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The new EU regulatory Framework for Electronic communications: From sector specific regulation to Competition Law

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¹ The opinions expressed in this paper do not necessarily represent those of the EU Commission.

Introduction

Nearly 60 years ago, success novelist Ayn Rand reminded that “Hell is said to be paved with good intentions”. “Could it be because we’ve never learned to distinguish what intentions constitute the good? Never have there been so many good intentions proclaimed in the world. And look at it.”².

The new EC Telecommunications Regulatory framework was also designed and adopted on the basis of good intentions such as to introduce flexible mechanisms in the legislation to allow it to evolve with future technology and market changes and to roll back regulation when markets become competitive as well as to create a level playing field across EU by facilitating market entry through simplified rules and ensuring harmonised application through strong co-ordination mechanisms at European level³. Will it deliver hell or paradise? Which effects will it have on investments and growth in the industry?

This is not a theoretical concern. The telecoms industry, and in particular the mobile⁴ and broadband sectors, have so far been a major driver of growth in the EU. Will the application of the new framework foster this growth or on the contrary discourage investment and stifle innovation? A glance at the recent evolution of share prices shows that market analysts have their doubts about the future growth of the industry. For example, in the first week of April, the European Mobile sector fell a further 11.0%, with Vodafone down 15.8%, mm02 down 21.7%, Orange 8.9%, TIM 5.1% and Telefonica Moviles 6.9%. This followed previous declines earlier in 2002 with the sector down 30.7% from the beginning of the year to April and Vodafone down 38.5%. And the decline continues. Telecoms shares have plunged 76 % between March 2000 and the last week of April 2002.

Vodafone's rating is often considered as a benchmark for European mobile stocks. Its derating affect the ability of EU operators to finance their investment, at least via public equity issuance. The derating of the mobile operators has also a damaging effect on the structure of competition, as shown by the fact that no operator could bid for a fourth licence in France, notwithstanding the upfront fee that has been reduced to 619m €. The cost of financing the minimum level of roll out as well as the initial start up losses are apparently still considered too high for the financial community to finance a fourth operator, taking also into account the uncertain returns⁵.

To restore confidence, mobile operators have firstly reduced capital expenditures⁶, forcing infrastructure manufacturers to downsize their production and investment. Less investment in infrastructure could reduce the level of competition. Another means for mobile operators to improve their EBITDA is to increase returns per subscriber (ARPU). It is here that regulation interferes with business logic the most. A possible capping of fixed-to-mobile termination rates and the required reduction of international roaming charges would indeed leave only limited room to increase revenue per subscriber.

At this stage, the market players need most of all certainty and visibility on the impact of the new framework. What regulatory constraints should they expect? And when? The IBA was therefore well advised to put the new framework on the agenda of its meeting. Corporate lawyers have

2 The Fountainhead, 1968, 27th printing, The American Library, Signet books, p. 626

3 IP/00/749 of 12 July 2000

4 "the fastest expanding segment in revenue terms is again mobile services, where revenue growth is expected to reach around 22.3%, from €67 billion to €82 billion by end 2001. This is down on the actual growth rate of 38.1% for 2000", Seventh Report on the Implementation of the Telecommunications Regulatory Package, COM(2001) 706, p. 2

5 C.Barjonet, Bouygues Telecom to bid for third generation licence, FT, 17.4.2002, p.15

6 K.Ridley, Vodafone slumps as customer growth tumbles, Reuters, Total Telecom, 25 April 2002

now the difficult task to advise their clients in the telecommunications sector on the risks and benefits that the new framework could bring about in the coming months. The questions their clients ask usually boil down to those of whether there will be more regulation and how they will be able to protect themselves or - depending on the client - benefit from the new rules?

My aim is to give a short outline of possible replies to such questions. I will first list the measures which are part of the new framework and highlight their common features with the current framework. I will then discuss the main changes brought about by the new framework as regards the imposition of regulatory obligations. Finally, I will try to reply to the question whether the new rules will lead to more ex-ante regulation or not and explain the mechanism foreseen to strike a balance between ex-ante regulation and the application of competition law remedies.

1. The new Framework

For the time being, only the main elements of the new regulatory package are in place, i.e. the **Framework Directive**⁷, the **Authorisations Directive**⁸, the **Access Directive**⁹, the **Universal Service Directive**¹⁰, and the **Spectrum Decision**¹¹ which were adopted by the Council and the European Parliament on 7 March 2002 and came into force on the day of their publication in the Official Journal, i.e. 24 April 2002.

Member States have fifteen months to transpose these Directives, i.e. to enact national law and regulations to ensure attainment of the objectives set out in these Directives. According to the Directives, Member States must apply those national measures from that date. The effective “date of application” of the national transposition measures is therefore 25 July 2003¹².

In addition, two further Directives still have to be adopted. The first is the **Commission Directive on competition** in the markets for electronic communications services (based on Article 86 ECT). This Directive will consolidate and simplify Directive 90/388/EEC and its subsequent amendments and align it to the new Council and Parliament Directives. The second Directive is the **Data Protection Directive**¹³. It has been subject to a different timing in the legislative process, due to divergences of views on certain of its provisions. In order to avoid that both Directives delay the transposition of the already adopted Directives, Member States will be given a shorter time period to transpose them.

7 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, OJ L 108, 24 April 2002

8 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, OJ L 108, 24 April 2002

9 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, OJ L 108, 24 April 2002

10 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, OJ L 108, 24 April 2002

11 Decision [...] of the European Parliament and of the Council on a regulatory framework for radio spectrum policy in the European Community - not yet adopted.

