REPUBLIC OF ALBANIA
COMPETITION AUTHORITY

GUIDELINE[1]

No. 2, dated 20.12.2018

"For the implementation of competition rules in the assessment of telecommunication access agreements"

The Competition Commission, based on articles 4, 9, 10, 13, 24, letter dh, 25, letter c, of the Law no. 9121, dated 28.07.2003 "On Competition Protection", as amended,

GUIDE:

The approval of the Guideline "On the evaluation of agreements in the telecommunications sector".

INTRODUCTION

In the telecommunications industry, access agreements are crucial in allowing market participants to benefits of the liberalization.

THE PURPOSE

1. Determination of access principles, deriving from Law 9121/2003 "On Protection of Competition", amended, in order to create greater market security and conditions for investments and commercial initiatives in the telecommunications and multimedia sectors;
2. Defining and clarifying the relationship between competition law and legislation in the field of telecommunications (especially this relates to the relationship between competition rules and open network provision legislation);
3. To explain how competition rules will be applied in a consistent way across the sectors involved in the provision of new services, and in particular to access issues and gateways in this context.

GENERAL

1. The treatment of access agreements in the telecommunications sector may be defined under the competition rules. This guideline, therefore, addresses the issue of how competition rules and procedures apply to access agreements.
2. The telecommunications sector, liberalisation and harmonisation legislation permit and simplify the task of the undertakings in the market in embarking on new activities in new markets and consequently allow users to benefit from increased competition. These advantages must not be jeopardised by restrictive or abusive practices of other undertakings. The competition rules are therefore essential to ensure the completion of this development. New entrants must in the initial stages be guaranteed the right to have access

[1] *Notice on the application of the competition rules to access agreements in the telecommunications sector (98/C 265/02)- (31998Y0822 (01)*

to the networks of incumbent telecommunications operators (OT/TO/ *Telecommunications operators*). Several authorities, at the regional, national and community levels, have a role in regulating this sector. If the competition process is to work well in the internal market, effective coordination between these institutions must be ensured.

3. *Part I* of the guideline sets out the legal framework and details how to avoid unnecessary duplication of procedures while safeguarding the rights of undertakings and users under the competition rules. In the telecommunications sector, specific procedures in the open[2] network provisions framework likewise aim at resolving access problems in the first place at a decentralised, national level. *Part II* defines the approach to market definition in this sector. *Part III* details the principles that will be followed in the application of the competition rules. It aims to help telecommunications market participants to shape their access agreements by explaining the competition law requirements. The principles set out in this Guideline apply not only to traditional fixed line telecommunications, but also to all telecommunications, including areas such as satellite communications and mobile communications.

PART I
1. Legal Framework
Competition rules and sector specific regulation

1. Access problems in the broadest sense of the word can be dealt with at different levels and on the basis of a range of legislative provisions, of both national and European Union origin. A service provider faced with an access problem such as a TO's unjustified refusal to supply (or on reasonable terms) a leased line needed by the applicant to provide services to its customers. Generally speaking, aggrieved parties will experience a number of benefits, at least in an initial stage, in seeking redress at a national level. At a national level, the applicant has two main choices, namely: (1) specific national regulatory procedures, and (2) an action under national law before a national court or national competition authority.
2. Complaints made to the Albanian Competition Authority (ACA) under the competition rules in the place of or in addition to national courts, ACA will be dealt with according to the priority which they deserve in view of the urgency, novelty and transnational nature of the problem involved and taking into account the need to avoid duplicate proceedings.
3. ACA, during the exercise of its functions, applies the competition rules. *First*, the regulatory bodies operate under national law. *Secondly*, this law, may have objectives different to, but consistent with, the objectives of European Union competition policy, that cooperates as far as possible with the regulatory bodies.
4. Competition rules are not sufficient to remedy all of the various problems in the telecommunications sector. Therefore, regulatory bodies have a significantly wider ambit and a significant and far-reaching role in the regulation of the sector.
5. It is also important to note that the ONP legislation impose on TOs having significant market power (OFNT)[3] certain obligations of transparency and non-discrimination. ONP directives lay down obligations relating to transparency, obligations to supply and pricing practices. These obligations are enforced by the regulatory bodies, which also have jurisdiction to take steps to ensure effective competition.
6. This Guideline is written, in most respects as if there was one telecommunications operator occupying a dominant position. This will not necessarily be the case: for example, new telecommunications networks offering increasingly wide coverage will develop progressively. These alternative telecommunications networks may, or may ultimately, be large and extensive enough to be partly or even wholly substitutable for the existing

[2] *(ONP) Framework: Open Network Provision*
[3] *(OFNT) Operators with Sensitive Power in the Market*

national networks. The existence and the position on the market of competing operators will be relevant in determining whether sole or joint dominant positions exist.

7. Given the responsibility for the competition policy, ACA must serve the general interest. The administrative resources can be necessarily limited and cannot be used to deal with all the cases brought to its attention. Therefore, is obliged, in general, to take all organizational measures necessary for the performance of its task and, in particular, to establish priorities.
8. ACA, through the competencies provided by Law No. 9121/2003, focuses on notices, complaints and procedures that are relevant to the market.
9. The notification of an agreement to a regulatory entity does not make notification of an agreement to ACA unnecessary. Regulatory bodies must ensure that actions taken by them are consistent with the competition law. This duty requires them to refrain from action that would undermine the effective protection of the law rights under the competition rules. Therefore, they may not approve arrangements which are contrary to the competition rules.
10. Access agreements in principle regulate the provision of certain services between independent undertakings and do not result in the creation of an autonomous entity which would be distinct from the parties to the agreements. Access agreements are thus generally outside the scope of the Merger Regulation.
11. ACA could be seized of an issue relating to access agreements by: (a) a notification of an access agreement by one or more of the parties involved, (b) a complaint against a restrictive access agreement or against the behaviour of a dominant company in granting or refusing access, (c) a ACA's own-initiative procedure into such a grant or refusal, or by way of a sector inquiry. In addition, a complainant may request that ACA will take interim measures in circumstances where there is an urgent risk of serious and irreparable harm to the complainant or to the public interest. It should however, be noted in every case, except ACA is of great urgency that procedures before national courts can usually result more quickly in an order to end the infringements.
12. There are a number of areas where agreements will be subject to both the competition rules and sector specific measures. Undertakings operating in the telecommunications sector should be aware that their activity is in compliance with the competition rules.

