

23rd Annual Communications and Competition Law Conference
International Bar Association

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Ladies and Gentlemen,

I would like to start by thanking the International Bar Association and its chairman Michael Reynolds for the kind invitation to speak at this conference on Communications and Competition Law.

Yesterday, I could only attend Michael Reynolds' introduction, Georg Serentschy's keynote address and the first session on regulatory update. But judging by what I heard and the feedback I got from several participants, I am sure this IBA 23rd Annual Conference has been a very successful one and deserves our warmest congratulations.

The interface between competition law and sector-specific regulation implies that competition authorities and telecommunications regulators both have a say in an increasing number of issues.

The case for ex-ante sectoral regulation is clear-cut as long as regulated markets continue to exist and non-economic regulation continues to be required. And this is the case in spite of the phasing out of regulation on some of the seven markets still subject to ex-ante regulation expected in the 2013 as a result of the adoption by the European Commission of the Third Recommendation.

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What is increasingly more relevant, though relatively more complex, are two aspects concerning competition: ex-ante competition advocacy and ex-post competition enforcement.

Competition advocacy and competition enforcement are the two faces of the same coin in all sectors of a modern market economy. In the specific case of telecommunications, together with sectoral regulation, they are particularly relevant when regulated and market prices co-exist in different stages of the value chain or when the various operators have to interact without violating competition rules.

This is the case when they have to ensure interoperability, to respect wholesale and retail price hierarchy between vertically integrated and retail-only operators, to share existing infrastructures, or to engage in network and spectrum sharing agreements as a way of spreading the investment risks and reaching additional geographic areas.

Bearing this in mind, I would like to talk here about the new challenges faced by competition enforcement, resulting from recent developments in the telecommunications sector. Then I will briefly speak about the activity of the Portuguese Competition Authority in this sector.

The telecommunications industry has in recent years undergone a process of fast technological change that has allowed for the emergence of new services, new networks, new business models, in brief, the digital revolution. But as European Commissioner Neelie Kroes recently pointed out in Copenhagen,² we cannot get the benefits of the digital revolution without the right support. This means, in her own words: *“High-speed networks to provide band-width; a skilled, digitally literate workforce; and the legal framework to open up a vibrant digital Single Market.”*

² See Neelie Kroes, *Investing in our digital future*, COSAC Conference of national parliaments, Copenhagen, 24 April 2012.

Investment in next generation fixed access networks and 4G networks have led to multiservice networks for audio, video, and data services, allowing for the provision of services with higher bandwidth and quality. These networks are being developed not only by incumbents but also by other operators. In the case of Portugal, it is not only the incumbent operator but also several others which are making significant investments in next generation access networks.

The very ICT landscape of a dominant, incumbent operator and others is evolving rapidly. Hopefully, tomorrow's landscape will reflect more clearly the increasing globalisation of the business and more balanced returns between global-service operators like Google, content-provider operators like paid TV suppliers, and infrastructure-based operators like most national telecoms operators. And in Europe, as Commissioner Neelie Kroes pointed out, the aim is a contestable, highly competitive Digital Single Market.

The development of networks clearly increases facility-based competition but it also raises a number of competition concerns. Past networks in Europe tend to be inherited networks from previous legal monopolies. New networks are being deployed in the context of a liberalized market.

Competition law enforcers have been faced with complaints regarding refusals of access to past networks, and have acted according to the so-called “essential facilities” doctrine. In terms of new networks built from scratch, when there is no public money involved, it is less clear whether this doctrine is applicable.

Many investment projects have been partially or totally supported by public funds, on the understanding that these investments have an important role in fostering sustainable economic growth and as an integration device for citizens. We should remember here the Digital Agenda objectives of reaching fast broadband coverage for all European

citizens and ultra-fast broadband subscriptions for at least 50% of European households by 2020.

