

# **The Commission's Contribution to the Emergence of 3G Mobile Communications - an Analysis of Some Decisions in the field of Competition Law**

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**Introduction**

In the field of telecommunications, the second generation (hereafter, “2G”) mobile communications sector is often cited as an example of a highly competitive market. Over the past ten years, mobile operators (hereafter, the “MOs”) and equipment manufacturers have fiercely competed on a wide range of parameters driving prices down and developing innovative products and services. This has helped elevate the European Community (hereafter, the “EC”) to worldwide economic and technical leadership in the field. The rise of a new mobile communications standard (known as the third generation telephony, hereafter “3G”) allowing the high speed transportation of all kinds of data on mobile phones has, however, called this leadership into question.<sup>1</sup>

From a competition policy standpoint, the transition to efficient and competitive 3G mobile communications markets is unsurprisingly a difficult task. These markets indeed demonstrate a variety of features that may inhibit the development of the competitive process. For instance, high sunk investments (acquisition of spectrum licences and network roll-out), barriers to entry (limited number of spectrum licences), strong incumbent operators (essentially former 2G operators as well as fixed telephony incumbents), oligopolistic market structure (in most Member States, between 3 and 5 operators), economies of scale, network externalities, etc. are all factors which may be detrimental to competition.<sup>2</sup>

These particular impediments have been aggravated in recent times by the influence of two additional factors. First, the general slowdown of the EC mobile sector that was observed following the allocation of spectrum licences by Member States (hereafter, the “MS”) has reduced operators’ incentives to implement aggressive commercial strategies. The very substantial sums spent by MOs in several MS have

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<sup>1</sup> In the mid 1990s, the progress made in the field of data transmission gave birth to the Universal Mobile Technology System (UMTS) which allows the high speed transportation of all kinds of data (multimedia, pictures etc.) through wireless networks at an utmost rate of 2000 Kbytes/s (1G mobiles only allowed voice and text transmission at a 9.6 Kbytes/s speed rate). The maintenance of this leadership is important in light of the so-called “Lisbon Agenda” which intends to make the EC the most competitive economy by the end of 2010 through, *inter alia*, the development of competitive services in the information society sector.

<sup>2</sup> See Philippe Mougeot, “Commentaires” in *Enjeux économiques de l’UMTS*, La Documentation Française, Paris, 2002 at p.162.

considerably strained their investment capacities and their financial resources.<sup>3</sup> MOs have thus sought to effect co-operative and consolidating strategies to limit the delays to the introduction of 3G telephony instead of seeking to achieve competitive advantages on a stand alone basis. Second, media content (e.g. TV broadcasts, sport events etc.) which is crucial for the development of the 3G markets is generally in the hands of single economic operators and secured by exclusive rights. The risk of content foreclosure, or of supra-competitive prices for the sale of content cannot be excluded.

In this context, a delicate balance thus has to be found between on the one hand, the necessity to preserve the competitive process and, on the other hand, the necessity to promote a swift launching of 3G technology through co operation between MOs. To address this, the European Commission (hereafter, the “Commission”) has enforced its powers under competition rules in a differentiated way. In a first series of cases, the Commission ranged on the side of caution in its attitude towards structural alliances between MOs’ following the allocation of spectrum licences (I). In a second series of cases, the Commission took a lenient approach towards MOs in order to help them build the necessary infrastructure for future 3G markets (II). Finally, in a third series of cases, the Commission has taken a more rigorous stance towards content owners by trying to ensure that the selling of exclusive rights over content does not render content inaccessible to MOs (III). The purpose of this article is to provide a brief review of these decisions.

## **I. Early Mergers between Mobile Operators - the Commission’s Caution**

Early after the allocation of 3G licences important restructuring operations were carried out between MOs. This is not surprising. In the economic context following licensing (slowdown of the telecommunications sector), a merger was advantageous for both the operators that had acquired a license, as well as those that had not. The former had often been placed in a poor financial position (limited liquidity) and were under pressure to achieve savings and realize synergies.<sup>4</sup> Mergers have thus been seen as a useful strategy to achieve savings as they permit, for instance, a spreading of the fixed cost of a licence or of the costs of network building over a larger scale.<sup>5</sup> The latter have also been interested in a merger with a successful bidder in order to gain a foothold in a market where it has not applied for a licence or where it has done so unsuccessfully.

Against this background, two distinct strategies were implemented by MOs. In a first series of operations MOs entered into Joint Ventures (hereafter, “JVs”) with the purpose of jointly operating a license. These JVs often consisted of the formalization of the former vehicle companies that had been set up between MOs for submitting a joint bid within licence procedures in MS where they had no local presence. In other

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<sup>3</sup> In turn, this has spilled over the whole value chain. Handset manufacturers have faced rampant demand and content providers have not aroused sufficient funds to develop attractive 3G applications.

<sup>4</sup> See “Comparative Assessment of the Licensing Regimes for 3G Mobile Communications in the European Union and their Impact on the Mobile Communications Sector”, Report by Mc Kinsey to the European Commission, 25 June 2002, at p.45, available at [www.europa.eu.int/comm/infosoc](http://www.europa.eu.int/comm/infosoc).