2. ACA action in relation to access agreements

Access agreements taken as a whole are of great significance, and it is therefore appropriate for ACA to spell out as clearly as possible the legal framework within which these agreements should be concluded. It should be considered if there are cases where these agreements should be handled according to Article 4 or Article 9 of Law 9121/2003 "On Competition Protection", as amended.

2.1 Notifications

In applying the competition rules, ACA will be based on the legal framework in force. Cases where agreements benefit from an exemption under Article 5 and 6 of Law 9121/2003, they must be notified to ACA.

a. Complaints

Natural or legal persons with a legitimate interest may, under certain circumstances, submit a complaint to ACA, requesting that ACA by decision require that an infringement of Article 4 and 9 of Law 9121/2003 be brought to an end. A complainant may additionally request that ACA take interim measures where there is an urgent risk of serious and irreparable harm. A prospective complainant has other equally or even more effective options, such as an action before a national court. In this context, the national courts can offer considerable advantages for individuals and companies, such as in particular:

a) national courts can deal with and award a claim for damages resulting from an infringement of the competition rules;
b) national courts can usually adopt interim measures and order the termination of an infringement;
c) legal costs can be awarded to the successful applicant before a national court.

b. Use of national procedures

1. As referred to above, ACA aims at protecting free and effective competition in the market. In evaluating and maintaining this interest, ACA examines the significance of the alleged infringement as regards the functioning of the common market, the probability of establishing the existence of the infringement and the scope of the investigation required in order to fulfil Articles 4 and 9 of the Law.
2. As regards actions before the regulatory bodies, they must take into account "the need to stimulate a competitive market" and may impose conditions on one or more parties, *inter-alia*, "to ensure effective competition".
3. In any case, ACA may cooperate with regulatory bodies to avoid procedures initiated at the same time by several authorities or institutions.

c. Safeguarding complainant's rights

1. In the telecommunications sector, innovation cycles are relatively short, and any substantial delay in resolving an access dispute might in practice be equivalent to a refusal of access, thus prejudging the proper determination of the case.
2. For this reason, an access dispute should be resolved within a reasonable period of time, normally speaking not extending beyond six months of the matter first being drawn to the attention of that authority.
3. In addition, ACA must always look at each case on its merits. It will take action if it feels that in a particular case, there is a substantial interest affecting, or likely to affect, competition in the market.

d. Interim measures

1. As regards any request for interim measures, the existence or possibility of national proceedings is relevant to the question of whether there is a risk of serious and irreparable harm. Such proceedings should, *prima facie*, remove the risk of such harm and it would therefore not be appropriate for ACA to grant interim measures in the absence of evidence that the risk would nevertheless remain.
2. The availability of and criteria for interim injunctive relief is an important factor which ACA must take into account in reaching the conclusions. If interim injunctive relief were not available, or if such relief was not likely adequately to protect the complainant's rights, ACA would consider that the national proceedings did not remove the risk of harm, and could therefore commence its examination of the case.

3. Own-initiative investigation and sector inquiries

If it appears necessary, ACA will open an own-initiative investigation. It can also launch a sector inquiry.

3.1 Fines

1. ACA may impose fines of up to 10% of the annual worldwide turnover of undertakings which intentionally or negligently breach Article 4 or Article 9 of the Law 9121/2003. Where agreements have been notified pursuant to articles 5 and 6 of the Law, no fine may be levied by ACA in respect of activities described in the notification, for the period

following notification. However, ACA may withdraw the immunity from fines by informing the undertakings concerned that, after preliminary examination, it is of the opinion that Article 4 of the Law applies and that application of Article 5/6) is not justified and does not rely on legal provisions.

2. ACA shall impose penalties and fines on undertakings in cases when:
   a) the agreement proves to contain provisions contrary to Article 9; and / or
   b) the infringement of Article 4 is particularly serious.
   The method of calculating the fines is done according to the provisions of the Law and the Regulation "On Penalties and Facilitation".
3. Where an agreement has been notified to regulatory bodies, but has not been notified to ACA, the Authority does not consider it would be generally appropriate as a matter of policy to impose a fine in respect of the agreement. Also, such notice does not limit the rights of a party to seek redress before a national court for the damage caused by anti-competitive agreements.

Part II
1. Relevant markets

1. In the course of investigating cases within the framework set out in Part I above, ACA will base itself on the approach to the definition of relevant markets set out in the Guideline" On the definition of the relevant market".
2. Firms are subject to three main sources of competitive constraints; demand substitutability, supply substitutability and potential competition. The first constituting the most immediate and effective disciplinary force on the suppliers of a given product or service. Demand substitutability is therefore the main tool used to define the relevant product market on which restrictions of competition for the purposes of Article 4 and Article 9 of the Law.
3. Supply substitutability may in appropriate circumstances be used as a complementary element to define relevant markets. In practice it cannot be clearly distinguished from potential competition. Supply side substitutability and potential competition are used for the purpose of determining whether the undertaking has a dominant position or whether the restriction of competition is significant within the meaning of Article 4, or whether there is elimination of competition.
4. In assessing relevant markets, it is necessary to look at developments in the market in the short term.

