

Some critical reflections about access obligations under the European Communications Framework

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1. Introduction

European communications and competition policy has a tradition of relying on access obligations as primary tool to discipline exclusive control over so called bottleneck facilities. The overarching goal behind the application of access obligations in the communications sector is to foster open and competitive markets with a broad range of diverse, interoperable services for consumers. The European Access Directive, part of the revised Communications Framework, continued this tradition and empowered National Regulatory Authorities (NRAs) to impose access obligations on all kinds of communications networks, services and technical facilities. The Access Directive has been reviewed in the first half of the year 2006. In its subsequently published Communication on the Review, the European Commission confirmed the overall adequacy and efficiency of the Access Directive. On this occasion the European Commission also stressed once more the importance of access rules as a tool to realize consumer welfare, competition and user rights, notably the right for users to access and distribute lawful content.

This article will place some critical reflections on access obligations. Using the example of bottlenecks in digital broadcasting, it will show that access obligations that were successfully applied to traditional bottleneck situations are not necessarily the best or effective way of guaranteeing openness of the digital service market. The example of digital broadcasting is for many reasons interesting. To begin with, the field of digital broadcasting is particularly well-suited to demonstrate the evolution of bottleneck questions from the classical “natural monopoly”-kind of bottleneck to more market-dependent bottleneck situations. The problem of bottleneck control in digital broadcasting is also well-suited to explain the conflicts between economic and public policy rationales for regulation in communications markets. In response, the Access Directive subjects bottlenecks in digital broadcasting to a particularly strict set of access rules. Finally, as the different media are converging, the example of digital broadcasting can also provide valuable inspiration for the discussion in other media sectors, such as the distribution of paid-for content via e-commerce platforms on the internet or via mobile platforms.

The aim of this article is not to provide an in-depth analysis of the rules of the Access Directive, nor to compare its different access regimes for the different kinds of network facilities and services. It is also not the ambition of this article to make predictions about the probability of leverage through bottleneck control in today’s broadcasting markets, or to provide a complete analysis of the pros and cons of imposing access obligations in the various communications markets. The goal of this article is more modest: it questions the broad support in European communications law for access obligations as standard answer to bottleneck problems in digital broadcasting. It will argue that their adequacy very much depends on the circumstances of a concrete case. Finally, it will suggest an alternative course of action.

2. Mandated access in digital broadcasting markets: background and rules

The problem of exclusive control over services or facilities that are crucial gateways for market access is a central problem in the regulation of communications markets in general, and broadcasting markets in specific. Note that exclusive control over facilities and services must not per se pose a competition or information policy problem (even if exercised by a party with dominant market power). Exclusive control can be acceptable from a competition and information policy point of view, unless the effect of such control is market foreclosure and restricted consumer choice. This is an important conclusion from general competition law cases that deal with so called essential facilities situations and that have ultimately influenced sector specific access rules. The notion of essential facilities is used to describe a facility or infrastructure which is essential for providing services to the market and which cannot be replicated by any reasonable means. Refusals to supply an essential facility can lead to a dominant party being required to grant access to its facility to one or more competitors in the market in question under general competition law. The most extreme case of essential facilities is natural monopolies. Natural monopolies describe situations in which demand for a particular services or facility can be best and most efficiently served by a single operator. Usually, this concerns resources whose capacities can be extended only with difficulties, due to the technical and economic particularities of a sector. Telecom networks are often cited as one example of a sector that is susceptible to natural monopoly situations.

To prevent the anti-competitive use of such telecommunications networks was the mission of the original Open Network Provisions (ONP). In this context, access obligations were a tool to guarantee that new private entrants would be allowed on the incumbent's telecommunications network to provide telecommunications services to end-users. Sector-specific access rules for the broadcasting sector followed with the 95/47 Standards Directive. It's Article 4 c) would mandate access to conditional access systems used by pay-TV operators. The provision responded to fears by public broadcasters and other industry players voiced that control over conditional access facilities might give major pay-TV operators the means to exclude other broadcasters from market access. Aspects of consumer protection were also put forward: consumers must be offered access to a variety of content while being protected from incompatible equipment that would hinder their reception of other, competing services. The access obligation in Article 4 c) of the 95/47 Standards Directive applied automatically and irrespective of market power to all operators of conditional

access (CA) services. Six years later, these provisions were transformed more or less literally into Article 6 of the Access Directive, and extended in Article 5 (1) (b) to also cover other facilities in digital broadcasting, such as Electronic Program Guides (EPGs) and Application Program Interfaces (APIs).

