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Legal Study on Part II of the Local Loop Sectoral Inquiry

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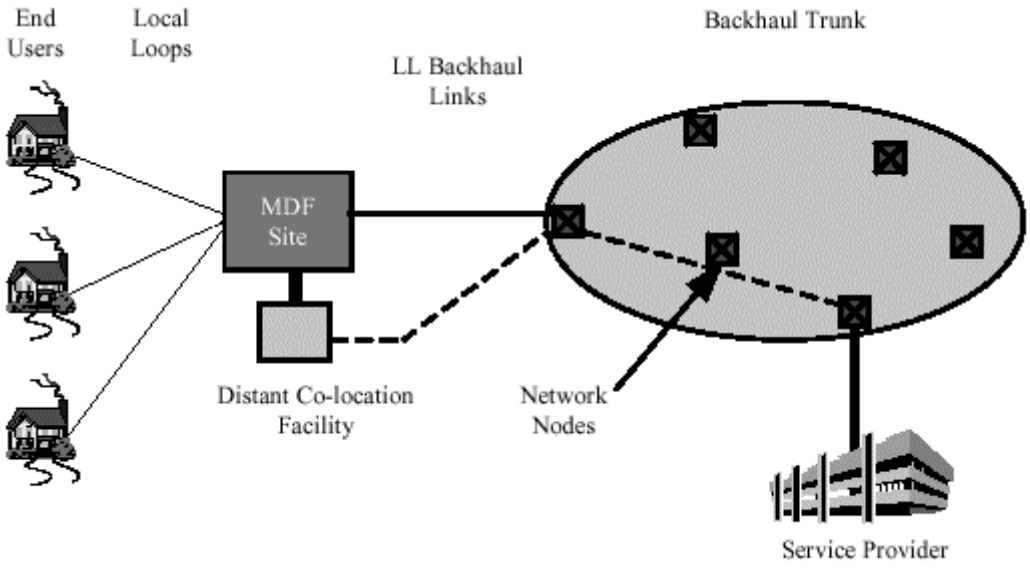

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All the information contained herein has been assembled in good faith and to the best of the ability of the Study Team. The information and views expressed do not constitute a legal opinion, and they should not be acted upon without independent confirmation and professional advice. Squire, Sanders & Dempsey L.L.P. cannot accept any responsibility for loss arising from decisions based upon this Study.

The information upon which the Study Team has relied is current as at 1 September 2001.

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TABLE OF CONTENTS

Annexes

LEGAL STUDY ON PART II OF THE LOCAL LOOP UNBUNDLING SECTORAL INQUIRY

CHAPTER I. INTRODUCTION

The importance to new entrants of obtaining unbundled access to the local loop of the fixed incumbent across the European Union (and the entire European Economic Area (EEA)) was acknowledged by the European Commission ("the Commission") in the *Fifth Report on the Implementation of Telecommunications Regulatory Package*,[1] and was reaffirmed by the Commission in the context of the *1999 Review*[2] process. In those legal instruments, the Commission took the position that the liberalisation of "the last mile" of telephone lines, invariably owned by former government telecommunications operators which have enjoyed a long period of legal monopoly, will enhance competition and benefit consumers by leading to lower prices *inter alia* for services such as local calls, Internet access and other products. The range of those products will be broadened significantly over time to include innovative broadband offerings, which are increasingly based on high bandwidth applications and which can be provided over copper lines conditioned with xDSL technology.

Legal Background

This Study is designed to complete the Second Phase of the Local Loop Unbundling (LLU) Sectoral Inquiry, launched initially by both the Commission and the EFTA Surveillance Authority ("the Authority") in July 2000,[3] and undertaken by the Commission and the Authority respectively under a Decision of 27 July 1999 under Article 12 of *Regulation 17/1962*[4] and a Decision of 1 December 1999 under Article 12 of Chapter II to Protocol 4 of the Agreement between the EEA States on the establishment of a Surveillance Authority and a Court of Justice.[5]

The Commission and the Authority have directed the Second Phase of the LLU Sectoral Inquiry towards obtaining the views of new entrants in terms of their understanding of how fixed incumbents have been able to satisfy the terms and the spirit of *Regulation 2887/2000*[6] (whose terms became mandatory among the EU Member States as of 1 January 2001), as incorporated into the EEA Agreement through a Decision of the EEA Joint Committee of 30

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1 *Communication* from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Fifth Report on the Implementation of the Telecommunications Regulatory Package*, COM (1999) 537, 11.11.1999.

2 *Communication* from the Commission on the 1999 Communications Review, *Towards a new framework for Electronic Communications infrastructure and associated services*, COM (1999) 539, 10.11.1999.

3 With respect to the Commission, see *Study on operational implications of Local Loop Unbundling and the need for technical coordination*, OJ 2000 S154; and, with respect to the Authority, see 17 July 2000 PR (00) 14.

4 *Regulation No 17/62,* implementing Articles 81 and 82 [then Articles 85 and 86] of the Treaty (OJ No 013, 21.02.1962).

5 The "Surveillance and Court Agreement"; see PR (99) 19 of 2 December 1999.

6 *Regulation No 2887/2000* of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop (OJ L 336, 30.12.2000, pp. 4-8).

March 2001 and entering into force on 1 October 2001.[7] The primary purpose of *Regulation 2887/2000* is the establishment of harmonised conditions for unbundled access to the local loop. For the purposes of this Study, we refer to these two legislative instruments collectively as the *Unbundling Regulation*.[8]

The results of the Second Phase of the LLU Sectoral Inquiry should be interpreted in tandem with the relevant conclusions of the Commission drawn in its *Seventh Report on the Implementation of the Telecommunications Regulatory Package*, adopted on 26 November 2001. The key conclusions of the *Seventh Implementation Report* concerning the status of local loop unbundling in the European Union were:

- Progress in the development of competition in local broadband access markets is not satisfactory, and should be speeded up on the basis of hands-on monitoring by NRAs, binding deadlines and credible penalties.

- The implementation of the *Unbundling Regulation* has thus far been very disappointing. Although Reference Unbundling Offers (RUOs) covering both unbundling and collocation have been published in all Member States, such offers do not cover shared access in a number of Member States. The lack of proactivity and/or powers on the part of NRAs was highlighted in nearly all Member States.

- The number of fully unbundled lines represents a small percentage of the total access lines in Europe, and, in two Member States, no lines had been unbundled.

- Shared access, at the time of publication, was actually operational in only four Member States.

- In most Member States, the number of high-speed access lines held by new entrants is not comparable to the number of the incumbent's retail access lines.

- NRAs need to take action to ensure that wholesale DSL is offered to entrants on non-discriminatory terms.

- It is understood that both regulators and operators have had to ride a steep learning curve to overcome practical difficulties relating, in particular, to collocation and pricing issues. The collocation of new entrants' equipment was considered to be a complex and time-consuming issue.

- Measures to ensure cost-orientation still need to be taken in a number of Member States and, even under the future new regulatory framework for electronic communications networks and services, such measures should not be removed until

[7] See Joint Committee Decision 47/2001. *Iceland* and *Liechtenstein* notified the EEA Joint Committee of the need to fulfill constitutional requirements before the Decision could enter into force. These constitutional requirements were subsequently fulfilled by *Iceland* and *Liechtenstein,* and Decision 47/2001 thus entered into force on 1 October 2001.

[8] In the EEA context, *Regulation 2887/2000* is referred to as "the act referred to at Point 5ce of Annex XI to the EEA Agreement (Regulation (EC) No. 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop (OJ L 336, 30.12.2000, p.14))".

justified by the market analysis due to be carried out by the NRAs under the proposed new regulatory regime due to take effect in 2003.

- In the market for local broadband access, the combination of a high price for local loop unbundling and collocation, a lack of shared access, failure to provide a wholesale DSL service by the incumbent, and authorisation by the regulator for the incumbent to provide its own DSL services at low retail prices (often predatory), will have the combined effect of keeping entrants out of the market.[9]

Methodology

In order to appraise the extent to which local loop unbundling has been implemented by fixed incumbents, as opposed to individual EEA States,[10] the Commission and the Authority contemporaneously in late July 2001 invited new entrants across the EEA States providing or seeking to provide electronic communications services to respond to a Questionnaire. Over 250 Questionnaires were sent out to new entrants and over 150 new entrants responded to those Questionnaires.[11] The Questionnaires were designed to identify any remaining difficulties in obtaining unbundled access to the local loop, given that the Commission and the Authority had already dedicated the First Phase of the Sectoral Inquiry to assessing the early progress of the unbundling of the local loop through a Questionnaire directed only to fixed incumbents.[12]

The Questionnaires to new entrants, whose terms are enclosed as Annex 1 to this Study, were thus directed to obtaining empirical data regarding:

1. the business strategies of new entrants seeking access to local loops;
2. the range of services which new entrants intend to provide over unbundled loops;
3. the relevant licences and/or authorisations which they require to provide such services;
4. the possible obstacles to obtaining unbundled access to the fixed incumbent's local loop (whether in terms of incomplete reference offers, refusals to provide certain types of access, delivery times and delays, refusals or unsatisfactory conditions of collocation, insufficient quality of the lines delivered, other unsatisfactory or unfair contractual requirements imposed by the fixed incumbent, and any possible discrimination between operators requesting access);
5. the economic conditions of unbundling;
6. the nature of the fixed incumbent's xDSL wholesale offers;

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9 COM(2001) 706, 26.11.2001.

10 In this regard, a first wave of infringement proceedings has already been initiated against a number of Member States (*i.e.*, *Germany*, *Greece* and *Portugal*) by the Commission, further to the findings of fact in the *Seventh Report on the Implementation of the Telecommunications Package*, for their failure to provide for effective conditions of Shared Access under the terms required by *Regulation 2887/2000* (refer to Commission Press Release of 20 December 20001, IP/01/1896, "Telecommunications: Commission takes action against Greece, Portugal and Germany").

11 A chart listing the number of responding new entrants in each EEA State is enclosed in Annex 6.

12 Case COMP/37.640 of 12 July 2000.

7. the effects of any problems or limitations on new entrants' business plans raised by the obstacles, pricing strategies or the xDSL offers of the fixed incumbent; and
8. the range and frequency of proceedings already taken at national level as regards various aspects of access to local loops.

Each of the above issues is in turn discussed in a series of national reports on individual EEA States (refer to Annex 4) and are also synthesised in the main body of this Study, especially with a view to determining whether:

- the actions of fixed incumbents in certain EEA States constitute either *prima facie* infringements of any of the terms of the *Unbundling Regulation* or Article 82 EC (or its equivalent, Article 54 EEA Agreement) and, therefore, are likely to require further investigation by the Commission or the Authority respectively;
- the existing regulatory framework is capable of effectively addressing the ranges of problems which have arisen as new entrants have requested unbundled access to the local loop from fixed incumbents;
- competition and sector-specific rules provide an adequate response to the problems reported by access seekers; and
- other avenues of effective redress are available to new entrants.

The Study Team's Conclusions and Recommended Actions with respect to the above set of issues are enclosed in Confidential Annex 7.

In conducting this exercise, the Study Team is mindful of certain limitations to its analysis. First, it is inevitable that the replies of new entrants may in some instances be self-serving insofar as their observations might be inspired by their strategic interests. Second, in some EEA States, the responses of new entrants have been incomplete and have not addressed all of the issues.[13] Third, it is apparent that new entrants utilising unbundled local loops in some EEA States are relatively inexperienced in the process of unbundling, and are therefore uncertain of the scope of their rights.

Despite these shortcomings, certain trends are clearly common across all the EEA States and therefore warrant a common regulatory or competition law response. However, the relative accuracy of the information reviewed by the Study Team is only current as at **1 September 2001**,[14] which means that some of the factual predicates underpinning our analysis may have changed over the course of the last quarter of the year 2001.

[13] For example, in *Liechtenstein*, the responding new entrants reported that Liechtenstein Telenet does not offer unbundled access to the local loop and, therefore, were not in a position to respond to the Authority's Questionnaire. In *Luxembourg*, despite the existence of an RUO (approved by the NRA) for full and shared access, sub-loop unbundling and various forms of collocation, only one new entrant submitted a response to the Commission's Questionnaire and merely stated that due to a recent merger and its ongoing review of its worldwide business strategy, it was not currently in a position to comment on unbundling in *Luxembourg*.

[14] Although we have endeavoured to update text, wherever possible, where data has come to our attention subsequent to 1 September 2001.

CHAPTER II. CURRENT POSITION

The purpose of this Chapter is not to replicate the more detailed regulatory analysis conducted in the *Seventh Implementation Report*, but to outline the regulatory context in which operators are seeking access to fixed incumbent's local loops. To this end, this Chapter discusses:

- the nature of the offerings provided by fixed incumbents under their regulatory obligations, and the timing of those offerings;
- the scope of regulatory provisions designed to unbundle sufficiently the individual tariff elements of a fixed incumbent's local loop offerings;
- the extent to which resale and bitstream access options are available to new entrants as a result of the availability of the fixed incumbent's xDSL wholesale offers; and
- the extent to which proceedings already initiated at national level are addressing competitive concerns regarding the availability of local loops.

II.A THE FIXED INCUMBENT'S OFFERING

The extent of availability of local loop unbundling in its various forms across the EEA States, and the legal obligations on a fixed incumbent to provide both unbundled copper loops and related facilities under its Reference Offer, is outlined immediately below.[15] Of course, the legal availability of a service is not necessarily synonymous with its widespread availability in practice on appropriate commercial terms. The extent to which new entrants have remained unsatisfied with the availability in practice of unbundled local loops and related facilities is considered separately in Chapter III below and in Annex 3 to this Study.

II.A.1 Full Unbundled Access

Full unbundled access is currently legally available in all 18 EEA States.

As regards the implementation of the terms of the *Unbundling Regulation* deadline, certain jurisdictions acted earlier (in certain cases, significantly earlier) than 1 January 2001 (or 1 October 2001, in the case of the EFTA States). For example, full local loop unbundling ("LLU") was:

- Mandated in *Germany* as early as 25 July 1996, at the time of the adoption of the *German Telecommunications Act,* and took effect on 1 January 1998.
- Made available in *Finland* in June 1997 following a government ruling requiring *all* operators to provide unbundled access to their local loop networks.

[15] A Glossary of Terms concerning elements of unbundled local loops is found in Annex 2 to this Study.

- Mandated in *The Netherlands* at the end of 1997, although the fixed incumbent did not publish a Reference Offer until May 2001.
- Enshrined in *Italy* in a Ministerial Decree dated 23 April 1998.
- Mandated in *Austria* through the provisions of the Austrian *Telecommunications Act* as of 1 August 1997, although LLU was not mandated in practice until a Decision of the NRA dated 12 March 2001.
- Available as a matter of law in *Denmark* since 1 July 1998.
- Offered by the fixed incumbent in *Sweden* in March 2000.
- Inserted as a requirement into the fixed incumbent's service licence in the *United Kingdom* through a licence condition which came into effect on 8 August 2000.
- Available following the unilateral decision of the fixed incumbent to open its local loop in April 2001, in *Norway*.

Seven EEA States took action to make full unbundled access to the fixed incumbents' local loops legally available in or around the implementation date of the *Unbundling Regulation*:

- In *Belgium*, legislation was introduced on 6 October 2000 by the Belgian Council of Ministers, in anticipation of the adoption of the *Unbundling Regulation*. The new law allowed all operators and service providers access to the fixed incumbent's local loops from 1 January 2001.
- In *France*, a Decree of 12 September 2000 (in force from 1 January 2001) imposed on the fixed incumbent the obligation to issue a Reference Offer for access to the local loop.
- In *Ireland*, the fixed incumbent published an initial Reference Offer for access to the local loop on 31 December 2000.
- The NRA in *Portugal* adopted a Resolution on 6 November 2000 declaring that the local loop of the fixed incumbent should be unbundled from 31 December 2000.
- In *Spain*, the unbundling of the fixed incumbent's local loop was mandated by a Royal Decree of 22 December 2000, with its access network (both in the form of local loops and associated resources) being opened to alternative operators by 1 January 2001.
- In *Luxembourg*, the fixed incumbent's Reference Offer was introduced as of 1 January 2001.
- In *Greece*, the decision to unbundle the local loop was taken by the NRA on 10 January 2001 and published in the Greek Gazette on 12 February 2001.
- Mandated by a legal order on October 2001 in *Liechtenstein*. However, there are as yet no RUO or published prices.
- In *Iceland*, a standard local loop unbundling offer was mandated under the *Telecommunications Act* 1999. The incumbent's standard offer for full unbundled access includes a price list and rules for rental or unbundled local loops.

