András Tóth

The changing role of competition law and the competition authorities in electronic communication

1. The actual role of the competition law in the electronic communication regulation

It was the Commission's Green Paper in 1987 that proposed a three-pronged action, which makes up the basic construction of also the current regulatory framework for electronic communication in the EU:

- the liberalisation of the supply of telecommunications services and equipments;
- the establishment of harmonised and open conditions for access to telecommunications networks;
- the application of the EC Treaty's competition rules to incumbent telecommunications operators.

So, liberalisation, harmonisation and the application of competition rules constitute the three pillars and the strategic elements of the telecom liberalisation process in EU.

All of these have been significantly influenced by the EC competition law, because

- the engine of the liberalisation process was the Commission with its directives based on Article 86 (3) of the EC Treaty, which led to the withdrawal of exclusive rights on the European markets;
- the main elements of the harmonised rules (such as the concept of SMP) are built on competition law principles ensuring flexible reaction to dynamic changes on the markets;
- the regulation and the competition law are applicable in parallel, whereby the two sets of rules may complement each other.

2. The challenges for competition law and authorities in the electronic communication sector

Most challenges – affecting competition law in electronic communication – relate to the above three pillars and arise from:

- the convergence between competition law and sector specific law in line with harmonisation, and
- the parallel applicability of both sets of rules to certain cases.

2.1. Convergence between competition law and electronic communication regulation

The convergence between competition law and electronic communication regulation – as is well known – results in SMP being identical to the notion of dominance under EC law.

From this, different consequences can be drawn for competition and the regulatory authorities.

First, the Framework Directive provides for close collaboration between the competition and regulatory authorities in the process of designation of SMPs. But there are some differences between the concept of dominance and the SMP, which the competition authorities have to consider:

- the trigger of the market analysis is not market behaviour or restrictive agreement but the relevant markets identified by the Commission.
- the NRA adopts the remedies in a forward-looking way and applies them ex-ante,
- the NRA has to review its decisions regularly.

Therefore if an undertaking has SMP it does not automatically imply that this undertaking is also dominant in accordance with Article 82 EC Treaty or similar national provisions. This fact may create regulatory inconsistencies, which could be limited

- by close relationship between the NCA and NRA after the practice of DG Comp and DG Infso, or
- or if the NRA is set up as a division of the NCA. (We will revert to this question at the parallel applicability)

Another unclear area of the regulation is that the national regulatory authority has to carry out the market definition and the market analysis based on supply-demand side substitution, which comprises more elements than the Commission's three criteria stated in its Recommendation. Therefore the Commission should clarify as a result of the Review that the NRA should apply the three criteria only in case of identification of market out of its markets list.

2.2. Relationship between competition law and sector specific law

The relationship between competition and sector specific law should be evaluated in terms of SMP and abuse of dominant position. This relationship could be described in three manners from competition law point of view.

1. no SMP, the competition law will be applied without any special concerns,
2. there is SMP and a certain behaviour violates both the sector specific regulation and competition law,
3. there is SMP and the sector specific law allows a conduct that breaches competition law.

Ad. 1) The NCA pursues quasi-regulatory enforcement policy in areas, which are not covered by the regulation. Mainly in the case of merger control NCAs regularly impose commitments to ensure access on a non-discriminative basis for third parties. (e.g. Commission decisions *Telia/Telenor, Vizzavi*)

Ad. 2) The regulatory framework as lex specialis does not exclude the applicability of competition law in electronic communication markets.

- Article 15 of Framework Directive declares that the identified markets under the European regulation for electronic communication are without prejudice to markets that may be defined in specific cases under competition law.
- Recital 31 of the Guidelines emphasises that in practice it cannot be excluded that parallel procedures under ex-ante regulation and competition law are pursued.

But this parallel applicability of both sets of laws creates jurisdictional overlap between the competency of the NCA and NRA. It may lead to

- forum shopping,
- legal uncertainty because the actions of different authorities regarding the same behaviour are unforeseeable, and
- rise in costs because of the duplication of the investigative resources.

Therefore this jurisdictional overlap should be limited. This could be achieved by close cooperation between NCA and NRA or setting up the NRA as a division of the NCA.

The cooperation arises from the general duty to observe the subsidiary role of competition law.

The Commission clarified its position in the Access Notice. Accordingly, no act on complaint be made if parallel procedure is running before NRA unless

- the matter is not resolved in 6 month, or
- there is an exceptional circumstance where the case involves substantial Community interest.

This doctrine has not been yet applied in electronic communication in Europe, but it was transported to the field of energy. In *British Gas* case (parties entered into Joint Venture agreement) the Commission decided to close the investigation following the finding by Ofgas that the risk of tying was unlikely.

In the field of electronic communication the US Supreme Court comes to the same conclusion in *Trinko* case. The court stated that if sector specific remedy is available, competition rules should not be enforced against the operator. So antitrust law should have a subsidiary role in regulated sectors in situations where no sector specific remedies are available. This approach is not unusual in European competition law practice. The CFI emphasised in *European Night Service* case that it was unnecessary imposing access remedy if sector specific access obligation was available.

If a regulatory remedy may exist but NRA fails to enforce then the competition rules should be enforced as an ignition device. In that case the NCA would start a procedure in order to call NRA's attention to particular problem. (e.g. Commission launched an inquiry on mobile termination charges and shifts the investigation to the relevant NRA)

Setting up the NRA as a division of the NCA

- eliminates the problem of duplication of proceedings,
- limits the costs of investigations,
- limits the risk of regulatory inconsistencies,
- ensures the proper allocation of resources by choosing between regulatory tools.

But the internalisation of the problems – emerging from the cooperation between NCA and NRA – must be avoided.

Ad. 3) Collision between competition law and sector-specific regulation on national level could arise also from the jurisdiction of national regulatory authority. ECJ confirmed that the national regulatory authority must ensure that actions taken by them are consistent with Community competition law. If the national authorities act so as to undermine the competition law, the Member State may itself be liable for damages. In this case the competition law has priority to the electronic communication law and Commission could launch infringement procedure against the Member State according to Article 226 (or Article 86) of EC Treaty based on "effet utile" of Article 3(g), 10, 81, and 82.

But Commission will probably be reluctant to act against NRAs because they are the prolongation of the arms of the Commission in liberalisation, and the formal legal proceedings may affect the credibility of the NRA. It was illustrated in *Deutsche Telekom* case[1], which could have been based on Article 86 as well.

Conclusions

The main challenges of competition law in electronic communication:

- convergence between dominant position and SMP, but there are some discrepancies,
- NCA pursues quasi-regulatory enforcement policy "imposing" commitments,
- parallel applicability of both regulations creates jurisdictional overlap between NCA and NRA,
- Commission will probably be reluctant to act against anti-competitive decisions of NRAs.

[1] DT enjoyed a limited commercial discretion, which established procedure of Commission based on competition law. DT could have avoided the price squeeze. DT's behaviour was the main source of restriction of competition.