

Controlling
Abusive
Behaviour in the
Roll out of
Broadband
Services

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CONTROLLING ABUSIVE BEHAVIOUR IN THE ROLL OUT OF BROADBAND SERVICES

Introduction

Access by electronic communications operators to “local loops” owned and controlled by national incumbents is imperative for the competitive roll out of high-speed broadband services in the Member States. Currently across Europe, many incumbent network operators are modernizing local loop infrastructure to permit and enhance the delivery of high-speed broadband services to Europe’s citizens.

Incumbent operators are generally recognized in EU regulatory and competition law as dominant holders of essential facilities. Under the guise of upgrading its local loop infrastructure, a dominant owner should not be allowed to grant access to the local loop to its competitors on terms less favourable to those it would enjoy itself. A dominant owner of an essential facility should not be permitted to “improve” its local loop network where current electronic communications services offered downstream by competitors are made less satisfactory or less attractive. Moreover, the modernization of local loops to enable the delivery of high-speed broadband services should not serve as a justification for causing unreasonable technical interference to other services (including voice telephony services) offered by competitors.

Where national authorities, under the EU’s legislative framework for electronic communications, fail to protect the rights guaranteed to competitors and consumers against dominant incumbents of local loop facilities, the only recourse of injured parties may be to initiate proceedings under Article 82 of the EC Treaty.

The “Local Loop” and “Broadband” defined

In layman terms, the local loop is described as the “last mile” of the fixed line telecommunications network that connects regional and national transmission systems to the homes of end users. In technology terms the local loop is the physical twisted copper pair circuit that joins the termination point in the home of the communication service user to the electronic communications network.

Before the modernization and convergence of electronic communications systems, the traditional use of the “local loop” infrastructure was limited to the conveyance of voice telephony services. In Europe’s information society, broadband roll out requires access to the twisted copper pair of the local loop. Use of technology that permits the efficient interfacing of twisted copper pair networks and other networks, including fibre optic is also essential.

An appreciation of the legal definitions of “local loop” and “broadband services” is essential before we can proceed to examine the legal rules applicable to the management of competition in those electronic communications markets.

As a matter of EU competition law, the local loop must be viewed as an essential network facility necessary for the provision of downstream broadband services. The local loop is an integral part of the EU’s pan-European electronic communications network. It is defined in Article 2 of Directive 2002/19/EC (“the Access Directive”) as “the physical circuit connecting the network termination point at the subscriber’s premises to the main distribution frame of equivalent facility in the fixed public telephone network”. A narrower definition is provided in Regulation (EC) 2887/2000 on unbundled access to the local loop (“the LLU Regulation”) where the local loop is defined as “the physical twisted metallic pair circuit connecting the network termination point at the subscriber’s premises to the main distribution frame or equivalent facility in the fixed public telephone network”.

Broadband technology can support a wide range of frequencies and is used to transmit data, voice and video over long distances simultaneously. It is a high-speed, high-capacity transmission medium that can carry signals from multiple independent carriers. Broadband services are delivered on a single coaxial or fibre-optic cable by establishing different bandwidth channels. Comparing broadband internet access to ordinary dial-up access has been likened to the difference between a new sports car and a horse drawn carriage.

To control potential competition abuses by local loop incumbents, European lawmakers, national regulatory authorities and the courts must keep abreast of technological advances. It is accepted that they must pursue policies to encourage the roll out of high-speed broadband services to Europe’s citizens. However, where incumbents of local loop facilities give effect to such policies, national regulatory authorities in particular must ensure that the competitive behaviour of incumbents complies with EU rules to avoid abusive conduct.

Why control abusive conduct on Europe's local loops?

As it is an essential facility, access to local loop infrastructure must be managed by national and supra-national bodies to ensure effective competition in downstream electronic communications service markets.

Importantly, communications constitutes one of the four essential modes or channels that permit trade and discourse among members of society. Electronic communications operators provide services upon which all economic activity beyond the level of self-sufficiency depends. It is a vital connective infrastructure upon which, with energy, transportation and our system of currency, the EU's economy rests.

European lawmakers have adopted and implemented rules designed to protect competition in the electronic communications markets and to ensure that dominant owners of essential facilities do not abuse their positions of dominance to the detriment of competitors and end users. The rules for managing competition in the local loop may be categorized having regard to the requirements of both the *ex ante* regulatory framework and the *ex post* competition rules.

The LLU Regulation itself underlines the need to manage competition in the local loop having regard to an *ex ante* legal framework. It recites that the "local loop" (insofar as it is a local access network) remains one of the least competitive segments of the liberalized telecommunications market. At the time of its adoption, its drafters were conscious that incumbent network owners for years had funded, through state support and/or monopoly rents, investment costs for the rollout of their metallic access infrastructure. Under exclusive or special privilege granted by Member State parliaments or Governments, national incumbents established and developed their domestic local loops. As a result, new entrants are unable with traditional technologies to match the economies of scale and the coverage of dominant incumbents in the fixed public telephone network market. To ensure a level playing field, national regulatory authorities must foster competition in the local loop within the pre-defined framework established under the EU electronic communications legislation.