12 As a corollary of this fact, Member States are obliged to continue to apply their existing national laws established in implementation of the current EU framework until the date of application referred to in Article 28 of the Framework Directive, when they will be replaced (where necessary) by the national measures implementing the new framework. This is reflected in the provisions of Article 26 of the Framework Directive, which provides that the Directives and other Community instruments constituting the current framework referred to therein will be repealed from the date of application referred to in Article 28.

13 Proposal for a Directive of the European Parliament and of the Council on processing of personal data and the protection of privacy in the electronic communications sector

In addition to the Directives to be transposed by the Member States, the new package contains also “soft law”. First of all, Article 15(1) of the Framework Directive provides that, after public consultation and consultation with national regulatory authorities, the Commission shall adopt a **Recommendation on Relevant Product and Service Markets**, for the purposes of the market analysis to be conducted by NRAs in accordance with Articles 15 and 16 of the Framework Directive. This recommendation¹⁴ lists the markets for ex-ante regulation and set out the methodology to include and/or maintain markets in the list. It is currently subject to a broad public consultation and will eventually be adopted and published in June 2002.

The second non-binding act is foreseen in Article 15(2) of the Framework Directive, i.e. the **Guidelines for market analysis and the assessment of significant market power (SMP)**. They set out the approach to be followed by the National Regulatory Authorities (NRAs) for the sake of their market analysis procedures. The major objective of these Guidelines is to ensure that NRAs use a consistent approach in applying the new regulatory framework, and especially when designating undertakings with SMP in application of the provisions of the regulatory framework.

Thirdly, the Framework Directive provides, in Article 17(1), for the Commission to draw up and publish in the Official Journal a **List of standards and/or specifications** to serve as a basis for encouraging the harmonised provision of electronic communications networks, electronic communications services and associated facilities and services, having consulted the Communications Committee acting in accordance with its advisory procedure. This is a continuation of a List of Standards that is already published in the OJ under the current Directives. It is intended that the procedures be followed in such a way as to permit publication of the new List in the 3rd quarter of 2002.

2. Main changes in comparison to the current Directives

The new Framework is not a “revolution”. It builds on the current telecommunications legislation in the EU.

1. The primary responsibility for implementing the new framework continues to rest upon the NRAs. The new Directives increase the degree of discretion of NRAs, eg. they will now have a large discretion in choosing between the tools listed in Articles 9 to 13 of the Access Directive the most appropriate to prevent dominant undertakings to abuse their dominant position. The remedies available remain nevertheless the same: transparency, non-discrimination, accounting separation, access to and use of specific network facilities, price-control and cost accounting obligations. As it is currently the case, the new Directives do not specify which body should be considered as an NRA. The new Directives will thus not change the current situation where, in several Member States, there is more than one NRA (an independent regulatory authority, the Ministry and/or a radio-frequency management body). They provide nevertheless that where under national law tasks are carried out by two or more separate regulatory bodies as regards the ex-ante regulation of markets, Member States should ensure clear division of tasks and set up procedures for consultation and co-operation between regulators in order to assure coherent analysis of the relevant markets.

¹⁴ Article 15(4) provides for the possibility for the Commission to adopt a Decision identifying transnational markets, for the purposes of NRAs’ market analysis of those types of relevant market. In doing so it would consult the Communications Committee acting in accordance with its regulatory procedure. The Commission has announced that it will wait for the results of the public consultation on the draft Recommendation (see above) before deciding whether the adoption of such a Decision is necessary.

2. Consultation and co-operation requirements are also re-established and expanded (eg. Consultations with national competition authorities). Articles 6 and 7 of the Framework Directive set out clear rules for public consultations on envisaged measures which have a significant impact on the relevant market. National consultation procedures will now have to be published. The results of the consultation procedure will have to be made publicly available.
3. Regulation of broadcasting content (radio and television programs) will further be excluded from the scope of the framework. However, the Framework Directive now clearly confirms that the Directives cover transmission infrastructures used for broadcasting purposes. The aim is to distinguish more clearly between content and transmission regulation.
4. The principle of asymmetric regulation is confirmed. However, the threshold for an operator being considered as having significant market power is no more based on a 25 % market share but on the competition law definition of dominant position. Furthermore the current directives pre-define the regulated markets. Under the new Directive markets will have to be defined using the methodologies of competition law. This new SMP threshold will, on the one hand, lead to less regulation – markets will indeed be more segmented and on some product markets there probably will not be any dominant player left; – and, on the other hand, to more regulation – where new entrants will be dominant on more narrowly defined markets (eg. call termination on mobile networks).
5. The current dialogue between regulators is confirmed. The Commission will establish two advisory groups to foster the exchange of information between NRAs and promote a co-ordinated approach to application of the new framework: the **European Regulators Group** (ERG) and the **Spectrum Policy Group**. These groups will succeed to the current National Administrations and Regulatory Authorities (NARA) meetings and Independent Regulator's Group (IRG).
6. The new framework does not give the Community further powers as regards the assignment of frequencies.

At the same time, the new framework contains three significant innovations in comparison to the current framework.

