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THE AMBIGUITIES OF THE EUROPEAN ELECTRONIC COMMUNICATIONS REGULATION

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1. Introduction

In this paper, we aim to outline some ambiguities of the so-called 2003 regulatory framework for electronic communications. We analyse ambiguities with regard its objectives as well as its institutional design (in particular the role of the European Commission), and try to propose some ways forward to alleviate that its implementation ends up increasing the regulatory costs.

In Section 2, we briefly set the stage and place the 2003 Framework in the context of the European policy for Information and Communications Technologies. In Section 3, we focus on the ambiguities in the objectives of the new directives. They provide for general regulatory principles and broad policy objectives, and otherwise use open norms leaving much discretion to the regulatory actors. We submit that this broad discretion given by the 'substantive law' is only partially counterbalanced by institutional mechanisms to guarantee regulatory forbearance and harmonisation across Member States. Thus, there may be a risk of over-regulation, inconsistent regulation, and ultimately legal uncertainty. In Section 4, we focus on a particular aspect of the institutional design of the new directives and analyse the ambiguous role of the Commission. It should control national regulators to ensure that they fulfil the objectives of the directives, and at the same time should be a catalyst of consensus among the very same regulators. We submit that this dual and possibly contradictory role of the Commission may undermine its duty in ensuring common regulatory approaches across Europe and a single market for electronic communications. Finally in Section 5, we conclude by sketching out possible solutions to address these ambiguities and alleviate inefficient regulation.

2. Setting the stage: the European policy for the ICT sector

The European ICT policy aims to foster investment and innovation in the sector. This objective is justified for macro-economic reasons as a consensus emerges among economists that the development of ICT is one of the main drivers for the increase of productivity and the growth of the GDP[1]. This objective is also justified on social grounds, in order to alleviate an

* European Commission, DG Competition, Brussels and European University Institute, Florence. The opinions expressed are purely personal and do in any case not reflect those of the European Commission. This paper states the law as of 1 June 2004, unless indicated otherwise. Thanks for their helpful comments: Yves Blondeel, Philippe Defraigne, Daniel Muether, Robert Queck Jean-Paul Simon, and the participants of the Third Conference of the Round Table Expert Group on Telecommunications organised by the IViR in December 2003.

[1] D.W. Jorgenson, *Information Technology and the G7 Economies*, Working Paper, Harvard University, October 2003. E. Liikanen, *Accelerating the Renewal of Europe's Economy and Society with ICT*, Speech 28.11.2003.

unacceptable digital divide between the 'information haves' and the 'information haves not'[2]. This European policy is based on a combination of three interlinked pillars[3].

The first pillar is the *eEurope 2005 Action plan* endorsed at the 2002 Seville European Council[4]. It sets very ambitious objectives for European electronic communications and relies on the Open Method of Co-ordination to achieve them. This method involves four steps[5]:

(1) Fixing guidelines for the Union combined with specific timetables for achieving the goals that they set in the short, medium and long terms. Thus, the Action Plan provides that by 2005, Europe should have high speed secure Internet infrastructure and attractive contents, services and applications. It focuses on the demand-side by encouraging the provision of modern on-line public services (e-government, e-learning, e-health) and a dynamic e-business environment. But the Plan also concentrates on the supply-side by stimulating a widespread availability of broadband and secure infrastructures.
(2) Establishing, where appropriate, quantitative and qualitative indicators and benchmarks against the best in the world and tailored to the needs of different Member Sates and sectors as a means of comparing best practice. Thus, the Commission[6] designed a set of indicators related to the Internet (access by the citizens and the enterprises, and its costs), to the on-line public services and the e-business activity (buying and selling on-line, e-business readiness), to the network's security (users' experiences regarding security) and the broadband penetration.
(3) Translating these European guidelines into national and regional policies by setting specific targets and adopting measures, taking into account national and regional differences. Thus, each Member State has to adopt a national strategy regarding for instance broadband deployment or digital switchover[7]. These strategies should abide EU law, and in particular the rules on state aids and structural funds[8].
(4) Periodic monitoring, evaluation and peer review organised as mutual learning processes. Thus the Commission publishes reports of the progress of the indicators and has just conducted a mid-term review of the Action Plan[9].

The second pillar of the European ICT policy is the recently adopted *regulatory framework for electronic communications*. It aims to provide certainty to investors, increase competition and consumers' choice and stimulate innovation to the benefit of the European consumers. In

[2] The digital divide is also addressed at the UN level, for instance at World Summit on Information Society: <http://www.itu.int/wsis/index.html>. See: Communication from the Commission of 17 February 2004, Towards a Global Partnership in the Information Society: Follow-up of the Geneva Summit of the World Summit on Information Society, COM(2004) 111.
[3] E. Liikanen, *EU Policies to boost Productivity through ICT investments*, Speech 21.11.2003. Communication from the Commission of 3 February 2004, Connecting Europe at high speed: recent developments in the sector of electronic communications, COM(2004) 61.
[4] Communication from the Commission of 28 May 2002, *e*Europe 2005: An information society for all, COM(2002) 263.
[5] Para 37 of the Presidency Conclusions of the Lisbon European Council, March 2000.
[6] Communication from the Commission of 21 November 2002, *e*Europe 2005: Benchmarking Indicators, COM(2002) 655.
[7] Communication from the Commission of 12 May 2004, Connecting Europe at High Speed: National Broadband Strategies, COM(2004) 369.
[8] See Commission Services Guidelines of 28 July 2003 on criteria and modalities of implementation of the Structural Funds in support of electronic communications, SEC (2003) 89.
[9] Communication from the Commission of 18 February 2004, *e*Europe 2005 Mid-term Review, COM(2004) 108; Communication from the Commission of 17 May 2004, *e*Europe 2005 Action Plan: An Update, COM(2004) 380.

practice and carrying forward the philosophy of the previous framework -the so-called 1998 package- the new directives places a strong confidence in market mechanisms to maximise consumers' welfare. The framework is made of a liberalisation directive[10] adopted by the Commission in September 2002, that recalls and specifies the principles of market liberalisation and freedom to provide services which were at the core of the 1998 full liberalisation of telecommunications markets. It is also composed of four harmonisation directives[11] adopted by the European Parliament and the Council in March 2002 (and whose national transposition measures were due to be applicable in July 2003). The Framework Directive comprises provisions related to the institutions and their co-ordination to ensure an European regulatory culture, to the assessment of Significant Market Power (which is the threshold to impose the majority of regulatory obligations), and to the facilities needed to operate in a telecom market (such as numbering, naming and addressing, rights of way). The Authorisation Directive organises market entry and rolls back any unnecessary red tape. The Access Directive organises the wholesale markets (i.e. relationships between providers of electronic communications networks and services) and aims at ensuring a true single and effectively competitive market. The Universal Service Directive organises the retail markets (i.e. relationships between operators and end-users) and aims at ensuring the best possible deal for the European citizens. In addition, the regulatory framework is made of a Spectrum decision and an e-privacy directive[12].

The third pillar of the European ICT policy consists of *supporting research and development* preparing the future and ensuring Europe's mastering of the key elements of the ICT technology and value chain. It consists of the part the Sixth Research Framework Program devoted to Information Society Technologies (IST, more than 4 billion Euro for the period 2002-2006)[13]. In particular[14], it focuses on (1) applied research addressing major societal and economic challenges (security, *e*Health, *e*Government, *e*Business, …); (2) communication, computing and software technologies (broadband development, wireless systems beyond 3G, open development platforms); (3) components and micro-systems (micro and nano systems, opto-electronics), (4) knowledge and interface technologies (multi-modal interfaces, cognitive systems); and (5) future and emerging technologies.

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[10] Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services, O.J. [2002] L 249/21.

[11] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), O.J. [2002] L 108/33; Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), O.J. [2002] L 108/21; Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and services (Access Directive), O.J. [2002] L 108/7; Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), O.J. [2002] L 108/51.

[12] Decision 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Union (Radio Spectrum Decision), O.J. [2002] L 108/1; Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), O.J. [2002] L 201/37

[13] Decision 1513/2002/EC of the European Parliament and of the Council of 27 June 2002 concerning the sixth framework programme of the European Community for research, technological development and demonstration activities, contributing to the creation of the European Research Area and to innovation (2002 to 2006), O.J. [2002] L 232/1.

[14] See: <http://www.cordis.lu/ist/>.

3. Ambiguities in the objectives of the 2003 Framework[15]

The 1998 regulatory package[16] was the last piece of the liberalisation program aimed to foster the emergence of a single EU telecommunications market securing the necessary critical mass for a dynamic European telecommunications sector, thus improving the competitiveness of the European economy in an increasingly globalised world[17]. The directives were designed for a relatively simple market structure and had clear goals that have been instrumentalised in easily observable indicators (as listed in Annex I of this paper). The package aimed to remove any special and exclusive right, as well as actively promote entry in the markets by regulating the previous monopolists and supporting new operators. They provided for a single date for the full opening of the markets in all the Member States (1 January 1998 with a few controlled exceptions), in order to avoid reciprocity objections of operators from countries that would have delayed liberalisation. The directives also provided for safeguards to ensure that the liberalisation would not happen at the expense of the weak categories of the society. To achieve all these objectives, the 1998 package was based on the practice and experience in a number of Member States that had liberalised their markets before its adoption, such as the UK and Sweden.

The new directives are designed for a much more complex market structure, with technologies converging at an unpredictable pace, markets being more or less competitive depending of the country or the segment in the value chain, and ultimately an increasing difficulty to determine which actors and activities to regulate, since the dominant position of the relevant actors does no more always result from former monopoly rights. Moreover, the new framework is not only based on the practice and experience of the NRAs with the previous framework, but also on now fashionable good governance principles and economic theory, discussed in the framework of the 1999 Review. As a consequence, the 2003 framework does not provide a clear regulatory vision (and its underlying market design). On the contrary, the directives provide on the one hand overarching regulatory principles and broad policy objectives, and on the other hand, leave a broad margin of discretion to the regulatory actors when addressing in detail each branch of the regulation (entry, economic, and social regulation). It is thus only when looking at the accompanying soft-law instruments (like Guidelines or Recommendations of the Commission, or Common Position or Principles of Implementation and Best Practices of the NRAs) that we find a more precise (although often vague) vision. Finally, the directives provide for an 'institutional design' whose safeguards may be insufficient to compensate the important discretion of the regulatory actors and ensure the principles of forbearance and of harmonisation

[15] On the 2003 Framework, see: A. Bavasso, *Communications in EU Antitrust Law: Market Power and Public Interest*, Kluwer, 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, 2002; W. Maxwell (ed), *Electronic Communications: The New EU Framework*, Oceana Publications, 2002; P. Nihoul and P. Rodford, *EU Electronic Communications Law: Competition and Regulation in the European Telecommunications Markets*, O.U.P., 2004.

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

[17] Communication of the Commission of 30 June 1987, Towards a Dynamic European Economy: Green Paper on the Development of the Common Market for Telecommunications Services and Equipment, COM(87) 290.

