary) infrastructure obligations, but to exclude access to fibre optic networks.²⁰ To that effect, French, Spanish,

regulatory authorities in other Member States, as mandated under EU telecom rules to ensure transparency and a better-functioning internal market. Thus, the EC Commission has started infringement proceedings under Article 226 of the EC Treaty before the EC Court of Justice (C-424/07). Germany adopted the rules in question despite the Commission's early warnings that they were incompatible with EU rules.

¹² FR/2008/780-781

¹³ BE/2008/801

¹⁴ DE/2007/646

¹⁵ AT/2008/757

¹⁶ PT/2008/850-851.

¹⁷ NL/2008/826-827.

¹⁸ Cases ES/2008/0804 and EC/2008/0805: Wholesale Broadband access in Spain. Brussels 13.11.2008 and 26.12.2008.

¹⁹ The framework reform on process includes as proposal to increase EC Commission new competences to review NRAs market analysis (Article 7 of the Framework Directive, the so called, "consistency procedure between national regulators and the Commission") extending the veto power to remedies. As Commissioner Reding described, there is a need to reinforce Article 7 in order to avoid situations in which, having been through the whole review procedure in Article 7, the notifying national regulator can just say "Thank you very much for your point of view but I prefer my approach" and simply go its separate way". Speech (08(426), Brussels 16 September 2008.

²⁰ Alternative operators' ability to roll out infrastructure similar to that of the incumbent is limited. In the local access network market, costs are concentrated in civil engineering works. These works can amount to 50%-80% of the total cost per customer depending on the deployed solution and specific local characteristics (such as customer density, availability of ducts, labour cost and digging conditions). Incumbents and cable TV companies can use their existing ducts and rights-of-way to minimise these costs. Other competitors do not have

Belgian, and Portuguese regulators have included these kinds of passive infrastructures obligations. Regarding access to fibre, most regulators²¹ that have regulated NGAs leave its regulation open to future development of the markets, as they include fibre optic networks (at least Fibre to the Node) within the definition of ULL and broadband markets (excluding the German and the Danish) but do not include access obligations that apply to the fibre.²² In addition and as a complementary measure to the access to passive infrastructure, access to dark fibre obligations are foreseen by some regulators²³ and symmetrical in-house wiring obligations are being implemented by several regulators as well (France, Spain,²⁴ and the UK).²⁵

THE FORTHCOMING EC COMMISSION RECOMMENDATION

The Telecom EC Commissioner has repeatedly stated that when regulating NGAs, "regulatory holidays are not the solution, what we need is 'appropriate' regulation that safeguards competition whilst creating new incentives for investment."²⁶ But what does appropriate regulation mean?

On September 2008, the EC Commission launched a public consultation on the draft Recommendation on NGN access including the regulatory principles to be applied by EU Member States on NGA. The Recommendation is addressed to national regulators of the 27 EU Member States. The final texts of the Recommendation and the Explanatory memorandum have not yet been published.

The basic principle of the Commission's draft Recommendation is that national regulatory authorities should provide access to the networks of dominant operators at the lowest possible level. In particular, they should mandate access to the ducts, street cabinets and civil works of the dominant operators allowing competitors to roll-out their own fibre. Such access should be provided according to the principle of equivalence set out in the Recommendation Annex II. However, NRAs should also impose further physical access obligations (access to unlit fibre) beyond access to ducts where ducts are not available or the population density is too low for a sustainable business model. Access to active elements such as "bitstream" shall be maintained provided lower level remedies do not sufficiently address distortions of competition.

the same advantages, except in rare cases where they may be granted access to other utilities' facilities.

²¹ The Netherlands is the exception as access remedies apply to fibre (in market 4 and market 5 only to high quality WBA market).

²² DK/2008/860.

²³ Spanish and German.

²⁴ CMT Decision of 12 February 2009 (MTZ 2008/965).

²⁵ Ofcom has set out the framework for the deployment of NGA in new building developments and the Government is working to develop a publicly available specification to facilitate installation of NGA in new buildings as a standard.

²⁶ SPEECH/07/755 Viviane Reding. Europe's evolving single market for telecoms: the future challenges of cooperation between the European Commission and National Regulatory Authorities. Budapest, 26 November 2007

The draft Recommendation provides also a common approach to ensure non-discriminatory access, as well as a methodology for calculating a proper rate of return, including a risk premium. The EC Commission believes that for NGA, rates of return should be derived in light of the risks associated with this kind of investment, bearing in mind that the nominal pre-tax weighted average cost of capital for fixed and mobile operators has been roughly 8 to 12% in recent years (Annex I of the Recommendation). Indeed, the Commissioner has informally stated that it foresees a 15% risk premium for NGA.

