International Competition Network

Report of the ICN Working Group on Telecommunications Services

APPENDIX I
Recent Case Law With Respect To Anti-Competitive Activity in Telecommunications

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CANADIAN COMPETITION BUREAU

Case Name, Decision-Maker and Date of Decision:

Acquisition of Microcell Telecommunications Inc. by Rogers Wireless Communications Inc. (Canadian Competition Bureau Findings, April 2005)

Antitrust/Telecommunications-Specific Issue Raised:

On September 20, 2004, RWCI, Rogers Communications Inc. ("RCI") and Microcell jointly announced that RWCI and Microcell had entered into an agreement under which RWCI would make an all cash bid for Microcell. The Canadian Competition Bureau ("the Bureau") conducted a comprehensive merger review under the *Competition Act* to determine the competitive effects of the proposed transaction.

The merger reduced the number of mobile wireless competitors in Canada from four to three. The transaction raised competition issues with respect to the potential removal of Microcell as a vigorous and effective competitor in the provision of mobile wireless services in Canada. In addition to the potential exercise of unilateral market power, the Bureau was concerned with the impact of the transaction on coordinated behaviour and whether Microcell could be considered a "maverick" in the mobile wireless market.

Competition Agency's Decision:

An application to the Competition Tribunal challenging this transaction was not warranted.

Reasoning/Rationale:

The Bureau concluded that:

- the relevant product market was mobile wireless (voice and data) telecommunications services. The Bureau considered whether wireline was in the same market as wireless and determined that wireline is not a sufficiently close substitute to wireless to constrain the market power of a wireless "hypothetical monopolist."
- the merger would not result in unilateral market power on the part of RWCI nor would it increase the likelihood of coordinated behaviour among the major cellular telephone companies, who are expected to continue to compete vigorously to add and maintain subscribers on their networks; and,
- Microcell would have faced significant challenges in maintaining its position as competitors move forward with the next generations of cellular service offerings. Whatever extent Microcell may have played the role of a maverick in the past, it was unlikely to be able to do so in the future given the very significant constraints it faced.

Competitive Impact:

The transaction would not prevent or lessen competition substantially in the mobile wireless market.

TRIBUNAL DE DEFENSA DE LA LIBRE COMPETENCIA (CHILE[200])

Case Name, Decision-Maker and Date of Decision:

Resolutions #686 (20/5/2003) and #709 (13/10/2003), www.fne.cl
Antitrust Commission (Comisión Resolutiva)

Antitrust/Telecommunications-Specific Issue Raised:

The dominant fixed line company asked for price liberalization on grounds that it was facing enough competition, at least in some areas of the country.

Competition Agency's Position/Arguments:

The Antirust Commission considered that although competition was growing, it was not widespread enough as to discipline the price behavior of the incumbent. The dominant firm market share was around 80%. The closest substitute, mobile phone, is a more expensive technology. Furthermore, the lack of number portability made it difficult to defy its dominant position in the fixed line market.

Competition Agency's Decision:

Liberalization was not granted. Instead, flexibility in price combination –fixed and variable charge-was granted for the incumbent.

Reasoning/Rationale:

It was accepted that the tariff setting system, in which maximum values were defined both for the fixed and the variable component of the price, gave incentive for inefficient competition entrance. In Chile only the incumbent has regulated prices and its area of concession covers most of the territory. New entrants, on the other hand, set their prices freely and may choose their concession area. In that way, cherry picking was taking the best clients from the incumbent. Furthermore, mobile companies were able to offer pre paid service to lower traffic clients, who do not want to commit to a fixed monthly charge and want to control their telecom budget. The conclusion was that flexibility of competitors gave them competitive advantage although they had a more expensive technology (diseconomies of density in the case of fixed lines and expensive technology in the case of mobile phones).

It is important to note that cherry picking would be a problem for any incumbent with regulated prices. This problem may be worse in countries with very unequal distribution of income, since the government is tempted to define very wide tariff areas so to maximize the use of cross subsidies and, hence, improve, coverage.

The sector agency proposed to allow for a flexible price scheme and the Antitrust Commission accepted this proposal. Finally, the price setting scheme would continue to be applied as always, but the incumbent was permitted to offer any other combination of fixed and variable charges, on the condition that any client could go back to the regulated scheme whenever she chooses.

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[200] Since then the institutional arrangement has been changed and the Comision replaced by the Tribunal de la Libre Competencia (www.tdlc.cl)

The flexibility had to be restricted to some conditions since otherwise the incumbent may use selective price reductions in order to prevent entrance of competitors. Thus, the following conditions were added:

- each alternative tariff plan had to be offered for at least one year
- plans should be widely advertised and not communicated only in a specific neighborhood
- contracts may only be finished by the client

Furthermore, the Commission considered that the incumbent faced enough competition in the corporate sector, so the above conditions were not to be required for the alternative price plans offered to that segment, defined for a consumption above 15000 minutes monthly.

Competitive Impact:

The introduction of flexibility in the incumbent pricing policy was definitely decreed in December 2003.

The effects may be summarized analyzing the evolution in the number of the dominant firm clients. In the period 1999-2002, the annual average rate of growth of CTC clients was merely 0,4%. In the 12 month period Sept. 2004 to Sept. 2005 the base of clients grew 3,25%. More significant than the net growth in total clients (77,908), is the reduction in clients subscribed to the regulated tariff (305,168) and the corresponding increase in the clients adopting alternative plans (383,076); i.e., over 15% of the clientele adopted a flexible plan which was not available before.

The main goal of this adjustment in policy was to pave the way to liberalization avoiding a pendulum between deregulation and regulation that may take place if predatory behavior is not controlled.

EUROPEAN COMMISSION

Case Name, Decision-Maker and Date of Decision:

Decision of the European Commission, Case COMP/37.451, 37.578, 37.579 – Deutsche Telekom AG (DTAG) of 21st May 2003 prohibiting the abuse of a dominant position by a the leading operator through unfair prices for the provision of local access to its fixed telecommunications network (EU Official Journal of 14th October 2003, L 263/9)

Public version available on:
http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_263/l_26320031014en00090041.pdf

Antitrust/Telecommunications-Specific Issue Raised:

DTAG is the only German network operator having a network with a nation-wide coverage. New entrants need access to this infrastructure on a wholesale basis in order to provide a services to end users. DTAG is legally obliged to provide competitors fully unbundled access since 1998 at cost oriented charges. However, DTAG charged competitors higher fees for local loop access than it charged, on average, its end users for retail subscriptions.

Competition Agency's Position/Arguments:

The Commission considered that DTAG's pricing:

- constituted a clear case of a margin squeeze for the period 1998 through 2001, because DTAG charged competitors more for unbundled access at wholesale level than it charged its subscribers for access at the retail level during that period;
- remained abusive in 2002 and 2003, although prices for the wholesale access were reduced below retail subscription prices in these years. A margin squeeze persisted nevertheless, because the difference between wholesale and retail tariffs was still not sufficient to cover DTAG's own downstream product-specific cost for the supply of the end-user services.

Decision:

The Commission fined DTAG € 12.6 million The Commission took account of the gravity and duration of the infringement, as well as - in favour of DTAG – the novel aspects in the methodology applied to assess the margin squeeze, the steady reduction of the margin squeeze and the degree of legal uncertainty resulting from the fact that the relevant tariffs had been reviewed by the German national regulatory authority on the basis of telecoms-specific legislation.

Reasoning/Rationale:

The Commission compared upstream access to the local loop with a bundle of different types of retail offerings in its assessment of the margin squeeze and used a weighted approach as to the different retail offers in order to achieve a coherent comparison.

Competitive Impact:

Despite pro-competitive access obligations, DTAG remained the dominant provider of wholesale and retail access to the local loop and there had been little effective unbundling of the local loop preventing in particular entrants to compete in the growing broadband market. The proceedings were opened following three complaints by 15 complainants in total lodged in 1999, amongst which the main competitors of the incumbent.

EUROPEAN COMMISSION

Case Name, Decision-Maker and Date of Decision:

Decision of the European Commission, Case COMP/38.233 – Wanadoo Interactive of 16th July 2003 prohibiting the abuse of a dominant position through predatory pricing in ADSL-based Internet access services for the general public.

Public version available on:
http://europa.eu.int/comm/competition/antitrust/cases/decisions/38233/en.pdf

Antitrust/Telecommunications-Specific Issue Raised:

Wanadoo was, at the time a 72% owned Interne Service Provision subsidiary of France Télécom, offering ADSL (asymmetric digital subscriber line) retail services which provide high-speed Internet access using a telephone line. Wanadoo marketed its ADSL services (Wanadoo ADSL and eXtense) at prices which were below average cost from the end of 1999 to October 2002. While it suffered substantial losses due to this pricing strategy, the undertaking followed a plan to pre-empt the strategic market for high-speed Internet access. The abuse came to an end in October 2002 when France Télécom significantly reduced its wholesale prices for access by Internet Service Providers to its ADSL service.

Competition Agency's Position/Arguments:

The Commission considered that Wandoo's practice:

- constituted an abuse of a dominant position from March 2001 onwards, since the mass marketing of the ADSL services began at that time;
- was predatory since retail prices were set below variable costs until August 2001 and, after that date, approximately equivalent to variable costs, but significantly below total costs;
- was committed deliberately, since the Wanadoo was fully aware of the level of losses and of the legal risks of its conduct.

Decision:

The Commission began its investigation in September 2001. Taking account of the gravity and, on the other hand, the fact that the abuse had ceased in the meantime, the commission imposed a fine of € 10.35 million on Wanadoo.

Reasoning/Rationale:

Preventing exclusionary practices by incumbent operators in strategic markets.

Competitive Impact:

High-speed Internet access is a strategic market and a key to the development of the information society. Wanadoo's market share in broadband retail market rose from 46% to 72% between January 2001 and September 2002 in a market which increased in volume by five times during the same period. The level of loses required in order to compete with Wanadoo had a dissuasive effect on competitors. Moreover, Wanadoo's conduct had a spillover effect and deterred cable operators from offering high-speed Internet access. At the end of the period during which the infringement was committed, no competitor held more than 10% of the market.

CONSEIL DE LA CONCURRENCE (FRANCE)

Case Name, Decision-Maker and Date of Decision:

Interim measures in the ADSL television sector - Decision of the Conseil de la concurrence (French Competition Council) n° 04-MC-01 of 15 April 2004 upon complaint of 3 competitors.