The following sections set out some basic principles of particular relevance to the telecommunications sector.

2. Relevant product market

The relevant markets set out in the Guideline "On the definition of the relevant market", point 8.1.

1. Liberalisation of the telecommunications sector will lead to the emergence of a second type of market, that of access to facilities which are currently necessary to provide these liberalised services. Interconnection to the public switched telecommunications network would be a typical example of such access. It will not be commercially possible for third parties to provide, for example, comprehensive voice telephony services.
2. It is clear, therefore, that in the telecommunications sector there are at least two types of relevant markets to consider — that of a service to be provided to end users and that of access to those facilities necessary to provide that service to end users (information, physical network, etc.). In the context of any particular case, it will be necessary to define the relevant access and services markets, such as interconnection to the public telecommunications network, and provision of public voice telephony services.
3. When appropriate, ACA will use the test of a relevant market which is made by asking whether, if all the suppliers of the services in question raised their prices by 5 to 10%, their

collective profits would rise. According to this test, if their profits would rise, the market considered is a separate relevant market.

4. The principles under competition law governing these markets remain the same regardless of the particular market in question. Given the pace of technological change in this sector, any attempt to define particular product markets in this notice would run the risk of rapidly becoming inaccurate or irrelevant. The definition of particular product markets — for example, the determination of whether call origination and call termination facilities are part of the same facilities market is best done in the light of a detailed examination of an individual case.

3. Services market

This market can be broadly defined as the provision of any telecommunications service to users. Different telecommunications services will be considered substitutable if they show a sufficient degree of interchangeability for the end-user, which would mean that effective competition can take place between the different providers of these services.

4. Access to facilities

1. For a service provider to provide services to end-users it will often require access to one or more (upstream or downstream) facilities. For example, to deliver physically the service to end-users, it needs access to the termination points of the telecommunications network to which these end-users are connected. This access can be achieved at the physical level through dedicated or shared local infrastructure, either self-provided or leased from a local infrastructure provider. It can also be achieved either through a service provider who already has these end-users as subscribers, or through an interconnection provider who has access directly or indirectly to the relevant termination points.
2. In addition to physical access, a service provider may need access to other facilities to enable it to market its service to end users. For example, a service provider must be able to make end-users aware of its services. Where one organisation has a dominant position in the supply of services such as directory information, similar concerns arise as with physical access issues.
3. Physical access issues are important and should be considered where what is necessary is access to the network facilities of the dominant TO.
4. Some incumbent TOs may be tempted to resist providing access to third party service providers or other network operators, particularly in areas where the proposed service will be in competition with a service provided by the TO itself. This resistance will often manifest itself as unjustified delay in giving access, a reluctance to allow access or a willingness to allow it only under disadvantageous conditions. It is the role of the competition rules to ensure that these prospective access markets are allowed to develop, and that incumbent TOs are not permitted to use their control over access to stifle developments on the services markets.
5. It should be stressed that in the telecommunications sector, liberalisation can be expected to lead to the development of new, alternative networks which will ultimately have an impact on access market definition involving the incumbent telecommunications operator.

5. Relevant geographic market

1. Relevant geographic market is defined according to the Guideline "On the definition of the relevant market", point 8.2.
2. As regards the provision of telecommunication services and access markets, the relevant geographic market will be the area in which the objective conditions of competition applying to service providers are similar, and competitors are able to offer their services. It will therefore be necessary to examine the possibility for these service providers to access

an end-user in any part of this area, under similar and economically viable conditions. Regulatory conditions such as the terms of licences, and any exclusive or special rights owned by competing local access providers are particularly relevant.

PART III
1. Principles

ACA will apply the following principles:

1. ACA implements legal provisions in force in the field of competition and specifically the Law No. 9121/2003 "On Competition Protection", as amended, and its sub-legal acts. All acts adopted in the telecommunications sector are to be interpreted in a way consistent with competition rules, so as to ensure the best possible implementation of all aspects in telecommunications sector.
2. In the context of access agreements, the internal market and competition provisions are both important and mutually reinforcing for the proper functioning of the sector. It should also be borne in mind that a number of the competition law principles set out below are also covered by specific rules in the legal context of the telecommunications framework. Proper application of these rules should often avoid the need for the application of the competition rules.
3. As regards the telecommunications sector, attention should be paid to the cost of universal service obligations. The details of universal service obligations are a regulatory matter, however, in any case the principles of competition will be respected.
4. Additionally, if an undertaking having special or exclusive rights, or a State-owned undertaking, were required or authorised by a national regulator to engage in behaviour constituting an abuse of its dominant position, then ACA could take a decision requesting the termination of the infringement.

2. Dominant Position

1. In order for an undertaking to provide services in the telecommunications services market, it may need to obtain access to various facilities. For the provision of telecommunications services, for example, interconnection to the public switched telecommunications network will usually be necessary. Access to this network will almost always be in the hands of a dominant TO. As regards access agreements, dominance stemming from control of facilities will be the most relevant to the ACA's appraisal.
2. Whether or not a company has dominant position does not depend only on the legal rights granted to that company. The mere ending of legal monopolies does not put an end to dominant position. The development of effective competition from alternative network providers with adequate capacity and geographic reach will take time.
3. The Tetra Pak[4] case is important in the telecommunications sector. The Court held that the very close ties between the market with dominant and non-dominant position, and the extremely high market share with dominant position Tetra Pak was 'was in a situation comparable to that of holding a dominant position on the markets in question as a whole'. The Tetra Pak case concerned closely related horizontal markets: the analysis is equally applicable, however, to closely related vertical markets which will be common in the telecommunications sector. In the telecommunications sector, it is often the case that a particular operator has an extremely strong position on infrastructure markets, and on markets downstream of that infrastructure. Infrastructure costs also typically constitute the single largest cost of the downstream operations. Further, operators will often face the same competitors on both the infrastructure and downstream markets.

