

# **EUROPEAN COMMUNICATIONS AT THE CROSSROADS**

## ***REPORT OF THE CEPS WORKING PARTY ON ELECTRONIC COMMUNICATIONS***

---

**CHAIRMAN:**           **MAGNUS LEMMEL**  
FORMER DIRECTOR GENERAL, DG ENTERPRISE  
EUROPEAN COMMISSION

**RAPPORTEURS:**   **MARTIN CAVE**  
WARWICK BUSINESS SCHOOL

**PIERRE LAROCHE**  
METRO INSTITUTE, FACULTY OF LAW, UNIVERSITEIT MAASTRICHT

**OCTOBER 2001**

---

This report contains the conclusions and policy recommendations that follow from the discussion and analytical presentations that took place at the meetings of the CEPS Working Party on Electronic Communications. The members of the Working Party participated in extensive debate and submitted comments on earlier drafts of the report. Its contents contain the general tone and direction of the discussion, but its recommendations do not necessarily reflect a full common position reached among all members of the Working Party, nor do they necessarily represent the views of the institutions to which the members belong. A list of participants and invited guests and speakers appears at the end of the report.

---

ISBN 92-9079-348-1

© Copyright 2001, Centre for European Policy Studies.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means – electronic, mechanical, photocopying, recording or otherwise – without the prior permission of the Centre for European Policy Studies.

Centre for European Policy Studies  
Place du Congrès 1, B-1000 Brussels  
Tel: 32(0)2 229.39.11 Fax: 32(0)2 219.41.51  
E-mail: [info@ceps.be](mailto:info@ceps.be)  
Website: <http://www.ceps.be>

# CONTENTS

---

Principal Conclusions	i
Executive Summary	ii
1. Introduction	1
2. The SMP Framework and the Scale of Intervention	3
2.1 Lessons of the 1998 package	3
2.2 The new regime	6
a. Market definition	6
b. Dominance	7
c. Remedies	9
2.3 Evaluation	15
3. The Coordination of Regulatory Intervention in the Union and Beyond	17
3.1 The case for institutional coordination	17
3.2 Article 6 of the proposed Framework Directive	20
3.3 Coordination with respect to frequency spectrum matters	26
4. The Internal Market	28
4.1 Licensing and authorisation regime	28
4.2 Coordination with other directives	29
Annex. The Current Set of Proposals	33
Members of the CEPS Working Party on Electronic Communications	35
Invited Guests and Speakers	36

**EUROPEAN COMMUNICATIONS**  
**AT THE CROSSROADS**  
***REPORT OF THE CEPS WORKING PARTY***  
***ON ELECTRONIC COMMUNICATIONS***

**PRINCIPAL CONCLUSIONS**

---

1. Under the new regulatory regime for imposing obligations on firms with SNP (significant market power):
  - Market definition should not be too narrow and it should take into account foreseeable changes in market conditions;
  - The use of as yet undefined concepts such as collective dominance and leveraging to assess SMP creates considerable uncertainty about the regulatory outcome; and
  - Insufficient attention has been paid to which form of remedy is appropriate for the different problems giving rise to SMP. Many of the remedies listed in the Access Directive are useful only in case of persistent monopoly (e.g. local loop).
2. The new regulatory regime, as regards SMP, while more sophisticated, will remain unpredictable in particular cases.
3. NRAs (national regulatory agencies) are likely to be overburdened with their new roles. In order to make the new regime predictable and consistent within the EU, it is vital that the Commission play a strong coordinating role.
4. The version of Article 6 of the Framework Directive contained in the common position of the Council is inadequate for lack of a ‘hard’ power on the part of the Commission.
5. Article 6 of the Framework Directive could be improved by:
  - Requiring NRAs i) to indicate in their draft measures already how they took into account the relevant decisions and other pronouncements of the Commission and other NRAs, with a justification for departing therefrom, as the case may be and ii) to consult the NCA (national competition authority) before circulating a draft measure.
  - Requiring the Commission, before taking a formal decision on an NRA measure, to consult a committee made up of representatives from the NRAs.
6. The scope of Article 6 of the Framework Directive must also include measures relating to radio spectrum (Article 8(3), (4) and (5) of the Framework Directive).
7. The current set of proposals does not achieve internal market objectives, and there seems to be a lack of concern about that point.
8. The Authorisation Directive leaves too much room for fragmentation, even though individual licenses are removed (e.g. different scope for general authorisations from one member state to the other).
9. The new regulatory framework misses the broader perspective. It still clashes with other directives such as the Television Without Frontiers and E-Commerce Directives.
10. The new regulatory framework neglects the relationship between content and electronic communications.

Community institutions are now busy with the second readings of the proposals for a new regime for regulating the European communications industry. While many aspects of the proposed new regulatory arrangements are widely accepted, a number of key choices still have to be made. The regulation of European communications is therefore at a crossroads.

This CEPS Working Party concentrated its work on those key choices lying ahead, with the aim of providing the institutions with some fresh input from well placed observers, at a time when discussions risk being bogged down in detailed issues of wording, at the expense of the broader perspective. It came to the following conclusions.

*1. The SMP framework and the scale of intervention*

The new regime is intended to operate as a *sui generis* form of competition policy. Where national regulatory agencies (NRAs) find firms with significant market power (SMP) as a result of a market analysis, they are required to intervene, choosing from a list of remedies specified in the draft legislation. Since markets are increasingly found not to contain firms with significant market power (and hence to be effectively competitive), this kind of intervention is abandoned and reliance is placed instead on the application of national and European competition law, which operates once an abuse of dominance has been found. The regulatory system thus contains automatic market-by-market sunset clauses.

This proposed regime imposes heavy technical burdens on the NRAs, which must participate in the process of market definition, evaluate the level of competition in markets and choose the necessary remedies. The NRAs are also operating in areas where European jurisprudence is not yet clear: this applies particularly to cases where several firms jointly exercise significant market power, or where market power is exercised in a vertically related market.

These circumstances create a considerable degree of uncertainty for firms, which may imperil investment and innovation. The uncertainty is aggravated by the low level of attention hitherto paid to the specification of regulatory intervention which the NRAs might choose. Several of these involve the mandating access to networks, sometimes at low (cost-oriented) prices. The expectation that NRAs might apply this remedy widely will discourage investment.

In order to make the regime predictable and consistent within the EU, it is vital that the Commission plays a strong coordinating role.

*2. The coordination of regulatory intervention at the EC level*

While the benefits of decentralised decision-making (through NRAs and other national authorities) must be preserved as much as possible, the Working Party is convinced of the need for a 'hard' coordination mechanism at EC level. The version of Article 6 of the Framework Directive contained in the common position of the Council is therefore inadequate and loses sight of the need to achieve the internal market in the communications sector.

At the same time, Article 6 of the Framework Directive – in the version put forward by the Commission and the European Parliament – could be improved to alleviate the concerns voiced by member states. Taking as a starting point the simplified version put forward by the EP at its first reading:

- When it submits draft measures to the Commission (Article 6(2)), the NRA should indicate in its reasoning how it has taken into account the relevant decisions and other pronouncements of the Commission and other NRAs, with a justification for departing therefrom, as the case may be. The NRA should also consult the national competition authority (NCA) before circulating a draft measure. This ‘upstream’ self-control should reduce the risk that the Commission would have to intervene against a draft measure.
- Before taking a ‘second-stage’ decision under Article 6(4) or 6(5), the Commission should consult a committee made up of representatives from the NRAs. This should ensure that the Commission remains in touch with the concrete problems faced by NRAs.

The resulting procedure would remain quick (maximum three months) and would likely grow to resemble the merger control procedure, where the second stage is used relatively infrequently.

Moreover, the scope of Article 6 of the Framework Directive should also include measures relating to radio spectrum (Article 8(3), (4) and (5) of the Framework Directive). The UMTS (universal mobile telecommunications system) experience provides ample justification for this. On this point as well, the common position is inadequate.

Finally, it is unfortunate that the Framework Directive contains no provision to ensure the consistency of national court decisions, such as those found in the proposed regulation reforming the competition law procedures under Articles 81 and 82 EC.

### *3. The internal market*

The Working Party is dismayed at the apparent lack of concern for internal market objectives on the part of the Community institutions. The internal market for electronic communications is by no means achieved, and the proposed new framework does not make it much more likely that it will be achieved soon.

In particular, the proposed Authorisation Directive, while clearly an improvement on its predecessor, leaves scope for further fragmentation, if for instance the various general authorisations do not cover the same services from one member state to the other. If it is not possible to have a general authorisation for all electronic communications, then at least member states should strive to harmonise the scope of the various authorisations they will put in place.

Furthermore, the new regulatory framework still misses the broader perspective. It does not solve the problems linked to overlap with closely related regulatory schemes following different principles, such as the Television Without Frontiers Directive and the E-commerce Directive, both of which follow the home-state control principle, in contrast to the regulation of electronic communications.

The distinction between ‘electronic communications’ and content is made much too strongly, in view of the obvious links between the two (as seen in recent competition law decisions such as *AOL/TimeWarner* or *Vivendi/Canal+/Seagram*). For example, the provisions on ‘must-carry’ in the Universal Service Directive remain overly technology-dependent for the sake of avoiding ‘content regulation’.

The Community institutions should not hide behind such conceptual distinctions to avoid presenting a coherent regulatory scheme that would advance the internal market in electronic communications.

In the last quarter of 2001, the debate about the re-regulation of European communications is reaching a final and critical stage. The Commission kicked off the Communications Review in November 1999, with the publication of a document that outlined the objectives and fundamental principles, and showed how they might be realised through legislation. In July 2000, it released a set of proposals – five Directives (Framework Directive, Access Directive, Authorisation Directive, Universal Service Directive and Privacy Directive) and a Decision on Radio Spectrum – all subject to the co-decision procedure (Article 251 EC).<sup>1</sup> In the course of the first half of 2001, these proposals (apart from one) went through the first reading in the European Parliament and were discussed in Council. In July and September 2001, the Commission tabled amended proposals. The Council has now also made its common position known. The Annex to this report contains all the references to the various documents made public so far in the course of the legislative process.

The Commission's policy objectives, set out at the beginning of the 1999 Review process, are a satisfactory starting point. These are:

1. to promote and sustain an open, competitive European market for communications services, to provide an even better deal for the consumer in terms of price, quality and value for money;
2. to benefit the European citizen, by ensuring that all have affordable access to universal service specified at the European level, and access to information society services; protecting consumers in their dealings with suppliers; ensuring a high level of data protection and privacy; improving transparency tariffs and conditions for use in communications services; and addressing the special needs of specific social groups, in particular disabled users and the elderly; and
3. to consolidate the internal market in a converging environment, by removing obstacles to the provision of communications networks and services at the European level so that, in similar circumstances, similar operators are treated in similar ways wherever the operator in the EU.

In the light of these objectives and the principles for regulatory action set out by the 1999 Review, we regard the appropriate criteria for assessment to be the following:

- Is the regime transparent and as legally certain as possible?
- Is it effective in protecting consumers?
- Does it encourage investment, innovation and competition?
- Does it promote the internal market?

---

<sup>1</sup> The Commission also presented a draft directive on competition in the markets for electronic communications services [2001] OJ C 96/2, to be adopted under Article 86(3) EC by the Commission acting alone. This directive would consolidate and replace (with few modifications) Directive 90/388 [1990] OJ L 192/10, as it has been amended over the years.