In the EC Commission's opinion, the ladder of investment has to adapt to the different end-to-end network architecture; alternative operators will increasingly be given an incentive to roll out their own infrastructure closer to the customer or when this is not feasible, they will have to go back to bitstream remedies.²⁷

The objective of the Commission's Recommendation is to foster the application of consistent access remedies on dominant NGA operators. The Recommendation is built on the prior European Regulators Group ("ERG") opinion on regulatory principles of NGA submitted to the Commission on 1 October 2007 and consequently, reflects the outcome of some of the different NRAs that have already gone through the NGA *ex ante* regulation.²⁸ Despite the fact that a recommendation is not binding under the EC law, it will be an important tool for NRAs when imposing *ex ante* obligations to SMP operators, especially in the event that the EC Commission is finally empowered to make binding comments on remedies.

²⁷ The regulation of access in telecommunications: a European perspective. Martin Cave. Revised, April 2007. Warwick Business School, University of Warwick, UK. <http://www.econ.upf.edu/docs/seminars/cave.pdf>

²⁸ http://www.erg.eu.int/documents/docs/index_en.htm See also Supplementary Document to the ERG Common Statement on Regulatory Principles of IP-IC/NGN Core- A work program towards a Common Position (ERG(08)26b final NGN IP-IC CS sup doc 081016).

Switched Packets in Economics

Network Competition and Access Charges in Mobile Telephone Termination

By Richard Shin and Kwang Soo Cheong¹

Telecommunications markets are complex with ambiguous boundaries, and have different levels of regulation even in seemingly similar markets. One of the key issues that arise in telecommunications markets is the settlement of interconnections (the originating and the terminating of calls and data services) between different networks. Such interconnections are necessary among fixed-line networks and mobile telephone networks. Charges associated with terminating calls (“termination charges” or “access charges”) are often believed to be excessive. Indeed, a recent headline screams, “Europeans Pay Over €10 Billion a Year in Spurious Mobile Termination Charges.”² As a result, the European Commission has ordered mobile telephone networks to lower their termination charges through price-cap regulation.

Many economic studies have examined interconnection charges among networks. In this article, we introduce and discuss two papers that deal with access rates in various settings:

Armstrong, Mark and Wright, Julian, "Mobile Call Termination," mimeo, University College London, October 2008.³

Calzada, Joan and Valletti, Tommaso M., "Network Competition and Entry Deterrence," *The Economic Journal*, Vol. 118, Issue 531, pp. 1223-1244, August 2008.⁴

Both papers attempt to explain as to why access rates observed in practice are higher than the rates existing theories predict. The first paper by Armstrong and Wright deals with the discriminatory access charges that result from asymmetric regulation of fixed-line telephone network operators and mobile telephone network operators. The second paper by Calzada and Valletti examines how non-discriminatory access charges can strategically deter or reduce entry. Despite the authors' different approaches, each author justifies the existence of greater-than-predicted access rates.

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² http://www.ectaportal.com/en/upload/File/Press%20Releases/2008/ECTA_termination_rates_press_release_final.pdf.

³ Abstract available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1227170.

⁴ Full text available at <http://else.econ.ucl.ac.uk/papers/uploaded/255.pdf>

As background, a call to one number cannot generally substitute for a call to another number. As a result, an originating network does not have a choice in selecting a terminating network. The terminating network in essence becomes a “bottleneck” to reaching a particular phone number or a particular customer. Thus, a mobile or fixed-line telephone network operator has monopoly power over the termination of calls on its network.

Absent regulation, each telephone network operator has an incentive to charge monopoly rates for the termination of calls (or other data services) in order to extract the largest surplus from the originating networks. However, the ability to extract monopoly prices is checked by each network operator's need to terminate its originating calls on the other network that possesses similar market power. Intuitively, the ultimate rate chosen by the telephone operators should be a function of each operator's network size, bargaining power, and regulatory constraints.

Concerned that access charges are inefficiently high, European regulators have attempted to lower access charges to terminate calls on mobile networks within Europe. For example, from 1998 to 2002, the United Kingdom (“UK”) forced a nine percent per year reduction in terminating access charges on UK's two largest mobile operators. Oftel, the UK's telecommunications regulator, concluded in 2001 that mobile terminating access charges were still substantially high relative to cost; Oftel proposed additional price controls. Eventually, price-caps were imposed with the European Commission's blessing, and other countries have followed suit.

Some economists have argued that reducing the level of termination access charges could result in higher retail prices for mobile subscribers as a result of the “waterbed” effect. As the name suggests, the waterbed effect describes a phenomena in which depressing a firm's prices for one product or service results in an increase in the firm's prices of another product or service while firm's profits remain the same. In this case, the theory predicts that a regulatory reduction in termination access charges would result in an increase in prices for telecommunication firm's other services resulting in a constant level of firm overall profit. Some have argued that understanding and quantifying this effect is critical in order to assess consumer benefits from regulating mobile termination access charges. These two papers also shed light on the waterbed effect by considering the network operators' strategic choices and their effect on profits.