[4] *In each market, Tetra Pak faced the same potential customers and current competitors. Case C-333/94 P Tetra Pak International SA v Commission [1996] ECR I-5951.*

4. It is therefore possible to envisage a number of situations where there will be closely related markets, together with an operator having a very high degree of market power on at least one of those markets.
5. If these circumstances are present, it may be appropriate to find that the particular operator was in a situation comparable to that of holding a dominant position on the markets in question as a whole.
6. In the telecommunications sector, the concept of 'essential facilities' will in many cases be of relevance in determining the duties of dominant TOs. The expression essential facility is used to describe a facility or infrastructure which is essential for reaching customers and/or enabling competitors to carry on their business, and which cannot be replicated by any reasonable means.
7. A company controlling the access to an essential facility enjoys a dominant position. Conversely, a company may enjoy a dominant position without controlling an essential facility.

3. Services market

One of the factors used to measure the market power of an undertaking is the sales attributable to that undertaking, expressed as a percentage of total sales in the market for substitutable services in the relevant geographic area. As regards the services market will be assessed, *inter-alia*, the turnover generated by the sale of substitutable services, excluding the sale or internal usage of interconnection services and the sale or internal usage of local infrastructure, taking into consideration the competitive conditions and the structure of supply and demand on the market.

4. Access to facilities

1. The concept of "access" can relate to a range of situations, including the availability of leased lines enabling a service provider to build up its own network, and interconnection in the strict sense, that is interconnecting two telecommunication networks, for example mobile and fixed. In relation to access it is probable that the incumbent operator will remain dominant for some time after the legal liberalisation has taken place. The incumbent operator, which controls the facilities, is often also the largest service provider, and it has in the past not needed to distinguish between the conveyance of telecommunications services and the provision of these services to end-users. Traditionally, an operator who is also a service provider has not required its downstream operating arm to pay for access, and therefore it has not been easy to calculate the revenue to be allocated to the facility. In a case where an operator is providing both access and services it is necessary to separate so far as possible the revenues as the basis for the calculation of the company's share of whichever market is involved. In this case introducing a requirement for separate accounting for "activities related to interconnection — covering both interconnection services provided internally and interconnection services provided to others — and other activities".
2. The economic significance of obtaining access also depends on the coverage of the network with which interconnection is sought. Therefore, in addition to using turnover figures where possible, also take into account the number of customers who have subscribed to services offered by the dominant company comparable with those which the service provider requesting access intends to provide. Accordingly, market power for a given undertaking will be measured partly by the number of subscribers who are connected to termination points of the telecommunications network of that undertaking expressed as a percentage of the total number of subscribers connected to termination points in the relevant geographic area.

5. Supply-side substitutability

Supply-side substitutability is also relevant to the question of dominance. A market shares of over 50% is usually sufficient to demonstrate dominance although other factors will be examined. For example, the examination of the existence of other network providers, if any, in the relevant geographic area to determine whether such alternative infrastructures are sufficiently dense to provide competition to the incumbent's network and the extent to which it would be possible for new access providers to enter the market.

6. Other relevant factors

1. In addition to market share data, and supply-side substitutability, in determining whether an operator is dominant also has to be exanimated whether the operator has privileged access to facilities which cannot reasonably be duplicated within an appropriate time frame, either for legal reasons or because it would cost too much.
2. As competing access providers appear and challenge the dominance of the incumbent, the scope of the rights, and notably their territorial reach, will play an important part in the determination of market power. ACA will closely follow market evolution in relation to these issues and will take account of any altered market conditions in its assessment of access issues under the competition rules.

7. Joint/collective dominance

1. The competition rules also apply when more than one company shares a dominant position.
2. The words "abuse by one or more undertakings" describe something different from the prohibition of anti-competitive agreements or concerted practices in Article 4 of the Law.
3. Two companies, each dominant in a separate national market, are not the same as two jointly dominant companies. For two or more companies to be in a joint dominant position, they must together have substantially the same position *vis-{-vis* their customers and competitors as a single company has if it is in a dominant position. With specific reference to the telecommunications sector, joint dominance could be attained by two telecommunications infrastructure operators covering the same geographic market.
4. In addition, for two or more companies to be jointly dominant it is necessary, though not sufficient, for there to be no effective competition between the companies on the relevant market. This lack of competition may in practice be due to the fact that the companies have links such as agreements for cooperation, or interconnection agreements. However, this doesn't consider that either economic theory or competition law implies that such links are legally necessary for a joint dominant position to exist. It is a sufficient economic link if there is the kind of interdependence which often comes about in oligopolistic situations. There does not seem to be any reason in law or in economic theory to require any other economic link between jointly dominant companies. This having been said, in practice such links will often exist in the telecommunications sector where national TOs nearly inevitably have links of various kinds with one another.
5. To take as an example access to the local loop, in some places this could well be controlled in the near future by two operators, the incumbent TO and a cable operator. In order to provide particular services to consumers, access to the local loop of either the TO or the cable television operator is necessary. Depending on the circumstances of the case and in particular on the relationship between them, it is possible that neither operator holds a dominant position. However, they may hold a joint monopoly of access to these facilities. In the longer term, technological developments may lead to other local loop access mechanisms being viable, such as energy networks. The existence of such mechanisms will be taken into account in determining whether dominant positions or joint dominant positions exist.

