

CLIENT ALERT

Electronic Communications & IT

June 16, 2009

Other sections of this issue:

[ISP-Liability & Media Law](#) | [Contracts & E-Commerce](#) | [Electronic Communications & IT](#)

-
- [Telecoms reform package backed by European Parliament but open for new round of negotiations](#)
 - [Belgian Competition Council shows its teeth and levies a 66,3 million Euro fine](#)
-

Telecoms reform package backed by European Parliament but open for new round of negotiations

One week after representatives of Europe's 27 member states agreed to support a compromise proposal to overhaul European telecommunications rules, the European Parliament approved an amended telecoms package which included a controversial amendment recognizing Internet access as a fundamental right. The telecoms ministers however disagreed with the European Parliament over Internet users' rights and proposed a new round of negotiations to settle this outstanding issue.

Introduction

After long negotiations the EU institutions reached a political deal on April 29, 2009 on provisions to counter piracy over the Internet. This was seen as the last outstanding obstacle to the final adoption of the telecoms package. However, since then, the European Parliament has voted to approve the telecoms reform, but included a controversial amendment that recognizes Internet access as a fundamental right. In response to this, Europe's telecoms ministers call for a new conciliation procedure.

Controversy about the telecoms package

While negotiating the telecoms package, national diplomatic representatives favored a text which explicitly refers to the need to require a decision of the courts prior to denying internet access to those who illegally download content online, whereas the European Council merely wanted to make a simple reference to the need to comply with fundamental rights. The European Parliament however favored a more explicit reference to the right for a regular trial. Finally, a compromise text was reached, stating that measures taken against offenders must respect "*the right to a judgment by an independent and impartial tribunal established by law and acting in respect of due process*".

This compromise text was not withheld by the European Parliament, which voted in favor of an amended text recognizing Internet access as a fundamental right.

The amendment faces opposition by the European Commission and certain groups that fear it will become more difficult to shut down access to people who illegally download copyrighted material. Moreover, on June 11, 2009, Europe's telecoms ministers

during an informal meeting in Luxemburg almost unanimously blamed the Parliament for breaching an earlier compromise reached with the Council on the telecoms package as a whole. The Council proposed a new round of negotiations to settle the outstanding issue of copyright protection and users' rights. This however blocks the entire telecoms package, which seems to be shelved once more.

National initiatives to tackle piracy

The French government was until recently in the process of adopting new legislation which would give a new state authority (called the "Hadopi" or *Haute Autorité pour la Diffusion des Œuvres et la Protection des Droits sur Internet*) the right to cut off the Internet connection of Internet subscribers who do not stop their illegal file-sharing activity after two warnings (the so-called 'three strikes and you're out' scheme). However, on June 10, 2009 the French Constitutional Council invalidated parts of this legislation. Moreover, now that the European Parliament pronounced itself in favor of Internet access as a fundamental right, it seems that it might become even more difficult for France to implement the three strikes and you're out scheme.

The UK Government also announced in early 2008 that it envisaged passing similar legislation and putting pressure on the internet service provider (ISP) industry and content owners to reach an agreement. A partial agreement between the ISP industry and content owners was reached and the UK Government minister responsible for intellectual property now ruled out a 'three strikes and you're out' law, because cutting off users was not "the right road" for UK law makers.

References: Position of the European Parliament adopted at second reading on 6 May 2009 with a view to the adoption of Directive 2009/.../EC of the European Parliament and of the Council amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks, 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, P6_TC2-COD(2007)0248

Belgian Competition Council shows its teeth and levies a 66,3 million Euro fine

On May 26, 2009, the Belgian Competition Council fined Proximus, the incumbent Belgian wireless communications provider, a record 66,3 million Euro for abuse of dominance.

Introduction

Closing an investigation that started in 2005 following a complaint by competitor Base and a dawn raid of the Proximus headquarters in 2006, the Council ruled that between 2004 and 2005 Proximus had abused its dominant position on the Belgian wireless communication markets.

The Council's ruling

According to the Competition Council, the abuse of dominance by Proximus consisted in a so-called margin-squeeze.

More particularly, the Council decided that Proximus had abused its dominant position because during the relevant period, the prices for on-net calls charged to Proximus' professional customers were lower than the mobile termination rates charged to its competitors¹. The Council stated that "*Since the mobile termination charges of Proximus were higher than the charges for its*

own on-net communications, its competitors were unable to propose prices to their clients for communications towards the Proximus network that were more interesting or even similar to the prices that Proximus could offer to its clients."

Belgacom has in the meantime announced that it will appeal the Council decision. It challenges *inter alia* the fact that in its analysis, the Council isolated one type of calls (i.e. on net calls) from other types of calls.

Belgian vs. US approach

With this decision, the Belgian Competition Council clearly demonstrates its intention to aggressively pursue and sanction anticompetitive behavior and impose fines that have a truly deterrent effect.

The Belgian approach, while consistent with other EU Member State decisions, that price or margin squeeze can be an abuse of dominance, is out of step with the US position, as set forth in the U.S. Supreme Court's recent *linkLine* decision, which quite sharply limited the obligation of a dominant company with respect to liability for price squeeze conduct. The Belgian decision therefore serves as a reminder to US based multinationals that they must be cognizant of differences between US and EU standards relating to abuse of dominance.

Links:

- [CONSEIL DE LA CONCURRENCE \(French version of the Council's decision\);](#)
- [De Raad voor de Mededinging legt aan Proximus een boete op van 66,3 miljoen euro wegens misbruik van machtspositie](#)

¹ On-net calls are calls made by one Proximus customer to another. Hence they are initiated and terminated on the Proximus network. The mobile termination rates are the prices charged by Proximus to its competitors for terminating calls made by those competitors' customers to Proximus customers. Hence, these are calls that are initiated on another network but terminated on the Proximus network.

For more information, contact: [Thomas De Meese](#) or [Eric Montens](#).

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Thomas De Meese

Partner – Brussels

Phone: +32.2.282.1842

Email: tdemeese@crowell.com