1. Article 7(2) FWD which imposes a co-operation between NRAs of the Member States, to ensure the consistent application in all Member States of certain provisions of the Directives. NRAs will have to consult their peers and the Commission i.a.¹⁵ on the markets they intend to regulate, the operators they consider dominant and the remedies they envisage to impose together with their reasoning. The time available for other NRAs and the Commission to comment should be the same time period as that set by the NRA for its national public consultation, unless the latter is shorter than the minimum period of one month provided for in Article 7(3). The Commission may decide in certain circumstances to publish its comments. This obligation only relates to measures that could affect trade between Member States, this should be understood as meaning measures that may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in a manner

15 The specific Articles covered are as follows: Articles 15 and 16 of the Framework Directive (the latter of which refers to Articles 16-19 of the Universal Service Directive and Articles 7 and 8 of the Access Directive), Articles 5 and 8 of the Access Directive (the latter of which refers to the obligations provided for in Articles 9-13 of the Access Directive) and Article 16 of the Universal Service Directive (which refers to Articles 17-19 of Universal Service Directive). In addition, Article 6 of the Access Directive, although not explicitly referenced in Article 7 of the Framework Directive, itself contains cross-reference to Article 7 of the Framework Directive and is therefore covered by the procedures therein.

which might create a barrier to the single European market¹⁶. Therefore, the notion of an effect on trade between Member States is likely to cover a broad range of measures. As regards the market definitions envisaged and the assessment of the dominant position of the undertaking(s) concerned, the Commission has under Article 7(4) the power to ask, with a binding decision, an NRA to amend or withdraw its draft if the latter did not do so after the initial consultation period.

2. Article 19 of the Framework Directive provides that the Commission can produce recommendations to promote the harmonised application of the new framework. It can also take technical implementing measures in accordance with the regulatory comitology procedure, where necessary to achieve harmonisation of numbering resources for pan-European services.
3. Article 16(1) of the Framework Directive requires NRAs to associate NCAs with the market analyses as appropriate. Member States should put in place the necessary procedures to guarantee that the analysis under Article 16 of the Framework Directive is carried out effectively. As the NRAs conduct their market analyses in accordance with the methodologies of competition law, the views of NCAs in respect of the assessment of competition are highly relevant. Co-operation between NRAs and NCAs will be essential, but NRAs remain legally responsible for conducting the relevant analysis. To facilitate this cooperation, Article 3(5) of the Framework directive requires NRAs and NCAs to provide each other with the information necessary for the application of the regulatory framework, and the receiving authority must ensure the same level of confidentiality as the originating authority. Information that is considered confidential by an NCA, in accordance with Community and national rules on business confidentiality, will nevertheless only be exchanged with NRAs where such exchange is necessary for the application of the provisions of the regulatory framework. The information exchanged should be limited to that which is relevant and proportionate to the purpose of such exchange.

3. Hybridization of the regulatory framework

As it is the case for any economically-driven, consumer welfare oriented approach, efficiencies are the goal of the new framework. Its goal is not to migrate from ex-ante sector specific regulation to competition law. Such transition may result indirectly from the application of certain provisions of the new framework (see section 6 below). What the new framework does explicitly is to base the application of ex ante sector specific regulation on competition law market analysis, which is a different matter.

This hybridization of sector specific regulation would not necessarily mean less regulation. The new framework will as a matter of fact extend the number of activities that NRAs can regulate while, at the same time, limit the margin of discretion to designate SMP operators.

More activities regulated

In the current framework, NRAs have the power to designate undertakings as having Significant Market Power when they possess 25% market share in the areas referred to in the Directives. These areas have been delineated in the applicable directives, but are not always "markets" within the meaning of competition law and practice. These market areas are nevertheless limited in number (Table 1 sets out the market areas in which undertakings are subject to existing

16 Recital 38 of the Framework Directive

obligations under the 1998 regulatory framework). NRA's are thus constrained in the activities they can regulate. For example, mobile call termination can only be regulated ex-ante, when the relevant operators reach 25 % market share in the interconnection market, encompassing both fixed and mobile interconnection revenues and assimilated turnover (on-net calls).

Under the new framework, markets to be regulated are defined according to competition law analysis. The Commission will identify the markets to be regulated ex ante in its recommendation on relevant product and service markets on the basis of Annex I of the Framework directive which provides a list of such market areas to be included in the initial version of the Commission Recommendation. The role of the Commission is to reformulate and further segment where justified these market areas so that they correspond to markets defined under Competition Law. In addition to the markets which will be listed in the Recommendation, other markets can be regulated in accordance with the consultation procedures set out in Articles 6 and 7 of the Framework Directive. In addition, a few more markets are specifically identified in Article 6 of the Access Directive and Articles 18 and 19 of the Universal Service Directive.

Competition law market definitions will most likely be narrower than the current market areas subject to ex-ante regulation. The application of the competition law approach would necessarily increase the number of markets to be regulated. For example under the current framework there is no separate market for mobile call termination. It is part of the broader market area of interconnection. However under a competition law approach, the following reasoning would be followed. It would start from the finding that mobile call termination is an input both to the provision of mobile calls (that terminate on other mobile networks) but also to calls that are originated by callers on networks serving fixed locations, that terminate on mobile networks. Such finding would lead to the initial conclusion that it is a wholesale market. This finding is confirmed by the fact that the termination charge is set by the called network, the calling party in general having no ability to affect or influence termination charges under the calling party pays principle, except by reducing the duration of his call.

In a second step, constraints from supply substitution would be examined. Users may exploit the possibilities to use more than one SIM card by purchasing phones with multiple SIM slots. However, such a practice would only exert a constraint on termination charges if it became commonly used, which is not yet the case.

The third step would be to examine potential demand substitution. At the retail level, fixed-to-fixed calls are a reasonably close substitute (since mobile users will in most of the cases also be fixed subscribers). However, it would not appear that such potential substitution has constrained the behaviour of mobile operators to set wholesale rates.

A competition law analysis of the market would therefore lead to the conclusion that each mobile network operator is a single supplier on each call termination market. This means that under the new framework, there would be as many mobile call termination markets¹⁷ as operators. This will thus lead to an increase in markets to be assessed by the NRAs. A similar assessment can be followed for call termination charges on fixed networks.

Therefore, under the new regulatory framework, the NRAs will assess a larger number of more narrowly defined markets. However, they are only entitled to impose obligations on undertakings being dominant on these markets¹⁸.

