2.2 Anti-Competitive Conduct

This section discusses anti-competitive conduct issues and remedies. Specifically, we address

2.2.1 POLICY ISSUES

As networks migrate to digital technologies, broadcasting networks are able to carry a range of services including voice telephony. This has important consequences for sector regulators and competition policy. Co-ordination across regulatory areas (between broadcasting, data services, and telecommunications) will be important to avoid 'regulatory arbitrage' *. Mergers between entities in previously separate sectors may now raise competition concerns.

Many competitive conduct issues can be addressed by competition law. But, *ex-ante* regulation of conduct can be quicker and cheaper. Regulators have to avoid over-reach and be consistent and predictable. In emerging markets, forbearance is wise.

Much of a regulator's work will focus on ensuring there is no anti-competitive conduct by the incumbent or dominant operator. But, the regulator must focus on protecting the process of competition which is not always the same as protecting new entrants. The integrity of competition can be compromised by possible new entrant practices such as "slamming" * and misleading advertising. Such practices should be stopped.

2.2.2 KEY CONCEPTS

The aim of competition policy is to promote sustainable competition. Before concluding that either a merger would harm competition or that anti-competitive behavior exists in a market, and then what remedies to apply, competition analysis follows the following steps:

- Define the relevant market or markets. For competition purposes, a market includes all those goods or services that are close substitutes in the eyes of buyers and all those suppliers who could produce those goods or services.
- Assess the level of competition in the market, with and without the trade practice or business acquisition in question. The level of competition in a market depends on the structure of the market, and whether it meets the conditions for effective competition. Important considerations include:
  - Decide whether any firm in the market is dominant or has significant market power and the impact of the trade practice or business acquisition in question on its market power.
  - Assess whether a firm with market power has abused this position to raise prices above competitive levels or engage in anti-competitive practices
  - Assess any barriers to entry and exit and the potential for competition from new entrants, and
  - Assess the role of any essential facilities.

Malaysia's Communications and Multimedia Act 1998 defines the remedies available to the Communications and Multimedia Commission to stop or authorise * anticompetitive conduct:

Issue	Possible Action
The conduct appears to have the **purpose** of substantially lessening competition	Interim injunctions or fines
The conduct appears to have the **effect** of substantially lessening competition	Direct to the licensee to cease the conduct and to implement appropriate remedies
Application for authorization of specific conduct	Issue an authorization of the conduct, or refuse the application

◂ Table 2.1: Malaysia: Remedies for Anticompetitive Conduct

Anti-competitive behaviour may also be inhibited by imposing some form of separation between the incumbent's upstream and downstream (competitive) activities.

Practice Notes

- Forms of Competition
- Two-Sided Markets

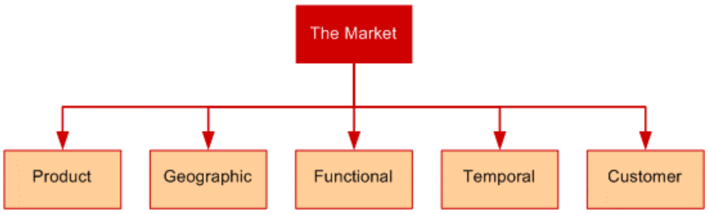
Reference Documents

- ERG Common Position on the approach to Appropriate remedies in the new regulatory framework

2.2.2.1 DEFINING THE MARKET

Market definition focuses on the substitutability of differentiated products or services. But it must also consider other dimensions. New Zealand's competition authority, the Commerce Commission, defines markets in terms of five dimensions (see Figure 2.1):

- The goods or services supplied and purchased (the product dimension)
- The geographic area from which the goods or services are obtained, or within which the goods or services are supplied (the geographic dimension)
- The level in the production or distribution chain (the functional dimension)
- The time frame or timing within which the market operates, where relevant (the temporal dimension), and
- The different customer types within a market, where relevant (the customer dimension).



◂ **Figure 2.1: Dimensions of Market Definition**

The above is similar to the **European Commission's market analysis procedure**:

- Tentatively define the product market by determining whether two products belong in the same market.
- Tentatively define the geographic market in terms of competitors' market shares, prices, and price differentials.
- Conduct a more detailed analysis of demand-side and supply-side substitutability.
- Determine whether customers can switch to an alternate product or supplier in response to a small (5-10 per cent) increase in price; the "SSNIP" test *. If they can, the market definition is widened to include the alternatives.
- Determine whether other suppliers can readily switch to providing the alternate product in the relevant market *.
- Further investigate the conditions in which competing firms operate. This may entail exploring the recent past activities of those firms, consumer behaviour and preferences (through demand elasticities and other studies), regulatory or market barriers to entry, market segmentation and the viability of efficient price discrimination.
- Use consultations with firms and consumers and on-the-spot inspections to further inform and refine the market definition analysis.

Fibre-to-the-Node is being rolled-out through "cabinetisation" in New Zealand. The Commerce Commission had to decide whether this created two wholesale markets reflecting different supply characteristics: - exchange-fed (copper) lines versus cabinet-fed lines.

For exchange-fed lines, there is competition through both unbundled local loop (ULL) and unbundled bitstream (UBA). The regulated access prices for ULL and UBA are cost-based and retail price minus avoided costs respectively.

With cabinetisation, only UBA can be used to supply broadband. This affects about 50% of lines in urban exchange service areas. As cabinets typically serve 300 -350 end users, it is uneconomic for access seekers to unbundle at cabinets (sub-loop access).

The Commission decided there is sufficient demand-side constraint to treat all lines as one market. As Telecom has a uniform retail price, any retail and associated (and automatic) UBA price increase would be likely to lead to Telecom's exchange-fed customers switching to unbundlers using DSLAMs (cost-based ULL), resulting in lost revenues for Telecom, and making the UBA price increase unsustainable.

◂ **Box 2.1: Wholesale access in transition to fibre in New Zealand**

Source: New Zealand, Commerce Commission Decision No. 731, Final Review of the Standard Terms Determination for the designated service Telecom's unbundled bitstream access, September 2011
http://www.comcom.govt.nz/1st-competition-test-for-uba-std/

Market definition in the ICT sector can be difficult. Effective substitutes may not be only those services supplied by similar telecommunications carriers (or by carriers at all). For example:

- Voice and data services are now available from conventional wireline or wireless networks, using either circuit-switched or packet-switched technologies,

- Voice mail services are available from telecommunications networks, answering machines, or manned answering services, and
- Some markets may be **two-sided** which will have regulatory implications for both pricing and merger analysis.

Practice Notes

- **Malaysia: Defining the Communications Market**
- **Two-Sided Markets**

Reference Documents

- **European Commission Guidelines on Market Analysis and the Assessment of Significant Market Power under the Community Regulatory Framework for Electronic Communications Networks and Services**
- **European Commission: regarding the wholesale national market for IP traffic exchange (IP transit) and the wholesale market for IP traffic exchange (IP peering) with the network of Telekomunikacja Polska S.A.**
- **New Zealand: Final Review of the Standard Terms Determination for the designated service Telecom's unbundled bitstream access,**

2.2.2.2 MARKET POWER

Market power is only damaging if the firm concerned exercises its power. For example, if it raised prices above competitive levels, this would reduce demand, generate efficiency losses, and harm the public interest. In addition, firms with market power may engage in **anti-competitive behavior**.

