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The New Concept of "Significant Market Power" in Electronic Communications: the Hybridisation of the Sectoral Regulation by Competition Law

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Introduction: a major reform in telecoms

The newly adopted European regulatory framework for electronic communications[1] is mainly composed of four directives[2] whose national transposition measures should be applicable in July 2003. As suggested by its denomination and to take into account the technological convergence, the new package covers not only telecommunications but all electronic communications networks, services and associated facilities. It therefore applies to all networks permitting the conveyance of signals (being wire or wireless, circuit or packet switched, used for telecom, broadcasting or other services), all the services consisting of the conveyance of signals on these networks, and all facilities that are associated with them (like conditional access systems contained in the set-top boxes used to receive digital television or electronic program guides). On the other hand, the package does not cover the content of services delivered over electronic communications networks such as broadcasting or e-commerce services.

The basic thrust of the directives is that citizens' interests are best served by market forces and that regulation should be kept to a minimum. However, as shown by economic theory, markets do not lead to a social optimum when firms enjoy substantial market power that they may abuse for their individual interest and at the expense of general welfare. The acquisition and exercise of this market power is usually controlled by antitrust, either in a preventive way (ex ante) when firms come together to form a joint venture or a concentration, or in a repressive way (ex post) when an anti-competitive agreement or abuse is committed. Nevertheless, antitrust control may be inefficient in certain market structures, hence a general ex ante control is necessary. This is the purpose of the significant market power (SMP) regulation, *i.e.* to control market power when antitrust would be inefficient to do so.

This SMP regime has been radically reformed by the new regulatory framework. Under the previous directives, the so-called 1998 package,[3] the market areas to be regulated were pre-defined in the directives on the basis of technical characteristics[4] and the SMP threshold generally equated to 25 per cent market share in these areas. The National Regulatory Authority (NRA) had

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1 On the new framework, see A. Bavasso, *Communications in EU Antitrust Law: Market Power and Public Interest* (Kluwer Law International, 2003); S. Farr and V. Oakley, *EU Communications Law* (Palladian Law, 2002); L. Garzaniti, *Telecommunications, Broadcasting and the Internet: EU Competition Law and Regulation* (2nd ed., Sweet & Maxwell, 2003); C. Koenig, A. Bartosh and D. Braun (eds), *EU Competition and Telecommunications Law* (Kluwer Law International, 2002); P. Nihoul and P. Rodford, *EU Electronic Communications Law: Competition and Regulation in the European Telecommunications Market* (OUP, 2003).

2 Directive 2002/21/EC of the European Parliament and of the Council of March 7, 2002 on a common regulatory framework for electronic communications networks and services: [2002] O.J. L108/33; Directive 2002/20/EC of the European Parliament and of the Council of March 7, 2002 on the authorisation of electronic communications networks and services: [2002] O.J. L108/21; Directive 2002/19/EC of the European Parliament and of the Council of March 7, 2002 on access to, and interconnection of, electronic communications networks and services: [2002] O.J. L108/7; Directive 2002/22/EC of the European Parliament and of the Council of March 7, 2002 on universal service and users' rights relating to electronic communications networks and services: [2002] O.J. L108/51.

3 On the 1998 package, see M. Cave and L. Prosperetti, "European Telecommunications Infrastructures" [2001] Oxford Review of Economic Policy 4; P. Larouche, *Competition Law and Regulation in European Telecommunications* (Hart, 2000); J. Scherer (ed.), *Telecommunications in Europe* (Sweet & Maxwell, 1998); I. Walden & J. Angel (ed.), *Telecommunications Law* (Blackstone Press, 2001).

4 Under the 1998 regulatory framework, mainly four markets were defined: fixed voice telephony (Directive 98/10 and Annex 1, Pt 1 of the Directive 97/33), mobile voice telephony (Annex 1, Pt 3 of the Directive 97/33), leased lines (Directive 92/44 and Annex 1, Pt 2 of the Directive 97/33), national fixed and mobile interconnection (Art.7(2) of the Directive 97/33). See note from the Commission services/DG XIII of March 1, 1999, "Determination of Organisations with Significant Market Power", available at *http://europa.eu.int/ISPO/infosoc/telecompolicy/en/SMPdeter.pdf*.

then to impose on the SMP operators the full set of obligations provided in the directives without being able to choose the most appropriate ones. The new regime has now been aligned on competition law principles.[5] This move was justified for several reasons: first, to make the regime more flexible than was the case previously and get regulatory decisions closer to the economic reality of the market; secondly, to maintain legal certainty, as decisions will be based on more than forty years of well-established antitrust case law; thirdly, to ensure a better harmonisation of regulatory decisions across Europe, as they will be based on legal principles that are strongly "Europeanised" and the control of the Commission over the NRA's decisions will be reinforced (due to the Commission's important antitrust powers under the EC Treaty); fourthly, to ensure a progressive removal of obligations as competition develops on the different markets (market-by-market sunset clauses) and facilitate the transition towards the pure application of competition law when sector-specific regulation will no longer be necessary.