3. Some caveats about access obligations in digital broadcasting markets

It is no the intention of this article to claim that access obligations are in no instance the correct response to bottleneck situations in digital broadcasting markets. Access obligations may be necessary in situations in which a bottleneck facility is a natural monopoly or an essential facility, namely when the duplication of the facility is not an option and when the refusal to provide access would prevent market entry. Here, forced access to elements of a digital pay-TV platform may be the only viable way to stimulate competition and to ensure that consumers have access to a diverse range of broadcasting as well as non-broadcasting services. Note that the refusal to grant access to technical facilities or services in digital broadcasting will not only affect competition in facilities markets (e.g. the market for conditional access technologies), but also competition between different pay-TV platforms. This is because in pay-TV, the technical and the service platforms are closely integrated and essential part of one and the same business platform. Moreover, access obligation could stimulate intra-platform competition because providing access-controlled services through the existing infrastructure would be less costly and more attractive to smaller operators in particular.

Having said, it is already questionable whether most bottlenecks in digital broadcasting display the characteristics of essential facilities. It is true that with the ongoing technical and organizational sophistication of broadcasting services, market entry depends on an increasing number of technical and organizational facilities and services. Yet, most of these facilities are probably not non-duplicable or essential to market entry per se. The co-existence of several competing conditional access standards, APIs and EPGs in larger markets such as France, Italy, the UK, Germany or The

Netherlands, seem to suggest that alternative systems can co-exist. Moreover, the fact that most of these facilities are (also) offered as service in their own right demonstrates that it is not so much access to e.g. a conditional access service in general that is critical, but access to a specific conditional access system as part of a popular pay-TV platform. The reason why access to that particular conditional access can be crucial is that it can be needed to reach the critical mass of a paying audience. In other words, the bottleneck character of a conditional access system, an EPG or API is often not so much the result of control over the facility per se, but of specific market conditions, and here notably factors that influence the size of switching costs:

- technical lock ins: in pay-TV, the economic power of a program platform can be influenced by the popularity of a certain embedded standard. Consumers and content providers will generally favor the most popular standard that promises the widest coverage.

- contractual lock ins: binding consumers to long-term subscription contracts or making it difficult to terminate the contract and is one way to bind consumers lastingly to one platform. Another form of contractual lock-ins are bundling strategies that oblige consumer to subscribe to a whole package of services or to make the provision of certain services conditional upon the subscription to others.

- influencing the search behavior and the information that consumers have about the services that are available: Electronic Program Guides, channel listings and search engines are not only instruments to present certain (own) programs or services more favorably, personally or associatively, but also to create a biased idea of the available offerings.

When a new pay-TV provider enters the market and starts offering services to the installed consumer base of the first pay-TV platform, the offering must be sufficiently attractive to justify the often high switching costs. Switching costs can involve investing in additional consumer equipment where the technical standards of the two platforms are incompatible, facing the consequences for breaking long-term subscription contracts or bearing temporarily the costs of two contracts, accepting the loss of indirect network benefits if the second platform is not yet as popular and will have fewer applications and programs to offer, personalizing yet another EPG, etc.

