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DOTTORATO DI RICERCA IN DIRITTO DEGLI AFFARI
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Gli obblighi giuridici di condivisione delle infrastrutture passive nel settore delle comunicazioni

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ABSTRACT

The importance of the successful introduction of a fast internet connection is recognized by all, given the positive impact it has on economy and welfare. To give just a few examples, the optical fiber enables faster transactions, the development of e-commerce, telemedicine services for citizens, e-learning: this leads to an increase in the provision of services, payment stream, jobs and, ultimately, a strong positive impact on gross domestic product.

The European Union, as well as the Italian legislator and the National regulatory authority (AgCom), are well aware of the huge potential of broadband.

The national network, however, still consists largely of copper connections, with obvious consequences in terms of speed and volume capacity of the drives.

The challenge then consists in the development of next generation networks (NGN), capable of conveying to the end user an increasing number of services based on the transmission of data.

It is also considered imperative next generation networks, access networks to respond to a logic of competition. The target is, in short, to create new infrastructures or to modernize existing ones, all ensuring the presence of several operators on the market in order to protect competition.

That being so, we understand the importance of facilities sharing, the main subject of this work.

As demonstrated by numerous analysts' studies, the main barrier to entry in the electronic communications market is represented by the infrastructure costs: 70-80% of costs is attributed to the construction of associated facilities, including ducts, buildings and masts. This principle

particularly applies to the next generation networks: the optical fiber has of itself a fairly low cost, amounting to about 6% of total investment.

Given the huge infrastructure costs, to achieve a good national coverage with the broadband network is therefore essential that operators who are willing to invest in areas of digital divide can exploit the existing infrastructures and facilities that are property of other operators, as well as those belonging to public and private subjects.

Similarly, it is important to establish incentives for shared use of existing infrastructure and for the joint creation and use of new structures (so said build and share).

The joint construction of new infrastructure means, for operators, the advantage of costs reduction, generating savings that can be reinvested in building infrastructures in those areas that, for low population density or geomorphic barriers, are not attractive for operators individually, not being guaranteed the investment return.

Facilities sharing also leads to clear advantages in competition, allowing access to the market also to operators of small and medium size, with consequent benefits for final users in terms of performance and competitive prices.

The advantage of a shared access to passive infrastructure can be summarized as follows: reduction of entry barriers through the abatement of costs for new infrastructure, efficient use of capital and the resulting attraction of new investors; implementation of competition in the networks, services and content markets; reduction of the disadvantages for environment and territory and diminution of mobility problems caused by excavations.

The main object of this study is the legal framework that deals with facilities sharing by operators of communications.

Strictly speaking, the sharing of infrastructure relates to the relationship between communications operators, especially the relationship between the owner of the network and of the associated facilities and other operators who wants to use them. However, our analysis will also extend the use of structures belonging to other stakeholders, such as the private owners of properties that may or must be used to place the network. Consider, for example, the owners of buildings that come the end of the broadband network, or public or private entities that owns conducts used for other types of networks, such as the electricity distribution network.

The starting point from which to approach the subject of study is the critical review of the European and national legal frameworks. The essential legislation is contained in the package of EC Directives on electronic communications (Directive 2002/21/EC, Directive 2002/20/EC, Directive 2002/19/EC, Directive 2002/22/EC). The main domestic sources are the Electronic Communications Code (Legislative Decree no. 259/2003) and the Law 6 August 2008, No 133.

Both the European and national law contain asymmetric rules, thus different depending on whether the recipient is an operator which has been recognized to be a significant market power or a so called alternative operator. To underline this distinction, it is accepted the definition used by the majority doctrine, which refers to specific facilities sharing commitments, obligatory only to operators with significant market power, and general facilities sharing commitments, obligatory to all operators.

About the European framework, the EU Directives package has been recently reformed by Directive 2009/140/EC. It was therefore necessary to examine the amendments, which are expected to be transposed in the Italian legislation by May 2011. Among the innovations, the most important is the possibility for national regulators

to impose the sharing of passive structures to all network operators, contrary to the provisions of the text adopted in 2002 which permitted to impose a facilities sharing obligation only to those operators with significant market power, while national authorities could only encourage the sharing for all other operators.

Moving on to the national legislation in force, we analyze the Electronic Communications Code (Legislative Decree no. 259/2003) regulating, among other things, the sharing of network infrastructure. The Code reproduces the facilities sharing obligations as they were ruled by EC pre-reform Directives.

Continuing, we have seen how, by L. 133/2008, the national legislature intended to foster the development of fiber networks by adopting a simplified procedure for the authorization of installation work, by providing the opportunity to use, without charge, existing public facilities, by imposing limits on private property to facilitate installation of the fiber network.

Provisions on broadband are also contained in Law No 18 June 2009 69, which provides a program of allocation of public funds in areas of low coverage, allows the simplification of rules of excavations for the installation of optical fiber and regulates the approval of the installation of the fiber within condominiums.

The work includes the exam of the role of the National Authority, who has the task of regulating and / or incentivizing infrastructure sharing.

Looking at broadband penetration in Italy, we can observe an unequal geographic development, due to the growth of metropolitan communications networks, compared to areas with a lower population density which are characterized by a low coverage.

We also stressed the important role played by municipalities and local authorities, through the approval and implementation of plans for

diffusion of fiber networks, as well as the importance of public financing.

By paying attention to recent events that have characterized the Italian scenario, it was also considered interesting to note the recent presentation by a group of telecommunications operators of a concrete project of fiber network to be built in common and then shared, also hypothesizing the participation of the Cassa Depositi e Prestiti in the role of financier.