

University of Oslo

JUS5641 Electronic Communications Law

Exam 2015

The telecoms operator CableTel (CT) owns an electronic communications network in an EU member state. It also offers electronic communications services to the public. CT's network consists of a core network and an access network.¹

- CT's core network is based on fibre technology.
- Most of CT's access network uses (older) cable technology, which facilitates communication only at a slower speed. A minor part of CT's access network is based on fibre.

New entrant RailTel (RT) owns only a core network based on fibre running along railway lines, but it has no access network. Therefore, it currently cannot connect subscribers to its network. RT wishes to offer electronic communications services to the public based on fixed access.

The National Regulatory Agency (NRA) has found that CT has significant market power in several relevant markets (including the market for wholesale local access at fixed location, and the market for wholesale high-quality access at a fixed location). The NRA is assessing potential remedies.

Discuss how the NRA can address the following issues with the remedies available in the Access Directive (2002/19/EC). Your discussion of all 4 issues carries equal weight.

1. **Use of cable-based access network**

RT would like to use CT's access network, but that request is partly rejected by CT. CT is willing to grant access to its fibre-based access network, but it argues that access should not be given to its cable network. It states that RT should invest in an access network of its own. It can be assumed that if RT invests in an access network, it will deploy fibre technology. According to CT, a new fibre-based access network would lead to better networks and more competition. On the other hand, RT argues that it needs access to the cable-based network in order to enable it to compete with CT, particularly with respect to customers who do not wish to transition to fibre-based networks. **Can the NRA impose an obligation on CT to allow RT's use of CT's cable-based access network?**

¹ A core network is the central part of a telecommunications network that provides various services to customers who are connected through the access network. An access network is the part of a network which connects subscribers to their immediate service provider.

2. **Provision of information**

Later, the NRA decides that CT must allow RT the use of its entire access network. RT then requests information about CT's access network, including the network architecture. It also asks for login information (passwords) for CT's network administration systems. CT argues that such information is business confidential and cannot be shared with its competitors. Moreover, CT argues that its software user license does not allow it to share the system with other actors. **Can the NRA impose an obligation that requires CT to provide this information?**

3. **Price for cable-based access**

A price comparison shows that CT's retail prices for cable-based access are kept at such a low level that RT has difficulties in attracting customers. RT's difficulty is caused by the high wholesale access fee it has to pay to CT. CT argues that the wholesale access fee is justified because RT only has relatively few end-users, which results in higher costs. **What can the NRA do to address this issue?**

4. **Price for fibre-based access**

CT and RT also disagree about the price for RT's use of CT's fibre-based access network. The NRA is considering the imposition of a non-discrimination obligation, and/or price control for wholesale access based on fibre.

- a. CT argues that it has taken a significant business risk when it invested the fibre-based part of its access network. Therefore, it argues, the wholesale access price should reflect that risk, resulting in a higher wholesale price for fibre-based access.
- b. Moreover, CT argues that an NRA-mandated price control of the fibre-based wholesale access would not create the right incentives for investment in new fibre-based access networks. It argues that a non-discrimination obligation would create better incentives for investment in new fibre-based access networks.

Discuss these arguments (a. and b.) in light of relevant regulatory instruments.

Attachment: Extract from Commission recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment (2013/466/EU).

Extract from Commission recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment (2013/466/EU)

NON-IMPOSITION OF REGULATED WHOLESALE ACCESS PRICES ON NGA NETWORKS

48. The NRA should decide not to impose or maintain regulated wholesale access prices on active NGA wholesale inputs, except those inputs specified in point 49 pursuant to Article 13 of Directive 2002/19/EC, where — in the same measure — the NRA imposes on the SMP operator non-discrimination obligations concerning passive and active NGA wholesale inputs pursuant to Article 10 of Directive 2002/19/EC that are consistent with:

- (a) EoI, following the procedure in point 51;
- (b) obligations relating to technical replicability under the conditions set out in points 11 to 18 when EoI is not yet fully implemented; and
- (c) obligations relating to the economic replicability test as recommended in point 56;

provided that the actual take-up of upstream passive wholesale inputs or non-physical or virtual wholesale inputs offering equivalent functionalities or the presence of alternative infrastructures create a demonstrable retail price constraint.