II.A.2 Shared Unbundled Access

In the majority of cases, the commercial strategies of new entrants focus primarily on the provision of data-related services, including fast Internet access and a range of high bandwidth "broadband" services. In these instances, new entrants do not require a fully unbundled local loop to satisfy their business case, and can leave the provision of traditional voice services to the fixed incumbent operator. Accordingly, the availability of shared unbundled access to the local loop is, arguably, as significant as full unbundling.

In September 2001, according to the responding operators, shared access to local loops was available, at least in principle, in 14 EEA States (*Austria*, *Belgium*, *Denmark*, *Finland*, *France*, *Iceland*, *Ireland*, *Luxembourg*, *The Netherlands*, *Norway*, *Portugal*, *Spain*, *Sweden,* the *United Kingdom*).[16] Of the other EEA States:

- In *Italy*, shared access is not currently commercially available, despite having been mandated by the NRA as of 29 November 2001, following a public consultation.

- In *Germany*, shared access is not yet generally commercially available, although it was mandated by the NRA in March 2000. Reportedly, the incumbent began offering certain individual operators shared access in August 2001.

- In *Greece*, the incumbent's RUO has only included shared access since December 2001, and the prices for shared access are still under consideration by the NRA.

- In *Liechtenstein*, shared access is not available.

Meanwhile, the Commission decided to take infringement actions against *Germany*, *Greece* and *Portugal* for the lack of intervention to ensure that shared access was being offered by incumbents in those countries.[17] Specifically, the Commission highlighted at the time that, in *Portugal*, the Reference Offer for shared access lacked tariffs and was therefore incomplete; in *Greece*, an offer for shared access had not been published prior to 31 December 2001; and, in *Germany*, shared access was not offered.[18]

As of February 2002, *Germany* is the only Member State where the RUO still does not include the provision of shared access at a fixed public price.

II.A.3 Sub-loop Unbundling

Sub-loop unbundling only appears to be on offer in seven EEA States, namely: *Austria, Belgium*, *Greece*, *Luxembourg*, *Spain*, *Sweden* and the *United Kingdom*. In *Norway*, the incumbent offers experimental sub-loop unbundling, but no operators have thus far reported any interest in its take-up.

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[16] By way of contrast, at the time of the Commission's *Seventh Implementation Report*, it was noted that shared access was actually only available operationally in *Belgium, Denmark, Finland* and *Sweden.*

[17] Commission Press Release IP/01/1896 of 20 December 2001, *op. cit.*

[18] As noted above, the *Greek* NRA has taken steps since the Commission's announcement to facilitate the incumbent's offering of shared access in *Greece*.

II.A.4 Collocation Services

Physical collocation is available in 17 EEA States. No form of collocation is as yet available in *Liechtenstein* given the absence of any Reference Offer for local loop unbundling, although this has not been substantiated.

Alternative forms of collocation are available in a number of EEA States, on varying conditions (*i.e.*, where technically feasible and physical collocation is not possible).

For example, distant collocation is available in 10 EEA States (*Belgium*, *France*, *Greece*, *Italy*, *Luxembourg*, *The Netherlands*, *Portugal*, *Spain*, *Sweden*, the *United Kingdom*). Meanwhile, virtual collocation is available in seven EEA States (*Belgium*, *France*, *Germany*, *Greece*, *Italy*, *Luxembourg*, the *United Kingdom*) and adjacent collocation is available in only two EEA States (*Italy*, *The Netherlands*).

Co-mingling, or cageless collocation, a form of physical collocation where an operator's equipment is fitted and operated in an area within the incumbent's exchange where the incumbent could or does house its own equipment, without a permanent barrier between them, is available in four EEA States (*Belgium*, *Denmark*, *Spain,* the *United Kingdom*), and is foreseen as a possibility in *Portugal* by the NRA, although it has not yet been mandated.

In *Italy*, collocation in specially constructed shelters is offered by the incumbent. In *Iceland*, a type of collocation referred to as "mobile collocation" is apparently available as an alternative to physical collocation. Finally, alternative forms of collocation also are apparently available in *Austria* in cases where physical collocation space is not available, but no details have been provided.

II.B TARIFFS FOR UNBUNDLED LOCAL LOOPS

A number of different charges are associated with local loop unbundling. Although the details of the tariff components may vary from country to country, the pricing structure usually includes the following items:

- the recurring rental fees for an unbundled line;

- the one-off fee for connection of the line;

- various collocation fees (including fees for renting the space, site preparation, exchanging specific surveys, power usage and security escorts); and

- fees for internal and external tie cables and related facilities.

According to the *Unbundling Regulation*, the costing and pricing rules for local loops and related facilities must be transparent, non-discriminatory and fair, and should:

> *[E]nsure that the local loop provider is able to cover its appropriate costs in this regard plus a reasonable return, in order to ensure the long term development and upgrade of local access infrastructure. Pricing rules for local loops should foster fair and sustainable competition, bearing in mind the need for investment in alternative infrastructures, and ensure there is no*

> *distortion of competition, in particular no margin squeeze between prices of wholesale and retail services of the notified operator*.[19]

More specifically, the *Unbundling Regulation* requires that prices for unbundled access to the local loop and related facilities be set on the basis of the principle of cost-orientation.[20]

An "apples to apples" comparison of prices across the EEA States is rendered difficult by the fact that it is not always clear from the incumbents' RUOs what the prices include; for example, whether the line rental fees are for comparable lines and whether they include power charges, survey fees, administrative costs, or refurbishment costs; whether the one-off connection fees are for existing (active) or new (non-active) lines, and what labour costs and other administrative fees are included in the fee; and whether the collocation space rental fees are for comparably sized collocation sites, in comparable exchanges, and whether they include such other costs as power, refurbishment, site surveys, and so forth.

II.C INCUMBENT'S XDSL WHOLESALE OFFERS

In general, the types of xDSL wholesale services offered across the Member States involve either the resale of the incumbent's ADSL services, or a high speed bitstream access product allowing some level of service differentiation and product innovation (or a combination of the two).

Availability of xDSL Wholesale Offerings

Based on the responses of new entrants to the Questionnaire and information acquired from the Commission's *Seventh Implementation Report*, it is clear that in at least thirteen EEA States (*Austria*, *Belgium*, *Denmark*, *France*, *Greece*, *Ireland*, *Italy*, *The Netherlands*, *Norway, Portugal*, *Spain*, *Sweden*, the *United Kingdom*), there is unanimity among new entrants that some type of xDSL wholesale offer is available from the fixed incumbent. Indeed, in six EEA States (*France*, *Denmark, Greece*, *Ireland*, *Italy*, *Spain*), it appears that some type of xDSL wholesale offer is mandated by legislation, regulation or decision of the regulator/ruling of the judiciary.

In two EEA States (*Finland*, *Germany*), there is uncertainty among new entrants whether an xDSL wholesale offer is in fact available. For example, in *Germany*, 17 new entrants stated that they were not aware of any xDSL wholesale services offered by the fixed incumbent, while 7 new entrants reported that an xDSL wholesale offer has been available since the end of August 2001.[21] In *Finland*, two new entrants indicated that one of the fixed incumbents, Sonera, does not offer a wholesale xDSL product, while another new entrant stated that an incumbent (without identifying any particular fixed incumbent) offers wholesale ADSL connections.

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[19] *Unbundling Regulation*, Article 11.

[20] *Ibid.*, Article 3(3).

[21] The Commission's Press Release of 20 December 2001, *op. cit.*, states that the Commission has decided to open infringement proceedings against *Germany* due its failure to ensure that the incumbent offers wholesale access to its DSL service.

In *Luxembourg*, the fixed incumbent presently does not offer alternative operators a wholesale xDSL service, although a possible bitstream access product is currently being examined by the regulator.

In *France*, for example, the incumbent offers three types of wholesale xDSL service: (1) ADSL Connect ATM (a high speed bitstream access service for residential or professionals); (2) Turbo DSL (a high speed bitstream access service for businesses); and (3) Collect IP/ADSL (available to ISPs for resale of the incumbent's ADSL service). Similarly, in *Italy*, the incumbent offers a high bitstream service (at three different speeds) based on ADSL, HDSL and SDH transmission technologies and the use of an ATM interface by alternative operators, as well as a resale xDSL service. However, this bitstream access product is apparently only made available by the incumbent in places where it is objectively impossible for it to provide full unbundled access to local loops.

Bitstream access services also appear to be offered in *Austria*, *Belgium*, *Greece*, *Norway, Portugal*, *Spain* and *Sweden*, and are mandated in *Denmark*, although the incumbent is not required to publish a standard offer until February 2002. In *Greece*, the incumbent announced during the week of 14 January 2002 that will begin offering bitstream access services, although the details of the offer are currently being examined by the NRA. Meanwhile, in *Ireland*, the launch of bitstream access services has been delayed since April 2001 and, in *Luxembourg*, a bitstream access product is currently being examined by the NRA.

The fixed incumbent operators in *Iceland* and *Liechtenstein* do not offer wholesale xDSL services.

Regardless of whether xDSL wholesale offerings are available, new entrants consistently assert that the relative usefulness of reselling xDSL services is completely undermined by the allegedly widespread practices of fixed incumbent operators to create a "price squeeze" situation on new entrants through their high pricing of the xDSL wholesale product and/or the low retail prices charged by the fixed incumbent for the same service (or even the relationship between the pricing of xDSL services and unbundled loops). Price squeeze issues are discussed in greater detail in Chapters III.A.3 and V.A.3.

Substitutability of Wholesale Offers in the Present Unbundling Environment

The majority of new entrants across the EEA States are of the view that the incumbents' xDSL wholesale offers are not viable alternatives to local loop unbundling. There is widespread agreement that wholesale offers cannot ideally be considered to be long term alternatives to unbundled loops, particularly due to intrinsic limitations regarding the lack of control over the service.

A number of new entrants have acknowledged that the availability of an xDSL wholesale offer can at least be helpful on an interim basis to allow market entry, especially where unbundled loops are not being made available at reasonable rates or conditions. In *France* and *Spain*, for example, new entrants state that the incumbents' wholesale xDSL offers are only a "transitional" alternative to local loop unbundling, offering immediate access to the broadband market until effective unbundling and national ADSL coverage. In *Portugal*, a new entrant confirms the view that the incumbent's wholesale DSL offer is only an alternative for the initial commercial phase of DSL offers, while in *Italy* new entrants view it

as a "residual" alternative, inferior in quality to local loop unbundling, but nevertheless facilitating an active commercial presence in the market for the short or medium-term.

However, in a number of EEA States (*Belgium*, *Denmark*, *Finland*, *France*, *Italy*, *The Netherlands*, *Norway, Portugal*, *Spain*, *Sweden*, the *United Kingdom*), the particular business plans of at least one new entrant mean that they see wholesale xDSL services as being an alternative to local loop unbundling.[22] In some EEA Member States such as *Denmark*, *Finland, Norway* and the *United Kingdom*, a small number of new entrants are even prepared to view the incumbents' wholesale xDSL service as an alternative to local loop unbundling in the medium term, while an even smaller number of new entrants in *France, Norway* and *Sweden* view it as a long-term alternative.

As noted above, the lack of control over the service is cited most often by new entrants as the reason why xDSL wholesale offers are not perfect substitutes for unbundled local loops. A common complaint across a number of EEA States (*Belgium*, *France*, *Germany*, *Ireland*, *The Netherlands*, *Norway, Spain*, *Sweden*, the *United Kingdom*) is that new entrants are forced to accept the exact xDSL services the incumbent is offering, which eliminates any possibility of them differentiating their service from the incumbent's services or enhancing the incumbent's offer with value-added services. New entrants also state that they lose any ownership of the customer's service and, therefore, cannot control the type, quality, configuration and speed of the service. Thus, the incumbent's wholesale xDSL service, which is typically limited to ADSL, an asymmetrical service, is unsuitable to the symmetrical transmission needs (*i.e.*, HDSL) of business customers. Moreover, the incumbent's ADSL service is inappropriate for business customers because it is limited to data transmission and does not include voice services.

New entrants in some Member States have also identified a number of other reasons why the fixed incumbent's wholesale xDSL service should not be considered to be a viable alternative to local loop unbundling:

- *High Prices and Margin Squeezes*: Discussed in detail in Chapters III.A.2-3 and V.A.2-3.

- *Discrimination*: In *Spain*, a new entrant alleges that the incumbent discriminates in favour of its own retail services by offering favourable elements and conditions to its affiliates which are not offered to new entrants. Further, the incumbent's affiliates deliver xDSL services to customers in 15 days, on average, while the services are provisioned to alternative operators, on average, in 35 days.
- *No Service Level Agreements*: In the *United Kingdom*, a new entrant complains that there are no SLAs for wholesale xDSL services. As a result, if the incumbent fails to deliver or provide poor service, there are no penalties.
- *Unfair and onerous conditions*: In the *United Kingdom*, new entrants are forced to accept all liability arising out of the customer's use of the incumbent's service, even though the new entrant has no control over that service.

[22] A new entrant in *Belgium* concludes that bitstream access service at the ATM level provides the best short term ADSL service solution, particularly on a quasi-nationwide basis, because it eliminates all collocation concerns.

II.D PROCEEDINGS AT THE NATIONAL LEVEL

New entrants across the EEA States report a wide range of proceedings having been initiated before the national competition and regulatory authorities concerning issues related to local loop unbundling. At issue in these proceedings are included, *inter alia*, allegations of: excessive pricing, predatory pricing and margin squeezes; delays in provisioning; collocation delivery terms; standards in the Reference Offer; the availability of retail and wholesale xDSL products; the absence or scarcity of information relating to networks or services; the technical conditions of unbundling; refusal to offer shared access; and quality of services.

For example:

- Excessive pricing, predatory pricing and margin squeezes (*Austria*, *France*, *Germany*, *Greece*, *Italy*, *The Netherlands*, *Portugal*, *Sweden*, the *United Kingdom*).
- Delays in provisioning (*Belgium*, *Portugal*).
- Collocation delivery terms (*Belgium*, *France*, *Greece*, *The Netherlands, Portugal*, the *United Kingdom*).
- Retail and wholesale xDSL products (*France*, *Germany*, *Italy*, *Spain*, *Sweden*, the *United Kingdom*).
- Absence or scarcity of network or service information (*France*, *The Netherlands*, *Norway, Spain*, the *United Kingdom*).
- Technical conditions of unbundling (*France*).
- Refusal to offer shared access (*Germany*, *The Netherlands*).
- Quality of services (*Portugal*, the *United Kingdom*).
- Failure to comply with international standards in the RUO (*Norway*).

New entrants have not reported any local loop unbundling-related proceedings in either *Iceland* or *Liechtenstein*.

In those proceedings which have been completed, new entrants report mixed results and, in some instances where they have received favourable results, a lack of willingness to comply on the part of the incumbents; this is also manifested in the large number of appeals lodged by incumbents against findings at first instance.

In addition to those proceedings identified by new entrants, there would appear, based on the *Seventh Implementation Report,* to be other important proceedings that were initiated subsequent to the new entrants' submitting their responses.

The net effect of these widespread appeals, and the inevitable appeal of most if not all decisions and judgments by the fixed incumbent operator, is to create a climate of legal and business uncertainty, which is exacerbating the practical difficulties faced by those operators seeking access to the local loop.

CHAPTER III. PROBLEMS IDENTIFIED BY ACCESS SEEKERS

Respondent operators to the Questionnaire have identified a series of problems with the unbundling of local loops which can be grouped around two key sets of concerns, namely:

(1) tariff and cost-related issues, whether in terms of the charging of:

(i) **discriminatory prices** for local loops or related services or the provision of local loops when compared to those granted to the fixed incumbent's retail arm or to other competitors;

(ii) **excessive prices** for the provision of local loops or related services, which are unrelated to the economic value of those services;

(iii) **predatory pricing** or **price squeeze** strategies on the part of fixed incumbents, whereby retail services are priced below cost by the incumbent, thereby rendering competitors' services uncompetitive, or where the margin between the wholesale price for local loops and downstream services is so small as to render their provision unprofitable; and

(2) "behavioural" obstacles generated by fixed incumbents to the timely and effective provision of unbundled local loops, especially in the form of:

(i) **refusals to supply** unbundled loops or related facilities, whether through actual or constructive refusal;

(ii) **unjustifiable delays** in terms of the provision of unbundled loops or collocation;

(iii) **discriminatory terms** of provision (including services of inferior quality), whom compared to those granted to the incumbent's retail arm or other competitors; and

(iv) **tying** in terms of the unjustifiable bundling of services.