Armstrong and Wright distinguish two different types of call terminations on mobile telephone networks: fixed-to-mobile (“FTM”) call terminations and mobile-to-mobile (“MTM”)

terminations. The existence of asymmetric regulation makes this distinction meaningful. The cost-based access charges of fixed-line network operators due to regulation create an incentive for the mobile network operator to raise its FTM access charges. If the mobile network operator is allowed to freely set access rates, Armstrong and Wright's model predicts that a competitive bottleneck exists for FTM access and hence FTM access charges will be set at the monopoly level. On the other hand, mobile network operators would set reciprocal MTM access charges below costs as a result of competition between mobile networks. Armstrong and Wright's benchmark model accurately predicts the high FTM access charges as was the case in the UK, but fails to accurately predict MTM access charges.

Regulation does not prevent mobile telephone network operators from charging low MTM access charges predicted by their benchmark model. However, it is well known that MTM access charges are high in par with FTM access charges in practice. In fact, this discrepancy between theoretical prediction and real-life observation is puzzling and has been a subject of many previous studies including the two papers being reviewed.

Armstrong and Wright propose several explanations for this puzzle. One is based on networks' ability to arbitrage the difference between FTM and MTM access charges. Another is based on demand substitution by subscribers who have both mobile and fixed-line phones. If a large number of fixed-line subscribers also own mobile phones, then mobile subscribers would avoid the high FTM termination charges by substituting FTM calls with MTM calls. Both supply-side arbitrage and demand-side substitution would mitigate the incentive of the mobile telephone network operator to charge non-uniform rates as well as the incentive to set termination charges above costs.

They also provide a more rigorous explanation: Uniform access charges set unilaterally are higher than those set jointly by all mobile telephone network operators. This result is intuitive in that the externality spillover to the other networks is internalized in the jointly set access charges, but not in unilaterally set access charges. Therefore, unilaterally set access charges are inefficiently high, leaving room for regulation.

Calzada and Valletti (2008) also deal with access charges (termination charges) for mobile telephone network operators. They extend the traditional duopoly model of network competition to a multi-firm industry. Networks interconnect with other networks to provide consumers with the benefit of network externalities. However, as previously discussed, a call to a subscriber in another network can only be terminated using the second network, giving the second network operator a monopoly over its subscribers' access lines. In a symmetrical manner, the first network operator also has a monopoly over its subscribers' access lines. The interconnection problem now becomes a "two-way" access problem.

Unlike Armstrong and Wright, who allow different rates between FTM and MTM access charges, Calzada and Valletti analyze incumbent networks negotiating an industry-wide non-discriminatory reciprocal access charges. The non-discriminatory nature of access charges implies that both incumbent and entrant network operators will face the same price consequences. They show that potential entry may impact the negotiation of access charges by incumbents and that a non-discriminatory access charge can be used effectively to deter or reduce entry.

According to their result, unregulated network operators competing in price with no threat of entry would establish an inefficient access charge below cost. This result is consistent with what Armstrong and Wright find for MTM access charges. Again, this result conflicts with the real world observation of access charges. To reconcile, Calzada and Valletti allow for the possibility of entry. Such possibility will bring about a trade-off situation for incumbent network operators, who have to now consider low access charges set for profit-maximization in comparison with high access charges set for entry deterrence. The high access charges effectively deter entry although they are inefficient and distorted.

The observation of Turkey's mobile industry referred to in their paper is a good example of effective entry reducing access charges. In 1998, the GSM duopolist incumbents reached an interconnection agreement in which the access charges were set at 1.5 eurocents/min. The new access charges that applied to all network operators increased to 20 eurocents/min in March 2001, just before the Turkish government issued two new licenses. Two new entrants struggled and then eventually merged together in 2003 resulting in a three-competitor industry instead of the expected four-competitor industry. The access charges were then reduced to 12 eurocents/min in October 2003 and eventually to 8 eurocents/min in February 2006.

Employing strategic interactions of network operators facing different regulatory constraints, these two papers illustrate how inefficiently high access charges can emerge and hence become consistent with real world observation. In this sense, these papers make meaningful contributions to the literature regarding network competition and access charges.

Plugged-In: The Latest Developments

CASES

By Chuck McBride and Katie Wallace¹

Antitrust Cases

Pacific Bell Tel. Co., dba AT&T California v. Linkline Communications, Inc., Supreme Court of the United States, No. 07-512 (Feb. 25, 2009) (reversed and remanded for further proceedings)

Linkline is an internet service provider (“ISP”) that resells AT&T’s DSL service in competition with AT&T. The FCC requires AT&T to sell DSL service on a wholesale basis to resellers such as Linkline.