The new SMP regime is now based on a three step process.[6] In the first step, markets to be analysed are defined in two sequences. The Commission periodically adopts a recommendation[7] that defines, in accordance with the principles of competition law, the product and service markets within the electronic communications sector, the characteristics of which may be such as to justify the imposition of regulatory obligations. In practice, the Commission has to select the markets justifying ex ante regulation because of their structural problems, and then delineate the boundaries of these markets on the basis of antitrust methodologies. Taking account[8] of this recommendation on relevant markets and the Commission Guidelines on market analysis,[9] the NRA then defines markets appropriate to national circumstances, in particular their geographical dimension within its territory, in accordance with the principles of competition law.

In the second step, the NRA analyses the defined markets to determine whether they are, or are not, effectively competitive, which amounts to determining whether one or more operators enjoy SMP on the market. In turn, this SMP assessment amounts to determining whether one or more undertakings enjoy a dominant position (as defined under European competition law) or could leverage a dominant position from a closely related market.

In the third step, if the market is effectively competitive, the NRA must withdraw any obligation that may be in place and may not impose or maintain any new ones. Conversely, if the market is not effectively competitive, the NRA imposes on the SMP operators the appropriate specific regulatory obligations to be chosen from a menu provided in the directives. In the case of an SMP operator on a wholesale market (*i.e.* the relationship between the providers of electronic communications networks and services), the regulator should rely on the menu of remedies provided in the Access Directive[10] comprising five ascending behavioural obligations: transparency, non-discrimination, accounting separation, third-party access, and price control. Exceptionally, and with the prior agreement of the Commis-

5 On the use of competition law in electronic communications sector: "Commission Guidelines on the application of EEC Competition rules in the Telecommunications sector" [1991] O.J. C233/2; "Commission Notice on the application of competition rules to access agreements in the telecommunications sector", hereinafter "Access Notice" [1998] O.J. C265/2C; "Communication from the Commission on the Unbundled Access to the Local Loop: Enabling the Competitive Provision of a full range of Electronic Communication Services, including Broadband Multimedia and High-Speed Internet" [2000] O.J. C272/55. See also the references cited in n.1; C.D. Ehlermann and L. Gosling (eds), *European Competition Law Annual 1998: Regulating Communications Markets* (Hart, 2000); J. Faull & A. Nikpay (eds), *The EC Law of Competition* (OUP, 1999), Ch.11; P. Larouche, *Competition Law and Regulation in European Telecommunications* (Hart, 2000); P. Roth (ed.), *Bellamy and Child: European Community Law of Competition* (5th ed., Sweet & Maxwell, 2001), Ch.14; J. Temple Lang, "Media, multimedia and European Community antitrust law", in B. Hawk (ed.) *Annual Proceedings of the Fordham Corporate Law Institute* (Juris, 1998), Ch.18; H. Ungerer, "EU Competition law in the telecommunications, media and information technology sectors", in B. Hawk (ed.) *Annual Proceedings of the Fordham Corporate Law Institute* (Juris, 1996), Ch.24.

6 Arts 14 to 16 of the Framework Directive, Art.8 of the Access Directive and Art.17 of the Universal Service Directive. See also the website of the European Regulators Group, which is composed of the NRAs of all the Member States and the Commission: *http://erg.eu.int*, with a working paper on the SMP concept. For a complete description of the regime, see A. de Streel, "The Integration of Competition Principles in the New European Regulatory Framework for Electronic Communications" [2003] *World Competition*.

7 Commission Recommendation of February 11, 2003 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services [2003] O.J. L114/45, hereinafter "recommendation on relevant markets", and the explanatory memorandum available at *www.europa.eu.int/information_society/topics/telecoms/index_en.htm*. See also A de Streel, "Market definitions in the new European regulatory framework for electronic communications" [2003] *Info* 5(3), 27–47.