49. The NRA should decide not to impose or maintain regulated wholesale access prices on passive NGA wholesale inputs or non-physical or virtual wholesale inputs offering equivalent functionalities, pursuant to Article 13 of Directive 2002/19/EC, where — in the same measure — the NRA imposes on the SMP operator non-discrimination obligations concerning passive NGA wholesale inputs or non-physical or virtual wholesale inputs offering equivalent functionalities, pursuant to Article 10 of Directive 2002/19/EC, that are consistent with:

- (a) EoI, following the procedure in point 51;
- (b) obligations relating to technical replicability under the conditions set out in points 11 to 18 when EoI is not yet fully implemented; and
- (c) obligations relating to the economic replicability test as recommended in point 56;

under the condition that:

- (d) the NRA can show that a legacy access network product offered by the SMP operator subject to a cost-oriented price control obligation in accordance with the costing methodology specified in points 30 to 37 or 40 constitutes a copper anchor and thus exercises a demonstrable retail price constraint; or
- (e) the NRA can show that operators providing retail services over one or more alternative infrastructures that are not controlled by the SMP operator can exercise a demonstrable retail price constraint. For the purposes of this condition, ‘control’ should be interpreted in accordance with competition law principles.

Guidance notes for examiners

The exam question points to the imposition of remedies under the Access Directive (AD), Art. 9-13 (a) in the context of this case. The purpose of these guidance notes is not to provide a complete answer to the questions, but to point out specific aspects that should be considered by the examiners.

For Master's level (10 credits), a "good understanding" is required (literature and knowledge requirements), as opposed to bachelor students (general understanding required). Relevant literature includes:

Joachim Scherer, "Electronic Communication Law and Practice of the European Union", in Joachim Scherer (ed.), *Telecommunication Laws in Europe*, 6th ed., Bloomsbury Professional 2013, (3-100, 97 p.)

Paul Nihoul and Peter Rodford, "EU Electronic Communications Law: Competition & Regulation in the European Telecommunications Market", (Chapter "Access to facilities and resources controlled by other undertakings", 171-298), 127 p.)

Ian Walden, *Telecommunications Law and Regulation*, 4th edition (Oxford University Press, 2012), (Chapter "Access and Interconnection", 397-453), (56 p.)

The present exam is probably significantly more difficult for students, compared to earlier exams. At the same time, there is no reason to expect more from the candidates, as the teaching and the literature has not been changed much. Examiners should take this into consideration in their assessment and grading. It may be the case that good and very good grades also can be given to students who are not able to adequately address some or several of the aspects mentioned in this advice.

An important part of the evaluation is the degree to which students are able to provide an independent analysis of relevant aspects highlighted in the 4 issues. Clarity of the analysis, relevant focus and the quality of arguments should count more than the fact that a student reaches the same conclusion as suggested in these notes.

1. Access obligation

The first aspect regards the imposition of an access obligation under Article 12. Can the NRA impose an obligation on CT to allow RT's use of CT's cable-based access network? In light of the basic requirement included in Art. 12 (1), candidates should thus discuss whether this is a situation where the denial of access would hinder the emergence of a sustainable competitive market at the retail level, or whether it would not be in the end-user's interest.

As specified in AD, Art. 8 (4) obligations imposed shall be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of Directive 2002/21/EC (Framework Directive, FD). In particular, the national regulatory authorities (NRAs) shall promote competition in the provision of electronic communications networks. FD Art. 8 (5) (c) and (d) are also relevant (promoting infrastructure-based competition and promoting effective investment and innovation in new and enhanced infrastructures).

In this context candidates need to discuss CT's allegation that RT should invest in a fibre-based access network of its own. A new fibre-based access network, CT argues, would increase innovation, consumer choice and competition. CT is willing to grant access to its fibre-based access network, but it argues that access should not be given to its cable network. It states that RT should invest in an access network of its own. In the case description there is an explicit distinction between the different parts of CT's network, and the candidates should be in a position to work with these distinctions and use them in their analysis. The case description states that it can be assumed that if RT invests in an access network, it will deploy fibre technology. According to CT, a new fibre-based access network would lead to better networks and more competition. On the other hand, RT argues that it needs access to the cable-based network in order to enable it to compete with CT, particularly with respect to customers who do not wish to transition to fibre-based networks.

CT's allegation is not entirely irrelevant. Indeed, according to AD Rec. 19, "The imposition by national regulatory authorities of mandated access that increases competition in the short-term should not reduce incentives for competitors to invest in alternative facilities that will secure more competition in the long-term." The candidates have some leeway in how they tackle this issue. However, it is difficult to justify that the need for investment in alternative facilities is a sufficient reason to reject access, in light of CT's significant market power.

2. Provision of information

The second question addresses the provision of information. The assumption is here that the NRA decides that CT must allow RT the use of its entire access network. RT requests information about CT's access network, including the network architecture. It also asks for login information (passwords) for CT's network administration systems. Can the NRA impose an obligation that requires CT to provide this information?

