

an order setting out what needs to be done to restore compliance.¹³

Guidelines

In January 1997 the Director General released the final draft of guidelines on the operation of the fair trading condition, containing material reminiscent of that which AUSTEL produced during its public consultation on the Decision Making Framework (DMF) in 1994.

The guideline is a summary of competition law matters as they relate to telecommunications. Issues that are covered include: factors in defining markets; assessing dominance in a relevant market; and the application of the fair trading condition to specific issues such as predatory pricing, price discrimination, refusal to supply or connect and anti-competitive agreements.

Of particular interest is the different approach taken in the UK and the EC to determining what level of market share presumes dominance in a market. In the UK, the relevant legislation excludes undertakings with less than a 25% market share which is used as a way of easily distinguishing cases that are unlikely to give rise to a misuse of market power. The guideline states that OFTEL would not presume that a player was dominant if it had a market share above 25%, but that it is unlikely that an operator with less than 25% market share would be capable of abusing a dominant position.¹⁴

The UK assessment of dominance contrasts with the European Court of Justice, which in a non-telecommunications case held that there was a presumption of dominance at or above a 50 per cent market share. Above 50 per cent, the onus usually shifts to the undertaking to show that the specific market conditions meant it was not dominant. The European Court of Justice has not examined the issue of market shares and dominance in the telecommunications sector.¹⁵

Conclusion

The price control and fair trading package reflects the maturity of the UK telecommunications market thirteen years after deregulation. It is also possibly the UK's opening gambit on influencing the structure of telecommunications regulation in the liberalised EU market. A challenge for the European Commission will be to reconcile the relative maturity of the UK telecommunications market (and comparative sophistication of the UK regulatory regime) and the embryonic competition in the majority of the EU Member States when it lays down the structure of future regulation of telecommunications across all EU Member States.

Christina Hardy is an Australian lawyer working at Bird & Bird in London.

1 Recent developments in access and interconnection regulation in the UK and draft proposals for the liberalised EU market will be the subject of a separate article in a subsequent CLB issue.

2 OFTEL, Guidelines on the operation of the Fair Trading Condition - Final Draft, 22 January 1997.

3 "Pricing of Telecommunications Services From 1997 - OFTEL's Proposals for Price Control and Fair Trading", Statement issued by the Director General of Telecommunications, OFTEL, June 1996

4 "Pricing of Telecommunications Services From 1997 - OFTEL's Proposals for Price Control and Fair Trading, Statement, June 1996, and "Network Charges from 1997", Consultative Document, December 1996, issued by the Director General of Telecommunications, OFTEL

5 BT was unsuccessful in its judicial challenge to the enforcement powers granted to the Director General in the fair trading condition.

6 An Introductory Guide to EC Competition Law and Practice, 5th edition, Valentine Korah, Seet Maxwell, 1994, p 2

7 Ibid, p 3

8 Condition 18A

9 Condition 18A(1)(b)

10 Condition 18A(3)(a)

11 Condition 18A(3)(a)

12 Condition 18A(3)(b)

13 Under s 16 of the Telecommunications Act 1984 (UK) the Director General can make a Provisional Order or a Final Order. Licensees are also protected by OFTEL's procedures for making Determinations which give an opportunity for a licensee to be heard.

14 Paragraph 28, Guideline

15 Paragraph 29, Guideline and Case C-62/86 AKZO Chemie BV v Commission [1991] ECR I-3359, [1993] 5 CMLR 215

Internet Telephony

Emma Maloney & Lisa Hill raise some of the technological, regulatory & industry issues of Internet telephony

Australian Internet Service Provider, OzEmail, recently launched a new product, OzEmail Phone, which it claims is the first commercial service in the world providing Internet telephony from a standard telephone. It is noteworthy because this product makes Internet telephony a realistic competitor in the long distance call market. It allows customers to make telephone calls using the Internet with a touch tone telephone at a substantially reduced rate compared with existing fixed line and mobile services.

This short article looks at the technology, the response of carriers and regulators to Internet telephony and at the legal position facing Internet telephony providers in Australia.

The Technology

The technology to make real time telephone calls over the Internet has been available for some time, but both parties needed personal computers. OzEmail Phone means that the caller makes a standard telephone call to a datacentre using a touch tone telephone. There, the caller's voice is digitised before the signal

is sent to a local carrier in the destination country using the Internet. When it is received the local carrier connects the call to the destination telephone.

Acceptance of Internet telephony as an alternative to PSTN has been slowed by compatibility and quality problems including response times, drop out and echoes and until now the need for microphones and speakers. So while the impact on telephony carriers may not have been felt as yet, technological developments and improving quality are a cause for concern as Internet telephony has the potential to drive down prices in the long distance market.