Linkline sued AT&T under Section 2 of the Sherman Act, alleging, *inter alia*, that AT&T had engaged in a “price squeeze” by raising its wholesale DSL service rates while at the same time reducing its retail DSL service rates. As a result of this price squeeze, Linkline alleged it could not make a profit sufficient to allow it to remain in business, while AT&T maintained monopoly power in the DSL market. AT&T moved to dismiss the claim on the ground that under the court’s holding in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398 (2004), Linkline could not bring a price-squeeze claim against AT&T under Section 2 of the Sherman Act, because AT&T had no antitrust duty to deal with Linkline. The District Court held that AT&T had no antitrust duty to deal with the plaintiffs; however, it certified for interlocutory appeal the question of whether Trinko barred Linkline’s price squeeze claims. On interlocutory appeal, the Court of Appeals for the Ninth Circuit held that Trinko did not bar Linkline’s price-squeeze claims.

The Supreme Court reversed the Ninth Circuit, holding there is no cause of action for a price-squeeze under Section 2 of the Sherman Act where there is no antitrust duty on the part of the defendant to deal with the plaintiff. In its analysis, the Court held that there is no meaningful distinction between the “insufficient assistance” claims rejected in *Trinko* and Linkline’s price-squeeze claims. The Court noted that since AT&T had no antitrust duty to deal with Linkline, it could have simply stopped providing DSL on a wholesale basis to Linkline without violating the Sherman Act by doing so. Thus the Court reasoned it would make no sense to require AT&T to offer favorable wholesale pricing to Linkline, when AT&T could at any time choose not to sell to Linkline. With regard to the retail component of the price-squeeze claim, the Court

refused to recognize a claim for prices that are “too low” outside the context of a predatory pricing claim meeting the standards of *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). There was no allegation that AT&T’s retail prices met the requirements for a predatory pricing claim as set forth in *Brooke Group*, including its requirement that the prices complained must be below an appropriate measure of rivals’ costs. The Court reasoned, therefore, the price-squeeze was “nothing more than an amalgamation of a meritless claim at the retail level and a meritless claim at the wholesale level.” Finally the Court also mentioned certain institutional concerns as support for its holding, and it pointed out that recognition of a price squeeze claim would require courts and businesses to aim at a “moving target” in analyzing price-squeeze claims, since the price squeeze would be necessarily dependent upon the interaction of wholesale and retail pricing. Thus there would be no safe harbor from price-squeeze liability.

Research in Motion Ltd. v. Motorola, Inc., 2008 WL 5191922 (N.D. Tex., Dec. 11, 2008) (denial of motion to dismiss).

Plaintiff Research in Motion Limited (“RIM”) accused Motorola of antitrust violations, breach of contract and patent infringement in connection with Motorola’s possession of certain essential and non-essential patents necessary for RIM’s wireless devices to meet standards adopted by the Institute of Electrical and Electronics Engineers (“IEEE”) and the European Telecommunications Standards Institute (“ETSI”). “Essential patents” claim technology which has been adopted by standards development organizations (“SDOs”) such as IEEE and ETSI. Since the patented technology is the standard, the owners of essential patents gain market power. Owners of essential patents commit to license those patents on fair, reasonable and non-discriminatory (“FRAND”) terms.

In this case, Motorola had previously licensed the subject patents to RIM under a five-year license, which expired in 2007. The parties entered into negotiations for the re-licensure of the patents; however, they were unable to reach an agreement. RIM also claimed that Motorola refused to negotiate reasonably and would not re-license the patents at a FRAND price.

Motorola moved to dismiss RIM’s Section 2 claims arguing that: (1) Motorola did not have monopoly power in the relevant market; (2) RIM had not pled anticompetitive conduct on the part of Motorola; and (3) RIM had not alleged anticompetitive injury.

The court rejected all three of Motorola’s arguments. The court held that the essential patents conferred market power on Motorola because the standard eliminated alternative technologies. The court further held that RIM adequately pled that Motorola has abused its position as “gatekeeper” to the

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technology that is the subject of the essential patents by refusing to license it to RIM at a FRAND price. After a lengthy analysis of Motorola's arguments regarding antitrust injury, the court held RIM's allegation that Motorola had failed to adhere to the FRAND price sufficiently stated a claim for harm to competition against Motorola.

In re: Text Messaging Antitrust Litig., 2008 WL 5119537 (U.S. Jud. Pan. Mult. Lit., Dec. 3, 2008) (multi-district consolidation)

The multi-district panel ordered the consolidation of sixteen actions pending in twelve districts and transferred them to the United States District Court for the Northern District of Illinois. All of the actions alleged that defendant wireless providers conspired to fix, maintain, and stabilize the price of text messaging in the United States in violation of the Sherman Act. The panel assigned the actions to United States District Judge Michael F. Kennelly.