<sup>5</sup> As all operators will have to roll out a network, concentration can help avoid duplication and may also boost investment capacities.

instances, operators have teamed up with a local license winner and created JV in order to participate in the operation of a 3G license.<sup>6</sup>

A second series of operations is those whereby JVs have been established and have been used by a founder as an instrument to progressively gain sole control over a licence and penetrate new markets. In this scenario, one of the JV's founders implements a progressive take-over of the JV and ends up enjoying sole control. This strategy is closely allied to the former one in that a JV is set up and used as a means to penetrate a market. However, it can be distinguished on the basis that in the end, a single firm operates the licence and no cooperation takes place. This strategy was followed by *Vodafone* which progressively attained a foothold in Spain via a progressive take-over of *Airtel*. This undertaking was originally a joint venture between *Vodafone* and *British Telecom* and other shareholders.<sup>7</sup> Once the Spanish licences were awarded *Vodafone* progressively sought to gain a majority share in *Airtel*.<sup>8</sup> It ended up with *Vodafone* ultimately gaining sole control over *Airtel*.<sup>9</sup> A similar strategy has been implemented by *Deutsche Telekom* and *British Telecom* to respectively gain a foothold in the Netherlands and in Germany.<sup>10</sup>

On competition grounds, most of these operations were notified to the Commission for clearance under the EC Merger Control Regulation.<sup>11</sup> The first of these was *ACS/Sonera/Vivendi/Xfera* where the Commission held that the JV led to the creation of a new entrant and thus neither created nor reinforced a dominant position.<sup>12</sup> In *Hutchison/NTT DoCoMo/KPN Mobile* the Commission came to a similar conclusion.<sup>13</sup> Having held that such operations were harmless for the competitive process, the Commission subsequently examined them under the simplified procedure considering that they fell within the scope of Article 4(b) of the Notice on a simplified procedure for the treatment of certain concentrations.<sup>14</sup>

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<sup>6</sup> This is, for instance, the case of *France Telecom* which acquired joint control of *Mobilcom AG* in order to operate the German UMTS licence which had been awarded to the latter. See Commission Decision, COMP/M.2155, *France Telecom/Schmid/Mobilcom* of 24 October 2000.

<sup>7</sup> See Commission Decision, COMP/JV.3, *BT/Airtouch/Grupo Acciona/Airtel* of 8 July 1998.

<sup>8</sup> See Commission Decision, COMP/M.1863, *Vodafone/BT/JV* of 18 December 2000.

<sup>9</sup> See Commission Decision, COMP/M.2469, *Vodafone/Airtel* of 26 June 2001.

<sup>10</sup> *Deutsche Telekom* gained sole control over *Ben*, a Netherlands MO that had been awarded a 3G licence. See Commission Decision, COMP/M.2130, *Belgacom/Teledanmark/T-Mobile International/Ben Nederland Holding* of 25 September 2000; Commission Decision COMP/M.2682, *Credit Suisse/Belgacom/T-Mobile/Ben Nederland* of 17 January 2002 and Commission Decision COMP/2959, *Deutsche Telekom/Ben* of 20 September 2002. A similar strategy was also implemented by *British Telecommunications plc.* in Germany. See Commission Decision, COMP/M.2143, *BT/Viag Intercom* of 19 February 2001.

<sup>11</sup> See Council Regulation 4064/89 of 21 December 1989 on the Control of Concentrations between Undertakings, OJ L395 of 30 December 1989, pp.1-12, as amended by Council Regulation 1310/97 of 30 June 1997, OJ L180 of 9 July 1997, pp.1-6.

<sup>12</sup> See Commission Decision, COMP/M.1954, *ACS/Sonera/Vivendi/Xfera* of 31 July 2000.

<sup>13</sup> See Commission Decision COMP/M.2099, *Hutchison/NTT DoCoMo/KPN Mobile/JV* of 5 September 2000.

<sup>14</sup> See for instance, Commission Decision COMP/M.2144, *Telefonica/Sonera/German UMTS JV* of 17 November 2000; Commission Decision, COMP/M.2310, *Hutchison/Investor/H13G* of 19 February 2001; Commission Decision, COMP/M.2255, *Telefonica Intercontinental/Sonera 3G Holding/Consortium Ipse 2000* of 9 January 2001. Article 4(b) of the Notice on a Simplified Procedure for the Treatment of certain Concentrations is applicable when: "[...] one or more undertakings acquire sole or joint control of another undertaking, provided that none of the parties to the concentration are engaged in business activities in the same product and geographical market [...]". Indeed, although

As several of the MOs participating to these JVs were already some of the largest players in the mobile communications sector, it has been argued that the 3G licensing process has indirectly given large operators scope to further concentrate thereby leading to a consolidation of the European telecommunications oligopoly.<sup>15</sup> The analysis by the Commission is however correct. Although such operations give rise to large pan European market players, no conclusion can be drawn from this as markets remain national. In accordance with the solution in *Telia/Telenor*, the Commission recalled that mobile communications markets were national in dimension and that market power should be assessed within the limits of national boundaries.<sup>16</sup> In that respect, the entry of a new competitor on a national market is likely to strengthen competition.

Furthermore, it is legitimate to avoid drawing conclusions from the oligopolistic structure of the mobile communications sector at the European level. It is needless to recall that fierce competition can take place on oligopolistic markets.<sup>17</sup> Also, given that the market was at the time when these operations took place still not yet operative, the risk of coordinated effects was almost impossible to assess. One can thus approve the “wait and see” approach adopted by the Commission.

## II. Agreements between Mobile Operators - A Lenient Stance

In more recent times, a number of MOs implemented technical co-operations by entering into Network Infrastructure Sharing agreements (hereafter, “NIS agreements”). These are agreements whereby operators agree to jointly purchase or lease 3G sites and share them so that each operator can install its network elements on the site (or a sole operator leases the site but leaves a preferential option to the other operator to share the site). In some cases, operators also share network elements on the site (masts, antennae etc.). The main advantage of NIS agreements is that they are a useful way to reduce some of the costs generally incurred when installing a 3G mobile radio network.<sup>18</sup> As has been outlined above, MOs face high coverage requirements which they may not be able to finance as they have already invested large amounts of money in the acquisition of licences.<sup>19</sup>

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most of the participants to the JVs operate on the same product markets, they all operate on different national geographic markets.

