I-1.26: Ensuring Effective Cost Orientation Obligations: The Ofcom's approach to repayment of overcharges

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Translated Article

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Cost orientation can be seen as a natural obligation in cases involving access to an essential facility held by an incumbent operator, such operator having generally inherited a facility developed over decades (not to say centuries) by the State (and therefore financed by tax payers) and having enjoyed a long period of legal monopoly before the opening of its market to competition. This has been the case in a number of sectors, such as energy, transportation, and of course telecommunications.

The holding of an essential facility places incumbents in a situation where their own competitors will need to have access, upstream, to their infrastructure in order to compete with them, downstream, on the retail market, while also seeking, ultimately, to compete on infrastructure upstream.

The fact that most of this infrastructure is not the result of investments made by a company into its infrastructure, has not stemmed from healthy competition on the merits, and is not replicable: these are some of the characteristics which justifies adopting a specific approach when it comes to adopting pricing obligations (unlike, for example, mobile operators that have all developed their own mobile networks and whose networks costs are covered by the price of subscriptions and calls[i]). Cost-orientation, as an obligation, seeks a triple objective: to ensure that the operator seeking access will pay a fair price for this access and will not unreasonably finance its competitor, to ensure that the incumbent granting access will obtain a price for it that will at least cover its prices and ensure fair remuneration of its capital, and lastly to ensure that the consumer will benefit from optimal competition between suppliers.

Early on, cost orientation was perceived as a competition law remedy to deal with issues linked to access to essential facilities. Hence, as soon as 1998, the French Competition Authority imposed on its telecom incumbent (France Télécom) an obligation to grant access to its telephone directory data base (which, as the Competition Authority) at a cost oriented price[ii].

It also became an essential tool in the framework of market regulation.

Indeed, since the legal transition from monopoly to competition has been theoretically achieved throughout the EU Member States, the EU regulatory framework for telecommunications has sought to create conditions for effective competition in this sector through market regulation and competition law, transferring this task from legislators to National Regulatory Authorities (NRAs)[iii]. In this context, cost orientation has become a major regulation tool.

The present article focuses of cost orientation as a remedy imposed in the framework of ex ante market regulation (**1.**) and how to ensure the efficiency of such remedy, both at the early stage of determining the relevant cost references (**2.**) and at the ex post stage where excessive prices are found to have been paid, there by raising the raising of repayment or supplementation of regulated prices (**3.**).

Indeed, where such a cost orientation obligation is imposed, it creates a patrimonial right for those seeking and paying access to the infrastructure whose violation (notably through the imposition of excessive prices) must be redressed.

We will consequently conclude on the example of the UK Ofcom's retrospective intervention (in the framework of arbitration procedures) (**4.**), which illustrate why repayment of excessive prices is the corollary of an efficient cost orientation remedy.

1. Market regulation and the *ex ante* promotion of effective competition: cost orientation as a remedy

It bears upon the National Regulatory Authorities (NRAs) to "*promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services by inter alia*", pursuing notably the EU objectives set out in the EU Framework Directive[iv], and in particular in Article 8 which sets, among other goals to be achieved, "[§2] *(b) ensuring that there is no distortion or restriction of competition in the electronic communications sector; (c) encouraging efficient investment in infrastructure, and promoting innovation;* [...]" and to "*contribute to the development of the internal market by inter alia* " [§3] "*(b) encouraging the establishment and development of trans-European networks and the interoperability of pan-European services, and end-to-end connectivity; (c) ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks and services*;[...]"

One of the primary means (but not the only) of promoting and ensuring these objectives is *ex ante* market regulation by National Regulatory Authorities, under the aegis and supervision of the EU competition.

The EU regulatory framework distinguishes between markets where competitive market pressure and *ex post* intervention of competition authorities are sufficient, and markets that are susceptible to *ex ante* regulation. The latter are markets (i) characterised by the presence of high and non-transitory barriers to entry (which may be of a structural, legal or regulatory nature, with no possibility to overcome such barriers to entry within the relevant time horizon); (ii) a structure which does not tend towards effective competition (still within the relevant time horizon); and (iii) where the application of competition law *ex post* alone would not adequately address the market failure(s) identified[v].

In such markets, NRAs may impose on operators with "significant market power" (SMP) *ex ante* obligations or "remedies" that will contribute to the development of competition on the market. The kind of remedies that may be imposed depend on the type of competition problems which one can expect to encounter on each market analyzed. In this respect, one should consider, in the electronic communications sector, at least two main types of relevant markets: markets for services or products provided to end users (retail markets), and markets for the inputs which are necessary for operators to provide services and products to end users (wholesale markets)[vi].

In the "preventive" context of *ex ante* market regulation, choosing and imposing an "appropriate" remedy is a hard task.

