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◆ Academic qualifications

Master of law (1976/77–1980/81)
Faculty of Law, Complutense University, Madrid
Diploma in European Studies (1984)
- Spanish Diplomatic School, Ministry for Foreign Affairs, Madrid
Certificate of European Studies (1985)
- University of Social Sciences, Grenoble(France)



◆ Professional experience

1982 – 1987: Banco de Bilbao (currently Banco Bilbao Vizcaya Argentaria).

Member of the bank's central insurance department.

01/05/1987 – 14/04/1991: Unit A-5 (Public-sector companies and state monopolies Unit). – DG COMP,

15/04/1991 – 31/10/1995: Unit C-2 (Agreements, abuses of dominant position and other distortions of competition, "Energy and basic chemicals" Unit) – DG COMP

16/11/1995 – 31/08/1999: Appointed Head of DG COMP Unit G-5 (at that moment dealing with all industrial sectors and the reunification of Germany), within the directorate responsible for "State Aid", charged with the application of Articles 87 and 88 of the Treaty in the field of "textile, papers, chemical, pharmaceutical, electronic industry, mechanical engineering and other manufacturing sectors".

01/09/1999 – 30/09/2006: Head of DG COMP Unit G-3, Directorate C "Information, communication and media",

01/10/2006 – 31/07/2007: Director of Directorate D – Services – Directorate General Competition (COMP).

01/08/2007 – 14/05/2011: Director of Directorate C – Information, Communication and Media. Directorate-General Competition (COMP).

01/11/2010 – 14/05/2011: Acting Deputy Director-General for Mergers and Antitrust – Directorate-General Competition (COMP).

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Disclaimer

The views expressed are purely those of the writer and may not in any circumstances be regarded as stating an official position of the European Commission.

**TOPIC 1: AN OVERVIEW OF AND STATISTICS AS TO THE
NUMBER OF ANTITRUST CASES BROUGHT OVER THE LAST 20
YEARS BY THE EUROPEAN COMMISSION**

KEY MESSAGES

- There are actually not that many dominant companies out there in the market – far fewer than the companies that engage in cartels and other anti-competitive agreements. And yet **a sizeable portion of our antitrust enforcement activities in Europe over the past decade has been dedicated to tackling abuses** (more than **20% of our cases**). Indeed, many of our landmark decisions are abuse cases.
- In total, the Commission has adopted 33 decisions of Article 102 TFEU over the past decade. In addition, the competition authorities of the EU Member States, who are also fully competent to apply Article 102, have adopted around 250 decisions in application of Article 102. As European Commission, each year we thus adopt on average 3 decisions on abusive practices by dominant companies. And I can tell you that amongst the investigations we have currently ongoing, more than a dozen [*actually 14*] cases concern the potential abuse of a dominant position.
- We take deterrence of serious infringement of Article 102 very seriously. In this respect over the last decade the Commission has imposed just over EUR 2 billion in fines for substantive infringements of abuse of dominance. For the sake of clarity this figure does not include procedural infringements

related to abuse of dominance cases¹ nor does it reflect the numerous and significant Article 102 commitment decisions [*more than half of our 102 decisions*] that are taken without the imposition of a fine.

- At the Commission (and, by the way, also at the competition authorities of the EU Member States), we have concentrated on recently liberalised **sectors** or sectors in the process of liberalisation, such as telecoms, media, energy and transport. These sectors are often characterised by high market concentration and/or the presence of dominant operators.
- The main focus (both for us and the NCAs) has been on **exclusionary practices (84% of the Commission Article 102 cases)** as opposed to exploitative practices which, as you know, for dominant firms are also prohibited under Article 102
- We have tackled a **wide range of exclusionary practices** such as refusal to deal (*Polish Telekom*), rebates (*Intel, Tomra*), tying/bundling practices (*Microsoft, Rio Tinto Alcan* [contractual tying], predation (*France Telekom (Wanadoo)*), margin squeeze (*Telefonica, Deutsche Bahn, Slovak Telekom*) and exclusivity clauses (*Tomra, Distrigas*).
- In addition, we have been confronted with some less **conventional forms of exclusionary abusive behaviour** which do not fit squarely in the traditional categories of exclusionary abuses. In *AstraZeneca* for instance, we dealt with the misuse of patent systems and national regulatory systems, while in the *Intel* case, in addition to abusive rebates schemes, we found that payments made by Intel to computer manufacturers for postponing or cancelling the launch of competitors' products constituted a naked restriction of competition falling within the ambit of Article 102 TFEU. In the *Servier* case of last summer, we found that the firm's strategy and measures to delay the market entry of generic drug producers infringed Article 102.
- We pursued less frequently cases involving **exploitative abuses (16%)**, such as excessive prices (e.g. *Rambus*). There are probably several reasons why