Each of these problems is discussed below in Sections III.A and III.B. A number of respondents have sought to measure the difficulties they have encountered in terms of economic damage to their businesses. Their views are reflected in Section III.C.

III.A TARIFF-RELATED ISSUES

III.A.1 Supply on Discriminatory or Less Favourable Terms

In 13 EEA States, respondent operators expressed concerns that fixed incumbents are discriminating against them in the provision of unbundled local loops and related facilities (*e.g.*, such as the availability of collocation space). That discrimination invariably results in

the fixed incumbent's retail arm or an affiliated sales agency being provided with much more favourable conditions in terms of pricing or delivery times, or in terms of penalties or restrictions being borne only by competitors.

In the majority of cases, there do not appear to be any reasonable justifications for the scale of the discrepancies in the treatment between customers (including the retail arm of the fixed incumbent). In particular, the installation and collocation rates charged by incumbents are often discriminatory in comparison to what the incumbents charge their own retail arms. In a key jurisdiction such as *Germany*, it is clear that claims of discrimination need to be verified by reference to a more transparent system of tariffing (at least in terms of transparency to the NRA).

The responses of competitive operators as regards allegations of discriminatory treatment are listed in Table III (i) of Annex 3.

Another form which discrimination may take is the provision of services which are inferior in quality – whether in terms of functionality, range of available services, reliability and repair concerns – without an attendant fall in price. There are a number of instances across a representative number of EEA States where, if the claims of respondents are substantiated, a *prima facie* breach of the discrimination principle has occurred (for instance, where the percentage of faults far exceeds the industry average for faults of such a nature). It may often be the case that this type of discriminatory conduct also amounts to a conscious "restriction of production" on the part of the fixed incumbent – itself an actionable practice under competition rules.

Individual EEA State operator responses regarding the provisioning of inferior services are listed in Table III (vii) of Annex 3.

III.A.2 Excessive Pricing

When compared to equivalent prices charged in other EEA States for the same types of service, there are a number of instances of *prima facie* excessive pricing on the part of fixed incumbents, whether this be measured with respect to, *inter alia*:

- monthly rentals
- one-time connection fees for new lines
- installation of local lines
- backhaul facilities
- unnecessary administrative charges for services which should otherwise bear little or no cost
- charges (*e.g.*, collocation escorted access) bearing no or little relation to economic costs or risks
- unilateral imposed and onerous technical solutions.

In addition, many allegations of excessive pricing of certain service elements were also characterised by respondents as providing the fixed incumbent with a second stream of monopoly rents which have already been earned from retail customers. Finally, an allegation of high pricing was closely linked in a number of instances with allegations of a price squeeze (see discussion at Chapter III.A.3 below).

Table III (ii) in Annex 3 summarises the main observations of respondents to the Questionnaire concerning alleged excessive pricing by fixed incumbents.

III.A.3 Predatory Pricing and Price Squeezes

In at least ten EEA States (*Belgium*, *France*, *Germany*, *Iceland*, *The Netherlands, Norway*, *Portugal*, *Spain*, *Sweden*, the *United Kingdom*), new entrants indicate that the margin between the incumbent's retail ADSL price and the prices that the incumbent charges new entrants for full or shared access to the local loop do not allow new entrants the opportunity to offer the service and to generate a profit. In at least five EEA States (*Belgium*, *France*, *Italy*, *Portugal*, the *United Kingdom*), responding new entrants identify a margin squeeze between the retail and wholesale (resale or bitstream access) prices of the incumbent's ADSL product.

A review of EEA State competitor responses to the Questionnaire suggests that a price squeeze argument can be legitimately examined along a number of lines of comparison between wholesale and retail price elements, namely:

- shared access prices v. retail ADSL prices;
- shared access v. resale ADSL prices;
- resale ADSL v. retail ADSL prices;
- wholesale xDSL tariff v. tariffs for unbundled wholesale access;[23]
- high bitstream (or equivalent wholesale ADSL) v. resale ADSL prices;
- high bitstream (or equivalent wholesale ADSL) v. retail ADSL prices.

Ultimately, it is the view of the Study Team that the understanding of a price squeeze includes both the level of wholesale tariffs as compared to end user price, and the relationship between the tariff for unbundled local loops and the wholesale price of xDSL.

Table III (iii) in Annex 3 illustrates the prevalence of price squeeze concerns of respondents, often raised in combination with predatory pricing concerns regarding retail services (with excessive pricing claims constituting an independent form of allegedly abusive behaviour).

[23] The only one of the price squeeze comparisons cited which does not rely the use of a retail tariff as one of the relevant benchmarks (*i.e.*, both composed are at the wholesale level).

III.B "BEHAVIOURAL" OBSTACLES

The process of local loop unbundling, because it requires that a fixed incumbent lease its own assets to a competitor and, just as importantly, continue to cooperate with its competitor in the provision of related services such as collocation, lends itself to a broad range of 'behavioural' problems which focus on alleged tactics of delay and denial by the fixed incumbent.

III.B.1 Refusals to Supply

The most obvious – and critical – behavioural issue is the refusal to provide unbundled local loops. Clearly, outright denial would be a particularly questionable strategy in light of the obligation to deal under the *Unbundling Regulation*. On the other hand, constructive denial has been identified by a number of respondents, whether by virtue of a lack of collocation space, the denial of backhaul/transit links, questionable operational restrictions, and other technical excuses. A summary of respondents' filings is outlined in Table III (iv) of Annex 3.

A number of allegations of a constructive refusal to deal are made in the context of fixed incumbents' alleged failures to provide sufficient network information and collocation details in order to facilitate unbundling. Many of those concerns stem directly from the fact that RUOs are, by and large, insufficiently detailed to resolve such matters. A summary of respondents' claims in this regard is contained in Table III (v) Annex 3.

III.B.2 Unjustifiable Delays

In response to the Questionnaire of the Commission and the Authority, new entrants indicated in their responses that the incumbents' delivery times for unbundled lines and physical collocation, as well as the amount of time involved in sorting out preliminary issues, were areas of concern. An analysis of this information indicates that delivery times for unbundled lines and collocation varies greatly across the EEA States.

For example, the provision of a new unbundled line in *The Netherlands* may take as long as 40 days, while only between 1 and 2 weeks in *Finland*. In *Belgium*, one new entrant indicates that it experienced delays of a number of months waiting for delivery from the incumbent of an unbundled line due to the incumbent's refusal to use the XML-ordering tool (an electronic ordering interface).

Meanwhile, delivery times for the provision of physical collocation sites are even more differentiated across the EEA States. For example, in *Finland*, it may take only 2 to 3 weeks for the delivery of a physical collocation site, but it may take up to 12 months in *Germany* (although some new entrants in *Germany* indicated that it may also take only two months).

The following table depicts average actual delivery times of unbundled lines and physical collocation sites, and the amount of time required for sorting out preliminary issues, for those EEA States where new entrants have reported such information in response to the Questionnaire of the Commission and the Authority:

Delivery Times

Average actual delivery time of unbundled lines	
< 4 weeks	*Austria, Finland, Germany, Iceland, Sweden*
4 – 6 weeks	*Denmark*
> 6 weeks	*Belgium, The Netherlands (although one new entrants reported less than 4 weeks on average), Norway (reported to be anywhere from 3 to 10 weeks)*
Average actual delivery time of physical collocation sites	
< 1 month	*Finland*
1 – 3 months	*Denmark, Norway, Sweden*
3 – 6 months	*Iceland, Italy, The Netherlands,*
> 6 months	*Austria, Belgium, Germany,* the *United Kingdom*
Time required to sort out preliminary issues	
< 5 weeks	*Finland, Norway, Sweden,*
> 5 months	*Denmark, Germany, Italy.*

Table III (vi) in Annex 3 outlines a range concerns of operators regarding various alleged unjustifiable delays in the provisioning of unbundled local loops, particularly as regards perceived unjustifiable delays in the negotiating process and various failures to provide related or ancillary technical services without which the principal right to unbundled access becomes illusory.

III.B.3 Tying

Although not of principal concern to most new entrants, the practice of tying is nevertheless alleged by respondents in a key number of EEA States, particularly as it relates to the purchase of backhaul facilities, ancillary services and collocation–related services (see summary of responses in Table (viii) of Annex 3). Most instances of alleged tying do not amount to express ties (or full-line forcing) by the fixed incumbent, but are characterised as constructive ties with ancillary services provided by fixed incumbents.

III.C ECONOMIC IMPACT

The combination of the pricing and behavioural practices reported by respondents has had an economic impact, which may have significantly affected their business plans, and even undermined the rationale for their seeking access. It appears, in particular, that the technical and financial conditions of collocation and the level of one-off activation (and deactivation)

fees are as important in the economic balance for an access seeker as is the recurring monthly fee for fully unbundled or shared access.

For example, the one-off activation (and de-activation) fees, which in a number of EEA States are in excess of € 100 per line for full access (see *Denmark*, *Finland*, *France*, *Germany*, *Greece*, *Ireland*, *Italy*, *Luxembourg*, *The Netherlands*, *Norway*, *Spain*, *Sweden*, the *United Kingdom*), must be recouped by new entrants from the subscriber. Rather than pass on these significant costs to the subscriber as a lump sum (*e.g.*, at the start of the relationship with subscribers), new entrants frequently amortise them over the period with respect to which they expect to retain the subscriber (often referred to as the churn rate), and apportion that cost by adding it to the subscriber's monthly fee. If one assumes a typical churn rate of 36 months (3 years) (*see*, *e.g.*, 3-year assumption made by respondents in *France* and *Germany*), this can add more than € 3 to the monthly fee. This differential is quite significant, given the already small margin (if any) between incumbent's rates for full or shared access, plus the retail rates that incumbents charge their own customers. Moreover, if a subscriber terminates service with a new entrant operator during the first 36 months of operation, the operator is unlikely to recover the uncollected portion of these one-off costs.

The total cost per line of unbundled access is even more impressive when the costs of collocation are added to the one-off costs related to activation and deactivation. Many respondents have argued that the fixed and recurring costs associated with collocation have a serious impact on their business plans. In *Belgium*, *France, Portugal*, for example, several operators provided cost-per-line estimations which include the costs of collocation and all one-off fees, and reached the conclusion that collocation costs have the effect of increasing the cost per line for unbundled or shared access, as reflected in the monthly fees, by a factor of two or three.

Generally speaking, the price structure and the conditions of collocation often lead to the need to generate economies of scale which, to some extent, may be viewed by access seekers as erecting entry barriers. Several respondents to the Questionnaires claim that, given the one-off expenditures which they must of necessity bear, it is necessary for an access seeker to acquire approximately 300 customers within a local switch to be able to reach "break even" point within a reasonable timeframe. Given these numbers and the fact that only a proportion of all subscribers will acquire services that local loop acquirers will provide, the first mover advantage of the incumbent might be seen as precluding its competitors from ever achieving such numbers. There is, therefore, a clear risk that very little room will be left for competitors to acquire a sufficient customer base to sustain a viable business model.

CHAPTER IV. APPLICABILITY OF EEA/COMMUNITY COMPETITION RULES

It is clear that all telecommunications sector-specific rules adopted by either the Commission or EEA States must be consistent with, and must be interpreted to ensure consistency with, competition rules.[24] The measures which can be found in the various *ONP Directives* go beyond those normally imposed under Article 82 EC or Article 54 EEA (*e.g.*, the transparency, pricing and supply provisions) and, as such, represent a deeper intervention into the operations of the market. However, there are a number of substantive issues, discussed at length in Chapter V below, that are and will continue to be subject to both the application of competition rules and sector-specific measures.

The application of EEA/Community competition rules to matters which are:

(a) governed in part by sector-specific regulation; and

(b) localised in terms of their immediate impact,

raises certain threshold questions of whether the impugned anti-competitive practices brought to light in the Sectoral Inquiry are best addressed through competition enforcement action or through some other means. The resolution of these broader issues requires that certain specific legal preconditions be satisfied in addition to the substantive evaluation of those allegedly abusive practices under either Article 82 EC or Article 54 EEA, namely:

(1) the resolution of ***jurisdictional issues***, especially in terms of whether the Commission and/or the Authority have an "interest"[25] in taking action, and the adequacy of national remedies to address the particular issue; and

(2) the establishment of the existence of a ***dominant position*** in a ***relevant product and geographic market*** on the part of the fixed incumbent (regardless of the nature of obligations imposed on such an entity under sector-specific rules), and the determination of whether that dominance is found to exist in a substantial part of the common market or in the EEA.[26]

Each of these issues is addressed below.

IV.A JURISDICTIONAL ISSUES

It is evident that the issue of local loop unbundling is of particular political, economic and legal significance, so that the intervention of the Commission or the Authority should be justified by the existence of the substantive criteria for action under Article 82 EC or Article 54 EEA. Specifically, the factual backdrop to the introduction of a local loop unbundling policy and the legal issues which local loop unbundling raise are of significance for the

[24] See *Guidelines on the application of EEC competition rules in the telecommunications sector*, points 15 and 16, 1990, O.J. C 233/02.

[25] In the EFTA context, this concept is understood to be that of "sufficient interest under the EEA Agreement".

[26] The Commission and the Authority may apply their respective provisions on the abuse of dominance in accordance with Article 56 EEA, which determines which of the two institutions has jurisdiction in any given case.

telecommunications sector in each Member State and across the EEA as a whole. The first Recital of the *Unbundling Regulation* supports this conclusion, by stating as follows:

> "*The conclusions of the European Council of Lisbon of 23 and 24 March 2000 note that, for Europe to fully seize the growth and job potential of the digital, knowledge-based economy, businesses and citizens must have access to an inexpensive, world-class communications infrastructure and a wide range of services. The Member States, together with the Commission, are called upon to work towards introducing greater competition in the local access networks before the end of 2000 and unbundling the local loop, in order to help bring about a substantial reduction in the costs of using the Internet. The Feira European Council of 20 June 2000 endorsed the proposed "e-Europe" Action Plan which identifies unbundled access to the local loop as a short-term priority.*"

The local access matters raised by the unbundling of local loops also deal with the rights of new entrants who are seeking to provide telecommunications services in competition with a fixed incumbent operator, formerly a monopolist, on which they depend for certain inputs essential for the provision of their own services. More particularly, a complaint relating to such inputs would raise legal issues as to the appropriate treatment of such a new entrant, where that new entrant is both a competitor at the service or retail level and a customer at the access or wholesale level. This would therefore raise legal issues which are significant to the entire telecommunications sector in Europe, and are not just limited to the situation existing in a particular EEA State. Moreover, given that wholesale access to local loops is by and large sought by a core group of telecommunications operators with pan-European commercial footprints, the importance in developing a consistent EEA-wide approach to such matters is paramount.

Despite the fact that the issue of local access is likely to raise issues of an "EEA/Community interest",[27] the *Access Notice* indicates that the Commission is intent on avoiding the unnecessary duplication of procedures, while safeguarding the rights of undertakings and users under competition rules. Thus, the Commission is, as a general principle, reluctant to initiate investigations where there is already an ongoing action taking place under national sector-specific legislation. It is unlikely, however, that the Commission will feel inclined to exercise such restraint where an undertaking's rights under EEA/Community law are being undermined by "*an excessive delay of the Commission's action, without a satisfactory resolution of the matter at a national level*"[28] or where interim relief is deemed to be necessary. The *Access Notice* considers that an access dispute before a NRA should be resolved within a reasonable period of time, *i.e.*, generally within a six month timeframe. If the dispute has not reached an effective conclusion within this period, the Commission acknowledges that there is a *prima facie* case that the rights of the parties are not being effectively protected. The Commission and the Authority could thus decide to commence their own investigation of the matter under the competition rules.[29]

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[27] The concept of EEA/Community interest was clarified by the Court of First Instance in the case of *Automec Srl. v. Commission*, Case T-24190, [1992] ECR II-2223, at paras. 84-94.

[28] Refer to the discussion in the *Access Notice* at paras. 11-38, and especially at paras. 14, 21 and 31.