An appropriate and efficient remedy is notably one that strikes the right balance between, on the one hand, the need to promote effective competition in markets where *ex post* competition law enforcement is deemed insufficient to do so and, on the other hand, the need to continue to promote efficiency and innovation.

The efficiency of a remedy will depend on its adequacy to the type of competition risks encountered, which in turn is linked to the nature of the market (notably, wholesale or retail market) and to the position of the SMP operator (generally, the incumbent operator which has "inherited" of the telecommunications network developed over decades by the State).

The European Regulator Group (ERG) dedicated an entire paper to its Common Position on the approach to Appropriate remedies in the new regulatory framework to be applied with players found to have a position of Significant Market Power (SMP). This Common Position, published in April 2004, was subsequently reviewed, in order to take into consideration the experience gained from actually applying the new framework and the development of the market. This lead to the adoption of a Revised Common Position on May 2006[vii].

In this Commission Position, the ERG analyses the various type of market situations that may be encountered, and the risks typically associated to such situations, analysis from which it derives remedies that are a priori most appropriate to address the risks identified.

Amongst the various situations envisaged by the ERG are cases presenting risks associated to vertical leveraging[viii], leveraging being defined, in general, as "*any behaviour by which an undertaking with SMP on one market transfers its market power to another, potentially competitive market. As leveraging is an attempt to drive*

rivals out of the potentially competitive market, to limit their sales or profits, or to prevent them from entering the market, it can also be regarded as a form of foreclosure", and vertical leveraging being described, more specifically, as: "*any dominant firm's practice that denies proper access to an essential input it produces to some users of this input, with the intent of extending monopoly power from one segment of the market (the bottleneck segment) to the other (the potentially competitive segment)'. Leveraging is not explicitly depicted in the framework set out above, but can be thought of as a 'heading' for all competition problems in case 1 and 2 [vertical and horizontal leveraging]. As leveraging creates market power in a potentially competitive market, it is usually detrimental to overall welfare*".

Vertical leveraging can typically take the form of three different type of strategies: outright refusal to deal or denial of access, leveraging by means of non-price variables, and leveraging by means of pricing, each type of strategy calling for a different type of remedy.

The ERG identifies the following possible forms of leveraging by pricing practices:

- price discrimination, which can be used by a vertically integrated undertaking with SMP on the wholesale market to raise its rivals' costs downstream and induce a margin squeeze. This is achieved by charging a higher price (which usually is above costs) to downstream competitors than implicitly charged to the own retail affiliate, i.e. discrimination between internal and external provision;

- cross-subsidisation: which involves two prices in two markets; whereas in one market (the SMP market) a price above costs is charged, in the other market (the market where the SMP-position is leveraged to) a price below costs (predatory pricing) is charged. Cross subsidisation is not anti-competitive in itself. However, if one price is excessive and the other price is predatory, it can be used to leverage market power and foreclose a related, potentially competitive market. If the market where the high price is charged is a wholesale market and the market where the predatory price is charged is a retail market and the dominant undertaking is vertically integrated, cross-subsidisation will result in a margin squeeze; and

- predatory pricing: which occurs *inter alia* where a dominant firm sells a good or service below costs of production for a sustained period of time, with the intention of deterring entry, or putting a rival out of business, enabling the dominant firm to further increase its market power and later its accumulated profits[ix].

These are typical behaviours which new entrants can be exposed to in the telecommunication sector, as they need to have access to the incumbent's local loop (upstream) in order to compete with it on retail services to consumers downstream, in reasonable economic conditions.

Amongst the possible remedies likely to prevent the risks of such practices are price control and cost accounting obligations. The ERG thus indicates that:

"*Price control may be necessary when market analysis in a particular market reveals inefficient competition. The regulatory intervention may be relatively light, such as an obligation that prices are reasonable, or much heavier such as an obligation that prices are cost oriented to provide full justification for those prices where competition is not sufficiently strong to prevent excessive pricing. In particular, operators with significant market power should avoid a price squeeze whereby the difference between their retail prices and the access/interconnection prices charged to competitors who provide similar retail services is not adequate to ensure sustainable competition. When a NRA calculates costs the method used should be appropriate to the circumstances taking account of the need to promote efficiency and sustainable competition and maximise consumer benefits*".

A typical pricing obligation imposed on SMPs is an obligation to set wholesale prices at a level which are cost oriented[x].

Such an obligation bearing on incumbent SMP operators is fully in line with the principles set out in the 2000 Regulation on unbundled access to the local loop[xi], which notably sets as a principle in its Article 3(3) that "*Without prejudice to Article 4(4)*[xii], *notified operators shall charge prices for unbundled access to the local loop and related facilities set on the basis of cost-orientation*".

The efficiency of such a remedy, however, depends on both the relevance of the costs (or methods) taken into consideration when calculating a cost oriented price, and on the existence of measures (such as a repayment obligation) preventing incumbents from using inflated costs as a basis for their prices.