Where the bottleneck character of a facility is the result of the size of switching costs rather than of the difficulty to duplicate it, mandated access regimes must face some critical questions concerning their static and dynamic efficiencies, as well as their impact on consumer welfare. At the heart of this critique is the possible negative impact of access obligations on both, the incentives of the operator of a facility as well as of his rivals. There is wide consent that mandated access is a considerable interference with the overall market structure and with the commercial incentives of the bottleneck controller, including the right to property and the freedom not to be forced to promote competitors at one's own cost. In addition, the sharing of one's resources could trigger considerable security risks for the resource operator, as well as capacity problems and financial losses. The prospects of being forced to share his resources with competitors might discourage not only the first platform operator but more generally any operator thinking about establishing a pay-TV platform. This is one reason why the European Court of Justice and scholars likewise have argued that the obligation to share one's resources with competitors should remain the exception.

Another, not less important but often overlooked argument is the impact on technical innovation and investment by rivals. Access obligations encourage the use of a particular standard, namely the standard of the platform access to which is requested. This can concern a conditional access, the EPG, the API, the DRM, etc. Because of the right of access, there is no need to develop costly alternatives even if this was possible in principle. Encouraging service providers to use one particular conditional access standard is likely to further increase the strategic and economic importance of this standard. This is the result of indirect network effects and the need to generate efficiencies and economies of scale and scope. The stronger a particular standard becomes, the more likely it is that the market will 'tip' towards this standard. In other words, access obligations risk 'freezing' the dominance of a proprietary service or facility. At the same time, they do nothing to improve the conditions in subscriber contracts, to remove technical-lock-ins or otherwise to reduce switching costs. Instead, they reduce demand for alternative systems or standards. The arbitrary effects of access obligations on dynamic competition were also a reason for scholars as well as for the European Court of Justice and also the US Supreme Court to argue in favor of a cautious approach to mandated access to facilities in general.

This is not to say that the tipping of the market to one particular platform is per se unavoidable, undesirable or economic inefficient. It can be inefficient, however, if the situation discourages the emergence of new, innovative and more attractive services that were principally viable and desirable from a competition policy point of view. Competition between different pay-TV platforms is arguably the most durable cure to bottleneck problems in digital broadcasting. Also, the European Commission made rather clear that it intends to promote the so-called multi-platform approach for the European market, meaning that consumers can access broadcasting, information society services and telecommunications services from multiple platforms. In addition, the acceptability of the dominance of one particular pay-TV platform also depends on the information policy goals for this sector. On the one hand, one could even argue from the public information point of view that a dominant pay-TV platform might have advantages. Arguably, a powerful privately controlled service platform could be an invaluable partner for media regulators in realizing public information policy goals, such as the digital switchover or broadband rollout. States could place burdensome tasks on the broad shoulders of a national media giant. Powerful pay-TV operators are major drivers of and catalysts for digitization; they invest in campaigns that convince reluctant consumers of the merits of digitization and develop the necessary equipment and attractive services. Finally, where access obligations focus on promoting intra-platform competition, the result might very well be a kind of 'internal pluralism' and more choice for consumers.

On the other hand, one may already wonder whether access obligations will indeed stimulate internal pluralism within a pay-TV platform. A reduction in economic freedom often comes hand in hand with a reduction of initiative and responsibility, in this case journalistic responsibility. In such situations, access obligations can strengthen not only the economic, but also the journalistic influence of a platform operator. This is to say, even in areas in which a monopoly position of a pay-TV platform may still be acceptable from a competition point of view, the requirements of pluralism and diversity of sources raise serious concerns about whether it is desirable to actively promote the creation and strengthening of one dominant access-controlled pay-TV platform. Monopoly control over the pay-TV market can challenge fundamental objectives in broadcasting regulation, namely to prevent one private player from exercising excessive influence on large parts of the audience. In addition, the effect of one large and comprehensive pay-TV platform on the position of free-TV providers in general and public

broadcasting in particular, must be taken into consideration, as well as the extent to which a pay-TV platform can affect their position when negotiating program rights and competing for audience attention. To conclude, access obligations could be counterproductive, not only from a competition policy point of view, but also from a public information policy point of view.