8 Any recommendation or soft law instruments should be taken into account by national authorities and national Courts; see *Grimaldi* C–322/88 1989 E.C.R. I–4407, para.18. The legal force of the recommendation on relevant markets is further reinforced as the Commission may veto any different product and service market that an NRA may wish to define.

9 Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services: [2002] O.J. C165/6, hereinafter "Guidelines on market analysis".

10 Arts 8 to 13 of the Access Directive.

sion, the NRA may also impose other remedies, possibly a structural one like divestiture. In the case of an SMP operator on the retail market (*i.e.* the relationship between operators and end-users) and insufficiency of remedies at the wholesale level, the regulator should rely on the non-exhaustive list of remedies provided in the Universal Service Directive[11]: price control, accounting obligation, interdiction of discrimination or bundling. The choice[12] of obligations made by the NRA should be based on the nature of the problem identified and justified in light of the three objectives of the new framework (effective competition, internal market, and interests of the European citizens[13]). It should also be proportionate, which implies that it should be the least burdensome option possible to achieve the regulatory aim.

This three step process shall be repeated periodically to ensure that obligations are adapted to the market evolution. During the whole process, the role of the Commission is very important. It starts the procedure by adopting and updating the recommendation on relevant markets. More importantly, the Commission may review[14] all of an NRA's decisions that would affect the trade between Member States.[15] It can veto a product and service market definition that differs from those of the recommendation and an SMP (or a non-SMP) designation, and it can give a non-binding opinion on the choice of regulatory obligations.

The remaining part of this article details the two first steps of the regime.

Market definition

Selection of the markets

In the electronic communications sector, lots of markets may be defined and several may lead to competition concerns, but only a sub-set of them are selected to be analysed by an NRA. According to the directives,[16] this selection should be based on the characteristics of the market, and more precisely on the relative efficiency of competition law remedies compared to sectoral remedies to address possible competition problems. In the recommendation on relevant markets,[17] the Commission has interpreted these provisions by referring to three cumulative criteria that should be fulfilled for a market to be selected.

The first criterion is static and relies on the presence of high and non-transitory barriers to entry. The barriers may be structural and result from original cost and demand economic conditions that create asymmetric conditions between incumbents and new entrants impeding or preventing market entry of the latter.[18] The entry barriers may also be legal or regulatory and result from legislative, administrative or other state measures that have a direct effect on the conditions of entry.[19] Both types of barriers are non-strategic (*i.e.* not artificially manufactured by the firms), as it was considered that strategic barriers like excessive investment or reinforcement of network effects would require idiosyncratic and episodic intervention, which would be better done under competition law.

The second criterion is dynamic and amounts to evaluating if the market has the characteristics such that it will tend towards effective competition over the relevant time horizon considered. If it is the case, the market should not be selected. The application of this criterion involves examining the state of competition behind the entry barriers, taking account of the fact that even when a market is characterised by high entry barriers, other structural factors or market characteristics may mean that it tends towards effective competition. This is, for instance, the case in markets with a limited but sufficient number of undertakings behind the entry barriers having diverging cost structures and facing a price-elastic market demand. Entry barriers may also become less relevant with regard to innovation-driven markets characterised by ongoing technological progress. In such cases, competitive constraints often come from the threat of innovation by potential competitors that are not currently in the market.

11 Art.17 of the Universal Service Directive
12 Art.8(4) of the Access Directive and Art.17(2) of the Universal Service Directive, and Guidelines on market analysis, para. 118.
13 Art.8 of the Framework Directive.
14 Art.7 of the Framework Directive and Commission Recommendation of July 23, 2003 on notifications, time limits and consultations provided for in Art.7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services [2003] O.J. L190/13.
15 See Recital 38 of the Framework Directive.
16 Art.15(1) and Recital 27 of the Framework Directive.
17 Recitals 9 to 16 of the Recommendation on relevant markets, as explained by s.3.2 of the Explanatory Memorandum. For the first recommendation on relevant markets, the Commission was instructed by the European legislature to include all the markets listed in Annex I of the Framework Directive. This list mainly corresponds to the markets regulated under the 1998 regulatory framework, albeit defined more precisely.
18 That may be the case for the last mile of the telecom fixed infrastructure (the so-called local loop between the customers' premises and the operators' Main Distribution Frame) in countries where there are no other substitutable technologies like cable.
19 That may be the case when only a limited number of undertakings have access to spectrum frequencies for the provision of the underlying services.