Inevitably, after such a long period of debate, many issues are already resolved. For example, there is almost universal agreement that the new legislation should recognise the phenomenon of convergence, and cover in an integrated way the networks and services that were previously treated separately under the 'telecommunications' and 'broadcasting' headings. For this reason, the proposed directives cover not telecommunications, but rather 'electronic communications'.

There is also general recognition that the new arrangements should acknowledge the progress that has been made in liberalising communications markets in recent years, and the urgent need to free firms from regulatory intervention that market developments have made either unnecessary or counter-productive.

There are, however, important issues yet to be resolved before the legislative process is complete. These are issues that the European Parliament and the Council must now address in their respective second readings; they may be resolved by informal agreement among the Community institutions, but they may require a more formal conciliation process carrying on into 2002.

The Working Party has focused its attention upon three issues in particular. The first concerns the workability of the proposals in the directives under which national regulatory agencies will analyse the degree of competition in European communications markets and intervene by various means in cases where the market is found not to exhibit effective competition. This task requires a great deal of demanding analytical work to be undertaken by the NRAs, and there is clearly a risk that some may find this impossible.

Related to this is the question of how responsibilities should be shared between the European Commission on the one hand and the NRAs on the other. This bears on the conflict between the desire to ensure that regulation is done at the lowest practicable level, by bodies that have the best local knowledge, and the desire to ensure that a harmonised approach is taken within the European Union. Related to this is the third issue that we deal with, namely whether the proposed legislation adequately promotes the internal market objective.

The report is thus organised as follows. Chapter 2 examines the triggers for regulatory intervention in communications markets, and the form which that intervention can take. Chapter 3 reviews issues arising in the coordination of regulatory intervention at national and EU levels. Chapter 4 considers internal market issues.

The new regulatory arrangements are set out in the proposed directives and draft guidelines, which already extend over hundreds of pages of text. Although the essence of the proposals can be fairly simply expressed, everyone agrees that the devil is in the detail. In this chapter of the report, we focus on one key issue – whether the regime that will emerge generates under-regulation which will lead to the exploitation of consumers, or over-regulation which will stifle investment and innovation, and ultimately work to the detriment of European citizens. Here we focus upon the regulatory processes to be deployed under the regime. In the next chapter, we turn our attention to the distribution of responsibilities for their use, particularly the roles of the Commission and the NRAs.

The Working Party's focus is not on the protection of individual consumers, or groups of consumers, such as the disabled and elderly (important as they are), but upon the problem of choosing levels of regulatory intervention that strike a balance between the interests of consumers as a group and producers as a group, both in the short term and in the long term, while furthering the internal market objective. In describing the current arrangements we rely chiefly on the amended proposals tabled by the Commission in July 2001, with appropriate references to alternative positions taken by the Parliament and the Council.

## 2.1 Lessons of the 1998 package

It is useful briefly to assess the 1998 legislative package, which aimed at liberalising telecommunications in the European Union.<sup>2</sup> For the ten years or more before that, a series of green papers, directives, recommendations and other interventions had imposed obligations on member states with respect to equipment markets, regulatory structures, value-added services and the regulation of infrastructure and service competition where it existed. But in 1998, the obligation was imposed on governments to liberalise entry into their telecommunications markets (except for those few countries for which extensions were granted).

However adequate the 1998 framework was at a conceptual level, serious defects nevertheless appeared in its implementation. Liberalisation and harmonisation directives first have to be transposed into national legislation to take effect in the member states. The transposition process took nearly two years, but the Commission was able to report in October 1999 that it was largely complete. But, as noted above, the directives give member states considerable latitude in implementation. For example, the Licensing Directive (Directive 97/13) permits ample variation on the requirements imposed on new entrants, and despite a requirement in the Interconnection Directive (Directive 97/33) that interconnection charges be cost-based, interconnection charges within the EU vary greatly.

Achieving the goals of liberalising the industry against the (initial) wishes of most incumbent operators and of many member states has required substantial regulatory intervention from the Commission. Moreover, the regulatory framework had to be

---

<sup>2</sup> This section draws on M. Cave and L. Prosperetti, 'European telecommunications infrastructure,' *Oxford Review of Economic Policy*, No. 4, 2001.

flexible enough to cover member states proceeding at quite different rates. In the early stages of liberalisation – the transition to competition – it is necessary to constrain the former monopolists considerably. Gradually this restraint can give way to a state of normalisation, as competition is established and regulatory intervention diminishes.

In markets where there are no technical restrictions on entry, arising, for example, from spectrum scarcity, the key structural requirement is that licenses should be granted to operators subject to a minimum of conditions.

For behavioural regulation, three instruments are required in the early stages of liberalisation:

- *Control of retail prices.* This is necessary only when the historical operator exercises market power at the retail level and where in the absence of retail price controls, customers will be significantly disadvantaged. Member states have historically fulfilled this consumer protection function, though under monopoly conditions, in a way that had the result that the controlled tariffs were seriously unbalanced with respect to cost.
- *Universal service obligation (USO).* Governments have typically imposed a universal service obligation requiring the historical telecommunications operator to provide service to all parts of the country at a uniform price, despite the presence of significant cost differences. Firms entering the market without such an obligation have a strong incentive to focus on low-cost, ‘profitable’ customers, putting the USO operator at a disadvantage: or the incumbent uses this as an argument against entry. There are, however, other ways to fulfil a USO, such as tendering for its provision.
- *Control of access prices.* In order to keep all subscribers connected with each other in the presence of competing network, operators require *access* to one another’s networks to complete their customers’ calls. This requires a system of inter-operator wholesale or network access prices. Especially in the early stages of competition, entrants will require significant access to the dominant incumbent’s network, and this relationship will almost inevitably necessitate regulatory intervention. As infrastructure is duplicated (initially the infrastructure necessary for long-distance and international conveyance), however, the need for direct price regulation of certain network facilities diminishes. Interconnection has been central to the development of competition within the EU, and the Commission has been heavily involved.

The Interconnection Directive (Directive 97/33) requires that charges for interconnection follow the principles of transparency and cost orientation. The first principle implies the publication of a reference interconnection offer. As a corollary, operators with significant market power (SMP) – defined as a 25% market share of a large pre-specified national market – are required to keep separate accounts for their wholesale or network activity and for other activities, including retailing. Cost orientation turned out to be an excessively vague phrase, permitting excessive interconnection charges.

Until adequate cost data were available, the Commission published recommended ‘best current practice’ interconnection charges, based upon the average of the member states with the lowest charges. Charges dropped rather fast for some countries, but not for all.

The level of access charges is likely to have had a major impact on entry strategy. A recent study commissioned by OPTA, the Dutch regulator, on the relationship between access pricing in The Netherlands and the development of infrastructure competition concluded that entrants in Holland typically adopted the policy of first replicating those assets which involved a relatively small amount of sunk costs.<sup>3</sup> Thus a *de novo* entrant may typically begin purely as a re-seller, investing primarily in marketing and advertising. It may then switch to making investments in switching and conveyance at the national level, before contemplating investment in the local loop.

A cable operator entering into telephony or the provision of internet services has a different inheritance and may adopt a different strategy. Further investment is required in the local loop, and the cable operator has to buy call termination from the incumbents – a service that is wholly non-replicable. The cable operator also needs access to long-distance conveyance, which it can either replicate itself or, for example, utilise facilities built by a former re-seller now investing in the national infrastructure. Finally, hypothetical non-cable entrants into the high band-width market will encounter the local loop as a non-replicable asset, making unbundling of the loop indispensable.

This analysis identifies two ways in which regulatory influence can be brought to bear to affect investment by infrastructure competitors. The first relates to the relative access prices of different assets. An entrant's investment decisions are more concerned with the price of replicable assets than of non-replicable assets. A regulatory policy that imposes a low price (relative to cost) for the former thus encourages infrastructure investment. Secondly, because entrants take time to develop their competing asset base, and begin with those assets that are the easiest to replicate, a policy of prices that rise over time will facilitate the gradual development by entrants of their own comprehensive network. The most investment-friendly policy is one of initially low access prices for all network services, followed by a rising price trend applied successfully to assets in descending order of replicability. Although the discussion above has been couched in favour of the price at which mandatory access is available, it can be translated into the alternative dimension of where access is mandated.

Taken together, the data and our account of falling access prices would seem to suggest the *de facto* existence of a 'service bias' in European telecommunications regulation. The Commission has wanted to open up all avenues of competition but in practice has been more preoccupied with opening existing infrastructures than with encouraging the construction of new ones. Entry of re-sellers has been vigorous and prices have been dropping fast, but this does not seem to have provided medium-term incentives for an extensive deployment of alternative infrastructures.

In a way, this is unsurprising, if we consider that existing ONP (open network provision) legislation was drafted in the first half of the 1990s, when – outside the UK – all major incumbents were state-owned. The idea of having competition upon a big, publicly owned network was then quite attractive.

While competition between fixed networks in Europe is rather limited, as is competition in fixed services markets in many member states, mobile has been a success story. Government spectrum policy initially restricted entry, but as third and fourth operators

---

<sup>3</sup> M. Cave et al., 'Access pricing and infrastructure investment (see <http://users.wbs.warwick.ac.uk/cmur>).

came into the market, prices fell and demand grew, assisted by innovative tariffs such as handset subsidies and pre-pay. The adoption within Europe of a highly successful second-generation standard, GSM, assisted in this process. The sector was lightly regulated. Apart from two pinch points, mobile call termination and international roaming charges, the absence of regulation was highly beneficial.

The new regulatory regime is thus being developed against a background of significant successes in mobile but much more limited competition in fixed services.

## 2.2 The new regime

At one level, the new regime is a major step down the transition path between monopoly and normal competition, governed exclusively by generic competition law, with regulatory ‘sunset clauses’ built in by the prohibition on regulating ‘effectively competitive’ markets. It represents an ingenious attempt to flexibly corral the NRAs to go down the path of normalisation – allowing them, however, to proceed at their own speed (but within the uniform framework necessary for the internal market). Since the end state is one governed by competition law, the Commission proposes to move away from the rather arbitrary and piecemeal approach of the current regulatory package towards something consistent with competition law. However, competition law is to be applied not in a responsive *ex post* fashion, but in a pre-emptive *ex ante* form. The new regime therefore relies on a special implementation of the standard competition triple of *market definition*, identifying *dominance*, and formulating *remedies*. We examine these in turn.<sup>4</sup>

### a) Market definition

Under the Framework Directive, the Commission will issue a decision on relevant markets – intended to be defined in the manner of competition policy; NRAs may depart from the decision with respect to geographical market definition if they think it appropriate to do so in their own circumstances (see Section 3 below). The NRAs and, more significantly, the Council (which in some respects appears to have been captured by the NRAs) prefer the list of markets to be a recommendation, departure from which is easier.

Both NRAs and NCAs and the Commission and European Court of Justice have undertaken many market definition exercises already, often using the now conventional competition policy approach. It is generally agreed that this involves applying the so-called hypothetical monopolist test, under which the analysts seek to identify the smallest set of goods or services with the characteristic that, if a monopolist gained control over them, it would be able to raise prices by 5 to 10 percent over a sustained period, normally taken to be about a year. The monopolist’s ability to force through a price increase obviously depends upon the extent to which consumers can switch away from the good or service in question (demand substitution) and the extent to which firms can quickly adapt their existing productive capacity to enhance supply (supply substitution).

---

<sup>4</sup> The first two of these processes are set out more fully in a draft Guideline, which is currently being revised. The first draft, however, confined itself largely to general, rather than specific advice. The absence of a guideline on remedies is discussed below.

While this approach is conceptually helpful, it is difficult to apply in practice, particularly across 15 markets simultaneously. It is reasonable to suppose that the Commission will be forced to fall back on more informal approaches which inevitably give the market definer considerable latitude.