8. Abuse of dominant position

1. Application of Article 9 presupposes the existence of a dominant position and some link between the dominant position and the alleged abusive conduct. It will often be necessary in the telecommunications sector to examine a number of associated markets, one or more of which may be dominated by a particular operator. In these circumstances, there are a number of possible situations where abuses could arise:
   a) conduct on the dominated market having effects on the dominated market;
   b) conduct on the dominated market having effects on markets other than the dominated market;
   c) conduct on a market other than the dominated market and having effects on the dominated market;
   d) conduct on a market other than the dominated market and having effects on a market other than the dominated market.
2. Although the factual and economic circumstances of the telecommunications sector are often novel, in many cases it is possible to apply established competition law principles. When looking at competition problems in this sector, it is important to bear in mind existing case law, for example, leveraging market power, discrimination and bundling.

9. Refusal to grant access to facilities and application of unfavourable terms

1. A refusal to give access may be prohibited under Article 9 if the refusal is made by a company which is dominant because of its control of facilities, as incumbent TOs will usually be for the foreseeable future. A refusal may have "the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition". A refusal will only be abusive if it has exploitative or anti-competitive effects. Service markets in the telecommunications sector will initially have few competitive players and refusals will therefore generally affect competition on those markets. In all cases of refusal, any justification will be closely examined to determine whether it is objective.
2. Broadly there are three relevant scenarios:
   (a) a refusal to grant access for the purposes of a service where another operator has been given access by the access provider to operate on that services market;
   (b) a refusal to grant access for the purposes of a service where no other operator has been given access by the access provider to operate on that services market;
   (c) a withdrawal of access from an existing customer.

10. Discrimination

1. As to the first of the above scenarios, it is clear that a refusal to supply a new customer in circumstances where a dominant facilities owner is already supplying one or more customers operating in the same downstream market would constitute discriminatory treatment which, if it would restrict competition on that downstream market, would be an abuse. Where network operators offer the same, or similar, retail services as the party requesting access, they may have both the incentive and the opportunity to restrict competition and abuse their dominant position in this way. There may, of course, be justifications for such refusal, for example, applicants which represent a potential credit risk. In the absence of any objective justifications, a refusal would usually be an abuse of the dominant position on the access market.
2. In general terms, the dominant company's duty is to provide access in such a way that the goods and services offered to downstream companies are available on terms no less favourable than those given to other parties, including its own corresponding downstream operations.

11. Essential facilities

1. As to the second of the above situations, the question arises as to whether the access provider should be obliged to contract with the service provider in order to allow the service provider to operate on a new service market. Where capacity constraints are not an issue and where the company refusing to provide access to its facility has not provided access to that facility, either to its downstream arm or to any other company operating on that services market, then it is not clear what other objective justification there could be.
2. In the transport field, the European Union has ruled that a firm controlling an essential facility must give access in certain circumstances. The same principles apply to the telecommunications sector. If there were no commercially feasible alternatives to the access being requested, then unless access is granted, the party requesting access would not be able to operate on the service market. Refusal in this case would therefore limit the development of new markets, or new products on those markets, or impede the development of competition on existing markets. A refusal having these effects is likely to have abusive effects.
3. The principle obliging dominant companies to contract in certain circumstances will often be relevant in the telecommunications sector. Even where restrictions have already been, or will soon be, lifted, competition in downstream markets will continue to depend upon the pricing and conditions of access to upstream network services that will only gradually reflect competitive market forces. Given the pace of technological change in the telecommunications sector, it is possible to envisage situations where companies would seek to offer new products or services which are not in competition with products or services already offered by the dominant access operator, but for which this operator is reluctant to provide access.
4. ACA must ensure that the control over facilities enjoyed by incumbent operators is not used to hamper the development of a competitive telecommunications environment. A company which is dominant on a market for services and which commits an abuse contrary to Article 9 on that market may be required, in order to put an end to the abuse, to supply access to its facility to one or more competitors on that market. In particular, a company may abuse its dominant position if by its actions it prevents the emergence of a new product or service.
5. The starting point for the analysis will be the identification of an existing or potential market for which access is being requested. In order to determine whether access should be ordered under the competition rules, account will be taken of a breach by the dominant company of its duty not to discriminate (see below) or of the following elements, taken cumulatively:
    a) Access to the facility in question is generally essential in order for companies to compete on that related market. The key issue here is therefore what is essential. It will not be sufficient that the position of the company requesting access would be more advantageous if access were granted, but refusal of access must lead to the proposed activities being made either impossible or seriously and unavoidably uneconomic. Although, for example, alternative infrastructure may be used for liberalised services, it will be some time before this is in many cases a satisfactory alternative to the facilities of the incumbent operator. Such alternative infrastructure does not at present offer the same dense geographic coverage as that of the incumbent TO's network;
    b) There is sufficient capacity available to provide access;
    c) The facility owner fails to satisfy demand on an existing service or product market, blocks the emergence of a potential new service or product, or impedes competition on an existing or potential service or product market;
    d) The company seeking access is prepared to pay the reasonable and non-discriminatory price and will otherwise in all respects accept non-discriminatory access terms and conditions;
    e) There is no objective justification for refusing to provide access. Relevant justifications in this context could include an overriding difficulty of providing access to the

requesting company, or the need for a facility owner which has undertaken investment aimed at the introduction of a new product or service to have sufficient time and opportunity to use the facility in order to place that new product or service on the market. However, although any justification will have to be examined carefully on a case-by-case basis, it is particularly important in the telecommunications sector that the benefits to end-users which will arise from a competitive environment are not undermined by the actions of the former State monopolists in preventing competition from developing.

In determining whether an infringement of Article 9 has been committed, account will be taken both of the factual situation in that and other geographic areas, and, where relevant, the relationship between the access requested and the technical configuration of the facility.