The third criterion relies on the relative efficiency of competition law remedies alone to address the market failure identified according to the two first criteria, compared to the use of complementary ex ante regulation. It is fulfilled when ex ante regulation would address the market failure more efficiently than antitrust. Such circumstances would, *e.g.*, include situations where the compliance requirements of intervention are extensive, where frequent and/or timely intervention is indispensable, or where creating legal certainty is of paramount concern.

These three criteria show that the rationale justifying the regulation of SMP operators has been radically revised. Under the 1998 framework, the SMP regime was mainly related to the competitive conditions under which infrastructures have been deployed. It mainly applied to markets previously under legal monopoly (fixed voice networks and services and leased lines[20]) and was thus linked to the so-called "original sin" of the previous monopolist. Under the new directives, the SMP regulation is disconnected from the original sin, and linked to the inefficiency of antitrust to control market power. It therefore represents a radical shift of the regulatory paradigm. Ironically, this may lead to an extension or even a perpetuation of sectoral regulation, even though the new directives were deemed to be de-regulatory. Indeed, the first Commission recommendation on relevant markets identifies 18 markets to be analysed, and will probably lead to more regulation (at least in the mobile sector).

Delimitation of the relevant markets [21]

Having identified the problematic areas, the precise boundaries of the market should be delineated in accordance with the principles of competition law.[22] A relevant market combines a product/service dimension with a geographical dimension. To determine both dimensions, the competitive constraints (*i.e.* the demand and supply substitutions) that will discipline the firms' behaviours should be identified, with the so-called "hypothetical monopolist test".

To apply the test,[23] the regulator starts by characterising the retail markets over a given time horizon. The product market definition should be primarily based on the needs of the end-users, and not necessarily on the technology used.[24] Clearly, customers' needs and preferences may be linked to specific technologies. For instance, fixed and mobile telephony are not in the same market because of the additional mobility feature offered by the latter,[25] and voice over Public Switched Telecom Network and voice over Internet Protocol may be in separate markets due to the additional quality of the former.[26] However, as technologies converge, consumers' preferences are less linked to technologies. For instance, consumers may be indifferent about receiving their broadband Internet connections via Digital Subscriber Line (DSL) technologies over telecom copper pair or via cable modem over broadcast cable infrastructure. In other words, the customer categories (large, medium and small corporate customers as well as individuals) should be more appropriate than technological categories as a basis to define product markets.[27] In addition, as sectoral regulation intervenes ex ante and for the future, the markets should be defined on a forward-looking basis, taking into account the developments foreseen over a reasonable period of time.

On the basis of retail market definitions, the regulator then defines the relevant linked wholesale or intermediate markets because wholesale customers are, by identity, the retail suppliers. An NRA has to determine the necessary service or infrastructure for an operator to enter a specific retail market. For example, if it is considered that Digital Subscriber Lines and cable modem are in the same retail Internet broadband access market, then it could be deduced that in this instance telecom and cable infrastructures are part of the same

20 There was nevertheless a slight possibility of regulating the mobile sector, that has been used more and more over time by the regulators across Europe: Art.7(2) of the Interconnection Directive 97/33.

21 S. Bishop and M. Walker, *The Economics of EC Competition Law* (Sweet & Maxwell, 2nd ed., 2002), Ch.3; M. Motta, *Competition Policy: Theory and Practice* (CUP, 2003), Ch.3; W.M. Landes and R.A. Posner, "Market Power in Antitrust Cases" [1981] *Harvard Law Review* 94(5), 937–996.

22 Art.15 of the Framework Directive, and Commission Notice on the definition of relevant market for the purposes of Community competition law: [1997] O.J. C372/5.

23 s.4 of the Explanatory Memorandum of the Recommendation on the relevant markets. In addition, see three studies made for the Commission services: Squire-Sanders-Dempsey and WIK Consult, "Market Definitions for Regulatory Obligations in Communications Markets", July 2002; Europe Economics, "Market Definition in the Media Sector—Economic Issues", November 2002; Bird and Bird, "Market Definition in the Media Sector: Comparative Legal Analysis", December 2002, available at *http://europa.eu.int/comm/competition/publications/publications/#media*; and also J. Gual, "Market Definition in the Telecoms Industry", September 2002, available at *http://europa.eu.int/comm/competition/antitrust/others/telecom/conference.html*.