It is often observed that market definitions depend upon the nature of the investigation that is being undertaken. This proposition is reinforced by examining the list of market definitions in the communications industry, adopted by the European Court of Justice and the Commission, which suggests that, in certain cases involving mergers or specific anti-competitive practices, highly disaggregated market definitions have been adopted. It is pertinent to point out that, since competition authorities will have access to specific *ex post* remedies under national and European competition law, there is no need to seek to replicate in the decision very narrow market definitions adopted for the purposes of particular inquiries.

In terms of their effect on the intrusiveness and effectiveness of regulation, market definitions cut both ways. A narrow definition increases the prospect of finding significant market power (SMP) but confines the scope of regulation. A broad definition is likely to reduce any firm's market share, but a finding of SMP will give regulators the obligation to intervene over a wide area.

A consequence of the reliance of the proposed new regime on pre-emptive regulation is that it is appropriate to adopt a forward perspective. Under the proposals, a finding of dominance (or significant market power) entails some kind of regulatory intervention: as in the case under the Merger Control Regulation, there is no need to make a finding of abuse. In the Working Party's view, market definitions should take account of foreseeable changes in market conditions.

#### b) Dominance

After first proposing an even more interventionist proposal, the Commission retained, in its initial set of proposals of July 2000, as a threshold for intervention the classical 'dominance' threshold, which it calls significant market power.<sup>5</sup> Article 13 of the proposed Framework Directive states that the dominance can be exercised by a single firm, or collectively, or leveraged into a vertically related market.

In addition, Article 14 of the Framework Directive contained a prohibition on intervention in markets that are effectively competitive – implicitly defining markets where dominance is absent as effectively competitive. This is a change of fundamental importance, and a major step in the route towards convergence with competition law. Its significance depends, however, upon the scope of dominance. Although single firm dominance has come to be well understood, joint dominance remains one of the most elusive and unstable components of European competition law.

Traditionally, joint dominance was considered to require the existence of some kind of formal 'economic link' between the firms in question – for example some degree of

---

<sup>5</sup> The same term was used in the 1997 Interconnection Directive, but with a different meaning (see Section 2.1 above).

common ownership.<sup>6</sup> Recent judgements have expanded the interpretation of economic links to include the relationship of interdependence existing between the parties to a tight oligopoly where the firms are in a position to anticipate one another's behaviour and are therefore inclined to behave in parallel.

In practice, in order to demonstrate collective dominance, it may be necessary to show that firms are tacitly coordinating their conduct on the basis of explicit expectations of rivals' responses. On this interpretation, it would not be enough, for example, to show (à la Cournot) that each firm was operating in a way that accepted its rivals' current behaviour as a 'given' in competitive conditions. In relation to an observed highly concentrated market, rather than in a merger proceeding where the focus is inevitably on the hypothetical consequences of the merger, the prospects for proof of joint dominance are weak.

The communications industry, like many industries, consists of a series of activities that can be performed either individually by vertically separated firms or jointly by a vertically integrated firm. There are well established benign motives for firms to become vertically integrated. In particular, doing so may reduce production costs, by eliminating the costs of transactions between two separate firms. It has also been argued that vertical integration by itself does not add additional market power. Thus, if a firm held a monopoly of an activity or process at any stage in an industry it would be able to extract maximum profit from that monopoly, and would have no desire to engage in other activities, unless it was extremely efficient in performing them.

More recent analysis of vertical integration has focused upon the way in which a firm can enhance its position by bringing together degrees of market power at different levels in the production process, in such a way that the whole becomes greater than the sum of the parts.

This is achieved by a variety of means involving the interaction of particular features of each market. For example, in one market (say, for delivery platforms), there may be consumer switching costs, because consumers need to make significant investments in equipment. The second may exhibit differentiation (for example, a live broadcast from one soccer league may be a poor substitute for a broadcast from another). In such circumstances, making the service exclusive to the delivery platform may strengthen consumer lock-in and give the firm an ability to distort competition. In many cases in the communications industry, however, particular activities (including the operation of networks and of technical services) are likely to be undertaken by small numbers of operators that are themselves vertically integrated into services. Significant detriment may arise for consumers in circumstances where a finding of single dominance would be difficult.

In these cases, the issues of joint dominance and leveraging interact, creating considerable uncertainty about the regulatory outcome. More generally, it is difficult for firms to forecast how widely NRAs or the bodies to which their decisions can be appealed will define dominance.

---

<sup>6</sup> Certain types of agreement between firms might also be caught under Article 81, which prohibits collusion among firms.

c) Remedies

Under the proposed directives, NRAs will have the power to impose obligations on firms found to enjoy significant market power in a relevant market. In earlier drafts, the NRA had the obligation to act as well, but this would have been inappropriate where the NRA's market analysis finds no signs of abuse.

The NRAs will act within a framework of duties set out in Article 7 of the proposed Framework Directive.<sup>7</sup> This observes that the measures they take shall be proportionate to the policy objectives identified. This can be construed as meaning that the intervention is appropriate, no more than is necessary, and, by implication, satisfies a cost-benefit test, in the sense that the expected benefits from the intervention exceed the expected costs. Article 7 additionally specifies policy objectives, which determine the weights appropriate for use in the cost-benefit analysis. For example, Article 7(2) requires NRAs to promote an open and competitive market for electronic communications networks and services by maximising users' choice and value for money, eliminating distortions or restrictions to competition and encouraging efficient investment and infrastructure. Article 7(4) requires NRAs to promote the interest of European citizens by, *inter alia*, providing consumers with protection in their dealings with suppliers and requiring transparency of tariffs and conditions of using publicly available electronic communications services. NRAs must also contribute to the development of the internal market by avoiding different approaches to regulation within the EU. These provisions provide an important context in which NRAs must hone their interventions.

In the light of the application of the concept of dominance in the proposed directive (in particular in Article 13 of the Framework Directive), the NRAs must also ensure that they act in accordance with European case law. One way of interpreting this requirement is that the NRAs should intervene in relation to an operator with SMP to produce behaviour consistent with that which would exonerate a dominant firm from the charge of abuse before the European Court of Justice. Regulatory interventions should also take account of other aspects of the framework to be established by the proposed directives. Notably, the existence of a procedure for resolving disputes between undertakings (set out in Article 17 of the proposed Framework Directive) provides an additional mechanism for resolving disputes. The existence of this alternative approach should be taken into account in determining whatever interventions are required.

Little attention has been paid to the question of the action to be taken by an NRA in relation to a firm or firms judged to exercise SMP. While the circumstances in which intervention is required are set out in the proposed Framework Directive, discussion of the nature of the regulatory response is principally confined to the proposed Access Directive.<sup>8</sup> Putting on one side proposals relating to conditional access systems and other associated facilities, Articles 8 to 13 of the proposed Access Directive outline the NRA's options. Thus Article 8 (Imposition, Amendment or Withdrawal of Obligations) reads as follows:

---

<sup>7</sup> References are to the amended proposals (COM (2001) 369 and 380), 4 July 2001.

<sup>8</sup> Article 16 of the Universal Service Directive also considers retail price control.

1: Where an operator is deemed to have significant market power on a specific market ..., national regulatory authorities shall impose one or more of the obligations set out in Articles 9-13 of this Directive as appropriate, in order to avoid distortions of competition. The specific obligation(s) imposed shall be based on the nature of the problem identified.

2a: Obligations imposed in accordance with this article shall be based on the nature of the problem identified, and shall be proportionate and justified in the light of the objectives laid down in Article 7 of the [Framework Directive]...

However, while Articles 9-13 of the Access Directive and the associated recitals (Nos. 9-14) contain some indications of the circumstances in which, in the Commission's view, a particular obligation should be imposed, the mapping from the existence of SMP to the appropriate regulatory solution is, at the least, incomplete. This opens the door to the possibility of over-regulation, under-regulation or regulation which, because the intervention does not deal with the problem in question, is simultaneously unnecessary and ineffective.

The ascending hierarchy of obligations in Articles 9-13 of the Access Directive can be summarised and evaluated as follows:

**Article 9 of the Access Directive:** *Obligation of transparency. This involves publishing data on technical specifications, network characteristics, terms and conditions for supplying use, and prices. In particular, NRAs may require the publication of a reference offer.*

This contains a range of different disclosures. Some of them can be construed as necessary for other firms to achieve interconnection or network access, for example the location and current technical specifications of points of interconnection. In the case of a firm with SMP, these may be fairly unexceptional, although the standardisation process may have already placed much of the information in the public domain. Others relate to transparent commercial conditions for supply, including price. Without the obligation of non-discrimination (see Article 10), there is no obvious basis for requiring the publication of a reference offer.

Disclosure of price data, is a possible instrument of collusion or price leadership. For this reason, price disclosure may be particularly unsuitable as a remedy where joint dominance is in question. The same problem applies in a moderated form to single dominance. Under the cost benefit test, the risk of harm should be high to justify price disclosure.

The implication of this analysis is that NRAs should address the question of transparency in a nuanced way. While the case for disclosure of technical information for a firm's access to technical facilities may be strong, the same reasoning does not extend to the mandatory disclosure of pricing information, which is rarely desirable of and by itself, even though it may be an element of more vigorous obligations.

**Article 10 of the Access Directive:** *Obligation of non-discrimination. This requires the operator to provide similar conditions in similar circumstances to other undertakings providing similar services, and to provide services and information to others under the same conditions and of the same quality as they provide for their own services, or those of their subsidiaries or partners.*

Since obligations relating to mandatory and cost-oriented access appear later in the Access Directive (see Articles 12 and 13 discussed below), it seems reasonable to conclude that Article 10 does not of itself trigger these obligations.

This is primarily relevant to cases of an SMP operator which is vertically integrated into a competitive market, and the obligation is said to be needed to prevent exclusionary behaviour by the firm with SMP, through the foreclosure of competition in the upstream and downstream market. The key issue, therefore, is whether this is a matter that can adequately be dealt with under competition law, on the basis that such behaviour would be a clear and foreseeable breach of Article 82 EC, for which significant case law exists.

In the absence of such integration, a firm may choose to price discriminate, or discriminate in other ways, in response to different demand conditions. This would immediately raise the question of whether such conduct would be justifiable in efficiency terms, in accordance with the inverse elasticity rule. If the ultimate problem were one of excessive pricing, then the obligation of non-discrimination might be ineffective, and counterproductive for consumer welfare.<sup>9</sup>

**Article 11 of the Access Directive:** *Obligation of accounting separation. An NRA may require a vertically integrated company to make its wholesale prices and its internal transfer prices transparent, especially where the companies which it supplies and itself compete in the same downstream market.*

This represents a considerable ratcheting up of the regulatory burden on the firm with SMP. NRAs should ask themselves whether the additional burden is justified. The principal justification would be a situation in which there were a persistent network monopoly enjoying an entrenched competitive advantage (which may itself be the result of regulatory policies on retail tariffs – see below), which merits ring fencing.

It has been argued that separate accounts may also play a role in facilitating the subsequent detection of particular abuses using competition law instruments. An NRA would, however, have to give serious thought to the question of whether this provides a legitimate justification for imposing such a wide-ranging obligation rather than the obligation to be able to demonstrate non-discrimination, or to respond to charges of abuse of dominance.

**Article 12 of the Access Directive:** *Obligations of access to, and use of specific network facilities. An NRA may impose obligations on operators to grant access to*

---

<sup>9</sup> This involves the well known proposition that third degree price discrimination (charging different buyers different amounts for the same product) can increase both profits and consumer welfare, in comparison with a situation in which discrimination is prohibited.