2. The issue of cost calculation in cost orientation

Insofar as most (if not all) telecommunications networks of EU Member States were created and developed by the Member States themselves in the framework of the provision of a universal service, cost information pertaining to this construction generally does not exist and thus need to be reconstructed from scratch. which leaves the door open to "over estimations" (or inflation) of costs, be they voluntary or genuine.

According to the European Court of Justice[xiii], when it comes to cost-orientation, NRA should follow a number of principles to ensure that prices are indeed cost oriented (and not over or under estimated), and notably:

"[…] the national regulatory authorities have to take account of actual costs, namely costs already paid by the notified operator and forward-looking costs, the latter being based, where relevant, on an estimation of the costs of replacing the network or certain parts thereof.
In that regard, the calculation basis of costs cannot be based exclusively either on the costs which represent the construction ex nihilo by an operator, other than the notified operator, of a new local access infrastructure for the provision of equivalent telecommunications services ("the current cost") or on the costs actually incurred by the notified operator and taking account of depreciation already made ("the historic cost").
The taking into account of only one or other of those bases is likely to call into question the aim of that regulation, namely to intensify competition through the setting of harmonised conditions for unbundled access to the local loop, in order to foster the competitive provision of a wide range of electronic communications services.
First, the possibility for the notified operator to base the calculation basis of costs exclusively on the current costs of its investments enables it to choose those which could enable it to set the rates as high as possible and not to take account of pricing elements which would favour beneficiaries, thereby circumventing the rules concerning the setting of rates for unbundled access to the local loop on the basis of cost-orientation.
Secondly, if the cost calculation basis were based exclusively on historic costs, which, depending of the age of the network, could potentially lead to account being taken of an almost entirely depreciated network and thus result in a very low tariff, the notified operator would be faced with unjustified disadvantages which is precisely what Regulation No 2887/2000 seeks to prevent".

The European Court also accounts for possible cases where cost information is not readily available and leaves the national authorities a margin manoeuvre on the choice of a price-determination method:

"*Pursuant to Article 4(2)(b) of Regulation No 2887/2000 on unbundled access to the local loop, the national regulatory authority may request notified operators to supply relevant information on the documents justifying the costs taken into account when applying the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation. Since Community law does not contain any provision concerning the accounting documents to be checked, it is the task of the national regulatory authorities alone, in accordance with the law applicable, to examine whether, for the purposes of cost accounting, the documents produced are the most appropriate ones.*
In the absence of evidence to establish to the required legal standard that the Community legislature opted for either a bottom-up or a top-down accounting mode 1, it is for the national regulatory authorities, on the basis of the applicable law, to choose the cost accounting method which they deem most appropriate in a specific case. Accordingly, when national regulatory authorities are applying the principle that rates for unbundled access to the local loop are to be set on the basis of cost-orientation, Community law does not preclude them, in the absence of complete and comprehensible accounting documents, from determining the costs on the basis of an analytical bottom-up or top-down cost model".

The Court also indicates that:

"*[…] the national regulatory authorities have a broad discretion concerning the assessment of the various aspects of those tariffs, including the discretion to change prices, and thus the proposed tariffs. That broad discretion also relates to the costs incurred by notified operators, such as interest on invested capital and depreciation of fixed assets, the calculation basis of those costs and the cost accounting models used to prove them*".

In other words, if the NRAs are free to opt for the method they want (i.e. bottom-up or top-down) but they do, however, have a duty to ensure that the resulting prices are indeed cost-oriented, without the absence of reliable cost data/accounting being an obstacle to this. Whichever choice is made, it must be one that does not render the cost orientation remedy ineffective.

Indeed, as highlight by the ERG "*Remedies are much more likely to be effective if they are designed in such a manner as to give strong incentives for compliance*" and one should bear in mind that:

"*SMP firms are likely to have incentives (and a myriad of means) to attempt to frustrate emerging competition. The NRA can then become locked into a cycle of compliance monitoring and intervention. It would be preferable if the original remedy could be designed in such a way that the advantages to the regulated party of compliance outweigh the benefits of evasion. To be able to achieve this, the NRA must be able to make the penalty from non-compliance (and the probability of action) such that the regulated firm will comply voluntarily. Incentive compatible remedies are likely to be effective and to require a minimum of on-going regulatory intervention."*

The choice of a method for determining the access prices can already have a strong impact on the incumbent's incentive to respect or note its obligation. Hence, as the ERG sees it (p. 99 of Revised Position):