As a consequence of these goals, the Commission has assessed and approved the use of State aid and other types of public funding under the broadband guidelines in several countries. In Portugal, for instance, the development of high-speed broadband networks in rural areas is being supported by public funding.

New services, often based on interactive platforms and content provision, are now being provided by several market players, some of them new entrants in the telecommunications sector, but with a vast experience in content provision. The participation of these new players in the industry, although bringing a new competitive dynamic to the market, by introducing innovative and value-added services, may also generate exclusionary or exploitative behaviours. As an example, the European Commission is currently investigating Google regarding potential abuses of a dominant position in online search, online advertising and online advertising intermediation.

Network neutrality, with the no discrimination rule against global service-providers or content-providers, is also an important issue, specifically with regard to network traffic management and access to network distribution platforms.

The importance of this matter is clearly illustrated by yesterday's discussions at this conference as well as the questionnaire "*The open internet and net neutrality in Europe*" launched by the European Commission and the document "*Final Rule for Preserving the Open Internet*," released by the U.S. Federal Communications Commission, which adopts three basic principles: transparency, no blocking and no unreasonable discrimination.

The business models of traditional operators are also evolving, moving towards more integrated approaches. For instance, market players are increasingly launching bundles

of services, in the form of triple-play or quadruple-play offers, for residential customers, and tailor-made offers, including a wide range of sophisticated services, for business customers. This might also raise competition concerns in terms of cross-subsidization, margin squeeze, and market power leverage practices.

For these reasons, the traditional tools used in competition analysis need to be revised, in particular the ones concerned with relevant market definition and the assessment of anti-competitive effects. Only then will it be possible to address this increase in complexity and sophistication.

In the Microsoft/Skype case, for example, the European Commission had to review the transaction's effects on consumer and enterprise communications integrating a wide range of functionalities (instant messaging, voice and video calls) across various platforms (PCs, smart phones, tablets) and operating systems.

Another example concerns the increasing importance of triple-play bundles. The question to be addressed in various competition and regulation cases is whether triple-play offers are a relevant market or not. The Portuguese Competition Authority has already developed an innovative approach, which leads to the conclusion that triple-play offers are indeed a relevant market.

In Portugal, the telecommunications sector was fully liberalized in 2000, and the Portuguese Competition Authority, which was created three years later in 2003, has always been an independent national authority and an active member of the European Union Competition System.

The Portuguese Competition Authority has taken a number of antitrust decisions on abuse of dominance and on merger control. More recently, it adopted a recommendation for the three national mobile network operators concerning the prices of call origination

to special services and non-geographic numbers. By July this year, they have to lower these prices to levels compatible with the cost of providing the service.

In addition, the Portuguese Competition Authority has been monitoring the different telecommunications markets, and publishes an annual general report on price trends and market structure.

It has also published a number of reports to address specific competition concerns. Among these is the report “*Consumer Mobility in the Electronic Communications Sector*”, which included a set of recommendations seeking to foster competition in the electronic communications markets by facilitating consumer switching. Our work, as mentioned yesterday, concluded that switching costs amount to 40% – 50% of the monthly subscription across telecommunications markets and our findings brought about amendments to the unlocking rules for mobile phones.

A new Competition Law has recently been approved by the Portuguese Parliament. This has overcome some of the main drawbacks of the previous law, and has strengthened the powers of the Portuguese Competition Authority. Moreover, a new specialist Court for Competition, Regulation and Supervision has also been created. We are confident that these two major changes are a significant step towards a more effective application of competition law in Portugal.

Let me conclude. Assuming that consumers and businesses all over the world deserve the best, state-of-the-art telecommunications systems, it is important that both sectoral regulation and competition advocacy and enforcement ensure that such systems continue expanding and innovating.

That is why it is so important to keep in mind these concerns when designing and implementing the legal and regulatory framework. In this way, it is possible to reconcile

economic and technical realities, sound economic reasoning, appropriate sectoral regulation and effective competition advocacy and enforcement.

Thank you!