*specific facilities or services, including in situations when the denial of access would hinder the emergence of a competitive retail market, or would not be in the end users' interests.*

This represents an obligation to be implemented in circumstances similar to, but significantly broader than, those in which the essential facilities doctrine is applied under competition law.<sup>10</sup> The extension of the test lies in the replacement of the precondition under competition law for mandatory access, that the asset is essential and cannot be replicated by any reasonable income, by a much broader condition that NRAs can mandate access in circumstances where its denial 'would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-user's interest.'

There is a risk that the last phrase in particular ('would not be in the end-user's interest') might open the door for extensive regulatory intervention. The obvious problem is the conflict between users' short-run and long-run interests. Short-run interests might best be furthered by the adoption of mandatory access on a wide scale. However, such a policy clearly reduces incentives to invest in competing facilities, and is likely to stifle innovation in the long term.

On the basis of this argument, and given the general desire that a new regulatory framework should approximate closely to competition law, there are grounds for changing the drafting of the Obligation. Should this not be done, then NRAs should rigorously apply an appropriate cost benefit test, using a suitable discount rate to weigh up short-term gains to end-users against the medium and long term disadvantages which a policy of mandatory access might bring.

**Article 13 of the Access Directive:** *Price control and cost accounting obligations. This deals with situations where a potential lack of competition means that the operator concerned might be capable of sustaining prices at an excessive level, or applying a price squeeze, to the detriment of end users. National regulators should take into account the investment made by the operator and the risks involved.*

It is generally accepted that the finding that a facility is essential implies the application of some appropriate pricing rule. The nature of that pricing rule is, however, by no means clear. In this context, Article 13 can be conceived as imposing the obligation of cost-oriented prices, the operator assuming the burden of proving that 'the charges are derived from costs including a reasonable rate of return on investment...'

The circumstances identified as appropriate for the application of this rule are 'situations where a market analysis indicates that a potential lack of effective competition means that the operator concerned might be capable of sustaining prices at an excessively high level, or applying a price squeeze to the detriment of end users'. There is, however, a major distinction between these two cases. In the case of excessive pricing, the question is whether SMP is being exploited directly

---

<sup>10</sup> Article 11 of the Framework Directive notes the application of the disputes resolution procedure (Article 17) to failures to agree on co-location and facility sharing. This represents a more restricted form of intervention which may be preferable in certain cases.

through an excessive price. In the case of a margin squeeze, the hypothesis is that the operator with SMP is foreclosing competition in a vertically related area by pricing that fails to cover costs. The appropriate way of dealing with the latter issue is discussed above.

Cost-oriented pricing for interconnection or access to customers should only be considered when dealing with an operator with SMP which is both persistent and incapable of being dealt with by other remedies, including particularly structural remedies. A classic case for its application might therefore be access to the local loop, either for call termination or for the purposes of leasing unbundled loops – provided that one operator enjoys a monopoly or position of super-dominance in the relevant geographical area.

It is far more questionable whether the principle should be applied where there is network duplication. This question has arisen particularly in connection with the mobile market, in relation both to indirect access or access to the network by virtual network operators.

In the former connection it has correctly been argued by OFTEL (and other NRAs) that offering cost-plus access to mobile call origination to indirect access providers would have the consequence of imposing a particular configuration of mobile call charges, prohibiting tariff innovation, such as the use of handset subsidies to expand the market, and reducing incentives to invest in competing networks. On the other hand, OFTEL has argued that the obligation to provide indirect access on a retail minus basis may be appropriate in the interests of expanding the number of competitive suppliers in a sector where spectrum limitations place a constraint upon the number of network operators.

In other words, NRAs should be extremely parsimonious in imposing the obligation of cost-oriented prices. It should be confined to cases where the monopoly is persistent and incapable of being addressed by structural remedies. The option of retail minus pricing should be retained.

These provisions relate to the terms on which one operator obtains access to another's network or customers. It is arguable that, if appropriate regulatory arrangements are in place in this respect, then the need for additional retail price regulation is limited, on the basis that firms would be able to buy interconnection and access services and perform their own retailing functions, where entry into retailing is freer – absent retail margin squeezes which the interventions above are designed to prohibit. However, the draft Directive on Users' Rights offers an additional regulatory intervention relating to retail tariffs (see below).

**Article 16 of the Universal Service Directive: Retail Price Regulation.** *Where an NRA determines that a retail market is not effectively competitive, it shall ensure that undertakings with significant market power in that market orient their tariffs towards costs, avoiding excessive pricing, predatory pricing, undue preference to specific users or unreasonable bundling of services. This may be done by appropriate retail price cap measures. Where there is retail tariff regulation, appropriate cost-accounting systems must be implemented. Retail tariff control may not be applied in geographical or user markets where the NRA is satisfied that there is effective competition. It has been*

*suggested that retail price regulation will apply only to retail services subject to a USO. This requirement is not explicit in the current proposals, and should be made so.*

The implicit assumption of many regulators and commentators of the communications industry is that if wholesale markets can be regulated to avoid the harmful effects of SMP, then regulation of retail markets can be confined to solving residual consumer protection problems, rather than problems relating to the abuse of market power. The underlying hypothesis is that entry into retailing activities will be sufficiently free from barriers to permit deregulation.

This proposition has not been properly tested, as many NRAs have been reluctant to accept the fundamental implication of the policy, which is that cost-based wholesale prices and competition in the retail market will bring retail prices into line with costs, thereby eliminating distributionally important pricing distortions associated with regulator-driven cross subsidies (or departure from cost orientation), involving either different services, such as fixed line access and usage, or different groups of customers, such as high-cost rural and low-cost urban consumers.

The working out of this dilemma can be seen in OFTEL's recent decision and consultation documents relating to regulation of the retail prices of fixed line services. The 'problem' is that BT continues to make persistent excess profits on its retail activities, both to residential and business customers. One possible response is to move away from unbalanced tariffs in the retail market. The effects of this could, of course, be mitigated by targeted regulation intervention to protect particular groups of users.

The above discussion has suggested indications and contra-indications for the application of the various interventions considered. We present them below in tabular form.

<b>Obligation</b>	<b>Indication</b>	<b>Contra-indications or adverse effects</b>
Transparency	Technical information indispensable to successful interconnection	Price disclosure may ensure excessive/rigid prices
Non-discrimination	Partial remedy against margin squeeze	Too broad a prohibition may reduce consumer welfare; conditions for discrimination may not exist
Separate accounting	Potentially useful for persistent monopoly	Costly; not essential for price squeeze investigation
Mandatory access	Useful to dealing with persistent network monopoly	Reduces incentives to invest and innovate
Cost-oriented pricing	Useful to dealing with persistent network monopoly	Reduces incentives to invest and innovate
Retail price control	Can maintain distorted retail price structure; possible approach to consumer protection issues (e.g. ignorance)	Widespread mandatory access by re-sellers an alternative

Perhaps the most striking feature of this analysis is that three of the five ‘access and interconnection’ remedies are principally appropriate to cases of persistent monopoly, of the kind found primarily in the fixed local loop. On this basis, the scale of desirable regulatory intervention under the new arrangement is quite limited. This highlights the fact that sector-specific regulation should be confined to cases where some durable feature of the market creates a persistent and high barrier to entry. In some cases, the barrier may be legal or regulatory – for example, limited allocation of spectrum may represent an absolute barrier to entry in mobile markets, although the latter may still be effectively competitive provided enough operators are licensed, even if entry is then prohibited. In other cases, notably the local loop, the barrier may arise from the combination of significant economies of scale and sunk investment, which together ensure that the market is not contestable.

It is, of course, possible to multiply types of regulatory obligations – for example by improving a specific restriction on bundling and tying. However, the Working Party has taken the view that the pay-off to this is probably negative, simply because each example is different and requires the kind of ‘rule of reason’ or case by case approach which is best applied under competition law, rather than sector-specific regulation

### **2.3 Evaluation**

It is now time provisionally to evaluate the proposals in terms of the criteria identified above. The first issue was whether the regime is transparent and legally certain. The analysis above notes the importance of the fact that NRAs can only intervene when SMP is identified in the relevant market. Hence the importance of market definition, the current proposals for which involve sharing of responsibilities between the Commission and NRAs. This facet of the situation, and the inherently subjective element in market definition, make it difficult for companies to anticipate whether they are likely to be regarded as holding SMP. Some of this uncertainty will diminish once the process gets underway, but it would be hard to overestimate the burden that the proposed framework will place on NRAs (or their economic and legal consultants).

The second element, the determination of dominance, also is subject to uncertainty, particularly in relation to joint dominance. This may shortly be clarified by the European Court of Justice or by a notice from the Commission. At present, however, the burden of proof on the NRA to demonstrate what economists refer to as tacitly collusive behaviour seems high.

Finally, there is a question of remedies. When confronted with SMP, NRAs have to do something, but the arsenal at their disposal ranges from popguns to nuclear weapons, with most of them tending towards the latter than towards the former. The silence in the Access Directive on any cost-related pricing scheme lyric is a worry, although its less-draconian alternative, retail minus, may be implicit in the mandatory access obligation.

In summary, the proposed arrangements are sophisticated and share some of the high-level conceptual certainties as are enjoyed by competition law. However, their application in particular cases is highly unpredictable.

It is helpful to brigade the next two criteria of protecting consumers and encouraging investment, innovation and competition together, because, in our view, the success of the regime in these two respects hinges crucially on the same consideration.<sup>11</sup> The criteria require answers to the question whether the new regime is capable of striking an appropriate balance between consumers' short-term interests and in the promotion of service competition and their long-run interests in facilities competition. In this respect, the Working Party shares the view of Justice Stephen Breyer of the US Supreme Court, who in a judgement on an interconnection issue, observed:

Increased sharing by itself does not automatically mean increased competition. It is in the unshared, not in the shared portions of the enterprise that meaningful competition would likely emerge. Rules that force firms to share every resource or element of the business would create, not competition, but pervasive regulation, for the regulators, not the market place, would set the relevant terms. (Quoted in A.E. Kahn, *Whom the Gods Would Destroy or How not to Deregulate*, 2001, p. 7.)

Put simply, the Working Group's concern is that NRAs may not take this view, and may be excessively prone to mandate access, at cost-based prices. This would be contrary to the policy objective of encouraging investment and innovation, but it would be justified in terms of short-run consumer protection.

How can this outcome best be avoided? What is required is a coordinating mechanism which prevents NRAs from over regulating. There are a number of ways in which this might be achieved in principle, but under the current proposals, the key area is the distribution of responsibility between NRAs and the Commission. To put it bluntly, the de-regulatory intentions of a good regime could be undermined by excessive discretion exercised by NRAs bent on over-intrusive regulation.

---

<sup>11</sup> The Single Market issue is discussed in Chapter 4.

**CHAPTER 3**  
**THE COORDINATION OF REGULATORY INTERVENTION**  
**IN THE UNION AND BEYOND**

---

**3.1 The case for institutional coordination**

One of the most positive and welcome developments in the proposed new regulatory framework for electronic communications is that more attention is paid to institutional and procedural issues.

Indeed, as things currently stand, firms active in the sector have to deal with numerous regulatory authorities. In a given member state, the following authorities will have a say in communications matters:

- the National Regulatory Authority (NRA), whose existence is mandated by the EC regulatory framework;<sup>12</sup>
- the National Competition Authority (NCA), which can intervene in a large number of disputes on the strength of national competition law, EC law (if empowered to apply it) or both; and
- the national courts, which can intervene not only as a further instance, by way of appeal or judicial review of administrative decisions, but also directly on the strength of Articles 81 and 82 EC or whatever powers they might derive from national regulatory or competition law.