24 Guidelines on market analysis, paras 63–69.

25 Decision of the Commission of September 20, 2001, *Pirelli/Editizione/Telecom Italia* M.2574, para.33.

26 Communication from the Commission on the Status of voice on the Internet under Community law: [2000] O.J. C369/3.

27 For that reason, the Recommendation on relevant market distinguishes the retail services provided to residential and non-residential customers (respectively markets 1, 3, 4 and markets 2, 5, 6).

wholesale market.[28] At this stage, the consideration of supply-side substitution is of the utmost importance and the markets should not be defined too narrowly.

A particular and politically very sensitive topic is the definition of the mobile termination market.[29] In the European mobile industry, the prevalent tariff principle is the so-called "calling-party-pays": the called party—who chooses the network which has to be called—does not have to pay for the call, whereas the calling party—who usually cannot choose the network—has to pay for the call. There is a dichotomy between the person who pays and the one who chooses: in other words, the called party imposes a negative externality on the calling party. It is therefore plausible that the called network may increase profitably its termination charges from 5 to 10 per cent, because on the one hand the calling network (and ultimately the calling customer) has no choice but to use the called network, and on the other hand the called customer will not switch to another network as he does not pay the termination charge. Each network may therefore be defined as a separate market with regard to wholesale termination.[30]

Obviously the market definition is an empirical exercise and other factors may constrain the pricing behaviour of the called network. For example, the person called may be sensitive about the cost of being reached (in the case of close users' groups or family and friends when the called party actually pays the invoice of the calling party), or there may exist a choice between the different networks to be used (using call back or multiple SIM cards if available[31]). If these factors are present, termination may be defined more broadly and comprise all the mobile networks of a specific country. But the general point is that the market may be defined very narrowly due to the specific tariff structure.

The geographical scope of the market is determined by the area covered by the network and the existence of legal and other regulatory instruments.[32] In the past, regulatory and technical restrictions clearly divided telecommunications markets along national or regional borders. Monopoly rights of the national telecommunications provider conferred its market an obvious national dimension. Nowadays, as a consequence of the liberalisation of telecommunications services and the harmonisation of technical standards and licensing procedures across Europe, electronic communications services can increasingly be provided or sold across national borders with no restriction. As a consequence the geographic markets may tend in some cases to expand towards a European dimension.

Assessment of significant market power

Having defined the markets, an NRA must then analyse them to find out if they are effectively competitive, which amounts to determining if any operator enjoys a dominant position or is able to leverage its dominant position. According to the case law, a firm enjoys a dominant position when, alone or collectively with others, it has sufficient market power to behave to an appreciable extent independently of competitors, customers, and ultimately consumers.[33] It corresponds to a certain degree of market power that enables its beneficiaries to behave without much constraint and that has been judged necessary to justify antitrust interventions. As the SMP threshold has now been aligned to the dominant position, the same level of market power will also trigger sector-specific regulation. Moreover, as an

28 For this reason, the Recommendation on relevant markets identifies a wholesale broadband access market (market 12) covering bitstream access over telecom infrastructure and alternative wholesale access provided over other infrastructures (like cable) if they offer facilities equivalent to bitstream access. In the US, some consider also that DSL and cable should be part of the same relevant market: R.W. Crandall, J.G. Sidak, H.J. Singer, "The Empirical Case Against Asymmetric Regulation of Broadband Internet Access" [2002] *Berkeley Technology Law Journal* 17, 953–987.

29 The termination charges are the wholesale charges that the calling network pays to the called network to terminate a call. For instance, if a customer of Vodafone calls a customer of Orange, Vodafone will pay to Orange a charge for the call to be terminated on Orange's network.

30 The recommendation on relevant markets identifies a market for voice call termination on an individual mobile network (market 16). See further: Decision of the Commission of July 10, 2002 *Telia/Sonera* M.2803, para.31. That is also the position adopted, *inter alia*, by the British regulator in 2001, and confirmed on appeal by the Competition Commission in 2003; see Reports on references under s.13 of the Telecommunications Act 1984 on the charges made by Vodafone, O2, Orange and T-Mobile for terminating calls from fixed and mobile networks, February 2003, available at: *www.competition-commission.org.uk/reports/475mobilephones.htm£full*. On the regulation of mobile termination, see also P. Crocioni, "Should telecoms liberalisation stops at call termination?" [2001] *Telecommunications Policy* 25, 39–58; A. Groebel, "Should we regulate any aspects of wireless?" [2003] *Telecommunications Policy* 27, 435–455; J. Haucap, "The Economics of Mobile Regulation" Working Paper, University of the Federal Armed Forces Hamburg, March 2003.