Not all students may note that the information requested by CT is regulated differently. The network architecture may be subject to a transparency obligation (Art. 9) and the login information can be subject to an access obligation (Art. 12 (1) (h)). In both contexts the students should consider the argument that such information is business confidential and cannot be shared with its competitors. However, Art. 9 states explicitly that NRAs can impose obligations for transparency in relation to interconnection and/or access, requiring operators to make public specified information, such as ... network characteristics. It may be possible to discuss whether a request for the network architecture is more than "network characteristics", but this list in Art. 9 is non-exhaustive ("such as") and the case does not provide further relevant details on this issue. The argument of confidentiality should be refuted, because the main objective with these obligations is to enable competition through ex-ante measures.

Moreover, CT argues that its software user license does not allow it to share the system with other actors. This aspect should be discussed in light of Article 12 (2) (b). The case description does not provide further details on how to solve this issue, but a simple solution would be to require RT to purchase a license of its own.

It is also possible that candidates may discuss other aspects, such as whether it is excessive to require access to the network administration system. The case description does not provide further information on this aspect.

3. Price for cable-based access

A price comparison shows that CT's retail prices for cable-based access are kept at such a low level that RT has difficulties in attracting customers. RT's difficulty is caused by the high wholesale access fee it has to pay to CT. What can the NRA do to address this issue?

This is a classical issue of margin squeeze. The NRA can attempt to address this through price controls (Art. 13). However, as illustrated by the case-law of the ECJ (Deutsche Telekom and Telefonica), wholesale price controls have often failed to effectively address margin squeeze issues. Regulated undertakings are still able to set a retail price, and if the difference between the retail price and the wholesale price is too small, the result may still be a margin squeeze. In 2015 this group of students examined, in particular, the Deutsche Telekom case, as a part of their mid-term paper. It should therefore be expected that the problems of margin-squeeze are well-understood by good students.

Another possibility is to address this issue through a non-discrimination obligation, Art. 10. Obligations of non-discrimination shall ensure, in particular, that the operator applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and provides services and information to others under the same conditions and of the same quality as it provides for its own services, or those of its subsidiaries or partners. In the present case, the obligation would have to focus on the conditions CT provides for its own services. CT argues that the wholesale access fee is justified because RT only has relatively few end-users, which results in higher costs. However, according to Art. 10 (2) the conditions have to be "the same". The relatively lower number of users does not justify price discrimination.

In order to be effective, the non-discrimination obligation should be combined with accounting separation (Art. 11) and transparency obligations (Art. 9).

4. Price for fibre-based access

CT and RT also disagree about the price for RT's use of CT's fibre-based access network. The NRA is considering the imposition of a non-discrimination obligation, and/or price control for wholesale access based on fibre. In this part the candidates are asked to discuss the arguments (a. and b.) in light of relevant regulatory instruments.

This question deals with more recent developments, in which the objectives of enabling and ensuring competition are still relevant, but where there is increasing focus on incentives for investment in upgrading the networks to next generation access networks (fibre). This is reflected in two recommendations, addressed in points a. and b. However, it should be noted that these aspects are not addressed well in the literature (in particular, point b. is more recent). These aspects were discussed in class, but the question deals with relatively specific aspects related to a business reality that is likely difficult to understand for students. Therefore, it can be expected that only the very best students are able address this question. Some degree of leniency may be required here, and examiners should not expect too much from the students.

a. CT argues that it has taken a significant business risk when it invested the fibre-based part of its access network. Therefore, it argues, the wholesale access price should reflect that risk, resulting in a higher wholesale price for fibre-based access. This aspect should be discussed in light of the

Commission recommendation of 20th September 2010 on regulated access to the next generation access networks (NGA) (2010/572/EU). Relevant parts include Recital 18 (“NRAs need to ensure that access prices reflect the costs effectively borne by the SMP operator, including due consideration of the level of investment risk.”), Point 20 (NRAs should ensure that access to the terminating segment is provided at cost-oriented prices in accordance with Annex I”), and Annex, point 6.

b. Moreover, CT argues that an NRA-mandated price control of the fibre-based wholesale access would not create the right incentives for investment in new fibre-based access networks. It argues that a non-discrimination obligation would create better incentives for investment in new fibre-based access networks. This argument can be discussed in light of the Commission recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment. This recommendation is not included in the collection of regulatory instruments, but an excerpt was attached to the exam. The recommendation itself is highly technical, but the aspect highlighted by this question was presented in a lecture. As is evident from the (complicated!) wording of points 48 and 49, the Commission recommendation indeed foresees that NRAs should refrain from regulating wholesale access prices under certain conditions, where — in the same measure — the NRA imposes on the SMP operator non-discrimination obligations. The rationale for this is to strengthen the incentives for investment in next generation access networks. Therefore, CT’s argument is in fact in line with the Recommendation. Thus, there are good reasons for the NRA to agree with CT’s argument. It remains to be seen whether the candidates are able to address issues at this level of detail and complexity. Therefore, depending on the overall level of quality of the responses to this sub-question, a failure to adequately discuss this point should not necessarily stop examiners from awarding a top grade.