In addition, of course, the European Commission can step in, either directly in its capacity as competition authority or more indirectly as the guardian of proper application of EC law by the member states (including their authorities).

As soon as a firm operates at a more pan-European level, the above picture must of course be multiplied by the number of member states involved (except for the European Commission). Moreover, in a context of convergence, even if the proposed new regulatory framework strives to establish a clear dividing line between content and networks, it cannot be excluded that national authorities concerned with content would also have their say, making the institutional side of the regulatory framework even more of a maze.

In the light of the above, it would be tempting to issue a strong disapproval of the current state of affairs. Yet upon a closer look there are some redeeming features that must also be taken into account.

From a practical perspective, the proliferation of competent authorities can serve the interests of claimants, by giving them a choice of fora in which to pursue their grievances; in each case, they will presumably pick the one that they perceive as the most favourable to their claim. Obviously, this may contribute to keeping the pressure on prospective defendants to comply with applicable law and regulation. For prospective defendants, however, it can become difficult to manage legal and regulatory

---

<sup>12</sup> Now in Directive 90/387 (ONP Framework Directive) [1990] OJ L 192/1, Art. 5a (as added by Directive 97/51 [1997] OJ L 295/23) and Directive 90/388 (Services Directive) [1990] OJ L 192/10, Art. In the new framework, the creation of NRAs is mandated in the Framework Directive, Art. 3.

matters when claims can arise in a number of fora. Most significant firms are likely to fall on the claimant side in some member states and on the defendant side in others, so that they experience both advantages and disadvantages.

The risk of contradictory decisions from these various instances affects claimants and defendants alike, however. Claimants who would have erred in their choice of forum might see their competitors obtain better results in another forum. More significantly, defendants might be put in a position where they have to comply with contradictory or perhaps even incompatible rulings.

Without a doubt, the risk of contradiction is the main drawback of having multiple authorities. In fact, uncoordinated action by the various authorities undermines the very basis for regulatory intervention: because of excessive costs arising from contradictions and incompatibilities, regulatory intervention could very well fail to deliver any overall benefit.

In any event, within a single member state, contradiction should be avoided at all costs, since the various authorities exert jurisdiction over the same firms within the same territory, and operational difficulties arise immediately. However, most member states have already provided for coordination mechanisms in their legislation, at least as regards NRAs and NCAs, ahead of proposed EC law obligations in this respect.<sup>13</sup>

The situation is less clear-cut at the EC level and beyond. As a starting point, it is trite to say that the communications sector has a global dimension, and that communications firms, as soon as they reach a certain size, plan and operate at a regional if not global level. The logical consequence is that regulation should correspondingly be coordinated – at the very least – at the level at which firms operate. For a pan-European or global communications firm, contradictory or even incompatible decisions arising from the respective authorities of various member states engender significant costs, since they complicate the entire range of activity, all the way from business planning down to operations. They also give rise to distortions of competition, when certain firms conduct a large part of their operations under a more or a less favourable national legal and regulatory framework. The situation is typical of failures in the internal market, and the solution involves greater coordination at EC level and beyond.

At the same time, there are some reasons for refraining from coordinating the actions of national authorities more than necessary:

- *Learning-by-doing.* In the telecommunications sector, there is agreement on the general regulatory principles (e.g. access on a non-discriminatory, transparent, cost-oriented basis). However, more specific decisions are notoriously difficult to take, given policy, technical and economic considerations (e.g. what type of access must be given? which conditions are not discriminatory? what price level qualifies as cost-oriented?). A number of options are open, none of which can be dismissed out of hand or picked as the obvious winner. In such cases, authorities that have to take decisions on the same or similar issues can benefit from the experience of those that already had to commit themselves to a decision. With time, one or more best practice(s) should emerge.

---

<sup>13</sup> See the proposed Framework Directive, Art. 3(4) and (5).

- *Closeness to the playing field.* National authorities are usually in a better position to know the situation in their respective jurisdictions, if only because their resources are devoted solely to that jurisdiction.
- *Responsiveness and flexibility.* Furthermore, the various decision-making procedures available under EC law are known to take some time: coordination at the EC level is thus likely to lead to longer decision-making processes. As a result, regulatory intervention will then be less responsive and flexible, since both its onset and its termination will not follow as closely the development of the market.

In the end, no simple solution can be put forward to ensure the appropriate level of coordination. Nonetheless, some guiding principles can be put forward:

- The benefits of a more decentralised approach, as described above, will not arise automatically from the mere fact that decisions are taken by national authorities. For instance, there is little to be gained if a national authority takes a decision in complete isolation, without examining what other authorities have done or are contemplating doing. Similarly, taking a different decision for political reasons (power struggle, etc.) unrelated to the situation of the market is counter-productive. At the very least, it would follow that, national authorities should be obliged to take into account the work of other authorities, and that they should give reasons if they choose a different route.
- The benefits of coordination can equally be lost through overly long or complicated procedures. The coordination procedure must therefore aim to keep costs and delays to a minimum.

The amount of coordination can vary depending on the level of the decision, which ranges from general policy decisions to individual cases. At the level of general policy decisions, i.e. legislation, a strong case can be made for coordination. At the opposite end of the range, i.e. decisions in individual cases, the benefits of a decentralised approach are overwhelming. One of the main characteristics of the regulation of electronic communications<sup>14</sup> is that a number of significant decisions are taken at an intermediate level, somewhere between legislation and individual decisions. For instance, decisions concerning the main aspects of interconnection with the incumbent (tariffs, conditions of co-location, etc.) are derived from higher legislative principles (cost-orientation, non-discrimination); at the same time, they go beyond the individual case, since they influence the operations of the whole industry. That intermediate level definitely benefits from coordination, yet at that level coordination must be more carefully balanced against the benefits of a more decentralised approach.

The current regulatory framework harmonises a number of basic principles, but it does not go much 'deeper' in order to ensure coordination at the intermediate level, as described above. This has been a weak point in EC telecommunications law so far. Even where an effort was made to take EC-level coordination fairly far, as with the unbundling of the local loop where an EC regulation was adopted on that specific topic, the lack of coordination further down, when member states had to turn the regulation

---

<sup>14</sup> The same can be said of other regulated sectors, such as utilities (energy, post), transport of financial services.

into concrete decisions, is proving to be very costly and threatens to nullify the benefits to be expected from an EC-wide approach.

### 3.2 Article 6 of the proposed Framework Directive

Against that background, the Working Party very much welcomes the intention of the Community institutions to improve upon the coordination amongst member states through various mechanisms. The main one is Article 6 of the proposed Framework Directive, in particular Article 6(2) and following.

Article 6 of the proposed Framework Directive has been one of the most debated provisions of the whole new package so far, and the three institutions have put forward different views, which are summed up in the following table, together with the proposed solution put forward by the Working Party (discussed further below).

<b>Commission – Amended proposal</b>	<b>EP – 1<sup>st</sup> reading</b>	<b>Council – Common position</b>	<b>CEPS Working Party Proposal</b>
Covers decisions concerning frequencies (Art. 8(3), 8(4), 8(5) FD), relevant market definition and analysis (Art. 14(4), 14(5) FD) and departures from SMP framework (Art. 8(2) AD)	Covers decisions concerning frequencies (Art. 8(3), 8(4), 8(5) FD), relevant market definition and analysis (Art. 14(4), 14(5) FD) and departures from SMP framework (Art. 8(2) AD)	Covers decisions concerning relevant market definition and analysis (Art. 14(2), 14a(4), 14a(5), 14a(5a) FD) and departures from SMP framework (Art. 8(2) AD)	Covers decisions concerning frequencies (Art. 8(3), 8(4), 8(5) FD), relevant market definition and analysis (Art. 14(4), 14(5) FD) and departures from SMP framework (Art. 8(2) AD)
NRA communicates draft measure to Commission and other NRAs	NRA communicates draft measure to Commission	NRA communicates draft measure to Commission and other NRAs	<i>After consultation with NCA, NRA communicates draft measure to Commission, including an explanation of how the position of other NRAs and the Commission was taken into account and a justification for departure therefrom</i>
Other NRAs comment within general comment period		Commission and other NRAs comment within 1 month (or general comment period if longer)	
NRA takes utmost account of comments of other NRAs and communicates draft measure to Commission		NRA takes utmost account of comments of other NRAs and Commission and adopts measure, save for cases listed below	
Commission has one month to respond, otherwise NRA can adopt measure	Commission has one month to respond, otherwise NRA can adopt measure		Commission has one month to respond, otherwise NRA can adopt measure
If Commission has serious doubts, adoption suspended for 2 months	If Commission has serious doubts, adoption suspended for 2 months	If i) measure substantially differs from the draft or ii) Commission voiced serious doubts, measure suspended for 1 more month	If Commission has serious doubts, adoption suspended for 2 months
Within 2-month period,	Within 2-month period,	Within 1-month period,	Within 2-month period,

Commission can take decision on compatibility with EC law and require amendment or withdrawal of draft measure	Commission can take decision on compatibility with EC law and require amendment or withdrawal of draft measure	Commission can make public detailed opinion	Commission can take decision ( <i>after consulting committee of NRAs</i> ) on compatibility with EC law and require amendment or withdrawal of draft measure
If no Commission decision (or if positive decision), NRA can adopt measure	If no Commission decision (or if positive decision), NRA can adopt measure	If no Commission opinion (or after opinion), NRA can adopt measure	If no Commission decision (or if positive decision), NRA can adopt measure
If Commission decision requires amendment or withdrawal, NRA must comply	If Commission decision requires amendment or withdrawal, NRA must comply	NRA must justify departure from Commission opinion and communicate reasons to Commission	If Commission decision requires amendment or withdrawal, NRA must comply
Minimum duration: general comment period and 1 month	Minimum duration: 1 month or less	Minimum duration: 1 month or less	Minimum duration: 1 month or less
Maximum duration: general comment period and 3 months	Maximum duration: 3 months	Maximum duration: 2 months	Maximum duration: 3 months

Similarly, as regards emergency decisions by NRAs (Art. 6(5) of the Framework Directive), the common position would do away with the possibility of review by the Commission, as found in the Commission proposal (to which the EP did not put forward amendments).

Overall, the amended proposal of the Commission and the outcome of the 1<sup>st</sup> reading in the EP are fairly similar, the EP having essentially attempted to streamline and shorten the procedure proposed by the Commission. The Council holds a very different view, pursuant to which the NRAs would not be subject to any binding review at EC level.

As a preliminary matter, the CEPS Working Party is well aware that broader institutional considerations are also at play here, which might lead to institutions taking certain positions as a matter of principle. Nonetheless, it urges the institutions not to make the communications sector suffer again because of broader considerations. Once already, at a earlier phase of liberalisation, an important piece of legislation was delayed on account of an inter-institutional conflict.<sup>15</sup> Furthermore, member states have already agreed for a long time, in order to achieve the internal market, to comply with much more constraining coordination mechanisms. For instance, under Directive 98/34 of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services,<sup>16</sup> which replaced Directive 83/189,<sup>17</sup> the Commission can stop national *legislative*

<sup>15</sup> It will be recalled that a key plank of the current framework, Directive 95/62 (ONP – Voice Telephony) [1995] OJ L 321/6 was finally adopted on 13 December 1995, more than three years after the original proposal. A second complete legislative procedure (with few substantial modifications to the proposal) had been necessary, after the first proposal was rejected by the European Parliament on third reading for reasons related to comitology.