31 The call back means that the called party will call back the calling party. The multiple SIM cards means that the mobile handset of the person called contains several SIM cards, hence several networks may be used to reach him.

32 Guidelines on market analysis, paras 55–60. Nevertheless, some have argued that the network coverage should be part of the product dimension of the market and not its geographical dimension: P. Larouche, "Relevant Market Definition in Network Industries: Air Transport and Telecommunications" [2000] *Journal of Network Industries* 407–445.

33 *United Brands* 27/76 1978 E.C.R. 207; *Hoffman-La Roche* 85/76 1979 E.C.R. 461; Art.14(2) of the Framework Directive.

NRA intervenes ex ante and for the future, the market power should be appraised on a forward-looking basis by considering the expected and foreseeable developments over a reasonable period (linked to the characteristics and the timing of the next market analysis), with past data being taken into account when relevant.[34]

The assessment of single dominance[35] is not an easy task limited to the review of an exhaustive checklist, but requires a thorough and overall analysis of the economic characteristics of the relevant market to determine if one undertaking enjoys sufficient market power to behave independently. An important criterion is the market share: below 25 per cent absence of dominant position may be presumed, whereas above 40 per cent dominant position will be presumed, both presumptions being refutable.[36] The market shares should preferably be measured in value because telecoms services are differentiated, and not in volume or in terms of the number of lines or termination points.[37] Other criteria are also important[38]: overall size of the undertaking, technological advantage or superiority, absence of or low countervailing buying power, easy or privileged access to capital markets, product diversification, economies of scale and scope, vertical integration, highly developed distribution network, absence of potential competition, barriers to expansion, or the control of essential facilities.

The assessment of collective dominance is more difficult.[39] Two or more undertakings are in a collective dominant position when, albeit remaining independent, they behave like a single dominant entity. This parallel behaviour may be due to structural links between the firms (like agreements) or a market structure which means that firms align their behaviours without any concerted practices (pure tacit collusion). As noted in *AirTours*, the proof of tacit collusion requires three conditions to be fulfilled: transparency, possibility of retaliation and no countervailing reaction of the fringe competitors or the consumers. The appraisal of collective dominance is complex, and the directives[40] provide some assistance to the regulators with a list of criteria that are neither exhaustive nor cumulative: *inter alia* concentrated market, transparency, mature market, similar cost structure and market shares, and possibility of retaliatory mechanisms. Furthermore, the Commission has already adopted several merger decisions where the concept of collective dominance has been applied to the electronic communications sector.[41] It was considered that the characteristics of the mobile telephony market in Germany and in Belgium[42] may lead to tacit collusion; whereas the characteristics of the market for dial-up Internet access in Ireland, the world-wide market for the provision of global telecommunications services, or the market for the provision of pan-European mobile services to internationally mobile customers[43] would not lead to tacit collusion. But in general, few electronic communications appear to fulfil the conditions of collective dominance, particularly since the concerns about the likelihood of tacitly collusive behaviours by operators in setting bilateral termination charges have now been abated by recent economic research.[44]

Finally, when an operator enjoys a dominant position on a specific market, it may be deemed to have SMP on a closely related market if the links between the two markets are such as to allow the market power held in one market to be *leveraged* into the other market.[45] But this possibility may lead to excessive regulation, in particular when applied to emerging markets[46] and should be used with extreme caution for two reasons. First, vertical integration is not usually anti-competitive. When a firm enjoys substantial market power, there is only one monopoly rent to be gained and there is