The Competitive Response

Some carriers have responded by embracing rather than ignoring the new technology. Telecom Finland recently offered a new service using VocalTec's Internet phone software. Telecom New Zealand has also announced a pilot project trialling Internet telephony using VocalTec servers and expects to offer Internet telephony on dedicated links by the middle of this year. In the US, telecoms operator RSL Communications has joined up with Israeli company Delta Three, to offer an Internet telephony service between the US and Colombia.

Sprint in the United States has also entered the market in a measured way beginning with conferencing applications and a new product called *Give Me a Call*. This allows companies to speak to visitors who are visiting their homepages.

According to some commentators, other carriers in the United States are hoping that legislative changes regulating the software will be enacted, slowing the acceptance of the Internet telephony technology (Chris Bucholtz, "Embracing Internet telephony").

A group of US carriers (via the America's Carrier's Telecommunications Association or ACTA) recently submitted a petition to the US communications regulator, the Federal Communications Commission (FCC), asking that providers of Internet telephony software be deemed to be telecommunications carriers and therefore subject to FCC regulation. This would require Internet telephony providers to file tariffs and pay access charges to local carriers. We understand that the FCC is still considering the petition, however, FCC Chairman, Reed Hundt, has stated that, "I am strongly inclined to believe that the right answer at this time is not to place restrictions on software providers, or to subject Internet telephony to the same rules that apply to conventional circuit-switched voice carriers. On the Internet, voice traffic is just a particular kind of data, and imposing traditional regulatory divisions on that data is both counterproductive and futile".

Australian Regulation

Until 30 June 1997, telecommunications services and facilities in Australia are regulated under the Telecommunications Act 1991, which enables any person to provide telecommunications services pursuant to

a class licence but reserves certain rights to carriers to install and maintain networks. From 1 July 1997 a new regulatory regime will provide open competition in the markets for the provision of both telecommunications services and infrastructure. Service providers will have rights to access and interconnect to carrier networks on reasonable terms and conditions. In December 1996 a package of Bills establishing this new regime was tabled in Parliament. At the time this article went to print, the Bills were stalled in the Senate for a number of amendments.

As providers of a telecommunications service, Internet service providers must currently operate in accordance with the limited provisions of service provider class licences issued under the Telco Act 1991. This light handed regulatory regime will continue after 1 July 1997 when, provided such service providers do not own substantial infrastructure, similar rules will generally apply.

Pricing pressures & timed local calls

Internet telephony, while less reliable, is significantly cheaper than PSTN telephony. There are a number of reasons why this is so. Internet telephony relies on packet-switching which enables the compression of data and avoids tying up lines for the duration of a call. Internet telephony providers can take advantage of the relative cheapness of using the leased capacity in the Internet backbone and as they are not carriers do not have to pay a share of universal service costs.

The current "honeymoon" pricing period may soon end if plans by the carriers to charge on a timed basis for receipt of data calls is implemented. Under current legislation, carriers must offer untimed local voice calls made using the standard telephone service (PSTN services) to residential customers (and customers who are welfare or charitable bodies). After 1 July 1997, it is proposed that this obligation be extended to require that all service providers offer an untimed local voice and data call option to residential customers (and customers who are welfare or charitable bodies), and an untimed local voice call option to all other customers (eg business).

With the rapid growth in Internet use, Telstra is pushing for the ability to charge both residential and business customers timed local calls when linking up to the Internet. In the Senate Inquiry

into the post 1 July telecommunications bills package, Telstra claimed that it is facing significant congestion on its network as a result of strong growth in the number of very long local calls which are more attributable to Internet usage. Internet service providers vigorously opposed this move claiming that it would seriously damage Australia's adoption of the Internet. It would also adversely affect the viability of Internet telephony. The Telecommunications Bill 1996, as passed by the Senate in late March 1997, allows Telstra to charge businesses for local data calls on a timed basis. However, residential customers will continue to enjoy untimed local calls.

There remains some uncertainty as to timed line tariffs for the receipt of calls (which would be charged to the Internet service providers and not the consumer) which leaves open the possibility that carriers will use double ended charging as a means of complying with the law, while still curbing the growth of Internet service providers and forcing traditional PSTN pricing of Internet telephony services. In an attempt to allay the fears of Internet service providers, the Office of the Minister for Communications and the Arts has state that any attempts by carriers to impose a B-Party charging regime will be prevented, with the Government currently considering how it will give regulatory effect to this intention.

Emma Maloney & Lisa Hill are lawyers with Allen Allen & Hemsley, Sydney.