The *ex ante* Regulatory Framework for Management of the Local Loop

Any sector is said to be regulated when the behaviour of economic operators is managed by an independent body within pre-defined market structures having regard to legislative

obligations with the goal of achieving fair competition in those markets between operators who, upon deregulation, may be managed *ex post* by general competition managers.

The current EU regulatory framework for electronic communications networks and services is set out in a series of directives adopted pursuant to the internal market provisions of the EC Treaty, namely Article 95. The central axis of the regulatory framework is Council Directive 2002/21/EC (“the Framework Directive”) complemented by Council Directives 2002/20/EC (“the Authorisation Directive”), Council Directive 2002/19/EC (“the Access Directive”) and Council Directive 2002/22/EC (“the Universal Service Directive”). The current regulatory framework for electronic communications has largely replaced the earlier EU telecommunications legislation, adopted pursuant to the competition and free movement of services provisions of the EC Treaty. Under the original regulatory framework (which liberalized and harmonized Europe’s networks and services) the local loop was identified for particular focused regulatory intervention from EU level to guarantee a uniform approach to managing competition issues raised by the essential nature of that facility.

The EU approach to regulating special network access to the local loop was originally provided for in Council Directive 98/10/EC (“the USO Directive”) and the LLU Regulation. For the past five years, the LLU Regulation has set out the directly applicable provisions for managing access to Europe’s local loops. Article 3(2) of the LLU Regulation, as a measure for *preventing* abuse by dominant owners of local loops, requires that incumbents shall meet all reasonable requests from beneficiaries for unbundled access to their local loops and related facilities under transparent, fair and non-discriminatory conditions. Requests from competitors may only be refused on the basis of objective criteria relating to technical feasibility or the need to maintain network integrity. Incumbents must provide beneficiaries with facilities equivalent to those provided for their own services or their associated companies and with the same conditions and timescales.

Article 27 of the Framework Directive provides that the provisions of the LLU Regulation shall only remain in force until such time as national regulatory authorities pursuant to Article 16 of the Framework Directive designate new markets and significant market operators. National incumbents may be designated as significant market players only for the purposes of imposing obligations under the Access Directive and/or the USO Directive.

Under Article 2 of the Access Directive, “access” is defined as the making available of facilities and/or services, to another undertaking, under defined conditions on either an exclusive or non-exclusive basis for the purpose of providing electronic communications services. It includes access to the local loop and to facilities and services necessary to provide services over the local loop and access to physical infrastructure, including

buildings, ducts and masts. National regulatory authorities have the power under the Access Directive to impose obligations of transparency (Article 9) and non-discrimination (Article 10) on dominant undertakings with a view to preventing abuses in the local loop by dominant players. Similarly under Article 12 of the Access Directive, the national regulatory authorities may impose obligations on incumbents to meet reasonable requests for access to and use of specific network elements in situations where it considers that denial of access or unreasonable terms and conditions having similar effect would hinder the emergence of a sustainable competitive market or would not be in the end users' interests.

National regulatory authorities have the necessary powers to address properly the competition concerns raised by local loop incumbents rolling out facilities like the interfacing technical houses on the local loop to enable high-speed broadband delivery. But a political will must exist within the regulatory bodies to take all appropriate steps to address possible abuses by incumbents. Where, however, competitors on the local loop suffer disadvantage at the hands of incumbent owners of infrastructure, and national regulators do not intervene or are unwilling to take assertive action, the only course open to those competitors may be to institute proceedings relying on *ex post* competition rules. Such proceedings would seek to argue that dominant controllers of essential local loop facilities have abusively exploited their dominant position over an essential local loop facility in contravention of Article 82 of the EC Treaty or similar national competition rules.

Ex post Competition Management of the Local Loop essential facility under Article 82

The European Court of Justice defined an "essential facility" in *Commercial Solvents* as any "infrastructure without access to which competitors cannot provide services to their customers". In *Commercial Solvents* behaviour by an undertaking in control of an essential facility was deemed to fall under Article 82 of the EC Treaty.

Article 82 prohibits abusive exploitation by one or more undertakings of a dominant position in a relevant market. Article 82 may be categorized as a directly effective legal provision providing for the *punishment* of past anti-competitive behaviour having regard to relevant market structures defined *ex post* by national or supra-national authorities, including the courts.

A national incumbent's control and use of essential facilities may fall within the remit of Article 82 where an operator exercises its power in an anti-competitive fashion to the detriment of competitors, customers and ultimately the end user. The EU case law does not

reflect an exceptional treatment of essential facilities under the competition rules. Rather an incumbent's behaviour in relation to the use and control of such facilities is treated as a specialized body of law under Article 82. Article 82, therefore, may be relied upon to address discriminatory anti-competitive behaviour by dominant undertakings that happen to be in control of an essential local loop facility. Article 82 requires a duty not to discriminate, where users of an essential facility are in competition with one another and where a duty to grant access exists.