34 Guidelines on market analysis, paras 20 and 75.
35 *ibid*., paras 72–82.
36 Recital 15 of the Council Merger Regulation 4064/89/EEC; *Akzo* C–62/86 1991 E.C.R. I–3359, para. 60; *Irish Sugar* T–228/97 1999 E.C.R. II–2969, para.70.
37 Guidelines on market analysis, paras 76–77; Notice on market definition, paras 53–55; Note from the Commission services/DG XIII of March 1, 1999, "Determination of Organisations with Significant Market Power", available at *http://europa.eu.int/ISPO/infosoc/telecompolicy/en/SMPdeter.pdf*.
38 Guidelines on market analysis, para.78.
39 *ibid*., paras 86–106; *Gencor* T–102/96 1999 E.C.R. II–753, paras 276–277; *Compagnie Maritime Belge* C–395/96, C–396/96P 2000 E.C.R. I–1365, para.39; *AirTours* T–342/99 2002 E.C.R. II–2585, para.62.
40 Annex II of the Framework Directive.
41 See also P. Rey, "Collective Dominance and the telecommunications industry", September 2002, available at *http://europa.eu.int/comm/competition/antitrust/others/telecom/conference.html*.
42 Respectively Decision of the Commission of May 21, 1999, *Vodafone/AirTouch* M.1430, para.28 and Decision of the Commission of July 11, 2000, *France Telecom/Orange* M.2016, para.26.
43 Respectively Decision of the Commission of March 27, 2000, *BT/Esat* M.1838, paras 10–14; Decision of the Commission of June 26, 2000, *MCIWorldCom/Sprint* M.1741, paras 258–302; Decision of the Commission of July 11, 2000, *France Telecom/Orange* M.2016, paras 39–40.
44 M. Armstrong, "The Theory of Access Pricing and Interconnection", in M. Cave, S. Majumdar, I. Vogelsang (eds) *Handbook of Telecommunications Economics, V.I: Structure, Regulation and Competition* (North Holland, 2002), pp.297–386.
45 Art.14(3) of the Framework Directive. See also *Tetra Pak II* C–333/94P 1996 E.C.R. I–5951.
46 Guidelines on market analysis, para.84.

usually no need to use vertical integration and foreclosure strategies to reap this rent. It is therefore only in exceptional circumstances when the monopoly rent cannot be gained on the monopolised market that vertical integration and market foreclosure are anti-competitive.[47] Secondly, even if vertical integration was anti-competitive, it is more appropriate to impose obligations on the dominated market (often the upstream infrastructure market) where the source of the competition problem lies, instead of imposing obligations on the leveraged market (often the downstream service market) where the consequences are felt. Therefore, the regulation of the downstream market would only be justified when upstream regulation is impossible or too late due to the lack of transparency of the wholesale terms and conditions.[48]

Conclusion: comparison between the SMP regime and competition law[49]

Even though the new concept of significant market power has been aligned on the antitrust concept of dominant position, competition law and sector-specific regulation do not coincide and should not be confused with each other. In general, they should be seen as complementary and not as substitutes. The objectives of both instruments tend to converge towards the pursuit of effective competition.[50] The scope of both instruments overlap as sectoral regulation applies to market structures where antitrust would be inefficient and competition policy applies across the board to all types of market structure.

On the other hand, the conditions of intervention vary according to the instruments. The SMP regime is limited to the market fulfilling certain criteria and then applies generally each time there are dominant operators. Competition law is triggered by a specific behaviour of the firms (abuse of dominant position, agreement or concerted practice, concentration) that should be proved to be anti-competitive. Therefore, the burden of proof for an NRA is fairly high when selecting a market, but becomes quite low to intervene. It is certainly lower than under competition law as there is no need to show any specific anti-competitive behaviour. Moreover, the appraisal of the intervention conditions (definition of market and assessment of market power) may differ under antitrust and sectoral regulation as the use of identical methodologies in different contexts may lead to different results.[51] The market is usually defined more broadly under sector-specific law than under competition. An NRA starts from a broader perspective and adopts a prospective approach, whereas the antitrust authority deals with a precise event that may be linked to one or more undertakings around which the market is defined. Similarly, the SMP operator does not necessarily enjoy a dominant position under Art.82 EC, as the relevant market may be defined differently and SMP is assessed more prospectively.

Finally, the remedies that may be imposed, or at least the principle guiding their selection, also differs under both instruments. With the decentralisation of competition law[52] and the new electronic communications directives, it is now clarified that both behavioural and structural remedies may be imposed under antitrust as well as under sectoral law. But the priority principle will vary. Under sectoral law and Art.82 EC, there is a priority for behavioural remedies and some sectoral remedies may go further than the antitrust one.[53] Under

47 P. Rey, P. Seabright, J. Tirole, *The Activities of a Monopoly Firm in Adjacent Competitive Markets: Economic Consequences and Implications for Competition Policy* (Working Paper, University of Toulouse, 2001).

48 For instance, if an incumbent operator wishes to leverage in an anti-competitive way its dominant position on the wholesale fixed local access to the retail internet access via DSL services, it is more appropriate to regulate the local access market.