Consumer Protection Cases

Marco Island Cable v. Comcast Cablevision of the South, Inc., No. 07-12886 (11th Cir. Feb. 13, 2009) (unpublished opinion) (affirming district court jury award to plaintiff and denial of motion for judgment as a matter of law)

Marco Island Cable ("Marco") sued Comcast Cablevision of the South, Inc. ("Comcast"), alleging that Comcast engaged in anticompetitive behavior which damaged Marco's business in violation of the Florida Deceptive and Unfair Trade Practice Act, Fla. Stat. § 501.201 et. seq. (the "Act"). The lawsuit arose out of competition between Marco and Comcast to provide cable services to Multiple Dwelling Units ("MDUs") on Marco Island, Florida. Marco alleged that Comcast violated the Act by asserting ownership of inside wiring in MDUs, omitting key operative language from quotes concerning its contracts in letters to MDU owners, overcharging MDUs and their occupants who may have wanted to purchase inside wiring, invoking inapplicable FCC regulations in support of asserted rights in wiring, as well as other misleading and wrongful conduct. In the district court, the jury awarded \$3.2 million in damages to Marco. Comcast moved for judgment as a matter of law and for a new trial. The district court denied Comcast's motion; however, it remitted the judgment to \$800,000. Comcast appealed the court's denial of judgment as a matter of law, arguing that Marco did not present sufficient evidence that: 1) Marco violated the Act, 2) that Comcast's action's caused Marco's injury, or 3) Marco was damaged as a result of Comcast's actions. The Eleventh Circuit Court of Appeals held it would not upset the jury's verdict if any theory presented by Marco was supported by sufficient evidence. Accordingly, the court considered the evidence presented by Marco on each of the three elements and found that a reasonable jury could have found for Marco based on several theories presented by the plaintiff. Therefore, the Eleventh Circuit Court of Appeals affirmed the district court's judgment.

Torres-Hernandez v. CVT Prepaid Sol'ns, Inc., 2008 WL 5381227 (D. N.J., Dec. 17, 2008) (denial in part, and grant in part, of motion to dismiss)

Plaintiffs alleged that CVT Prepaid Solutions, Inc. ("CVT"), a provider of pre-paid long distance services, engaged in fraud and misrepresentation in violation of the New Jersey Consumer Fraud Act and common law by deducting more minutes than were actually used by customers.

CVT moved to dismiss under the doctrine of primary jurisdiction due to the FCC's "broad, sweeping regulation of interstate communications, namely pre-paid calling cards." The court denied the motion, recognizing that in some instances it is appropriate to defer to an administrative agency where claims "contain some issue within the special competence of [the agency]," however, stating that a court need not defer review in every cause of action, particularly where the issues can be resolved "using the plain language of the [regulations] and ordinary rules of construction." The court concluded that the doctrine of primary jurisdiction was an exceptional doctrine reserved for cases that would conflict with specific federal regulations or pending agency hearings.

CVT also moved to dismiss for failure to state a claim under the heightened pleading requirements of Fed. R. Civ. P. 9(b). The court granted CVT's motion holding that the plaintiffs failed to sufficiently allege the who, what, when, where and how of the alleged fraud sufficient, and allowed plaintiffs leave to re-plead their case.

PlatinumTel Commc'n, LLC v. ZEFCON, LLC, 2008 WL 5423606 (N.D. Ill., Sep. 30, 2008) (denial in part, and grant in part, of motion to dismiss)

PlatinumTel Communications, LLC ("PTC") sued Zefcom and others alleging false advertising in violation of Section 43 of the Lanham Act as well as violation of the Illinois Consumer Fraud and Deceptive Business Practices Act ("IFCA") and the Illinois Deceptive Trade Practices Act ("IUDTPA"). PTC also alleged a civil conspiracy among the defendants.

The claims arose after PTC became suspicious that Zefcom and other related entities were offering prepaid cellular services on a resale basis at rates which were too good to be true. PTC conducted its own investigation and gathered evidence that the defendants who provided prepaid wireless services to consumers were deducting more minutes than were actually used.

PTC included claims against an entity known as Telespire in its complaint. Telespire provided the technological platform on which the resellers set rates, coordinated billing, and prepared call detail reports. All of PTC's claims against Telespire were made upon information and belief. The court granted Telespire's Motion to Dismiss, principally on the basis that there were no allegations that Telespire knew of the advertising or of the resellers' conduct in overcharging minutes.

The court did not dismiss the claims against the resellers, with the exception of the conspiracy claims, which the court dismissed on the grounds that without Telespire the remaining defendants were not separate entities. Notably, the court held that PTC sufficiently pled its Lanham Act, IFCA and IUOTPA claims with specificity sufficient to meet the requirements of Fed. R. Civ. P. 9(b). By relying upon the results of its own investigation, PTC was able to sufficiently plead the who, what, when, where and how of the allegedly false advertisements.