Public version available on :
http://www.conseil-concurrence.fr/user/standard.php?id_rub=134&id_article=296

Antitrust/Telecommunications-Specific Issue Raised:

Thanks to broadband access technology, the copper pairs making up the local loop can be used both for voice, Internet and TV broadcasting services. Since December 2003, a new competitor has been marketing an offer via its multi-service modem. The offer includes broadcasts of free-to-air channels and subscription based channels in addition to broadband Internet access and telephone services. In reaction, the incumbent telecom operator launched a service offering TV via ADSL using telephone lines, in partnership with the leading TV operator.

In its decision the Competition Council strives to answer following questions:

1. Is the deployment of ADSL-video equipment in unbundling rooms a legitimate request?
2. May a dominant operator pair the service offering transmission of video signals from channel control rooms to delivery points in various towns, with the local service providing subscribers with access to television via ADSL?

Competition Agency's Position/Arguments:

Yes, for the first question.
No, for the second.

Decision:

The competition authority handed down interim measures consisting of:

- an injunction ordering France Télécom (incumbent telecom operator) to authorise one of the complaining competitors to install, in splitters, the ADSL video equipment it requires in order to deploy its ADSL-based television offer and to migrate unbundled lines to this new equipment;
- an injunction ordering France Télécom to issue separate invoices for the transmission of video streams and local ADSL-video services, so that the two services, which are open to competition, are commercially independent and unconnected.

Reasoning/Rationale:

Concerning the deployment of an offer for television via ADSL by a new competitor on unbundled lines:

The deployment of ADSL-video equipment in unbundling rooms was a legitimate request and any delay in the installation of this equipment by alternative operators was likely to adversely affect competition for the supply of TV services via ADSL. Therefore there were no grounds for ruling out the possibility that the dominant player has abused its position as owner of the fixed telephony local loop, by acting in a discriminatory manner or by adopting a delaying attitude with regard to its competitors.

Co*ncerning the pairing of video signal transmission services with local ADSL services:*

Since the two markets concerned were open to competition, there was no obligation to pair the service offering transmission of video signals from channel control rooms to delivery points in various towns, with the local service providing subscribers with access to television via ADSL. Therefore this pairing, which was implemented in extremely long contracts (10 years) offered by France Télécom and its partner might constitute an abusive practice on the part of the dominant operator.

Competitive Impact:

The decision on the substance of the case is still pending.

CONSEIL DE LA CONCURRENCE (FRANCE)

Case Name, Decision-Maker and Date of Decision:

Decision of the Conseil de la concurrence (French Competition Council) n° 05-D-65 of 05-D-59 of 7th November 2005 prohibiting abusive unilateral practices implemented by the leading operator on the broadband Internet market.

Public version available on:
http://www.conseil-concurrence.fr/pdf/avis/05d59.pdf

Antitrust/Telecommunications-Specific Issue Raised:

In December 1999, the telephony incumbent operator France Télécom refused a request by a new competitor concerning access to the wholesale broadband Internet market. ADSL technology, which was launched in 1999, has resulted in the appearance of several new markets: the provision of broadband Internet access via ADSL, the routing of ADSL traffic between subscribers and Internet Service Providers (ISPs) by operators. However, France Télécom held a monopoly on the copper lines (the local loop) that link subscribers to the telephone exchange, and the local loop was not actually unbundled until 2002. As a result, competing operators who wanted to provide ISPs with these routing services had to buy wholesale services from France Télécom, in order to be able to take delivery of ADSL traffic at an intermediate point on the incumbent operator's network. The incumbent had agreed to offer ISPs these wholesale services, provided they were implemented entirely in its own installations. However, it refused to allow competing telephone operators, like the plaintiff, the possibility to partly use their own installations. In doing so, it prevented the competitors from making wholesale offers to the ISPs. France Télécom then agreed to permit its competitors to substitute their own installations, but at prices that prevented them from making the ISPs competitive offers.

Competition Agency's Position/Arguments:

The Competition Council considered that France Télécom's practices:

- led to the closure of the market for broadband Internet (ADSL), thereby guaranteeing that France Télécom remained the sole ADSL wholesale supplier;
- persisted for almost three years, and this despite the injunctions handed down by the Agency and the warnings issued by the Telecom regulator (ARCEP) between January 2001 and October 2002, concerning the anticompetitive effect of the practices;
- were committed by a vertically integrated incumbent operator, which owned an essential infrastructure necessary for the establishment of broadband services by competitors. Due to its position, France Télécom therefore had a special responsibility in the broadband market, since it was able to alter the structure unilaterally;
- took place in an emerging market, and served to hold back that market's vitality.

Decision:

Following a complaint filed in November 1999, the Competition Council first ordered France Télécom to propose a new technical and commercial offer, that would enable other operators to compete effectively in the market (so called "option 3" in the decision of February 2000 ordering interim measures).

In May 2004, the Competition Council found that France Télécom had breached the injunction and fined the company a total of €20 million. The fine was subsequently doubled by the court of appeal.

Finally called upon to rule substantively on the merits of the case, the competition authority decided to fine France Télécom €80 million for preventing its competitors from accessing the wholesale ADSL Internet market until October 2002.

Reasoning/Rationale:

Whilst the "option 3" was eventually proposed at prices enabling competing operators to put together offer for ISPs under economically acceptable conditions, this did not take place until September 2002, after the French Telecommunications Regulation Authority (ARCEP) obtained concomitant price reductions for all France Télécom's offers. France Télécom's refusal of its competitor's request, and the inappropriate conditions it subsequently proposed, amounted to a refusal of access to the local loop and the installations located between this loop and the connection points under option 3. The loop and the associated installations constituted essential facilities, since the loop had not yet been unbundled.

By refusing access to these essential facilities in this way, France Télécom was able to remain the only supplier of services routing broadband Internet (ADSL) traffic between subscribers and ISPs until 2002, whilst preventing potentially more innovative and efficient competitors from entering the market. The ISPs were unable to take advantage of competition in the market and were therefore deprived of more attractive technical or price conditions, which they could have passed on to consumers.

When calculating the fine, the Competition Authority took into account the previous fine imposed on France Télécom for the aforementioned breach of injunction.

Competitive Impact:

The French sector regulation mechanism was already in place before the end of 2000, with 3 options for broadband access:

- In the first offer ("option 5") France Telecom transports subscribers' ADSL data to the ISP server. This is in fact resale of the incumbent operator's offer under the ISP brand. In this situation the ISP fully depends on France Telecom for the supply of access and all collection.
- With "option 3", operators buy a DSL data collection service on the local loop from France Telecom which they can then resell to ISPs as a comprehensive offer including access, data collection and transport.
- Finally, in the last option ("option 1") France Telecom competitors have access to copper pairs connected to the subscriber. In this case, the local loop can be partially or fully unbundled. With the last two options, ISPs become independent from the incumbent and can differentiate their offers in commercial and technical terms.

At the end of 2002, France Telecom still had 80% market share in the downstream market through its subsidiary Wanadoo and 100% of the transport and access market. According to recent estimates, the market share of the incumbent operator has dropped below 50% in 2005. In the same period of time, retail prices for consumer's access to ADSL decreased at least by half. This development probably results from various factors such as measures taken by the telecom regulator to foster competition in broadband, rigorous decisions of the French and EU competition authorities to prohibit abusive conducts by the dominant operator (notably the summarised case), the entry of new competitors and the development of innovative commercial offers.

CONSEIL DE LA CONCURRENCE (FRANCE)

Case Name, Decision-Maker and Date of Decision:

Mobile telephony in Martinique, Guadeloupe and Guyana - Interim measures - Decision of the Conseil de la concurrence (French Competition Council) n° 04-MC-02 of 9 December 2004.

Public version available on:
http://www.conseil-concurrence.fr/user/avis.php?avis=04-MC-02

Antitrust/Telecommunications-Specific Issue Raised:

The mobile telephony sector in the French Caribbean Islands is a mature market characterised by an asymmetric duopoly. In June 2004, the two main operators held a 82% share of the market, with 17% for the second one. The leader began marketing its services in the Caribbean as early as September 1996, some four years before its competitor. In addition, the mobile telephony market is becoming a replacement market where the installation rate is no longer growing. This makes the market particularly vulnerable to practices aimed at discriminating against competitors, foreclosure or abusive customer loyalty schemes.

The practices concerned:

- Suspected foreclosure of the distribution network via exclusivity contracts with independent retailers;
- Exclusivity clause imposed on the only manufacturer-approved mobile telephone repair company;
- The « club effect » generated by tariff discrimination between "on net" (calls within its network) and "off net" calls (calls made by a subscriber of one operator to a subscriber of another operator);
- Various customer loyalty programmes (communication credits for holders of prepaid cards, anniversary bonuses, a "Change mobiles" programme which enables subscribers to accumulate loyalty points depending on the size of their bills; if they wish to use these points to purchase a new mobile at a preferential tariff they must first sign up for a further 24 months period).

Competition Agency's Position/Arguments:

Foreclosure: given the narrowness of the geographical market concerned and the low rate of turnover in the leases of first choice retail outlets, the Competition Council takes the view that these restrictions on distributors' freedoms are likely to give the dominant operator a crucial advantage, by limiting the access of competitors to the retail market. Furthermore, consumers are unable to compare the products offered by the two operators in one retail outlet.

Exclusive dealing: since it is unable to use the local maintenance company, the second operator is obliged to send defective mobile telephones back to mainland France, which has the effect of extending the time taken and the cost of carrying out repairs (artificial increase of the competitor's costs).

Overpricing of *off net* calls: this gives the Bouygues network an unfavourable, expensive image, and encourages consumers to co-ordinate their purchases (between members of the same family, group or company) and to concentrate their subscriptions on the larger network.

Loyalty programmes: cumulated offers may deter customers from switching between networks. In particular, the "Change mobiles" programme encourages customers to stack up their subscription periods. By artificially extending the subscription period, the market leader avoids having to compete with its rival firm once more. This practice may have the effect of freezing market shares for its benefit.

Decision:

The interim measures ruling ordered the market leader to:

- remove the exclusivity clauses in all its current and future contracts with independent distributors;
- remove all the exclusivity obligations it has imposed upon the maintenance company;
- take steps to ensure that, for all offers including different tariffs for on net calls on the one hand, and off net calls on the other hand, the difference between these on net and off net tariffs does not exceed the difference between the costs borne for handling the two types of call;
- allow all its customers to use the loyalty points they have acquired or may acquire, to benefit from a reduction in the price of all the products and services it offers.