<sup>15</sup> See Patrick Geoffron and Gérard Pogorel, “La consolidation de l’oligopole européen des télécommunications” in *Enjeux économiques de l’UMTS*, supra note 2 at p.283.

<sup>16</sup> See Commission Decision, COMP/M.1439, *Telia/Telenor* of 13 October 1999 and Commission Decision, COMP/M.2803, *Telia/Sonera* of 10 July 2002.

<sup>17</sup> See Simon Bishop and Mike Walker, *The Economics of EC Competition Law*, 2<sup>nd</sup> Ed. Sweet and Maxwell, London, 2002 at 2.52.

<sup>18</sup> The level of savings achievable depends on several factors (level of sharing, geographic areas concerned, coverage requirements imposed by MS, possession of a 2G network etc.). Observers consider that a reduction of costs from 5% to up to 50% can be expected. See Laurent Benzoni, “Concentration, segmentation, fragmentation dans l’Internet mobile”, in *Enjeux économiques de l’UMTS*, supra note 2 at p.273. In addition, NIS offers other ancillary advantages on public policy grounds (e.g. environment, public health etc.).

<sup>19</sup> See David Harrington, “Access for All? Spectrum Auctions in the Local Loop” (2000) 2 *Info* 351. In addition, network costs are estimated to be high as 3G technology requires a density double to that of 2G. See Philippe Lucas, “La technologie UMTS” in *Enjeux économiques de l’UMTS*, supra note 2 at p.211.

In February 2002, *O2* and *T-Mobile* notified an agreement (hereafter, the “UK Network Sharing Agreement”) to the Commission pursuant to which they had agreed on site sharing as well as on national roaming (i.e. parties do not share any network elements as such but simply use each other’s network to provide services to their own customers) in the UK.<sup>20</sup> In urban areas of the UK the parties planned to site share (planning, acquiring, building, deploying and using 3G sites and network elements).<sup>21</sup> In rural areas of the UK each party was to be assigned a territory within which it would roll out its own network.<sup>22</sup> When outside its own area, either party would provide roaming to the other’s customers.

As far as site sharing is concerned, the Commission had essentially raised four main areas of concern with respect to Article 81(1). A first risk was that site sharing entailed a high degree of common costs between operators. In line with previous decisions, the Commission feared that the realisation of substantial common costs would limit the scope for price competition on retail markets and lead to coordinated effects. A concrete analysis revealed, however, that the extent of site sharing was very limited (only masts, antennae, power supplies etc.) and that the most sensitive parts of the sites (intelligent elements which might determine the range and nature of services), which constitute a majority of the costs and for which there is scope for competition, would only be shared in exceptional circumstances. The level of common costs (which can in turn influence decisions on prices and output) was therefore likely to be low.<sup>23</sup>

Second, the Commission had raised doubts on the parties’ project to adopt a joint radio plan whereby parties would deploy their radio equipment in a similar or a substantial number of the same sites.<sup>24</sup> Indeed, operators will often buy sites individually and leave a subsequent option to the other party. Thus, parties will not necessarily deploy their radio equipment in the same sites or at the same time. Hence, there could be scope for differentiation in terms of coverage. The adoption of a joint or common radio plan could limit network competition as parties would roll out similar networks. Under the Commission’s pressure, this project was consequently abandoned by the parties thereby eliminating any concerns under Article 81(1).

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<sup>20</sup> See Commission Decision, COMP/38.370, *O2 UK Ltd./T-Mobile UK Ltd.*, of 30 April 2003, OJ L200 of 7 August 2003, p.59. The Commission also issued a decision with respect to a NIS agreement in Germany. See Commission Decision, COMP/38.369, *T-Mobile Deutschland/VIAG Interkom* of 16 July 2003. The latter has not yet been published and thus will not be analysed in the present article. See Commission Press Release of 16 July 2003, “Commission approves 3rd Generation mobile network sharing in Germany”, IP/03/1026.

<sup>21</sup> Within a mobile communications network, two segments can be distinguished. The first is the Radio Access Network (RAN) which is composed of basic infrastructure components such as, for instance, masts, site support cabinets, power supply, antennae, combiners and transmission links, and the base stations that receive and send data across frequencies and control a particular network cell (also called Nodes B). The second segment is the Core Network, which is the intelligent part of the network and consists of mobile switching centres, services platforms, client home location registers and operation and maintenance centres. The agreed degree of site sharing only involved a part of the RAN. In addition several specific provisions were laid down (such as exchange of technical information etc.). Lastly, the parties agreed to also provide for national roaming where coverage gaps existed.

<sup>22</sup> Site sharing could, however, be considered for specific point solutions.

<sup>23</sup> See Commission Decision at §88.

<sup>24</sup> *Id.* at §89.

Third, a potential risk of foreclosure was identified. National regulatory frameworks generally require that sites acquired by either party, if suitable for sharing, be shared with other operators.<sup>25</sup> The parties had thus agreed to exclusivities between themselves with respect to the new sites each would acquire. Either party would grant the other party an option over sites identified as suitable for site sharing for a duration of two years and a month. Both parties had also consented to grant the other party first refusal in case a third party wishes to share the same site.<sup>26</sup> These provisions might have had the effect of foreclosing market access for new entrants as they could be potentially used as a blocking tactic against competitors. The Commission nevertheless pointed out that this could only be an area of concern if (i) the availability of sites was low, (ii) the duration of the exclusivities was too long and (iii) no regulatory remedy existed which was not, however, the case here. Indeed, the regulatory remedy provided for by Article 12 of the Framework Directive on electronic communications could be used to allow competitors to access sites.<sup>27</sup> This would remove the risk of foreclosure and the Commission thus came to the conclusion that the exclusivities did not raise any competition concerns under Article 81(1).