49 For the relationship between competition law and the sector-specific regulation, see the references cited in n.1; and B. Doherty, "Competition Law and Sector-Specific Regulation" [2001] C.T.L.R. 8, 225–232; ITU, "Competition Policy in Telecommunications" Background paper for the workshop held on November 22, 2002, available at: *www.itu.int/osg/spu/ni/competition/documents.html*; M. Kerf and D. Géradin, "Controlling Market Power in Telecommunications: Antitrust vs Sector-Specific Regulation" (OUP, 2003); P. Larouche, *Competition Law and Regulation in European Telecommunications* (Hart, 2000); H. Ungerer, "Introduction of competition in the communications markets—The European experience", September 20, 2001, available at *www.europa.eu.int/comm/competition/speeches/*. For a US perspective: H.A. Shelanski, "From sector-specific regulation to antitrust for US telecommunications: The prospects for transition" [2002] *Telecommunications Policy* 335–355.

50 Along the same lines, see the speech of Commissioner Monti, "Competition and regulation in the new framework", July 15, 2003, available at *www.europa.eu.int/comm/competition/speeches/*. On the goals of competition law, see C.D. Ehlermann and L.L. Laudati (eds), *European Competition Law Annual: The Objectives of Competition Policy* (Hart, 1997).

51 Guidelines on market analysis, paras 24–32.

52 Art.7(1) of the Council Regulation 1/2003 of December 16, 2002 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty: [2003] O.J. L1/1.

53 Access Notice, para.15. For instance, compulsory access or cost orientation may more easily be imposed under sectoral regulation than antitrust.

merger control, there is a priority for structural remedies.[54]

Therefore, even though the new regulatory framework brings economic sector-specific regulation and competition law closer together, both are and remain different. Whereas the objectives and the scope of the two instruments may overlap, the conditions to intervene and the remedies available diverge. Under sectoral regulation, the intervention takes place ex ante, is relatively easy on the selected markets, and the obligations focus mainly on the behaviour of the firms. That makes its intervention particularly useful (and more efficient than antitrust) for a market needing on-going intervention,[55] *i.e.* the market fulfilling the three criteria identified by the Commission in its recommendation on relevant markets (high barriers to entry, absence of dynamic elements behind the barriers, and relative efficiency of sectoral remedies).

More fundamentally, some have argued that competition law has been stretched beyond its reasonable bounds by the new directives.[56] This paper shows the need to distinguish between antitrust principles and antitrust intervention. The antitrust principles are only a rigorous economic way of looking at the market and decrypting the forces at play. Their use should not be limited for antitrust intervention in markets whose competitive structures are *a priori* satisfactory. They could equally be used for sectoral regulation to control market power when antitrust would be inefficient to do so.

To conclude, the hybridisation of the SMP regime with competition law methodologies does not stretch antitrust beyond its reasonable limits and does not replace sectoral regulation by competition law. It is just an attempt to ensure that regulatory decisions are more flexible and closer to the economic reality of the market. It is a big challenge for the European regulators, and indeed for the whole electronic communications sector. If it fails, the national authorities and operators will be entangled in multiple legal challenges to the detriment of the whole industry. If it succeeds, the authorities' decisions will be focused and efficient to the benefit of European citizens.

54 Commission Notice on remedies acceptable under Council Regulation 4064/89/EEC and under Commission Regulation 447/98/EC: [2001] O.J. C68/3. Note that behavioural remedies having structural effects on the market may be imposed under the Merger Regulation (Case T–120/96 *Gencor* [1999] E.C.R. II–753, paras 316–320), and have been extensively used in the electronic communications sector. However, with the extended scope of the new regulatory framework and the increased possibility to rely on behavioural remedies under sector-specific regulation, it is hoped that the use of behavioural remedies in merger control will decrease and that the co-operation between the Merger Department of the Commission and the NRAs will be enhanced; see A. de Streel, "European Merger Policy in Electronic Communications Markets: Past Experience and Future Prospects" [2002], available at: *www.tprc.org/TPRC02/Agenda02.HTM#merger.*

55 See also the non-successful experience in New Zealand which relied exclusively on competition law to regulate telecoms: M. Webb and M. Taylor, "Light-handed Regulation of Telecommunications in New Zealand: Is generic Competition Law Sufficient?" [Winter 1998/99] *International Journal of Communications Law and Policy,* available at: *www.ijclp.org/basic/archive.html.*

56 P. Larouche, "A closer look at some assumptions underlying EC regulation of electronic communications" [2002] *Journal of Network Industries* 3, 148.