"If the access price is regulated at a cost-oriented level, however, the undertaking will only be able to charge a price above costs to its competitors if either the access price has been calculated incorrectly by the NRA or if it transgresses the rules set by the regulator. Thus, if an access obligation according to Art 12 AD together with a cost oriented price regulation according to Art 13 AD is in place already (possibly backed by Art 9 and 11 AD obligations), the task of the NRA is to ensure compliance with the obligation it has imposed. These monitoring costs need to be considered when choosing cost orientation as a remedy. When calculating a cost-oriented access price, NRAs have to make sure that the access product is sufficiently unbundled (see section 5.2.3.3.), and that the SMP undertaking does not artificially increase the costs at which it is providing the service to the alternative operator ('gold plating'). Inflated costs can be dealt with by the NRA in course of the access price calculation. Further considerations have to be given to economies of scale and scope at the retail level, to allow the alternative operator to compete with the incumbent on a level playing field. These issues are discussed in the Annex.
Under a wholesale price set according to the retail-minus methodology, on the other hand, a dominant undertaking is able to raise the price for its wholesale product. This does not result in a margin squeeze, however, as – according to retail-minus – the retail price has to be increased as well whenever the wholesale price is increased. The task of the NRA thus is to ensure compliance with the retail-minus rule."

In other words, simply imposing a cost orientation without actually fixing the access price, can present create a risk that the SMP operator artificially inflates its costs.

This consequently raises the issue of how NRAs should react if and where it appears (usually *ex post*) that prices were set by the incumbent above its costs. Indeed, how efficient can a remedy be when violations of such obligations are not sanctioned. Should such sanctions be limited to fines, or should this include another form of "reperation" through a retrospective (and not retroactive) intervention? Where it appears that the prices were excessive not as a result of a genuine overestimate of projected costs, but as a result of voluntary over inflations, should this "tort" also create an additional right to damages?

This issues is particularly relevant considering that generally, the actual nature (cost-oriented or excessive) of prices imposed in the framework of ex ante regulation will only be visible and "controllable" *ex post*.

3. Repayment or supplementation of regulated prices: a fundamental effectivity issue?

It is indeed not sufficient to impose a cost orientation and the NRAs must ensure that non compliance entails consequences which are credible enough to dissuade, from the start, incumbents from not complying.

Clearly imposing financial sanctions is one way. This is the position reflected by the ERG when it declares that: *"To achieve incentive compatibility, the NRA needs to be able to adjust the pay-off from non-compliance. This will normally involve giving the SMP firm strong financial incentives to comply. The degree to which this can be achieved in practice will depend largely on the legal powers that NRAs have to apply such administrative measures (against the background of their own legal system). The ability to impose a financial penalty is envisaged (in Article 10 of the Authorisation Directive) if an SMP undertaking fails to comply with an obligation (after such failure has been pointed out to it). However, such a power has to be given by Member States in accordance with national law. In addition, when there are repeated serious breaches there is the power to prevent an undertaking from supplying communications networks or services or suspend or withdraw rights of use. From an economic perspective, if the NRA has evidence of a breach of an obligation that is so serious so as to create inter alia serious economic or operational problems for other providers or users, the NRA may take immediate interim measures*."[xiv]

This is however insufficient and the "interest" which an incumbent can find in artificially inflating its costs (and the prices calculate on the basis thereof) can be substantially reduced if the NRAs ensure that the appropriate price (once identified *ex post*) is effectively applied from the start, meaning from the date at which the cost orientation has come into force.

The incumbent must thus be aware, from the beginning, that it will need to repay any excess price it may have charged, with interest rates added and at its expanses. (This should, of course, be without prejudice to the alternative operators' rights to, in addition, seek indemnification of any prejudice suffered).
This is also clearly considered by the ERG as a means to ensure the efficiency of the remedy:

"*One problem with the latter approach* [the one that consists, for the NRA, in simply specifying to an incumbent that "charge should be 'cost-oriented' or 'based on costs which are reasonably and efficiently incurred' or some similar formulation", as opposed to specifying the actual charge or fixing a price cap] *is that the SMP player may have an incentive to inflate its estimate of its costs. However, such an incentive can be significantly reduced – if not removed altogether – if the NRA orders that the appropriate charge (once it has been identified) should be levied from the date on which the cost orientation obligation became applicable. The SMP player would therefore be required to repay (preferably with an appropriate commercial rate of interest and at its own expense) any overpayment, which had been made while non-compliant charges were in effect. A provision of 'retrospection' should not, of course prevent an aggrieved party from seeking further redress in Court*"[xv].

This comment *inter alia* confirms that a measure would not be a "retroactive" measure but a "retrospective" one.

Indeed, in one of the cases before the Ofcom (PPC case, see point 4 below), British Telecom argued, in order to dissuade the Ofcom from imposing a repayment of excess charges, that it could not use its powers "*retrospectively*", argument to which the Ofcom responded that this position "*mischaracterised*" its powers and misunderstood their purposes.