In a consistent body of law, stemming from *Commercial Solvents* EU law makers have held that companies in dominant positions may not refuse to supply services, unless justified, to competitors or customers if that refusal would have a significant or appreciable effect on competition in the market place.

Where a dominant undertaking both owns/controls and itself uses an essential facility, in its commercial relationship with competitors it cannot, without objective justification, deny access to those facilities or grant access on terms less favourable than those enjoyed for its own downstream services. Under Article 82, such an incumbent cannot place its competitors at a competitive disadvantage.

The EU Commission in *London European Sabena* held that the duty to provide access to an essential facility arises if the effect of the refusal to supply on competition is objectively serious enough or if without access there is, in practice, an insuperable barrier to entry for competitors of the dominant company, or if without access competitors would be subject to a serious, permanent and inescapable competitive handicap which would make their activities uneconomic

If the modernization of local loops to facilitate broadband service delivery results in increased unreasonable levels of interruption and interference on existing electronic communications services offered by competitors of an incumbents, Article 82 may provide an effective remedy. Article 82 case law highlights that where a competitor is already subject to a certain level of disruption from the dominant undertaking's activities, the dominant player is under a duty not to take any action which would result in further disruption for the competitor. This duty persists even if the dominant player has engaged in the impugned action primarily to make its infrastructure more efficient.

Where liability for abusive conduct/failing to control abuse should lie

Article 82 is a directly effective provision of EU law. It is capable of engendering rights in operators and consumers upon which they may rely before the national courts. The abusive exploitation of a dominant position by incumbent holders of local loop facilities would entitle operator/consumer plaintiffs to recover damages where loss and injury is caused by the incumbent's anti-competitive behaviour.

The LLU Regulation remains directly applicable in Member States where the transitional provisions of Article 27 of the Framework Directive are still in force. Article 3(2) of the Regulation is directly effective. It may be relied upon before the national courts by a plaintiff to recover damages or seek other relief for breach of the *ex ante* rules to control abusive behaviour.

Where the transitional provisions of Article 27 of the Framework Directive are no longer in force and the requirements of the EU electronic communications directives have been properly transposed into domestic law, any right to recover damages or seek other relief flows not from EU law but under domestic substantive and procedural laws transposing those directives.

In accordance with Article 10 of the EC Treaty, Member States are under a duty to cooperate with the EU institutions to give full effect to the provisions of the Treaty and legislation adopted thereunder. Where a Member State fails to give full effect to the provisions of the EU's electronic communications legislation and facilitates abusive conduct by an incumbent that State exposes itself to an action in damages at the instance of any aggrieved person before the national courts under the *Francovich* and *Factortame* jurisprudence of the European Court of Justice.

Conclusions – Challenges Ahead

The main objective of the EU's 2002 electronic communications framework when adopted was to establish a uniform regulatory approach to regulating the sector across Europe and to permit the free movement of electronic communication services to enable effective competition in national markets.

Member States, as a matter of EU law, are obliged to ensure the proper implementation of that framework. Ineffective transposition necessarily leads to a lack of uniformity, uncertainty and the creation of legal and economic barriers to entry within the internal market.

Financial and commercial investment by entrants on local loop networks for the provision of broadband services will only take place in an environment where legal certainty exists and Member States ensure effective implementation of the applicable EU rules.

Where national regulatory authorities fail to protect competition in the local loops having regard to the 2002 electronic communications framework, the EU Commission must, as guardian of the EC Treaty, move to ensure that Member States fully comply with their obligation of dutiful co-operation under Article 10 of the EC Treaty. It is impossible to see how uniformity in the regulation of local loops can be achieved across Europe when certain Member States still maintain in force the old telecommunications rules, not having implemented properly the electronic communications regulatory rules three years after the relevant deadline for transposition has passed.

Article 226 of the EC Treaty vests the EU Commission with all the relevant powers to ensure that Member States effectively comply with the EU's 2002 electronic communications framework. As national local loops are essential infrastructures underpinning the European economy, the EU Commission should pursue regular systematic reviews and investigations to ensure compliance by national regulatory authorities and incumbents with all applicable EU laws.

If the EU Commission does not act appropriately to safeguard the rights of competitors injured by the abusive conduct of incumbents on the national local loops, aggrieved parties may be forced to institute proceedings under Article 82 of the EC Treaty or equivalent national competition provisions. A natural consequence of enforcement of *ex post* competition provisions by national courts may be a lack of uniform approach in the management of competition in Europe's various local loops. Such a result, it is argued, would be contrary to the intention of the legislators who adopted the 2002 electronic

communications framework and would undermine the future competitiveness of the EU's internal market.

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