The operator concerned was ordered to comply with these injunctions within two months.

Reasoning/Rationale:

Interim measures can be imposed if there is a serious risk of immediate harm to the competitors, to the market and to consumers. At this stage of the investigation, the anticompetitive effects of the exclusivity contracts cannot be excluded, given that the non-competition obligation has been imposed by an operator with a high degree of market power against its sole, much smaller competitor. The "club effect" may in particular have a restrictive impact on competition due to the difference between the sizes of the networks concerned: the larger network holds a market share in excess of 82%. The difference in size is likely to multiply the overpricing effect. Eventually, the overall effects of the practices observed is likely to prevent the only competing operator from applying normal competitive pressure to the market leader.

The Competition Council further observed that whilst the practices outlined above also exist in mainland France, they have particular effects in the Caribbean as a result of the specific structure of the geographical market, where competition is limited to two operators with very unequal market shares (82% and 18% respectively).

Competitive Impact:

A full investigation of the case on the merits is still ongoing.

CONSEIL DE LA CONCURRENCE (FRANCE)

Case Name, Decision-Maker and Date of Decision:

Decision of the Conseil de la concurrence (French Competition Council) n°05-D-65 of 30 November 2005 sanctioning concerted practices on the mobile telephony market.

Public version available on :
http://www.conseil-concurrence.fr/pdf/avis/05d65.pdf

Antitrust/Telecommunications-Specific Issue Raised:

At the time of the investigation (2001-2002), the supply of mobile telephony services was limited to three licensed operators. None of them had opened its network to MVNOs. The market was highly concentrated (HHI = 3864), with respective market shares amounting to 45%, 35% and 20%.

The practices sanctioned:

1. Sharing strategic information on new subscriptions and cancellations: every month between 1997 and 2003, the mobile operators exchanged detailed and confidential information on the numbers of new customers signed up the previous month, and the numbers of people who opted to cancel their subscriptions.
2. Agreement between the 3 operators from 2000 to 2002 to stabilise their market shares based on jointly-defined targets: between 2000 and 2002, the 3 operators entered into a gentlemen's agreement aimed at stabilising the development of their respective positions.

Competition Agency's Position/Arguments:

Although the operators' decision to share market information had no bearing on their future pricing strategies, it was nonetheless likely to reduce competition in the mobile phone market for several reasons:

- First, the operators could not have gained access to this type of data if they had not systematically shared it, in an arrangement which they were careful to keep secret. Indeed ARCEP (the French Telecommunications Regulator) has never published this information, merely a general overall indicator of total new acquisitions and cancellations, monthly or quarterly.
- Second, it was clear from the minutes of the three operators' various executive committees, that the developments in these indicators were an extremely important source of information, which was used for determining commercial strategies.

In addition, the Agency observed that from 2000 onwards, the operators' sharing of information enabled them to monitor the separate agreement they had reached on the development of their respective market shares. Some of the measures adopted could clearly have led to a drop in sales (and therefore market share) for any operator who took the step of introducing them unilaterally.

Decision:

The investigators uncovered a number of pieces of serious, specific and corroborating evidence pointing to the existence of a collusive agreement (e.g. hand-written documents with explicit references to an "*agreement*" between the three operators, to the "*pacification of the market*" and to a "*Yalta of market share*"). Certain similarities were also observed in the commercial policies implemented by the operators during this period, particularly in terms of acquisition costs and call rates (e.g. the operators' simultaneous decision at the beginning of 2001 to start charging for calls in 30-second increments, after the minimum first minute).

The *Conseil de la concurrence* imposed fines totalling €534 million on the three operators for engaging in two kinds of anticompetitive agreements that distorted market competition. The practices were revealed as part of an investigation carried out following the *Conseil*'s decision to begin proceedings *ex officio* on 28th August 2001, and a referral handed down by a consumer association on 22nd February 2002.

The high level of the fines imposed is justified by several factors:

- The length of time over which the practices took place (from 1997 to 2003 concerning the sharing of information);
- The very considerable size of the market in question;
- The seriousness of the practices: market sharing agreements are unjustifiable and among the most serious restrictions of competition.
- The fact that the agreement took place in a market to which entry was highly restricted, since mobile telephony operators are required to obtain a licence and no MVNO was granted access to the operators' networks during the period in question.
- The harm to consumers: since the late 1990s, mobile telephones have come to represent a new expense for households, and now account for significant portion of their budgets. By colluding, the operators were therefore able to introduce measures that seriously damaged the interests of consumers.

Reasoning/Rationale:

On a market which is difficult to penetrate and comprising only three operators, information sharing of this kind is likely to distort competition, by reducing uncertainties over competitors' strategies and diminishing each company's commercial independence, particularly where - as has been the case in the mobile telephony market since 2000 - growth in demand is slowing substantially.

In the medium term, this collusion served to maintain the three operators' share of new subscription sales at relatively stable levels, and also paved the way for them to alter their strategy from 2000 onwards. Up until then, the mobile operators had relied on acquiring market share to ensure their growth, which required considerable investment. From 2000 onwards, a period which coincided with the end of the race to acquire market share, the three operators simultaneously adopted strategies aimed at consolidating their existing customer bases. This led, among other things, to a hike in prices and the adoption of measures such as giving priority to contracts with commitments over pay-as-you-go cards, or the introduction of billing per 30-second increments after a minimum first minute.

Competitive Impact:

The decision is appealed by all addressees. However, the consumer association which filed a complaint with the Competition authority has already collected a number of complaints in order to launch a follow-on action for damages. In addition to the end it put to a harmful cartel, this case will therefore probably lead to further developments. Moreover, it might raise sector specific issues such as the role of the MVNOs on the market as well as general questions concerning private enforcement of competition rules (the French Government is considering the possibility to introduce collective actions against abusive practices on certain markets).

HUNGARIAN COMPETITION AUTHORITY

Case number:	Vj-39/2002
Party:	UPC Magyarország Kft. (UPC Hungary)
Type of case:	abuse of dominance – restrictive practice
Decision:	imposition of fine
Date:	16 December 2002

Summary of Case No. Vj-39/2002

In the case in question, the Competition Council of the GVH held that UPC abused its dominant position by refusing, without justification, to establish or maintain business relations, appropriate of the type of transaction, with TVNet Számitástechnikai Kft. (hereinafter TVNet), an Internet service provider, under Subsection (c) of Article 21 of ActLVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (hereinafter Competition Act). Therefore the Competition Council imposed a fine of HUF 35,000,000 (ca. EUR 138,000) on UPC.

The reasons for the above decision were as follows.

In 1998 UPC purchased the first generation cable network of Satimex Kft. In connection with the cable network Satimex Kft. transferred all its rights and obligations deriving from its contracts concluded with third parties, amongst them TVNet. According to one of these contracts, from 1996 to 31 December 2001, TVNet was entitled to provide exclusively Internet services on the cable network of Satimex Kft. within the territory of the 13th district of Budapest. Following the purchase of the cable network by UPC, TVNet continued its activity in accordance with the provisions of its contract with Satimex Kft. until 31 December 2001.

In 1999, however, UPC commenced to construct a new second generation cable network covering the same territory as the first generation one. As of the expiry of the contract UPC discontinued to operate the first generation cable network, and at the same time refused to enter into a new agreement with TVNet as to provide Internet service on the second generation cable network. Therefore, TVNet had to abandon its services, while UPC started to offer its own services to the costumers of TVNet.

The Competition Council established that the relevant product markets in the present case were the following. In the first place the wholesale, and in the second place the retail market of Internet access services on broadband Internet access technologies (ADSL, cable net).

The Competition Council was of the view that the relevant geographic market comprised, in a broader sense, those districts of Budapest and Budaörs where UPC was able to provide broadband Internet access through its cable network; and, in a narrower sense, all those areas (such as the 13th district of Budapest) where the technical conditions to provide ADSL were not available.

The Competition Council established that UPC held a dominant position on both relevant product markets within the relevant geographic market as defined above, that is within the 13th district of Budapest.

In its defense UPC argued that on the one hand the Competition Act did not apply to the conduct examined by the Competition Council, and on the other hand it did not abuse its dominant position in the course of its market practices.

The Competition Council was of the view that the second generation cable network of UPC was technically suitable for parallel activities of two Internet service providers, and the commencement and the maintainance of the activity did not require any further investment. Further, no evidence was found that the lack of agreement to provide access for TVNet to UPC's cable network was due to the disagreement on the price that UPC was to charge.

As the Act LXXII of 1992 on Telecommunications and the enforcement decrees thereto – regulating the Internet access services – were not in force at the time of the infringement, further, the notion of'accession contract' was regulated by the Act XL of 2001 on Communications that came into effect only on 23 December 2001, the Competition Council held that the given market practice of UPC did come under the ambit of the Competition Act. Accordingly, the Competition Council imposed a fine on UPC for the abuse of its dominant position.

HUNGARIAN COMPETITION AUTHORITY

Case number:	Vj-100/2002
Party:	Magyar Telekom (formerly Matáv)
Type of case:	abuse of dominance –margin squeeze
Decision:	imposition of fine
Date:	12 January 2004

Summary of Case No. Vj-100/2002

In 2002 the Hungarian Competition Authority (‘Gazdasági Versenyhivatal’, hereinafter: GVH) initiated a procedure against the largest fixed line operator, Matav (called ‘Magyar Telekom’ at present, a subsidiary of the German incumbent, Deutsche Telekom) because upon competitors’ claims GVH found that Matav had allegedly infringed the provisions of the Hungarian Competition Act[201] prohibiting the abuse of dominant position by applying unfair prices and hindering market entry in any other manner.[202] Alternative Service Providers (hereinafter: ASPs) were complaining about interconnection fees which were – in their view – higher than some retail tariffs, other unfavourable conditions in interconnection contracts and the exclusion of carrier selection in most of the retail offers for business customers.