Indeed, BT's is a frequent misconception that an NRA, when it imposes repayment of excessive charges, is imposing a retroactive measure.

A retroactive law, is a law that retroactively changes the legal consequences (or status) of actions committed or relationships that existed prior to the enactment of the law[xvi]. A retroactive intervention of an NRA would thus be one where the NRA would impose on an incumbent operator the effects, in the past, of an obligation which was not bearing upon it previously.

As oppose to that a retrospective intervention is merely one which is drawing consequences, in the past, of the violation found ex post to have existed from the beginning.

In other words, once a cost orientation obligation is imposed, any over charge imposed by the incumbent in violation of that obligation must be repayed, no matter when the NRA actually discovers that the prices charged were not cost oriented.

This also means that when such a violation is found, NRAs must draw the full consequences of this, without this being limited to a given framework of action[xvii]. Notably, the ordering of such repayment measures has not reason to be limited to "infringement procedures" and could also be ordered in the framework of ispute resolutions.

Article 20 (relating to Dispute Resolution between undertakings), paragraph 3, of the Framework Directive provides, in this respect, that "*In resolving a dispute, the national regulatory authority shall take decisions aimed at achieving the objectives set out in Article 8. Any obligations imposed on an undertaking by the national regulatory authority in resolving a dispute shall respect the provisions of this Directive or the Specific Directives*".

In other words, NRA are under a duty, in the framework of their dispute resolution powers, to ensure the objectives as in the framework of ex ante market regulation.

This is a message that clearly "heard" by the Ofcom which, in a number of dispute resolution decisions, imposed on the incumbent operator an obligation

4. The Ofcom's retrospective interventions

Over the past few years, the Ofcom issued a number of decisions, in the framework of a dispute resolution, where it imposed on the incumbent operator (BT) the repayment of excessive prices charged to competitors in violation of *ex ante* remedies.

Hence, among the Ofcom's earlier decisions were the decisions in the dispute concerning BT's overcharges for wholesale line rental (WLR) ISDN2 (known as the "Energis/BT" dispute[xviii]), as well as in the dispute concerning the retrospective application of carrier pre-selection (CPS) charges (known as the "Opal" dispute[xix]). In both cases, the Ofcom odered BT to repay the excess charges imposed on its wholesale clients through an adjustment of the prices which had been applicable throughout the overcharge period.

This position was to be fully in line with the Competition Appeal Tribunal (CAT)'s *TRD Judgement* of May 2008[xx] and *Rates Judgment* of August 2008[xxi].
In a recent decision, of October 14, 2009[xxii], ending a dispute opposing Cable & Wireless, THUS, Global Crossing, Verizon, Virgin Media and Colt to British Telecom (BT), the Ofcom, after having found that BT had overcharged alternative operators for partial private circuits (PPC) services in violation of its cost orientation obligation, ordered BT to repay the Disputing CPs the overpayments, adding interests on the amounts overcharged.

This again was the position which was adopted by the Ofcom in its even more recent October 20, 2010 decision in the dispute opposing British Telecom to (each individually) Cable & Wireless Worldwide (C&W), Gamma Telecom Holdings Ltd (Gamma), Colt Technology Services (Colt) and Verizon UK Limited (Verizon), Opal Telecom (Opal) (ensemble, des Clients de Transit, Transit Customers), concerning the repayment by BT of certain charges for the transit of traffic to particular Mobile Network Operators (MNOs) (the "*PPC case*")[xxiii]. In this specific case, BT's own charges with respect to transit traffic had decreased (as it had obtained repayments from MNOs) but BT did not pass this decrease on to its Transit Customers. The Ofcom thus considered that this failure to pass on the reduction lead to BT's prices being excessive (as in above costs). Here again, the Ofcom ordered a repayment of the excess charges, with interests.

In all the above decisions, two elements appear clearly in the Ofcom's reasoning.

The **first** is that the Ofcom considered it "*consistent with its powers and duties*" to order repayment and that by "its powers and duties", it refers both to its power under sections 3 and 4 of the Act and to its "*Community Obligations*".
The **second** is that the choice to impose repayment of overcharges is not motivated by "*private enforcement*" objectives (reparation of a loss or prejudice), but clearly by the need to send a clear signal to incumbents and to dissuade future violations of *ex ante* remedies.