The European Commission defined the concept of Significant Market Power (SMP) as the ability of a firm to act independently of competitors and customers. In some jurisdictions, the term dominance is used but has a similar meaning to SMP. The World Trade Organization defines dominance as the ability of an organisation to prevent effective competition being maintained in the relevant market by having the power to behave to an appreciable extent independently of its competitors, its providers, its customers and ultimately of the consumers. In the United States it has been largely left to courts to decide what constitutes dominance and, for the most part, they have applied criteria based solely on **market shares**.

Under the European model, firms that are found to have SMP are subject to additional *ex ante* regulatory obligations such as:

- Obligations to align interconnection prices with costs,
- Accounting separation requirements, and
- Mandatory publication of reference interconnection offers.

A high market share does not necessarily imply market power. A firm's market share may increase, at least temporarily, due to a successful new invention or better customer service. Or, incumbent telecommunications firms may have high market shares but as competition emerges, its market share cannot guarantee it the ability to charge prices higher than its competitors.

Market share in itself is neither necessary nor sufficient for market power. Firms with high market shares may be constrained from raising prices by a range of factors, including:

- Competition from other suppliers already in the market,
- Barriers to entry; a well-established firm may have exclusivity agreements with distributors, making it difficult for competitors to enter the market.
- Barriers to exit; if an entrant must incur high sunk costs to enter the market, then the entrant must be prepared to absorb those sunk costs in the event that it fails,
- The role of any essential facility; if an entrant needs access to an essential facility that is controlled by one of its competitors, this creates a barrier to entry.
- The "countervailing power" of customers in the market, for example their willingness to do without the service if the price increases.
- Any technological advantages, or privileged access to financial resources,
- Economies of scale and scope; in the telecommunications sector, a new facilities-based entrant may have no choice but to start out at a relatively large scale of operations, in order to achieve unit costs close to the incumbent's,
- Product differentiation, and
- The type and availability of sales channels.

Practice Notes

- **Quantitative Tests for Market Power**

Reference Documents

- **European Regulators Group -- ERG Common Position on Best Practices in Remedies Imposed as a Consequence of a Position of Significant Market Power in the Relevant Markets for Wholesale Leased Lines**
- **European Regulators Group -- ERG Report on Guidance on the application of the three criteria test (June 2008)**

- Explanatory Statement and Notification of decisions on BT's SMP status and charge controls in narrowband wholesale markets
- Lebanon -- Significant Market Power Regulation
- Trinidad and Tobago: Determination: Dominance in Retail Domestic Fixed Telephony Markets

2.2.2.3 SEPARATION

There are three main forms for separating a dominant firm's competitive activity from its monopoly activities:

- **Accounting separation** which requires separate income statements and balance sheets to be maintained for the wholesale division and the retail units. The objective is to make the costs of non-competitive services transparent so that regulators and others can more easily detect possible abuses. Accounting separation is at a high level of aggregation and may not be able to detect a price squeeze .The benefit of accounting separation is that it preserves the vertically-integrated structure of the firm thereby preventing the loss of vertical efficiencies. On the other hand, accounting separation does not prevent non-price discrimination – such as delays in switching customers to competitors.
- **Functional (operational) separation** which requires the retail and wholesale arms of the vertically integrated dominant access provider to act independently of each other [*]. The wholesale arm should not know if an order it receives has been placed by its sister retail unit or by a competing retail operator. Policing obligations for non-discrimination in vertically integrated operators is notoriously difficult. The 'six degrees of separation' (Table 2.2) form a spectrum of options between the other two main forms of separation.
- **Structural separation** is a last resort which requires an operator to separate its network infrastructure from its units offering services using this infrastructure. Also known as 'ownership unbundling' or 'divestiture', structural separation means that all of the network elements are placed in a separate legal entity.

	Structural (Ownership) Separation	
6	Legal separation (under same owner)	Functional Separation
5	Business separation with separate governance arrangements	
4	Business separation with localised incentives	
3	Business separation	
2	Virtual separation	
1	Creation of a wholesale division	
	Accounting Separation	

◂ Table 2.2: Six Degrees of Functional Separation

Practice Notes

- Functional Separation
- Structural Separation

2.2.3 COMMON FORMS OF ANTI-COMPETITIVE CONDUCT

The focus of this section is on the forms of anti-competitive conduct engaged in by firms with significant market power. These practices include:

- Abuse of Dominance
- Refusal to Supply
- Vertical Price Squeeze
- Cross-Subsidisation
- Misuse of Information
- Customer Lock-In
- Exclusionary or Predatory Pricing
- Tying and Bundling
- Non Discrimination and Net Neutrality

In all cases, the object of regulation is to support competition as a process. Although only firms with significant market power may be stopped from engaging in the practices listed above, all firms must abstain from misleading the market (eg making false claims in advertising), "slamming" (ie claiming customers from the incumbent when the customer has not knowingly provided consent to switch providers) and unreasonable contract terms.

Reference Documents

- European Regulatory Group: Common Position on the approach to appropriate remedies in the ECNS regulatory framework

2.2.3.1 ABUSE OF DOMINANCE

A dominant firm abuses its power when it engages in practices with the aim of eliminating or substantially lessening. Abuse of dominance may entail:

- Refusals to deal, for example a refusal to supply an essential facility to a competitor,
- Exclusive dealing arrangements, in which a seller prevents its distributors from selling competing products or services,
- Tying and bundling, where a firm sells makes the purchase of one product or service conditional on the purchase of a second product or service,
- Predatory pricing, where a firm sets prices below cost in order to force a competitor out of the market,
- Non-price predation, where a firm adjusts the quality of its product offering to customers with the aim of harming its competitor. For example, an incumbent might offer an improved level of service to customers served by one new entrant.

A firm does not need to be dominant (in the sense of possessing a high market share) in order to implement these strategies. However, the consequences for competition can be particularly severe when the firm concerned is dominant.

If the firm is dominant in the relevant market, the behaviour does not necessarily constitute and abuse of its position: is the behaviour harmful to competition and to consumers? It is important to distinguish between aggressively competitive behaviour that harms individual competitors but benefits customers (for example by reducing prices), and behaviour that is anti-competitive because it harms competition.

A range of possible remedies exists. Which remedy is appropriate will depend on the specific nature and seriousness of the behaviour, and the likelihood that the firm may repeat the behaviour in the future.

Directive Remedies, such as injunctions or bans, require the firm to:

- Cease its abusive behaviour, or
- Make specific changes to its behaviour so it is no longer damaging to competition.

Directive remedies may require ongoing monitoring, to ensure that the behavioural change is sustained.

Punitive Remedies include:

- Fining the firm,
- Ordering the firm to pay compensation to its competitors and/or customers,
- Fining company officers with direct responsibility for the behaviour.

Punitive remedies are intended to discourage abusive behaviour in the first place by making such behavior unprofitable. However, this objective must be weighed against the potential to “chill” competition. If the penalty for abuse is very high, then dominant firms will “err on the side of caution” and compete less aggressively.

In June 2011, the European Commission imposed a fine of €127 million on telecoms operator Telekomunikacja Polska S.A. (TP) for abusing its dominant position in the Polish market.

Poland has one of the lowest broadband penetration rates in Europe - in January 2010 it reached only 13%, significantly below the EU average of 24%.Consumers have also suffered from lower connection speeds: 66% of Internet access lines in Poland do not exceed the speed of 2Mbit/s compared to an EU average of just 15%. Finally, monthly prices per advertised Mbit/s were much higher than the prices in other Member States and the second highest in the OECD area.

In order to provide broadband Internet access to end-users, new market entrants need to acquire wholesale broadband access and local loop unbundling. In Poland, these are exclusively provided by TP which proposed unreasonable conditions, delayed the negotiation processes, rejected orders in an unjustifiable manner and refused to provide reliable and accurate information to alternative operators. Together, these practices prevented alternative operators from competing effectively in the market and constituted an abuse of TP's dominant position on the Polish broadband market.