6. The question of objective justification will require particularly close analysis in this area. In addition to determining whether difficulties cited in any particular case are serious enough to justify the refusal to grant access, the relevant authorities must also decide whether these difficulties are sufficient to outweigh the damage done to competition if access is refused or made more difficult and the downstream service markets are thus limited.
7. Three important elements relating to access which could be manipulated by the access provider in order, in effect, to refuse to provide access are timing, technical configuration and price.
8. Dominant TOs have a duty to deal with requests for access efficiently: undue and inexplicable or unjustified delays in responding to a request for access may constitute an abuse. In particular, however, the Commission will seek to compare the response to a request for access with:
   a) the usual time frame and conditions applicable when the responding party grants access to its facilities to its own subsidiary or operating branch;
   b) responses to requests for access to similar facilities;
   c) the explanations given for any delay in dealing with requests for access.
9. Issues of technical configuration will similarly be closely examined in order to determine whether they are genuine. In principle, competition rules require that the party requesting access must be granted access at the most suitable point for the requesting party, provided that this point is technically feasible for the access provider. Questions of technical feasibility may be objective justifications for refusing to supply, for example, the traffic for which access is sought must satisfy the relevant technical standards for the infrastructure or there may be questions of capacity restraints, where questions of rationing may arise.
10. Excessive pricing for access, as well as being abusive in itself, may also amount to an effective refusal to grant access.
11. There are a number of elements of these tests which require careful assessment. Pricing questions in the telecommunications sector will be facilitated by the obligations under this sector, to have transparent cost-accounting systems.

12. Withdrawal of supply/offers

1. There are many cases in practice related to withdrawal of supply from downstream competitors.[5]
2. The unilateral termination of access agreements raises substantially similar issues to those examined in relation to refusals. Withdrawal of access from an existing customer will

[5] *EU practice: For Solvents trading company, the Court held that "an enterprise which has a dominant position in the raw material market and which, for the purpose of reserving raw materials for the production of its derivatives refuses to supply a customer who is themselves the producer of these derivatives and therefore risks eliminating all competition from this client, is abusing her dominant position.*

usually be abusive. Again, objective reasons may be provided to justify the termination. Any such reasons must be proportionate to the effects on competition of the withdrawal.

13. Other forms of abuse

Refusals to provide access are only one form of possible abuse in this area. Abuses may also arise in the context of access having been granted. An abuse may occur *inter-alia* where the operator is behaving in a discriminatory manner or the operator's actions otherwise limit markets or technical development. The following are non-exhaustive examples of abuse which can take place.

14. Network configuration

Network configuration by a dominant network operator which makes access objectively more difficult for service providers could constitute an abuse unless it were objectively justifiable. One objective justification would be where the network configuration improves the efficiency of the network generally.

15. Tying

This is of particular concern where it involves the tying of services for which the TO is dominant with those for which it is not. Where the vertically integrated dominant network operator obliges the party requesting access to purchase one or more services without adequate justification, this may exclude rivals of the dominant access provider from offering those elements of the package independently. This requirement could thus constitute an abuse under Article 9.[6]

16. Pricing

In determining whether there is a pricing problem under the competition rules, it will be necessary to demonstrate that costs and revenues are allocated in an appropriate way. Improper allocation of costs and interference with transfer pricing could be used as mechanisms for disguising excessive pricing, predatory pricing or a price squeeze.

17. Excessive pricing

1. Pricing problems in connection with access for service providers to a dominant operator's facilities will often revolve around excessively high prices. In the absence of another viable alternative to the facility to which access is being sought by service providers, the dominant or monopolistic operator may be inclined to charge excessive prices.
2. An excessive price has been defined as being "excessive in relation to the economic value of the service provided". In addition, in the European Union practice was made it clear that one of the ways this could be calculated is as follows:
   "This excess could, *inter-alia*, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production".
3. It is necessary to determine what the actual costs for the relevant product are. Appropriate cost allocation is therefore fundamental to determining whether a price is excessive. For example, where a company is engaged in a number of activities, it will be necessary to allocate relevant costs to the various activities, together with an appropriate contribution

[6] *The European Court has held that "... even where the sales of the two products are in accordance with the commercial use or there is a natural link between the two products in question, such sales may still constitute abuse in the sense, are objectively justified ... '*

towards common costs. It may also be appropriate to determine the proper cost allocation methodology where this is a subject of dispute.

4. In determining what constitutes an excessive price, account may be taken the legislation setting out pricing principles for the particular sector.
5. Further, comparison with other geographic areas can also be used as an indicator of an excessive price: could be made a comparison between the prices charged by a dominant company, and those charged on markets which are open to competition. Such a comparison could provide a basis for assessing whether or not the prices charged by the dominant company were fair. In certain circumstances, where comparative data are not available, regulatory authorities have sought to determine what would have been the competitive price were a competitive market to exist. In an appropriate case, such an analysis may be taken into account by ACA in its determination of an excessive price.