3.1. Regulatory principles and policy objectives

Thus, the Commission decided to ground its proposals on five good regulatory principles[18]. (1) Regulation should be based on clearly defined political objectives. (2) Regulation should be limited to what is necessary to meet those objectives, removing the obligations of the 1998 package which are no longer necessary. (3) Regulation should ensure legal certainty allowing companies to make investment decisions with confidence, but be flexible enough to respond to dynamic and unpredictable market developments. That implies a sort of "re-nationalisation" of the common regulation of the dominant operators to allow each NRA to impose obligations on the market players on its territory according to national circumstances instead of having these obligations set in EU Directives. (4) Regulation should be technologically neutral to take the convergence into account. (5) Regulation should be enforced as closely as practicable to activities being regulated, whether regulation has been agreed globally, regionally or nationally.

According to the first principle, the Framework Directive[19] provides for three broad policy objectives to be followed by the NRAs: (1) sustaining an open and competitive European market for communications services in order to provide a better deal for the consumer; (2) consolidating the internal market; and (3) benefiting the European citizen by ensuring affordable access to universal service and ensuring a high level of data protection and privacy. These objectives remain very general and look more like a catalogue than a coherent statement. For instance, NRAs 'shall promote competition' by 'ensuring that users ... derive maximum benefits in terms of choice, price and quality', 'ensuring that there is no distortion or restriction of competition' and also 'encouraging efficient investment and promoting innovation'. These various goals, as we saw under the 1998 package, are not necessarily compatible so that the new directives leaves the door open to a continuation of the current policy contradictions[20] between the approaches of the various European Ministries and NRAs, and do, in principle, not prevent further divergences as regards the obligations ("remedies") imposed on SMP operators.

3.2. The 'substantive law' and its use of open norms

(a) Entry on the market

With regard to entry on the market, the directives aim to get rid of any unnecessary red tape to enter the market that the 1998 package was not able to avoid. Thus, they ensure that the general authorisation is the rule, and their conditions are limited to the list provided in the Annex A of the Authorisation directive[21]. For the scarce resources (like numbering and frequencies), they allow Member States to grant individual rights of use in addition of the

[18] Communication of the Commission of 10 November 1999, Towards a new framework for Electronic Communications infrastructures and associated services – The 1999 Communications Review COM(1999) 623, pp. 14-17. For an analysis of the application of these principles in the directives: A. de Streel et R. Queck, "Un nouveau cadre réglementaire pour les communications électroniques en Europe", *Journal des tribunaux de droit européen*, 2003, 193-202.
[19] Article 8 of the Framework Directive.
[20] P. Larouche, "What went wrong: the European perspective", in *Report of the Second Conference of the Round Table Expert Group on Telecommunications Law*, April 2003, p. 76.
[21] Articles 3, 4, 6, 9 to 12 and Annex, part A of the Authorisation Directive.

general authorisation when justified and given in a transparent and non-discriminatory way but limit the conditions that may be imposed on operators[22].

These rules are undoubtedly a big step forward, but are still insufficient to ensure a single and competitive electronic communications market at least in two respects. First with regard to the management of frequencies which have been identified by many as one of the main failures of the 1998 package and a possible cause of the over-indebtedness of telecom operators and the reluctance of the financial markets to further invest in the sector[23], the framework sets the basis for a co-ordinated policy across Europe (for instance allocation of radio spectrum, possibilities and conditions of secondary trading,…) but without forcing Member States to agree or granting the Commission specific powers beyond recommending common approaches. That may be not be enough to alleviate another 3G-licence tragedy and ensure the emergence of new technologies and applications (like Wi-Fi, WiMax 802.16, ...). Second with regard to the granting of rights of way, the new directives guarantee that they will be allocated under proportionate and non-discriminatory conditions, but do not manage to limit the type of conditions that may be imposed on the operators[24].

(b) Economic Regulation of market activities (1): The SMP regime

With regard to the regulation of economic activities to ensure efficiency, the directives set only very general criteria to decide when NRAs should intervene. That may be illustrated with the two main aspects of economic regulation: the SMP regime which constitute the main part of it, and the standardisation regime.

In SMP regime[25], regulatory obligations are imposed in three steps. (1) In the first step, markets to be analysed are defined in two sequences. The Commission periodically adopts a Recommendation[26] 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

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[22] Articles 5 to 8, 10, 13, 13 and Annex, parts B and C of the Authorisation Directive.

[23] P. Larouche, cited at note 20; H. Ungerer, *What are the results of 15 years deregulation in Telecommunications, What are the challenges and opportunities for telecommunications and media operators and policy makers in the coming years?*, Speech 23.1.2003, p. 6.

[24] In other words, there is no Part D in the Annex of the Authorisation Directive that would list the conditions that may be attached when granting rights of way, as there is a list for the conditions attached to the general authorisation (Part A), to the rights of use of radio frequencies (Part B), and to the rights of use for number (Part C).

[25] Articles 14 to 16 of the Framework Directive. A.F. Bavasso, "Electronic communications: a new paradigm for European regulation", *Common Market Law Review* 41(1), 2004, 87-118; M. Bak, "European electronic communications on the road to full competition: The concept of Significant Market Power under the new regulatory framework", *Journal of Network Industries* 4, 2003; M. Cave, "Economic Aspects of the New Regulatory Regime for Electronic Communication Services", in P. Buiges and P. Rey (eds), *The Economics of Antitrust and Regulation in Telecommunications*, E. Elgar, 2004, 27-41; A. de Streel, "The Integration of Competition Law Principles in the New European Regulatory Framework for Electronic Communications", *World Competition* 26, 2003, 489-514.

[26] Commission Recommendation of 11 February 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, OJ [2003] L 114/45, hereinafter *Recommendation on relevant markets*. See: A. de Streel, "Market Definitions in the New European Regulatory Framework for Electronic Communications", *Info* 5, 2003, 27-47.

problems and then, delineate the boundaries of these markets on the basis of antitrust methodologies. Taking account of this Recommendation on relevant markets and the Commission Guidelines on market analysis[27], 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. (2) In the second step, the NRA analyses the defined markets to determine whether one or more operators enjoy SMP, which amounts to determine 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[28]. (3) In the third step, if operators have been designated as having SMP, the NRA imposes on them the appropriate specific regulatory obligations to be chosen from a menu provided in the directives They should choose remedies that are appropriate, justified and proportionate according to the Common Position on remedies recently adopted by the European regulators[29]. Conversely, if none operator enjoy SMP, the NRA must withdraw any obligation that may be in place and shall not impose or maintain any new one. Thus the regime build in a market-by-market sunset clause.

As we detail later, the role of the Commission is important as it steers the whole process. It starts the procedure by adopting and updating the Recommendation on relevant markets. More importantly, the Commission may review under the so-called Article 7 review[30] all the NRAs decisions that would affect trade between Member States. It can veto a product and service market definition that differs from those of the Recommendation and an SMP (or a non SMP) designation. It can also give a non-binding opinion on the choice of regulatory obligations.

However, this three-steps process leaves a number of uncertainties as regards its future application. The first sequence of the first step (i.e. selection of markets to be regulated because of their structural problems) may for example be controversial. The Framework Directive provides, in a very sibylline way, that SMP obligations are to be imposed only where there is market power that can not be efficiently controlled by antitrust law. It adds that new and emerging markets, in which market power may be found to exist because of 'first mover' advantages, should not in principle be selected[31]. This selection shows that the rationale justifying economic regulation has been radically revised. Under the 1998 package, 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[32]) and was thus linked to the original sin of the previous monopolist. Under the new directives, the SMP regulation is dis-connected from the original sin, and is linked to the inefficiency of antitrust to control market power.

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[27] Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, OJ [2002], C 165/6, hereinafter *Guidelines on market analysis*.

[28] See Guidelines on market analysis, para 70-106; ERG Working Paper of May 2003 on the SMP concept for the new regulatory framework, ERG(03) 09rev2.

[29] ERG Common Position of 1 April 2004 on the approach to appropriate remedies in the new regulatory framework, ERG(03) 30rev1, hereinafter *Common Position on remedies*. See R.A. Cawley, "The new approach to economic regulation in the electronic communications sector in Europe: the application of regulatory remedies", *Journal of Network Industries* 5, 2004.

[30] By reference to the Article 7 of the Framework Directive.

[31] Article 15(1) and Recital 27 of the Framework Directive.

[32] There was nevertheless a slight possibility to regulate the mobile sector, that has been used more and more over time by the regulators across Europe: Article 7(2) of the Interconnection Directive 97/33.

However the efficiency of antitrust is an untested criterion that may be difficult to apply. Indeed different interpretations (that are not necessarily contradictory) have already been proposed. For the Commission[33], three criteria must be cumulatively fulfilled: high and non-transitory entry barriers, market structures that do not lead to effective competition behind the barriers, and relative inefficiency of antitrust remedies to solve the market failure (because compliance requirement are extensive, frequent and/or timely intervention is indispensable, or legal certainty is of paramount concern). For one of us[34], this means that regulation is justified in case of natural monopoly, externalities, or market structure leading to tacit collusion. Before the adoption of the directives, Larouche[35] proposed to focus regulation on cases of bottlenecks or network effects. For some external consultants of the Commission, market failures that may currently justify ex ante regulation: interconnection (especially termination practices), access to networks or digital gateways, local loop, distributions and access to scarce resources. For the future, they identified also: intellectual property rights, directory services, programming guides, control over interfaces/web navigators[36].

In addition, the third step of the process (i.e. imposition of appropriate remedies) is also difficult as the directives provides for a broad list of remedies to be imposed on the wholesale markets (mainly transparency, non-discrimination, accounting separation, third-party access, and price control) and the retail markets[37]. They only instruct the NRAs to follow three high level principles: remedies should be based on the identified problem, justified with regard to the objectives of the NRAs, and proportionate[38]. In addition, the ERG committed to a fourth principle: that remedies should be incentive compatible, i.e. formulated in such way that the advantages to the regulated party of compliance outweigh the benefits of evasion[39].

However, these principles leave room for much interpretation. For instance, a classical debate is to determine if regulation should promote infrastructure (facilities-based) competition or services (access-based) competition. For Commissioner Monti[40], there is no conflict between both types of competition when the time dimension is taken into account. Indeed, NRAs should provide incentives for competitors to seek access from the incumbents in the shorter term, and to rely increasingly more on building their own infrastructure in the longer term. It remains that the balance between short-term and long-term considerations is very delicate to set, and the debate may be reframed between NRAs favouring long-term considerations and NRAs favouring short term needs.