<sup>16</sup> [1998] OJ L 204/37, as amended by Directive 98/48 [1998] OJ L 217/18.

<sup>17</sup> [1983] OJ L 109/8.

procedures. Article 6 of the Framework Directive cannot therefore create much of a precedent.

In light of the general considerations set out earlier, the common position is inadequate and dangerous for the internal market, since no binding coordination mechanism is put in place. It is true that the discretion of NRAs is already curtailed to a significant extent through substantive provisions, such as Articles 13 and 14 of the Framework Directive (combined with Articles 8-13 of the Access Directive), which set out a relatively precise framework for the NRAs to conduct their supervisory activities: market definition and analysis, determination of SMP and adoption of appropriate measures.<sup>18</sup> The common position appears to assume that these substantive constraints, combined with the persuasive weight of a well publicised Commission opinion and the threat of infringement proceedings under Article 226 EC,<sup>19</sup> would be sufficient to ensure that national authorities will act in a coordinated fashion. Yet the measures covered by Article 6 of the Framework Directive are not merely individual decisions – they fall in the intermediate level mentioned above. Accordingly, coordination is necessary in order to ensure that the overall effect of regulatory intervention in the various member states is at all beneficial. In the eyes of the Working Party, the risk of conflicting national decisions still remains too high to do without some ‘hard’ coordination mechanism. While in some cases ‘soft’ coordination mechanisms apparently worked – for instance the treatment of voice over IP under the current regulatory framework,<sup>20</sup> in a number of key cases they did not work – for instance the unbundling of the local loop.<sup>21</sup> All the Community institutions are bound to work to reach the objectives of the Treaty, including first and foremost the internal market. With its rejection of any form of ‘hard’ coordination mechanism, the common position basically fails on that count.

Yet at the same time, some of the arguments made in support of the common position point to weaknesses in the amended proposal and suggest that some improvements could be made.

First of all, the coordination procedure of Article 6 of the Framework Directive, as set out in the amended proposal, involves review and control by the Commission acting alone. It is understandable that member states might be wary of this, since there are risks attached to leaving supervisory tasks to the Commission alone. Even if the review would bear on ‘compatibility with Community law, in particular the objectives of Article 7 [of the of the Framework Directive]’, it cannot be denied that most of the time,

---

<sup>18</sup> As mentioned above, this framework could be improved with a better articulation between the assessment process (set out in the Framework Directive) and the available remedies (set out in the Access Directive).

<sup>19</sup> It must be underlined that infringement proceedings under Article 226 EC, among other weaknesses, are much too slow given the speed at which the communications sector evolves. For instance, the Commission found in 1997 that the French legislation concerning universal service did not correctly implement applicable EC legislation (as found in Directives 90/388, as amended and 97/33). The Commission initiated infringement proceedings. At the time of writing, the ECJ judgment is expected soon (Case C-146/00).

<sup>20</sup> See the two Commission communications on the status of voice on the Internet, published at [1998] OJ C 6/4 and [2000] OJ C 369/3 respectively.

<sup>21</sup> Here the Commission began with a recommendation (Recommendation 2000/417 {...}) but, faced with the inaction of member states, it proposed the adoption of a regulation (Regulation 2887/2000 of 18 December 2000 [2000] OJ L 336/4).

a number of reasonable options will meet that standard for review. The Commission would thus enjoy considerable room for manoeuvre in the course of its supervisory powers. The Commission would become a kind of policy-making actor, making its influence felt through ‘second-line’ review decisions, without however going through the motions of actually conducting an inquiry. There is some risk that the Commission would cease to be confronted with the ‘front line’ – i.e. the reactions and objections from the involved parties in the various member states, and the legal constraints designed to ensure reliable and accurate decision-making. As mentioned above, national authorities are closer to the playing field, and any coordination procedure should seek to preserve that benefit associated with decentralised decision-making. In order to address that concern, it would seem appropriate at least to include the other NRAs in the review process, as a sounding board for the Commission, to ensure that it has proper exposure to the realities of the sector. Within the current principles governing the participation of member states in the decision-making process of the Commission, the NRAs could for instance be obligatorily consulted once the Commission indicates that it has serious doubts about a proposed NRA measure, and before it takes a final decision on that matter (along the lines of the model prevailing for merger control).<sup>22</sup>

Secondly, the coordination procedure set out at Article 6 of the Amended proposal has been criticised for its length. Indeed, on the assumption that the NRA would turn around immediately after the general comment period to submit a revised draft to the Commission, the overall procedure could still last up to the duration of the general comment period plus 3 additional months. In this respect, the Working Party supports the amendments put forward by the European Parliament at its first reading of the Commission proposal, whereby one stage of the procedure of Article 6 is removed, namely the round of comments by other NRAs. The maximum overall duration of the procedure is then brought down to 3 months, which appears more palatable. As a consequence of the EP amendments, however, the role of other NRAs is curtailed. That loss could be offset if, as proposed above, the other NRAs are involved when the Commission takes a final decision once it has expressed serious doubts about a draft measure. Furthermore, it seems to the Working Party that the consultation of other NRAs could very well be ‘internalised’ at an earlier stage, i.e. when the NRA prepares its draft measure. As mentioned previously, a national decision taken in isolation exhibits very few redeeming features as far as regulatory coordination is concerned. Accordingly, every NRA should be obliged to explain, in any draft measure submitted to the procedure of Article 6 of the Framework Directive, how it has taken into account the decisions and the views already expressed by other NRAs (and by the Commission) and, as the case may be, why it chose not to follow its peers. Such a requirement would not lengthen the duration of the coordination procedure. One could argue that decision-making would still be slowed down because NRAs would have more work to accomplish before releasing a draft measure. Yet it can only be assumed that NRAs are already conducting that kind of comparative analysis for the time being. If they do not, then they should, for reasons already mentioned.

Thirdly, it has been said that the procedure set out in the Amended proposal is too broad in scope, covering an excessive number of measures to be taken at national level (i.e.

---

<sup>22</sup> See Regulation 4064/89 of 21 December 1989 [1989] OJ L 385/1, as amended.

the measures concerning frequencies, market definition and analysis as well as departure from the SMP framework), so that the NRAs and the Commission would be constantly busy with the coordination procedure. However, the scope of the coordination procedure of Article 6 can hardly be defined in other, perhaps narrower terms without using vague concepts that could give rise to litigation.<sup>23</sup> The use of a string of references to other provisions might be the ‘cleanest’ solution. In any event, if the suggestions made previously are taken on board, the chances that a draft measure would give rise to serious doubts as to its compatibility with EC law should be reduced, so that the procedure of Article 6 of the Framework Directive, while it would remain applicable to many draft measures, would with time become more of a routine than a full-time occupation for all those involved.

A further problem remains, however. The coordination procedure of Article 6 of the Framework Directive is concerned exclusively with the work of NRAs. At the outset, it was emphasised that other actors also had a say in the regulation of the communications sector, namely NCAs and national courts. It would be most unfortunate indeed if all the efforts devoted to designing an efficient coordination procedure at Article 6 of the Framework Directive would be undermined by conflicting national decisions emanating from NCAs or national courts.

With respect to NCAs, the procedural framework of EC competition law is currently being revised. It appears likely that, as part of an overall decentralisation of decision-making, a mechanism will be put in place whereby the Commission is kept informed of draft decisions which the NCAs intend to adopt, with the possibility for the Commission to seize itself of the matter,<sup>24</sup> should it for instance entertain doubts as to the course of action envisaged by the NCA or find that the matter is of Community interest. Accordingly, some measure of coordination between the NCAs and the NRAs will take place through the Commission acting as a supervisory authority in both areas. Yet efficiency would be improved if the coordination between NCAs and NRAs were done at an earlier stage, at the national level itself. Article 3(4) of the Framework Directive is a step in the right direction, since it requires each member state to introduce and publish procedures for cooperation between its NRA and its NCA. The Framework Directive could go further. Given that the thrust of the proposed new framework is to bring sector-specific regulation closer to competition law principles, decisions taken by the NRA under Article 14 of the Framework Directive, in combination with Articles 8-13 DAI, will rely to a large extent on analysis very similar to that of competition law. Logic would dictate that these decisions, if anything, should be examined by NCAs as well to ensure consistency at the national level. By the same token, the risk of conflicting decisions between member states would be reduced, since it is less likely that *both* the NRA and the NCA would, without a strong justification, take a position that would stray from corresponding authorities in other member states. As a result, an express requirement that each NRA consult the NCA – or perhaps even obtains a positive opinion from it – before issuing a draft measure would make the procedure of

---

<sup>23</sup> In the Working Document of 27 April 2000, which preceded the original Framework Directive proposal, the Commission had defined the scope of the procedure of Article 6 by reference to ‘decisions which will affect providers of electronic communications networks and services or users’, which depending on the interpretation could be even broader than the scope of Article 6(2) and ff. in the current proposal.

<sup>24</sup> Proposed Regulation implementing Articles 81 and 82 of the Treaty [2000] OJ C 365E/264, Art. 11.

Article 6 of the Framework Directive more efficient, by reducing the likelihood that the Commission would have to intervene at a latter stage.

As regards national courts, it is for constitutional reasons more difficult to ensure the appropriate level of coordination through the direct intervention of the Commission. Nevertheless, it is unfortunate that the of the Framework Directive contains no provisions along the lines of Article 15 of the proposed Regulation implementing Articles 81 and 82 of the Treaty. According to that provision, national courts may ask the Commission for guidance on EC competition law matters. They must forward to the Commission any judgement where they apply EC competition law. Finally, the Commission can intervene before the courts on EC competition law matters, more or less as an *amicus curiae*. The same could have been done under the new framework for electronic communications since, in addition to the role national courts could play when they apply EC competition law,<sup>25</sup> these courts will frequently be called upon to review decisions made by NRAs. In such cases, the effect of the procedure of Article 6 of the Framework Directive could be nullified if NRA decisions were overturned by national courts.

In summary, the Working Party wishes to underline the following points:

- The coordination procedure provided for at Article 6 of the Framework Directive (in the Amended proposal) responds to a strong need. The new regulatory framework cannot do without the possibility of a ‘hard’ intervention by the Commission to prevent NRAs from going ahead with contradictory or incompatible measures. In this respect, the Common position is not acceptable;
- At the same time, care must be taken not to lose the benefits of decision-making at the national level (learning-by-doing, proximity to the playing field, flexibility and responsiveness) through an overly long or costly coordination procedure. The WP supports the amendments put forward by the European Parliament at its first reading;
- In addition, the efficiency of the procedure would be enhanced if the NRAs themselves were entrusted with the task of ensuring coordination at a prior stage, thereby reducing the risk that the Commission would have to intervene. Before they publish a draft measure, each NRA should be bound to consult the NCA. Furthermore, the draft measure should explain how the NRA took the work of other NRAs (and the Commission) into account, and as the case may be, why it chose to depart from the results of that work;
- Similarly, the risk that the Commission would lose touch with the playing field when exercising its supervisory powers would be reduced by requiring it to consult with a committee of NRAs after it expressed serious doubts about a draft measure, before it adopts a final decision;
- It is unfortunate that the Framework Directive contains no provisions designed to ensure the consistency of national court decisions (to the extent possible within constitutional limits) along the lines of the provisions of the proposed Regulation implementing Articles 81 and 82 of the Treaty.

---

<sup>25</sup> Where the provisions of the proposed Regulation, *ibid.* will apply.