¹ Microsoft was fined EUR 899 million for non-compliance with obligations under a Commission infringement decision and was more recently fined EUR 561 million for breach of commitments given to the Commission

exploitative abuse cases are less frequent than exclusionary abuse cases. One is of course that it can be challenging for any enforcement agency to determine what a fair (i.e. non-exploitative) price would be. But we have the clear and explicit mandate in Article 102 letter (a) that we should pursue these cases and therefore have to live up to that challenge. Some of our ongoing Article 102 cases concern exploitative pricing. Another reason probably why there are less exploitative cases is that we focus more on exclusionary cases, i.e. we try to intervene before competitors have been excluded from the market. After all, it is better to prevent exclusion than to "cure" later excessive behaviour.

- To conclude, let me mention a particularity we have in our European legal system: we have the specific power in our Treaty (Article 106) to attack State measures that unduly protect State owned or controlled dominant firms or certain privileged private dominant firms from competition. This can be an effective tool for safeguarding competition in newly liberalised markets, especially where these markets are closely linked to markets reserved by the State for public or privileged incumbents. Such cases are less frequent though. In the past decade we have adopted four decisions against EU Member States finding infringements of Article 106(1) TFEU in conjunction with Article 102 TFEU (recently, *Greek lignite*, *Slovak Post*). After a very welcome clarification of the law by the European Court of Justice last year in the *Greek Lignite* case, I would expect a certain uptake of enforcement activity here.
- With an average of 3 abuse decisions that the Commission adopts per year and some 20-30 decisions that the national authorities of the Member States adopt each year, antitrust enforcement against dominant companies is very much alive in Europe.

TOPIC 2 COMPETITION LAW IN THE TELECOMMUNICATION INDUSTRY

- A well-functioning telecoms sector is a pre-condition for a flourishing digital single market.
- Since the telecoms sector was **liberalised** in Europe over 15 years ago, the combination of sector regulation and enforcement of the competition rules have brought by a competitive environment in telecoms at the national level, which has resulted in services of quality at affordable prices.
- Indeed, **competition is a driving force of innovation** and quality networks and services. In a competitive environment, operators are in a constant race to satisfy demand and provide better and more affordable services.
- However, **the beneficial effects of liberalization have only been felt so far at national level**. Today we have a series of national telecommunications markets with different supply and demand conditions. Telecoms operators have national strategies even when they form part of larger multinational groups. Important differences exist within the EU as regards telecoms regulation and spectrum policies, which hinder the potential for further investment and the emergence of innovative businesses at an EU level. This prevents the EU from reaping the full potential of an EU-wide telecoms market.
- A number of **Commission decisions** have addressed antitrust infringements by telecoms operators in the EU. Action has focused on incumbents trying to **prevent competition from alternative operators**, typically by refusing to grant them access to the incumbent's network or by practices of margin squeeze. **Collusion** between telecom operators has also been a matter of concern, in particular practices aimed at market partitioning.

➤ Case / Parties	➤ Year	➤ Infringement	➤ Judicial review
➤ Slovak Telekom / Deutsche Telekom	➤ 2014	➤ Margin squeeze and refusal to supply	➤ Under appeal
➤ Telefónica / Portugal Telecom	➤ 2013	➤ Non-compete clause	➤ Under appeal
➤ Telekomunikacj a Polska	➤ 2011	➤ Refusal to supply	➤ Under appeal
➤ Telefónica	➤ 2007	➤ Margin squeeze	➤ Fully confirmed by the ECJ
➤ Deutsche Telekom	➤ 2003	➤ Margin squeeze	➤ Fully confirmed by the ECJ

- A recent development is the increasing importance of **network sharing** between mobile operators – i.e. the sharing of elements of the operators' radio access networks.
- The lighter forms of network sharing (i.e. passive sharing, which involves the "non-intelligent" elements of the access network, like the sites or the towers) are very often seen in practically all EU Member States, while the deeper forms of cooperation (i.e. active sharing, which concerns the "intelligent" parts of the access network – the base stations and the controllers) are becoming increasingly popular. We are aware of **active network sharing agreements, with or without spectrum sharing, in many Member States.**
- To state the obvious, network sharing can be pro-competitive.
- if deployment takes place which would not occur absent the cooperation; or

- if network sharing produces sufficient efficiencies; a fair share of those efficiencies is passed on to consumers; any restrictions are indispensable to achieve the efficiencies in question; and, of course, if there is no possibility of eliminating competition.