AGENCY DECISIONS

By David Blonder²

DOJ

Jan. 14, 2009 - The DOJ Antitrust Division filed a petition and consent decree finding AT&T in civil contempt of a 2008 consent decree. Under the consent decree, AT&T Inc. agreed to pay more than \$2 million as part of a civil settlement that resolved AT&T's alleged violations of two court orders entered in connection with AT&T's acquisition of Dobson Communications Corporation.

http://www.usdoj.gov/atr/public/press_releases/2009/241435.htm

Nov. 17, 2008 - The DOJ Antitrust Division issued a report entitled, "Voice, Video and Broadband: The Changing Competitive Landscape and Its Impact on Consumers," which was the result of a Telecommunications Symposium hosted by the Department on Nov. 29, 2007. The report addresses a number of issues that may affect consumers of telecommunications services and antitrust analysis in this industry, including the development of new facilities-based competition, wireless technologies as alternatives to wireline networks, price and non-price consumer benefits from competition, the significance of bundled products, and obstacles to competitive entry. The report focuses on telecommunications services provided to residential consumers, rather than business users.

<http://www.usdoj.gov/atr/public/reports/239284.pdf>

Oct. 30, 2008 – The DOJ Antitrust Division filed a civil suit and proposed consent decree which would require Verizon Communications Corp. (“Verizon”) to divest assets in 100 areas in 22 states in order to proceed with its \$28 billion acquisition of Alltel Corp. Without this divestiture the transaction would have substantially lessened competition to the detriment of consumers of mobile wireless telecommunications services in those areas, and likely would result in higher prices, lower quality and reduced network investments.

http://www.usdoj.gov/atr/public/press_releases/2008/238941.htm

Oct. 21, 2008 – The DOJ Antitrust Division announced that it would not challenge a proposal pursuant to a business review by a consortium of companies to jointly license patents needed to comply with standards for ultra high frequency radio frequency identification (UHF RFID) technology, which has a variety of uses including airline baggage tracking, retail product inventory and ticketing for events.

http://www.usdoj.gov/atr/public/press_releases/2008/238428.htm

FTC

Feb. 10, 2009 – The FTC obtained a \$2.25 million settlement against major prepaid calling card companies to resolve charges that they made false claims to consumers about the number of minutes of talk time their prepaid calling cards would provide. The FTC charged that the companies misled consumers about the number of minutes of talk time their prepaid calling cards provided and testing showed that consumers received only about half the advertised minutes. In addition, the FTC alleged that the defendants' cards carried hidden fees.

<http://www.ftc.gov/opa/2009/02/alternatel.shtm>

Jan. 27, 2009 – The FTC obtained \$1.2 million from two groups of vacation and timeshare companies for violating the Federal Trade Commission's Do Not Call (DNC) Rule. The companies called consumers whose phone numbers were on the Do Not Call Registry without having obtained their express written agreement or having an “established business relationship” with them. One group's telemarketers also allegedly abandoned many calls, by failing to connect the calls to a sales representative within two seconds after consumers answered, as required by law.

<http://www.ftc.gov/opa/2009/01/westgate.shtm>

Jan. 13, 2009 – The FTC obtained \$16 million in penalties from fourteen defendants involved in a massive telemarketing scheme operated by Largo, Florida-based Suntasia Marketing, Inc. Between 1999 and July 2007, Suntasia deceptively marketed a series of negative option programs, including memberships in discount buyer's and travel clubs, to nearly one million consumers nationwide. Telemarketing scripts Suntasia employed in selling its programs “contained misleading statements and omissions” in violation of the FTC Act and the Telemarketing Sales Rule.

<http://www.ftc.gov/opa/2009/01/suntasia.shtm>

Dec. 19, 2008 – The FTC obtained \$13 million against three telemarketers who allegedly duped consumers, most of whom were elderly, into buying grossly overpriced household products such as garbage bags and light bulbs. The FTC's complaint alleged that the telemarketers falsely claimed that the proceeds from the sales would be used to benefit handicapped and disabled individuals. According to the FTC, the defendants harassed some consumers into buying these products, charged consumers' credit and debit cards, debited their bank accounts without the consumers' authorizations, and called consumers who either had registered their

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telephone numbers on the FTC's DNC Registry or had previously told the defendants that they did not want to be called again.

<http://www.ftc.gov/opa/2008/12/hdwksp.shtm>

Dec. 10, 2008 - The FTC settled the second of 13 complaints brought as part of the multi-agency "Operation TELEPHONE" law enforcement sweep in May 2008 against deceptive telemarketers and the companies they operated throughout the United States. The defendant allegedly deceptively marketed advance-fee credit cards to consumers nationwide, and has been prohibited from making the misrepresentations alleged in the complaint, and more broadly from violating the FTC Act and Telemarketing Sales Rule (TSR). The order also imposes a monetary judgment of more than \$2.4 million.

<http://www.ftc.gov/opa/2008/12/telephoney.shtm>

Dec. 4, 2008 - The FTC obtained a \$3.46 million judgment against a group of Canadian telemarketers who allegedly deceived U.S. consumers through the fraudulent sale of telephone calling cards. Beginning in 2004, the defendants fraudulently marketed telephone cards from Canada to U.S. citizens. All but \$10,000 of the judgment was suspended, however, based on the defendants' inability to pay. If they are later found to have misrepresented their financial condition, the entire amount would become due.