The directives[41] do not provide any clear indication to decide between the different positions among the European regulators[42]. It may be argued that the accompanying soft-law

[33] Recitals 9 to 16 of the Commission Recommendation on relevant markets. See the background study done for the Commission services: Squire-Sanders-Dempsey and WIK Consult, *Market Definitions for Regulatory Obligations in Communications Markets*, 2002.
[34] A. de Streel, cited at note 25, 496.
[35] Cited at note 16, 368-398.
[36] Squire-Sanders-Dempsey and Analysis, *Consumer demand for telecommunications services and the implications of the convergence of fixed and mobile networks for the regulatory framework for a liberalised EU market*, 1999, 147.
[37] Respectively Articles 9 to 13 of the Access Directive and Article 17 Universal Service Directive.
[38] Article 8(4) of the Access Directive and Article 17(2) of the Universal Service Directive.
[39] Common Position on remedies, 71-73.
[40] M. Monti, *Remarks at the European Regulators Group Hearing on Remedies*, Speech 26.01.2004, 3.
[41] In particular Article 12 of the Access Directive.
[42] T. Kiessling and Y. Blondeel, "The impact of Regulation on Facility-Based Competition in Telecommunications: A Comparative Analysis of Recent Developments in North America and the European

instruments are tilting the balance in favour of infrastructure competition, but that is not definitive. The Recommendation on relevant markets notes that[43]: "The aim of the new regulatory framework is ultimately to achieve a situation where there is full infrastructure competition between a number of different infrastructures. This can occur within or between platforms. Regulation mandating access to existing networks serves as a transitional measure to ensure services competition and consumer choice until such a time as sufficient infrastructural competition exists". The Common Position on remedies notes that: "Where replication of the infrastructure is known to be feasible, remedies should assist in the transition process to a sustainable market and assist the new entrants in climbing the 'ladder of investment'. Where infrastructure competition is not likely feasible, NRAs must ensure sufficient access to wholesale inputs in order to secure maximum consumers benefits". Thus, the regulatory actors agree that regulation should aim to promote infrastructure competition where possible (and that access price should safeguard investment incentives[44]) because it is the only competition that is self-sustaining and may lead to a complete removal of regulation. Services competition should only be relied upon when facilities-based competition is not possible or as a transitory step towards facilities-based competition. However, it is not clear when infrastructure competition is possible and when services competition may be a transitory step, in particular in a sector with a long and rapidly evolving value chain. Thus, the hard-law as well as the soft-law leave much discretion to the NRAs to pursue their own regulatory strategies.

A related issue is to determine if and how sector regulation should promote entry. In particular, should regulation only favour entry of operators that are equally efficient than the incumbent or also entry of operators that are less efficient than the incumbent? This is all the more complicated because the relative efficiency of a new entrant is difficult to assess due to the prevalent economies of scale and scope in the sector[45]. Should the efficiency of a new entrant be assessed as if they were enjoying the same economies of scale and scope than the incumbent (which will rarely be the case in reality), or should it be assessed without such economies (which will often lead to the conclusion that the new entrant is less efficient)?

Again, the directives are fairly silent on the issue. The alignment of the SMP concept with antitrust principles may suggest that the regime is now limited to favour entry of equally efficient firms. Indeed, the role of antitrust is to protect competition and not competitors[46],

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Union", *Communications & Strategies*, 1999, 36; T. Kiessling and Y. Blondeel, "Effective competition in European telecommunications: an analysis of recent regulatory developments", *Info* 1, 1999, 419-439.

[43] Explanatory Memorandum, p. 25. This was the justification for not including resale products. However during its market analysis, Oftel has selected and regulated pure resale products (wholesale access lines), and the Commission did not raise any comments regarding the proportionality of this remedy (Commission decision of 23 September 2003, UK/2003/11 to UK/2003/16). The issue is nevertheless also the time-horizon of the relevant remedies as reflected in the statement of M. Monti (*idem* note 40) that: 'in the longer term, the regulatory framework should privilege operators which base their competitive advantage on building their own infrastructure".

[44] On the relationship between access prices and infrastructure investment, see the papers in *Telecommunications Policy* 27, 2003, 657-727 (special issue edited by M. Cave). These papers suggest an access price positively related to the replicability of the asset, and rising over time. This scheme aims to ensure static as well as dynamic efficiency. This sort of rising access price over time has been adopted by the Dutch NRA since 1998.

[45] See the discussion in the Annex of the Common Position on remedies.

[46] E.M. Fox, "We Protect Competition, You Protect Competitors", *World Competition* 26, 2003, 149-165.

and an alignment in methodologies may imply an alignment in objectives[47]. However, this rationale may not hold for at least two reasons. First, the role of antitrust in newly liberalised sectors where effective competition seems possible in the future may be different than in normal industries[48]. In these particular sectors, there may be a case for antitrust to actively promote entry of less efficient firms because it may pay in the long run to have many actors competing with each other[49]. Second, an alignment of methodologies does not necessarily imply an alignment of objectives. Antitrust methodologies may just be seen as a rigorous economic way to look at the market and read the forces at play, independently of the objectives of the authority relying on these methodologies. Again, any more precise indication should be looked for in the soft-law instruments, but they do not provide an explicit answer. For instance, the Common Position on remedies contains certain indication that regulators may promote less efficient entry in some cases, but that is not definitive[50].

These uncertainties may lead to very different regulatory strategies across Europe, all of them being compatible with European law because the 2003 Framework does not prioritise between the objectives that NRAs should bear in mind when intervening. For instance, to deal with the pervasive domination of the incumbents in the local loop, a national regulator may be very interventionist. It may impose access obligation at several points of the incumbent's network (full unbundling, shared access, bitstream, simple and double transit interconnection) or even resale offers, and choose pricing methodologies leading to the lowest access price providing a reasonable rate of return[51]. Conversely, a national regulator may be less interventionist. It may limit compulsory access (by excluding bitstream in some densely populated region) or not imposing wholesale offers, and/or implement pricing methodology leading to higher access prices.

(c) Economic Regulation of market activities (2): Standardisation

Another example where the new directives do not contain a binding regulatory strategy relates to the standardisation regime and the much-debated open source issue[52]. The Framework Directive provides that standards should not be regulated in principle, but that the Commission may impose specific standards where necessary to ensure interoperability of services and improve freedom of choices for users[53]. The most controversial issue relates to

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[47] M. Monti, *Competition and Regulation in the new Framework*, Speech of 15.7.2003; R. Kruger and L. Di Mauro, "The Article 7 mechanism: managing the consolidation of the internal market for electronic communications", *Competition Policy Newsletter* 2003/3, p. 36.

[48] Larouche, cited note 16; L. Hancher and J.L. Buendia Serra, "Cross-Subsidization and EC Law", *Common Market Law Review*, 1998, 901-941; M. Motta and A. de Streel, "Exploitative and exclusionary excessive pricing in EU law", in C.D. Ehlermann and I. Atanasiu (eds), *Competition Law Annual 2003: What is an Abuse of Dominant Position*, Hart, 2004.

[49] Conseil de la Concurrence français, "Etudes thématiques: L'orientation des prix vers les coûts", in *Rapport d'activités 2002*, 2003, p. 72. Similarly, Grout notes that in an industry where it is anticipated that there will be an enormous degree of competition, regulator is justified to pro-actively enhances competitors in its choice of regulatory devices (for example, using LRIC model instead of the ECPR method, relying extensively on price squeeze actions): P.A. Grout, *Competition Law in Telecommunications and its Implications for Common Carriage of Water*, CMPO Working Paper 02/056, July 2002

[50] Common Position on remedies, 79, and its Annex dealing with margin squeeze.

[51] For instance in case of unbundling, by adopting an approach which started from the book value of the assets (historic costs) as in Denmark, or using a benchmark referring to that price like the Italian regulator

[52] See the Commission web-site devoted to open-source: <http://europa.eu.int/information_society/activities/opensource/index_en.htm>.

[53] Article 17 of the Framework Directive; Commission List of standards and/or specifications for electronic communications networks, services and associated facilities and services (interim issue), O.J. [2002] C 331/32.

the broadcasting sector, and the possible imposition of an open API to ensure competition for digital interactive television services and cultural diversity[54].

After many political debates during the adoption of the directives, the compromise was fairly neutral. No open standard has been imposed, but Member States should encourage the providers of digital interactive TV services to use an open API and the holders of proprietary APIs to give access to their APIs on fair reasonable and non-discriminatory terms. Moreover, the Commission shall review the situation in July 2004, and possibly decide to impose an API if interoperability and freedom of choice were not been adequately achieved in one or more Member States[55].

(d) Protection of users' interests

The new Universal Service Directive carries forward the objectives of the 1998 package but provide a great deal of helpful clarifications[56]. It ensures that every European citizen gets access to basic services of the Information Society at an affordable price, and that Member State may go further than this European socle provided they do not rely on sector fund to finance additional mandatory services.

The Directive also introduces two important new principles aiming at improving governance and ensuring that the public service will be provided more efficiently. The first principle states that retail markets controls is only justified if wholesale regulation were insufficient to police market behaviour[57], thus calling for a drastic reduction of retail regulation. Indeed, as most of retail anti-competitive behaviour stems from the exercise of market power on a upstream wholesale market, it is more appropriate to regulate this intermediate market (source of the problem) than the retail market (manifestation of the problem). The second principle introduced by the Directive guarantees that universal service is provided in the least distorting way for the economy. This implies *inter alia* that the least costly way to ensure universal service is chosen by the Member State[58], or that in the case of compensation from within the sector, the contributors' basis should be as wide as possible[59].

However, the application of these (fairly theoretical) principles may be difficult and lead to divergent interpretations. As for the first principle, it remains to be seen whether NRAs will be ready to free retail markets from their obligations. In particular, price controls on retail

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[54] Article 18 of the Framework Directive. Note that the Application Program Interface is software interface between applications, made available by broadcasters or service providers, and resources in enhanced digital television equipment for digital television and radio services. An open API may be the MHP (Muti-Home Platform) developed by the DVB Group.

[55] See further: Communication from the Commission of 9 July 2003 on barriers to widespread access to new services and applications of the information society through open platform in the digital television and third generation mobile communications, COM(2003) 410; Study done for the Commission services by OXERA, *Interoperability, Service Diversity and Business Models in Digital Broadcasting Markets*, March 2003.

[56] In general, see: A. de Streel, "The protection of the European citizen in a competitive e-Society: The new E.U. Universal Service Directive", *Journal of Network Industries* 4, 2003, 189-223.

[57] Article 17 Universal Service Directive.

[58] For an overview: ERG/IRG Report of October 2003 on Universal Service Designation, ERG(03) 38.

[59] Articles 3(2), 8, 12 of the Universal Service Directive. However, the latter approach is already creating a distortion as far as contributions are calculated on number of minutes or turnover and thus imposing a high burden on services with a low margin, such as broadband access via unbundled loops or IP voice. In other words, while this second principle introduced sound for economic principles in the regulatory arena, it did not avoid unintended side-effects.

markets are currently used by NRAs to monitor *ex ante* possible price squeeze (and time squeezes) between wholesale and retail offers. In the absence of controls on retail prices, a NRA can only intervene *ex post* as a competition authority[60]. As for the second principle, the method to designate the universal service provider or to calculate of the net cost may still vary in the Member States. Finally, note that the consumer protection provisions of the directives are only minimal (and not complete) harmonisation. Thus, they allow further national rules on consumer protection in conformity with Community Law, for instance to protect the small and medium sized enterprises[61].

3.3. The institutional design

Next to the substantive rules, the directives provide for an 'institutional design' when defining the tasks and procedure of the regulatory trinity (NRAs, national Courts, and the European Commission).