Telekomunikacja Polska’s total turnover in 2010 was € 3.9 billion (PLN 15.7 billion). The fine takes account of the duration and gravity of the infringement and has been calculated on the basis of the average value of TP's broadband sales between 2005 and 2009 in Poland. TP’s turnover in 2010 was € 3.9 billion.

◂ Box 2.2: Abuse of Dominance in Poland

Source: European Commission, Press Release, 22 June 2011.

Some form of separation may also be considered.

Reference Documents

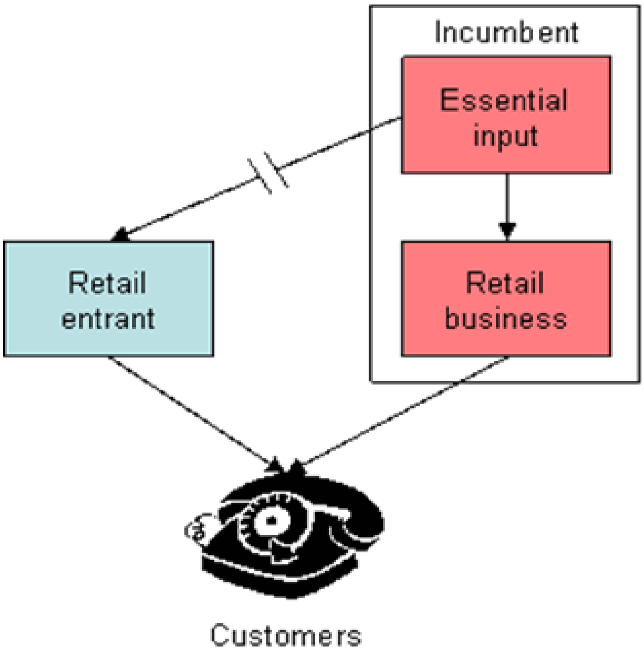
- **European Commission, Press Release, Antitrust Case in Poland: 22 June 2011**

2.2.3.2 REFUSAL TO SUPPLY

Incumbent firms often control access to facilities that are essential inputs in the supply of services at the retail level. Competing retailers depend on the incumbent for access to the essential facility. In the telecommunications sector, the local loop connecting end customers to the local exchange is often regarded as an essential facility.

Incumbent firms may attempt to prevent competitors from entering the market by refusing to provide access to an essential facility or withhold information..

The figure below shows a vertically integrated incumbent firm (red) and a downstream entrant (blue). The incumbent firm controls an essential input, on which the downstream entrant depends in order to provide services to its customers. The incumbent also competes with the downstream entrant at the retail level. By refusing to supply the essential input, the incumbent can prevent the downstream entrant from competing.



◂ Figure 2.2: Refusal to Supply an Essential Facility

To encourage competition, many jurisdictions require firms with control over essential facilities to provide access to competitors. Rules may also determine the way in which access prices will be agreed, and procedures for resolving any disputes.

Refusal to supply may include deliberate delays and obstruction such as 'losing the keys to the exchange' where a competitor has the right to co-locate equipment in an exchange under supervision.

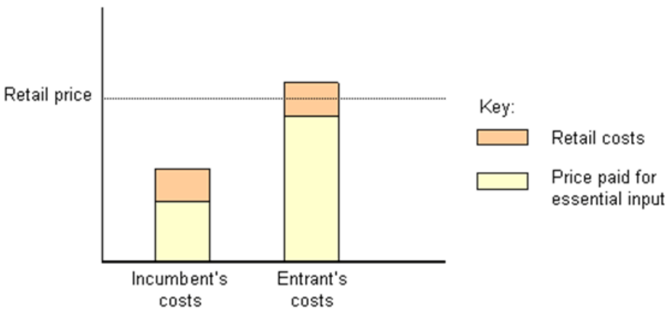
Practice Notes

- Ireland – The Role of Own-Use Requirements in Access Disputes

2.2.3.3 VERTICAL PRICE SQUEEZE

A firm which is vertically integrated and controls an essential input to the retail service implements a price (Figure 2.3) squeeze if:

- The price the firm demands makes it impossible for an equally-efficient retail-stage competitor to operate profitably (or even survive) given the level of retail prices, and
- The firm does not charge its own downstream operation this high price.



◂ Figure 2.3: Example of a Vertical Price Squeeze

A price squeeze has a similar effect to a refusal to supply an essential facility. In the extreme, the firm might demand a price for the essential input that is higher than the full retail price of the service.

The EU Commission fined Telefónica €151.9 million in July 2007 for a margin squeeze between its retail prices and the prices for wholesale broadband access at both the national and regional levels between September 2001 to December 2006. It was a large fine because Telefónica's 2001 business plan knew it would be engaging in a margin squeeze.

Wholesale access at national level allows alternative operators to offer retail broadband services throughout the Spanish territory by connecting to a single, "national" access point. Wholesale access at the regional level requires that alternative operators roll out a costly network reaching up to 109 "regional" access points.

Although Telefónica provides unbundled access to its local loops, this was not considered a substitute for the other two wholesale products because its investment intensity.

Lower and fairer wholesale prices putting an end to the margin squeeze were introduced at the end of December 2006 when, following a market analysis, the Spanish regulator reduced Telefónica's wholesale prices by between 22% and 61%.

European Commission (staff analysis), Margin squeeze in the Spanish broadband market: a rational and profitable strategy, Jean-Christian Le Meur, Iratxe Gurpegui and Katja Viertio
http://ec.europa.eu/competition/publications/cpn/2007_3_22.pdf

◂ **Box 2.3: Margin Squeeze in Spain**

Sources: *Antitrust: Commission decision against Telefónica - frequently asked questions*, MEMO/07/274 July 2007
http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/274&format=HTML&aged=0&language=EN&guiLanguage=en

International approaches to price squeeze differ:

- · In the EU, the existence of price squeezing by a dominant operator is sufficient to find an abuse of dominance; price squeezing is treated as an illegitimate use of market dominance in and of itself.
- In the United States, price squeezing is not linked to dominance and is not considered to be inherently anti-competitive. Price squeezing only attracts liability if it is predatory or if the firm concerned is obligated to provide the goods or services; on its own, however, price squeezing is merely part of a robustly competitive market.
- In New Zealand, a causal link has to be established between the impugned conduct and dominance. This is done by applying a counterfactual test whether the prices charged are no greater than the prices found in a hypothetical competitive market. If not, then the dominant firm would not have “used” its market powers. The basis for this test is the "Efficient Component Pricing Rule" (ECPR), which is discussed below.

A number of remedies for this price squeezing exist, including:

- Resale Obligations or
- Price floors, or
- Structural remedies

A price floor sets a minimum retail price for the incumbent's retail service, with reference to wholesale prices. A price floor should ensure that competitors that as efficient as the vertically integrated firm are able to cover their costs. The rule for setting a price floor, or "imputation rule" can be stated in a number of ways:

The retail price *must be no less than* the wholesale price plus the direct incremental cost of the vertically integrated firm's pure retailing functions.

Pr > Pa + Cr

Equivalently, the retail price *must be no less than* the vertically integrated firm's direct incremental cost to supply the product, plus the profit margin it could earn from selling the essential input to its competitors.

Pr > Ca + (Pr – Pa – Cr)

Or, the profit margin on the vertically integrated firm's price for the retail product *must be no less than* the profit margin it earns from selling the essential input to its competitors.