- As regards merger control, the Commission has the exclusive jurisdiction to review mergers between companies which exceed a certain size in terms of revenues, even if these companies are only active in one or few Member States. This is why, over the recent years, the Commission has reviewed several mergers between telecom operators in the EU, including many which only concerned operators active in only one Member State.

- **Telecoms markets in Europe still operate nationally**, so the Commission examines mergers on that basis, looking at the potential impact for business customers and consumers.

- The aim of the Commission is to ensure that mergers do not give rise to market structures or market dynamics which lead to higher prices, less investments and less innovation in the market.

- In the mobile sector alone, between 2006 and 2014, the Commission reviewed seven mergers between mobile operators active in the same national market. **All these transactions were ultimately approved by the Commission**. However, in a number of them (five), **the Commission had to intervene** (i.e. impose remedies) to ensure that the outcome of the merger was not detrimental to consumers and businesses.²

²

Case	Description and outcome
TPG IV/Apax/Q-Telecom (2006)	4-3 in Greece; cleared unconditionally
T-Mobile/tele.ring (2006)	5-4 in Austria; cleared with remedies
T-Mobile/Orange NL (2007)	4-3 in the Netherlands; cleared unconditionally
T-Mobile/Orange UK (2010)	5-4 in the UK; cleared with remedies
H3G Austria/Orange AT (2012)	4-3 in Austria; cleared with remedies
H3G Ireland/O2 IRL (2014)	4-3 in Ireland; cleared with remedies
Telefónica O2/E-Plus (2014)	4-3 in Germany; cleared with remedies

➤ **Towards a true Single Market?**

- In the **mobile segment**, the EU is behind other economic areas in terms of coverage of 4G/LTE networks.
- Take for example the US. The **US advantage** is to a great extent due to the fact that the US is a **single non-fragmented telecoms market** for 320 million people, as opposed to 28 separate national markets in the EU.
- Moreover, important differences exist as regards **spectrum policies**: while in the US the spectrum for 4G networks was allocated in 2008, the late and uncoordinated national auctions of spectrum delayed the launch of 4G technologies in many EU Member States. For example, the first commercial launch worldwide of a 4G/LTE network took place in Sweden in 2009 (and Sweden is today one of the most advanced countries as regards 4G/LTE coverage), while in Ireland or in Spain, 4G/LTE was made available only as recently as in 2013.
- There should be a move towards **more coordination** of national allocation procedures, so that **spectrum assignment** across the EU is as harmonized as possible.
- This does not mean that only large operators can obtain spectrum. In the US, where the FCC is the only authority which allocates spectrum, not only state-wide and nation-wide bands are assigned: the territory is divided into hundreds of local areas to allow smaller operators to offer services. Operators can trade the spectrum they own; this facilitates market entry and exit. At the same time, it is necessary to ensure that the transition to NGAs does **not lead to the rolling back of the high level of competition achieved so far**.

TOPIC 3: STANDARD ESSENTIAL PATENTS AND THE LITIGATION SURROUNDING THEM

- The enforcement of Standard Essential Patents (SEPs) continues to be of strategic importance in the telecommunication industry: patent litigations all over the world form part of the so-called "**patent war**". The European Commission has been no stranger to this pattern and it has also dealt with this type of cases.
- Last year the Commission adopted two decisions, against **Motorola and Samsung** (prohibition Article 7 decision and commitment Article 9 decision respectively), which provide guidance to the market on the use of SEPs.
- In a nutshell, the Commission position is that **recourse to injunctions is a legitimate remedy for patent infringements. However, such conduct may be abusive where:**
 - first, a SEPs holder has given a voluntary commitment to licence on FRAND terms, and
 - second, the potential licensee against which the injunction is sought is willing to enter into a licence on FRAND terms.
- I understand that there is also broad agreement within the industry on the basic principle that there should not be any injunctions against implementers willing to take a licence on FRAND terms. The Commission's decisions and the underlying principle strike the right balance between the interests of patent holders, who should be fairly remunerated for the use of their intellectual property, and those of the implementers of standards, who should get access to the standardised technology without being "held up" through abuses of market power.
- Our **Motorola** decision creates a "**safe harbour**" for licensees willing to accept **3rd party determination of FRAND terms**, and the **Samsung** decision provides an example of how such a safe harbour can be implemented in

practice. An independent monitoring trustee has been appointed and oversees the proper implementation of the Samsung commitments so as to ensure that the mandatory negotiation period (up to 12 months) and if necessary, a FRAND determination by a court or arbitrator goes smoothly.