### 3.3 Coordination with respect to frequency spectrum matters<sup>26</sup>

Matters relating to frequency spectrum are split between three instruments under the proposed new regulatory framework:

- In Article 8 of the Framework Directive, member states are bound to manage spectrum in accordance with the objectives of EC electronic communications regulation, and to ensure that allocation<sup>27</sup> and assignment<sup>28</sup> are done objectively, transparently, without discrimination and according to proportionate criteria. NRAs must then work to foster the harmonisation of use of radio spectrum across the EC.
- In the Authorisation Directive, a series of provisions concerns the use of rights of use for radio frequencies (Article 5-6), the procedures for limiting the number of rights of use and for their grant (Article 7) as well as compliance with harmonised rules on the assignment of frequencies (Article 8).
- The Decision on Radio Spectrum provides for an EC-level procedure to ensure policy coordination and produce harmonised conditions for availability and use of spectrum.<sup>29</sup>

It is well known that until now the member states have been very reluctant to deal with radio spectrum issues within the framework of the European Community. The proposals described above mark a great progress, since a more permanent forum would be put in place, which could then help to develop a general European approach to spectrum policy, as opposed to the *ad hoc* discussions that have been taking place so far as issues arose (GSM, S-PCS, UMTS), without any overall design.

Nevertheless, the Working Party is concerned that some important aspects of radio spectrum policy would remain uncoordinated. The amended proposal of the Commission (supported by the EP on that point) provides that national decisions concerning the use of auctions or administrative pricing for spectrum (Art. 8(3) Framework Directive), the transfer of spectrum rights (Art. 8(4)) or the allocation of rights to use spectrum (Art. 8(6)), will be subject to the coordination procedure of Article 6 of the Framework Directive, discussed previously. In its common position, however, the Council removes these decisions from the ambit of the procedure of Article 6 of the Framework Directive, so that no mechanism is available to ensure the coordination of national decisions on those points.

The UMTS experience clearly shows the dangers of a lack of coordination at European level. The first member states started to award UMTS licenses at a time when it was not even known how the rest of the member states would proceed, thus making it very difficult for interested firms – most of which took a European view on the UMTS licensing process – to plan their actions. For many firms and observers, UMTS licensing became a ‘beggar-my-neighbour’ process, at odds with the objectives of the internal market.

---

<sup>26</sup> One of the rapporteurs (M. Cave) took no part in drafting this section.

<sup>27</sup> I.e. the decision to reserve a certain frequency band for a certain purpose.

<sup>28</sup> I.e. the decision to allow a firm to use part of the frequency spectrum.

<sup>29</sup> See the amended proposal for the Decision on Radio Spectrum.

For the Working Party, it is imperative that EC-level coordination be improved in future spectrum assignment processes. The procedure set out at Article 6 of the Framework Directive appears well suited for that purpose – especially in light of the modifications proposed above. In practical terms, this would mean that the national authorities, when dealing with spectrum matters, would have to pay attention to developments in other member states, with the threat of an adverse Commission decision if they do not do so. Given that a number of possible avenues are open and can be justified, it is unlikely that member states would find themselves forced to follow a single solution. For instance, spectrum allocation can be done through auctions or beauty contests (each of which in turn knows of many variants), as is expressly recognised in Article 8(3) of the Framework Directive (amended proposal). As long as their choice of timing and procedure does not impair the internal market, member states should thus retain a range of options. There is therefore no reason to exclude decisions to be taken under Article 8(3), 8(4) and 8(5) of the Framework Directive from the scope of Article 6.

Furthermore, the free band part of the radio spectrum is now being frequently used for wireless LAN and broadband connections. As this part of the spectrum is very limited, there is an evident risk that, in populated areas, it would be quickly monopolised. Consequently, in order to secure healthy competition, the Commission should encourage NRAs to ensure that these areas are served by providers whose aim is to offer an open network where consumers can choose between several operators.

---

**THE INTERNAL MARKET**

---

**T**he pan-European and global dimension of the communications sector was a recurring theme in the previous sections. Indeed, achieving the Internal Market in the communications sector is of strategic significance for the EU, not just because communications as such is one of the leading sectors of the European economy, but also because the whole of the economy benefits from a healthy and efficient communications sector. It suffices here to recall the ambitious objective set by the Lisbon European Council – for Europe ‘to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion’.

In spite of that, the integration of the national markets into an internal market remains the dark spot on the track record of telecommunications liberalisation. The run-up to liberalisation, one of the success stories of the EC in the 1990s, appeared to have been driven more by a willingness to remove legal monopolies than by the pursuit of internal market objectives. As a result, the current picture of the telecommunications sector in the EC tends to show 15 fully liberalised markets more than a single open market.

It is true that the starting point was almost as far from integration as one could imagine, with national monopolists dominating their respective ring-fenced national markets. Still the onset of competition, combined with ‘technological leaps’ (rise of the internet and of mobile telephony), contributes to reduce the overall influence of incumbents on the evolution of their respective home markets. By the same token, incumbents also become more interested in developments abroad. The legal framework should then strive to encourage firms to operate at a pan-European and even global level, so as to foster the integration of markets.

The Working Party is very concerned that the internal market will remain forgotten – or even ignored – in the new regulatory framework. It is not sufficient to make the national markets more competitive; they must also be better integrated. In a context of globalisation and convergence, fifteen small markets, however buoyant, just will not cut it. So far, the European industry has prospered most, and European consumers have benefited most in the areas where serious efforts were made to achieve the internal market – witness mobile communications until recently. By the same token, a loss of focus on the internal market – as seems to be happening with UMTS – could entail a loss of those advantages.

#### **4.1 Licensing and authorisation regime**

The resulting Directive 97/13 of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services<sup>30</sup> was not a huge success. It did introduce some discipline in national licensing practices, but it still left too much discretion for member states to require individual licenses before offering certain services.<sup>31</sup> Since then, the industry was heard over and over again complaining about the diverging and contradictory licensing regimes. Fees, procedures, duration, conditions, scope, all the main elements of the licensing regime differ from one member state to the

---

<sup>30</sup> [1997] OJ L 117/15.

<sup>31</sup> See in particular Article 7(2) of Directive 97/13, according to which ‘the provision of publicly available voice telephony services, the establishment and provision of public telecommunications networks as well as other networks involving the use of radio frequencies may be subject to individual licences’.

other, leaving firms with significant costs and inconvenience when they want to operate at a pan-European level.

In the proposed Authorisation Directive,<sup>32</sup> the same approach is brought one step further. Individual licenses are removed altogether, so that electronic communications services and networks can only be submitted to general authorisations (if anything).<sup>33</sup> Member states may still require firms to obtain rights of use for frequencies or numbers or rights of way.<sup>34</sup>

In the eyes of the Working Party, the proposed Authorisation Directive marks a clear improvement over the current situation. At the same time, it calls for a few remarks.

First of all, the few areas left where member states retain the ability to require individual applications for authorisations (rights of use), namely frequencies and numbers, also beg for coordination at the EC level. For instance, the recent round of license awards for UMTS suffered from a total lack of coordination. As a result, the mobile communications sector is likely to remain broken down into national markets (among other negative impacts). Accordingly, as already discussed previously, the proposed Directive cannot fulfil its aims if it is not accompanied by an adequate coordination mechanism for the areas – most of all frequencies – where member states retain the power to require individual applications (for rights of use).

Secondly, even in the absence of individual license requirements, firms will continue to be hampered by 15 different general authorisation schemes. In particular, there is no indication as to the scope of the general authorisation: there could be one general authorisation for all electronic communications networks and services, or a series of authorisations concerning specific networks or services.<sup>35</sup> In the latter case, the scope of the service- or network-related authorisations could vary from one member state to the other (i.e. because definitions or interpretations are slightly different), thereby perpetuating problems for the industry and undoing the progress made with the proposed Authorisation Directive. This issue has been left out of consideration so far, but care should be taken that member states align the scope of their respective general authorisation schemes to the greatest extent possible.

## 4.2 Coordination with other directives

The internal market also comes out short when one considers the proposed new electronic communications regulatory framework together with other closely related EC legislation. Inconsistencies within EC legislation mean that the benefits of the internal market are significantly reduced.

For instance, the general approach of the new framework is not entirely compatible with that followed in other sectors, such as audio-visual media and e-commerce. The new framework – like the current one – is geared to produce 15 harmonised sets of national regulation. Firms can then operate with some level of certainty that they will face similar regulation from one member state to the other. In contrast, EC legislation on audio-visual

---

<sup>32</sup> See the Amended proposal.

<sup>33</sup> *Ibid.*, Art. 3(2).

<sup>34</sup> *Ibid.*, Art. 5.

<sup>35</sup> The Amended proposal, *ibid.*, is unclear on that point. In the Common position, a definition of ‘general authorisation’ is introduced, according to which it ‘may apply to all or to specific types of electronic communications services and networks’.

media<sup>36</sup> and e-commerce<sup>37</sup> rests on principles of mutual recognition and home-state control. There the national regulatory frameworks are not necessarily so similar, but a firm need only comply with the regulation applicable in its member state of establishment (with some exceptions). In a context of convergence, this leads to awkward situations, where a single firm is concerned with the law of a single member state for its operations in the audio-visual or e-commerce sector, while it must ensure compliance with the law of every member state where it conducts ‘electronic communications’ activities. What is more, the definitions which delineate the scope of each piece of EC legislation are not entirely exclusive of each other; for instance, a single service could be both an ‘electronic communications service’ (falling under the new regulatory framework) and an ‘information society service’ (to which the Directive on E-Commerce applies). The same type of inconsistency is also present between the E-Commerce Directive and other measures, including the proposed directive concerning the distance marketing of consumer financial services,<sup>38</sup> which do not follow the home-state control principle.

The same pattern can be seen with the treatment of the distinction between ‘electronic communications’ and content. On the one hand, in the definition section, services involving content are excluded from the definition of ‘electronic communications services’, which would imply that they are entirely left out of the new regulatory framework. On the other hand, services such as TV broadcasting qualify as ‘services delivered using electronic communications networks and services’ within the meaning of Article 1(2) of the proposed Framework Directive,<sup>39</sup> where it is stated more broadly that the proposed directive would be ‘without prejudice to obligations imposed by national law in accordance with Community law or by Community law in respect of services delivered using electronic communications networks and services.’ On that account, the new regulatory framework could thus potentially affect services involving content, but not so as to supersede other laws and regulations (including Directive 89/552). It seems that this latter approach, which does not seek to isolate content and communications hermetically, would be more advantageous, leaving the regulatory framework to apply to services building on electronic communications when suitable and adequate, while letting rules that are specific to those services prevail. Indeed, it must not be forgotten that there is more to ‘content’ than audio-visual content: whereas a communications/content distinction could perhaps be applied with a limited measure of success when it comes to A-V content, it is impossible and counter-productive to seek to enforce a strong distinction between financial services, for instance, as ‘content’ and the communications networks and services over which these financial services are provided.

For the rest, the proposals are silent on content. The Commission simply mentioned in a recital that ‘[t]he separation between the regulation of transmission and the regulation of content does not prejudice the taking into account of the links existing between them’,<sup>40</sup> but included very few specific provisions to that end. As mentioned in the proposed Framework Directive, Directive 89/552 remains outside the scope of the new framework.<sup>41</sup> A few

<sup>36</sup> Directive 89/552 [1989] OJ L 298/23, as amended.

<sup>37</sup> Directive 2000/31 [2000] OJ L 178/1.

<sup>38</sup> See the amended proposal [2000] OJ C 177E/21. The proposal is currently before the Council, which has not been able to reach political agreement on it.