In order that one could understand this situation better it is worth briefly describing the regulatory environment. The then effective regulation for telecommunications came into force on the 23rd of December 2001 and opened up the sector to liberalization. Within the frames of this legislation Matav was designated as an SMP operator in the markets for fixed line communications and for leased line services, except for interconnection services. Designation of SMP operators was based on the following criteria: the Communications Authority defined an operator as having SMP if it had more than 25% market share on the respective markets of fixed line telephone services, mobile telephone services, leased line services or interconnection services. As an operator having SMP on the market for fixed line telecommunications Matav was obliged to make a Reference Interconnection Offer (RIO) and a Reference Unbundling Offer (RUO), moreover, it had to set its prices of interconnection and unbundled local loop services based on the FL-LRIC (forward-looking long run incremental costing) methodology.[203] These prices were subject to the approval of the Communications Authority. As the drawing up of a RIO/RUO and the calculation and control of cost-based prices is a very time-consuming procedure[204] the Communications Authority obliged Matav (and other SMP operators) to conclude on interconnection contracts with ASPs before RIO/RUO came into existence at prices determined in the course of commercial negotiations but with the opportunity for both parties to request the application of the future cost-based prices retroactively. After the approval of the Communications Authority came into effect the cost-based interconnection fees were obligatory, i.e. Matav had to apply these tariffs and it was not allowed to apply either higher or even lower interconnection fees than the ones in its RIO.

[201] Act No. LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices
[202] Para 21 of the Competition Act, points a) and i)
[203] However, as a exemption in the first year right after liberalization, in 2002 prices could be set based on the FDC (fully distributed costing) methodology instead of applying LRIC.
[204] The first formal approval of Matav’s interconnection fees dated only from the 18th of July 2002.

On the other hand, Matav's retail prices were subject to regulation, too. There was a price cap regulation in effect which meant that Matav could raise its retail prices in such a way that the degree of the overall average price increase could not be higher than the planned inflation rate plus the so-called adjusting factor minus the so-called efficiency factor.[205] There were some 'partial price caps' too, so the price increase concerning local calls could not exceed 5% in the second half of 2002 and 6% in 2003 and 2004 respectively, and the growth rate of the subscription fees (monthly rental) could not be more than 3% in the second half of 2002 and 10% yearly in 2003 and 2004. In contrast with the obligatory interconnection fees the retail price cap regulation opened the door for the operators to act autonomously to some degree.

Right after market opening, in February 2002 Matav launched new tariff packages for business costumers (the so called 'Ritmus' packages) in which it offered special retail tariffs if the subscriber committed itself to generate a minimum traffic volume in every month, to pay an extra monthly rental fee and to remain loyal, i.e. not to change to another service package or to another service provider. This latter also meant that carrier selection and carrier preselection were prohibited in these new packages. Similar conditions applied to Matav's special offers to large corporate users as well with the difference that they had to pay even higher subscription fees but they could profit from the even lower call tariffs.

In their complaints related to these business packages and offers, the ASPs claimed that compared to the interconnection fees in the commercial contracts and also in the FDC-based RIO these retail call tariffs created margin squeeze and hence hindered competition in the business segment. The ASPs criticized the other disadvantageous conditions of the interconnection contracts, too, i.e. the extremely high prices of collocation and other related services and the exclusion of carrier selection and preselection in retail packages.

The GVH however found that it could not simply confer retail call tariffs to the sum of the initiation price and the termination fee determined in the commercial contracts or in the RIO, because the single call services did not create distinct markets. The GVH defined the relevant retail market as the one for fixed line telephone services offered to business customers[206] comprising access, local and national long distance call services. Although the GVH admitted that theoretically these services created distinct markets, it found that in practice there was no separate demand for these services, they were taken by costumers together in one package. The same approach was applied in the case of international call services and the GVH concluded that international call services did not belong to the same market because there was separate demand for these services and hence there were substitute services and totally different competitive conditions. As retail access services were incorporated in the analysis, wholesale access (i.e. LLU) and origination and termination services were also taken into account in the calculation of the costs incurred by Matav due to providing these retail packages. Other tariffs and fees determined in the commercial contracts or in the RIO were omitted from the calculation because they do not occur if Matav as a vertically integrated operator provides the retail services itself. According to the GVH in a margin squeeze test created for competition policy purposes the synergies and cost savings deriving from vertical integration must be taken into account (in favour of the incumbent) and only a regulator can apply such tests that prefer competitors to the incumbent. On the other hand, the price of

[205] The adjusting factor was calculated as two third parts of the difference between the planned and the actual inflation rate (either positive or negative) and could be applied only if the difference exceeded one percentage point. The efficiency factor was 3%.

[206] GVH established that residential and business services had very different characteristics so they belonged to separate markets and it also considered the possibility of defining different segments in the market of business services (i.e. SOHOs, SMEs and large customers demanding complex communications services) but in the end it did not come to a decision as it was a question of minor importance concerning the outcome of the procedure.

these other services was approved by the Communications Authority as well (and it approved lower one-off charges and higher monthly fees than the ones in the commercial services[207] while reducing the prices of origination and termination services), so they could not be challenged by the GVH.

The price squeeze test showed that Matav's revenues from the provision of these retail business packages and offers had not covered the wholesale, infrastructure-related costs occurring due to these services from February 2002 to July 2002. In this period the margin proved to be negative, but afterwards, following the approval of the cost-based RIO tariffs this margin turned slightly positive and in the lack of information on product specific or retail costs the GVH could not assess whether this positive margin had been sufficient in the sense that it could have covered all Matav's relevant costs and expenditures. This calculation however revealed that the former negative margins had been caused by the unduly high wholesale prices which problem was solved by the intervention of the Communications Authority, i.e. by the approval of the RIO and the cost-based prices therein.

In spite of the above-mentioned relatively short time period and the efficient intervention of the Communications Authority the GVH established that Matav applied abusive price squeeze from February to July 2002 and thus infringed competition law, because its behaviour was capable of excluding competitors or hindering them in entering the market. By deciding so the GVH — though it admitted that as a rule of thumb margin squeeze as an abusive behaviour under competition law could be established only if it lasted for a bit longer period of time otherwise it could not have an excluding effect on the market — considered that right after market opening this strategy of Matav had to be judged in a more rigorous manner. Similar argumentation was presented why the defence of Matav concerning the retroactive application of the cost-based prices had not been taken into account. The GVH found that during this period in their business decisions ASPs had been able to rely only upon the then known facts and figures, i.e. the tariffs in the commercial agreements, and these had been, together with the retail tariffs, capable of deterring competitors from entering the market or hindering their market expansion. For the time period after July 2002 abuse of dominant position could not be proved, so no infringement was established.

As telecommunications are a regulated sector Matav built its defence upon the argumentation that GVH had no power to act against it because both its interconnection fees and its retail prices were subject to regulation and the Communications Authority approved its wholesale tariffs by controlling its RIO and implicitly the sector specific regulator approved its retail prices also, when it did not challenge Matav's standard contractual terms concerning retail services. The same reasons were adduced in relation to the exclusion of carrier selection and carrier preselection by Matav. The GVH however found that price cap regulation had allowed Matav sufficient latitude concerning its retail pricing behaviour[208] and thus indirectly concerning the determination of the margin between its retail and wholesale prices.

Consequently, regulation did not eliminate Matav's freedom of action but let it act autonomously to a certain extent, so competition law was found to be applicable. In GVH's view, its competence could be established concerning the exclusion of CS/CPS as well, and the claim that the Communications Authority did not condemn this condition[209] could not be

[207] This situation was the presumed reason why most of the ASPs did not sign the RIO contract but kept up the commercial one in spite of the higher interconnection (i.e. origination and termination) fees therein.
[208] The aim of price cap regulation is to prevent operators from applying unfair (i.e. unduly high) prices while giving them plenty of elbow-room in order to let them react in a flexible way to market shifts.
[209] Under the Communications Act operators had to make it possible for their subscribers to use carrier selection and preselection services concerning long distance and international calls in their service packages except the

a proper justification for the legality of this conduct and particularly not for its compliance with competition rules.

so-called ‘preferential universal service package’ devoted to satisfy the needs of low-income residential consumers with relatively low monthly rental charges (under the LLU costs) and higher call tariffs. Matav interpreted this provision in such a way that it made CS/CPS available only in one single tariff package and excluded this possibility in all the others claiming that in these packages it provided different discounts which could only be recouped if all access and call services were acquired from Matav. These conditions were laid down in the general contractual terms of Matav which were subject to Communications Authority’s control, but the Authority did not challenge these terms (as a matter of fact it did not say anything).

HUNGARIAN COMPETITION AUTHORITY

Case number:	Vj-73/2003
Party:	Magyar Telekom (formerly Matáv)
Type of case:	Abuse of dominance
Decision:	No violation of Competition Act found
Date:	14 September 2004

Summary of Case No. Vj-73/2003

The Party

In the case in question the proceedings were started against Matav Rt.[210]. It is a subsidiary of Deutsche Telekom, and as the largest incumbent it has 39 primary areas (out of 54) as a fixed telephone network operator providing all retail and wholesale voice services, and it has market leader subsidiaries on the mobile and Internet markets and a runner-up on the cable TV market. Matav had significant market power (SMP) in fixed telephony and leased line markets under the previous regulatory framework.

The alleged infringements

The case was initiated because Matav presumably abused its dominant position by:

- excluding carrier selection (CS) in certain retail packages, and using conditions that hindered carrier-selection on the residential market;
- threatening to increase tariffs of calls to subscribers of alternative service providers;
- applying retail tariffs on the residential market that in regard to the interconnection fees (RIOs were approved by Communications Authority) impede the market entry and the profitable operation of efficient market players in 2002 and 2003.

Regulatory environment

Matav as having SMP was obliged to make reference wholesale offers (interconnection-RIO, unbundling-RUO) which were authorized by Communications Authority – so fees therein were obligatory.

Retail prices were under a price cap regulation that determined the maximum level of price increase on the average. It means that the regulated company could change its individual prices within the frame of the price cap (there was a room to manoeuvre), so the competition law was applicable (in theory).

There was an obligation of providing CS (except for local calls), but Communications Authority did not proceed against Matav.

Relevant markets

[210] In May 2005 it changed its name to Magyar Telekom, and its business units adopted the international T-brands.

The relevant market at the wholesale level was the wholesale interconnection services (call origination, and call termination) and access services (Local Loop Unbundling). At the retail level a distinction was made between business and residential services markets, in theory there were access, local/national call services, international call services markets but in practice the relevant market was the market of tariff packages (bundles of access and call services). The behaviour basically concerned the wholesale market, therefore the Competition Council (hereinafter CC) found that there was no need to analyse the substitutability between mobile and fixed telephone services in detail.

Dominant position

The dominant position on the wholesale (upstream) markets was established, because Matav's wholesale services had no reasonable substitutes, and the market was not contestable.
The aim of the alleged infringements was to transfer the upstream dominant position to the downstream market.

Legal assessment

In connection with the exclusion of CS in certain packages the infringement was not established because in the so-called Bázis package (the basic package of Matav) there was a possibility to use CS services and Bázis and other packages belonged to the same relevant market.

