

Dealing with abusive conducts

A perspective from a National Regulatory Authority

Adela Gómez

Brussels, 5 November 2009

Dealing with abusive conduct – A perspective from a National Regulatory Authority

I. How does CMT deal with abusive conduct ?

➤ Ex ante imposition of remedies in regulated markets

Goals: infrastructure-based, sustainable competition (efficient investment, deployment of NGAs)

Approach: intervention in wholesale markets

Prohibition of anticompetitive practices – focus on exclusionary pricing and tying

Obligations imposed – verification tools

- Reasonable requests for access to, and use of, specific network facilities
- Price control: cost orientation / reasonable prices
- Cost accounting and accounting separation
- Transparency: reference offer, network developments
- Non-discrimination: notification of agreements, network developments, performance indicators
- Communication of prices and conditions of retail products

Dealing with abusive conduct – A perspective from a National Regulatory Authority

I. How does CMT deal with abusive conduct ? (cont.)

➤ Analysis of the incumbent's retails products

Facilitating downstream entry/expansion: profitability margins and replicability of retail offers

Methodology of assessment

- Value added: legal certainty, flexible and systematic analysis, time to market
- Approach: “Discounted Cash Flows” (DCF) test
 - Setting of profitability thresholds (WACC, network costs, customer lifetime)
 - Standard of efficiency
- Scope of analysis: stand-alone products and bundles (access, traffic, broadband, TV)
- Review of criteria: market and regulatory developments

Assessment so far: limited number of offers blocked

Dealing with abusive conduct – A perspective from a National Regulatory Authority

I. How does CMT deal with abusive conduct ? (cont.)

➤ Infringement proceedings: interconnection and access conflicts

The obligation of NRAs to intervene – the right of operators to request intervention

Imposition of obligations provided for in reference offers / imposition of fines

Type of abusive conduct concerned: constructive refusal to deal, discrimination

Decreasing degree of conflict – different drivers

- Interconnection scenario: the efficacy of infringement proceedings
- Access: the “new deal” boosted by CMT

Dealing with abusive conduct – A perspective from a National Regulatory Authority

II. Regulatory intervention on the basis of competition law criteria

➤ Enforcement priorities on Art. 82

A necessary first step in the right direction: reinforcing legal certainty and alignment with modern economic analysis

- Link between exclusionary conduct and sound market power
- Focus on likelihood of negative impact on consumer welfare / but-for analysis
- Assessment of efficiencies
- Competitors as efficient as dominant undertakings
- Margin squeeze as a constructive refusal to deal

A few question marks: clarity of rules, feasible implementation and focus on what makes the real difference

Finally, will EU courts buy this new approach ?

Dealing with abusive conduct – A perspective from a National Regulatory Authority

II. Regulatory intervention on the basis of competition law criteria (cont.)

➤ Specificities of the telecoms sector

- Need for adequate technical capabilities: anticipating concerns, targeting remedies, monitoring compliance
- Efficacy of measures imposed on markets where Competition Law has a limited ability to timely ensure fair play by dominant undertakings

➤ Competitive functioning of markets as a common denominator – need for close cooperation

- Adequate solutions to address market failures
- Legal certainty and predictability