The first actor (the NRA), already crucial under the 1998 package, has seen its powers considerably increased with the new directives[62]. Strong national regulators are now at the heart of the organisation of the electronic communications markets, which may have clashed in the past with a conservative interpretation of the Constitutions of some continental Member States. Fortunately, these concerns seem now to have been abated in most of these countries[63]. To ensure appropriate regulatory decisions, the Framework Directive[64] provide some very general rules on the national institutions, which define the tasks, the main characteristics (independence, sufficient resources), and the powers of the NRAs. They also set the institutional checks and balances (like the consultation to be held with the public and the competition authority, or the scope of judicial review) to ensure following Montesquieu that *le pouvoir arrête le pouvoir*. In particular the directives put in place some forbearance mechanisms in order to alleviate the risk of regulatory inflation: like the three broad policy objectives in the Framework directive, the market-by-market sunset clause embodied in the SMP regime, or the effective appeal process.

Moreover, NRAs should co-operate with each other and with the Commission to ensure a consistent application across Europe of the new Directives[65], which is particular important to implement a framework which is more derived from theory than from practical experience. Thus the directives provide that NRAs should consult each other on draft measures imposing

[60] This was evidenced by the roughly 20% wholesale price cuts from France Télécom on 1st January 2004 and simultaneous and well marketed retail price cuts of Wanadoo's retail offers (the price of the 512k service to €34.90/month, down by 23% from €45.42/month, and €29.90/month on a 24-month contract). The NRA had proposed to allow the retail price cuts only from 1 April onwards, in order to allow competing ISPs to adapt their marketing strategy on a level playing field, but the French Minister had not followed the proposal from the NRA, and authorised without delay the retail price cuts. This sequence of events reveals the vulnerability of alternative operators in the absence of ex ante retail price controls. Note that in Germany, DT is obliged to provide parallel corresponding wholesale product when filing tariff approval application for new retail products (§ 37 (4) TKG).

[61] See Article 20(1) and Recital 49 of the Universal Service Directive.

[62] For an overview: D. Stevens and P. Valcke, "NRAs (and NCAs?): the Cornerstones for the Application of the New Electronic Communications Regulatory Framework, *Communications & Stratégies* 50, 2003, 159-192. In general, see: D. Geradin and N. Petit, *The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform*, Jean Monnet Working Paper 01/04.

[63] See generally: Rapport public du Conseil d'Etat français, *Les autorités administratives indépendentes*, La Documentation française, 2001.

[64] In particular, Articles 3 to 8 of the Framework Directive.

[65] Article 7(2) of the Framework Directive.

obligations to an SMP operator, and collaborate for the analysis of trans-national market or the resolution of cross-border disputes[66]. Moreover, some institutional fora are set up for the Ministries and NRAs to talk to each other and exchange best practices. The Framework Directive sets up the Communications Committee (COCOM), which is a standard Committee composed of representatives of Member States[67]. It aims to assist (and control) the Commission in implementing the new directives. In addition, the Commission sets up in 2002 the European Regulators Group (ERG) that is composed of the NRAs of each Member State and the Commission[68]. It aims to provide an interface between the NRAs and the Commission to contribute to the development of common regulatory culture. To do so, the ERG looks in more detail to certain particular and politically sensitive problems and tries to develop a common approach, such as remedies, bitstream, and LRIC methodology[69]. Finally, there is the Independent Regulators Group (IRG)[70], which was established in 1997 as an informal group of NRAs from the Member States and other European countries members of the EEE, without the Commission. The broad objective of the IRG is to share experience and exchange point of view on issues of common interest amongst its members. To do so, the IRG looks also at several detail regulatory issues and decided Principles of Implementation and Best practices (PIBs)[71].

The role of the second actor of the trinity -national Courts- also increases[72]. First, the scope of judicial review has been broadened to include the merits of the case[73]. Second, the incentives to appeal have been increased by the alignment of the SMP regime with competition law methodologies. Indeed, if an operator is designated as having SMP, it will probably be presumed to have a dominant position in an antitrust proceeding as well[74]. Hence, the operator has a double incentive to appeal the NRA's decision: to lift regulation, and also not to be

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[66] Articles 7(3), 16(5), 21 of the Framework Directive.

[67] Set up by the Article 22 of the Framework Directive and with a website at: <http://forum.europa.eu.int/Public/irc/infso/cocom1/home>. For spectrum matters, there is the Radio Spectrum Committee-RSC, set up by the Article 3 of the Radio Spectrum Decision and with the website at <http://forum.europa.eu.int/Public/irc/infso/radiospectrum/home>.

[68] Commission Decision of 29 July 2002 establishing the European Regulators Group for Electronic Communications Networks and Services, O.J. [2002] L 200/38. For spectrum matters, there is the Radio Spectrum Policy Group (RSPG) composed of high level governmental experts of each Member States and the Commission, set up by Commission Decision of 26 July 2003 establishing a Radio Spectrum Policy Group, O.J. [2002] L 198/49. See the website of ERG: <http://erg.eu.int>; and of the RSPG: <http://rspg.groups.eu.int>.

[69] ERG Interim Document of 20 November 2003 on Bitstream Access, ERG(03) 34; ERG Consultation Document of July 2003 on a Proposed ERG common position on FL-LRIC modelling.

[70] See: <http://irgis.icp.pt/site/en/>.

[71] For instance: PIBs of 20 November 2003 on the application of remedies in the mobile voice call termination market; PIBs of of 24 September 2003 regarding cost recovery principles; PIBs of 9 July 2003 regarding Itemised Billing; PIBs of 19 May 2003 regarding call barring; PIBs of 19 May 2003 regarding Disconnection; PIBs of 18 October 2001 regarding Local Loop Unbundling (as amended in May 2002); PIBs of 24 November 2000 regarding FL-LRIC cost modelling.

[72] For the role of the Courts under the 1998 package: A. Ottow "Dispute Resolution under the new European Framework" in *Report of the Third Conference of the Round Table Expert Group on Telecommunications Law*, December 2003; British Institute of International and Comparative Studies, *Effective Access and Procedure in Telecommunications Disputes in Europe*, 2004; E. Dommering (ed), *Zes Jaar Bestuur en Rechtspraak in de Telecommunicatiemarket*, 2004.

[73] Article 4 of the Framework Directive. Note that under the national implementation of the 1998 framework, the judicial review was already broad in some countries (like Germany or the Netherlands) but not in others (like Austria or the UK). See also the indications in *Connect Austria* C-462/99 [2003] I-5197, para 37-40 : due to the direct effect of Article 5 Directive 90/387, national appeal should be sufficient, otherwise national law should be dis-applied.

[74] Note however, that a SMP designation does not automatically imply a dominant position: Guidelines on market analysis, para 30.

presumed as being dominant. Moreover, as dominant position is difficult to assess, it is quite easily challengeable. Third, in some countries, the appeal of regulatory decisions is now located at a Court specialised in antitrust law, which would then be more at ease to strictly review and possibly set aside an NRA decision[75].

The role of the third actor of the trinity -the European Commission- has also been modified. First, the Commission should ensure compliance of Member States with European law (via infringement procedures). This has been enhanced by the Article 7 review. Second, the Commission should ensure implementation of European law, next to the Member States (via the adoption of implementing measures), as well as a common regulatory approach in Europe (via its role inside the ERG and the RSPG).

3.4. The risks of the 2003 Framework

After this rapid *tour d'horizon*, we observe that the new directives rely extensively on 'open norms' (broad objectives and high level regulatory principles) instead of clear and precise rules, thereby leaving large discretionary powers to the regulatory actors. This should not be problematic as such. Indeed, there is a general tendency of the law to rely more on flexible concepts[76]. In particular, for a sector evolving rapidly and in unpredictable way, it would not have been appropriate to freeze in non-easily modifiable hard-law instruments a policy vision based on a specific market design reflecting a political agreement achieved at a specific moment in time. In any case, this latter option was not feasible politically due to the diverging positions of the Member States.

The extensive use of 'open norms' may be problematic if their interpretations would lead to over-regulation. The new directives were deemed to be deregulatory[77], and during the adoption of the Directives, the three main EU Institutions argued in favour of a progressive, but complete, phasing out of the economic regulation to the benefit of the mere application of antitrust law[78]. Similarly, the Commissioner in charge of Competition refers to the time when only antitrust will be applicable[79], and the Commissioner in charge of Information Society refers to a time when several infrastructures will compete against each other and sector-specific economic regulation will be completely phased out[80].

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[75] For instance, in the UK, the appeal of Ofcom's decisions have been located to the Competition Tribunal. In Belgium, the appeal against BIPT's decisions have been moved from the Council of State to the Appeal Court of Brussels. On this point: P. Strivens, "New Access Conditions-a Challenge to Competitive Telecoms Operators and Services Providers", *C.T.L.R.*, 2003, 123.

[76] F. Ost et M. van de Kerchove, *De le la pyramide au réseau?: Pour une théorie dialectique du droit*, Bruylant, 2002.

[77] Note that Larouche identified this rhetoric as an underlying assumption of the 2003 Framework: "A closer look at some assumptions underlying EC regulation of electronic communications", *Journal of Network Industries* 3, 2002, p. 140.

[78] Communication Review 1999, cited at note 18, p. 49; Resolution of the European Parliament of 13 June 2000 on the 1999 Communications Review of the Commission A5-0145/2000, O.J. [2001] C 67/53, Point A; Statement of Reasons of the Council Common Position 38/2001 of 17 September 2001 on the Framework Directive, O.J. [2001] C 337/51, para II.1.

[79] M. Monti, *Competition and Regulation in the new Framework*, Speech of 15.7.2003.

[80] E. Liikanen, *Accelerating Broadband in Europe*, Speech of 28.1.2003: 'Competing network infrastructures are essential for achieving sustainable competition in network and services in the long term. When facilities-based competition is effective, the new framework will require ex-ante obligations to be lifted. Investment in new and competing infrastructure will bring forward the day when these obligations can be relaxed".

However, the wordings of the Directives are fairly neutral and may well be relied on to increase regulation. It is true that the revised SMP regime contains an in-build clause to remove regulation when competition develops (market-by-market sunset clause). At the same time, the directives open the possibility to extend the 1998 regulation that was more or less linked to the 'original sin' infrastructures to any infrastructure where antitrust would be insufficient to police market behaviour. Thus, economic regulation will apply when and until it can control market power more efficiently than antitrust. A complete removal of sector regulation may never happen for at least two reasons. First, the ideal situation of perfect facilities-based competition may never materialise, as the characteristics of some new infrastructure (like the fibre-to-home) may re-introduce natural monopoly characteristics in the local access[81]. Second, even if there is effective facilities-based competition, which does not necessarily remove any structural market failure in the sector that would justified economic regulation[82]. Moreover, the institutional mechanisms to curb the regulatory creep (like the SMP regime or the appeal mechanism) are weak and may not be enough to counterbalance the increased possibilities and incentives for the NRAs and the operators to expand regulation beyond its optimal level[83]. In effect, some NRA like Oftel have an elastic supply function of regulation through practising narrow regulation. This should be combined with an elastic and outward-shifting demand function as the incentives for firms is to expand their use of regulation until they equate the marginal benefits of an extra euro spent on regulation with their marginal costs[84].