The CC found that the announcement of tariff differentiation was not abusive because:

- Matav withdrew its announcement after 3 weeks
- this interim time period was too short to affect the market (for business clients that have many private customers [banks, insurance companies, cable television providers etc.] the cost that has to be paid by their customers when calling them is an important factor, and they consider this factor when they change their telecom provider, but changing service provider is a longer process).
- the costs behind the difference in the tariffs had already been investigated in another ongoing case (Vj-66/2004), that could assess the long-term effects of this planned tariff differentiation in detail.

In theory Matav's pricing strategy could have been abusive in the following three ways:

<u>Excessive pricing – wholesale tariffs</u>

The Competition Authority had no means to examine RIO and RUO charges as they are approved by the Communications Authority and therefore these must have been cost based prices.

<u>Predatory pricing – retail tariffs</u>

Matav's operating revenues were too high to assume that its retail prices were bellow costs, in theory it would have come from the business segment and other services, but actually most of the revenues came from the residential market. On the other hand the recoupment of a presumed sacrificed profit was not likely.

<u>Margin squeeze - between wholesale and retail tariffs</u>

Margin squeeze occurs when a vertically integrated firm (having dominant position on the wholesale market) hinders/prevents competition through the spread between wholesale and retail tariffs for comparable services.

As the relevant product market was the market of tariff packages, calculation was carried out incorporating the following: access, local calls, national (long distance) call services (as tariff packages), excluding international and dial-up Internet calls (because the markets of these calls had different characteristics) and the investigation had to build up the wholesale price of these retail services from RIO and RUO price-elements.

Steps of testing margin squeeze:
Retail price – wholesale (interconnection) price = Spread I.
Spread I. – downstream (retail) cost = Spread II.

Results of the test (return on revenues)

	Period	Spread I.	Spread II.
Residential market	2002	3-7%	less than 1%
	Jan-Sept 2003	less than 10%	5-10%

In 2003 margin squeeze could not be established with regard to the degree of Spread II. (5-10%) in this case.

In 2002 Spread II. was not sufficient to cover the cost of capital (profit) relating to these services and thus hindered new entry. However, CC established no infringement because this situation was caused by regulation (fixed wholesale charges and price caps for retail services).

Matáv exhausted almost all its possibilities for increasing prices[211] and the regulatory environment was rather unpredictable and risky for the incumbent to apply higher prices.

Insufficient margin partially was due to delays in tariff rebalancing (monthly subscription fees [retail access prices] were much lower than monthly fees for LLU [wholesale price]) in spite of the fact that in 2002 Matav increased monthly rental charges higher than its partial price cap index. On the other hand the Communications Authority completed the checking of prices of 2002 just in 2004 and the methodology of the Communications Authority's price cap control was not known in 2002 as well.

[211] The results of the NRA's follow-up price-cap control:
Composite index 2,4% (allowable:4%)
Monthly rental 5,4% (allowable:3%)
Local calls 4,2% (allowable:5%)

HUNGARIAN COMPETITION AUTHORITY

Case number:	Vj-66/2004
Party:	Magyar Telekom (formerly Matáv)
Type of case:	abuse of dominance
Decision:	imposition of fine
Date:	6 September 2005

Summary of Case No. Vj-66/2004

The Competition Council of GVH declared in 2005 that Magyar Telekom abused of its dominant position on one hand in 2003, when it stipulated in network access agreements regarding special numbers (free green number 0680xxx xxx; blue number 0640xxx xxx) such charge structure, which resulted in unjustified advantage for itself, on the other hand refused to finance the Interconnection Links (IC Link) traffic based. In connection with special number, the Competition Council imposed a fine (35 million HUF), whereas in case of IC Link it obliged the Magyar Telekom to agree with its partners based on traffic within 60 days.

The special numbers offered by telecommunication operators facilitate maintaining the contact with their clients for several undertakings. The Magyar Telekom had approx. 80 % market shares on the relevant residential costumers market of fix phone during the investigated period. So for its competitors it was essential to agree with Magyar Telekom in order to secure the accessibility of their and Magyar Telekom's special number services from their and Magyar Telekom's networks. The abusive conduct manifested in the fact that Magyar Telekom wanted to distinguish between retail special number tariff according to the system on-net and off-net because the off-net calls entail extra costs. At the same time this solution would have been harmful from marketing point of view that's why the competitors wanted to avoid it. In the interest of this they accepted asymmetric wholesale tariffs offered by Magyar Telekom. The Competition Council declared that this asymmetric wholesale tariffs in network access agreements are much higher than the similar fees of calls in reference interconnection offer of Magyar Telekom, which was approved by the Hungarian Regulatory Authority cost based.

The Competition Council declared in this same case the abusive conduct of Magyar Telekom in connection with financing of IC Link as well because the undertaking required that its partners finance the cost of IC Link unilaterally, which is a physical connection between two network. The Magyar Telekom had approx. 80% market shares on the relevant residential costumers markets of fix phone, so it was essential to agree with it. Since the IC Link was used by Magyar Telekom increasingly as well, so was the refusal to the finance of IC Link based on traffic committed abusive conduct.

The full Hungarian texts of the decisions can be reached on the website of the Hungarian Competition Authority (www.gvh.hu).

ITALIAN COMPETITION AUTHORITY

Case Name, Decision-Maker and Date of Decision:

A351 Comportamenti abusivi di Telecom Italia (Abusive practices by Telecom Italia).

The decision maker is the Autorità Garante della Concorrenza e del Mercato (Italian Competition Authority).

Available in:

- 16 November 2004, Antitrust Bulletin n.47/2004.
- http://www.agcm.it/eng/index.htm, Press release n.30/2004.

Antitrust/Telecommunications-Specific Issue Raised:

Telecom Italia was offering commercial conditions for fixed network telecommunications services for business customers that competitors were unable to match because of sophisticated margin squeeze strategies.

Competition Agency's Position/Arguments:

Telecom Italia introduced exclusionary clauses in its business contracts and imposed technical and economic conditions on competitors that were less favourable than those offered to its commercial divisions for the same service to final customers (price squeeze). Particular attention was given to the CONSIP bid in 2002 for the supply of telecommunications services to the Italian Public Administration. Telecom Italia offered to Consip financial terms and conditions that could be matched only at a loss by an equally efficient competitor, conditions that were also extended to other large private users.

Decision:

The Competition Authority found that in 2001-2003, Telecom Italia adopted an exclusionary strategy against its competitors aimed at maintaining and/or increasing its share of the market for network communication services for business customers. Telecom Italia implemented such exclusionary strategy by two types of conducts, both violating section 3 of the Competition Act (law n. 287/90):

a) the use of contractual terms and conditions, such as exclusive clauses and clauses equivalent in terms of their effects to English clauses, which would ensure that a substantial part of the business customers would be bound to Telecom Italia, making it more difficult or impossible for competing telecommunications companies to offer fixed network telecommunications services, and to handle even a small part of the traffic of the customers in question; these clauses were therefore considered to be abusive not because they would discriminate between different end customers, but rather because of their exclusionary effect on competitors;

b) the offering of financial and technical conditions to customers which the competitors could replicate only at a loss. In fact, the technical and financial conditions offered to the competitors were less favorable than those offered to its own commercial divisions for the same services. The purpose of this conduct was to hamper access by competitors to the end services market.

The Competition Authority imposed on Telecom Italia a sanction of 152 million Euros, taking into account, among other things, the long duration of the infringement (3 years).

Reasoning/Rationale:

The Competition Authority established two key principles, applicable on price discrimination cases:

- When assessing whether a commercial offer may be matched by a competitor, the economic analysis should be conducted with regard to the single components of the offer and not to the bundle of services (i.e. local calls, national calls, international calls, etc.) since the final customer can later “cherry pick“ the services to buy;

- The incumbent operator should apply the same cost base not only to services provided to its own final customers, but also to wholesale services provided to competitors in order to avoid the price squeeze effect.

Competitive Impact:

It is still difficult to assess the impact of this case since the Authority decision has been appealed. A final judgment is expected soon.

THE JAPAN FAIR TRADE COMMISSION

Case Name, Decision-Maker and Date of Decision:

The Japan Fair Trade Commission (JFTC), issued a recommendation to Nippon Telegraph and Telephone East Corporation (NTT East) on 4 December 2003.

The public version is available at :
http://www.jftc.go.jp/e-page/pressreleases/2003/december/031204ntt.pdf

Antitrust/Telecommunications-Specific Issue Raised:

In the Eastern Area of Japan, almost all of new entrants or competing telecom operators without their own optical subscriber lines have no choice but to interconnect optical subscriber lines widely possessed by NTT East so as to run the FTTH (*1) service business since the establishment of optical subscriber lines and communication networks takes a huge amount of costs as well as requires a long time in completing legal procedure in leasing its conduits and telephone polls. Under this situation, there should be an antitrust and telecommunications-specific concerns, if the NTT East, a dominant telecom company which possesses significant share of the optical subscriber lines in the region, sets the retail price of the FTTH service to a customer in a certain category below the interconnection charge of optical subscriber lines leased by it for the competing telecom operators to provide the same service to the customer, namely, the wholesale price of the FTTH service.

*1 Fiber To The Home: The connection service to provide Internet access enabling broadband communications by connecting a terminal facility of telecommunications carrier and a user's home with optical fiber.

Competition Agency's Position/Arguments:

NTT East, using optical fiber cables of its own, provided the FTTH service for customers at a certain level of user fee as well as leased the rest of unused optical fiber cables for competing operators to provide the same kind of the service at a regulated interconnection charge.

NTT East, in its offer of the FTTH service for detached houses, reset the user fee for an entry plan of the FTTH service named "New Family Type" by the split system, which means that each cable is split into up to 32 customers of detached houses, in order to reduce the user fee without lowering the interconnection charge. However, the split system was not used in practice but the direct cable connection system, which means that one user is allowed to use the one optical fiber cable, was used so as to offer New Family Type service. Therefore the user fee of the service was in reality lower than the interconnection charge per one optical subscriber cable and this price setting excluded the business activities of the telecommunication carriers who offered the FTTH services for detached houses through interconnecting with the optical subscriber lines of NTT East. Thereby it was causing, contrary to the public interest, a substantial restraint of competition in the field of the FTTH service for detached houses in the Eastern area of Japan.