Fourth, a clause of the agreement provided that if access to a site was to be granted to a third party, it should be so at a price equal to or higher than that of the parties.<sup>28</sup> This had the effect of limiting the commercial freedom of the site owning party and of raising the cost of entry for third parties. In addition, this could have even amounted to an agreement to set a minimum price. In light of the Commission's concern, the parties therefore amended their agreement so as to remove the condition of higher price.<sup>29</sup>

It is of note that the Commission comes to the conclusion that the risk of foreclosure on sites does not fall within the scope of Article 81(1) in light of the existence of a regulatory remedy. The Commission refrains from *ex ante* action on the basis of competition rules where potential competition restrictions could be corrected with *ex post* regulatory intervention on the basis of sector specific legislation.<sup>30</sup> The decision by the Commission to shift the potential competition concerns to National Regulatory Authorities (hereafter, "the NRAs") on the basis of specific legislation is to be welcomed.<sup>31</sup> Problems of access to sites (or more generally to infrastructure) in

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<sup>25</sup> Id. at §17.

<sup>26</sup> Id. at §25.

<sup>27</sup> See Article 12(2) of Directive 2002/21 on a common regulatory framework for electronic communications networks and services (hereafter, the "Framework Directive") of 7 March 2002, OJ L108 of 24 April 2002, pp.33-50 which provides that : "where undertakings are deprived of access to viable alternatives because of the need to protect the environment, public health, public security or to meet town and country planning objectives, Member States may impose the sharing of facilities or property (including physical co-location) on an undertaking operating an electronic communications network or take measures to facilitate the coordination of public works only after an appropriate period [...]".

<sup>28</sup> See Commission Decision at §25.

<sup>29</sup> Id. at §106.

<sup>30</sup> This is a rather original situation as generally, in the telecommunications sector, competition law is used on an *ex post* basis (generally in Article 82 proceedings) and sector specific legislation is implemented on an *ex ante* basis. This approach confirms that the Commission considers general competition regimes and sector specific legislation as alternative tools to control market power in telecommunications.

<sup>31</sup> See, for a similar point of view, Damien Geradin and Greg J. Sidak, "European and American Approaches to Antitrust Remedies and the Institutional Design of Regulation in Telecommunications", forthcoming in the *Handbook of Telecommunications Economics*, 2<sup>nd</sup> Vol. at p.18.

telecommunications markets are to be dealt with preferably under sector specific legislation by NRAs. These questions may involve pricing issues which NRAs are better placed to deal with than competition authorities.<sup>32</sup>

As far as national roaming is concerned, the Commission showed more concern on competition grounds. It shall be recalled that, within the rural areas, the parties had assigned to themselves distinct territories within which they would each roll-out their network, either party being forbidden to roll out in the other's area. When customers of one party are outside their own area, the other party would provide roaming to the first party's customers on the basis of a *retail minus* price formula.<sup>33</sup> As such, the agreement raised three potential concerns with respect to competition. First, the agreement had the effect of limiting almost all infrastructure based competition. Parties would not seek to achieve maximum coverage and rely instead on the others' network.<sup>34</sup> This would limit network quality and competition in transmission rates because the roaming operator would rely on the network quality and transmission rates of the visited operator.<sup>35</sup>

Second, the agreement provided that national roaming would be charged at wholesale rates.<sup>36</sup> Given that national roaming will account for almost half of each party's capacity, it is probable that the wholesale rates which it will charge to purchasers of its own wholesale services will be largely (up to 50%) constrained by the wholesale rates it has to pay for national roaming to the other party.<sup>37</sup>

Third, as far as the retail market is concerned, the Commission considered that a variety of parameters (network coverage, quality and transmission speeds etc.) would tend to be similar while the rolling out of two full networks would have led to some differentiation and increased network competition on retail markets. In addition, service competition might also be hampered. Given that transmission speeds on each party's network will determine the types of service that an operator will be able to provide, each party will depend on the other for the introduction of services. Also the Commission found an area of concern with respect to price competition. As operators using wholesale national roaming will have to pay for wholesale access based on the *retail minus* system (retail price minus the avoided costs of not providing the service on the originating network), the scope for price competition on the retail market will be limited. Finally, it could even be used as a device for coordinating prices on retail markets.<sup>38</sup>

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<sup>32</sup> For a sceptical view of competition authorities taking decisions in terms of pricing, see Richard Whish, *Competition Law*, 4<sup>th</sup> Ed., Butterworths, 2001 at p.480. See also Pierre Larouche, *Competition Law and Regulation in European Telecommunications*, Hart Publishing, 2000 at pp.259 and 319.

<sup>33</sup> National roaming "involves the customer of one mobile operator using the network of another operator within the same country to make or receive phone calls". The retail minus approach sets the price cap for interconnection at retail price minus costs incurred by the retail activities of the network operator's in-house/affiliated service providers. See Damien Geradin and Michel Kerf, *Controlling Market Power in Telecommunications - Antitrust vs. Sector Specific Regulation*, Oxford University Press, 2003 at p.39.

<sup>34</sup> The restriction not to roll out in the other's network could have been constitutive of market sharing. However, the Commission came to the conclusion that it was not anticompetitive, given the width of the exceptions to it in the agreement. See Commission Decision at §92.

<sup>35</sup> *Id.* at §110.

<sup>36</sup> *Id.* at §116.

<sup>37</sup> *Id.* at §117.

<sup>38</sup> *Id.* at §120.