In practice, the initial application of the new directives does not curb the regulatory creep we saw under the 1998 package in the fixed segment (from local loop unbundling to bitstream access to part circuits) as well as in the mobile (cost orientation of termination charges)[85]. It is true that some deregulation has taken place. For instance, the minimum set of leased lines has been reduced from seven to five types of lines, or the mobile access and origination market has been de-regulated in the UK[86]. Even though these steps have been welcomed and much underlined by the Commission, that should not hide the fact in many other market segments, regulation is actually increasing. Many soft-law instruments or individual NRAs' decisions go in this direction. For instance, the ERG suggests that in the fixed world that bitstream will be strictly regulated and that non-reciprocity interconnection charges might be allowed, and in the mobile world that termination and roaming charges will have to be cost-oriented[87]. The

[81] Along these lines, see: J. Cas, "Fallacies and Inefficiencies of Telecom Regulation in Europe", *Communications & Stratégies* 51, 2003, p. 109.

[82] For instance, under some circumstances, operators may have market power on their termination charges, although there is facilities-based competition. See in general: 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, 297-386.

[83] M. Cave, "Ofcom and light touch regulation", in C. Robinson (ed), *Successes and Failures in Regulating and Deregulating Utilities*, E. Elgar, 2004; J. Stern, "Regulatory forbearance: why did Oftel find it so hard?", *Telecommunications Policy*, 2004, 273-294; L. Waverman, "Regulatory incentives and deregulation in telecommunications" in C. Robinson (ed), *Competition and Regulation in Utility Markets*, E. Elgar, 2003, 138-159.

[84] To make thing worse, there is a negative externality as the marginal costs for the firms of using regulation are simply their internal costs, as they do not pay the costs imposed on others.

[85] In some way, the exchange of best practices under the 1998 package seem to be one-sided. It refers to regulatory practices, and not to de-regulatory ones.

[86] IP/03/1114 of 25 July 2003, and IP/03/1203 of 5 September 2003. Note that the situation of the UK mobile origination market is particular with four operators having more or less equal market shares. In most of the other European countries, the leading operators has over 40% market shares, hence the de-regulatory move of the UK could not be followed elsewhere.

[87] See note 69.

thrust of the Common Position on remedies is also fairly regulatory[88]. Some (or even all of these) may be justified for economic reasons, but it remains that it may equally be due by the lack of incentives to decrease regulation. Indeed, additional forbearance mechanisms may be think of: a regulatory cap for regulators (they may not expand over time a weighed average index of regulation)[89]; appropriate fines for entrants and incumbents so as to ensure that regulation will not be used as a strategic output[90]; a systematic review of the need of regulation[91], preferably with some external to the NRA involved like the competition authority.

Similarly, open norms may be problematic if their interpretations would lead to inconsistent regulation. One of the aims of the 1999 Review and the new directives was to foster harmonisation and the single market, which was perceived as the *parent pauvre* of the 1998 package.

However the wordings of the directives allow different regulatory strategies. Moreover, the additional mechanisms to ensure harmonisation between the Ministries, the NRAs, and the national Courts (like ERG, Commission veto on NRAs' decisions,…) are relatively weak and may be insufficient[92]. Indeed, the three main European fora (COCOM, ERG, IRG) have important drawbacks. First, the membership is not always clear. In principle the COCOM should be composed of the Ministries and the ERG of the NRAs, but in practice, some Ministries want to attend ERG and some NRAs are represented in COCOM. Second, the division of labour between the groups is not clear because there is considerable overlap between the ERG and the IRG (although the issues covered by ERG appear to be narrower than those covered by IRG[93]). That is a problem as the working methods are different: in the ERG, there is more transparency and the Commission is present. Finally, ERG and IRG work very much on a consensual basis, and there is no possibility for a majority, or even a super majority of the NRAs, to impose a strategy on one of its members[94]. In addition, the enhanced role of national courts has not been accompanied by additional mechanisms to ensure consistency of judicial decisions across Member States. There is only the standard preliminary ruling procedure at the European Court of Justice. However, this procedures is very slow (2 to 3 years)[95], which is not appropriate to a sector evolving rapidly under complex regulation. Other mechanisms may have been provided, similarly to what was achieved for the decentralisation of the European competition law (for instance the possibility of the Commission to intervene as *amicus curiae* in the national court proceedings)[96]. We could hope that some exchange of information will take place among the European Judicial

[88] Possibility of regulating emerging markets, extensive use of cost-orientation obligation, extensive reading of the possibilities to regulated offered by Article 9 Access Directive.
[89] L. Waverman, cited at note 83, p. 145.
[90] See on the abuse of competition law action: *ITT Promedia/Commission* T-111/96 ECR [1998] II-2937.
[91] Like provided in Article 6(4) of the UK 2003 Communications Act.
[92] Note that Larouche, cited at 20, p. 85 is less pessimistic.
[93] ERG-IRG Work Programme 2004, p. 1.
[94] Article 4(4) of the Interim Rules of Procedures for ERG, ERG(03) 07.
[95] Until now, it has been used only 10 times under the 1998 framework.
[96] Article 15 of the Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty, O.J. [2003] L 1/1; Commission Notice of 30 March 2004 on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, O.J. [2004] L 101/54. This *amicus curiae* procedure may be heavy as it requires a decision of the Commission.

Network, although this forum is mainly suited for cross-border disputes and not so much to ensure consistency of decisions concerning purely internal disputes[97].

On balance, the new directives may in practice lead to less harmonisation in term of range of obligation imposed on operators but also more critically in terms of regulatory vision. Note that under specific conditions, less harmonisation is not necessarily such a bad policy like for the broadband regulation[98].

Finally, open norms are problematic if their interpretations are unpredictable and they undermine legal certainty. The new directives were to enhance legal certainty and investor confidence but it seems that the open norms contained therein hide several policy conflicts that make their implementation difficult to predict. There are gaps between an explicit deregulatory rhetoric and actual interventionist moves, or between the harmonisation motto and the reluctance of Member State to tie their hands and compromise. There is also an apparent contradiction between the *e*Europe Action Plan and the 2003 Framework. The contradiction may possibly be resolved[99], as the *e*Europe's objectives would primarily be fulfilled by market mechanisms, and it is only in case of market failure that the State should intervene in the most efficient way. However, it remains that the interventionist logic of *e*Europe (an instrument of positive integration, placing lots of confidence in the State setting objectives and intervening pro-actively to achieve them) contrasts with the liberal logic of the new directives (an instrument of negative integration, distrusting the State). This raises the more 'ontological' question of the role of the NRAs, that should decide if they are mere economic regulator, or active industrial policy maker[100].

To sum up, the use of 'open norms' would have been welcomed in this sector if they were accompanied by strong forbearance and harmonisation mechanisms and were not hiding unresolved policy conflicts. It is not the case and that is worrying as they may lead to regulatory costs increase. All the more so that the Commission, probably the main actor that could ensure minimal and harmonised regulation, has a very ambiguous institutional role, to which we now turn.

4. Ambiguities in the role of the Commission

As we have seen the third member of the regulatory trinity has two different roles that may clash between each other. First, the Commission should ensure Member States compliance with European law. It may do so with its standard powers as the guardian of the Treaty, but also with its new and far reaching powers under the 2003 Framework and with its role as the antitrust authority. Second, the Commission should ensure consensus between Member States and/or NRAs when applying day-to-day the new directives. It may do so with its standard powers of adopting implementation measures, but also with its new role inside the ERG.

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[97] Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters, O.J. [2001] L 174/25; see also: <http://europa.eu.int/comm/justice_home/ejn/index.htm>.

[98] T. Brennan, "The FCC and policy federalism: broadband Internet access regulation" in G. Madden (ed), *International Handbook of Telecommunications Economics V. III*, 2003, E. Elgar, 173-199; However, that is not the case for mobile regulation: T.W. Hazlett, *Is Federal Pre-emption Efficient In Cellular Phone Regulation?*, Working Paper of the AEI-Brookings Joint Centre for Regulatory Studies, September 2003.

[99] See E. Liikanen, *Accelerating Broadband in Europe*, Speech of 28.1.2003.

[100] On the related question of the relationship between industrial policy and antitrust, see: W. Sauter, *Competition Law and Industrial Policy in the EU*, Clarendon Press, 1997.

4.1. The Commission as a referee

(a) Commission ensuring correct implementation of the 2003 Framework

As the guardian of European law, the Commission enjoys under the EC Treaty specific powers to ensure a timely and correct transposition of the new directives into national laws. In its ninth implementation report[101], the Commission announced that it would take a particular attention at the main critical points of the new system to ensure its efficient functioning.

The targets

The major part of the 2003 Framework was supposed to be transposed and applicable throughout the EU on 25 July 2003 and in the ten accession countries on 1 May 2004. The aim of a single date was to ensure a level playing field throughout the Union. Applicable means for example that individual licenses would no more be required in the Member States. It meant also that the NRAs would, on that date start the process of assessing markets, designate SMP operators and review existing obligations[102].

However, on 25 July 2003, only five Member States had transposed the relevant directives (Denmark, Finland, Ireland, Sweden, and United-Kingdom)[103]. The transposition delays in the other Member States were considered to be less dramatic than under the 1998 package when transposition delays meant delays in liberalisation of the market. To fight such delays at that time, the Commission had set up in 1996 a specific "joint team" between DG Competition and DG Information Society in order to prepare swiftly infringement procedures, and has shortened the time for Member States to reply to letters of formal notice from two to one month. In addition, the state of transposition was monitored by that 'joint team' already in advance of the date of full liberalisation (1 January 1998), and two implementation reports[104] were published by the Commission in the course of 1997 showing of progress in the Member States in their transposition of the 1998 directives. The 1998 framework is now nearly completely in place in the current Member States. Since the objectives of the 2003 Framework are broadly similar to those of the 1998 package, a continued application of the national measures transposing the latter package after 25 July 2003 does not affect substantially the objectives of the new directives.

More than timely transposition, the issue is thus the correct transposition. In its ninth implementation report the Commission has already mentioned a number of national provisions (some of them still in draft form) which go against objectives of the 2003 Framework.

As regards the institutional provisions, the Commission had concerns on the national rules that do not confer enough independence and/or sufficiently wide powers and discretion to NRAs to allow them to fulfil their new duties. As regards the objective to simplify rules on

[101] Communication from the Commission of 19 November 2003, Ninth Implementation Report, COM(2003) 715.
[102] See COCOM 03-17 (timing of notifications under Article 7 Directive).
[103] IP/03/1121 of 25 July 2003. Note in addition that the e-Privacy Directive has been transposed by its deadline of 31 October 2003 by five countries (Denmark, Spain, Italy, Austria and Sweden). Note also that by 31 October 2003, six countries had notified measures transposing the Competition Directive (Denmark, Ireland, Italy, Austria, Finland and the United Kingdom).
[104] Available at: <http://www.europa.eu.int/comm/competition/liberalization/others/>.

market entry, the Commission had concerns on the provisions which do not reflect the principles that must apply to grant of individual rights of use of frequencies, as well as to the level of administrative charges. As regards the objective to guarantee universal service, the Commission had concerns on provisions which do not clearly define the scope of the universal service in accordance with the new directives, and the requirement that any mechanism for designating universal service providers and for funding any unfair burden on them is to be established in a way that minimises market distortions and upholds the principle of non-discrimination.