Decision:

The JFTC recommends as follows:

(a) NTT East to cease the conduct that it interferes with a new entry of other telecommunications carriers, who offer the FTTH service through interconnecting with optical subscriber lines of NTT East, into the field of the FTTH service for detached houses, by allowing one user to use the one optical fiber cable in providing the New Family Type service although it sets the interconnection charge and the users' fee by way of the split system.
(b) NTT East to do fair and proper indications to consumers in advertising of New Family Type,
(c) NTT East to inform the other telecoms who access the optical fibers of NTT East and consumers of the measures taken according to (a) above and non-recurrence of the above mentioned activities in the future,
(d) NTT East not to do the above mentioned (a) activities in the future.

Reasoning/Rationale:

NTT East possesses high-speed fiber-optic networks over eastern Japan, offers FTTH service to consumers, and rents unused optical fibers to other telecom carriers. It is difficult for the telecom carriers to offer an FTTH service without accessing the fiber-optic networks owned by NTT East because it is hard for them to build new fiber networks on their own. NTT East rents each optical fiber to other telecoms at 5,074 yen per month. NTT East offers an FTTH service named "B-FLET'S" to consumers.

When a company publicized its entry plan into FTTH service in March 2002, NTT East considered providing a cheaper FTTH service for consumers. Since NTT East considered that it was problematic in terms of fair competition to set a user fee which is cheaper than the interconnection charge for an each optical fiber cable, it avoided discounting the interconnection charge for an optical fiber cable by creating the system in which each cable is split into up to 32 consumers. Thus NTT East introduced a bargain category of B-FLET'S named "New Family Type" for detached houses consumers in June 2002 and set the charge (5,800 per month) after notification to the Minister of Public Management, Home Affairs, Posts and Telecommunications. But actually, NTT East did not practice the split system because of having so little demand among consumers and used the direct cable connecting method as before.

The competitor discounted its fees in December 2002 and NTT East considered discounting the user fee. In March 2003, NTT East notified the Minister of Public Management, Home Affairs, Posts and Telecommunications of discounting of New Family Type (4,500 yen per month) on the basis of cost down simulation per a user by the split method with the intention of preventing the fees of an optical fiber from dropping in order not to let other telecoms enter into the detached houses market. But actually, NTT East continues providing the service by the direct cable connecting method.

As the result of that, the New Family Type fee (4,500 yen per month) is lower than the access fee to other telecoms (5,074 yen per month), and telecoms except the carriers with own fiber networks can not enter into the detached houses market. By this way, NTT East prevents other telecoms from starting FTTH service to detached houses. The JFTC concludes that the conduct of NTT East substantially restricts competition in the trading field of FTTH service in eastern Japan.

Competitive Impact:

The JFTC issued a decision to initiate hearings to NTT East on January 19, 2004, and the case is now pending on hearing procedure.

KOREA FAIR TRADE COMMISSION

Case Name, Decision-Maker and Date of Decision:

The matter of improper concerted acts between 2 local telephone companies (Korea Fair Trade Commission Decision No. 2005-130, 18. August, 2005).

Antitrust/Telecommunications-Specific Issue Raised:

With an aim to narrow a local call rate gap between KT and Hanaro Telecom before the implementation of local phone number portability slated for late June 2003, KT made a suggestion that if Hanaro Telecom raised its rate while KT maintaining the rate it charges, KT would transfer its market share to Hanaro Telecom by 1.2 percentage point a year over the next five years. Hanaro Telecom agreed on KT's proposal on June 23, 2003. The Ministry of Information and Communication (MIC), the telecommunication regulatory authority, made administrative guidance on October 16, 2002. The guidance recommended KT and Hanaro Telecom activities similar to the agreement between the KT and Hanaro telecom.

KT argued that the agreement shall not be governed by competition law because it was inevitably made in accordance with the administrative guidence by MIC.

Competition Agency's Position/Arguments:

Competition law shall govern the agreement and the agreement was an illegal cartel.

Decision:

The KFTC finds the administrative guidance made by MIC does not prevent competition law from being applied to the agreement between KT and Hanaro Telecom.

Therefore, the KFTC imposed corrective orders and a total of 115.2 billion won (about 113 million USD) in surcharge on two local telephone companies—KT and Hanaro Telecom—for fixing prices in the local call market.

The amount of surcharge levied on KT is 115.97 billion won (about 1,104 million USD), the largest ever imposed on a single company. Hanaro Telecom received a 49% reduction in its surcharge for providing cooperation in cartel investigations under the leniency program.

Reasoning/Rationale:

The KFTC said there were no direct and specific administrative guidance by MIC concerned on price fixing between local call service providers, and that the administrative guidance issued in October 2002 was a mere recommendation.

Alternatively, even though the administrative guidance was the cause of the concerted acts, because the administrative guidance was not based on provisions in laws or regulations, the agreement between KT and Hanaro Telecom is illegal under the competition laws.

Concerted acts following administrative guidance with legal ground in law are not governed by the competition law only under the condition that i) they have an explicit and direct basis in the law, ii) the purpose, means, content and method of such acts are in accord with the law, and iii) the concerted act occurs as a result of the administrative guidance.

Competitive Impact:

The expected effect of the case is the expansion of consumer welfare by increased price and service competition in local call market.

FEDERAL COMPETITION COMMISSION (MEXICO)

Case Name, Decision-Maker and Date of Decision:

Declaratory statement to Telmex as an agent with substantial power on five relevant markets. A summary of the Federal Competition's resolution is available at: http://sp.cfc.gob.mx:8080/cfc01/Documentos/ing/Resolutions/Other/August2001/shp_RA-36-2001.htm

Antitrust/Telecommunications-Specific Issue Raised:

The prime concern in this case has been to sustain the Declaratory statement that Teléfonos de México, SA de CV (Telmex), the incumbent, has substantial market power in five telecommunications markets. The sectoral regulatory framework establishes that a FCC's Declaration on market power under the competition law criteria is a condition for the regulator, COFETEL, to impose additional regulations on tariffs, quality and information to the telecommunication carrier endowed with such power.

Competition Agency's Position/Arguments:

In 1997, the FCC determined that Telmex possessed substantial market power in five telephony markets, namely: local service, access to local networks, domestic long distance, international long distance, and signal transportation (intermediate service for long distance services). On February 1998, the FCC confirmed the initial resolution in an appeal for review filed by Telmex. In 2000, COFETEL issued specific regulations to control Telmex's market power, but the competition authority was not asked to participate in this proceeding as it was not mandatory under sectoral legislation.

Decision:

The FCC's decision has been subject to several *amparos* by Telmex before Federal Courts, resulting in the suspension of its decision and the withdrawal of COFETEL's remedial regulations in May 2002. The first reversal occurred in May 2001, when a Circuit Court granted an *amparo*[212] to Telmex against the FCC's 1998 resolution. By different legal means, including several *amparos*, Telmex has been successful in delaying the enforcement of the FCC's declaration on its market power that would trigger the issuance of specific regulations to control its dominant position in five relevant markets.

In August 2004, the FCC issued a new resolution satisfying the Circuit Court's rulings, but it was also challenged before the judiciary and resolution is still pending. Meanwhile, the issuance of regulations to control Telmex's market power remains suspended and the FCC continues addressing alleged anti-competitive conduct by this firm.

Reasoning/Rationale:

In 2001, the judiciary reversed Telmex's arguments that the FCC lacked jurisdiction to issue a Declaration with effects on telecommunications specific regulations, as well as to assess its market power under the competition law criteria. In judiciary suits against other FCC's decisions involving Telmex, the courts have responded that *"…Telmex is an economic agent*

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[212] The amparo lawsuit is a constitutional injunction that supersedes any other type of proceeding or resolution, and can be filed every time an individual constitutional right is allegedly infringed by any public authority.

under the terms of article 3 of the [FLEC] and, as result, it is subject to the economic competition law."

However, Telmex has been granted *amparos* that lead to reinstalling the FCC's resolution based on procedural matters. In May 2001 and April 2004, two Circuit Courts ordered the FCC to revoke its previous resolutions and issue new ones to replace them. In May 2001, a District Court decided that:

"*….it is not enough that the file contains a certification of the Executive Secretary of the Federal Competition Commission in the sense that the Plenum…resolved to "ratify" the initial resolution, … a new resolution should be issued, in writing,… even if [it] contains the same results, considerations, and resolving points, since both the Constitution and the Competition Law compel it to pronounce its acts in …writing…*
the lack of a definitive written resolution was alleged by the complaining party in its appeal for review, but the FCC…had not noticed the illegality pointed out in previous paragraphs…it is imperative to grant the constitutional protection requested to leave without effects such resolution and, in its place, to issue another one that…declares without foundations this appeal…"

In 2004, the Circuit Court decision confirmed that:

> *"…the declaration on substantial market power of the FCC constitutes the legal and indispensable presumption…to determine whether [the sectoral regulator] imposes specific obligations related to tariffs, service quality and information to the agent with substantial market power.*
> *…it is undeniable that the second proceeding results from the first one and…its legal validity will depend on the resolution of the first proceeding.*
> *…it is mandatory to modify the appealed act and declare partially founded the complaint under study, because the [previous] amparo sentence will not be satisfied until the pertinent authorities leave without effects the listed acts, that directly proceeds from a resolution opposed to the Constitution"*

Competitive Impact:

Due to the delays in imposing regulatory control on Telmex's substantial market power, the FCC has resolved several complaints from Telmex's competitors about monopolistic practices and has imposed sanctions to remedy their negative effects on competition conditions. In fact, 40 percent of the total amount of fines the Commission has imposed throughout its existence have been directed at Telmex, but several judicial actions have impeded their collection in practice.

FEDERAL COMPETITION COMMISSION (MEXICO)

Case Name, Decision-Maker and Date of Decision:

Auction to allocate radioelectric spectrum for broadband Personal Communications Services (PCS) at the 1.9 Ghz band.

Antitrust/Telecommunications-Specific Issue Raised:

In July 2004, the telecommunications regulator, COFETEL, called for an auction to allocate the remaining available spectrum for broadband PCS. Since spectrum is a scarce resource both, COFETEL and the FCC, share the objective of promoting its efficient allocation.

To participate in the auction the Federal Telecommunications Law requires prospective bidders to obtain the FCC's favorable opinion in order to avoid concentration prohibited under Article 28 of the Mexican Constitution. In addition, the auction call imposed a 65 MHz spectrum cap on the combined cellular and PCS frequencies for a (new or incumbent) license holder.[213] Once the seven prospective bidders revealed their purchase intentions, the FCC realized that the bids of the three larger incumbents in mobile telephony exceeded the available spectrum and no individual offer surpassed the 65 Mhz spectrum cap imposed by the regulator.