18. Predatory pricing

1. Predatory pricing occurs, *inter-alia,* where a dominant firm sells a good or service below cost for a sustained period of time, with the intention of deterring entry, or putting a rival out of business, enabling the dominant firm to further increase its market power and later its accumulated profits. Such unfairly low prices are in breach of Article 9. Such a problem could, for example, arise in the context of competition between different telecommunications infrastructure networks, where a dominant operator may tend to charge unfairly low prices for access in order to eliminate competition from other (emerging) infrastructure providers. In general, a price is abusive if it is below the dominant company's average variable costs or if it is below average total costs and part of an anti-competitive plan. In network industries a simple application of the above rule would not reflect the economic reality of network industries.[7]
2. In order to trade a service or group of services profitably, an operator must adopt a pricing strategy whereby its total additional costs in providing that service or group of services are covered by the additional revenues earned as a result of the provision of that service or group of services. Where a dominant operator sets a price for a particular product or service which is below its average total costs of providing that service, the operator should justify this price in commercial terms: a dominant operator which would benefit from such a pricing policy only if one or more of its competitors was weakened would be committing an abuse.
3. In such cases is important to determine the price below which a company could only make a profit by weakening or eliminating one or more competitors. Cost structures in network industries tend to be quite different to most other industries since the former have much larger common and joint costs.
4. For example, in the case of the provision of telecommunications services, a price which equates to the variable cost of a service may be substantially lower than the price the operator needs in order to cover the cost of providing the service. To apply the AKZO test to prices which are to be applied over time by an operator, and which will form the basis of that operator's decisions to invest, the costs considered should include the total costs which are incremental to the provision of the service. In analysing the situation, consideration will have to be given to the appropriate time frame over which costs should be analysed. In most cases, there is reason to believe that neither the very short nor very long run are appropriate.

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[7] This rule was established in the AKZO8 case, where the European Court of Justice defined the variable average costs as "those that differed depending on the quantities produced" and explained the reasoning behind the following rules: "A dominant undertaking has no interest to apply such awards, except in cases of elimination of competitors, in order to subsequently increase prices by exploiting its monopoly position, as each sale generates a loss, namely the total amount of fixed costs (which would i.e., those that remain constant irrespective of the quantities produced) and at least one part of the variable costs associated with the units produced. "

5. In these circumstances, is often need to examine the average incremental costs of providing a service, and may need to examine average incremental costs over a longer period than one year.

19. Price Squeeze

1. Where the operator is dominant in the product or services market, a price squeeze could constitute an abuse. A price squeeze could be demonstrated by showing that the dominant company's own downstream operations could not trade profitably on the basis of the upstream price charged to its competitors by the upstream operating arm of the dominant company. A loss-making downstream arm could be hidden if the dominant operator has allocated costs to its access operations which should properly be allocated to the downstream operations, or has otherwise improperly determined the transfer prices within the organisation. In this case will be appropriate a recommendation related with a separate accounting for different business areas within a vertically integrated dominant operator. In an appropriate case, may be required to the dominant company to produce audited separated accounts dealing with all necessary aspects of the dominant company's business. However, the existence of separated accounts does not guarantee that no abuse exists: ACA will examine the facts on a case-by-case basis.
2. In appropriate circumstances, a price squeeze could also be demonstrated by showing that the margin between the price charged to competitors on the downstream market (including the dominant company's own downstream operations, if any) for access and the price which the network operator charges in the downstream market is insufficient to allow a reasonably efficient service provider in the downstream market to obtain a normal profit (unless the dominant company can show that its downstream operation is exceptionally efficient).
3. If either of these scenarios were to arise, competitors on the downstream market would be faced with a price squeeze which could force them out of the market.

20. Discrimination

1. A dominant access provider may not discriminate between the parties to different access agreements where such discrimination would restrict competition. Any differentiation based on the use which is to be made of the access rather than differences between the transactions for the access provider itself, if the discrimination is sufficiently likely to restrict or distort actual or potential competition, would be contrary to Article 9. This discrimination could take the form of imposing different conditions, including the charging of different prices, or otherwise differentiating between access agreements, except where such discrimination would be objectively justified, for example on the basis of cost or technical considerations or the fact that the users are operating at different levels. Such discrimination could be likely to restrict competition in the downstream market on which the company requesting access was seeking to operate, in that it might limit the possibility for that operator to enter the market or expand its operations on that market.
2. Such discrimination could similarly have an effect on competition where the discrimination was between operators on closely related downstream markets. Where two distinct downstream product markets exist, but one product would be regarded as substitutable for another save for the fact that there was a price difference between the two products, discriminating in the price charged to the providers of these two products could decrease existing or potential competition. For example, although fixed and mobile voice telephony services at present probably constitute separate product markets, the markets are likely to converge. Charging higher interconnection prices to mobile operators as compared to fixed operators would tend to hamper this convergence, and would therefore have an effect on competition. Similar effects on competition are likely in other telecommunications markets. Such discrimination would in any event be difficult to justify given the obligation to set cost-related prices.

3. With regard to price discrimination, Article 9 prohibits unfair discrimination by a dominant firm between customers of that firm including discriminating between customers on the basis of whether or not they agree to deal exclusively with that dominant position firm.[8]
4. A determination of whether such differences result in distortions of competition must be made in the particular case. It is important to remember that Articles 4 and 9 deal with competition and not regulatory matters. Article 9 cannot require a dominant company to treat different categories of customers differently, except where this is the result of market conditions and the principles of Article 9. On the contrary, Article 9 prohibits dominant companies from discriminating between similar transactions where such a discrimination would have an effect on competition.
5. Discrimination without objective justification as regards any aspects or conditions of an access agreement may constitute an abuse. Discrimination may relate to elements such as pricing, delays, technical access, routing, numbering, restrictions on network use exceeding essential requirements and use of customer network data. However, the existence of discrimination can only be determined on a case-by-case basis. Discrimination is contrary to Article 9 whether or not it results from or is apparent from the terms of a particular access agreement.
6. In this context, a general duty on the network operator to treat independent customers in the same way as its own subsidiary or downstream service arm. The nature of the customer and its demands may play a significant role in determining whether transactions are comparable. Different prices for customers at different levels (for example, wholesale and retail) do not necessarily constitute discrimination.
7. Discrimination issues may arise in respect of the technical configuration of the access, given its importance in the context of access.
   a) *The degree of technical sophistication of the access*: restrictions on the type or "level" in the network hierarchy of exchange involved in the access or the technical capabilities of this exchange are of direct competitive significance. These could be the facilities available to support a connection or the type of interface and signalling system used to determine the type of service available to the party requesting access (for example, intelligent network facilities).
   b) *The number and/or location of connection points*: the requirement to collect and distribute traffic for particular areas at the switch which directly serves that area rather than at a higher level of the network hierarchy may be important. The party requesting access incurs additional expense by either providing links at a greater distance from its own switching centre or being liable to pay higher conveyance charges.
   c) *Equal access*: the possibility for customers of the party requesting access to obtain the services provided by the access provider using the same number of dialled digits as are used by the customers of the latter is a crucial feature of competitive telecommunications.