[29] The principles outlined in the *Access Notice* can be considered to be sound general principles of EEA/Community law. The *Access Notice* has not been adopted by the Authority, but has been followed to the extent that it is still considered to be current. The Authority's Annual Report for 2000 stated that: "*the*

Effects of Ex Ante Regulation

The powers available to NRAs under the *Unbundling Regulation* to deal with potential anti-competitive conduct in the provisioning of unbundled local loops include the following:

Ex Ante Powers

- NRAs are required to ensure that charging for unbundled access to the local loop fosters "fair and sustainable" competition.

- NRAs are empowered to impose changes in Reference Offers for unbundled access to the local loop and related facilities, especially as regards prices. NRAs are also entitled to require notified operators to supply information relevant for the implementation of the *Unbundling Regulation*.

Ex Post Powers

- If an NRA determines that the local access market concerned is sufficiently competitive, it is required to relieve the designated operator(s) of the obligation to provide cost-oriented pricing for unbundled access to the local loop and related facilities.

- NRAs may intervene on their own initiative in order to ensure non-discrimination, fair competition, economic efficiency and the maximisation of benefit for users.

- Disputes between undertakings concerning issues raised under the *Unbundling Regulation*, and particularly those concerning the refusal of access to local loops and related facilities, are subject to the national dispute resolution procedures established in conformity with the provisions of the *Interconnection Directive*, and such disputes should be handled promptly, fairly and transparently by the NRA in question.

Having noted the range of regulatory powers that are, in principle, available to NRAs under the *Unbundling Regulation*, one should not underestimate the fact that even very detailed regulation in the *United States* has not removed serious obstacles to the provisioning of unbundled local loops. For this reason, there may be a range of 'regulatory' and competition law options which need to be considered, which go beyond merely mandating certain rights and obligations, to create financial incentives for fixed incumbents to provision loops expeditiously, effectively and at a reasonable cost.

Effect On Trade Between Member States

The final jurisdictional hurdle which needs to be overcome before an action can be brought under EC competition rules is whether the effect of the alleged violation is such that it has an "effect on trade between Member States" or, in the context of the broader EEA, "trade between the Contracting Parties" (*i.e.*, the EEA States).

preparation by the Authority of non-binding acts corresponding to theses adopted by the European Commission is subject to internal resource allocation. Pending the adoption of its own notices, the Authority intends to apply the principles set out in the Commission notices whenever relevant".

As recognised in *Remia*,[30] any abuse on the part of the dominant operator which affects competition on the entire territory of a Member State (or an EEA State) leads to repercussions on trade between Member States (unless, by reason of the activity concerned, it can be shown not, in fact, to have any appreciable effect on cross-border trade). The *Access Notice* also refers to this principle, specifically in the telecommunications sector. Given that the telecommunications sector is characterised by a number of operators and service providers which seek to provide their services across a range of Member States, any action on the part a fixed incumbent affecting the entire territory of a Member State is clearly liable to discourage such investment and is, therefore, likely to affect trade between EEA States. Accordingly, disputes regarding the unbundling of local loops will in principle have the requisite effect on cross-border trade so as to trigger EEA/Community competition rules.

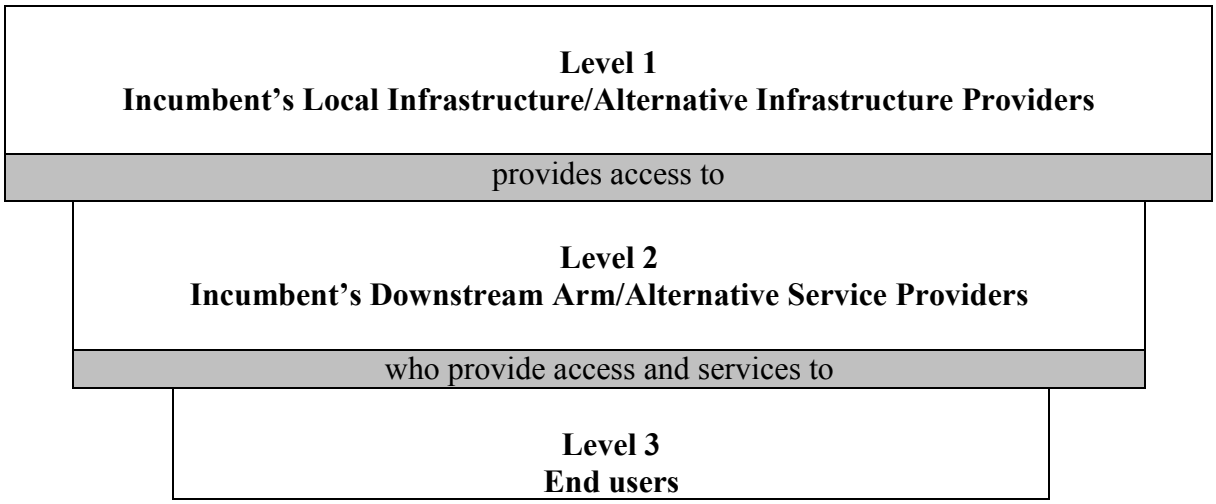
IV.B ESTABLISHMENT OF THE EXISTENCE OF A DOMINANT POSITION

Beyond deciding whether intervention at the EEA/Community level is desirable, any action brought under Article 82 EC or Article 54 EEA requires the identification of relevant product and geographic markets in which the allegedly abusive actions of a fixed operator take place. This exercise is without prejudice to the manner in which obligations in the *Unbundling Regulation* are set forth.

Clearly, the scope of and for competition cannot be judged without having identified the products or services, if any, which compete with those provided by the allegedly dominant firm. The definition of the relevant market is essential in assessing whether the undertaking concerned is in a position to prevent effective competition from being maintained.

IV.B.1 Affected Relevant Product Markets

There are relevant product markets which can be identified at two levels of trade – wholesale and retail – within which local access concerns should be analysed. By preventing new entrants from acquiring wholesale access to the local access infrastructure, fixed incumbents are restricting both directly and indirectly the emergence of competition on the downstream retail services market, as well as on the local retail access market. Diagrammatically, the relationship can be shown as follows:



[30] [1985] ECR 2545, at paras. 22-23.

It is difficult to identify how any of the potential relevant retail markets affected by practices identified by respondents might have evolved and might be continuing to develop in the absence of regulatory intervention. However, a distinct relevant product market can be identified at the wholesale level for fixed network access to end users over facilities controlled by the access provider. On the demand side, the relevant product market for wholesale fixed network access to end users appears to consist of access to the fixed incumbent's local copper loop.[31] The incumbent has such access. There are no other access delivery platforms currently available to new entrants which can provide the same infrastructure-based access to the end user with control over the physical facilities.[32]

As will be discussed in greater detail in the supply-side analysis below, it is not currently feasible for many new entrants to either "make" or to "buy" alternative access delivery platforms. First, it is not commercially feasible for them to build and deploy their own facilities down to end users nationally, given the high costs and long lead times of doing so. Second, "buying" access at wholesale rates is not a viable option, because technological and functional limitations and availability do not render them viable substitutes for the local loop.

While cable networks can self-supply fixed network access, they currently have technical constraints which limit their ability to be "unbundled" in the same way as local loops and, therefore, do not present a viable option for new entrants wishing to provide access services to end users over facilities under their control. Meanwhile, alternative platforms such as WLL, fibre-to-the-home, electricity cables, mobile and satellite are currently in the embryonic stages of development, are not ubiquitously deployed and, in many cases are not economically viable or efficient. Therefore, from the new entrant's perspective, there do not exist any viable full substitutes for the local loop, at this time.[33]

Access to end users over facilities controlled by another party (*i.e.,* where the new entrant resells the access services of the owner of the network) also does not constitute a viable full substitute because the actual control over the physical facilities themselves is critical to the new entrant's ability to provide an appropriate range of services, including the future provision of competitive broadband Internet access services to the end user. The reasons for our conclusions include the following:

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[31] It should be acknowledged that the existence of the *Unbundling Regulation* and the obligations imposed thereunder has altered and will continue to alter the demand for unbundled loops. It seems likely that the very existence of an obligation mandating supply will, as it has in relation to interconnection, over time make it difficult to assess "real" competitive demand for access to local loops.

[32] It does not seem to be appropriate to define the relevant (wholesale) market by reference to either the (retail) services sought to be provided by the service providers seeking access (*i.e.*, the range and number of retail services sought to be provided varies from operator to operator, and an arbitrary list of retail services excluding/including operators from the relevant wholesale market is unnecessary and might inadvertently skew market developments). In addition, there do not yet appear to be sufficient grounds on which to differentiate two separate wholesale markets for full or shared access.

[33] For further discussion of these alternative platforms, refer to the "Wholesale Fixed Network Access to End users" analysis, in the Study Team's *Market Definitions for Regulatory Obligations in Communications Markets Study* for DG Information Society (to be published, March 2002).

(1) control over the physical facilities ensures that the operator will be able to configure and manage the entire length of the end user connection;

(2) control over the physical facilities allows the operator to choose the most appropriate offerings for its customers, rather than simply reselling the identical retail offering made available by the network owner; and

(3) pricing terms and other contractual terms (*e.g.*, SLAs) related to the resale of the network owner's access services may preclude the operator from entering the market and establishing a customer base (and revenue stream) to allow the development and provision of new services.

The historical fixed incumbent operator is clearly able to self-supply such services, but the use of unbundled local loops are the only means of access to end users that enable new entrants to ubiquitously and expeditiously provide, over physical facilities under the control of the provider, a broad range of services to end users (especially those services requiring the use of higher bandwidths) made possible through the upgrading of copper loops using xDSL technology. Under existing EEA/Community law, service providers are entitled to *full* access to the unbundled local loop from fixed operators notified as having SMP. Full unbundled access entitles new entrants to use the full frequency spectrum of the twisted metallic copper pair to be able to provide both voice and more bandwidth-intensive services to end users.

For service providers who do not wish to provide voice services, *shared* access to the unbundled local loop allows the new entrant to use the higher non-voice band spectrum of the twisted metallic copper pair (should it desire to do so), with the fixed incumbent continuing to provide voice telephony services over the lower frequency portion of the loop. Thus, with shared unbundled access, new entrants which do not wish to provide both voice and services requiring access to a broader bandwidth can still offer their own ADSL services and not simply resell the ADSL service of the incumbent.

The construction of new networks clearly increases (and will continue to increase) the "competitive space" in which unbundled loops are offered, thereby diluting the historical market power of fixed incumbent operators. In addition, if the technical issues that currently surround the "unbundling" of existing alternative platforms (*i.e.,* cable) are resolved such that there is clear substitutability between access using alternative platforms and unbundled local loops, it is likely that facilities-based access over additional platforms will become part of the fixed facilities-based wholesale access market to end users.

The technical reviews and commercial negotiations that are currently underway in a number of Member States (*e.g.*, *The Netherlands* and the *United Kingdom*) suggest that, in the medium-term, a form of wholesale access over cable networks may become technically viable. However, it is clear that any such access will be, to a large extent, technically (and probably functionally) different to access achieved through the incumbent's local loop. Moreover, the deployment of additional networks based on WLL, fibre or electricity wires may provide, in the medium to long-term, forms of access that are functionally equivalent to unbundled local loops.

It is premature to attempt to anticipate the impact of, as yet not deployed, UMTS networks on the scope of the relevant product market. Given that the market is being driven by retail demand for bandwidth-intensive services, wholesale access that is substitutable for access

over unbundled local loops must be able to provide such retail services. It is not likely that UMTS will demand such capabilities. As such, it is not clear whether UMTS will be in a position to exert competitive pricing pressure on entities operating in the relevant product market for fixed network access to end users.

IV.B.2 Relevant Geographic Market

The relevant geographic market for wholesale access to end users is national in scope, both because incumbent PSTN operators have deployed nationwide local loop infrastructures (with this infrastructure being subject to a national licensing regime in all EEA States) and because the competitive conditions under which service providers seek access to end users is essentially national.

The commercial drivers for the provision of access to unbundled local loops create an environment in which the competitive conditions are nationally homogeneous, with service providers seeking wholesale access to the maximum number of end users across a national territory.

It is possible that, if alternative local loop infrastructures (*e.g.* WLL or fibre) are deployed with any degree of ubiquity, they might over time be able to provide viable, but less than national, means of acquiring access to end users over facilities controlled by operators, at least for the operators of such networks. In such circumstances, the relevant geographic market might be smaller than national and actually be definable by reference to regional or city-based geographic scope. However, the presence of alternative networks in regions or cities is likely to exert pressure on the conditions of supply of unbundled local loops offered by national PSTN operators, since the non-discrimination obligation imposed on such operators is interpreted to require that the terminal conditions of unbundling (including costs) offered are the same across the entire network. This uniformity of price causes competitive conditions to converge at the national level.

Cable networks, which are currently deployed in most Member States on a regional or franchise basis, cannot currently provide own-controlled facilities-based access to any network other than that of the network operator. As such, they do not exert pressure on entities providing unbundled local loops in any manner that would narrow the scope of the relevant geographic market so that it would be considered to be regional or bounded by the relevant cable franchise area in question.

IV.B.3 Dominance in a Substantial Part of the Common Market

As discussed above, each EEA State has a fixed operator that occupies a dominant position with respect to the provision of wholesale access to end users over facilities controlled by the access provider and the provision of access to collocation space. These operators have rolled out their local loops over significant periods of time, during which they were insulated from competitive constraints through the existence of exclusive rights, and were also able to fund investments through monopoly rents.[34] In addition, fixed incumbents operate the largest - in many cases the only - and most ubiquitous local access networks in their national territories.

[34] It should be acknowledged that the network upgrades that have occurred in recent years to enable the provision of xDSL services have occurred since the incumbents lost their exclusive rights.

Recent empirical research indicates that, for example, of the over 206 million "contestable" exchange lines across the 15 EU Member States, only slightly more than 642,000 unbundled lines had been made available as of mid-2001.[35] In addition, almost 400,000 of those lines are exclusively used to provide telephony services. Recent figures reveal total or near-total control of all xDSL lines by national PSTN incumbents in *Austria*, *Belgium*, *France*, *Germany*, *Greece, Ireland*, *Italy*, *Luxembourg*, *The Netherlands*, *Portugal*, *Spain*, *Sweden*, and the *United Kingdom*.[36] In the *United Kingdom*, where 20 or so operators originally participated in the process for collocation in BT's exchanges, most have pulled out, leaving only a handful of competitors seeking copper lines.[37]

Even if the number of "access lines" controlled by alternative infrastructure providers is taken into account, it is clear that national fixed incumbent operators remain the dominant providers of local loops in all EEA States. In addition to their large market shares, there are substantial economic and commercial barriers to entry, they enjoy extremely important economies of scale and scope and have, in each relevant geographic market, substantial economic size and strength advantages over virtually all new entrants.

IV.C SPECIAL RESPONSIBILITY OF DOMINANT OPERATORS

The ownership and control of a local access infrastructure which is not economically or efficiently capable of replication, suggests that *de facto* monopolists might be required to satisfy a standard of conduct exceeding that required of operators which would be competing solely on the merits.

In *Michelin*,[38] the Court of Justice referred to the "special responsibility" that a company holding a dominant position has not to allow its conduct to impair undistorted competition on the common market. This obligation is particularly important in circumstances where a company is dominant on a market where its conduct can significantly affect competition on one or more downstream, neighbouring or associated markets. Article 82 EC and Article 54 EEA embrace all conduct by an undertaking in a dominant position whose effect is the hindrance of the maintenance or growth of the degree of competition still existing in the dominated market, or an associated market where, as a result of the very presence of that undertaking, competition is weakened.

The actual scope of the special responsibility imposed on a dominant undertaking must therefore be considered in the light of the specific circumstances of each case. In *Compagnie Maritime Belge*,[39] Advocate General Fennelly suggested that the conduct of an undertaking in a near-monopolistic position which is demonstrably intent on preventing the emergence of

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35 *See* ECTA Latest DSL Scoreboard – October 2001. (http://www.ectaportal.com/uploads/486LLU_Scorecard_October01.xls) (website last visited on 15 January 2002). The Study Team notes, however, that statistics for available loops are subject to rapid change in the immediate future.

36 In *Finland*, although competitors controlled over 35% of the total DSL lines as of October 2001 (*see* ECTA Latest DSL Scorecard – October 2001), the majority of these competitors are fixed incumbents operating outside of their traditional service areas.