<http://www.ftc.gov/opa/2008/12/fusion.shtm>

Dec. 1, 2008 - The FTC announced that its new rules took effect requiring any telemarketing call that delivers a prerecorded message to include a quick and easy way to opt-out of receiving future calls. The opt-out must work both for consumers who answer these calls in person and for those whose answering machines or voicemail services receive the calls.

<http://www.ftc.gov/opa/2008/12/tsramendments.shtm>

Nov. 7, 2008 - The FTC issued its report entitled "The Do-Not-Call Improvement Act of 2007: Report To Congress Regarding the Accuracy of the Do Not Call Registry."

The report explained the goals of the 2007 DNCIA and how the Commission has met those objectives, described the operation of the National Registry since its implementation in 2003, and discussed the tests conducted to evaluate the accuracy of the National Registry. The report further details the new procedure put in place to maintain the accuracy of the National Registry.

<http://www.ftc.gov/os/2008/11/P034305dncreport.pdf>

Oct. 1, 2008 - The FTC obtained a \$120,000 judgment against a list broker and two companies run by him for selling "full data leads" to these telemarketers that included consumers' bank account and routing information, credit card numbers, credit card security codes, and credit card expiration dates, without first obtaining authorization from consumers to do so, all the while knowing that the data would be used in schemes designed to mislead and defraud consumers.

<http://www.ftc.gov/opa/2008/10/glenpatten.shtm>

FCC

Feb. 10, 2009 - In *Verizon California, Inc. v. Federal Communications Commission*, No. 08-1234, the U.S. Court of Appeals for the District of Columbia Circuit denied Verizon's petition for review of an FCC order requiring Verizon to cease and desist from using information it receives to port the number to win back the customer before the number port has been completed. The Court expressly noted that Verizon's efforts to win back customers after porting had been accomplished were not at issue.

<http://pacer.cadc.uscourts.gov/common/opinions/200902/08-1234-1164087.pdf>

Jan. 18, 2009 - The Commission's Wireline Competition Bureau and Office of General Counsel issued a letter to Comcast seeking clarification of Comcast's new network management practices. Among other things, the Commission asked for information regarding treatment of VoIP providers of its network, and specific information regarding Comcast's advertising and network management practices relating to its Digital Voice service.

http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-288047A1.pdf

Jan. 16, 2009 - The Commission issued a Notice of Inquiry concerning the 14th Annual Assessment of The Status of Competition in the Market for the Delivery of Video Programming. The Notice requests information, comments, and analyses that will allow the Commission to evaluate the status of competition in the video marketplace, changes in the marketplace in the last year, prospects for new entrants, factors that have facilitated or impeded competition, and the effect these factors are having on consumers' access to video programming.

http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-207A1.pdf

Jan. 16, 2009 - The Commission released its 13th Annual Report Assessing the Status of Competition in the Market for the Delivery of Video Programming. The Commission also released its 13th Annual CMRS Competition Report.

http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-206A1.pdf

http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-54A1.pdf

Nov. 4, 2008 - The Commission approved with conditions, the transfer of control of licenses held by Sprint-Nextel Corporation and Clearwire Corporation to New Clearwire Corporation, for the purpose of facilitating the build-out of a nationwide WiMAX-based network that will lead to increased competition, greater consumer choice and new, innovative wireless services. The Commission conditioned its approval of this transaction on Sprint Nextel's compliance with a voluntary commitment to phase out its requests for federal high-cost universal service support over a five-year transition period and with a voluntary commitment to use counties for

measuring compliance with the Commission's wireless E911 location accuracy rules governing handset-based technologies.
http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-286221A1.pdf
http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-259A1.pdf

Nov. 4, 2008 - The Commission approved Verizon Wireless' acquisition of ALLTEL subject to both mandatory conditions and voluntary commitments by Verizon Wireless. Among other things, the Commission required that one of the two companies divest the licenses and related operational and network assets in five markets in conjunction with conditioning its approval of the transaction on Verizon Wireless' voluntary divestitures in 100 markets, as agreed to with the Antitrust Division of the DOJ.
http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-286571A1.pdf
http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-258A1.pdf

INTERNATIONAL

By Blanca Escribano³

European Union

Feb. 4, 2009 – The Paris Court of Appeal has prohibited the exclusivity agreement reached between Apple and Orange (mobile subsidiary of the former monopoly, France Telecom) regarding the iPhone commercialization. Under the agreement, Orange was granted exclusive rights as unique network operator and distributor of iPhone in France. As a result of a complaint lodged by Bouygues Télécom in September 2008, the French Competition Authority -*Conseil de la concurrence*- had adopted interim measures suspending the effectiveness of the deal, considering that it may harm competition in the mobile market. In spite of the appeal by the parties, such measures have now been confirmed in Court (*Cour d'Appel de Paris. Arrêt du 4 Février 2009. RG n° 2008/23828*).
http://www.conseil-concurrence.fr/doc/ca08mc01_iphone_fev09.pdf

http://www.conseil-concurrence.fr/user/standard.php?id_rub=256&id_article=1014

Jan. 22, 2009 – Slovak Telekom has been subject to an unexpected inspection carried out by the EU Commission Officials. The raid is based on the suspicion that the Slovak former monopoly has breached the European antitrust rules by means of an abuse of its dominant position.
<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/22&format=HTML&aged=0&language=EN&guiLanguage=en>