These potential competition restrictions, combined with the fact that the parties are two well established telecommunications operators in an oligopoly market (in the UK, 5 market players) were held to infringe Article 81(1) of the EC Treaty.<sup>39</sup> The Commission thus turned to the analysis of the four conditions required for granting an exemption under Article 81(3). The agreement is firstly deemed to promote production and distribution in that the parties will on the one hand be able to provide more rapid coverage, quality and favourable transmission rates and on the other hand, networks will have a greater density and coverage than they would have had if rolled out individually.<sup>40</sup> In addition, as 3G services are technologically advanced products, the agreement also promotes technical and economic progress.<sup>41</sup>

The rest of the conditions are also considered to be fulfilled. The fourth condition of Article 81(3) (i.e. the non elimination of competition in respect of a substantial part of goods and services concerned) is however analysed in more detail.<sup>42</sup> The Commission takes the view that the agreement is likely to enhance competition between the various 3G operators in the UK. Since they compete with three other operators at network level, the parties have an incentive to realise greater density and a more extended footprint rather than merely economising on their network costs. Also, the agreement leaves scope for competition between the parties themselves as national roaming does not remove home operators from the responsibility for billing, pricing and services offering. Finally, the costs of 3G roaming are essentially transport costs and the importance of these should decrease in the face of increased content costs. In light of the fact that most traffic will not be roamed, the agreement thus leaves scope for price differentiation among the parties.

For these reasons, the Commission takes the view that it is possible to grant an exemption under Article 81(3) to national roaming arrangements.<sup>43</sup> Three aspects of the decision are of note. First, despite the fact that site-sharing agreements must be assessed on a case by case basis, the decision's main interest lies in the fact that the Commission has established a form of guidelines to be observed by National Competition Authorities (hereafter "the NCAs"), but also by NRAs. As the Commission held in a previous Communication:

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<sup>39</sup> Id. at §135. As the markets delineated were essentially national and the restriction identified of a domestic nature, doubts could have been raised as to the effects on trade between MS. The Commission however considered that trade between EEA States was affected since the services provided through telecommunications networks are traded throughout the EC (as wholesale access to international roaming) and the conditions for access to network may affect the ability of non UK providers to trade services in the UK.

<sup>40</sup> Id. at §139. At the retail level, the Commission considers that each party has an incentive to compete individually on quality services. The urban area in which incentives to roll out are normally very low, will be more optimally covered. 3G services will be more quickly available to a greater number of customers.

<sup>41</sup> Id. §141. A distinction is nonetheless made between roaming in high density regions and roaming in low density areas. In the first, it is considered that the economic benefits of roaming are less obvious.

<sup>42</sup> Id. at §§144-148.

<sup>43</sup> Id. at §§150-152. It is worth noting that the exemption's duration is differentiated. On the one hand, in the urban areas (where the potential for infrastructure competition is high) the exemption is limited to 2007. On the other hand, in the rural areas (where the potential is lower), the exemption is granted for a longer time.

“EU competition rules continue to apply beside the sector-specific regulation and the NRAs, like any other public authority, are bound to respect the provisions of the EC Treaty”.<sup>44</sup>

Thus, if NRAs approved NIS agreements in contradiction with Articles 81(1) and 81(3), this could lead to the initiation of infringement proceedings on the basis of Articles 10 and 86. In addition, the Commission or a NCA retained the possibility to act against the undertakings themselves on the basis of Article 81, as long as the NRAs’ decision left a margin of autonomy (for instance, by requiring minimal requirements for NIS or national roaming). This is confirmed in the recent *Deutsche Telekom* decision where the Commission recalled that:

“[...] the competition rules may apply where the sector-specific legislation does not preclude the undertakings it governs from engaging in autonomous conduct that prevents, restricts or distorts competition”<sup>45</sup>

Second, it is now clear that both NCAs and NRAs should scrutinise national roaming arrangements more vigorously than decisions on site sharing which have a less anticompetitive potential. This should not come as a surprise as roaming arrangements are a potential vehicle for anticompetitive practices. For instance, by reciprocally charging high roaming prices to each other operators could raise prices on the retail market without having to enter into a formal agreement in that regard.<sup>46</sup>

Third, the question whether NIS agreements could potentially fall within the scope of Article 82 EC under the concept of joint dominance could be raised. The Commission has not addressed this concern in its decision as it is indeed under no legal obligation to carry out an Article 82 assessment within Article 81 proceedings.<sup>47</sup> In addition, as services are not yet operative and markets are still to emerge, the Commission has legitimately refused to rule at such an early stage on the potential for anticompetitive tacit collusion.

However, observers have raised two main concerns over the appearance of oligopolistic collusive outcomes on 3G markets. A first is that, in MS where licences have been sold at high (excessive) prices, the industry profits generated by each operator would be less than the price of the licence. In that situation, operators would face two options: exit or collusion in order to maintain artificially high prices and pass on licence costs to the consumers.<sup>48</sup> A second is that 3G markets are characterized by

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<sup>44</sup> See Communication from the Commission, “Unbundled access to the local loop: enabling the competitive provision of a full range of electronic communication services, including broadband multimedia and high-speed Internet”, OJ C272 of 23 September 2000, pp.55-66 at §6.

<sup>45</sup> See Commission Decision, COMP/C-1/37.451, 37.578, 37.579, *Deutsche Telekom AG*, of 21 May 2003, OJ L263 of 14 October 2003, at §54.

<sup>46</sup> See D. Geradin and M. Kerf, *supra* note 33 at p.46.

<sup>47</sup> See Commission Decision at §154. As for any Article 81(3) decision, the exemption does not prejudice the application of Article 82. On the cumulative application of Articles 81(3) and 82, see CFI, *Tetra Pak Rausing SA v. Commission*, Case T-51/89, [1990] ECR II-309.