The means available to the Commission

As noted in its recent Communication on the control of application of EU law[105], the Commission may rely on several instruments to ensure compliance of the Member States, some being more formal than others.

The Commission services firstly provide interpretative guidance on particular provisions of the new directives, in reply to specific questions coming from Ministries, NRAs or undertakings and associations with interests in the communications sector. Bilateral discussions have been held with several Member States on draft transposition laws. Where possible, responses from Commission services to interpretative questions have been made available on a collective basis, and at the level of the principles involved, within the framework of the Communications Committee[106]. This approach aimed to foster the objective of achieving consistency of application across the Community, made interested parties (including COCOM members) aware of specific issues of interpretation which were probably also relevant to their own situations, and enabled Committee members to give their views on the issues concerned. This approach has been run in parallel with other initiatives of the Commission in this field, such as the preparation of a Users Guide and the publication of a substantial amount of relevant information on the website of DG Information Society.

A second mean used by the Commission was the publication on November 2003 of its ninth annual review of the state of transposition in each Member State. The attention of the broader public was drawn on this publication by a press release and the report was made available on line on the web-site of DG Information Society[107]. The annual implementation reports aim to inform public opinion and stakeholders in such a way that pressure would be put, including 'peer pressure", on the concerned actors in the Member States. In marketing terms, this initiative would be seen as a "pull" approach.

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[105] Communication from the Commission of 11 December 2002, Better monitoring of the application of Community law, COM(2002)725, adopted as a follow-up of the White Paper of the Commission of 25 July 2001 on the European Governance, O.J. [2001] C 287/17.

[106] See: ONPCOM 02-12 (Timeframe for implementation); ONPCOM 02-13 (Provision of information to NRAs for the initial market analyses); ONPCOM 02-24 (Impact on infringement proceedings); ONPCOM02-14 (Implications for broadcasting); COCOM 02-06 (Commission services' working documents on transposition); COCOM 02-08 (Present structure and powers of the NRAs); COCOM 02-29 (Issues relating to transposition of the new regulatory framework for electronic communications); COCOM 03-14 (comparative table on Privacy Directive), COCOM 03-17 (timing of notifications under Article 7 Directive); COCOM 03-25 (Digital interactive television in the new framework); COCOM 03-33 (opt-in approach regarding unsolicited emails); COCOM 03-37 (Notification to the Commission and communications requirements); COCOM 03-38 (Costing the transport of 'must-carry' channels).

[107] IP/03/1572 of 19 November 2003.

A third mean which is original in European law and new to the electronic communications sector is to rely on the 'Article 7 review' to signal to NRA infringement of European rules, and ultimately instruct the regulator to dis-apply its own national law (supposedly violating the directives). The Commission used this mean already once when commenting a draft decision of the Finnish NRA in the mobile sector[108]. It noted that the Finnish law, which restricts regulation of mobile termination to mobile-to-mobile calls (thus excluding fixed-to-mobile calls), is contrary to the Access Directive. According to the case law of the Court of Justice, the Commission reminded the NRA of its right not to apply this Finnish law although it did not yet have opened an infringement procedure against Finland. However, this power of the Commission has been criticised by some NRAs[109] as it by-pass the normal infringement procedure provided in the Treaty and upset the balance between harmonisation and subsidiarity that lies at the heart of the 2003 framework.

Finally, the Commission may also open formal infringement procedures, which can be compared to what is known in marketing terms as a "push" approach[110]. In October 2003, the Commission opened procedures against eight Member States for delay in notification of the national transposition measures and brought six Member States before the Court in April 2004[111]. Several reasons justify swift infringement procedures. First, it ensures legal certainty. That is all the more important in the case of the 2003 framework because it leaves a wide margin of discretion to national legislators in particular on procedural aspects. Certain national procedures can make the enforcement of rights acknowledged under the directives more cumbersome or lengthy[112]. Second, a decision of the Court in an infringement case may clarify the objective of European law that it considers that Member States do not have correctly transposed and/or implemented. For instance, under the 1998 package, the Court specified that the lack of transparent rules was tantamount to discrimination as regards the granting of rights of way, since the non-discrimination obligation had to be interpreted as aiming at the objective of market opening[113].

(b) Commission defining the field of regulatory activity

The main powers of the Commission to influence the process under the 2003 Framework are its competence to define the field of the SMP regime, with its power to periodically adopt the Recommendation on the markets susceptible to ex ante regulation (during the first step of the

[108] Commission Decision of 17 December 2003, FI/2003/31, citing para 48-49 of *Consorzio Industrie Fiammiferi (CIF)* C-198/01 [2003] not yet published. On this case, see C. Rizza, "The Duty of National Competition Authorities to Disapply Anti-Competitive Domestic Legislation and the Resulting Limitations on the Availability of the State Action Defence", *ECLR*, 2004, 126-131.
[109] See Conclusions of the 7th Plenary of the ERG, 30 January 2004, ERG(04) 11, p. 2.
[110] Note since the beginning of the liberalisation, the Court had decided 18 infringement cases related to the implementation of the telecommunication regulatory framework.
[111] IP/04/540 of 21 April 2004 (actions against Belgium, Germany, Greece, France, Luxembourg, and the Netherlands); IP/03/1356 of 8 October 2003 (formal letters against Belgium, Germany, Greece, Spain, France, Luxembourg, the Netherlands, and Portugal). With regard to the *e*Privacy Directive, formal letters were sent in November 2003 against nine Member States (Belgium, Germany, Greece, Finland, France, Luxembourg, the Netherlands, Portugal and Sweden): IP/03/1663 of 5 December 2003 and IP/04/435 of 1 April 2004.
[112] For instance, in December 2003, the press mentioned the concerns of entrants regarding the way the French Government envisaged implementing the obligation to give the NRA powers to review the retail tariffs of France Télécom: "Veut-on réduire la concurrence dans les telecoms au detriment du consommateur", Le Monde, 17 December 2003, p.6
[113] *Commission/Luxembourg (Rights of way)* C-97/01 [2003] I-5797.

SMP process) and to veto part of NRAs' decisions (related to the first and the second steps of the SMP process).

The power to issue the Recommendation on relevant markets allows the Commission to influence the scope of actual regulation, as it focuses the activities of the NRAs on the selected markets. In its first Recommendation[114], the Commission identified 18 markets (7 retail and 11 wholesale), but its discretion was strongly constrained by the Annex I of the Framework Directive, which contains a list of markets to be identified in the initial Recommendation. In practice, the Commission had merely to re-define the markets listed in the Annex according to competition law methodologies and add the relevant markets related to the broadcasting sector. However, for the next revision of the Recommendation set for End 2005, the role of the Commission will be much more important as it will have to an even larger extent select the markets justifying ex-ante regulation according to the three criteria explained above. By doing so, it may influence the phasing out of the regulation of certain markets[115], or conversely foster regulation of other markets.

The Recommendation[116] on relevant markets leaves to the NRA the possibility to notify markets that are not included in the list or to conclude that some of these markets are competitive. But these decisions that would affect the trade between Member States[117] are reviewed by the Commission under the Article 7 procedure[118]. Once the draft measure is notified and within a period of one month (or if the national consultation period is longer, within that period), the Commission may indicate to the NRA that it considers that the draft measure would create a barrier to the single market or if it has serious doubts as to it compatibility with the Community law and open a so-called phase II. Then within a period of a further two months and having consulted the COCOM, the Commission may take a decision requiring the NRA concerned to withdraw the draft measure.

In order to manage this consultation, two Task Forces have been set up (the *e*CCTF or the electronic Communications Consultation Task Forces), one in DG Competition, as part of the unit dealing with telecommunications, and another one in DG Information Society. They work very closely together and establish joint case teams in each case in order to draft the Commission reaction within the imposed tight deadlines. In order to speed up the process, the College of Commissioners empowered two of its members (the Commissioners in charge of the Information Society and in charge of Competition) to take jointly most of the decisions on

[114] See note 26.
[115] Explanatory Memorandum of the Recommendation on relevant markets, p. 30.
[116] Any Recommendation or soft law instruments should be taken into account by national authorities and national Courts, see *Grimaldi* C-322/88 [1989] ECR 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 on the basis that some of the criteria set out in the Recommendation are not fulfiled.
[117] According Recital 38 of the Framework Directive, "Measures that could affect trade between Member States are measures that may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in a manner that might create a barrier to the single market. They comprise measures that have a significant impact on operators or users in other Member States (…)". These criteria result from the case law related to competition policy and the Internal market: *Sociéte Technique Minière* 56/65 [1966] ECR 235 at 249; *Commercial Solvents* 6/73, 7/73 [1974] ECR 223 para 30-35. See also the Commission Guidelines of 30 March 2004 on the effect on trade concept contained in Article 81 and 82 of the Treaty.
[118] Note that if an NRA does not notify its decision to the Commission, the consequences have yet to be tested. The Commission may take an infringement procedure against the Member State. In addition, it is possible that the Court of Justice will decide that the NRA measure can not have any effect in the national legal order. For a similar solution in the context of the transparency Directive, see: *Securitel* C-194/94 [1996] ECR I-2201 para 45-55 and *Sapod Audic* C-159/00 [2002] ECR I-5031 para 47-53.

their behalf[119]. In practice, the full Commission has only to decide on negative decisions at the end of Phase II, i.e. decisions to require a NRA to withdraw a draft measure. Subsequently, a sub-delegation of powers was granted to the Directors General of DG Information Society and DG Competition as regards to phase I decisions[120]. Moreover, in order to simplify and expedite the examination of a notified draft measure, the Commission has adopted a procedural recommendation[121], which provides a standard format for notifications (summary notification form) to be used by NRAs and clarifies the notification process and the calculation of the legal time limits. In order to ensure transparency, most of the decisions related to the Article 7 control are published on the web site of the Task Forces[122].

In practice[123], the Commission gives NRAs, who so request, an opportunity to discuss any draft measure they intend to adopt before formal notification (pre-notification meetings). As of May 2004, the task forces held 40 pre-notification meeting (with 14 different NRAs) and received 47 notifications (from 5 NRAs: mainly British and Finnish regulators, and also from the Austrian and Irish media regulator and the Dutch Ministry). 44 cases have already been dealt with: 40 by way of 'comments' letters, 2 by way of 'incompleteness' decision and 2 by way of 'veto' decision. These cases shed some light on the position of the Commission on the three steps of the SMP regime, even though each decision is case-specific. They illustrate the important role of the Commission in shaping the economic regulation.

On the market selection, the Commission is ready to accept additional markets than those of the Recommendation provided the three selection criteria are fulfilled[124]. On market definition, the Commission is ready to accept more segmented markets than those of the Recommendation provided it is justified by the observed market conditions[125]. The Commission also notes that voice over 3G should be part of the same market than voice over 2G if they offer the same functionalities[126]. On the SMP/dominance assessment, NRAs should determine if effective competition is (or is not) entirely or primarily the result of the regulation in place[127]. In applying competition law, the competition authority should assess

[119] See the habilitation of 23 July 2003, SEC(2003) 857, which relates to: decisions to declare a notification incomplete; decisions not to make comments at the end of Phase I; decisions to make comments at the end of Phase I; decisions to launch a Phase II review on the basis of serious doubts as to the measure's compatibility with community law or the single market; decisions, at the end of Phase II, to withdraw the Commission's initial objections; decisions to approve "alternative remedies" under Article 8(3) of the Access Directive; decisions to reject "alternative remedies" under Article 8(3) of the Access Directive.