¹⁷ See also Commission press release of 27 March 2002 at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/0

¹⁸ "dominance is an objective criterion, requiring analysis to meet tests defined by the Court" recalls Andrew Tarrant in "Significant Market Power and dominance in the regulation of telecommunications markets" E.C.L.R., 2000, p. 320

Less discretion to designate SMP operators

Undertakings can currently be designated as having SMP when they have 25% market share in the market areas listed. The Directives provide however for a possibility to deviate from this threshold taking into account the undertaking's ability to influence the market, its turnover relative to the size of the market, its control of the means of access to end-users, its access to financial resources and its experience in providing products and services in the market. This provides a substantial margin of discretion to the NRA's to designate operators as having SMP or not¹⁹. For example, various Member States considered second GSM operators as having SMP although they had less than 25 % market share in the interconnection market. Conversely, the German NRA did not designate any mobile operator as having SMP in the interconnection market although the market share of two of them is higher than 25 % (see table 2).

Under the new framework, the NRAs will be bound by the criteria used under competition law to establish the existence of a dominant position. These include in addition to market share i.a:

- overall size of the undertaking
- control of infrastructure not easily duplicated
- technological advantages or superiority
- absence of or low countervailing buying power
- easy or privileged access to capital markets/financial resources
- product/services diversification (e.g. bundled products or services)
- economies of scale
- economies of scope
- vertical integration
- a highly developed distribution and sales network
- absence of potential competition
- barriers to expansion

As recalled in the Commission guidelines, a dominant position can be derived from a combination of the above criteria, which taken separately may not necessarily be determinative.

Consequently, the increase in number of markets to be regulated does not necessarily mean more operators being regulated. For example where market conditions are such that an undertaking remains dominant in one market segment and not in another, a narrower market definition will allow this undertaking to be regulated in the more competitive part of the market.

This would be the case where retail competition for certain well defined and separate categories of residential users is much better developed than for other categories. In the same vein, a narrow market definition of wholesale fixed call termination limited to each network, does not mean that each operator, although being the single provider of to its own subscribers, would ipso facto be dominant. There can indeed be countervailing market power by the incumbent. The fact that the incumbent is being regulated does not take away the fact that it can exert buying power. Article 8 of the Access Directive requires that interconnection arrangements be reasonable. The incumbent would not be required to accept unreasonable arrangements for access and interconnection and could refer the matter to the NRA. Therefore, if a new entrant were to try to impose conditions unacceptable to the incumbent (or another operator), NRAs or

19 The margin of discretion varies substantially between Member States depending on the level of justification required by national courts. In Sweden, a Court recently struck down the NRA decision designating Tele2 as being SMP although it had only 16.6 percent market share on the Interconnection market (see Court blocks Swedish watchdog ruling on Tele2, Reuters 17 April 2002, in Total Telecom, 18 April 2002 on www.totaltele.com/vprint.asp?txtID=51133)

Courts could be asked to decide the dispute in a reasonable manner, taking into account the relevant factors to the interconnection²⁰.

In addition, narrower definitions of markets to be regulated will facilitate the application of specific and proportional remedies. Any remedy needs indeed to be designed to reflect actual competitive conditions – otherwise, over- or under-regulation will surely result, neither being in consumers' interests. In the UK BT continued for example to be regulated on some competitive markets because OFTEL had no powers under the current Directives to dispense it from the relevant obligations²¹.

On the other hand, less discretion to designate SMP operators does also not mean, less operators being designated. Firstly because the use of competition law analysis will now allow designating more than one operator in case of joint dominance which is not possible under the current framework.

Secondly, because NRAs will be able to designate SMP operators on markets on which they are not dominant when they are dominant position in a distinct but neighbouring market. Article 14, paragraph three of the Framework directive states that “*where an undertaking has significant market power on a specific market, it may also be deemed to have significant market power on a closely related market, where the links between the two markets are such as to allow the market power held in one market to be leveraged into the other market, thereby strengthening the market power of the undertaking*”. This will mainly concern vertically integrated markets. For example an operator being dominant on the infrastructure market and having a significant presence on the downstream, services market could extend its dominant position to the other market²². A NRA could therefore designate such operator as having SMP on both markets taken together²³. This will allow an NRA to (continue) regulating retail tariffs where the imposition of *ex ante* obligations on an undertaking which is dominant in the (access) upstream market would not result in effective competition on the (retail) downstream market. Article 14 (3) could provide a basis to impose the provision of a wholesale offer of the relevant retail products.

4. Does the use of the competition concept of dominant position suffice to provide legal certainty?

The new Framework only provides for the use of the competition law methodology. Article 15(1) of the Framework Directive states for this reason that the markets to be defined by NRAs for the purpose of ex-ante regulation are without prejudice to those defined by NCAs and by the Commission in the exercise of their respective powers under competition law in specific cases. This can only mean that the use of the same methodology does not necessarily lead to the same conclusions. The reason is that in Competition cases, the analysis will consider events that have already taken place in the market and will not be influenced by possible future developments. Under the merger control provisions of EC competition law, markets are generally defined on a forward-looking basis. The Commission suggested in its draft guidelines that under the new Framework, the NRAs should conduct a forward looking, structural evaluation of the relevant market to determine whether the lack of effective competition is durable. NRAs commented that

20 In Belgium, fixed line operator Telenet increased its termination charges by 400 % as from 1 March 2002. The incumbent operator took it to a Court (see V.S. Tuiles à répétition pour Telenet, La libre Belgique, 21.02.2002).