<sup>48</sup> See, for instance, Harald Gruber, “Spectrum limits and competition in mobile markets: the role of licence fees”, (2001) 1-2 *Telecommunications Policy*, 59; “Endogenous Sunk Costs in the Market for Mobile Telecommunications: the Role of Licence Fees”, (2002) 1 *The Economic and Social Review*, 55, at p.59; William H. Melody, “Assessing Highly Imperfect Mobile Markets”, (2001) 1-2 *Telecommunications Policy*, 1; Colin Blackman, “Editorial: Spectrum Auctions - Who is screwing

attributes that are generally deemed to increase the risk of coordinated effects, i.e. transparency, barriers to entry, small number of market players, growing demand, limited buyer power, existence of links between operators, etc.<sup>49</sup> As a result, the 3G markets could potentially lead to stagnant competitive conditions or to the maintenance of supra-competitive prices.

In light of this, from a legal perspective, it could be questioned whether the agreements could be held to constitute “economic links” necessary to a finding of joint dominance. It results from the *Italian Flat Glass* and *Compagnie Maritime Belge Transports* case law that agreements (such as, for instance, the NIS agreements) can constitute such “economic links”.<sup>50</sup> However, the test for the required intensity of the links to ensure the stability of a collusive equilibrium was clarified in the *Airtours* case where it was held that for collusion to occur, (i) a certain amount of transparency, (ii) a punishment (or retaliatory) mechanism and (iii) the absence of reaction by consumers and potential competitors were required.<sup>51</sup> While, in the case of 3G markets, the first and third conditions might be fulfilled easily, it is debatable whether the NIS agreement constitutes a potential retaliatory device.<sup>52</sup> Let us recall that the sustainability of a collusive equilibrium depends on the reactions of oligopolists to a potential deviation by one of them from the collusive conduct. In such a situation, the existence of a retaliation mechanism neutralizes the incentive for deviation and consequently ensures the stability of the collusive equilibrium. It is admitted that retaliation does not necessarily take the form of aggressive pricing strategies. Retaliation can, for instance, encompass a refusal to cooperate on joint policies with the deviating oligopolist.<sup>53</sup> Thus, the termination of the NIS agreements could be used as a threat to ensure the perpetuation of a collusive equilibrium. To this extent, the second condition laid down in *Airtours* would be fulfilled giving rise to a qualification of collective dominance.

However, these arguments are not convincing. Firstly, the risk of anticompetitive oligopolistic behaviour on 3G markets should not be overstated. Licence fees constitute a sunk investment for operators which accordingly do not influence their pricing strategies.<sup>54</sup> There is thus, little risk that operators will try to pass on licence costs to consumers through oligopolistic coordination. On the contrary, operators that have paid high license fees might try to rapidly maximise their commercial return and thus offer services at very competitive prices.<sup>55</sup> Secondly, 3G markets are characterized by network externalities which may enhance competition. One network externality in such markets is portrayed by price cuts by a competitor which directly

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whom?” (2000) 2 *Info*, 339; Patrice Geoffron and Gérard Pogorel, “Consolidation de l’oligopole européen des télécommunications” in *Enjeux économiques de l’UMTS*, supra note 2 at pp.288-289.

<sup>49</sup> See Patrick Rey, “Collective Dominance and the Telecommunications Industry”, 7 September 2002, mimeo.

<sup>50</sup> See CFI, *Società Italiano Vetro v. Commission*, Case T-68/89, [1992] ECR II-1403; ECJ, *Compagnie Maritime Belge Transports SA v. Commission*, Case C-395, 396/96P, [2000] ECR I-1365. It could also be asked whether the agreements could constitute “facilitating practices” in the meaning of the *UK Agricultural Tractor* decision. See Commission Decision, 92/157 of 17 February 1992 IV/31.370 and 31.446, *UK Agricultural Tractor Registration Exchange*, OJ L68 of 13 March 1992 pp.19-33.

<sup>51</sup> See CFI, *Airtours plc v Commission*, Case T-342/99, [2002] ECR II-2585.

<sup>52</sup> See P. Rey, supra note 49 at p.30.

<sup>53</sup> *Id.*

<sup>54</sup> See D. Geradin and M. Kerf, supra note 33 at p.51. See also Martin Cave and Tommaso Valletti, “Are Spectrum Auctions Ruining our Grandchildren’s Future?” (2000) 2 *Info*, 349.

<sup>55</sup> See D. Geradin and M. Kerf, supra note 33 at p.51.

attracts a larger number of new subscribers and in turn increases the value of the network. This creates a strong incentive for remaining non subscribers to enter the network. For this reason, the incentive to undercut rivals' prices is thus extremely high, given the 'snowball effect' of demand responses to price cuts and the increase in network value. In addition, 2G markets have proven very competitive while evincing a number of characteristics similar to those of 3G markets (transparency, barriers to entry, scale economies etc.). Finally, for NIS agreements to be considered as "economic links", minimal market shares should, at least, be achieved by the two parties to the agreement.<sup>56</sup> In the current pre-market context, it is impossible to anticipate on the achievement of a sufficient collective market power by the parties to the NIS agreements. The Commission is thus correct not to engage in an analysis of NIS agreements through the lenses of Article 82. The future will tell whether NIS agreements lead to situations of oligopolistic dominance.

### III. The Commission's Tough Stance toward 3G Content Owners

It is widely admitted that the success of the UMTS technology will critically depend on the availability of content at competitive conditions.<sup>57</sup> This is the reason why the Commission increasingly tries, in a variety of fields, to promote the accessibility of content to 3G providers. To this end, the Commission has forced content owners to concede limitations of their rights over content on the basis of competition rules. Examples of this can be found in the field of antitrust policy with the *UEFA/Champions League* decision as well as in the field of merger control with the *Newscorp/Telepiu* decision.