[120] Decisions that a notification of a draft measure is incomplete; decisions to refrain from making comments on a notified draft measure within the one-month period; decisions to make comments on a notified draft measure and/or the reasoning on which it is based, within the one-month period provided.

[121] Commission Recommendation of 23 July 2003 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, O.J. [2003] L 190/13.

[122] <http://forum.europa.eu.int/Public/irc/infso/ecctf/home>

[123] See COCOM04-27 of 5 May 2004, *Article 7 update*.

[124] See for instance, the UK wholesale unmetered narrowband Internet termination services (Commission Decision of 23 September 2003, UK/2003/4 and UK/2003/25), the UK wholesale lines rental markets (Commission Decision of 23 September 2003, UK/2003/11 to UK/200316), the UK route-by-route wholesale international services (Commission decision of 24 September 2003, UK/2003/6).

[125] See for instance, in the UK retail fixed voice service (Commission Decision of 24 September 2003, UK/2003/7, UK/2003/8, UK/2003/9, UK/2003/10), or the UK leased lines markets (Commission Decision of 6 February 2004, UK/2003/35 to UK/2003/39).

[126] Commission decision of 29 August 2003, UK/2003/1.

[127] Commission Decision of 20 February 2004, FI/2003/24 and FI/2003/27, *publicly available international telephone services provided at a fixed location for residential and non-residential customers*. On this decision, see: A.G. Inotai and L. Di Mauro, "Market Analyses under the New Regulatory Framework for Electronic

the market power of the relevant company, taking into account the existing regulatory obligations on the latter. This is, for obvious reasons, not the case under the 2003 Framework, where the NRAs should compare the current market situation to the market situation absent of regulation. On the choice of remedies, the NRA should justify an imposition of differentiated remedies (for instance, different remedies according to the size of the operator) to address the same market failure[128]. More generally, the Commission noted that some cases do not affect trade between Member States, hence are not under its veto jurisdiction[129], and that any modification of the draft decision notified to the Commission due to the results of the national public consultation should be re-notified[130].

But the most interesting question is the criterion used by the Commission to open a phase II and eventually block a NRA decision. Until now, one veto decision has been adopted. It relates to a draft decision of the Finnish regulator not to regulate the retail fixed international telephone services for residential and non-residential customers (markets 4 and 6 of the Recommendation on relevant markets). The NRA concluded that there is no SMP operators in either of the two markets, because despite the high market shares of TeliaSonera (about 55% of the residential market and about 50% of the non-residential market[131]), there are several operators active on the market, barriers to entry are low and customers may easily get international service from another operator than the one providing the line. The Commission required the NRA to withdraw its notified draft measure because of lack of evidence (in terms of market shares, prices and other market data) to support the finding of the absence of SMP[132].

This decision is interesting for two reasons. First, it concerns a market that the Finnish regulator did not want to regulate. Vetoing such decision did not give signal to market players – expected by several of them - that the policy objective is to avoid further increases of sector specific regulation. Nevertheless, the Commission had an interest in vetoing the Finnish regulator because TeliaSonera had market shares above 50% and the antitrust practice presumes that in the absence of exceptional circumstances such level of market shares implies a dominant position[133]. It would be difficult for Commission officials to support without convincing evidences during the Article 7 review that undertakings with such market shares are not dominant, while arguing the opposite when dealing with competition cases. Can we thus conclude that the Article 7 review contains a 'regulatory bias'? Not necessarily because the Commission argued for lack of evidence of absence of dominance at the SMP assessment step, but it did not argue for more obligations at remedies step. Indeed, it was suggested that the obligations already imposed (like Carrier Selection and Carrier preselection[134]) might

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Communications – Context and Principles Behind the Commission's First Veto Decision", *Competition Policy Newsletter*, 2004.

[128] For instance in the Finnish markets fixed calls origination and termination (Commission Decision of 17 December 2003, FI/2003/28 and FI/2003/29), or Finnish market for mobile call termination (Commission Decision of 17 December 2003, FI/2003/31).

[129] For instance in UK wholesale international routes (Commission Decision of 24 September 2003, UK/2003/6).

[130] For instance Commission Decision of 24 September 2003, UK/2003/6.

[131] Note however that contrary to most EU countries, the majority of local loops in Finland are controlled by several local monopolist and not by TeliaSonera. Thus, the high market share of the latter on international calls market very much depends on the access regulation in place.

[132] Cited note 127.

[133] Guidelines on market analysis, para 75, citing the relevant case-law: *Akzo* C-62/86 [1991] ECR I-3359, para 60; *Irish Sugar* T-228/97 [1999] ECR II-2969, para 70.

[134] Carrier selection refers to the possibility to use an alternative operator for making calls than the operator renting the line, by dialling a short code before the called number. In case of carrier pre-selection, the short code is registered in the user's terminal, hence should not be dialled for the alternative operator to be used.

suffice to deal with the supposedly dominant position and to achieve the three policy objectives of the new directives. Second, this decision is interesting because it shows that the Commission does not intend to make the market assessment itself, but merely reviews the quality of the work of the NRA and identifies possible manifest errors in the legal or factual analysis. The Commission does not replace NRA's assessment by its own, although as regard the markets concerned, it had probably as much factual background as the regulator, gathered in the framework of the annual implementation reports as well as the *Telia/Sonera* merger[135]. The control of the Commission on NRAs' draft decisions is not unlike the control of the Court of First Instance on Commissions' decisions.

(c) Commission acting as European Competition authority[136]

In addition to its powers under the 2003 Framework, the Commission may also intervene with its competition law powers under the EC Treaty and control telecom private and public operators as well as the Member States. With regard to operators, European antitrust applies in addition to national sector-specific rules. Thus, firms' compliance with national regulatory decisions does not absolve them of their duty to abide by obligations imposed by EC antitrust[137]. Article 86(1) EC is even more explicit for public undertakings and undertakings to which Member States have granted special or exclusive rights. With regard to Member States (including their NRAs), Articles 10 and 86(3) EC in conjunction with Articles 81 and 82 EC implies that NRAs may not enact measures which would be contrary to European antitrust. In particular, the Court[138] held that Articles 10 and 81 EC are infringed where a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to Article 81 EC, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere. These extensive powers have allowed the Commission to stimulate and control the NRAs when they had jurisdiction to act under their national law, and to intervene and supplement these NRAs when they could not act[139].

When the NRAs have jurisdiction to act, the Commission may influence them in a loose way by issuing Guidelines setting its interpretation of European antitrust to particular problems in the electronic communications sector[140]. These soft-law instruments aim to inform operators

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[135] Commission Decision of 28 May 2002, *Telia/Sonera*, M. 2803.

[136] On the application of competition law to electronic communications, see: A. de Streel, "Remedies in the Electronic Communications Sector", in D. Geradin (ed), *Remedies in Network Industries: EC Competition Law vs. Sector-Specfic Regulation*, Intersentia, 2004, 67-122.L. Garzaniti, *Telecommunications, Broadcasting and the Internet: EU Competition Law and Regulation*, 2nd ed, Sweet & Maxwell, 2003.

[137] Access Notice, cited at note 140, para 22.

[138] *Ahmed Saeed* 66/86 [1989] ECR 1839. See: J. Temple Lang, "Ahmed Saeed – National authorities must not approve practices or prices contrary to EC Competition law", in M. Dony (coord.), *Melanges Waelbroeck*, v. II, Bruylant, 1999, 1539-1560; J. Temple Lang, "Community antitrust law and national regulatory procedures", *Fordham Corporate Law Institute*, 1998, 297-334; S. Martinez Lagae and H. Brokelmann, "The application of Articles 85 and 86 EC to the conduct of undertakings that are complying with national legistlation", in M. Dony (coord.), *Melanges Waelbroeck*, v. II, Bruylant, 1999, 1247-1295. On Article 86 EC, see in general: J.L. Buendia Sierra, *Exclusive Rights and State Monopoly under EC Law*, Oxford University Press, 1999.

[139] H. Ungerer, *Use of EC Competition Rules in the Liberalisation of the European Union's Telecommunications Sector*, Speech 6.5.2001; International Competition Network, *Antitrust Enforcement in Regulated Sectors Working Group*, Report to the Third ICN Annual Conference in Seoul, April 2004; N. Petit, "The Proliferation of National Regulatory Authorities alongside Competition Authorities: A Source of Jurisdictional Confusion", *Working Paper*, March 2004.

[140] Until now, three guidelines have been adopted: Commission Guidelines on the application of EEC Competition rules in the Telecommunications sector, O.J. [1991] C 233/2; Commission Notice of 31 March

and deter them to behave anti-competitively, but also guide the NRAs (and the NCAs) when applying antitrust concepts such as price squeeze and discrimination. But the Commission may also influence companies and authorities in a much stringent way by opening individual cases against them. When the NRAs remained inactive, the Commission triggered their intervention by opening antitrust cases against operators and then passed the cases to the NRAs for them to act under their national telecom laws. For instance, the Commission opened cases related to excessive international accounting rates[141], fixed retention and termination rates[142], or abuses in national leased lines provisioning[143]. These cases were closed only when the NRA had intervened satisfactorily from the Commission's view. When the NRAs was intervening but not satisfactorily, the Commission went that far as condemning the regulated private firm for infringement of competition rules. Indeed in 2003, the Commission fined *Deutsche Telekom*[144] for anti-competitive price squeeze between its wholesale charges and retail charges of the local loop, although both charges were regulated by the German regulator. The Commission considered that the obligations imposed by the RegTP left to DT some leeway that may have been used to diminish the squeeze. The Commission opened several other cases against Deutsche Telekom (for anti-competitive retail business tariffs[145], excessive charges of carrier selection and number portability[146], and price squeeze between wholesale charge for lines sharing and retail DSL tariffs[147]) that implied a critique of the RegTP's policy. Until now, no case has been opened against a Member State for violation of European law by its NRA.

When the NRAs do not have jurisdiction to act under their national telecom laws, the Commission may supplement them preventively under the Merger control or repressively way under Article 82 EC. Under the merger control, the Commission imposed extensive structural and behavioural remedies aimed at preventing abuse of dominant position from the merging parties that the NRAs would be unable to police. For instance, in *Telia/Telenor*[148], the Commission obtained from the parties a commitment to provide access to unbundled local loop that was not yet imposed in Sweden at the time of the merger. In *Telia/Sonera*[149], the Commission went further and imposed a legal separation between the operation of networks and services of their fixed and mobile activities in Sweden and in Finland. In *Vodafone/Mannesmann*[150], the Commission imposed third party access for three years on a

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1998 on the application of competition rules to access agreements in the telecommunications sector, O.J. [1998] C 265/2; Communication from the Communication of 26 April 2000 on the Unbundled access to the local loop, O.J. [2000] C 272/55.