(Pr – Ca – Cr) > (Pa – Ca)

All the above imputation rules are equivalent, but provide different insights into the conditions that must hold for a vertical price squeeze to be impossible.

In 2003, Deutsche Telekom (DT) was found to have abused its dominant position by committing a price squeeze. From 1998, DT has been legally obligated to provide competitors with wholesale access to its local loops. The European Commission found that from 1998 to the end of 2001, DT charged new entrants higher fees for wholesale access to the local loop than what DT charged its retail subscribers for fixed line (analogue, ISDN, and ADSL) subscriptions – so the margin was negative (Pa > Pr) even before allowing for a competitors own retail costs. From 2002, there was a margin (Pa<Pr) but it was not big enough to cover retail costs (Cr).

DT argued that its wholesale prices were regulated and it had to meet competition in the retail market. But the Commission argued that DT had the freedom to terminate the squeeze itself. In fact, DT increased retail prices (but not enough) in 2002.

To remedy the competition concern, DT terminated the margin squeeze mainly by lowering its wholesale access fees.

◂ **Box 2.4: Price Squeeze in Germany**

Source: European Commission (Staff Analysis): Two Commission decisions on price abuse in the telecommunications sector, Competition Policy Newsletter, Autumn 2003

These measures may achieve the objective of preventing a price squeeze, but they can have substantial costs. In particular, under structural separation the firm would lose any efficiencies or cost savings from vertical integration. This loss would ultimately fall on customers, through higher prices.

Practice Notes

- Comparative Approaches to Price Squeezes and Abuse of Dominance
- New Zealand Commerce Commission v. Telecom Corporation of New Zealand Limited and Telecom New Zealand Limited
- Structural Separation
- The U.S. Pacific Bell Price Squeeze Case
- Vertical Price Squeeze Charge Against Deutsche Telekom

Reference Documents

- European Commission, Antitrust: Commission decision against Telefónica, July 2007
- European Commission: Margin squeeze in the Spanish broadband market: a rational and profitable strategy
- European Commission: Two Commission decisions on price abuse in the telecommunications sector

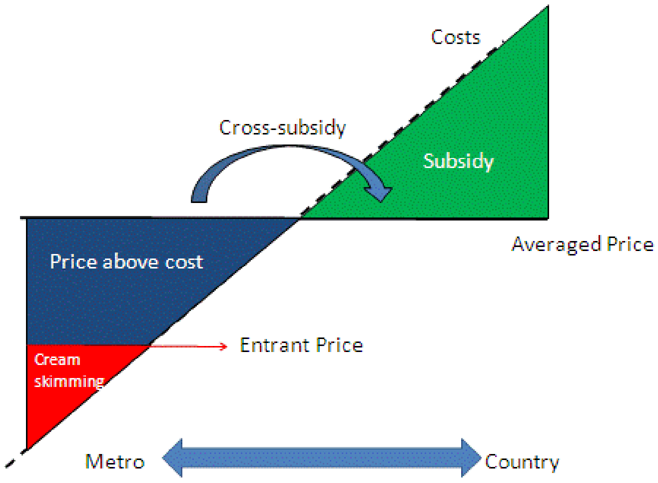
2.2.3.4 CROSS-SUBSIDISATION

A cross-subsidy may be anti-competitive when a firm with market power prices services in less competitive markets higher so that it can have lower price for services it sells into competitive markets.

Not all cross-subsidies are anti-competitive. Traditionally, telephone operators have cross- subsidized high-cost (under-priced) services from low-cost (over-priced) services:

- Line rentals or handsets from call revenues
- Residential customers from business customers in line rentals
- Country customers from metropolitan customers

Cross-subsidy has been important in driving adoption of both fixed and mobile services. But this worked only when access and calls were joint in both supply and demand, as with fixed monopoly and mobiles. With the introduction of competition for calls, cross-subsidies are "cream-skimmed" (Figure 2.4).



◂ Figure 2.4: Cross-subsidy and Competition

New entrants do not complain about the above cross-subsidies as they provide scope for profit in serving low-cost markets. Competition is very good at attacking cross-subsidy.

Incumbents complain about "cream-skimming" competition allowed by the cross-subsidies above. So, regulators assist incumbents with **price rebalancing** to meet competition, which generally increases line rentals so that call prices can fall. This is a politically sensitive process because raising access prices disadvantages the poorer users who make fewer calls; so some policy direction may be needed.

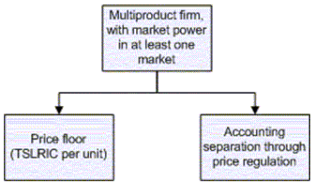
Anti-competitive pricing can be difficult to identify. Ideally, competition drives prices to marginal cost. But in network industries, the cost curve declines across the range of possible levels of output so prices must be set above marginal cost to recover all costs. Since the network supports many different services, it is difficult to say which services are cross-subsidising others.

The remedies for cross-subsidization are preventative in nature:

- Implement and enforce a price floor,
- Require accounting separation of the costs of the firm's competitive and non-competitive products.

◂ Figure 2.5: Remedies for Cross Subsidization

Price Floor



◂

For a firm that at least breaks even across all of its products, any single product receives a subsidy if the revenue it generates fails to recover its *total service long run incremental cost (TSLRIC)*. Thus, the effective price floor in a test of whether a product receives a subsidy is:

TSLRIC of the service / number of units produced

For a multiproduct firm, the rule for preventing cross-subsidization requires that, for a firm that at least breaks even, every product must satisfy this price floor test.

Accounting Separation

The objective of accounting separation in this context is to separate the costs of the firm's competitive and non-competitive products. This can be achieved through price regulation (either direct regulation, or a **price cap**). Such regulation can prevent cross-subsidization by allocating competitive and non-competitive products to separate "baskets", with separate controls or rules for the each basket.

2.2.3.5 MISUSE OF INFORMATION

It is common for vertically integrated firms to sell wholesale products to other firms, while competing against those same firms in retail markets. In this situation the vertically integrated firm can obtain sensitive commercial or business information through its wholesale transactions that gives it a competitive advantage in its retail activities.

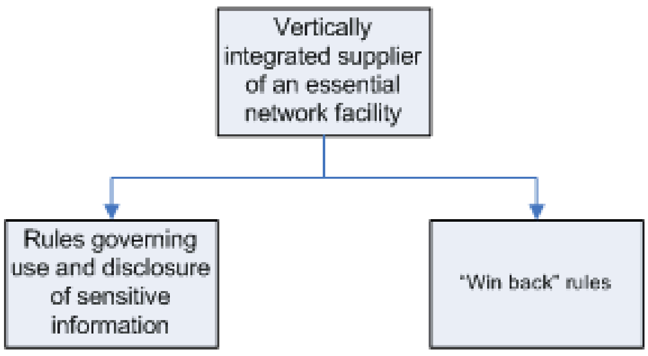
Two of the three anti-competitive practices proscribed by the WTO * concern misuse of information:

(a) engaging in anti-competitive **cross-subsidization**;

(b) using information obtained from competitors with anti-competitive results; and

(c) not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.

For example, suppose a vertically integrated incumbent firm is the sole source of dedicated access lines needed to provide retail private line services. Other firms may have no choice but to acquire wholesale dedicated access lines from the incumbent. To complete the wholesale transaction, the incumbent needs information about the identity, size, and other characteristics of end-users being targeted by its competitors. It could use this information to target the same end-users with superior service offerings, placing its competitors at a considerable competitive disadvantage. This would constitute a misuse of information.