21 Andrew Tarrant, o.c., p. 321

22 See Access Notice, par. 65.

23 S. Taylor considers this as "an invitation for NRAs to extend the scope of regulation to non-dominant markets in circumstances not justified by market failure and inconsistent with a finding of dominance in EC Competition Law" see S. Taylor, European Commission's draft Guidelines on Market Analysis and the Calculation of Significant Market Power: The Extension of Tetra Pak II to Regulation, C.T.L.R., 2001, p.135

contrary to merger reviews, their assessment should only deal with current difficulties and that their assessment would be reviewed from time to time. The assessment will therefore not be forward-looking, but based on the current situation. Ex ante regulation aims to achieve short term results - setting specific access conditions, fixing prices - to address market failures of today. The risks of assessing the market power of the players on a forward-looking approach in the framework of ex-ante regulation can be illustrated by a comparison between the level of competition in the local calls markets in Germany and Denmark at the one hand and France and Spain at the other. The 1998 German and Danish ex-ante regulation was based on the finding that there was no competition and that its emergence would be delayed if entrants were imposed any specific investment or interconnection requirements. Entrants were not submitted to any investment requirements or limited in the number of subscribers which could be reached through each point of interconnection. In addition, Germany and Denmark introduced local loop unbundling from the outset of the liberalisation. Conversely, France and Spain used a forward looking analysis and imposed restrictions on (so called "hit and run") service competition since they consider that there was a potential for (stronger) infrastructure competition. Four years later, the result is clear: Deutsche Telecom lost nearly 30% of its market share in the market for local calls - and would probably even have lost more if Germany had timely implemented carrier selection for local calls - TeleDenmark lost 28 %. This contrasts strongly with the situation in France and Spain, where the incumbents only lost respectively 3 % and 6 % of their market share. Under the new Framework, NRAs will thus probably be very cautious in taking into account the likelihood that undertakings not currently active on the relevant product market may in the medium term decide to enter the market following a small but significant non-transitory price increase. They have to find solutions for today's lack of competition.

A second important difference of starting points in the application of competition law methodologies is that when assessing *ex-ante* whether one or more undertakings are in a dominant position, NRAs will in principle rely on different sets of assumptions and expectations than those relied upon by a competition authority applying Article 82, *ex post*²⁴, within a context of an alleged committed abuse. As a matter of fact, competition exists in most of the relevant electronic communications markets as a result of the obligations imposed under the current ONP Directives. The market power of the incumbent operators is today substantially curtailed by regulatory obligations and their prices have been reduced over the last years on the basis of the principle of cost-orientation. A difficulty in the assessment by NRAs is that in such circumstances, market data do not provide sufficient basis to conclude whether the undertaking concerned is still in a dominant position. In applying ex-ante the concept of dominance, NRAs will thus have a broad margin of discretion to make assumptions on how the relevant markets would be in the absence of regulatory obligations.

Given the difference in starting points markets defined for the purposes of competition law and markets defined for the purpose of sector-specific regulation could diverge and operators be dominant under one framework and not under the other. This explains the need to establish a procedure - under Article 7(4) of the Framework Directive - to avoid unjustified divergences.

The question of the lack of legal certainty which would result from the mere reference to competition law concepts was in particular raised as regards the application of the concept of joint dominance. Considering that the case law on the subject was limited and evolving, Council and Parliament have included a list of criteria of joint dominance in Annex II of the Framework

24 Dominance has, as recalled in the Commission Guidelines, been defined in the case-law of the Court of Justice as a position of economic strength affording an undertaking the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers, so long as such conduct does not operate to its detriment. See Case 85/76 Hoffmann-La Roche v Commission [1979] ECR 461, par. 39. This definition cannot be applied as such for the purposes of ex ante regulation, if an undertaking has already been imposed regulatory obligations.

Directive. According to this Annex, “two or more undertakings can be found to be in a joint dominant position within the meaning of Article 14 if, even in the absence of structural or other links between them, they operate in a market, the structure of which is considered to be conducive to co-ordinated effects²⁵. It continues that this is likely to be the case where the market satisfies a number of appropriate characteristics, in particular in terms of market concentration, transparency and other characteristics mentioned below:

- mature market
- stagnant or moderate growth on the demand side
- low elasticity of demand
- homogeneous product
- similar cost structures
- similar market shares
- lack of technical innovation, mature technology
- absence of excess capacity
- high barriers to entry
- lack of countervailing buying power
- lack of potential competition
- various kind of informal or other links between the undertakings concerned
- retaliatory mechanisms
- lack or reduced scope for price competition”

The Directive nevertheless states that the list is not exhaustive. It provides the sorts of evidence that can be used to support assertions concerning the existence of a collective (oligopolistic) dominance. However, the list clearly confirms that the existence of structural links among the undertakings concerned is not a prerequisite for finding a collective dominant position.

Does this list provide the necessary legal certainty to market players? This is not certain²⁶. The fact that one or another of these elements may not be clearly established is not in itself decisive to exclude the existence of joint dominance. NRAs can still argue that market operators have a strong incentive to converge to a co-ordinated market outcome and refrain from reliance on competitive conduct. They will nevertheless have to show on the basis of the various market structure characteristics that the long-term benefits of an anti-competitive conduct thus outweigh any short-term gains resulting from a resort to a competitive behaviour. Such argumentation can be rebutted, as the Commission did in the *BT/Esat*²⁷ merger decision. In this Decision the Commission examined whether market conditions in the Irish market for dial-up Internet access lent themselves to the emergence of a duopoly consisting of the incumbent operator, Eircom, and the merged entity. The Commission concluded that this was not the case for the following reasons. First, market shares were not stable; second, demand was doubling every six months; third, internet access products were not considered homogeneous; and finally, technological developments were one of the main characteristics of the market²⁸.

In this area also the procedure of Article 7(4) will play a crucial role to avoid divergent practices between NRAs.