37 "Competition in the last mile remains elusive", *Financial Times*, 18 July 2001, at FT Telecom 4.

38 *Michelin v. Commission*, Case 322/81, [1983] ECR 801.

39 *Compagnie Maritime Belges Transports, Compagnie Maritime Belge and Dafra Lines v. Commission*, Joined Cases C-395/96 & C-396/96, [2000] ECR I-1365.

competition could be assessed according to a higher standard, a view which the Court of Justice appeared to uphold.

It is difficult to imagine a more unambiguous example of *de facto* monopoly in most EEA States brought about by the historical monopoly over local loops which would trigger the "special responsibility" referred to by the European Courts.

CHAPTER V. SUBSTANTIVE ANALYSIS UNDER EEA/COMMUNITY COMPETITION RULES

Article 82 EC and Article 54 EEA provide that any abuse by an undertaking of a dominant position within the territory of the EEA or in a substantial part of it shall be prohibited as incompatible with the functioning of the common market (or the EEA Agreement) in so far as it may affect trade between EEA States. Such abuse may include:

(a) directly or indirectly imposing **unfair selling prices** or other **trading conditions**;
(b) **limiting production**, markets or technical development to the prejudice of consumers;
(c) applying **dissimilar conditions** to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage; and
(d) making the conclusion of contracts subject to acceptance by the other parties of **supplementary obligations** which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Based on the categories of abusive practices identified in the observations of the respondents discussed in Chapter III, each of these potential infringements is analysed immediately below.

V.A TARIFF AND COST-RELATED ISSUES

As noted above in Chapter II.B, the comparison of prices across the EEA States is a difficult exercise, not least as a result of the wide variations in the service offerings and differences in services covered by the various charges.

These variations cannot be overlooked when trying to appraise the significance of large differences between many of these prices across the EEA States. For example, the monthly rental fee for a full unbundled line varies by as little as €8.28 in *Denmark*[40] to as high as €16.47 in *The Netherlands* (which includes the controversial €4.54 broadband service surcharge). Meanwhile, the monthly rental fee for shared access varies from under €5 in *Belgium*, *Denmark*, and *Iceland* to higher than €10 in *The Netherlands* (again, including the €4.54 broadband service surcharge) and *Norway*. These differences can, to some extent, be explained, *inter alia*, by different approaches to cost accounting, some countries using historical costs, with some others using current or long run incremental costs.

There are also large variations among the one-off connection fees across the EEA States. Indeed, while one-off connection fees (in some cases, for both existing and new lines) are well below €100 in *Austria*, *Belgium*, *Iceland* and *Portugal* – with the price in *Iceland* being as low as €29.72 – they are above €150 in EEA States such as *Denmark*, *Finland* (Sonera),

[40] *Denmark*, as well as *Iceland*, *Liechtenstein*, *Norway*, *Sweden* and the *United Kingdom*, have not joined the Euro and their currencies, therefore, fluctuate in relation to the Euro from day-to-day. The European Central Bank exchange rates used, for the purposes of this Study, are as follows: for *Denmark*, 1 DKK = .1342462 Euro (12 December 2001); for *Iceland*, 1 IKR = .0107158 Euro (12 December 2001); for *Norway*, 1 NOK = .1248985 Euro (12 December 2001); for *Sweden*, 1 SEK = .1071432 Euro (12 December 2001); for the *United Kingdom*, 1 GBP = 1.6110842 Euro (12 December 2001). No exchange rate is listed for *Liechtenstein* because there are not yet any prices for unbundled local loops or related facilities.

Norway and *Sweden*, and over €200 for some types of new lines in *France* and *The Netherlands*. For shared access, the one-off connection fees vary from as low as €29.72 in *Iceland* and €42.05 in *Finland* (Sonera), to as high as €169.78 in *Luxembourg*, €184.75 in *Ireland*, €188.50 in the *United Kingdom*, and €267.85 for new lines in *France*.

Collocation prices are even more difficult to compare across the EEA States, due principally to the fact that collocation charges are not always publicly available in each EEA State. In some EEA States, prices for the critical elements of collocation are set on a case-by-case basis (*France*, *Norway*, the *United Kingdom*) and may even be covered by a non-disclosure agreements between the fixed incumbent and the requesting operator (*e.g.*, *Ireland*). Even in those EEA States where collocation prices are publicly available, the prices are calculated differently by the fixed incumbents (*i.e.*, for different size spaces, inclusive of different costs, or for different geographic locations). Nevertheless, a basic comparison of monthly rental fees for 5 m^2 and 8 m^2 collocation spaces in *Germany* and *Portugal* provides an interesting result:

- *Germany* (in cities such as Düsseldorf, Bonn, Köln and Hamburg)
  5 m^2 unit: €178.36 per month
  8 m^2 unit: €254.80 per month

- *Portugal*
  5 m^2 unit: €515.06 per month, plus one-off fee of €4,468.48
  8 m^2 unit: €821.37 per month, plus one-off fee of €4,827.32

Meanwhile, in *Luxembourg*, the monthly price, per footprint, appears to be as low as €62 in metropolitan areas, €49.60 in urban areas and €44.70 in rural areas.

Finally, one interesting comparison of prices, which actually can be performed on an "apples to apples" basis, is between the security escort fees charged by the incumbent when new entrants desire access to their collocation spaces in the incumbent's exchange. A comparison of these charges illustrates that the fees charged by the incumbents in *Ireland* (€284.42 for the first 30 minutes, and €77.45 for each 15 minutes thereafter, for visits during office hours in which the new entrant provides less than 10 days notice), *Sweden* (€321 minimum, for up to four hours) and the *United Kingdom* (€260.96 minimum fee for planned visits during business hours) are extremely high as compared to the fees charged by incumbents in other EEA States. For example, the fees in *Portugal*, for a visit made during any time of the day, is €20.87 per hour, plus €11.17 for other expenses and, in *Iceland*, €40.08 per hour during the day and €50.10 per hour during the night.

V.A.1 Supply on Discriminatory or Less Favourable Terms

Article 82 EC and Article 54 EEA prohibit dominant undertakings from discriminating between similar transactions (*i.e.*, not treating like cases alike or treating different cases in the same way) where such discrimination would have an adverse effect on competition. Article 82(c) EC and Article 54(c) EEA expressly identify discrimination as the application of

dissimilar conditions on parties when compared to equivalent transactions with others, thereby placing those parties at a competitive disadvantage.[41]

An understanding of the concept of discrimination resulting from differential treatment of customers where supply is constrained can be found in the judgment of the Court of First Instance in *BPB Industries*.[42] In that case, the Court stated that, while it is open to a dominant entity to lay down criteria prioritising orders where supply does not meet demand, such criteria must be objectively justifiable and not discriminatory in any way. Criteria that treat similar customers in similar circumstances in different ways can be both discriminatory and exclusionary in effect and, as such, abusive. The fact that the abusive practice might occur only for a short or transitory period of time does not negate its abusive character.

The *Access Notice* deals with the application of the principle of non-discrimination in the telecommunications sector at some length. In particular, the *Access Notice* states this principle as, "*[A] dominant access provider may not discriminate between the parties to different access agreements where such discrimination would restrict competition*", and goes on to add that there is "*a general duty on the network operator to treat independent customers in the same way as its own subsidiary or downstream service arm*". However, it should be remembered that the *Access Notice* itself acknowledges that the non-discrimination regulatory obligation that it describes goes beyond the non-discrimination obligation that would be imposed under Article 82 EC or Article 54 EEA. For similar reasons, the application of non-discrimination obligations on SMP operators under the ONP framework provides only limited guidance for our current purposes. As such, the elements of "similarity" under Articles 82 EC and 54 EEA must be addressed in any *ex post* analysis pursuant to those Articles. To date, the application of the principle of non-discrimination under Article 82 EC and Article 54 EEA to access agreements in the telecommunications sector has remained largely untested.

In order to demonstrate discriminatory behaviour under Article 82 EC or Article 54 EEA, it is necessary to demonstrate that the two separate transactions were comparable (but not necessarily "identical"). In this regard, the *Access Notice* notes that the "*nature of the customer and its demands may play a significant role*". The majority – if not all – of the local access seekers should be regarded as competing service providers to the fixed incumbents' retail services based on local access (*e.g.*, ADSL services). As such, they should therefore receive access on terms (relative to both prices and other key terms of supply) that are substantially equivalent to those which the incumbents provide to themselves. While it should be borne in mind that the existence of discrimination under competition rules can only be determined on a case-by-case basis, the Study Team is of the view that many fixed incumbents are discriminating against access seekers by granting them a type of access which is commercially, technically and functionally inferior to (and more onerous than) the access granted to other competitors or their own downstream arms.[43] In particular, allegations of discriminatory tariffs have been made in *Belgium, Ireland, Italy*, *Norway* and the *United*

41 Section 4.2 of the Commission's *Communication* (C 272, 23/9/00, 0055-0066) also discusses other forms of discrimination which might constitute an abuse under Article 82 EC.

42 [1993] ECR II-389.

43 The Court of First Instance described such abuse, at para. 93 of *Deutsche Bahn*, as imposing dissimilar conditions for equivalent services, thereby placing other parties operating the journeys at a disadvantage in competition with the upstream service provider itself and its subsidiary [1997] ECR II-1689.

Kingdom, relating to both discrimination between third parties acquiring access and the incumbent's own retail arm and between different third parties.

Allegations of non-tariff-related discrimination have been made in virtually all EEA Member States (with the exception of *Germany*, where new entrants stated that they were unable to assess any discrimination that may be occurring). The alleged behaviour ranged across terms relating to waiting times, quality of service, participation in trials, delivery times, service unbundling, functionality, access to collocation facilities, restrictions on availability of new capacity and access to services information.

The effect of such discrimination is that it restricts competition on the downstream markets for the provision of telecommunications services to end users, on which the fixed incumbents operate in either actual or potential competition with those access seekers. Specifically, such abusive behaviour will have an anti-competitive effect by limiting the possibility for those access seekers to provide telecommunications services (*e.g.*, xDSL and related services) to end users. An additional abusive effect results from the fact that these access seekers will be prevented from meeting *end user* demand for xDSL or related services.

Existing Relevant Ex Ante Obligations

Non-discrimination was a primary concern of the Commission in drafting the *Unbundling Regulation*. As such, Article 3(2) explicitly requires that notified operators meet reasonable requests for unbundled access to their local loops and related facilities under "transparent, fair and non-discriminatory conditions." Moreover, the Article prohibits notified operators from discriminating in favour of their retail services (provided on their own or through affiliated companies) (*e.g.*, *"[n]otified operator shall provide beneficiaries with facilities equivalent to those provided for their own services or to their associated companies, and with the same conditions and timescales"*). In addition, Article 4(3) empowers NRAs to intervene on their own initiative to ensure non-discriminatory treatment (including discrimination in relation to the quality of lines provisioned).[44]

According to the responses to the Commission and the Authority Questionnaires, NRA proceedings investigating alleged discriminatory conduct on the part of the incumbents in relation to local loop unbundling have been initiated in *Italy* and the *United Kingdom* following intervention requests or complaints by new entrants. In the *United Kingdom* proceedings, the NRA dismissed the complaint (which requested regulatory intervention with respect to the competitive advantages enjoyed by the incumbent from its own DSL retail operations), ruling that it did not have sufficient evidence to establish a breach of the terms of the *Unbundling Regulation*. Meanwhile, the complainant in *Italy* is still waiting for formal notice from the NRA in response to its request for intervention regarding a possible discriminatory practice by the incumbent favouring larger operators over smaller operators.

The reluctance of NRAs to intervene might possibly be connected to the inherent difficulties in obtaining the necessary evidence of discrimination. Given that neither the *Unbundling Regulation* nor national law require the legal separation of an incumbent's network (or

[44] The Commission's Revised *Voice Telephony Directive* (98/10/EC) also provides that NRAs shall ensure that organisations with significant market power adhere to the principles of non-discrimination when they make use of any forms of special network access for providing publicly available telecommunications services (Art. 16(7)).

wholesale arm) from its retail arm, it is sometimes difficult to demonstrate, in a vertically integrated environment, that the retail arm is favoured over new entrants. In particular, it will be difficult to compare the conditions of collocation imposed on access seekers with those provided to the incumbent's own service arm as long as, in the latter case, such provision amounts to no more than self-supply. This lack of structural separation provides an incentive for an incumbent to treat its retail arm and third party access seekers in a different (and sometimes discriminatory) manner, in so far as it makes the detection and gathering of evidence of discrimination more difficult.

Conclusions:

1. **The Study Team considers that there are numerous examples of *prima facie* infringement of the non-discrimination obligation contained in Article 82 EC and 54 EEA (refer to Table III (i) in Annex 3). Instances of discriminatory conduct appear to exist especially with respect to the favouring by fixed incumbents of their own (or affiliated) downstream operations. Moreover, the practice of discrimination extends well beyond pure pricing issues and covers the provisioning of key resources such as collocation space.**

2. **The style of non-discrimination obligation imposed under the *Unbundling Regulation* (*i.e.*, an absolute prohibition of discrimination between entities acquiring the specified access services)[45] does not require the assessment of similarity of trading conditions that is required by Article 82 EC or Article 54 EEA. As such, it may be easier, in principle, to enforce the non-discrimination obligation under the terms of the *Unbundling Regulation*, rather than to take action under those Articles. However, it appears highly likely that an infringement action under Article 82 EC or Article 54 EEA requires serious consideration, if NRA enforcement of the implementation of the *Unbundling Regulation* proves to be problematic, in view of the many instances of alleged abuse reported by respondents to the Commission and the Authority.**

V.A.2 Excessive Pricing

As was indicated in Section III.A.2 and amplified in Table III (ii) of Annex 3 to this Study, alternative operators across the EEA States are of the view that fixed incumbents' prices both for actual provisioning of local loops and for ancillary services such as collocation are often unjustified and excessive.[46] In particular, excessive pricing allegations refer to monthly rental and one-time connection/installation charges, back-haul services, collocation (physical and distant) and line rentals.

Excessive prices (*i.e.*, directly or indirectly imposing unfair purchase or selling prices) are considered to be a classic example of the abuse of a dominant position. Excessive pricing occurs where pricing policies are designed to achieve a turnover and profits which could not

[45] The approach mirrors that taken in the *ONP Directives* and is also reflected in the *Access Notice*, as noted above.

[46] *See* Table III (ii) of Annex 3.

be achieved in a more competitive environment or, in the case of the supplier of an essential input service or infrastructure, where the prices impose unfair costs on competitors, irrespective of the profit generated by that behaviour. In *General Motors v. Commission*, the Court of Justice adopted a test of unfairness based on the relationship between the price and the "economic value" of the goods or services provided by the dominant firm.[47]

It would appear that the "economic value" of a product can be inferred by examining comparable prices[48] for comparable goods, or by examining the production costs[49] of the relevant goods or services supplied. Charging a price that is excessive in relation to the economic value of the product is *prima facie* abusive. As is demonstrated in the Court's case-law, the economic value can be established by either examining:

- comparable prices; or
- production costs.

Comparative Pricing

A comparison of prices within one country is in most cases, at least with regard to the actual costs of access to the local loop, not a valid option due to the absence of other national providers of local loop services. However, in some EEA States it appears that there are differences in prices for the same services between different regions. For example, it is already clear that the differences in collocation prices in *France* that are attributed to geographic location show variation that may be difficult to justify by reference to macro-economic or demographic factors or to the conditions of the real estate market. All prices may, however, be compared between the different national fixed incumbents if the economic situation in two affected EEA States is comparable.[50] In *United Brands*,[51] for example, the pricing was held to be excessive in relation to the economic value of the product supplied, as evidenced by the widely differing prices charged as between Member States.[52] The telecommunications sector has had a highly successful sector-specific experience in the application of "best practices" or the "benchmarking" of prices for interconnection and other input pricing, as a surrogate for an efficient costing model while the necessary highly complex data is produced and sorted.

Some care needs to be taken in relying on inter-Member State comparisons, since the sectoral and macro-economic conditions may vary to differing degrees between the Member States. As such, there should be an up-front assessment of the extent to which markets are

47 *General Motors v. Commission*, Case 26/75 [1975] ECR 1367, at paragraph 11.

48 *British Leyland v. Commission*, Case 226/84 [1986] ECR 3263, at paragraphs 28-30.

49 *United Brands v. Commission*, Case 27/76 [1978] ECR 207, at paragraphs 235-268.