Jan. 9, 2009 – *Conseil de la concurrence*, the French antitrust authority, has been requested to deliver an opinion relating to exclusivity between the provision of Internet access and content distribution, especially regarding the effects that exclusive content offers by Internet access providers may have on the competition.
http://www.conseil-concurrence.fr/user/standard.php?id_rub=293&id_article=1010

Jan. 8, 2009 – A hearing on roaming regulation has been held in the European Parliament. In September 2008, the European Commission presented a proposal to reduce roaming charges within the EU. The proposal would effect both voice calls, SMS and other data services. The proposal, which broaden the scope and duration of roaming regulation, must be approved by the European Parliament and the Council before entering into force. The Council endorsed the proposal in November 2008. The Proposal is currently being discussed by the Parliament.
http://www.epp-ed.eu/Press/peve09/eve001_en.asp

<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/745&format=HTML&aged=0&language=EN&guiLanguage=en>

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1386&format=HTML&aged=0&language=EN&guiLanguage=en>

Dec. 11, 2008 – AGCOM, Italy's telecommunications regulator, has approved a set of undertakings proposed by Telecom Italia with regard to its fixed access network, including the split of the incumbent's wholesale and retail activities. This measure, known as functional separation, involves the establishment of a separate wholesale access division, Open Access, in charge of the management of the network and completely independent from the retail and commercial unit of the company. In order to supervise appropriate compliance an independent committee, made up of the different operators and chaired by AGCOM, has also been created. Functional separation aims to ensure equivalent access inputs to the alternative operators, as well as boost sustainable competition in the deployment of Next Generation Networks (*Delibera n. 718/08/CONS. Approvazione della proposta di impegni presentata dalla societa' telecom italia s.p.a. ai sensi della legge 248/06 di cui al procedimento avviato con delibera n. 351/08/CONS*).
http://www.agcom.it/provv/d_718_08_CONS/d_718_08_CONS.htm

Dec. 10, 2008 – The European Commission has adopted a Communication establishing guidelines on the authorization regime for Mobile TV networks and services. For the purposes of facilitating and encouraging the development and penetration of these new services at the European level, the Commission is in favor of light regulation which places minimal burden on operators.

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<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1923&format=HTML&aged=0&language=EN&guiLanguage=en>

Nov. 11, 2008 – The Italian Antitrust Authority -*Autorità Garante della Concorrenza e del Mercato*- sanctions thirteen telephony companies for unfair commercial practices which resulted in hundreds of consumers being charged for calls that were never completed. The sanctions include a global fine of 2,430 million Euros. (*Delibera della Autorità Garante della Concorrenza e del Mercato del 30 ottobre 2008*).

<http://www.agcm.it/>

Australia

Feb. 3, 2009 – Five access disputes - all of them related to the price for the domestic mobile terminating access service (“MTAS”)- have been notified to the Australian Competition and Consumer Commission. Four of the disputes arose between Telstra and Optus.

<http://www.accc.gov.au/content/index.phtml/itemId/859112>

Dec. 23, 2008 – Telstra’s requests for exemption from certain wholesale obligations have been denied by the Australian Competition Tribunal. The requests sought exemptions from providing the WLR and local transport services in certain metropolitan areas.

<http://www.accc.gov.au/content/index.phtml/itemId/854855>

Committee Updates and Notices

MAY 7, 2009 DEVELOPMENTS BROWN BAG

On May 7, 2009, at 12:00 EST the authors of the Plugged-In section will be holding a teleconference to discuss, in greater detail, relevant antitrust and consumer protection developments. If you are interested in participating in the free teleconference please email AbGreenCooper@bryancave.com.

NEW NEWSLETTER TITLE AND FORMAT

As you may have noticed the newsletter has gone through a substantial change in format and title. Thanks to everyone who submitted suggestions for the new title, and particular thanks to Paul Donahue, at Bell Boyd, for suggesting "Antitrust Connections."

ARTICLE SUBMISSIONS

If you are interested in writing an article for the *Antitrust Connections* please submit your idea or proposal to [David Zetoony](mailto:David.Zetoony@bryancave.com). Articles selected for publication generally contain 750 to 2000 words and address current antitrust and consumer protection topics that effect the telecommunications industries.

LISTSERV

The Committee's listserv has been recognized as one of the most active in the Antitrust Section. Help keep the listserv up-to-date by sending information about new events or cases to [Bill Schur](mailto:Bill.Schur@att.com), the listserv moderator. If you are not a member of the listserv, you can join from the Committee's [webpage](#).

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