Competition Agency's Position/Arguments:

The FCC's chief concern in this case was that the auction would increase spectrum concentration, impede the entry of new carriers and diminish the prospects of long term competition in the relevant market. To prevent these results, the FCC adopted the specific goal of encouraging the entrance of new participants to the mobile telephony market by reducing spectrum caps.

Decision:

On January 2005, the FCC gave conditional clearance to prospective bidders to participate in the auction by limiting any agent's acquisition of spectrum to no more than 35 Mhz at the 1.9 Ghz band.

The three larger incumbents filed separated *amparo* lawsuits before Federal Courts against the FCC's decision. District Courts issued preliminary injunctions allowing them to participate in the auction under the COFETEL spectrum cap (up to 65 Mhz). Following the auction, in March and August 2005, the Circuit Courts reversed the District Courts' rulings and revoked the preliminary injunction. However, on the merits of the case, the District Courts also ruled that the FCC had exceeded its legal powers by changing the spectrum cap and ordered the FCC to reconsider the documents submitted by the applicants and rule on whether each could acquire up to 65 MHz or not. These decisions were appealed by the FCC to the Circuit Courts and final rulings are still pending.[214]

Reasoning/Rationale:

[213] This cap takes into account the spectrum owned, leased or otherwise exploited by the applicant, their affiliates and subsidiaries, and all shareholders (direct/indirect and major/minor).

[214] The Tenth Collegiate Tribunal in Administrative Matter of the First Circuit.

The Commission based its decision mainly on two conclusions: (a) incumbent carriers have the higher marginal valuations for scarce spectrum and, therefore, have strong incentives to hoarding it to deter the entry and limit the growth of competitors; and (b) the mobile telephony market is highly concentrated.

Competitive Impact:

The preliminary injunctions issued by the District Courts allowed incumbents to participate in the auction and succeed in obtaining more than 35 Mhz in some regions. However, any spectrum amount above the cap determined by the FCC has not been awarded and it is still unclear whether it will be awarded once the Circuit Courts reach a final decision on the merits and possible remedies.

NEW ZEALAND COMMERCE COMMISSION

Case Name, Decision-Maker and Date of Decision:

Commerce Commission v Telecom Corporation of New Zealand Limited & Telecom New Zealand Limited CP No. 148/00

The Commission commenced court action against Telecom alleging that it contravened section 36 of the Commerce Act 1986 in introducing its 0867 package. Statement of Claim filed 31 July 2000.

Antitrust/Telecommunications-Specific Issue Raised:

Telecom had in place interconnection agreements with a number of competitors, which provided for payments to be made for originating and terminating access services. When the agreements were reached, Internet calls were a small proportion of traffic.

By around mid-1998, Internet traffic had grown considerably and was forecast to continue to do so. Many Internet service providers (ISPs) had introduced flat rate pricing, encouraging customers to stay online longer. With 99% of residential telephone customers being on the Telecom network, Telecom found itself suddenly paying large amounts of money to terminate calls to ISPs on its competitors' networks. With free local calling, Telecom received no revenue to offset these termination payments.

On 10 June 1999, Telecom unilaterally announced a package of services (the "0867 package") in order to address what was termed "the Internet problem". The 0867 package involved:

a) segregated numbering for Internet calls to ISPs utilising an 0867 number range;

b) an Internet Dial-up Charge for Internet calls by Telecom residential telephone customers to ISPs utilising a local call number (pre-existing numbers); and

c) telecom paying no terminating payments in respect of 0867 numbers.

Competition Agency's Position/Arguments:

Section 36 prohibits persons who hold a dominant position in a market from using that position for various purposes, including preventing or detering competitive conduct by others.

The Commission alleges that in introducing 0867 Telecom sought to prevent or deter competitive conduct by other telecommunications network operators and ISPs. In a hypothetically competitive market, a person otherwise in the same circumstances, but without Telecom's market power, would not have been able to introduce the 0867 package.

Decision:

It is for the court to determine whether a contravention occurred. The Commission is not empowered to make such a finding. Court hearing yet to occur. If the Court finds that Telecom breached the Act, then it could order Telecom to pay a penalty of up to $5 million and could also impose a wide range of orders and injunctions.

Reasoning/Rationale:

Court hearing yet to occur.

NEW ZEALAND COMMERCE COMMISSION

Case Name, Decision-Maker and Date of Decision:

Commerce Commission v Telecom Corporation of New Zealand Limited & Telecom New Zealand Limited CIV-2004-404-1333

The Commission commenced court action against Telecom alleging a contravention of section 36 of the Commerce Act 1986 in respect of Telecom's pricing of access to data tails . Statement of Claim filed 18 March 2004.

Antitrust/Telecommunications-Specific Issue Raised:

On or about 1 December 1998, Telecom introduced new pricing for its retail high-speed data transmission services (termed "Streamline"), and in March 1999 Telecom introduced new wholesale pricing (termed carrier data pricing ("CDP"). Through CDP, Telecom provided and continues to provide other telecommunication service providers competing with Telecom with two wholesale data service options:

a) the ability to resell Telecom's retail high-speed data transmission services (both dedicated and switched). Through CDP, Telecom offers other telecommunications service providers its retail end-to-end high-speed data transmission services for re-sale; and

b) access to dedicated data tails in Telecom's network in order to supplement the other telecommunications service providers' own network and, thereby, provide retail high-speed data transmission services.

Competition Agency's Position/Arguments:

Since 26 May 2001, section 36 of the Commerce Act prohibits persons who have a substantial degree of market power in a market from taking advantage of that position for various purposes, including preventing or deterring competitive conduct by others. Prior to 26 May 2001, the prohibition under the Act was use of a dominant position.

The Commission alleges alleging that Telecom has misused its market power, and continues to do so, to prevent or deter competition in markets involving high speed data transmission. That alleged behaviour includes Telecom setting retail prices lower than wholesale prices for a particular product.

The Commission alleges that Telecom has priced access to its data tail services for high speed data transmission, for the purposes of deterring potential and existing competitors from engaging in competitive conduct.

Specifically, the Commission alleges that the manner in which data tails are provided, and the way in which it is priced has the effect that in almost all circumstances the price charged by Telecom for access data tails required by other telecommunication service providers to supplement their own network:

a) Exceeds the price charged by Telecom to the telecommunication service provider for an "end to end" data service, when provided for re-sale;

b) Exceeds the comparable retail price charged by Telecom for provision of comparable data services;

c) Exceeds the price Telecom charges itself for access to the data tails; and

d) Exceeds the sum of Telecom's direct incremental cost and opportunity cost of supplying access to the data tails.

Decision:

It is for the court to determine whether a contravention occurred. The Commission is not empowered to make such a finding. Court hearing yet to occur. If the Court finds that Telecom has breached the Act, it could order Telecom to pay a penalty of up to $10 million or either three times the value of any commercial gain resulting from the breach or if commercial gain is not known, then 10 percent of the turnover of the business.

Reasoning/Rationale:

Court hearing yet to occur.

TURKISH COMPETITION AUTHORITY

Case Name, Decision-Maker and Date of Decision:

ISP Case, Turkish Competition Board, 2.10.2002, http://www.rekabet.gov.tr/pdf/02-60-755-305.pdf (only in Turkish). Appeal process is pending.

Antitrust/Telecommunications-Specific Issue Raised:

The case was about complaints lodged by Internet Service Providers concerning the activities of Turk Telecom, the incumbent, state-owned fixed line operator, in internet access market. Main issue was that Turk Telecom, which had a legal monopoly over fixed line infrastructure at that time, excluded competition in the retail dial-up internet services market by charging high prices for infrastructure services which ISPs had to use to provide services in this market. Tariffs for infrastructure services were subject to the approval of Ministry of Transport at the time of complaint.

Competition Agency's Position/Arguments:

Reporters, investigating the case and bringing it before the Competition Board, claimed that Turk Telecom abused its dominant position in different ways in order to exclude competition coming from other ISPs in internet access services market.

Decision:

Competition Board accepted some of the claims of reporters and found that the independent ISPs could not effectively compete in the dial up internet access services market because of the margin between the low prices charged by Turk Telecom for its own retail services and the high prices charged for the infrastructure services used by competing ISPs. Therefore, the Board found that Turk Telecom abused its dominant position contrary to Competition Act and fined Turk Telecom.

Reasoning/Rationale:

The Board, by considering that the Ministry only approves the tariffs instead of setting them, decided that Turk Telecom's practices infringed the Competition Act.

TURKISH COMPETITION AUTHORITY

Case Name, Decision-Maker and Date of Decision:

Roaming Case, Turkish Competition Authority, 9.6.2003, http://www.rekabet.gov.tr/pdf/03-40-432-186.pdf (only in Turkish). Appeal process is pending.

Antitrust/Telecommunications-Specific Issue Raised:

Two incumbent GSM operators, Turkcell and Telsim, refused newly licensed GSM operator, Aria, to supply national roaming capabilities, although telecommunications legislation explicitly obligated GSM operators to provide their infrastructures for the use of new GSM operators and Telecommunications Authority issued the relevant regulation. The new operator in question, at the same time, applied to the Competition Authority and sought national roaming by claiming that the two incumbent operators were abusing their positions contrary to Competition Act.

Competition Agency's Position/Arguments:

Reporters, investigating the case and bringing it before the Competition Board, claimed that two incumbent operators, who had joint dominance in GSM infrastructure market, abused that position by refusing to supply access to essential infrastructure (roaming) which was deemed as an essential facility for the first two years of the network roll out period.

Decision:

Competition Board found that the two incumbent providers abused their joint dominance that they had in the GSM infrastructure market; ordered these undertakings to provide roaming services to the new GSM operator, and fined these two undertakings.

Reasoning/Rationale:

The Board, by considering the importance of network effects in mobile services market and network coverage especially at early stage of entry, found that GSM infrastructure was an essential facility for newcomers and incumbent operators abused their joint dominance by refusing to supply roaming services in this market in order to complicate the activities of the new entrant.

Competitive Impact:

Neither intervention under sector specific legislation nor intervention under competition law remedied the problem and the new entrant left seeking roaming after it merged with another new entrant operator in the market.

TURKISH COMPETITION AUTHORITY

Case Name, Decision-Maker and Date of Decision:

UMTH (Long Distance Telephony Operators) Case, Turkish Competition Board, 19.10.2004, http://www.rekabet.gov.tr/pdf/04-66-956-232.pdf (only in Turkish).