In other words, repayment of overcharges (with interests) is a policy statement.
Hence, in its October 2009 decision, in response to the a *pass on* defence invoked by BT, the Ofcom responded (§ 8.37 to 8.39) that:

"[…] *Where we have found that BT has overcharged in non compliance with an SMP obligation, it is appropriate to require a repayment of the amount of overcharge, even if the Disputing CPS may have passed on that charge to their customers.*
We additionally note that a similar situation arose in the TRD Decision, where the CAT concluded that it was appropriate to require repayments to be paid to BT regardless of whether or not BT had passed on the overcharges to its customers.[see paragraphs 169 – 174 of the TRD Decision]. In that case, BT was the beneficiary of repayments after being overcharged for mobile call termination, despite the mobile call termination charges being reflected at least to some degree in its own call prices.
We have considered carefully the ***incentives and regulatory signals this approach gives*** *to the industry. We are concerned that the incentives and benefits for competition, for which the cost orientation obligation was set, should be safeguarded.* ***Any level of overcharge that we allow BT to keep could act as an incentive not to comply with cost orientation obligations in the future****. We consider that the approach to seek the repayment of the overcharge gives an incentive to BT not to overcharge in the future by taking into account, amongst others, all its regulatory obligations.*"

In its 2009 draft determination[xxiv] (i.e. the draft decision published for comments which subsequently lead to the adoption of the 2010 Decision[xxv]), the Ofcom highlighted, in the same line, that "*failure by Ofcom to intervene in this case would provide BT with a* ***perverse set of incentives****, which would be inconsistent with* ***our statutory duties and Community obligations***". The Ofcom highlighted, in its final decision, that in fact, by not passing on the relevant

repayments in this matter, BT could be in breach of its SMP obligations.

In other words, the Ofcom's position is clear: it is the NRA's duty to order repayment or "over charges", as this is necessary to promote the interests of consumers, the development of competition, and to encourage incumbents to respect their SMP obligations on a market. As indicated in its draft determination (§6.52 to §6.57):

"*6.54 Ofcom considers that to require BT to make payments to the Disputing CPs by way of adjustment for overpayments supports its obligation to further the interests of consumers, where appropriate by promoting competition, as it encourages BT to comply with its SMP obligations (the purpose of which is to promote competition). It promotes competition more generally by enabling other providers to compete with BTin the provision of retail leased lines to businesses. Promoting competition in this case leads to benefits for businesses in the form of increased choice, downward pressure on retail prices and improved quality of service.*
6.55 Requiring BT to make repayments [...] therefore supports Ofcom's principal duty at section 3(1)(b) of the Act, as well as its duty under section 4 of the Act to promote competition in communications markets in accordance with the Framework Directive.
6.56 In addition, Ofcom considers that requiring BT to make payments to the Disputing CPs by way of adjustment for overpayments, by encouraging BT to comply with its SMP Conditions and thereby helping to level the playing field for BT's competitors, supports its obligation at section 3(2)(b) of the Act to secure the availability of a wide range of communications services, as well as its duty under section 4 of the Act to encourage the provision of network access (here, PPC trunk services) for the purposes of securing efficiency and sustainable competition, for the benefits of consumers
6.57 Requiring BT to make repayments [...] by supporting the duties set out above, also supports Ofcom's principal duty to further the interests of consumers. While Ofcom does not consider, in this case, that retail consumers will necessarily benefit directly as a result of the Disputing CPs passing on the reduced trunk charges in retail prices, the effect on competition of this transfer of funds between CPs will benefit consumers in the form of greater competition, leading to downward pressure on prices, availability of a wider range of services, and improved quality of service."

These are in fact all the objectives which the NRA have a duty, under Article 8 of the Framework Directives imposes, to support and pursue.

To the Ofcom, a lack of action (ordering repayment of over charges) would thus clearly both be in violation of its statutory duty and have a strong negative signalling effect which inducing incumbents into believe that charges excessive prices (in violation of their SMP obligations) would create no risks for them.
As clearly understood by the Ofcom, NRAs have the same duty to ensure the enforcement of Article 8 of the Framework Directive when acting in the framework of *ex ante* market regulation as in the framework of arbitration procedures.

The French Supreme Court, in a judgement of 14 December 2010, clearly indicated that the ARCEP should, similarly, consider it its duty to order repayment of excessive charges levied in violation of a cost orientation obligation and should consider, when doing so, that where prices are found to be have been excessive, a repayment obligation should be considered as from the date the obligation violated was imposed.

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[i] In the mobile sector, a cost orientation can be imposed on call termination rates, each operator being considered as having a monopoly on access to its subscribers. In such a case, however, the justification and approach is different and the main objective will be to prevent possible leveraging effects, restrictions of competition based notably on "club effects", etc. aim of the cost orientation, in the mobile context, is not to cover the costs associated to terminating an incoming call (such costs being impossible to identify) but to impose the transfer of part of the costs from the monopolistic part to the competitive part, knowing that competition on the latter will lead to a pressure on

prices. In this context, such obligations are symmetrical and generally translate into a price cap which leaves some freedom to the operators when actually fixing their prices. This approach also takes into consideration the fact that although there is strong competition at the level of the development of infrastructures/networks, there is no competition possible on the specific call termination market: indeed, no operator can develop and substitute its own call termination to another operator's as the later will always be the only operator control final access to its subscribes, whereas in the fixed telecommunication sector, the authorities will seek both to impose a reasonable access and to stimulate competition in the form of the development of alternative infrastructures.