◂ **Figure 2.6: Responding to misuse of information**

Remedies for misuse of information are generally *ex ante* in nature, and include:

- Establishing strict rules or procedures governing the use or disclosure of commercially sensitive information, and setting limits on the sharing of sensitive information between a carrier and its affiliates
- “Win back” rules, limiting the extent to which the vertically integrated firm may directly market to customers that choose to switch to a competitor.

Practice Notes

- **Canada: Misuse of Information and \"Win-Back\" Behaviour**
- **United States: Rules to Prevent Misuse of Information**

Reference Documents

- **World Trade Organization - Reference Paper**

2.2.3.6 CUSTOMER LOCK-IN

Service providers may attempt to “lock in” customers to prevent them from switching to alternative products, technologies, or suppliers. Customer lock-in involves raising customers’ **switching costs** to the point that the cost of switching outweighs the potential benefits from switching.

Switching costs may be:

- **Transactional,** for example the cost of replacing existing equipment and technology in order to move to a different service provider, or
- **Contractual,** for example penalties for breaking an existing contract with one service provider, in order to switch to a new service provider.

Contractual provisions that increase switching costs are not necessarily anti-competitive. Service providers may use contractual provisions that ensure customer loyalty to recover legitimate underlying costs over a period of time, for example:

- Service providers may incur substantial upfront fixed costs to acquire and serve customers. For example, it is common for mobile service providers to subsidize the cost of mobile handsets and recover the cost of the subsidy through service charges over time,
- Service providers may have incentives to spread non customer-specific fixed costs over as many customers as possible. In order to do this, a service provider may use contractual provisions to ensure customer loyalty and maintain its installed customer base.

Where the customer’s switching cost is less than the *present value* of the expected revenue from the customer, competing firms may offer to pay the customer’s switching cost. In this case, switching costs are not effective as a means of locking in customers.

High switching costs and customer lock-in tactics do not necessarily cause problems for competition or exclude competitors. Most service agreements that seek to lock-in customers do not warrant regulatory interference. Indeed, in some cases, high switching costs may trigger market responses that improve efficiency.

Cases of lock-in need to be considered on a case by case basis, taking account of:

- The degree of competition in the market,
- Whether the firm in question has market power, or a dominant position, and
- The effect of the locking-in arrangements on competition. Are the arrangements blocking efficient competitors?

Practice Notes

- **Mobiles: Customer Lock-In**

2.2.3.7 EXCLUSIONARY OR PREDATORY PRICING

Predatory pricing is a pricing strategy used by an established firm to eliminate competition from equally efficient firms, and secure a monopoly position in a previously competitive market. A firm practicing predatory pricing lowers its price below cost and maintains it there until equally efficient competitors are forced to incur unsustainable losses and exit the market. The firm then raises its price to a monopoly level in order to recoup its lost profits.

The US Supreme Court defines predatory prices as "below-cost prices that drive rivals out of the market and allow the monopolist to raise its prices later and recoup its losses".

Predatory pricing is a risky strategy. The firm involved incurs high up-front losses, with no guarantee of future gains from monopolization. The strategy will only be profitable if, once all competitors have been forced out of the market, the incumbent is able to raise its prices to a monopoly level and keep them there. If the firm is subject to either direct price regulation or some other form of control, predatory pricing is unlikely to succeed.

Predatory pricing requires high barriers to entry. If firms are able to enter the market easily, then each time the incumbent increases its price this will attract new entrants into the market, forcing the incumbent to drop its price again.

Predatory pricing is notoriously difficult to prove. It can be difficult in practice to distinguish predatory pricing from aggressively competitive below-cost pricing (such as "loss leaders" and promotional activities).

In 1995, a competing internet service provider, UUNet, alleged that BT was engaging in predatory pricing for its internet access service (provided through BTNet). UUNet complained that a BTNet offer at a price 9 times less then BT's comparable services was anti-competitive, and BTNet was not recovering its cost; furthermore, BT was offering a free trial period of subscription. The British regulatory agency Oftel (now Ofcom) found in 1997 under the following conditions:

- - Barriers to entry were low and, therefore, BT could not expect to exclude competitors from the market and gain the market power needed to recoup losses in the long run
- - BT's other internet services were distinguishable from the BTNet service and, therefore, UUNet's comparison was not well-founded
- - Early BTNet losses not recovered were consistent with start-up business trends and that BT's projected figures showed more profitability
- - Free promotional subscriptions were commonplace in the industry, and BTNet had limited the offer to the initial period

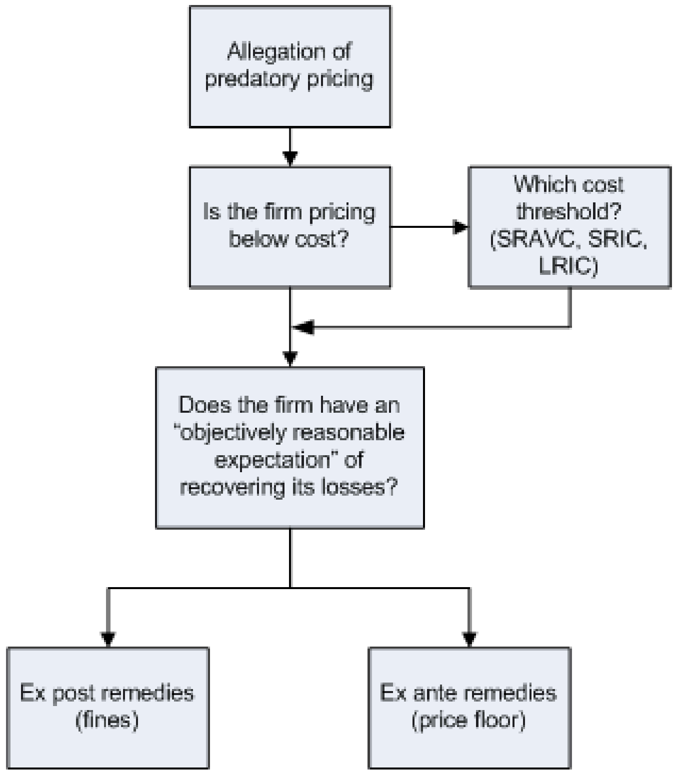
Oftel's final ruling was that BT had not engaged in any form of predatory pricing, although Oftel did continue to monitor BT due to its significant market presence.

◂ **Box 2.5: UK: UUNet's claims of predatory pricing against BT**

Source: Ofcom's Competition Bulletin Issue 6, October 1997

Establishing whether predatory pricing has taken place requires that two tests be met (see Figure 2.7):

- Is the firm pricing below cost? And
- Whether the firm has an "objectively reasonable expectation" of being able to recover the losses it must incur by pricing at below cost.



◂ **Figure 2.7: Remedies for Predatory Pricing**

Is the Firm Pricing Below Cost?

There is no universally accepted test to determine whether a firm is pricing below cost. According to EC case law two tests are possible to find an abuse in the form of predatory pricing:

- where variable costs are not covered, an abuse is automatically presumed;
- where variable costs are covered, but total costs are not, the pricing is deemed to constitute an abuse if it forms part of a plan to eliminate competitors.

From the end of 1999 to October 2002, Wanadoo, a 72% owned subsidiary of France Télécom, marketed Wanadoo ADSL at prices which were well below variable costs until August 2001 and then significantly below total costs.

Since the mass marketing of Wanadoo ADSL began only in March 2001, the Commission considered that the abuse started only on that date. Wanadoo suffered substantial losses up to the end of 2002 as a result of this practice. The practice coincided with a company plan to pre-empt the strategic market for high-speed Internet access. From January 2001 to September 2002, Wanadoo's market share rose by nearly 30 percentage points to between 65% and 75 % on a market which saw more than a five-fold increase in its size over the same period.