Finally, it is important to realize that access obligations alone are no guarantee for functioning competition. Access obligations still leave ample room for the monopolist to influence competition in its favor at both the technical and the service level. Much will depend on how effectively National Regulatory Authorities (NRAs) can ensure that the terms and conditions of access to a conditional access solution are fair, reasonable and non-discriminatory for rivals. The principle of strict separation between the transport and the service level in regulation and supervision does not make this task any easier, at least not in areas in which activities at both levels are as tightly integrated as they are in the case of digital broadcasting. Also, in order to promote consumer welfare and the realization of "net freedoms", it is not enough that NRAs monitor the conditions under which access to the conditional access facility is offered to competitors. It is equally important to keep in mind the costs for consumers and society, including deadweight losses, and to make sure that services are priced and offered under conditions that are acceptable and affordable for consumers.

4. Reform proposal

Having said that access obligations are not the best remedy to realize competition policy and public information policy objectives in the pay-TV market, the next question is what the better remedy is. Access obligations can be a remedy for the symptoms of a lack of competition in the market for technical pay-TV facilities, as well as a lack of competition in the pay-TV market itself. Providing consumers can choose from a number of equally attractive pay-TV offers, trying to dominate a share of the consumer base by means of a proprietary standard would be a risky and probably not very profitable strategy. Access obligations do not create the conditions for consumers to freely choose between different services outside the dominant

platform, because it ignores entirely the impact that the contractual and technical relationship between the platform operator and consumer has for competition.

This article would like to suggest an alternative approach, that is to shift the regulatory focus to the other side of the market—the retail side—and to create the conditions that enable consumers to choose and give them the freedom to choose by lowering their switching costs. Obviously, such an approach is only an option in markets that would principally offer room for more than one pay-TV platform. Where this is so, instead of mandated access to elements of a pay-TV platform, National Regulatory Authorities should turn their attention to consumers' subscription contracts. More generally, they should be empowered to remove contractual or technical lock-ins and to improve transparency for consumers. A possible legal basis could be found in the provisions of not the Access Directive but the Universal Service Directive. The Universal Service Directive hands NRAs tools to scrutinize bundling strategies and the adequacy of end-user tariffs. Article 21 (2) of the Universal Service Directive stresses the importance of comprehensive, comparable and user-friendly service information. For the time being, however, most of the aforementioned provisions on consumer protection in the Universal Service Directive are only applicable to providers of telephony services. Others only apply to electronic telecommunications services and associated facilities. Services providing content, such as the offer for sale of a package of sound or television 'broadcasting' content have been deliberately excluded from the Universal Service Directive. Again, this is an indication that in the case of digital broadcasting, consumers are still not considered active market participants—which they are in pay-TV—but passive receivers. With ongoing convergence, the differentiation between broadcasting and non-broadcasting services is not any longer justified as far as the modalities of the way services are marketed to consumers are concerned.

5. Conclusions

This article has raised some doubts as to whether access obligations are by default the optimal answer to undesirable exclusive control over technical facilities in pay-TV (e.g. the Electronic Programme Guide, Conditional Access or Application Programme Interface). It concluded that under certain circumstances, access obligations can result in the opposite effect of what they were supposed to do: further strengthening the position of one pay-TV platform and discouraging investment in competing services for consumers. This is particularly true in situations where a facility is not per se non-duplicable, but where the bottleneck character of a facility is the result of a proprietary standard, indirect networks effects and/or high individual switching costs for consumers because of technical, contractual or information lock-ins. In such a situation, interventions that seek to reduce switching costs by tackling restrictive conditions in consumers' subscription contracts and by enhancing transparency for consumers are probably better suited to promote functioning competition, diversity and pluralism.

The conditional access, the EPG and the APIs are just three examples of facilities in modern electronic communications markets that do not display the essential-facility-like characteristics of traditional bottlenecks in this sector, and that are subject to access regulation. The Access Directive has broadened the power of National Regulatory Authorities to impose access obligations on operators of all kinds of technical facilities, including such whose gateway character depends on the market conditions in a concrete case (possible examples could be operational support systems, operating systems, switching services, search agents, Digital Rights Management, etc.). While the arguments brought forward in this article concentrated on the example of conditional access, National Regulatory Authorities would do well to examine their relevancy also when imposing access on other facilities than the conditional access.