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Regulation, competition and infrastructure investment: an evolving policy

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The evolution of regulatory policy on infrastructure investment

Phase 1 (1984/1998 – 2000) > The only genuine competition is infrastructure competition

Licence-based restrictions: Express rollout obligations imposed on new operators (eg, Mercury (UK) 1984, WLL, 2G, 3G; BT barred from providing entertainment services (to protect cableco investment)

Negative reinforcement > new operators given limited access to incumbent facilities

Positive inducements > network operators pay wholesale access prices (service providers pay retail)

Phase 2 (2000 - 2003) > Apparent failure of Phase 1 policies to deliver infrastructure competition in access leads to attempts to stimulate competition via a broadening of *mandated access* to incumbent facilities

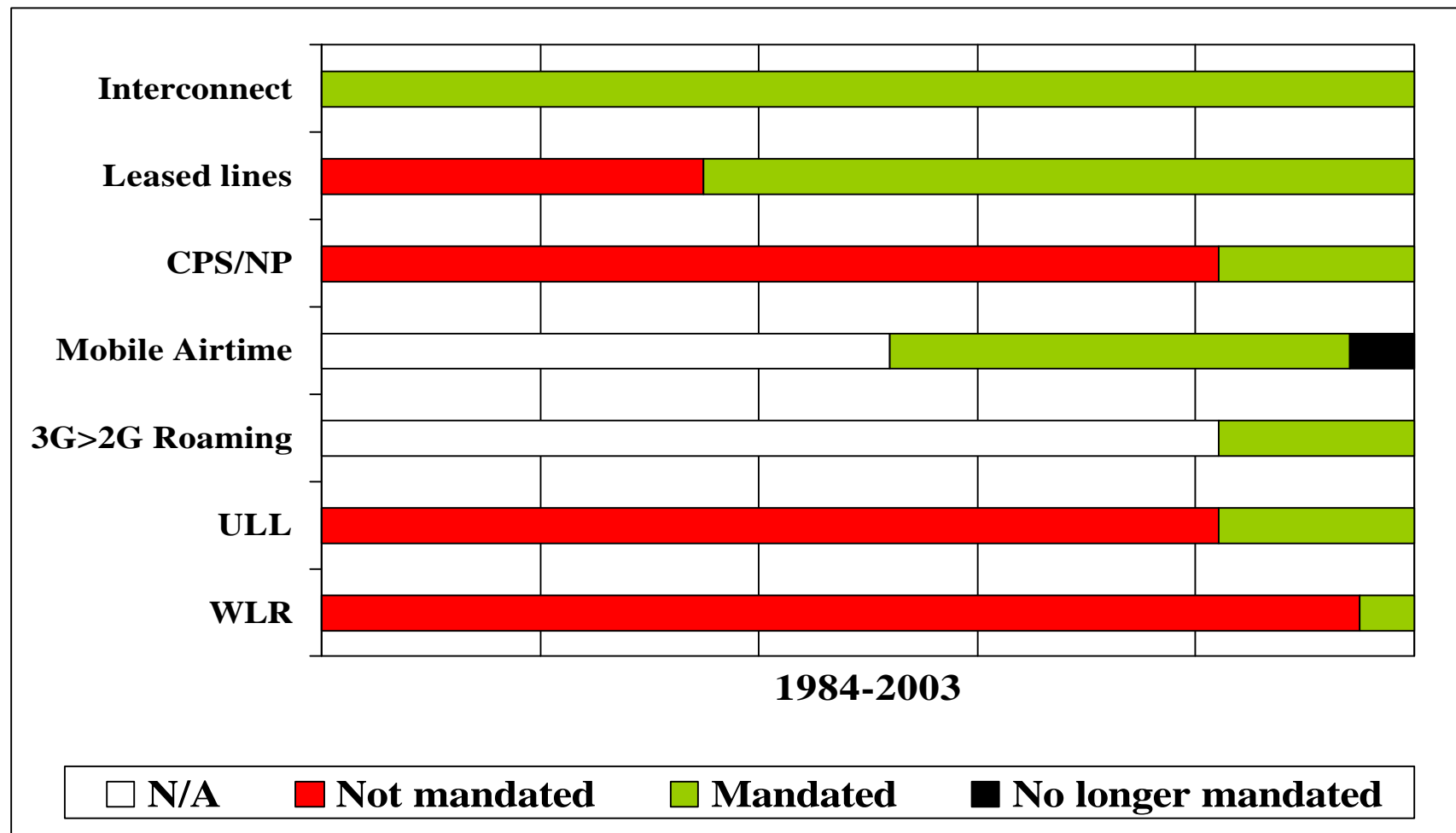
Competitor market shares:

USA - 5% of local access lines (since 1996)

Germany - 3% of local access lines (since 1998)

UK - 17% of exchange lines (since 1984)

UK: Mandated access to incumbent facilities, 1984-2003



The case for (and against) mandated access

Mandated access to incumbent networks and services may

stimulate new investment by reducing the risks of entry

However, mandated access may also

reduce the incentives for infrastructure investment and
technical innovation by the incumbent

attract uneconomic (and therefore unsustainable) entry

Phase 3 (2003 - .) > Further erosion of policies promoting infrastructure competition in the access layer?

access to network elements vs access to services?
municipal infrastructure

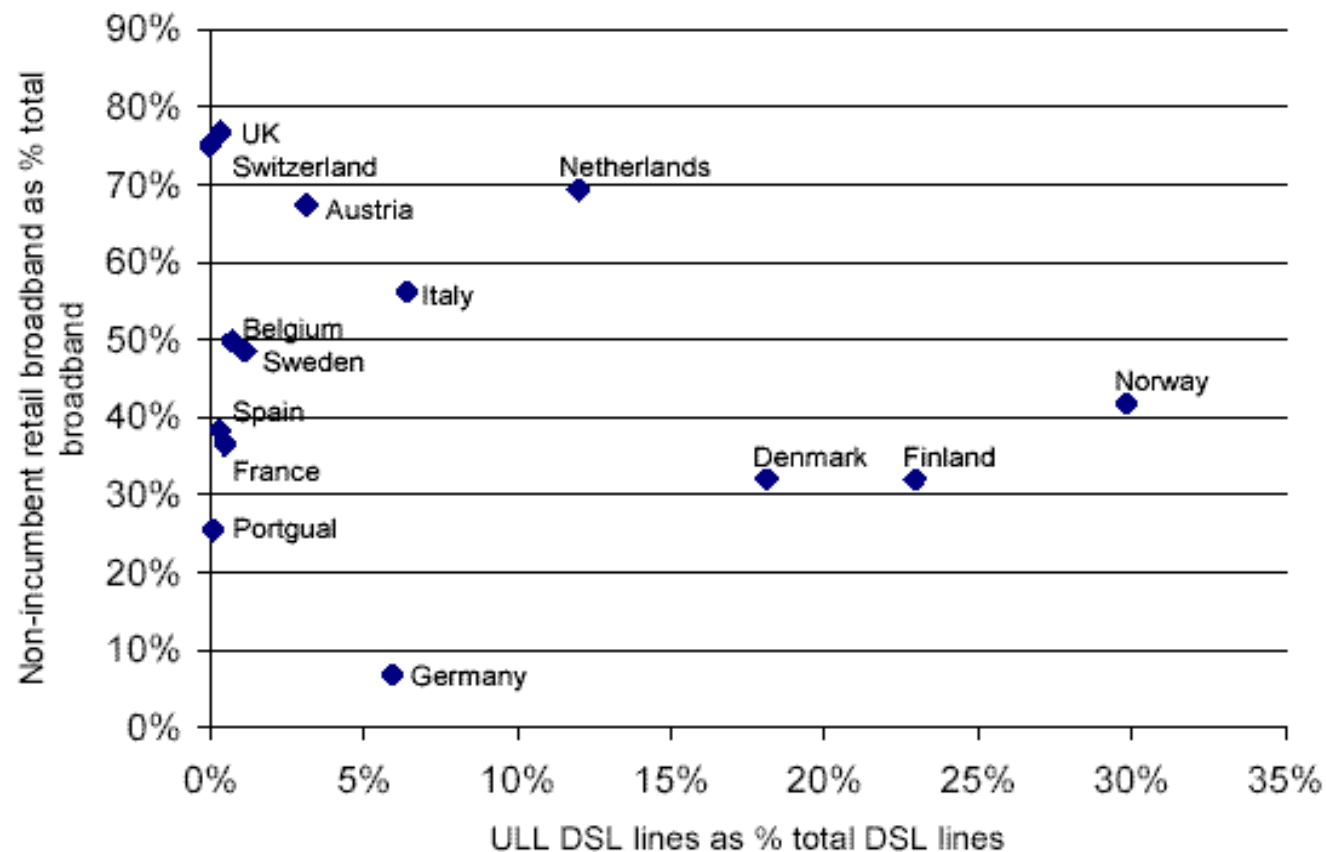
United Kingdom

reduced rates for incumbent retail/wholesale broadband products renders competing infrastructure and ULL less attractive

decline in number of ULL operators from 40 to 3

introduction of Wholesale Line Rental for telephony

The impact of regulation on competitors' broadband business models



Sources: Analysys Research and Banc of America Securities Limited

How to ensure that an expansion of mandated access does not threaten continued infrastructure investment by incumbents?

The US approach – the “necessary and impair” standard

FCC may order access to unbundled elements of an incumbent's network where such access is

necessary, and

lack of access would impair an entrant's ability to compete

Telecom Act of 1996, s. 251(d)(2)

A totally unbundled world – a world in which competitors share every part of an incumbent's existing system, including, say, billing, advertising, sales staff, and work force (and in which regulators set all unbundling charges) – is a world in which competitors would have little, if anything, to compete about.

[T]he statute's unbundling requirements, read in light of the Act's basic purposes, require balance.

Breyer J. (dissenting in part)
AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999)

FCC mandated “unbundled network elements”

mass market loops: copper loops and subloops, existing fibre

enterprise loops (dark fibre, DS3* and DS1*)