The abuse came to an end in October 2002, with a 30 percent reduction in wholesale prices charged by France Télécom.

◂ **Box 2.6: France: Wanadoo DSL pricing**

Source: European Commission (staff analysis), Two Commission decisions on price abuse in the telecommunications sector, Competition Policy Bulletin, No. 3, Autumn 2003

Under the Areeda-Turner rule, prices must be below a firm's short run marginal cost to qualify as predatory pricing. Recognizing that short run marginal cost is very difficult to measure, alternative short run measures of cost may be used *(short run average variable cost, SRAVC, or short run incremental cost, SRIC)*.

Many economists promote the use of *long run incremental cost* (LRIC) as the appropriate cost threshold for predatory pricing. If two firms are equally efficient, they must have the same long run incremental cost. When one of them sets a price below LRIC, the other firm cannot match that price without incurring a loss.

Regardless of the measure used, calculations of firm-specific costs for individual services can be highly contentious.

Does the Firm Expect to Recover its Losses?

Many practitioners are skeptical about the prospect that a firm could know in advance all of the information needed to implement a predatory pricing strategy. In order to have a reasonable expectation that the strategy will succeed, the firm must know:

- How long it must price below cost before it succeeds in forcing its competitors out of the market,
- The size of the loss that it must withstand while predatory pricing is in effect, and

- The probability that it will recover its losses once it has achieved a monopoly.

Remedies

Ex post antitrust remedies, such as fines or compensation, may be available for proven instances of predatory pricing. However, predatory pricing is difficult to prove with sufficient certainty to justify punitive measures.

A more useful remedy for predatory pricing is an appropriate price floor for the affected product or service. This is a preventive remedy, requiring *ex-ante regulation.*

Reference Documents

- **European Commission: Two Commission decisions on price abuse in the telecommunications sector**
- **Ofcom: Predatory pricing allegation by UUNet against BT, 1997**

2.2.3.8 TYING AND BUNDLING

Tying of services occurs where a service provider makes the purchase of one product or service over which it has market power (the "tying good") conditional on the purchase of a second, competitively supplied, product or service (the "tied good"). By tying services, a service provider can try to use market power in one market to give itself an advantage in another, competitive market. Customers who opt to buy the tied good from a competitor cannot find a feasible substitute for the service provider's tying good.

Tying is primarily a strategy to maximize profits. It can be profitable:

- where the demands for the two products are complementary, such that end users consume both products together (for example a network subscription and local calls), or
- if the tying good is regulated and the regulated price is below the service provider's profit maximizing level. In this case a successful tying strategy would enable the service provider to increase its overall profitability by increasing the price of the tied good.

◂ Box 2.7: Tying in Morocco

Source: ITU Case Study of Effective Regulation: Morocco

Until 2002, Maroc Télécom was Morocco's only incumbent basic telecommunications service provider and operated the only fixed network in the country.

Amidst de-regulatory steps taken in Morocco in 1999 and after, Médi Télécom was licensed to operate a GSM mobile network in competition with Maroc Télécom. In early 2001, Maroc Télécom began offering a 10% discount to anyone calling a Maroc Télécom mobile phone from a fixed line. Its competitor, Médi Télécom charged that this was anti-competitive and complained to the Moroccan National Telecommunications Regulatory Agency (ANRT).

The ANRT reviewed the case and concluded that the discount offered only to Maroc Télécom customers was discriminatory and constituted an act of abuse of dominance, given that Maroc Télécom was to remain the fixed network monopoly until 2002. Maroc Télécom eventually suspended the 10% discount in light of the ANRT's ruling.

Tying will not be profitable where:

- The demands for the two products are independent, so that end users are unlikely to consume them jointly,
- The price of the tying good is already at the service provider's profit maximizing level. In this case there is no room to increase profits further, or
- The two products are consumed in fixed proportions. To maximize its profits, all the service provider needs to do is set the price for the product over which it has market power at its profit maximizing level.

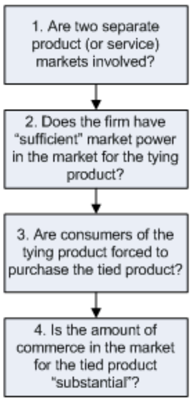
A tying strategy is only likely to exclude competitors from the market for the tied good if competitors are unable to overcome the loss of sales to customers who have been successfully tied. For example this might be the case if:

- Competitors face *economies of scale*, so that a loss of sales causes their average costs to increase, or
- The tied good is associated with *network externalities*, so that a loss of sales to some customers causes other customers to drop off as well.

Even where tying does have an exclusionary effect, this may be an unintended consequence of a strategy to maximize profits.

There are few circumstances in which tying can be profit-enhancing for the firm concerned. Accordingly firms with market power will often have no incentive to engage in a tying strategy.

In recognition of this, the courts in the United States have developed a four-part test for analyzing allegations of tying (see Figure 2.8).



◂ Figure 2.8: USA: Test for Alleged Tying

In addition to the tests illustrated in Figure 2.8, some courts require that the alleged harm exceed any efficiencies produced by the alleged tying, before allowing a complaint to proceed.

Service **bundling** occurs where a service provider offers two or more services separately, but gives a discount to customers who purchase the services as a combined bundle.

Bundling is common in telecommunications and other multiproduct industries, reflecting both cost savings from producing services jointly, and consumer preferences for service bundles. In telecommunications, local and long distance services are often bundled with services such as call waiting, call forwarding, voice mail, or Internet access.

Bundling is generally a pro-competitive, and customer friendly, strategy. As such bundling does not call for regulatory intervention.

Reference Documents

- Morocco: Effective Regulation Case Study

2.2.3.9 NON DISCRIMINATION AND NET NEUTRALITY

The Internet has flourished in part due to a "hands off" approach by governments and the apparent willingness of all stakeholders to cooperate and self-regulate. As the amount of video traffic increases, carriers may feel the need to adopt network management practices to control congestion of their networks. Some carriers may try to take the opportunity to extract value by prioritizing traffic in ways which violate the tradition of network neutrality.

> In 2008, the U.S. Federal Communications Commission attempted to order Comcast, a cable TV and Internet access provider, to cease blocking or downgrading certain users' access to some high capacity peer-to-peer download services. There was no attempt to impose capacity charges or separate pricing tiers, and other high capacity usage, such as video streaming or VoIP, was not treated similarly. On the surface, it appeared that Comcast was simply trying to discourage peer-to-peer file sharing itself, although it had no specific policy to do so. The FCC's ruling, however, was subsequently struck down on appeal in court, leaving U.S. law undecided as to the FCC's authority to implement net neutrality regulations.

◂ Box 2.8: USA: Comcast and the FCC

Source: ITU, Telecommunications Regulation Handbook, 10th Anniversary Edition, 2011

Regulators are moving tentatively to decide how far they need to intervene. While many see the need for transparency about traffic management rules, only a few have moved to set traffic management rules.