5. Will the use of competition law concepts lead to more ex-ante regulation?

25 See also recital 26 of the Framework Directive: “two or more undertakings can be found to enjoy a joint dominant position not only where there exist structural or other links between them but also where the structure of the relevant market is conducive to co-ordinated effects, that is, it encourages parallel or aligned anticompetitive behaviour on the market”.

26 S. Taylor, o.c., p.135

27 Case No COMP/M.1838 – BT/Esat.

28 Idem, paras 10 to 14.

The new regulatory framework requires NRAs to carry out an analysis of the product and service markets identified in the Recommendation, taking the utmost account of the Guidelines. On the basis of this market analysis, NRAs will determine whether there is a dominant operator on these markets or not and impose, amend, or withdraw regulatory obligations accordingly.

Neither the number of markets to be regulated, nor the number of operators which could be designated as having SMP will nevertheless determine whether the new Framework will lead to more or less regulation. Under the new framework, the NRAs have to impose the appropriate remedies on each dominant operator on the basis of those listed in the Access Directive.

The issue of market definition must in this regard be distinguished from that of imposing appropriate remedies. In dealing with lack of effective competition in an identified market, several obligations might be imposed to achieve an overall solution. An example is local loop unbundling, where obligations of various kinds can be imposed (ranging from access to the row copper pair to access to operational support systems). Each technical element or market segment covered by a specific obligation does not necessarily constitute a distinct market. There is no need to segment markets to apply obligations to specific technical elements.

In addition, contrary to the current framework, there is no more an automatic link between the designation as SMP and specific obligations.

The obligations listed are: transparency (Article 9); non-discrimination (Article 10); accounting separation (Article 11), obligations for access to and use of specific network facilities (Article 12), and price control and cost accounting obligations (Article 13). In addition, Article 8 of the Access directive provides that NRAs may impose obligations outside this list. In order to do so, they must submit a request to the Commission, which will take a decision, after seeking the advice of the Communications Committee, as to whether the NRA concerned is permitted to impose such obligations.

Moreover, the Universal Service Directive lists the following obligations: regulatory controls on retail services (Article 17), availability of the minimum set of leased lines (Article 18 and Annex VII) and carrier selection and pre-selection (Article 19).

NRAs may also impose similar obligations on operators other than those that have been designated as having SMP, in the cases in Article 8(3) of the Access Directive:

- Obligations covering *inter alia* access to conditional access systems, obligations to interconnect to ensure end-to-end interoperability, and access to application program interfaces and electronic programme guides to ensure accessibility to specified digital TV and radio broadcasting services (Article 5(1), 5(2) and 6 of the Access Directive);
- Obligations that NRAs may impose for co-location where rules relating to environmental protection, health, security or town and country planning deprive other undertakings of viable alternatives to co-location (Article 12 of the Framework Directive);
- Obligations for accounting separation on undertakings providing electronic communications services who enjoy special or exclusive rights in other sectors (Article 13 of the Framework Directive);
- Obligations relating to commitments made by an undertaking in the course of a competitive or comparative selection procedure for a right of use of radio frequency (Condition B7 of the Annex to the Authorisation Directive, applied via Article 6(1) of that Directive);
- Obligations to handle calls to subscribers using specific numbering resources and obligations necessary for the implementation of number portability (Articles 27, 28 and 30 of the Universal Service Directive);

- Obligations based on the relevant provisions of the Data Protection Directive; and
- Obligations to be imposed on non-SMP operators in order to comply with the Community's international commitments.

A question is whether the NRA might merely designate an undertaking as having SMP on a given market, without imposing - for the time being - any compelling regulatory obligations. Can this be considered as an appropriate remedy in the sense of the Directive? The fact that the initial drafting - i.e. obliging NRAs to impose "one or more obligations" on operators with SMP was changed - appears to support the argument that it was the Council's and Parliament's intention that NRAs should have the discretion not to impose obligations on SMP designated undertakings where that would be appropriate. This interpretation finds support in recital 27 of the Framework Directive which envisages ex-ante measures only when competition law remedies are insufficient. Given that for example one of the ex-ante obligations listed in the access directive is non-discrimination (Article 10), one could indeed imagine that if an NRA would deem this remedy the appropriate one to tackle the absence of competition in the relevant market, they would decide not to duplicate the existing non-discrimination obligation under Competition law.

Another difficult question relates to markets where a NRA determines the existence of more than one undertaking with dominance, i.e. that a joint dominant position exists. Is the NRA bound to impose the same remedies on all operators?

The new framework is not clear on that point. In their choice of the appropriate remedy, NRAs seem nearly only constrained by the principle of proportionality; under Article 8 of the Framework Directive. Article 7 of the Framework Directive requires NRAs to set out the reasoning on which any proposed measure is based when they communicate that measure to other NRAs and to the Commission. Thus, in addition to the market analysis supporting the finding of SMP, NRAs need to include in their decisions a justification of the proposed measure in relation to the objectives of Article 8, as well as an explanation of why their decision should be considered proportionate to the problem to be remedied.

Under EC case law a measure is deemed compatible with the principle of proportionality, when the action to be taken pursues a legitimate aim, and the means employed to achieve the aim are both necessary and the least burdensome, i.e. it must be the minimum necessary to achieve the aim.

Article 8(2), (3) and (4) of the Framework Directive identify in addition policy objectives that NRAs must seek to achieve. These fall into three categories:

- promotion of an open and competitive market for electronic communications networks, services and associated facilities
- development of the internal market and
- promotion of the interests of European citizens.

It can nevertheless be expected that these policy objectives will not substantially constrain the discretion of NRAs in the choice of remedy.

NRAs must consult on remedies. The only recourses available against the choice of remedies are nevertheless the national courts. The Commission might also challenge the choice of remedies

under Article 226 of the Treaty²⁹, for failure to apply correctly the provision of the new Directives.