<sup>39</sup> As stated in Recital 7.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

content-related provisions come through the inclusion within the new proposals of Directive 95/47 on the use of standards for the transmission of television signals.<sup>42</sup> For instance, the proposed Access Directive provides for broadcasters to be granted fair, reasonable and non-discriminatory access to the conditional access services of pay TV or other operators.<sup>43</sup>

In addition, the proposed Universal Service Directive contains a provision on ‘must-carry’ obligations in Article 26, whose aim is not to impose such rules at the EC level, but rather to establish an EC-level framework to assess the validity of member state rules; this provision does not put content providers in a privileged position vis-à-vis network operators. In a set of proposals that otherwise seek to be technology-neutral, the Universal Service Directive remains tied to specific technological models, as is evidenced by Article 26. The proposal defines ‘must-carry obligations’ restrictively as the ‘transmission of broadcasts’. If member states can justifiably impose the transmission of broadcasts in the public interest, under certain conditions, then in the era of convergence and digitalisation, they equally should be able to impose ‘must-list’ (for electronic programme guides) or ‘must-link’ (for Internet portals) obligations, for instance. The amendments to Article 26(1) proposed by the European Parliament sought to remedy that weakness,<sup>44</sup> but the other institutions dismissed them. The Commission justified its position by arguing that ‘regulation of the due prominence aspects of EPGs and navigators forms part of content regulation and this is now recognised in [Article 6(4)] of the Access Directive’,<sup>45</sup> which reads (in the Common position): ‘Conditions applied in accordance with this Article are without prejudice to the ability of member states to impose obligations in relation to the presentational aspect of electronic programme guides and similar listing and navigation facilities.’<sup>46</sup> In the name of the content/communications distinction, the extension of ‘must-carry’ to EPGs and portals is thus left to a vague ‘without prejudice’ clause, whereas it could have been brought under the scope of Article 26 of the Universal Service Directive, which provides a canvas to ensure that member state measures remain in line with EC law. The result will be an unnecessary legal vacuum.

The overall scheme of the proposed new regulatory framework therefore leads to a clear distinction between ‘electronic communications’ and content, the new regulatory framework being (self-)focussed on the former and leaving the latter almost entirely out of consideration. Providers of ‘content’ – audio-visual or other – are thus put in the same position as any other user of electronic communications networks and services. In their

---

<sup>42</sup> Directive 95/47 of 24 October 1995 on the use of standards for the transmission of television signals [1995] OJ L 281/51.

<sup>43</sup> See Art. 6(1) and Annex I(1). The scope of these access rights can be extended to application programme interfaces (APIs) and electronic programme guides (EPGs), pursuant to Art. 6(2) and Annex I(2).

<sup>44</sup> In addition, the EP proposed to restrict ‘must-carry’ obligations to broadcasts ‘in pursuit of a public service broadcasting remit’, which appears logical given that ‘must-carry’ obligations are exceptional and must be justified by a public interest objective. That amendment was rejected by the Commission because it would exclude ‘commercial television channels that fulfil a cultural diversity criterion’ (see the amended proposal); the reasoning of the Commission rests on a confusion between ‘broadcasters with a public-service remit’, which can be in either public or private hands (see the example of the French TF1, which is subject to a number of public-service obligations) and ‘public broadcasters’ which are not privately-owned. The wording of the European Parliament amendment refers to the nature of the remit and not to the ownership of the broadcaster, and as such the objections of the Commission are not founded.

<sup>45</sup> See the comments of the Commission on the common position at 11.

<sup>46</sup> Common position, Article 6(4).

relationship with operators of such networks and services, they are left to rely generally on EC competition law. If anything, major competition law cases such as *AOL/Time Warner*<sup>47</sup> and *Vivendi/Canal+/Seagram*<sup>48</sup> only underline the need for some regulatory regime concerning the relationship between content and delivery networks, since that issue will arise again in subsequent cases, and it cannot always be settled on a piecemeal basis.

Here as well, it seems that the Community institutions<sup>49</sup> are quick to draw comforting lines through legal definitions and then neglect the overall consistency of EC legislation. The Working Party calls upon the Community institutions to try to overcome organisational difficulties caused in large part by the need to divide work amongst persons and groups within a large organisation. The various strands of EC law should not meet only on the receiving end, when citizens and businesses must deal with them; Community institutions should pay more attention to the overall consistency of EC legislation in a sector where boundaries are in practice few and fluid.

---

<sup>47</sup> Decision of 11 October 2000, Case COMP/M.1845 ([europa.eu.int/comm/competition/index\\_en.html](http://europa.eu.int/comm/competition/index_en.html)).

<sup>48</sup> Decision of 13 October 2000, Case COMP/M.2050 ([europa.eu.int/comm/competition/index\\_en.html](http://europa.eu.int/comm/competition/index_en.html)).

<sup>49</sup> Except perhaps the European Parliament, which sought to improve upon the relationship between 'electronic communications' and content with its 1<sup>st</sup> reading amendments, some of which were taken over in the Amended proposal.

ANNEX  
THE CURRENT SET OF PROPOSALS:  
DOCUMENTS RELEASED SO FAR IN THE LEGISLATIVE PROCESS

---

### **Framework Directive**

Full title: Directive of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services

Commission proposal: COM(2000)393 (12 July 2000), [2000] OJ C 365E/198

ESC Opinion: [2001] OJ C 123/56 (6 February 2001)

EP – 1<sup>st</sup> reading: A5-0053/2001 (1 March 2001), available at: [www.europarl.eu.int](http://www.europarl.eu.int)

Amended Commission proposal: COM(2001)380 (4 July 2001), available at: [europa.eu.int/eur-lex](http://europa.eu.int/eur-lex)

Common position: 17 September 2001, available at: [www.europarl.eu.int](http://www.europarl.eu.int)

Commission opinion on Common position: SEC(2001)1365 (18 September 2001), available at: [www.europarl.eu.int](http://www.europarl.eu.int) (in Annex to common position)

### **Access Directive**

Full title: Directive of the European Parliament and of the Council on access to, and interconnection of, electronic communications networks and associated facilities

Commission proposal: COM(2000)384 (12 July 2000), [2000] OJ C 365E/215

ESC Opinion: [2001] OJ C 123/50 (24 January 2001)

EP – 1<sup>st</sup> reading: A5-0061/2001 (1 March 2001), available at: [www.europarl.eu.int](http://www.europarl.eu.int)

Amended Commission proposal: COM(2001)369 (4 July 2001), available at: [europa.eu.int/eur-lex](http://europa.eu.int/eur-lex)

Common position: 17 September 2001, available at: [www.europarl.eu.int](http://www.europarl.eu.int)

Commission opinion on Common position: SEC(2001)1409 (18 September 2001), available at [www.europarl.eu.int](http://www.europarl.eu.int) (in Annex to common position)

### **Authorisation Directive**

Full title: Directive of the European Parliament and of the Council on the authorisation of electronic communications networks and services

Commission proposal: COM(2000)386 (12 July 2000), [2000] OJ C 365E/230

ESC Opinion: [2001] OJ C 123/55 (24 January 2001)

EP – 1<sup>st</sup> reading: A5-0062/2001 (1 March 2001), available at: [www.europarl.eu.int](http://www.europarl.eu.int)

Amended Commission proposal: COM(2001)372 (4 July 2001), available at: [europa.eu.int/eur-lex](http://europa.eu.int/eur-lex)

Common position: 17 September 2001, available at [www.europarl.eu.int](http://www.europarl.eu.int)

Commission opinion on Common position: SEC(2001)1411 (18 September 2001), available at: [www.europarl.eu.int](http://www.europarl.eu.int)

### **Universal Service Directive**

Full title: Directive of the European Parliament and of the Council on universal service and users' rights relating to electronic communications networks and services

Commission proposal: COM(2000)392 (12 July 2000), [2000] OJ C 365E/238

COR Opinion: [2001] OJ C 144/60 (14 December 2000)

ESC Opinion: [2001] OJ C 139/15 (1 March 2001)

EP – 1<sup>st</sup> reading: A5-0202/2001 (13 June 2001), available at: [www.europarl.eu.int](http://www.europarl.eu.int)

Amended Commission proposal: COM(2001)503 (14 September 2001), available at: [europa.eu.int/eur-lex](http://europa.eu.int/eur-lex)

Common position: 17 September 2001, available at: [www.europarl.eu.int](http://www.europarl.eu.int)

Commission opinion on Common position: SEC(2001)1407 (18 September 2001), available at: [www.europarl.eu.int](http://www.europarl.eu.int)

### **Privacy Directive**

Full title: Directive of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector

Commission proposal: COM(2000)385 (12 July 2000), [2000] OJ C 365E/223

ESC Opinion: [2001] OJ C 123/53 (24 January 2001)

### **Decision on Radio Spectrum**

Full title: Decision of the European Parliament and of the Council on a regulatory framework for radio spectrum policy in the European Community

Commission proposal: COM(2000)407 (12 July 2000), [2000] OJ C 365E/256

ESC Opinion: [2001] OJ C 123/61 (24 January 2001)

EP – 1<sup>st</sup> reading: A5-0232/2001 (5 July 2001), available at: [www.europarl.eu.int](http://www.europarl.eu.int)

Amended Commission proposal: COM(2001)524 (18 September 2001), available at: [europa.eu.int/eur-lex](http://europa.eu.int/eur-lex)

**MEMBERS OF THE CEPS WORKING PARTY  
ON ELECTRONIC COMMUNICATIONS**

---

<b>Chairman:</b>	Magnus Lemmel Former Director General, DG Enterprise European Commission	
<b>Rapporteurs:</b>	Martin Cave Warwick Business School	
	Pierre Larouche METRO Institute, Faculty of Law, Universiteit Maastricht	
Gunnar Ahlbom Deputy Director Telia s.p.r.l		Raphael Bailly Lawyer Bird & Bird
Otto Björklund Head of Representative Office Nokia Group		Barbara De Vet Lawyer Clifford Chance
Brendan Devlin Delegation Co-ordinator Enron Delegation to the EU		Nailia Dindarova Delegation Co-ordinator Enron Delegation to the EU
Ninette Dodoo Lawyer Clifford Chance		Charles Goldfinger Managing Director Global Electronic Finance
Hein Hobbelen Telecoms Lawyer Freshfields Bruckhaus Deringer		Staffan Jerneck Deputy Director & Director of Corporate Relations CEPS
Kjell Johnsen Manager Regulatory Affairs Telenor Bruxelles S.A.		Claude Mariotte Direction de l'International France Télécom Bruxelles
Feli Martinez Research Fellow CEPS		Olof Nordling President Telia s.p.r.l.
Jacques Pelkmans Senior Research Fellow CEPS		Erik Pierre EU Representative Stokab AB
Pierre Puig Deputy Head France telecom		Anja Stobbe Research Economist Deutsche Bank

Marie Törnell  
Deputy Director  
Confederation of Swedish Enterprise

**INVITED GUESTS AND SPEAKERS**

Per-Göran Blix  
Former Chairman of the Telecoms Working Group of  
the Council  
Swedish Presidency

Pierre Buigues  
Head of Unit  
DG Competition  
European Commission

Malcolm Harbour  
Member of the European Parliament  
Rapporteur of the Universal Services and Users Rights  
Directive

Fabienne Marcelle  
Chairwoman of the Telecoms Working Group of  
the Council  
Belgian Presidency

Lambras Papadias  
DG Competition  
European Commission

Stephan Pascal  
Head of Unit  
European Commission

Peter Scott  
Head of Unit  
DG Info  
European Commission