Stage in process	Position along the spectrum (least to most stringent)	Country
No consultation	Considered net neutrality, but found no problems requiring a consultation and subsequent rule; will continue to monitor	Denmark Germany Ireland Portugal
	Non-binding neutrality guidelines	Norway
In consultation stage	Information gathering on current practices to potentially establish rules	Italy (Feb. 2011)
	Transparency/disclosure rules proposed, **but no** traffic management	United Kingdom
	Transparency/disclosure rules **and** traffic management/non-discrimination rules proposed	Brazil Sweden (Feb. 2011)
Rules/legislation adopted	Transparency/disclosure rules **but no** traffic management/non-discrimination rules	European Commission (Apr. 2011)
	Transparency/disclosure rules **and** traffic management/non-discrimination rules	Canada Chile (Jul. 2010 and Mar. 2011) France (Feb. 2011) United States (Dec. 2010)

◂ Table 2.3: Status of net neutrality initiatives in selected countries

Practice Notes

- Mobiles: Customer Lock-In
- Network Neutrality

Reference Documents

- European Commission: BEREC response to the EC consultation on the open Internet and net neutrality in Europe, September, 2010
- European Commission: The open internet and net neutrality in Europe, April 2011
- GSR 2012 Net neutrality: A regulatory perspective. Discussion Paper, ITU.
- infoDev: Broadband Strategies Handbook
- Telecommunications Regulation Handbook
- USA: FCC Open Internet Rules

2.2.4 MERGERS, ACQUISITIONS AND JOINT VENTURES

Mergers, acquisitions, and joint ventures are all different ways for two or more firms to integrate or coordinate their operations:

- A merger is a structural fusion of two firms that results in a common ownership and management structure. Mergers usually happen through stock swaps.
- An acquisition is a type of merger in which a firm with more resources and greater market strength may acquire another firm. The acquiring firm usually uses some combination of stocks, debt, and cash to finance the transaction.
- A joint venture is a strategic alliance between two firms that share resources, equity, revenues, expenses, and management to pursue a common goal. Each firm usually retains its own corporate identity.

There are three types of mergers: horizontal, vertical, and conglomerate. Conglomerate mergers occur between firms operating in separate markets. As such they do not generally raise competition concerns and are not covered further in this section.

Mergers, acquisitions, and joint ventures are motivated by a range of factors such as cost savings from synergies between the firms or economies of scale and scope, efficiencies from vertical integration, or geographical diversification or cross-selling of products.

The Role of Competition Authorities and Regulators

Provisions governing mergers and acquisition are generally included in competition or antitrust laws, where these exist. In this case, investigation of proposed mergers is usually the responsibility of a competition authority.

Some countries with no competition law have included sector specific merger provisions in their telecommunications laws (for example Hong Kong).

In countries with both a competition authority and a telecommunications regulator, both agencies may have a mandate to investigate mergers in the telecommunications sector. For example, in the US the Federal Trade Commission and the Justice Department have a general responsibility to investigate potentially anti-competitive mergers. However, the Federal Communications Commission may also investigate horizontal mergers between telecommunications firms to determine whether or not the merger is "in the public interest" [*].

Practice Notes

- Structural Separation

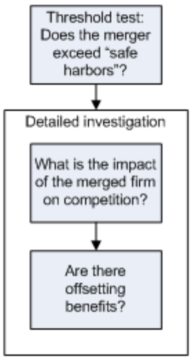
2.2.4.1 MERGERS AND ACQUISITIONS

Mergers can be horizontal - bringing together firms that produce the same product within the same market – or vertical – bringing together firms in potential customer-supplier relationships.

Analysing Horizontal Mergers

By definition, horizontal mergers reduce the number of actual competitors in the market. Horizontal mergers may also produce cost savings * and other benefits. If these benefits outweigh any reduction in competition, then the merger should be allowed to proceed.

Competition authorities commonly take a two-stage approach to analysing horizontal mergers (see Figure 2.9).



◂ Figure 2.9: Two Stage Process for Analysing Mergers

The first stage uses measurable thresholds or "safe harbors" to determine whether a merger is likely to raise serious competition concerns. If a merger falls within the specified threshold then it is considered to be "safe", and may proceed without further investigation.

Like the USA, the EU calculates the Herfindahl-Hirschmann Index. While the absolute level of the HHI can give an initial indication of the competitive pressure in the market post-merger, the EU looks at the change in the HHI as a useful proxy for the change in concentration directly brought about by the merger.

The purpose of these thresholds is to focus resources on investigating those transactions that are most likely to raise serious competition concerns. Those mergers that do not fall within specified safe harbors are investigated in depth.

The EU Commission * assesses "horizontal mergers" where the undertakings concerned are actual or potential competitors on the same relevant market. See KPNQWest/Ebone/GTS Horizontal Merger on one market assessment. The Commission's assessment of mergers normally entails:

§ definition of the relevant product and geographic markets;

§ competitive assessment of the merger.

The EU Commission also takes account of a number of factors (such as the possibilities for customers of switching supplier or the possibilities for competitors to respond to the merger) which may influence the likelihood that a merger will have significant anticompetitive effects.

The merger of Orange and T-Mobile (UK subsidiaries of France Télécom and Deutsche Telekom) into Everything Everywhere, cleared on 1 March 2010, reduced the number of network operators from five to four. The UK Office of Fair Trading (OFT) had two concerns about the impact on competition.

First, the smallest remaining mobile network operator, 3UK, depended upon T-Mobile for 3G (radio access network) infrastructure sharing and on Orange for 2G national (voice) roaming. The remedy was a revised commercial agreement between T-Mobile, Orange and 3UK on post-merger infrastructure sharing roaming including a fast-track dispute resolution process.

Second, the parties' combined contiguous spectrum could result in the new entity being the only mobile network operator in the UK able to offer next-generation mobile data services through Long Term Evolution (LTE) technology at the best possible speeds in the medium term. The remedy was a commitment that the merged entity would divest a quarter of their combined spectrum in the 1800 MHz band.

European Commission (staff analysis), Of spectrum and radio access networks: the T-Mobile/Orange joint venture in the UK,Competition Policy Newsletter, No. 2, 2010 and European Commission: T-MOBILE/ ORANGE, March 2010

◂ Box 2.11: UK: Orange and T-Mobile Merger

Sources:

The EU Commission also undertakes to take account of efficiency or profitability criteria that undertaking might claim in order to mitigate any adverse impact on competition; in such cases, the undertakings would, of course, have to show that the efficiency was indeed attributable to the merger and would be beneficial for consumers.

If a merger is found to generate benefits that do not outweigh the damage to competition, then in some jurisdictions regulatory authorities may impose ex ante obligations on a merged firm, where the merger would otherwise be anti-competitive. In both the United States and Europe, National Regulatory Authorities may impose conditions on a merger that would otherwise be anti-competitive.

Conditions were imposed for the horizontal merger approved by the European Commission in April 2006. The Austrian subsidiary of T-Mobile (part of the Deutsche Telekom group) merged with a small competitor, tele.ring (controlled by US Western Wireless Corporation).

Some firms have more of an influence on the competitive process than their market shares would suggest. Before the merger, tele.ring exerted competitive pressure on the two largest Austrian operators, Mobilkom and T-Mobile Austria. The merger could have changed competitive dynamics significantly.

It seemed that no other operator could take over the role that tele.ring played. H3G had offered the next most attractive prices and in 2005 nearly half the customers who ported their numbers away from tele.ring went to H3G.But H3G was even smaller, had a network with only 50 percent population coverage and a roaming agreement with Mobilkom which raised its variable costs reducing its potential to be a vigorous price competitor.

The Commission approved the merger on the basis of T-Mobile's legally binding commitments to H3G to sell it UMTS frequencies and mobile telephony sites (including all necessary technical equipment). According to H3G, these acquisitions would allow it to achieve complete network coverage of the population quickly. Buildings its own network nationally would also eliminate H3G's dependence on the national roaming agreement with Mobilkom, reduce its variable per minute costs considerably and allow H3G to achieve much larger economies of scale. And the extended network and enhanced capacity would provide the incentive to price aggressively to "fill" the network.