[ii] Decision n°98-D-60 of 29 September 1998 concerning practices implemented by France Telecom in the sector of the commercialisation of lists of telephone subscribers. The Authority, in this case, considered that this exhaustive data base, which France Télécom benefited from only as a result of its legal monopoly, constituted an essential facility. Both the Competition Authority and the Telecommunication Regulatory Authority considered that access to this data base should be priced at the incremental cost of access, ie: what it costs the incumbent to give access to the data base, and not what it cost it to create this data base.

[iii] The opening of the EU telecoms was carried out in three waves, or "telecom packages". The first is the "1998 package" of legislation which was established in time for the opening of the EU telecoms market on 1 January 1998; in 1988 the Commission adopted a directive removing all special and exclusive rights to import, market, connect, bring into service and maintain telecommunications terminal equipment in the Member States; in 1990 it adopted the "Services Directive" which required the abolition of special and exclusive rights over public telecommunications services (but not networks) except the provision of voice telephony services; subsequent liberalisation was achieved by amending this latter directive to expand the scope of the activities in the liberalised area. By 1 January 1993, liberalisation was extended to the provision of data services to the public; by mid-1993 the Commission had carried out a broad public consultation which led to political commitments from the Council and European Parliament to accept the full liberalisation of telecoms services from 1 January 1998 (subject to possible transitional periods for certain countries). The Council extended this agreement to telecoms networks in the autumn of 1994. In 1994 the provision of satellite services and satellite equipment was liberalised. In 1995 the first steps to liberalise networks was taken with the Cable Directive, which required Member States to allow Cable TV networks to be used to offer telecommunications services which were open to competition. (At the time that opened the possibility of using those networks for corporate and closed user group voice and data services, for value-added services and for the provision of public data services). Also in 1996 the Mobile Directive required the removal by 1998 of certain restrictions on the way in which mobile networks were operated (i.e. allowing operators to build their own infrastructure or microwave links, rather than relying on the networks provided by the national fixed network operator. This meant they could directly interconnect with mobile or fixed networks in other Member States, rather than having to interconnect via the incumbent

operator in their home State.) There was also a requirement to license DCS 1800 systems in every Member State from 1998. Finally, in 1996 the Full Competition Directive provided for the early liberalisation of alternative telecoms networks from July 1996, and set the deadline of 1 January 1998 for full liberalisation as well as a mechanism for requesting additional transitional periods. It opened up the market for directory information to full competition, and set out a range of provisions addressing licensing, universal service, interconnection, and numbering, which established basic regulatory principles derived from the competition rules. A further Article 106 Directive was adopted in July 1999 which followed the detailed review of the issue of cable network ownership by telecoms operators and of restrictions imposed on telecoms operators which prevent them from offering broadcasting services over the telecoms networks. The directive deals only with the issue of joint ownership of cable and terrestrial networks by incumbent operators, and requires Member States to ensure the structural separation of the cable business. This provision requires separation, but not divestiture of the cable business. These liberalisation directives were complemented by a series of harmonising directives adopted by the Council and European Parliament, under the general principles relating to the internal market and the freedom to provide services. The 1990 Framework Directive established the principle of Open Network Provision (ONP) (i.e. open access to publicly available telecommunications networks and services, according to harmonised conditions) and set a timetable for legislative action, identifying the need for a series of harmonisation Directives and Recommendations. It also established the "ONP Committee" composed of delegates of the Member States and chaired by the Commission, with both consultative and regulatory powers. The Committee assists the Commission on matters relating to the legislative programme. The Directive on the application of ONP to leased lines, was adopted by Council in June 1992 and aimed to ensure the availability throughout the Union of a minimum set of analogue and digital leased lines with harmonised technical characteristics. Leased lines were vital to the early development of competition, since they were the only means by which new entrants could compete with the incumbent. The Directive on the application of ONP to voice telephony services was adopted by the European Parliament and Council in December 1995. The aims of the ONP Voice Telephony Directive were to ensure the availability throughout the Community of good quality telephone services, and to define the services available to all users, in the context of Universal Service. In 1995, the Commission's Green Paper on liberalisation of infrastructure part II pointed to the need to adapt the existing ONP Directives to a competitive environment and to develop a further specific Directive on Interconnection. Together with the Licensing Directive, these measures make up the so-called "1998 package" of legislation which was established in time for the opening of the EU telecoms market on 1 January 1998.

The package that followed was the "2002 package" which includes: Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (aka the "Framework Directive"), Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic

communications networks and associated facilities (aka "Access the Directive"); Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (aka the "Authorisation Directive"); Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (aka the "Universal Service Directive"); and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (aka the "Directive on privacy and electronic communications").