subloops (to access inside wire)

network interface device

local switching (for mass market applications only)

shared transport*

signalling networks (only with unbundled local switching)

call-related databases, OS/DA (only with unbundled local switching)

OSS functions (ordering, provisioning, maintenance, repair, billing)

Order on Remand, CC Docket No. 01-338, 20 February 2003

The Canadian approach – “essential” and “near essential” facilities

CRTC has made it a policy objective to foster *network* competition

mandated access only to essential and near essential facilities

CRTC, *Regulatory framework for the 2nd price cap period*,
Decision 2002-34, 30 May 2002

The EU approach

national regulatory authorities need to balance the rights of an infrastructure owner to exploit the infrastructure for its own benefit, and the rights of other service providers to access facilities that are essential for the provision of competing services

Access Directive, Recital (19)

NRAs may impose access obligations on SMP operators where it is considered that:-

denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-users interest

Before deciding, NRAs are obliged to take into account:-

the initial investment made by the SMP operator
the economic viability of installing competing facilities

Access Directive, Article 12

In the long term it is generally pro-competitive and in the interests of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business. For example, if access to a production, purchasing or distribution facility were allowed too easily there would be no incentive for a competitor to develop competing facilities. Thus while competition was increased in the short term it would be reduced in the long term. Moreover, the incentive for a dominant undertaking to invest in efficient facilities would be reduced if its competitors were, upon, request, able to share the benefits.

Case D-7/97, Oscar Bronner GmbH & Co. KG v.
Mediaprint Zeitungs-und Zietschriftenverlag GmbH & Co. KG and Others,
Opinion of Advocate General Jacobs, 28 May 1998, para 57

Conclusions

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