As a matter of fact, the crucial question will nevertheless not only be which remedies are imposed, but in first instance how these remedies will be applied in practice. The practice in the past for example as concerns the enforcement of the cost orientation obligation of leased line tariffs, can give grounds for pessimism. Ayn Rand noted with perspicacity “ask anything of men. Ask them to achieve wealth, fame, love, brutality, murder, self-sacrifice. But don’ t ask them to achieve self-respect”³⁰. However, one could expect that under the new framework and in particular given the transparency mechanism of Article 6, NRAs will be under stronger pressure to ensure the effective application of the new obligations.

6. How the dividing line between competition law and sector specific regulation is ensured

In each of the markets for ex-ante regulation, NRAs will investigate whether there are dominant operators. According to the new Framework, a finding that an operator enjoys a single or joint dominant position on a market means that no effective competition exists on that market. Even if there are no abuses, the mere fact of being dominant³¹, justifies that the NRAs either impose appropriate specific obligations, or maintain or amend such obligations where they already exist.

In theory, it is not excluded that parallel procedures under ex ante regulation and competition law arise with respect to different kinds of problems in relevant markets. However, such simultaneous application of remedies by different regulators even if apparently addressing different problems in such markets can hardly be perceived as far as they would address the same concern. Complainants will probably only use the most easily way to obtain a remedy - i.e. the one not requiring the proof of the abuse. In addition, it would also not be in the interest of the regulators to promote such a forum shopping.

As a consequence, the application of Article 82 prohibiting abuses of dominant position in the sector could soon become obsolete.

This would not only affect the powers of the competition authorities, but also - and this is the real issue - investment incentives (or in this case, investment "disincentive"). Sector specific regulation is less predictable than competition law and can lead to more damaging interference in the commercial strategy of the relevant undertakings. A threat with 'rate of return' regulation could for example easily discourage investments of entrants. Ayn Rand asked “To what level of depravity has a society descended when it condemns a man simply because he is strong and great?”³². The same question should be asked to those who would propose to regulate dominant undertakings only because they are strong and great. To be subject to ex ante regulation it is enough to be dominant. The prohibition under Article 82 of the Treaty requires not only a dominant position but also an abuse. Imposing obligations in the absence of abuse (or very strong likelihood of abuses) is in most cases disproportionate.

29 "If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice".

30 O.c., p.357

31 i.e. to have, from a structural perspective, and in the short to medium term, on the relevant market identified, sufficient market power to behave to an appreciable extent independently of competitors, customers, and ultimately consumers.

32 O.c., p.624

This is the reason why recital 27 of the Framework Directive warns that emerging markets, where *de facto* the market leader is likely to have a substantial market share, should not be subject to inappropriate ex-ante regulation. Premature imposition of ex-ante regulation may unduly influence the competitive conditions taking shape within a new and emerging market.

This is also why Article 15 FWD states regulatory obligations should only be imposed on those electronic communications markets whose characteristics may be such as to justify sector-specific regulation. This provision must be interpreted in the light of recital 27 of the Framework directive, which states that “it is essential that ex-ante regulatory obligations should only be imposed where (...) national and community competition law remedies are not sufficient to address the problem”.

Article 15 will be applied via the periodical revisions of the list of markets to be regulated in the recommendation.

The new regulatory framework aims at ensuring harmonisation across the single market and guaranteeing legal certainty. The Recommendation will play an important role in achieving both of these objectives, as it ensures that the same product and services markets will be subject to a market analysis in all Member States and that market players will be aware in advance of the markets to be analysed. It will only be possible for NRAs to regulate other markets where this is justified by national circumstances and where the Commission does not raise any objections, in accordance with Articles 7(4) and 15(3) of the Framework Directive.

The Commission will periodically review the Recommendation. National regulatory authorities will regularly review their market analysis on the basis of the market identified in any updating of the Recommendation, as stated in Article 16 of the Framework Directive. In reviewing the Recommendation, the Commission will consult Member States, NRAs and NCAs, and all interested parties via a public consultation. The initial Recommendation will provide criteria that it considers predictable and objective means of identifying such markets. The main difficulty of interpretation of the new framework relates in the fact that the criterion provided in recital 27 - competition law remedies being insufficient - will evolve together with the case law of the Court and practices of the Commission and NCA. At each review, a new assessment will have to be done of the results that can be achieved via the application of competition law remedies, when deciding to maintain markets or not in the list.

Deleting a market from the list will nevertheless not prevent NRA to regulate the dominant operator on the market ex-ante. National regulatory authorities may as mentioned identify markets that differ from those of the Recommendation. There may be a number of ways in which market definition at a national level, for the purposes of market analysis, might differ from the markets identified in the Recommendation. NRAs may consider segmenting markets for reasons related to national market circumstances. There may for example be evidence that demand or supply substitution is possible in part of the market but not (over a given horizon) in the remainder, so that a market segmentation is justified.

In such cases the concerned NRA must initiate a consultation procedure of both the other NRAs and the Commission. As far as the imposition of ex-ante regulation on a market could affect trade between Member States as described in recital 38 of the Framework Directive, the identification of any market that differs from those of the Recommendation would be subject to the procedure in Article 7(4) of the Framework Directive.

Consequently, the key provision of the new framework to monitor the border line between the application of ex-ante regulation and competition law procedures is this Article. This explains

why its adoption has been the subject of hard bargaining between Council, Commission and Parliament³³.

Article 7(4) of the Framework Directive empowers the Commission to require an NRA to withdraw or amend a draft measure in two specific situations:

- the draft measure concerns the definition of a relevant market which differs from that identified in the Recommendation; or
- the draft measure concerns a decision as to whether to designate, or not to designate, an undertaking as having SMP, either individually or jointly with others.