The third package is the "2009 package" comprising Regulation (EC) no 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office; Directive 2009/140/EC of the European parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services; Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws.

[iv] The Framework Directive established a legislative framework for the electronic communications sector that seeks to respond to convergence trends by covering all electronic communications networks and services within its scope, the aim of this regulatory framework being notably to progressively reduce ex ante sector-specific rules as competition in the market develops.

[v] Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services (2003/311/EC) and Revised Commission Recommendation of 17 December 2007.

[vi] There are of course further markets to be distinguished within each of these two wide categories.

[vii] ERG Revised Common Position published on 18 May 2006 (ERG(06)33).

[viii] See Revised ERG Common Position on the approach to appropriate remedies in the ECNS regulatory framework, Final Version May 2006, point 2.3.1, pages 29 and following.

[ix] According to economic analysis, predatory pricing has the following characteristics: (i) the price charged is below costs, (ii) competitors are either driven out of the market or excluded, and (iii) the undertaking is able to recoup its losses. Predation thus involves a trade-off for the predator between the short-run and the long-run. Consumers will benefit in the short run from low prices but will suffer in the long rung from the elimination of competitors. In practice, predation is hard to prove,

especially in dynamic markets with high fixed costs, multi-product firms and long-run business cases.

[x] A cost oriented price does not preclude an incumbent from deriving a reasonable return from the setting of those rates in order to ensure the long-term development and upgrading of existing telecommunications infrastructures. Such a price is therefore not "at cost" but slightly above costs.

[xi] Regulation (EC) no 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop.

[xii] Said Article 4(4)) provides that "*When the national regulatory authority determines that the local access market is sufficiently competitive, it shall relieve the notified operators of the obligation laid down in Article 3(3) for prices to be set on the basis of cost-orientation*".

[xiii] ECJ, Case C-55/06, *Arcor AG & Co. KG v Bundesrepublik Deutschland*, reference for a preliminary ruling from the Verwaltungsgericht Köln, 24 April 2008.

[xiv] Revised ERG Common Position on the approach to Appropriate remedies in the ECNS regulatory framework (Final Version May 2006) ERG (06) 33, pp. 64/65.

[xv] Idem, p. 66.

[xvi] In reference to criminal law, it may criminalize actions that were legal when committed; or it may aggravate a crime by bringing it into a more severe category than it was in at the time it was committed; or it may change or increase the punishment prescribed for a crime, such as by adding new penalties or extending terms; or it may alter the rules of evidence in order to make conviction for a crime more likely than it would have been at the time of the action for which a defendant is prosecuted. Conversely, a form of ex post facto law commonly known as an amnesty law may decriminalize certain acts or alleviate possible punishments (for example by replacing the death sentence with life-long imprisonment) retroactively.

[xvii] Although the present article focuses on NRAs' power, this by no means signifies that an ordinary court would not be able to impose repayment of excessive prices, far from it.

[xviii] *Resolution of a dispute between Energis and BT relating to BT's charges for WLR ISDN2 from 28 November 2003 until 1 October 2004*, 9 March 2005, http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_797/.

[xix] *Determination to resolve a dispute regarding the retrospective application of CPS charges*, 16 May 2006, http://www.ofcom.org.uk/consult/condocs/cps_charges/.

[xx] The *TRD* judgment and a summary thereof are available at: http://www.catribunal.org.uk/238-1928/Judgment-Core-issues.html

[xxi] The *Rates* judgement and a summary thereof are available at; http://www.catribunal.org.uk/238-2156/Judgment-Rates-in-dispute-.html

[xxii] Ofcom Determination to resolve disputes between each of Cable & Wireless, THUS, Global Crossing, Verizon, Virgin Media and Colt and BT regarding BT's charges for partial private circuits, 14 October 2009, available on the web site http://stakeholders.ofcom.org.uk/binaries/consultations/draft_deter_ppc/PPC_final_determination.pdf .

[xxiii] Ofcom Determinations to resolve Disputes between BT and each of Cable & Wireless, Gamma, Colt, Verizon and Opal regarding the repayment by BT of certain charges for the transit of traffic, 20 October 2010, available at http://stakeholders.ofcom.org.uk/binaries/consultations/draft_bt_charges_traffic/st

atement/determination.pdf

[xxiv] Ofcom Draft Determination to resolve disputes between each of Cable & Wireless, THUS, Global Cerossing, Verizon, Virgin Media and Colt and BT regarding BT's charges for partial private circuits, 27 April 2009, http://stakeholders.ofcom.org.uk/binaries/consultations/draft_deter_ppc/summary/main.pdf.

[xxv] Indeed, in the UK, the Ofcom published its draft arbitration decisions for third parties to comment, unlike the French *ARCEP*.