◂ Box 2.12: Austria: T-Mobile and tele.ring merger

Source: European Commission (staff analysis), T-Mobile Austria/telering: Remedying the loss of a maverick, Competition Policy Bulletin, No. 2, Summer 2006

Analysing Vertical Mergers

Vertical mergers involve complementary services while horizontal mergers involve substitute services. Vertical mergers are generally considered beneficial where they can:

§ Reduce transaction costs by improving coordination between the services,

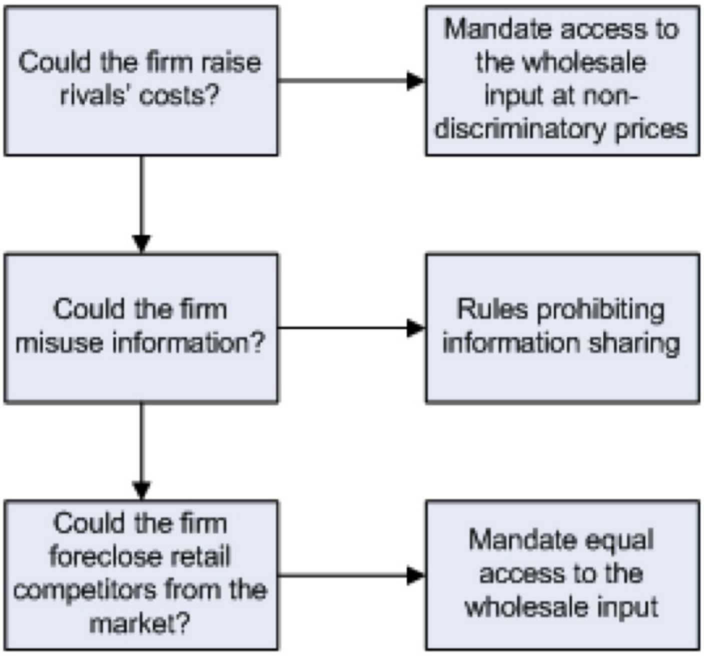
§ Improve efficiency through more integrated production, and

§ Eliminate "double markups" *.

Vertical mergers are more likely to increase efficiency than horizontal mergers but may raise competition concerns in limited sets of circumstances. Competition authorities in the Unites States typically pay attention to three issues (see Figure 2.10). Could the merged firm:

-
    - Raise the costs of its retail rivals? For example, suppose a retail firm merges with the supplier of a wholesale input. By removing a source of supply from the wholesale stage of the market, the retailer is able to increase the price of the input to its competitors (but not to itself). If it can, the remedy is a requirement that the wholesale resource be made available at non-discriminatory prices.
    - Misuse competitively sensitive information gathered about rivals when selling them the wholesale resource? If it can, the remedy is to implement rules and procedures to prohibit information-sharing between the firm's retail and wholesale operations.
    - Foreclose retail competitors from the market by exercising market power at the wholesale stage of the market? The merged firm may withhold supply of the essential facility to its retail competitors, preventing them from competing. If it can, the remedy is to require the merged firm to provide equal access to the wholesale resource to its non-integrated retail-stage competitors.

◂ Figure 2.10 Three Issues of Vertical Mergers



See the conditions imposed to allow the **Telia/Sonera Merger** which raised both horizontal and vertical merger concerns.

◂ **Box 2.13: EU and Vertical Mergers**

Sources:

In many merger cases in mobile telecommunications, the issue at stake could be that of horizontal overlaps in activities of the parties in their respective markets (reduced competition) or vertical relationships between the markets for wholesale international roaming and the markets for fixed and/or mobile telecommunications in the countries where the parties to the transaction operate.

In several cases of this type the Commission found that the transactions would not harm competition and the mergers were cleared without commitments. Examples include France Télécom/Mid Europa Partners/One (2007) and Deutsche Telekom/OTE (2008).

European Commission: Deutsche Telekom/OTE, October 2008 and

European Commissin: France Telecom/Mid Europa Partners/ONE, September 2007 with a third case in 2005 mentioned at **http://ec.europa.eu/competition/sectors/telecommunications/mobile_en.html**)

Analysing Acquisitions

There is no difference between mergers and acquisitions in terms of regulation.

Practice Notes

- KPNQwest/ Ebone/ GTS Horizontal Merger
- Quantitative Tests for Market Power
- Telia/ Sonera Merger

Reference Documents

- European Commission: Deutsche Telekom/ OTE, October 2008
- European Commission: FRANCE TÉLÉCOM / MID EUROPA PARTNERS /ONE, September 2007
- European Commission: Guidelines on the assessment of horizontal mergers
- European Commission: Spectrum and radio access networks: the T-Mobile/Orange joint venture in the UK, 2010
- European Commission: T-Mobile Austria/telering: Remedying the loss of a maverick, 2006
- European Commission: T-MOBILE/ ORANGE, March 2010
- OECD: Roundtable on Vertical Mergers, February 2007

2.2.4.2 JOINT VENTURES

Joint ventures can have many different objectives, and have different implications for competition. Telecommunications joint ventures raise three broad types of competition concern:

- The potential for collusion among the parties in the joint venture,
- A loss of potential competition, and
- The potential for market exclusion and access discrimination.

Joint ventures with the purpose of fixing prices, restricting output, or allocating markets between firms reduce competition, and generally should not be permitted. Regulators or competition authorities should consider whether the joint venture will increase market power sufficiently to cause a substantial lessening of competition. Will the joint venture lead to an increase in prices or a reduction in output?

The EU prohibits agreements and concerted practices which may affect trade and have as their object or effect the prevention or restriction of competition (Article 101) – in Europe. Telefónica and Portugal Telecom concluded a co-operation agreement in 1997 concerning markets outside the EU, which was notified to the Commission at the time.

In 2010, Telefónica acquired of sole control over the Brazilian mobile operator Vivo from Portugal Telecom. That agreement suggests that Telefónica and Portugal Telecom will not compete with each other in their respective home markets. The Commission has a copy of the agreement and of the non-compete clause, which runs from September 2010 to the end of 2011.

In January 2011, the European Commission opened an investigation into this agreement including the scope and effects of the co-operation between the parties in Spain and Portugal prior to the 2010 Vivo transaction.

Although the parties ended their non-compete agreement in February 2011, the Commission said on 25th October 2011 that is was pursuing the fact that such an agreement had been made.

◂ **Box 2.14: Collusion in Spain and Portugal**

Source: EU Commission, Press Release, 24 January 2011
http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/58&format=HTML&aged=0&language=EN&guiLanguage=en

In some cases joint ventures include an agreement for the parties to acquire assets or voting rights in their respective firms. This type of arrangement is more durable than a conventional joint venture, and so requires additional scrutiny. The investigation should consider factors such as:

- The level of competition in the relevant market
- The number and power of competitors in the relevant market,
- The market power of the parties in the joint venture,
- The background of, and the relationship among, the parties in the joint venture,
- The setting in which the joint venture was created,
- The relationship between the lines of commerce of the joint venture and of the individual parties in the joint venture.

Ultimately, regardless of the benefits they produce for the collaborating parties, joint ventures must deliver consumer benefits and limited (in both duration and scope) integration in order to enhance the public interest.

Reference Documents

- European Commission: Co-operation between Telefónica and Portugal Telecom on Iberian markets, January 2011
- European Commission: T-Mobile Austria/telering: Remedying the loss of a maverick, 2006

Next: 2.3 Access to Customers and Facilities ➡