50 In the recent *Napp* decision, Case 1000/1/1/01 (IR), Judgment given 22 May 2001 in the U.K., the Competition Tribunal upheld the various comparisons drawn by the Director: prices with costs; prices with the costs of the provider's next most profitable competitor; prices with its competitors' prices; and prices of the provider with its own prices in other jurisdictions.

51 *United Brands Company and United Brands Continental BV v. Commission*, Case 27/76 [1978] ECR 207 Cf. *Ministère Public v. Jean-Louis Tournier* Case 395/87 [1989] ECR 2521.

52 Although ultimately the Court held that the Commission's findings were defective, this related to the facts of the case, not to the principle of law at issue.

sufficiently similar. New entrants in *Norway*, for instance, argue that a comparison of prices can be made between the telephony systems of *Norway* and *Sweden*, arguing that the network architecture and other factors are essentially similar, with both telephony systems being of approximately the same age, and the existence of similarities in the population demographics (the urban/rural mix, which therefore influences the average loop length, a major pricing factor). However, it is clear that many price comparisons that could be made in relation to simple collocation and other local loop charges are less likely to be subject to significant Member State macro-economic or demographic variations. As such, comparative pricing in relation to these charges will be a valuable tool.

As discussed above, however, the examination of comparable prices in the local loop environment will be a more complex and sophisticated exercise than a mere comparison of the prices actually charged in the various EEA States.

Calculating Various EEA Production Costs

A second way to establish economic value is the examination of the production costs themselves. However, any evaluation of production costs for local loop pricing must inevitably involve data that is under the control of the fixed incumbent. Obtaining this data will require an investigation of the particular incumbent in question. Moreover, it may sometimes involve the construction of a specific economic model, which can turn out to be a time-consuming exercise.[53] In addition, there appears to be some inconsistency in the treatment of service activation and deactivation costs, in that some incumbents charge new entrants for such services but do not record similar charges between the incumbent's wholesale and retail arms (*e.g., Belgium*), that may warrant further investigation.

With regard to ancillary services such as collocation space, costs for electricity, cable *etc.*, such costs could be readily established on the basis of factors outside the control of the incumbent, such as average rental costs per square meter, and so forth. Such an evaluation has to be made on a case-by-case basis.

Existing Ex Ante Regulatory Measures

Article 3(3) of the *Unbundling Regulation* requires that prices charged by notified operators for unbundled access to the local loop and related facilities (defined to include collocation, cable connections and relevant information technology systems) be set on the basis of cost-orientation. NRAs are empowered to ensure that charges for unbundled access to the local loop "foster […] fair and sustainable competition" (Article 4(1)), to impose pricing changes on the Reference Offer where such changes are justified (Article 4(2)), and to intervene on their own initiative in order to ensure "non-discrimination, fair competition, economic efficiency and maximum benefit for users" (Article 4(3)). As it currently stands, the *Unbundling Regulation* itself provides no real guidance as to the appropriate methodology to determine whether prices are being set on the basis of cost-orientation, whether they foster fair and sustainable competition, or whether they ensure economic efficiency.

According to the responses to the Commission's Questionnaire, NRA proceedings investigating complaints of excessive pricing for unbundled local loops and related facilities have been initiated in at least the following EEA States: *Austria*, *Belgium*, *France*, *Germany*,

[53] For example, costing models for interconnection have taken a number of years to develop and implement.

The Netherlands, *Sweden* and the *United Kingdom*. In the majority of instances, these proceedings have resulted in the NRA mandating lower prices.

Excessive Pricing v. Cost-orientation

A further factor in the assessment of excessive prices flows from the cost-orientation requirement contained in the *Unbundling Regulation*, coupled with the power given to NRAs to foster fair and sustainable competition. In circumstances where rates have been approved by an NRA, it may be difficult to demonstrate that an incumbent had the requisite intention to charge excessively. However, if this difficulty can be overcome, the Study Team does not believe that the acceptance of prices by an NRA bars investigation under Article 82 EC or Article 54 EEA. Given the historic difficulty that NRAs have found in developing cost-oriented pricing models (*e.g.*, for both fixed and mobile interconnection), it would be extraordinary if the NRAs have had the time, data or opportunity to have already developed defensible cost-oriented models for all material components of local loop charges.

Conclusions:

1. **In the absence of further guidance under the *Unbundling Regulation*, and based on an empirical verification of the claims of new entrants outlined in Table III (ii) of Annex 3, an Article 82 EC or Article 54 EEA excessive pricing action may be available against a number of fixed incumbent operators. The initiation of such an infringement action will, at the very least, exert sufficient pressure on incumbents to consider the defensibility of their current pricing policy. The Study Team does not believe that NRAs have always had either the time or the data to develop cost-oriented pricing methodologies under the *Unbundling Regulation.* As such, incumbents cannot realistically claim that all their prices are cost-oriented in the context of an excessive pricing action.**

2. **The opportunities of mounting a successful excessive pricing action are raised significantly if the competitive damage caused by the "excessive" pricing in question is compounded by other pricing or behavioural infringements (especially discrimination, which appears to be an alternative or supplementary basis for action which is widespread throughout the EEA States).**

3. **As it stands, the *Unbundling Regulation* itself provides no real guidance as to the appropriate methodology to be used to determine whether prices are being set on the basis of cost-orientation, whether they foster fair and sustainable competition or whether they ensure economic efficiency. The Commission could consider providing guidance in these matters through the issuance of a *Recommendation* identifying the relevant costing principles, which could also incorporate a framework for, effectively, benchmarking key charges across the EEA States.**

V.A.3 Predatory Pricing and Price Squeezes

As discussed in Chapter III and Annex 3 (Table III (iii)), there are a number of *prima facie* "price squeezes" raised by the respondents which focus on the following wholesale/retail price comparisons:

- Shared access prices v. retail ADSL prices;
- Shared access v. resale ADSL prices;
- Resale ADSL v. retail ADSL prices;
- Wholesale unbundled loop tariff v. xDSL resale price offered by incumbents to resellers;
- High bitstream (or equivalent wholesale ADSL) v. resale ADSL prices; and
- High bitstream (or equivalent wholesale ADSL) v. retail ADSL prices.

The most common form of price squeeze occurs where the price of the relevant input (whether the local loop itself, or an xDSL conditioned line which could be resold) is so high, relative to the market price of the downstream retail services, that a hypothetically efficient operator cannot sustain such losses beyond the short term.

The opposite phenomenon to that discussed above, namely, below-cost pricing to retail customers while maintaining relatively high wholesale prices, creates the same economic effect, namely, the inability of a new entrant to sustain itself in the market beyond the short term because the margin between its inputs and the price of which it must compete with the fixed incumbent is so low (or even negative) that it will be compelled to exit the marketplace.

As explained above in Chapter III, a price squeeze situation will usually be encountered when one of the two relevant prices is excessive (see above) or is below cost (see immediately below).

In at least five EEA States (*i.e.*, *Belgium*, *France*, *Germany*, *Portugal*, *Spain*), such a comparison is sufficient to establish a margin squeeze with respect to certain services, without the need to take into account the incumbent's downstream costs, since the incumbent's monthly retail rates are lower than its wholesale access rates.

In addition, in at least eight EEA States (*i.e.*, *France*, *Germany*, *Greece*, *Iceland*, *Ireland*, *The Netherlands*, *Norway*, the *United Kingdom*), even though the incumbents' wholesale access rates are lower than its retail rates for certain services, the respondents assert that the incumbent is guilty of a margin squeeze, on the basis of the very small margin between the incumbent's retail and wholesale rates.

Clearly, predatory pricing and price squeezes between retail and wholesale prices act as barriers to entry, affect the ability of new entrants to competitively offer services using unbundled local loops and ultimately have a detrimental effect on customers.[54]

None of the respondents across the EEA States who addressed these alleged margin squeeze situations were able to provide any information regarding the incumbent's downstream costs. Instead, they relied exclusively on a comparison of the incumbent's access price charges and retail prices.[55]

(i) Predatory Pricing

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, thereby enabling the dominant firm to further increase its market power and its accumulated profits at a later point in time. Thus, such unfairly low prices are considered to be in breach of Articles 82(a) EC or 54(a) EEA.[56] It may occur through selective price cutting, pricing "aimed" at a particular competitor, or where prices are unprofitable or are barely profitable. However, predatory pricing must not be confused with normal price competition, which is a natural and expected feature of the competitive process. Price reductions, whether initiated by the dominant firm or by others, and whether across-the-board or on specific contracts, may be evidence of the competitive process at work, even in a market dominated by a single firm. It can therefore be difficult to distinguish between a legitimate competitive response on the one hand, and predatory or abusive action on the other. The leading case on predatory pricing is the *AKZO* Case, where the Court of Justice held that, in order to establish predatory pricing, it is necessary to demonstrate that the alleged predator is: (i) selling at below average total costs; and (ii) has the intention of eliminating a competitor.[57] However, the Court drew an important distinction with respect to the second element *(i.e.* proof of intention):

*"First, prices **below** average variable costs must always be considered abusive. In such a case, there is no conceivable economic purpose other than the elimination of a competitor, since each item produced and sold entails a loss for the undertaking. Secondly, prices below average total costs but above average variable costs are only to be considered if an intention to eliminate can be shown".*[58] (emphasis added)

Thus, where prices charged are above average variable costs, evidence of intention to exclude a competitor is required.[59] Conversely, insofar as the predator's prices are lower than the

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54 In the *Seventh Implementation Report*, the Commission stated that where artificially low access prices are imposed by government or regulatory action, this may constitute an infringement of the tariff principles in the ONP framework (at p. 20).

55 With only one exception, which compared "wholesale" rates for resold xDSL on the one hand, and unbundled loops on the other.

56 The *Access Notice*, at paragraph 110.

57 *AKZO v. Commission,* Case C-62/86 [1991] ECR I-3359.

58 *AKZO*, *op.cit*., at paragraphs 70-72.

59 It should be remembered that the Court of Justice, in *AKZO*, inferred the necessary intention from the fact that there was no objective justification for the low prices charged over a long period in the absence of quotes from competitors. In *Tetra Pak II*, the Court of First Instance established the requisite intention on the basis of the evidence that loss-making prices were charged only when necessary to win customers,

average variable costs, "proof of intention to eliminate competitors is therefore not necessary".[60] In addition, the Court of Justice held that it must be possible to penalise predatory behaviour where there is a risk that a competitor might be eliminated, without the need for proof that any losses incurred could be recouped.[61]

Clearly, as with the telecommunications sector broadly, all but the most straight-forward predatory pricing cases relating to the below-cost provision of ADSL retail services by the incumbent will hinge on the allocation of joint and common costs, and the calculation of incremental costs. The recent *Deutsche Post* Decision turned on the Commission establishing that the incremental costs incurred by Deutsche Post providing mail-order parcel services were not covered by the price that it charged its customers for that service. In reaching this conclusion, the Commission distinguished between the additional costs of providing the particular service and common fixed costs, taking into account the additional burden represented by the universal service obligation (particularly the network capacity obligations).[62] The Commission found that the pricing policy was not in Deutsche Post's economic interest in the medium term and had the effect of restricting the activities of competitors offering a similar service at prices covering their costs. The other dimension explicitly raised by the Commission in the *Deutsche Post* Decision, which is also highly relevant in the telecommunications environment, is cross-subsidisation. The Commission assessed the competitive harm in that case on the basis of the combined effect of predatory pricing and cross-subsidisation. This development will be particularly useful in circumstances where a new entrant (or the Commission or the Authority) considers that retail cross-subsidisation is occurring (cross-subsidisation across levels of trade is discussed below in the content of price squeezes).

(ii) Price Squeeze

A price squeeze is usually understood to occur when an undertaking which is dominant in an upstream market may be able to discriminate in favour of its own downstream operations and against potential downstream competitors by cross-subsidising the former while charging the latter input prices at a level which leaves insufficient margin for them to compete effectively in the downstream market.[63] In such a situation, alternative carriers normally complain that their margins are being squeezed because the spread between access prices and the incumbent's corresponding retail services is too narrow for them to compete with the incumbent.

The Commission has already considered the problems created by price squeezes in the context of the telecommunications sector. Indeed, in the *Access Notice*, the Commission took the position that it considers that a price squeeze may be demonstrated either by:

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board minutes, the duration, continuity and scale of losses incurred, the lower (relative) prices in the Member State in that market and the declining sales of the competitor.

60 *Tetra Pak v. Commission* Case C-333/94P [1996] ECR I-5951, at paragraph 42.

61 *Tetra Pak*, *ibid*., at paragraph 44.

62 Between 1990 and 1995, Deutsche Post's revenue from mail-order parcels was below the incremental cost provision. As such, each sale represented a loss comprised of all of the proportionate universal service costs and at least part of the incremental costs of providing the service.

63 Commission Decision 88/518/EEC of 18 July 1988, *Napier Brown/British Sugar* (OJ L 284, 19.10.1988, p.41).

- showing that the dominant company's own downstream operation could not trade profitably on the basis of the upstream price charged to its competitors by the dominant company's upstream arm; or

- by showing that the margin between the price charged to competitors on the downstream market 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.[64] As the Commission points out, 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.

The particular implications of, and issues relating to, the potential for a margin squeeze in the provision of local loops has been considered in the ONP Committee document on pricing issues related to unbundled access to the local loop (ONPCOM 01-17, 26 June 2001). It states that three key pieces of information must be considered when determining whether a margin squeeze exists:

- the access price charges to alternative carriers by the incumbent (Pa);

- the incumbent's retail price of the corresponding service (provided the wholesale and retail services can be compared) (Pr); and

- the downstream costs incurred by the incumbent in delivering the retail service, in addition to those costs which have already been included in the price of the access service (Cr).

A margin squeeze will occur when the incumbent's price for access, combined with its downstream costs, is higher than its corresponding retail price (*i.e.*, Pa + Cr > Pr). In these circumstances, the margins of the incumbent's competitors, even if these operators are as efficient as the incumbent, are "squeezed" and they cannot competitively deliver a retail service unless they find additional efficiency gains.

It is also arguable that the "squeeze" might be said to occur because alternative wholesale products are priced in such a way that meaningful purchasing decisions as between the two products cannot be made, with the effect on downstream prices being the same as a traditional price squeeze situation.

Identification of the correspondent retail service is difficult in the context of unbundled local loops (*e.g.*, incumbents will no doubt argue that services such as ADSL, and not voice services, should be considered; new entrants will invariably argue for a broader range of services). In an *ex post* price squeeze action, however, it is possible to identify the particular retail services sought to be provided. By way of contrast, in an *ex ante* environment, NRAs cannot identify (with greater specificity) individual retail services. Accordingly, they appear to have three alternative options:

- assess a price squeeze for all possible retail services (starting with the cheapest retail service, given that this service is the most likely to create a price squeeze);

64 Unless the dominant company can show that its downstream operation is exceptionally efficient.

- assess a price squeeze for a sample of the retail services most commonly provided by (or most commonly identified in the business plans of) new entrants; or

- create a "weighted average" or "retail basket" of retail prices (as proposed by the Commission in its June 2001 discussion paper for the ONP Committee).[65]

The Commission recognises, however, that while the access price and the incumbent's retail price are usually readily identifiable, the downstream costs incurred by the incumbent are often more difficult to identify, with incumbents often arguing that such cost components are difficult to trace within existing accounting systems. As a result, it may be difficult to conduct this form of "bottom-up" price squeeze test. However, as the Commission has noted, the sensitivity of the results of any such test to the quality of the accounting data provided should not be underestimated, and should be given due weight by regulators relying on the results of such an assessment. Nevertheless, there are a number of instances in the EEA States where access prices alone are higher than the corresponding retail price (*i.e.*, Pa > Pr). In such cases, the finding of a margin squeeze appears to be self-evident, with little need for a competition regulator to determine an incumbent's downstream costs.

Existing Ex Ante Regulatory Measures and Ex Post Actions

Article 4(3) of the *Unbundling Regulation* permits NRAs to intervene in order to ensure "non-discrimination, fair competition, economic efficiency and maximum benefit for users". In addition, Article 4(1) directs NRAs to ensure that charges for unbundled access to the local loop "foster […] fair and sustainable competition"; Article 4(2) empowers NRAs to impose pricing changes on the Reference Offer where such changes are justified; and Article 4(3) provides NRAs with the power to intervene in order to ensure fair competition and the maximum benefits for end users. Finally, Recital 11 of the *Unbundling Regulation* provides that the pricing rules for local loops should "foster fair and sustainable competition" and ensure there is "no distortion of competition, in particular no margin squeeze between prices of wholesale and retail services of the notified operator."