In respect of the above two situations, where the Commission has indicated to the NRA in the course of the consultation process that it considers that the draft measure would create a barrier to the single European market or where the Commission has serious doubts as to the compatibility of the draft measure with Community law, the adoption of the measure must be delayed by a maximum of an additional two months.

During this two-month period, the Commission may, after consulting the Communications committee following the advisory procedure³⁴, take a decision requiring the NRA to withdraw the draft measure. The Commission's decision will be accompanied by a detailed and objective analysis of why it considers that the draft measure should not be adopted together with specific proposals for amending the draft measure. If the Commission does not take a decision within that period, the draft measure may be adopted by the NRA.

Article 7 explicitly states that the two-month deadline (can be prolonged. In addition, it does not detail the procedures, neither provides an explicit basis for the formal adoption of implementing rules. Consequently many issues remain to be clarified. This applies for example to the scope of the Commission review: will it be on the legal reasoning or equally on the facts, the level of detail of the background information to be submitted by the NRAs, the calculation of the deadlines, the role of third parties during the consultation period.

At this stage, it is thus difficult to predict how the key measure of the new framework will work and how effective it will be to ensure a consistent approach by NRAs throughout the EU and to avoid over-regulation in areas where competition law provides sufficient remedies.

Conclusion

Will the new framework bring about more ex-ante regulation? We have seen that replying to this question is not easy. The new framework contains as highlighted the tools to avoid the risk of "over-regulation", starting from the introduction of competition law concepts in ex ante regulation to the 'veto' procedure of Article 7(4) of the Framework Directive.

However, one should not expect from these measures more than what they can offer, i.e. an incentive for NRAs to deliver high quality work. The new framework as the current one is based mainly on the key role of NRAs. The current tools do not appear to give the Commission the means for a confrontational approach against a majority of NRAs. The effect of the new framework will therefore mainly depend from whether NRAs in applying the new framework strike the right balance between the interest of the consumers with those of the investors (eg. the

33 See Sylvia Alonso Salterain, "Review of the European Legal Framework - Article 6 of the Framework Directive, a Violation of the Institutional Balance set forth by the E.U. Treaty", C.T.L.R., 2002, I

34 As provided for in Article 3 of Council Decision 1999/468/EC laying the procedure for the exercising of implementing powers conferred on the Commission, the Commission shall take the utmost account of the opinion delivered by the Committee, but shall not be bound by the opinion.

investors in the mobile industry have lost 30.7% of value since the beginning of this year). As a matter of fact, it is possible to find a good balance since both voice and data usage and revenues will continue to grow. This growth could more than offset the effect of regulatory-intervention to cut termination and roaming rates, if done taking into account of the characteristics of the market. For example, a substantial reduction in roaming rates could be more than compensated by the growth in roaming traffic and the reduction of costs in providing the service.

There will be no increase of ex-ante regulation if NRAs take into consideration all the objectives of the new framework including the promotion of an open and competitive market for electronic communications networks, services and associated facilities and not only the short term pressures of consumers. In that case, one could expect a growing reliance on competition law remedies.

In addition, the NRAs of today are not those of four year ago. They have, often out of necessity, gone through a learning curve - in particular to ensure the unbundling of the local loop - and have now a much better understanding of the market and of appropriate remedies. Moreover, the flexibility of the new framework will facilitate negotiated compromise solutions between NRAs and operators to end disputes rapidly, given the possible threat to impose more stringent ex-ante regulation. In any case, the increased transparency requirements will improve the situation in comparison to the current framework, both for incumbents and for entrants.

Table 1 : Market areas subject to obligations under the 1998 framework – link to Annex I Framework directive of the new regulatory framework

Market area subject to obligations under the 1998 regulatory framework
RETAIL
Fixed public telephone networks and voice telephony services Directive 98/10/EC ³⁵
Leased lines, including the minimum set of leased lines Directive 92/44/EEC ³⁶
WHOLESALE
Fixed public switched telecommunications networks – interconnection Directive 97/33/EC ³⁷ Art 7.1, Annex I part 1
Fixed public switched telecommunications networks – unbundling of the local loop Regulation 2887/2000/EC ³⁸
Fixed public switched telecommunications networks - carrier (pre)selection Directive 97/33/EC Art. 12(7), introduced by 98/61/EC
Leased lines services – interconnection

35 OJ L101 01.04.1998, p.24

36 OJ L 295, 29.10.1997, p.23

37 OJ L 199, 26.07.1997, p.32

38 OJ L 336, 30.12.2000, p.4

Directive 97/33/EC Art. 7(1), Annex I part 2
Mobile public switched telecommunications networks – interconnection (linked to national market for interconnection)
Directive 97/33/EC Art. 7(2), Annex I part 3

Table 2 : Regulation of wholesale mobile termination charges (situation November 2001)

NRAs imposing cost orientation on one or two operators	France, Ireland, Sweden; Austria (until October 2001 ³⁹), Belgium, Italy Spain
NRAs imposing non-discrimination as well as, but on the basis of competition law powers, a price cap.	UK and Portugal
NRAs imposing non-discrimination on one or more mobile operators	Denmark, Luxembourg, the Netherlands, Greece, Finland*
NRAs imposing neither non-discrimination nor cost-orientation	Germany

* In Finland there are no wholesale termination charges. The called network bills the calling party. The calling party receives thus a double bill, one from the operator to which it subscribes and a second one from the operator of which the called party is a subscriber. Mobile termination is thus a retail product.

39 By decision of 5 November 2001 the NRA no longer applies cost orientation to any of the mobile operators (since there are now no SMP designations as regards the national market for interconnection) but applies the principle of ‘appropriate prices’ under dispute resolution powers