21. Objective justification

Justifications could include factors relating to the actual operation of the network owned by the access provider, or licensing restrictions consistent with, for example, the subject matter of intellectual property rights.

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[8] The EU legislation provides that "different tariffs, terms and conditions for interconnection may be set for the different categories of undertakings authorized to provide networks and services where such differences may be objectively justified by the type of interconnection type provided and / or the relevant national licensing conditions ... "(provided that such differences do not cause distortions of competition).

22. Abuses of joint/collective dominant positions

1. In the case of joint dominance behaviour by one of several jointly dominant companies may be abusive even if others are not behaving in the same way.
2. In addition to remedies under the competition rules, if no operator was willing to grant access, and if there was no technical or commercial justification for the refusal, one would expect that the regulatory would resolve the problem by ordering one or more of the companies to offer access.

23. Access agreements

1. Restrictions of competition included in or resulting from access agreements may have two distinct effects: restriction of competition between the two parties to the access agreement, or restriction of competition from third parties, for example through exclusivity for one or both of the parties to the agreement. In addition, where one party is dominant, conditions of the access agreement may lead to a strengthening of that dominant position, or to an extension of that dominant position to a related market, or may constitute an unlawful exploitation of the dominant position through the imposition of unfair terms.
2. Access agreements where access is in principle unlimited are not likely to be restrictive for competition. Exclusivity obligations in contracts providing access to one company are likely to restrict competition because they limit access to infrastructure for other companies. Since most networks have more capacity than any single user is likely to need, this will normally be the case in the telecommunications sector.
3. Access agreements can have significant pro-competitive effects as they can improve access to the downstream market. Access agreements in the context of interconnection are essential to interoperability of services and infrastructure, thus increasing competition in the downstream market for services, which is likely to involve higher added value than local infrastructure.
4. There is, however, obvious potential for anticompetitive effects of certain access agreements or clauses therein. Access agreements may, for example:
   a) serve as a means of coordinating prices;
   b) serve as a means of market sharing;
   c) have exclusionary effects on third parties;
   d) lead to an exchange of commercially sensitive information between the parties.
5. The risk of price coordination is particularly acute in the telecommunications sector since inter-connection charges often amount to 50% or more of the total cost of the services provided, and where interconnection with a dominant operator will usually be necessary. In these circumstances, the scope for price competition is limited and the risk (and the seriousness) of price coordination correspondingly greater.
6. Furthermore, interconnection agreements between network operators may under certain circumstances be an instrument of market sharing between the network operator providing access and the network operator seeking access, instead of the emergence of network competition between them.
7. In a liberalized telecommunications environment, the above types of restrictions of competition will be monitored by ACA and other regulatory bodies under the competition rules.
8. Can be identified certain types of restriction which would potentially infringe Article 4 of the Law and therefore require individual exemption. These clauses will most commonly relate to the commercial framework of the access.
9. In the telecommunications sector, it is inherent in interconnection that parties will obtain certain customer and traffic information about their competitors. This information exchange could in certain cases influence the competitive behaviour of the undertakings concerned, and could easily be used by the parties for collusive practices, such as market sharing. The information received from an organization seeking interconnection be used

only for the purposes for which it was supplied. In order to comply with the competition rules, operators will have to introduce safeguards to ensure that confidential information is only disclosed to those parts of the companies involved in making the interconnection agreements, and to ensure that the information is not used for anti-competitive purposes. Provided that these safeguards are complete and function correctly, there should be no reason in principle why simple interconnection agreements should be caught by Article 4.

10. Exclusivity arrangements, for example where traffic would be conveyed exclusively through the telecommunications network of one or both parties rather than to the network of other parties with whom access agreements have been concluded will similarly require analysis under Article 5. If no justification is provided for such routing, such clauses will be prohibited. Such exclusivity clauses are not, however, an inherent part of interconnection agreements.
11. Access agreements that have been concluded with an anti-competitive object are extremely unlikely to fulfil the criteria for an individual exemption.
12. Furthermore, access agreements may have an impact on the competitive structure of the market. Local access charges will often account for a considerable portion of the total cost of the services provided to end-users by the party requesting access, thus leaving limited scope for price competition. Because of the need to safeguard this limited degree of competition, have to pay particular attention to scrutinizing access agreements in the context of their likely effects on the relevant markets in order to ensure that such agreements do not serve as a hidden and indirect means for fixing or coordinating end-prices for end-users, which constitutes one of the most serious infringements of Article 4 of the Law. This would be of particular concern in oligopolistic markets.
13. In addition, clauses involving discrimination leading to the exclusion of third parties are similarly restrictive of competition. The most important is discrimination with regard to price, quality or other commercially significant aspects of the access to the detriment of the party requesting access, which will generally aim at unfairly favouring the operations of the access provider.

Conclusions

1. The competition rules and sector specific regulation form a coherent set of measures to ensure a liberalized and competitive market environment for telecommunications markets in the country.
2. Where competition rules are invoked, ACA will consider which markets are relevant and will apply Articles 4 and 9 in accordance with the principles set out above.

This Guideline enters into force immediately.

CHAIRWOMAN

Juliana Latifi