According to the responses to the Commission's and the Authority's Questionnaire, NRA proceedings investigating allegations of margin squeezes have been initiated in *Belgium*, *Italy*, *Sweden* and the *United Kingdom*. In *Sweden,* the Swedish Competition Authority, after receiving complaints from four operators, initiated a proceeding on or about 14 December 2001 to examine whether the incumbent's retail prices for ADSL violates the competition rules. In *Belgium*, the NRA issued a binding opinion amending the incumbent's Reference Offer for bitstream access services after receiving complaints from new entrants that the Reference Offer left no viable margins for them to compete. By contrast, in the *United Kingdom*, the NRA concluded that it could not find any evidence supporting an allegation of a margin squeeze with respect to the incumbent's ADSL retail product. The margin squeeze proceedings recently initiated in *Italy* are ongoing, while, in *Germany*, the NRA recently opened proceedings against the incumbent for providing DSL services at prices lower than cost.

[65] Where the third option is adopted for *ex ante* purposes, there is need for caution in selecting the services comprising the "retail basket" which serves as a surrogate for the incumbent's retail price in the alleged price "squeeze". This selection process is relevant in identifying both the actual services that should be included in the basket and the "weighting" attributed to that basket (especially given the fact that new entrants usually target their services more narrowly than the incumbent).

Conclusions:

1. **While it is clear that NRAs have jurisdiction to address both predatory pricing and price squeezes in the context of local loops, it appears that there is a general reluctance to do so. In fact, in the few EEA States where new entrants have initiated proceedings relating to price squeezes, they have done so before the NCAs. As such, it does not appear that action by NRAs in relation to these key issues is likely to produce tangible results. It may assist NRAs, as noted above, if guidance as to the interpretation of the cost-orientation obligation imposed under the *Unbundling Regulation* were to be issued, perhaps in the form of a *Recommendation* requiring the publication of "best practice" prices for key services, while pursuing individual predatory pricing and price squeeze cases under Article 82 EC and Article 54 EEA.**

2. **There are a sufficient number of situations identified by respondents across the EEA States (see Table III (iii) Annex 3) which satisfy the legal and economic criteria necessary to ground an action for a price squeeze. Because the Commission and the Authority are not encumbered by NRAs' decisions approving the costs in an RUO, there is greater likelihood of an action under the competition rules being more effective. Subject to a more in-depth analysis, there would *prima facie* appear to exist a rebuttable presumption that an infringement of Articles 82 EC or 54 EEA may have taken place where access prices are higher than the corresponding retail price. In such a situation, it would seem unnecessary for a competition authority to determine an incumbent's downstream costs.**

V.B "BEHAVIOURAL" OBSTACLES[66]

V.B.1 Refusals to Supply

An alleged refusal to deal needs to be assessed both in the context of existing supply obligations under the *Unbundling Regulation* and on the basis of general *ex post* competition principles.

Essential Facilities

It is clear that refusal to supply (or an offer to supply on unacceptable terms) by a dominant firm may, under EEA/Community competition rules (as expressed in the jurisprudence of the Court and the administrative practice of the Commission), amount to an abuse of dominance. More particularly, a refusal to grant access to an **"essential facility"**, in the absence of objective justification, will constitute an abuse. An essential facility has been defined under the administrative practice of the Commission as "a facility or infrastructure, without access to which competitors cannot provide services to their customers".[67] What constitutes an

[66] *See*, in addition, the discussion of discrimination in V.A.1, above.

[67] *See Containers/Stema Sealink* [1995] 4 CMLR 84. The reasoning stems from the categorisation of the Court of Justice in *Hoffman-La Roche* on abusive conduct.

"essential facility" is determined by the technical, legal or economic obstacles preventing a would-be user of the facilities from competing on a relevant (downstream) market.[68] In the *Bronner* Judgment, the Court of Justice applied both the precedents in *Commercial Solvents* and *Magill*,[69] according to which it appears that the essence of the abuse was the refusal, without objective justification, of access to goods or services for which there is no alternative and without which the would-be acquirer of access would be unable to compete on a relevant (downstream) market. In *Magill*, the Court of First Instance elaborated on the "essential" nature of the facility in question, finding that the access service itself must be indispensable[70] to carrying out the access seeker's business (*i.e.,* there are no actual or potential substitutes).[71]

Deregulation in the telecommunications sector raised the importance of third party access in the sector. The access to essential facilities concept, as it pertains to the sector, is dealt with at length in the *Access Notice* in its treatment of self-supply issues (*i.e.,* where a fixed incumbent, dominant on the wholesale access market, provides network access to its downstream arm while not supplying access to any third party in the face of requests for access). The *Access Notice* regards the legal test under this scenario as tantamount to an "essential facilities" analysis, because there has been no third party supply. In determining whether or not to impose access obligations under EEA/Community competition rules under this scenario (on the basis that a refusal to grant access to a facility is abusive),[72] the Commission and the Authority will take account of the following elements, cumulatively:

- access to the facility in question is generally essential in order for companies to compete on that related market;
- there is sufficient capacity available to provide access;
- 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;
- the company seeking access is prepared to pay a reasonable and non-discriminatory price and will otherwise in all respects accept non-discriminatory terms and conditions; and

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68 *Bronner v. Mediaprint* [1998] ECR I-7791 at para 44. *See* also the Opinion of Advocate General Jacobs at para.50.

69 *See Istituto Chemioterapico Italiano SpA and Commercial Solvents Corp. v. Commission*, 6 and 7/73, [1974] ECR 223 and *RTE and ITP v. Commission*, C-241 and C-242/91P, [1995] ECR I-743.

70 In this context, see the discussion in Chapter IV.B.2, above, on the existing and potential substitutes for unbundled local loops.

71 In conducting an essential facilities assessment, the legal standard does not vary if the form of access requested is not currently provided (either the downstream arm of the dominant entity or the third parties).

72 The *Access Notice* also provides that network configuration by a dominant operator which makes access objectively more difficult for service providers could constitute an abuse under Article 82 EC (and therefore Article 54 EEA by analogy), unless it were objectively justifiable. One such objective justification would be where the network configuration improves the efficiency of the network generally.

- there is no objective justification for refusing to provide access.[73]

It is clear that the *Unbundling Regulation* itself (and the obligations imposed therein) was based - at the time of its adoption - on an essential facilities assessment of access to the local loop. Similarly, the Commission's *Local Loop Unbundling Communication* of April 2000 referred to the legal threshold for a refusal to grant access to the local loop as the essential facilities doctrine *"where the incumbent is the only provider of services over the local loop."* While this does not, in the view of the Study Team, remove the need to determine whether the local loop is an essential facility in the course of any specific *ex post* assessment of the alleged abuse of dominance and appropriate remedies in responses thereto, it does effectively provide a reasoned approach for an essential facilities finding, unless a significant change of circumstances has occurred in the interim since the time of adoption of the *Unbundling Regulation*. However, it is important to recall that the form of access to the essential facility must be indispensable, in that there are no actual or potential substitutes. Accordingly, it will be necessary to determine whether there are economic and technical substitutes (*e.g.,* is there a wholesale access service offering that acts as a substitute).

Non-discrimination

An alternative approach to determining whether self-supply amounts to an abuse of dominance is to consider whether the (dominant) incumbent is in effect discriminating between like cases (*e.g.,* between its own downstream arm and its competitors). Oftel, in the *United Kingdom,* for example, adopts this approach, thereby avoiding the difficulties of bringing an action based in the essential facilities doctrine. However, in the view of the Study Team, this approach appears to confuse the concept of abuse occurring through discrimination and that of abuse occasioned through a refusal to supply. As such, it misconstrues the non-discrimination obligation.

In the instances of refusal to supply identified by the various respondents, a refusal to supply case based on an essential facilities argument appears, *prima facie*, to be capable of being substantiated. It should be borne in mind, however, that the prosecution of an essential facilities case will, no doubt, be time-consuming (even where the case is conferred priority by the Commission's Services or the Authority) and requires extensive economic and legal analysis of substitutes to assess the indispensability of the access sought to the facility in question. As such, such a case is likely to lead to a lengthy delay which is unlikely to be in the interests of access seekers (or ultimate consumers).

[73] The *Access Notice* provides further guidance on those criteria. As regards the essential facilities criterion, the *Access Notice* notes that the term "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". It should be noted that the *Access Notice* predates both *Bronner* and *Magill*.

Relevant Existing Ex Ante Obligations

Article 3(2) of the *Unbundling Regulation* requires notified operators to meet reasonable requests for unbundled access to their local loops and related facilities on "transparent, fair and non-discriminatory conditions", and that requests can only be refused on the basis of objective criteria relating to technical feasibility or the need to maintain network integrity. In addition, where access is refused, Articles 3(2) and 4(5) state that the aggrieved party may submit the case to the national dispute resolution procedures established in conformity with *Directive 97/33/EE*.[74] Moreover, Recital 12 to the *Unbundling Regulation* provides that notified operators are required to provide information to third parties under the same conditions and of the same quality as they provide for their own services or associated companies.

The *Unbundling Regulation* imposes, *ex ante*, the very access remedies that are likely to be imposed as a result of an *ex post* competition investigation. As such, it imposes obligations that do not hinge on any finding that, in the case of each notified operator, access to its local loop constitutes an essential facility.

According to the responses to the Questionnaire of the Commission and the Authority, NRA and NCA proceedings investigating allegations of refusal to supply full local loop access were initiated in *Greece* and *Ireland*. In the proceeding in *Greece*, which began in June 1999, the NRA found the complaints to be justified. The proceedings in *Ireland* before the NCA are still pending. Meanwhile, proceedings were initiated in *Germany* and *The Netherlands* alleging refusals to supply shared access. In *Germany*, the NRA adopted a decision ordering the fixed incumbent to offer shared access, while the proceedings in *The Netherlands* are ongoing.

Conclusions:

1. **The absolute obligation on fixed incumbent operators imposed in the *Unbundling Regulation* to provide access to unbundled local loops should render superfluous the need for recourse to a competition action, based on the essential facilities doctrine, in those situations where an absolute refusal to deal has occurred.**

2. **Absent action being taken by an NRA to enforce the obligation to supply unbundled loops imposed by the *Unbundling Regulation*, an essential facilities argument could be used in situations amounting to a constructive refusal to deal, consistent with principles of EEA/Community law. Given that the policy rationale underlying the *Unbundling Regulation* is that fixed incumbents hold a local access monopoly, one could imagine that only a very significant change in the underlying structure of competition could erode the accuracy of that working presumption. (*Quaere* whether this presumption could be sustained in those Member States characterised by a high degree of technically and functionally substitutable infrastructure-based competition.)**

[74] Article 11 of the *Interconnection Directive* (97/33/EC) also provides that the NRA may intervene to resolve collocation and facility sharing disputes pursuant to Article 9 of the *Directive*.

V.B.2 Unjustifiable Delays

There are a number of heads of abuse under Articles 82 EC and 54 EEA pursuant to which delays in the provisioning of loops or related services could be reviewed, namely:

- discrimination, in light of the apparent wide variation in provisioning times (*see* Chapter V.A.1, above);
- delay which amounts to a refusal to supply (*see* Chapter V.B.1, above);
- the failure to "satisfy demand"; and
- inefficiency and mismanagement.

Article 82(b) EC or Article 54(b) EEA not only refer to exclusionary conduct (*i.e.*, conduct related to keeping out new entrants or limiting their growth), but also prohibit behaviour that is exploitative and, therefore, abusive because it limits the satisfaction of demand. The Commission has previously stated that it could only intervene in such a matter if there was *"clear and uncontroversial evidence that a very substantial share of demand is being deprived of a service that it manifestly needs"*.[75] The facts in particular cases may provide grounds on which to take *ex post* action against an incumbent on this basis.

Similarly, inefficiency, idleness, mismanagement or wilful neglect may also constitute instances of abuse under Article 82(b) EC or Article 54(b) EEA. The Court of Justice has found, for example, that a refusal to use modern technology (increasing both costs and delays) by the entity with the exclusive right to organise dock work[76] and the failure by the agency with the exclusive right to provide employment agency services to ensure that it was adequately able to meet demand,[77] can amount to an abuse.

While it is clear that no dominant loop local provider currently has exclusive rights, it may be that, in the particular circumstances in a given Member State (or region of a Member State) it is the *de facto* exclusive provider of such services (for which there are, on the facts, no effective substitutes). In addition, the anecdotal evidence suggests that there are significant differences between the internal management of incumbents' ADSL roll-outs (which are rapid and all-encompassing in many EEA States) and the limited resources and management tools devoted to local loop unbundling and ongoing supervision, maintenance and management of unbundled facilities. As such, the factual predicates may exist for a case to be brought in some circumstances, for an abuse caused through inefficiency and mismanagement by a fixed incumbent.

In addition, the *Access Notice* expressly states that timing is one of the three most important elements relating to access which is susceptible to manipulation by an access provider in

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75 *P&I Clubs IGA and P&I Clubs Pooling Agreement* [1999] 5 CMLR 646.

76 *Port of Genoa v. Gabrielli* [1991] ECR I-5889.

77 *Höfner and Elser,* Case C41-90 [1991] ECR I-1979; *Job Centre* [1997] ECR I-7119.

order, in effect, to deny or delay the provision of access. The *Access Notice* goes on to add that dominant operators have a duty to deal with requests for access efficiently. As such, the undue and unjustified delays on the part of many fixed incumbents in responding to access seekers' requests for access appear to constitute abuses of their respective dominant positions. What actually constitutes an unjustifiable delay will be a matter of fact and will need to be examined on a case-by-case basis. When considering allegations of undue and inexplicable or unjustified delays, the *Access Notice* provides that the Commission will seek to benchmark the fixed incumbent's response to an access request with:

- the usual timeframe and conditions applicable when the incumbent grants access to its facilities or to its own subsidiaries; and

- responses to requests for access to similar facilities in other Member States.

It will also compare the explanations given for any delay with those provided to and by others.

Table III (vi) of Annex 3 identifies the principal concerns in this regard and those concerns which merit additional examination by the Commission and the Authority, as they demonstrate *prima facie* cases of discriminatory and/or foreclosing behaviour on the part of fixed incumbents. For example, it is widely alleged that DTAG in *Germany* substantially delays responding to access seekers' initial requests for access. Despite the conclusion of an agreement for unbundled loops, DTAG is said to continue to abuse its dominant position by not guaranteeing any precise date for the delivery of the ordered unbundled line or collocation services, which makes it impossible for new entrants to plan further network rollout or advise their clients on service activation. Many new entrants are said to be suffering serious economic harm while these services are being delayed.

The Study Team believes that it is possible to benchmark alleged delays against the efficient processes in other EEA States. For instance, operators do not report any significant delays in *Sweden*, where the incumbent (through the infrastructure owner, Skanova, which is a legally and operationally separate affiliate of the incumbent) apparently meets, or comes close to meeting, the deadlines set forth in its RUO (within 10 working days for delivery of copper access lines and within 9 weeks for delivery of collocation sites).

Existing Relevant Ex Ante Obligations

Unjustifiable delays in the provision of unbundled local loops and collocation facilities are unfair and discriminatory, and are prohibited by Article 3(2) of the *Unbundling Regulation*. Unjustifiable delays also have a detrimental effect on fair competition, prevent economic efficiency and cause harm to consumers; NRAs therefore have the authority to intervene under Article 4(3).

However, the *Unbundling Regulation* does not define or describe when delays are unjustified. As a result, implementation of the *Unbundling Regulation* to address such delays will require a similar assessment of whether a delay is unjustified as an Article 82 EC or Article 54 EEA *ex post* review. Accordingly, the Commission and the Authority should consider whether the treatment of such actions (or inactions) under the *ex post* framework, given their behavioural nature, is likely to be any more effective than an approach based on NRA implementation of the existing *Unbundling Regulation* (aside from the deterrent quality of significant

administrative fines where a clear abuse has occurred). Alternatively, amending the *Unbundling Regulation* to provide a legal standard for such review may provide greater *ex ante* certainty. A less intrusive - and arguably more effective - amendment could provide for the adoption of a *Recommendation* (to be periodically amended) outlining best practice comparisons of key provisioning times, to assist NRAs' in their assessment of the reasonableness of delays.