#### *The UEFA/Champions League Decision*

The recent Commission decision in the *UEFA/Champions League* case is a good example of the proactive use of competition rules in order to promote 3G development.<sup>58</sup> The "Union des Associations Européennes de Football" (UEFA) is an association of national football associations which, *inter alia*, is in charge of the organisation of the Champions League tournament, a famous pan-european football competition. In this respect, members of the UEFA have agreed to entrust the association with the duty to supply TV rights to interested buyers. This joint-selling agreement was notified to the Commission on 19 February 1999.

The Commission expressed concern about the possible infringement of article 81(1) and issued a statement of objections on 18 July 2001. First, the arrangement prevented the individual football clubs participating in the tournament from taking independent commercial action in respect of the TV rights and therefore restricted competition between them. Second, and probably more importantly, the joint-selling arrangement had traditionally been implemented in a detrimental way to several market players.

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<sup>56</sup> Presumably above 50%, see Commission's Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the control of concentrations between undertakings, OJ L24 of 29 January 2004, pp.1-22, at §17.

<sup>57</sup> See Herbert Ungeger, "Media in Europe: Media and EU Competition Law", Speech delivered at the Conference on Media in Poland by the Polish Confederation of Private Employers, Warsaw, February 2002, available at [www.europa.eu.int/comm/comp](http://www.europa.eu.int/comm/comp).

<sup>58</sup> See Commission Decision COMP/C.2-37.398, *Joint Selling of the Commercial Rights of the UEFA Champions League*, of 23 July 2003, OJ L291 of 8 November 2003, pp.25-55. See Torben Toft, "Football: Joint Selling of Media Rights", (2003) 3 *European Competition Policy Newsletter*, 47.

The UEFA used to sell all Champions League TV rights to a single TV broadcaster per territory on an exclusive basis for up to four years a time. This resulted in several foreclosure effects as well as to leaving a certain number of rights left unexploited.<sup>59</sup> The arrangement prevented the diffusion of UEFA content on mediums other than TV (such as, for instance, 3G wireless technologies).<sup>60</sup>

In response to the Commission's objections, the UEFA submitted a new draft for the joint-selling arrangement for negotiation with the Commission. The latter has had a very influential impact on the final design of the agreement.<sup>61</sup> Not all issues of the decision are relevant in the context of the present study, as a result of which the issue of football content for 3G technology will be focused on. To address, *inter alia*, the concerns raised by the Commission, the UEFA proposed to 'unbundle' football rights in several packages including TV rights, Internet rights and UMTS rights. The latter platform was therefore singled out as a category/market for the sale of football rights. Furthermore, pursuant to the modified version of the agreement, both the UEFA and the clubs (for the matches in which they participate) will have a right to provide audio/video content via UMTS services available max. 5 minutes after the action takes place.<sup>62</sup> This is different to the former situation where UEFA was the only supplier. Competition on the supply side will increase, arguably driving prices down for 3G operators that hold an UMTS licence.

On pure competition grounds, one can observe that it is difficult to see how the fact of not selling rights to UMTS operators constitutes a restriction of competition, as these operators will not compete with TV channels. The selling of all rights to TV channels does not raise problems from a strict competition perspective. In fact, the Commission's intervention is driven by more urgent considerations, among which one is to avoid suboptimal allocation of resources (situations in which it is possible to make someone better off - e.g. 3G operators - without making someone worse off - e.g. TV channels). In light of this, it is fair to say that the Commission uses competition rules to promote a market development policy on the basis of allocative efficiency considerations.<sup>63</sup>

Moreover, this is not an isolated instance of Commission action and more cases of this kind may arise. A similar approach has already been followed in the *BSkyB* case with respect of football rights sold by the *Football Association Premier League* to the TV Channel *BSkyB*.<sup>64</sup> In addition, the Commission has recently launched a vast sector inquiry into the sale of sports rights to Internet and 3G mobile operators.<sup>65</sup> The reason

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<sup>59</sup> See Commission Decision at §19.

<sup>60</sup> See Jean François Pons, "La Politique européenne de concurrence et le sport (1995-2002)", (2002) 2 *Revue du Droit de l'Union Européenne*, 251.

<sup>61</sup> See Commission Decision at §23.

<sup>62</sup> See Commission Decision at §44 and following. The content will be based on the raw feed produced for television. Clubs will acquire the raw feed from the UEFA and it is provided that the fee for it must be transparent, fair and non discriminatory and submitted to an arbitration system in case of dispute. This does not prevent clubs from customising the product acquired and from including club related content.

<sup>63</sup> See Mario Monti quoted in Commission's Press Release of 24 July 2003, [the Commission's wanted] "to give an impulse for the emerging media markets such as UMTS services", IP/03/1105.

<sup>64</sup> See Commission Press Release of 16 December 2003, "Commission reaches provisional agreement with FA Premier League and BskyB over football rights", IP 03/1748.

<sup>65</sup> See Commission Press Release of 30 January 2004, "Commission launches sector inquiry into the sale of sports rights to Internet and 3G mobile operators", IP 04/134.

for this unusual procedure is that potential content providers on UMTS platforms have contacted the Commission with respect to the availability of premium content and in particular sport rights.<sup>66</sup> The Commission suspects a number of content owners from trying to limit the marketing of rights on new platforms so as to safeguard the value of the TV rights and maintain high prices on these markets. Given the critical importance of premium contents for the rolling out of new services on the UMTS networks, the Commission wants to ensure open and non discriminatory access to 3G operators.<sup>67</sup> There may thus be scope for the application of Article 82 to the refusal to supply content by the owner or to the bundling of TV rights with UMTS rights. In addition, when such obstacles to marketing are the result of agreements, Article 81 may also apply. The pro-active stance taken by the Commission in the UEFA case may therefore be confirmed in the near future.<sup>68</sup>

### *The Newscorp/Telepiù Merger*

On 2 April 2003, the Commission granted regulatory clearance to the acquisition by the Australian media group *Newscorp*, of (i) *Telepiù*, an Italian pay-TV company formerly owned by *Vivendi Universal*, as well as to (ii) the acquisition of sole control over *Stream*, the other Italian pay-TV company (until then a 50/50 JV between *Newscorp* and *Telecom Italia*).<sup>69</sup> The two target companies would, as a result of the merger, be joined in a single entity. This operation had the direct result of creating a quasi-monopoly (single supplier) on the Italian pay-TV market. It was thus subject to a thorough review by the Commission. However, the latter came to the conclusion that the financial difficulties of the sector and the potential disruption that the possible closure of *Stream* would cause to Italian customers could prove potentially more costly than the proposed creation of a quasi-monopoly. In this context, the merger could be admitted provided sufficient remedies were offered by the parties in order to ensure that the market remained open.