Antitrust/Telecommunications-Specific Issue Raised:

The case was about complaints lodged by the Association of Internet Service Providers and Association of Telecoms Operators concerning the activities of Turk Telecom, the incumbent, state-owned fixed line operator, in long distance and international calls market. Main issue was that Turk Telecom, after liberalization of the fixed telephony market, sustained its interconnection prices for long distance and international calls at the same level while it lowered its retail tariffs for these calls. It was claimed that Turk Telecom aimed to complicate the activities of newly licensed long distance telephony operators.

Competition Agency's Position/Arguments:

Reporters, investigating the case and bringing it before the Competition Board, considering the issuance of reference interconnection tariff by Telecommunications Authority and presence of arbitration mechanism under the regulation issued by Telecommunications Authority on access and interconnection, which were absent at the time of complaint, claimed that there was no need to proceed an investigation under the Competition Act.

Decision:

The Board adopted a Decision parallel with the Opinion of Reporters. Considering that the arbitration procedure was initiated under telecommunications legislation, the Board did not open an investigation.

Reasoning/Rationale:

The Board, by considering the reference interconnection tariff issued by Telecommunications Authority and initiation of arbitration mechanism under the access and interconnection regulation, decided that possible anti-competitive behavior, which could stem from high interconnection prices and relatively low retail prices (margin squeeze), could be effectively dealt with under the telecommunications legislation.

UNITED STATES (DOJ)

Case Name, Decision-Maker and Date of Decision:

United States v. Verizon Communications Inc. and MCI, Inc.
and
United States v. SBC Communications Inc. and AT&T Corp.

Proposed settlements between the U.S. Department of Justice (Antitrust Division) and the companies requiring divestitures to resolve the Antitrust Division's competitive concerns about the proposed transactions, in the United States District Court for the District of Columbia. Both announced on October 27, 2005.

Available at:
http://www.usdoj.gov/atr/cases/verizon.htm
http://www.usdoj.gov/atr/cases/sbc2.htm

Antitrust/Telecommunications-Specific Issue Raised:

Would the proposed transactions to combine the local telecommunication networks and voice and data services of the parties substantially lessen competition in any relevant markets.

The transactions were also subject to review by the Federal Communications Commission (FCC). The Antitrust Division coordinated with the FCC throughout its investigations. For more information on the FCC reviews see: http://www.fcc.gov/transaction/verizon-mci.html and http://www.fcc.gov/transaction/sbc-att.html.

The FCC Orders are available at:
Verizon/MCI: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-184A1.pdf
SBC/AT&T: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-183A1.pdf

Competition Agency's Position/Arguments:

The Antitrust Division determined that each transaction, as proposed, would substantially lessen competition for local private lines that connect hundreds of commercial buildings in the acquiring firm's (SBC and Verizon respectively) franchised territories to a carrier's network or other local destination, and other telecommunications services that rely on local private lines.

The Antitrust Division determined that local private lines constituted a relevant market. A local private line is a dedicated, point-to-point circuit offered over copper and/or fiber-optic transmission facilities that originates and terminates within a single metropolitan area. Local private lines can be used to carry voice traffic, data, or a combination of the two.

Decision:

The Antitrust Division determined that the transactions, as originally proposed, would have resulted in higher prices for certain business customers in 8 metropolitan areas in Verizon's franchised territory and 11 metropolitan areas in SBC's franchised territory. The settlement requires Verizon and SBC to divest portions of certain local fiber-optic network facilities in these areas in order to proceed with their respective acquisitions of MCI and AT&T.

Reasoning/Rationale:

Verizon and MCI were the only two firms that owned or controlled a direct wireline connection to hundreds of buildings in eight identified metropolitan areas. Similarly, SBC and AT&T were the only two firms that owned or controlled a direct wireline connection to certain buildings in eleven identified metropolitan areas. In the absence of new entry, the mergers would have eliminated competition for facilities-based local private line service to those buildings. These local private line connections are used to supply voice and data telecommunications services to business customers in these locations.

In all other areas in which the merging firms competed, including residential local and long distance service, Internet backbone services and a variety of telecommunications services provided to business customers, the Antitrust Division concluded that the transactions would not harm competition, due to existing competition, emerging technologies, the changing regulatory environment, and large merger-specific efficiencies.

The Antitrust Division considered numerous product and geographic markets and evaluated all overlaps between the merging parties. The Division took into account competition from cable companies as well as emerging technologies such as voice over Internet protocol (VOIP). The Division also considered changing FCC regulatory requirements and efficiencies that the parties claimed would result from the mergers.

UNITED STATES (DOJ)

Case Name, Decision-Maker and Date of Decision:

Sprint Corporation's acquisition of Nextel Communications Inc.: Department of Justice's (Antitrust Division) announced closing of its investigation into Sprint's proposed acquisition of Nextel, August 3, 2005.

Available at:
http://www.usdoj.gov/atr/public/press_releases/2005/210412.htm

Antitrust/Telecommunications-Specific Issue Raised:

Would the proposed transaction between the third and fifth-largest providers of wireless services with a national presence substantially lessen competition for mobile wireless voice and data services.

The transaction was also reviewed by the Federal Communications Commission (FCC). The Antitrust Division coordinated with the FCC throughout its investigation. For more information on the FCC review see: http://www.fcc.gov/transaction/sprint-nextel.html.

The FCC Order is available at:
http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-148A1.pdf

Competition Agency's Position/Arguments:

Competition between Cingular and AT&T Wireless in the relevant geographic areas had resulted in lower prices and higher quality in mobile wireless telecommunications services than would otherwise have existed in these geographic areas. Cingular's acquisition of AT&T Wireless, as originally proposed, would have substantially lessened competition in mobile wireless telecommunications services and mobile wireless broadband services in the relevant geographic areas. Mobile wireless telecommunications services include both voice and data services provided over a radio network and allow customers to maintain their telephone calls or data sessions without wires. The Division argued that there are no cost-effective alternatives to mobile wireless telecommunications services or mobile wireless broadband services. Fixed wireless services and other wireless services that have a limited range (e.g., Wi-Fi) do not offer viable alternatives. The Division also argued that the relevant geographic areas were local or regional.

Decision:

The settlement required Cingular to divest assets in 13 areas in 11 states in order to proceed with the acquisition (mobile wireless services in 10 areas and mobile wireless broadband services in 3 areas).

Reasoning/Rationale:

Cingular and AT&T Wireless were two of six mobile wireless services providers with a national presence, offering mobile wireless telecommunications services, which include both voice and data services provided over a mobile wireless network, in areas throughout the United States. The proposed transaction would have reduced competition for mobile wireless telecommunications services in 10 areas, and for mobile wireless broadband services in three additional areas. In nine of the 10 geographic areas where there was potential harm to wireless telecommunications services, Cingular and AT&T Wireless were, or held interests in, the two largest incumbent wireless providers. In the three geographic areas where the Division alleged harm for mobile wireless broadband services, the merging companies were also two of a limited number of mobile wireless services providers who had launched or were likely to launch mobile wireless broadband services, which offer data speeds four to six times faster than existing service. As a result, the loss of competition between Cingular and AT&T Wireless would have increased the likelihood of unilateral actions by the merged firm in the relevant geographic areas to increase prices, diminish the quality or quantity of services provided, refrain from or delay making investments in network improvements, and refrain from or delay launching new services.

Without the required divestitures, wireless customers in the identified areas would have had fewer choices for their wireless telephone service and faced the risk of higher prices, lower quality service, and fewer choices for the newest high-speed mobile wireless data services.

UNITED STATES (DOJ)

Case Name, Decision-Maker and Date of Decision:

United States and Plaintiff States v. Echostar Communications Corp., Hughes Electronic Corp., General Motors Corp., and DirecTV Enterprises, Inc.

Complaint filed in the United States District Court for the District of Columbia on October 31, 2002. Available at: http://www.usdoj.gov/atr/cases/echost0.htm

Antitrust/Telecommunications-Specific Issue Raised:

Would the proposed transaction between the two most significant nationwide direct broadcast satellite (DBS) companies substantially lessen competition for multichannel video programming distribution (MVPD) services. At the time, Echostar and Hughes marketed and sold MVPD equipment and services throughout the United States through the Dish Network (DISH) and DirecTV (DTV), respectively.

The proposed merger between Echostar and Hughes was also subject to review by the Federal Communications Commission (FCC) for the transfer of licenses for the DBS service. The Antitrust Division coordinated with the FCC throughout its investigation. For more information on the FCC review see: http://www.fcc.gov/transaction/echostar-directv.html.

The FCC Order is available at:
http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-02-284A1.pdf

Competition Agency's Position/Arguments:

The Antitrust Division identified the relevant product market as multichannel video programming distribution (MVPD) to include cable television and DBS. Although the programming can in theory be delivered via a number of distinct methods, the only firms to experience a significant degree of commercial success are those distributing programming via digital or analog cable, or direct broadcast satellite. Moreover, although the two DBS firms competed against cable TV services, the Division concluded that important head-to-head competition between DISH and DTV would be lost if the merger was to proceed.

Decision:

After investigation, the Antitrust Division determined that the combination of the nation's only two DBS firms would have substantially lessened competition in violation of the Clayton Act. The United States and the Plaintiff States therefore filed suit in federal court seeking an order to permanently enjoin the merger.

On October 18, 2002, the FCC, citing substantial competitive concerns, stated that it was noticing the license transfer application for a hearing. The parties terminated the proposed merger due to the Antitrust Division's decision to block the merger and the FCC's decision to send the merger application to a hearing.

Reasoning/Rationale:

At the time, over 80% of households in the United States subscribed to a MVPD service such as DBS or cable. DTV and DISH each offered hundreds of channels to customers equipped with small satellite receiver dishes. For most households, DISH and DTV were two of only three providers of MVPD services, with a local cable system providing the third option. For many others, mostly in rural areas, DISH and DTV were the only option.

Hughes and Echostar competed vigorously against each other throughout the United States as well as against cable companies in areas that had cable. As a result of the competition between Hughes and Echostar, customers benefited from lower prices and higher quality service. The proposed acquisition of Hughes by Echostar would have caused significant harm to competition in numerous local markets for MVPD services throughout the country. For millions of households this merger would have created a monopoly. For tens of millions of households in the United States, this merger would have created a duopoly. For the roughly 95% of U.S. television households that currently have three or fewer options for MVPD service, the merger would have led to higher prices and lower service quality.