According to the responses to the Commission's Questionnaire, NRAs are investigating complaints of delays by the incumbents in *Belgium* and *Portugal*. Neither of these investigations have yet resulted in any formal notice or fines on the incumbents.

Conclusions:

1. **The effective and timely policing of intentional delaying tactics, given both their breadth and the difficult evidentiary issues underpinning any such claim, render attempts to address such conduct exceedingly difficult, regardless of whether it is to be appraised in an *ex post* review or under *ex ante* regulation.**

2. **It is arguably more effective for NRAs to police delaying tactics by reference to the comparative international timeframes ("best practices"), made possible through greater transparency obligations. Such transparency might take a variety of forms. The Study Team considers that a "self-help" strategy by which Service Level Agreements between incumbents and alternative operators incorporate such best practices is likely to be an effective regulatory solution.**

V.B.3 Tying

Article 82(d) EC and Article 54(d) EEA prohibit:

"*making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."*

The Court of First Instance amplified the scope of this prohibition in *Tetra Pak II,* where it held that:

"*even where tied sales of two products are in accordance with commercial usage or there is a natural link between the two products in question, such sales may still constitute abuse within the meaning of Article [82] unless they are objectively justified*".[78]

In addition, an obligation which has the economic effect of tying services which are ancillary to the supply of the principal service may also infringe Article 82 EC or Article 54 EEA.[79]

As illustrated by Chapter III.B.3 and Annex 3, seven operators appear to have identified instances of direct or indirect tying. More particularly, potential tying is of concern with respect to access to backhaul facilities in three jurisdictions (operators in another jurisdiction, *Ireland,* have not specified whether tying to ancillary products also includes access to backhaul facilities); such tying appears to result from provisions in the RUO which render the build out of own infrastructure uneconomical (*i.e.,* through a prohibition of sharing of backhaul capacity). Other complaints deal with "customer tying" scenarios (*Belgium*), tying due to a lack of unbundling on the level of the sub-loop (*Germany*) and tying resulting from the obligation to provide the incumbent operator with access on a reciprocal basis (*Italy*). It appears that, in most cases, operators were not particularly concerned about the occurrence of tying. Therefore, concerns voiced with respect to tying appear to be relatively marginal.

Existing Relevant Ex Ante Obligations

Article 3(1) of the *Unbundling Regulation* prohibits tying, insofar as it requires that Reference Offers be "*sufficiently unbundled so that the beneficiary does not have to pay for network elements or facilities which are not necessary for the supply of its services . . ."* Tying arrangements are also contrary to the principles of fair competition and economic efficiency and, as such, fall within the scope of an NRA's authority under Article 4(3).

In the interconnection environment, a number of NRAs have adopted an approach to enforcing the unbundling obligation which suggests that they would have the ability to do likewise in the local loop context. Given that the easiest way to enforce such an obligation is through review of the RUO, it appears that it would be appropriate to allow NRAs to address tying issues in the context of their regular reviews of RUO terms or in response to particular complaints (*de facto* tying, which would require a detailed economic analysis of the

[78] [1994] ECR II-755, at para.37.

[79] The Commission has considered clauses requiring the customer to obtain its maintenance and repair services for the supplier of the principal product (*Tetra Pak II)*; delivered, rather than ex-factory pricing (*Napier Brown/British Sugar)*; and a reservation of groundhandling services by an airport authority *(Flughafen/Frankfurt Main).*

relationship between the tied and tying product, would be more difficult to assess without a full *ex post* investigation.)

The respondents to the Commission and the Authority Questionnaires do not report any past or ongoing proceedings before the NRAs or NCAs with respect to tying arrangements.

Conclusions:

1. **Thus far, concerns regarding the tying of related or ancillary services to the provision of unbundled loops do not appear to be a focal point of alternative operators' concerns.**

2. **To the extent that tying concerns might emerge in the future, they might most effectively be addressed by the inclusion of more detailed obligations in RUOs. The initiation of *ex post* investigations into tying would be more appropriate in more complex instances of *de facto* tying.**

CHAPTER VI. COMMERCIAL IMPACT OF OBSTACLES TO ACCESS

The commercial impact of the incumbents' conduct referred to by respondents to the Questionnaire, in terms of the anti-competitive effect on retail service delivery, innovation and conditions of supply, and the resultant changes in the market behaviour of new entrants, are discussed in Sections A and B, below, particularly:

- The range of services which can be provided to end users, and the range customers which can benefit from such services, where alternative operators obtain access to the unbundled local loops of the fixed incumbents across the EEA States.

- The type of tangible economic damage suffered by alternative operators as a result of the alleged violation of key principles of EEA/Community competition rules and/or specific obligations contained in the *Unbundling Regulation.*

The identification by regulators of both appropriate *ex ante* and *ex post* measures which can be undertaken to ensure the effective implementation of the principles contained in the *Unbundling Regulation* is addressed below in terms of the range of measures under competition rules and under sector-specific regulation which can be targeted to address the problems identified by alternative operators in Part II of this Sectoral Inquiry (see discussion in Chapter III and in Annex 3) and whose legal significance has been appraised under existing principles of EEA/Community law (see discussion in Chapters IV and V). The Study Team's Conclusions and Recommended Actions with respect to addressing the issues identified below in Section VI.B are enclosed in Confidential Annex 7.

VI.A SERVICES TO BE PROVIDED OVER THE LOCAL LOOP

In order to best assess the impact of anti-competitive practices in the refusal or delay in the provisioning of unbundled local loops, it is necessary to identify the breadth of the overall market which new entrants are seeking to address through their use of unbundled local loops.

New entrants across the EEA States have indicated in their responses that their business rationales for the use of local loops[80] can be analysed on the basis of a number of elements, namely:

- Modalities: Over fully unbundled lines or shared lines.

- Functional Levels of the Market: At both wholesale and retail levels.

[80] In the majority of EEA States, new entrants who offer, or plan to offer, services using unbundled local loops require an individual licence. A number of EEA States only require general authorisations for the provision of services over local loops *(e.g., Norway* and *Sweden*). Only in *Denmark* is no licence or authorisation required in order to offer services over unbundled local loops.

- Customer Segmentation:
  - ► Retail customers can be broken down into residential and business end users.
  - ► Wholesale customers can be grouped into key target/groups such as ISPs, carriers, service providers.
- Product Segmentation:
  - ► Access services (including Internet access, regardless of whether flat-rate or metered) and content-related services (including portals).
  - ► Data and voice.
  - ► "Narrowband" and "broadband" services (although the distinction is difficult to draw at the retail level).
  - ► As an alternative to low capacity leased lines.
- Service Segmentation: [81]
  - ► Narrowband retail access, including ISDN access services.
  - ► Narrowband retail call services.
  - ► Narrowband retail dial-up Internet access.
  - ► Wholesale broadband telecom services.
  - ► Retail broadband telecom services, with own services and without access to Internet content.
  - ► Internet broadband access.
  - ► Wholesale broadband telecom services.
  - ► Other services (*e.g.*, Internet portal activity).

New entrants across the EEA States offer, or plan to offer, a wide range of narrowband and broadband services using unbundled local loops. The majority of new entrants target business customers exclusively (often differentiating between SMEs, SOHOs and large corporate customers), while some new entrants also selectively target residential customers.

Based on the services listed by the Commission and Authority in their Questionnaires, the table in Annex 5 depicts which services are generally offered (or are planned to be offered) by new entrants in each EEA State, and whether new entrants generally target residential or business customers for their retail services. The strategic focus of access seekers is obviously much influenced by the commercial conditions of unbundling, which have the potential to create a number of disincentives in their targeting of some market segments.

VI.B EFFECTS OF ANTI-COMPETITIVE CONDUCT ON ACCESS SEEKERS

The net effect of alleged "delay and denial" tactics on the part of fixed incumbents in the provisioning of unbundled local loops has produced a range of damaging economic results of varying seriousness.

Alternative operators across the EEA States generally concur that the unbundling of the local loop is a vital element to allow effective competition in the downstream market for the provision of all types of broadband services. Consequently, the myriad of problems and

[81] The Commission and the Authority listed only these particular services in their Questionnaires, and new entrants were instructed to respond whether or not they provided each service.

obstacles that these operators have encountered constitute a serious impediment to the introduction of competition.

Only in a very limited number of cases do operators conclude that there have been no negative effects on their competitive positions in the provision of broadband services and that their business plans have remained intact. In all other cases, respondents state that the obstacles and problems they face in gaining access to unbundled local loops are having serious implications on their business strategies and are significantly hindering the development of competition for the provision of a range of broadband services.[82]

For example, alternative operators report the following changes in their business strategies as a result of obstacles to obtaining prompt and reasonably priced local loops and related services:

- **Avoid the unbundling process entirely**. In *Austria*, three operators report that, because of the obstacles to gaining access to unbundled local loops, they have decided not to become involved in the local loop unbundling process, even though they originally intended to do so.

- **Terminate unbundled loop activities**. In *Denmark*, *France*, *Germany*, *Italy*, *Spain* and the *United Kingdom*, a number of operators report that because of bad economic conditions for unbundling and an overall unfavourable local loop unbundling environment, they have closed down their local loop unbundling activities and withdrawn from the local loop unbundling process entirely. Indeed, in *Italy*, 30% of the operators withdrew from the process following the first round of collocation. Meanwhile, in *Germany*, one operator cancelled plans to enter the DSL market after investing millions of Euros in the process, and in *France* only 7 out of 40 operators initially involved in the unbundling process have completed a collocation application.

- **Delay DSL market entry**. In *Belgium*, *Germany*, *Italy*, *The Netherlands* and *Norway*, some operators report that as a result the obstacles to local loop unbundling, they have postponed or been delayed in entering the broadband access services market. In *Norway*, operators report that the obstacles have been detrimental to their businesses. This has provided the incumbents with a significant "first-mover" advantage, including significant competitive advantages of scale.

- **Limit scope of activities**. A number of operators across the Member States have scaled back the scope of their competitive product offers. For example, in *France*, six operators report that the high LLU tariffs have forced them to offer DSL services only in large cities to business and professional customers, while another operator has reduced the scope of its target market to only medium-sized businesses. In *Germany*,

[82] With the exception of *Luxembourg*, where new entrants did not identify any obstacles to obtaining unbundled access to the local loop in their responses to the Questionnaire and, therefore, did not describe any effects on their business strategies.

eight operators report that price squeezes have forced them to exclude analogue end user customers from their product offer, while seven operators assert that they have been compelled to target only business customers and those private individuals that generate high traffic volumes (*i.e.*, monthly traffic charges of more than €76.69). Another operator in *Germany* reports no infrastructure rollout in rural areas. In *Sweden*, one operator reports that the high prices for unbundled loops means that it can only offer DSL services to business customers, and must exclude SOHO customers. The scaling back of DSL rollout is also reported by operators in *Austria*, *Italy*, *Spain* and the *United Kingdom*.

- **Change DSL entry strategy**. Operators in a number of Member States report that obstacles to unbundling have forced them to re-evaluate and alter their strategies to offer DSL services. For example, in the *United Kingdom*, operators state that they have delayed offering DSL services via unbundled local loops and have instead turned to reselling the incumbent's wholesale DSL product. Difficulties in gaining physical collocation within a reasonable time and on reasonable terms, and barriers to obtaining shared access, have forced another operator in the *United Kingdom* to rely on full access and distant collocation, at a much higher cost. Meanwhile, an operator in *Sweden* reports that the incumbent's prevention of implementing HDSL via unbundled loops has forced it to purchase other, more expensive, types of access from the incumbent to provide HDSL services. In *Greece*, an operator states that the lack of a comprehensive and adequate Reference Offer has forced it to turn to alternative solutions, for example wireless local loop access. In *Germany*, the pricing of unbundled local loops has even forced one operator to replace unbundled loops with its own infrastructure. Similarly, in *Iceland*, one operator indicates that the difficulties it has encountered in relation to the incumbent's local loop have forced it to invest in its own DSLAM infrastructure.

The overall effect of these changes in new entrants' business strategies is that competition has been slow to develop in local access and broadband markets and the incumbents have retained their overwhelmingly dominant positions in these markets. As such, there exists strong proof that damage has occurred as a result of likely violations of EEA/Community competition rules, as discussed in Chapter V and based on the allegations discussed in Chapter III and Annex 3 to this Study.

For example, as reported by one operator in *The Netherlands*, the incumbent's allegedly discriminatory provision of line sharing has allowed the incumbent to remain the dominant provider of DSL, with the incumbent having an estimated 120,000 retail customers of its MxStream services and alternative operators only having 5,000 DSL customers. Meanwhile, in the *United Kingdom*, one operator reports that the incumbent has installed its own DSL services in over 800 exchanges throughout the country while it has only opened one exchange (which was the location of the original trial collocation sites) to new entrants for collocation and has made available only 27 additional distant collocation sites. In *Germany*, one operator reports that the incumbent's DSL market share has remained at steady 98.5%. The picture is also similar in *France*, *Italy* and *Spain*.

Moreover, a number of new entrants have faced serious financial difficulties and, in some cases, even liquidation. Indeed, according to operators in *Germany*, *Greece*, *The Netherlands* and *Portugal*, delivery delays and quality problems related to local loop unbundling have made many potential customers reluctant to order lines from new entrants. This has been problematic for new entrants, as they strive to build their customer bases and establish customer confidence and loyalty. In addition, as described by operators in *Germany* and the *United Kingdom*, many operators have been unable to realise revenues on their investments within the timetables expected by financiers, and investment funds have been withdrawn while potential new investors are reluctant to commit themselves. The difficulties faced by new entrants in obtaining access to capital in the prevailing difficult economic climate has exacerbated the economic harm incurred by new entrants as a result of provisioning delays.

Based on the responses of alternative operators to the Questionnaires, it appears that industry does not believe that the local loop unbundling process has thus far been successful in the majority of EEA States and that the NRAs will need to be aggressive and active in implementing the *Unbundling Regulation* if local loop unbundling is to succeed. Similarly, in the *Seventh Implementation Report*, the Commission's view was that progress in implementation of the *Unbundling Regulation* has been less than satisfactory and that NRAs need to have an active role in speeding up its implementation, specifically through:

(i) "hands-on" monitoring;

(ii) imposing binding deadlines on incumbent operators;

(iii) imposing credible financial penalties on incumbents not complying with the requirements imposed; and

(iv) acting to ensure that wholesale DSL is offered to entrants on non-discriminatory terms.[83]

Clearly, these circumstances are not ideal, especially in the current economic climate which requires the speedy resolution of outstanding unbundling issues and certainty in the marketplace. Any delays in the removal of obstacles to local loop unbundling will result in the continuation of the fixed incumbents' domination of access options and will entrench their crucial first-mover advantages in evolving retail markets for high-bandwidth services. Furthermore, because achieving rapid market entry, building a customer base, generating revenues and securing future investment are crucial goals in new entrants' strategies, any significant delays in the resolution of outstanding unbundling issues can severely affect their financial viability (at worst leading to insolvency, as has already happened in a number of notable instances).

The empirical information gleaned in this Study reveals that there are numerous instances of cases where the rights of access seekers under EEA/Community law and national legislation are not being effectively protected - whether through an absence of effective regulatory intervention or through ineffective regulatory intervention – and where intervention by the Commission or the Authority is warranted where the substantive criteria discussed in Chapter

[83] At 5, 20.

V are satisfied. The discussion above in Chapter II.D illustrates the level of pro-active redress being sought by access seekers at national level across a variety of tribunals and courts, yet also illustrates that the issue of access to the local loop is one fraught with implementation difficulties and delays. In these circumstances, it may be desirable to initiate competition law investigations at EEA/Community level in order to overcome existing enforcement bottlenecks, lay down concrete guidelines as regards particular practices and, where necessary, punish flagrant abuses with administrative fines.[84] The range of possible measures which could be taken to address particular issues are discussed in Confidential Annex 7.

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Brussels, February 2002

[84] As is emphatically stated in the "Guidelines on the application of EEC competition rules in the telecommunications sector" (O.J. (1991) C233, at p.2): …." *the competition rules have full application, even when all ONP rules have been adopted" (at para. 17; cf. discussion at paras. 15-18)*. See also the Authority's equivalent Guidelines OJ L/53, 18.6.94, p.35 and EEA Supplement to the OJ N.5, 18.6.1994, p.34.