A variety of commitments concerning access to content were thus negotiated with the Commission. The investigation had revealed that the merged entity would have enjoyed a variety of exclusive rights over “premium” content (i.e. essentially recent movies, sport rights and in particular football rights) leading to a dominant position on these markets.<sup>70</sup> In addition, the Commission was particularly preoccupied by the scope of exclusivities on these rights. The exclusivities were so wide that the merged entities could have prevented the diffusion of premium content over non “*Direct-To-Home*” (or satellite) platforms, or at least charged a monopoly price for the sale of such content on other platforms. In other words, the merged entity was in a position to

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<sup>66</sup> *Id.*

<sup>67</sup> See Communication from the Commission, “The introduction of Third Generation Mobile Communications in the European Union: State of Play and the way Forward”, COM(2001) 141 final, at §3.2, “*Acceptance of the new mobile service generation will critically depend on content*”. See also the XXXIIInd Report on Competition Policy, 2002, at §§141-145, where the Commission expressly considers the issue of access to new media rights.

<sup>68</sup> On a larger scale, questions of access are crucial for the Media industry and similar approaches are also experimented in other sectors of the media industry. See on content markets and on the media sector, Miguel Mendes Pereira, “Recent Consolidation in the European Pay-TV Sector”, (2003) 2 *Competition Policy Newsletter*, at p. 38 and following.

<sup>69</sup> Commission Decision, COMP/M.2876, *Newscorp/Telepiù* of 2 April 2003. See Cristina Caffarra and Andrea Coscelli, “Merger to Monopoly: *Newscorp/Telepiù*”, (2003) 11 *European Competition Law Review*, 265.

<sup>70</sup> See Commission Decision at §144 and following.

restrict the access of other technical platforms to premium content in Italy. This could have largely impaired the development of 3G mobile telephony in this market.

In a fashion comparable to the *UEFA* case, a solution was found by limiting the scope of exclusivities on premium content rights.<sup>71</sup> In the first place, the merged entity has committed to waive its current exclusive rights (as well as any other protection rights) on premium content for non DTH transmission (e.g. transmission on UMTS mediums).<sup>72</sup> In the second place, the merged entity has also committed not to acquire exclusive rights, holdback rights, negative exclusive rights or similar protections for means of transmission other than DTH.<sup>73</sup>

Analogies can be drawn from the solution found in the *Newscorp/Telepiu* and *UEFA* decisions as both facilitate the access of 3G mobile operators to premium content. The Commission shows that it is ready to make use of all the instruments provided by the Treaty to ensure wide access to content by 3G operators. Content owners and holders of exclusive rights should thus be extremely cautious in the near future as they might be a priority target for the Commission as well as by NCAs.

## Conclusions

The Commission is currently implementing a market development policy based on supporting cooperation between MOs and by enforcing competition rules against content owners to promote the development of attractive services on the UMTS platforms. The extensive use of competition rules to regulate the 3G markets might even increase in the near future. Several mobile operators are currently considering commercial co operations by entering into “strategic alliances” in order to run common services and handle each other’s clients where abroad (i.e. roaming). It is, however, a matter of conjecture as to what the regulatory outcome of these alliances will be as there has so far been no Commission decision in that field.<sup>74</sup> Also, the results of the sector inquiry into the sale of sports rights to Internet and 3G mobile operators might lead to further competition law developments.

This is, however, not to say that the Commission’s lenient approach to MOs is limitless. The risk of tacit collusion between MOs could well trigger the initiation of actions against operators by competition authorities on the basis of Article 82. In addition, the Commission has already shown, in the field of merger control, that it would take a tough stance on horizontal mergers between MOs on similar national markets. The strengthening of dominant positions on oligopolistic national mobile

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<sup>71</sup> See M. Mendes Peirera, *supra* note 68.

<sup>72</sup> This waiver commitment concerns ongoing contracts for movie content and sport events. See Commission Decision Part II, Substantive Obligations n°2 and 5.

<sup>73</sup> *Id.* n°3(2) and 6(1).

<sup>74</sup> For instance, *Orange, Telefonica Moviles, Telecom Italia Mobile* and *T-Mobile* have recently agreed on the operation of a commercial pan-european alliance. See *Financial Times*, 24 June 2003, “Orange seeks to firm up Strategy”. See also *Financial Times*, 20 April 2004, “Mobile Operators Join Forces”. Observers consider that that the Commission will take a positive stance towards alliances between smaller operators, in so far as they counter the market power of larger operators. The Commission has accepted such arguments in *Vodafone/Airtel*, See Commission Decision, Case COMP/M.2469, *Vodafone/Airtel*, 26 June 2001 at §19.

communications markets will not be cleared unless substantial commitments are submitted by MOs.<sup>75</sup>

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<sup>75</sup> See Commission Decision, COMP/M.2803, *Telia/Sonera* of 10 July 2002. The commitments led to the divestment by Telia of its Finnish subsidiary and of the 3G License.