- I would also like to emphasize that the US and Europe are very much in line in the fundamentals pertaining to the SEPs cases. An illustration of it, is the consent decree in the FTC Google/Motorola case which very much is in line with the Commission's position in its recent Samsung case.
- Going forward the **Commission will continue to closely monitor SEP issues.** However, willing licensees and SEP holders now have a path to a solution of their dispute and we already see companies using this path.

TOPIC 4: EXCLUSIVE DEALING IN UNILATERAL CONDUCT CASES

KEY MESSAGES

- In Europe, cases related to exclusive dealing and exclusivity enhancing rebates are not new to the European Commission. As you certainly know, three weeks ago, the Commission decided to **open proceedings against Google** to assess whether the company had breached EU antitrust rules for entering into anticompetitive agreements or abusing a possible dominant position in relation to operating systems, applications and services for smart mobile devices such as smartphones and tablets. The Commission will investigate, among other things, the following two allegations according to which Google would have illegitimately hindered the development and market access rival applications or services on smartphones and tablets by:
 - **requiring or incentivising exclusive pre-installation** of Google's own applications or services
 - **tying or bundling** certain Google applications and services distributed on Android devices with other Google applications, services and/or application programming interfaces of Google.

You will understand that at this preliminary stage of the instruction I will not comment further on the investigation, although it is clear that our enquiry on Android has clear links with the subject of today's seminar.

- The General Court of the European Union issued last year a landmark judgment upholding the Commission's Decision imposing a fine to **Intel** of EUR 1.06 billion. In essence, the abuse consisted of Intel foreclosing AMD from the market for x86 microprocessors by means of exclusivity rebates, direct payments to customers for not buying from AMD and other naked restrictions.

- The judgment is under appeal, and we will have to wait what the Court of Justice will say. We take very seriously the messages that the General Court has given us.
- The Court has told us the following:
 - **Exclusivity rebates**, i.e. rebates which are conditional on the customers obtaining all or most of their requirements from the dominant undertaking, are abusive by their very nature. This implies that the **anticompetitive effects** are presumed by the **nature** of the conduct and there is no need for the competition agency to show them. This follows previous case law in Europe [Hoffmann La Roche from 1979]. The Court reminded us, also in line with more recent case law [e.g. British Airways and Post Danmark from 2003 and 2012], that dominant undertakings can justify this practice by showing that it is objectively necessary or that the potential foreclosure effect that it brings about may be counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers.
 - The Court has also stressed that rebates where the grant of a financial incentive is **not directly linked to a condition of exclusive** or quasi-exclusive supply from the undertaking in a dominant position, may have a mechanism for granting the rebate that may nonetheless have fidelity-building effects leading to market foreclosure. For such rebates, the Court in Intel requires an effects analysis.
 - The implications of the *Intel* judgment in terms of enforcement are clear pending the appeal. It goes without saying that the Commission will apply the *legal test* as clarified by the General Court for **exclusivity rebates**. We will extend that conclusion also to **exclusive dealing**: If exclusivity rebates are **by their very nature distortive of competition**, then this must also be the case for direct exclusive dealing obligations.
 - However, this does not mean that the Commission will from now on enforce Article 102 in the context of exclusivity rebates and exclusive dealing without taking any account of effects. The European Commission, as any

public administration, has limited resources and has as a public duty to make the most of these resources. It is for this reason that the Commission is committed to focus our enforcement activity on the potentially most harmful cases.

- I have spoken already too much about discounts [rebates]. Let me say a few words about the other price related practices.
- For predation, there is actually quite a wide consensus across a large number of different jurisdictions worldwide. I would therefore like to draw your attention to the recently adopted International Competition Network (ICN) recommendation on the assessment of predatory pricing cases agreeing on an effects-based test as analytical framework for predatory pricing cases. Determining whether a firm is selling below a measure of cost is one of the central aspects of a predatory pricing case – virtually all jurisdictions use cost benchmarks/measures as part of the assessment of whether the alleged predator is selling at a loss or incurring an avoidable loss. This reflects the view that pricing above some appropriate measure of costs will in general constitute competition on the merits.
- Finally, when speaking about pricing abuses from a European perspective, I must refer briefly to margin squeeze. With respect to this type of abuse, the Commission and the European Courts have a very well established tradition in applying price cost test. For instance, last year the Commission adopted a decision fining Slovak Telekom and its parent company Deutsche Telekom for margin squeeze practices on the Slovak broadband market. The Commission's practice in applying price-cost test in margin squeeze cases has been endorsed by our Court of Justice in its Judgments on *Deutsche Telekom*, and *TeliaSonera*, and also last year when the Court of Justice confirmed the General Court's ruling on our Telefonica decision.

Thank you for your attention.