[141] IP/97/1180 of 19 December 1997; IP/98/763 of 13 August 1998.

[142] IP/98/141 of 9 February 1998; IP/98/707 of 27 July 1998; IP/98/1036 of 26 November 1998; IP/99/298 of 4 May 1999.

[143] W. Sauter, *The Sector Inquiries into Leased Lines and Mobile Roaming: Findings and follow-up*, Speech 17.9.2001.

[144] Commission Decision of 21 May 2003, *Deutsche Telekom*, O.J. [2003] L 263/9, appeal pending Case T-271/03 *Deutsche Telekom/Commission*, O.J. [2003] C 264/29. R. Klotz and J. Fehrenbach, "Two Commission decisions on price abuse in the telecommunications sector", *Competition Policy Newsletter* 2003/3, 8-14.

[145] IP/96/543 of 25 June 1996; IP/96/975 of 31 October 1996.

[146] IP/98/430 of 15 May 1998.

[147] IP/04/281 of 1 March 2004.

[148] Commission Decision of 13 October 1999, *Telia/Telenor*, M. 1439, O.J. [2001] L 40/1. Unbundling was imposed later in sector law by the Regulation 2887/2000/EC of the European Parliament and of the Council of 18 December 2000 on unbundling of the local loop, O.J. [2000] L 336/4. Another interesting evolution is a recent decision of the Commission imposing remedies, but relying on the NRAs to ensure their implementation, in the Commission Decision of 2 April 2003, *NewsCorp/Telepiu*, M. 2876, para 259.

[149] Cited at note 135.

[150] Commission Decision of 12 April 2000, *Vodafone/Mannesmann*, M. 1795.

non-discriminatory basis to the parties' integrated networks (wholesale services like interconnection and roaming) with a fast track dispute resolution procedure. Under the ex post control, the Commission opened several cases for abusive practices, and closed them only after the operators changed their behaviour to the satisfaction of the Commission. For instance, the Commission opened a sector enquiry dealing with the supposedly excessive roaming charges[151], or opened individual cases for excessive international leased lines tariffs[152].

The new directives will undoubtedly change this role of the Commission. On one hand, the means for the Commission to control NRAs via its antitrust powers will be reinforced. First, the alignment of sector rules to competition law principles implies that the analysis and the results of the NRAs should be closer (albeit not identical[153]) to what a competition authority would conclude. Thus, the NRAs should not only abide to European antitrust, but often should end up with the same results. Second, the Commission has now an additional procedural route (the Article 7 review) to signal to the NRA any infringement of competition rules[154]. On the other hand, the role of the Commission in supplementing NRAs intervention should decrease. As the criteria to impose sector regulation are much more flexible under the new directives than previously (going from the original sin to the inefficiency of antitrust remedies), the scope of NRAs jurisdiction is enlarged, hence there is less rationale for the Commission to intervene. In particular, we may expect a decrease in the behavioural remedies imposed when reviewing electronic communications mergers.

4.2. The Commission as a coach

Under the new directives, the second role of the Commission is to build consensus among the NRAs on a common regulatory vision and culture. This role is particularly important because on the one hand, the 2003 Framework leaves lots of discretion to the NRAs, and on the other hand, is more based on theoretical models than practical experiences (hence NRAs may not know what to do with their discretion). To do so, the Commission rely on two main fora: the Communications Committee and the ERG.

(a) The Communications Committee (COCOM)

As explained above, the Communications Committee is a standard comitology committee composed of representatives of Member States (usually the Ministries, but also in some cases the NRAs). It aims to assist the Commission in implementing the new directives and, to provide a say to Member States, when the Committee acts as a regulatory committee. Thus, the Commission was assisted by the COCOM before issuing three first harmonisation

[151] IP/00/111 of 4 February 2000; Commission services Working Document of 13 December 2000 on the initial findings of the sector inquiry into mobile roaming charges; MEMO/01/262 of 11 July 2001.
[152] IP/99/786 of 22 October 1999; Commission services Working Document of 8 September 2000 on the initial results of the leased lines sector inquiry,; IP/00/1043 of 22 September 2000; IP/02/1852 of 11 December 2002.
[153] Guidelines on market analysis, para 24-32.
[154] Note however that the fact that the Commission refrain from signalling any violation of European antitrust does not impede the Commission to take later an action against the Member State for infringement (under Article 226 or 86 EC), nor to take an action against an operator for violation of Articles 81 or 82 EC. See similarly in case dealing with the power of the Commission to notify to the Member States a clear and manifest infringement of Community provision in the field of public procurement, according to Article 3 of directive 89/665: *Commission/The Netherlands* C-359/93 [1995] I-157, para 13.

recommendations[155]: on the public R-LAN, on the processing of caller location information[156], and on the procedural aspect of the Article 7 control.

But the Committee is also a useful forum for discussion and exchange of best practices among Member States. For instance, the national transposition process and difficulties encountered by certain Member States have been discussed in the Committee, and the Commission had played a pedagogic but crucial role in ensuring a common interpretation of new directives.

The work of the Commission can also be illustrated by its initiative to harmonise the pricing of terminating leased circuits, the first measure aimed to harmonise remedies to be adopted under Article 19 of the Framework Directive. Since 2002, the Commission discussed with the COCOM a draft Recommendation on the provision of leased lines in the European Union to update a previous Commission Recommendation[157]. Part 1 of the Recommendation deals with the major supply conditions for wholesale leased lines[158], whereas Part 2 deals with the pricing of wholesale leased lines part circuits. Under the Recommendation on relevant markets, Member States must review both the markets for wholesale terminating segments of leased lines and wholesale trunk segments of leased lines (respectively market 13 and 14). Thus, Part 2 of the Recommendation on leased lines will apply in all cases where NRAs impose obligations for non-discrimination and/or cost orientation on operators providing leased line services (albeit only to the provision of leased lines part circuits and of wholesale leased lines).

(b) The European Regulators Group (ERG)

As explained, the ERG is composed of the NRAs of each Member States and the Commission services (DG Information Society and DG Competition) and aims to develop a common regulatory culture. It is a useful forum where the Commission may try to steer and develop best practices across NRAs. However, the relationship between the IRG (whose the Commission is not part) and the ERG (whose is part) is not clear, hence the role of the Commission is rendered even more complicated.

The work of the Commission in consensus building can best be illustrated with its approach to foster a consistent approach on remedies. In 2002, the Commission appointed economic consultants to reflect on which competition problems could be expected in fixed, mobile and broadband markets and which could be the proportionate remedies[159]. A discussion between the Commission services, NRAs and consultants took place at the end of 2003 and the beginning of 2004. A steering group brought to the floor several fundamental issues that were further discussed by the head of the NRAs at the ERG meetings, and then arrived at a wording

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[155] Article 19 of the Framework Directive.

[156] Respectively, Commission Recommendation of 20 March 2003 on the harmonisation of the provision of public R-LAN access to public electronic communications networks and services in the Community, O.J. [2003] L 78/12; Commission Recommendation of 25 July 2003 on the processing of caller location information in electronic communication networks for the purpose of location-enhanced emergency call services, O.J. [2003] L 189/49.

[157] Commission Recommendation of 24 November 1999 on leased lines interconnection pricing in a liberalised telecommunications market, C(1999) 3863.

[158] Commission Recommendation on wholesale leased lines – Part 1: Major supply conditions, *to be adopted*.

[159] See the reports of the Economic Expert Group on Remedies, Sept. 2003, available at: <http://www.europa.eu.int/information_society/topics/ecomm/useful_information/library/studies_ext_consult/index_en.htm>.

that revealed the complexities of the underlying issues as well as the different approaches taken by different NRAs. A Common position was finally adopted by the ERG in April 2004.

4.3. Can you be a referee and a coach at the same time?

Thus, the Commission should be the referee of the Ministries and the NRAs sanctioning (under the control of the Court of Justice) those which infringe European law, and at the same time the coach of these Ministries and NRAs trying to develop a common team spirit. That is not new as the Treaty itself requires the Commission to be the guardian of the Treaty and to implement European law (with the Member States committee, thus implying a coaching role). But both roles have been considerably reinforced, and the opposition between each has been radicalised. This dual role is not necessarily a bad solution to ensure a common regulatory approach in Europe and ultimately a single market for electronic communications. In any case, it was probably the only feasible political option at the time of the adoption of the directives. The Council was strongly opposed to the creation of a European regulatory authority and the Commission could only ask to increase the dual powers it enjoys from the Treaty.

However, being a referee and a coach is not easy. That will require a skilful use of each of its power from the Commission, as well as a loyal collaboration from the Ministries and the NRAs (in the spirit of Article 10 EC) to ensure the success of the common culture. Only this way, the Commission will assume effectively its ultimate responsibility of ensuring effective application of the new directives[160]. We have seen as an example of the conflict between political rhetoric and actual actions that the new directives may in practice lead to less harmonisation in term of range of obligation imposed on operators but also more critically in terms of regulatory vision[161]. If it were to be the case, the European Parliament will probably bring back the issue of a European regulator during the next legislative review in 2006[162].

5. The way forward

The new directives contain more 'open norms' than the 1998 package. In particular, it does not define when competition law remedies are sufficient to address potential market failures or what the appropriate remedies are. These kind of open norms may become a problem if they would lead to over-regulation, incompatible regulatory strategies across Member States, or legal uncertainty undermining investment incentives and the internal market.

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[160] Recital R of Resolution of the European Parliament of 18 November 2003 on the Eight Report from the Commission on the implementation of the Telecommunications Regulatory package, A5-0376/2003.

[161] Note that under specific conditions, less harmonisation is not necessarily such a bad policy: T. Brennan, "The FCC and policy federalism: broadband Internet access regulation" in G. Madden (ed), *International Handbook of Telecommunications Economics V. III*, 2003, E. Elgar, pp. 173-199; T.W. Hazlett, *Is Federal Pre-emption Efficient In Cellular Phone Regulation?*, Working Paper of the AEI-Brookings Joint Centre for Regulatory Studies, September 2003.

[162] The creation of an European Regulator was already backed by the European Parliament before the 1999 Review, but was rejected by the Commission and the Council. See on that issue the study of Eurostrategies/Cullen International, *The possible added value of a European Regulatory Authority for telecommunications*, Dec. 1999, available at: <http://europa.eu.int/ISPO/infosoc/telecompolicy/en/Study-en.htm>.

To alleviate these dangers, regulatory actors should first articulate and formulate clearly their regulatory vision, showing that they have a genuine understanding of the techno-economic conditions of the industry. As the main regulatory actor, the NRA should state clearly in soft-law instruments (like the Common Position on remedies and the PIBs) or milestone individual cases their objectives, the means they envisage to achieve them, and the rationale behind them. The Commission could also set out its vision more clearly in the soft-law (in particular in the future reviews of the Recommendation on the markets to be regulated ex-ante, and, in the meantime, in the yearly implementation reports). Second, these visions should respect the principle of forbearance and minimal regulation, and guarantee investment incentives. Third, these visions should be discussed between all regulatory actors (being national or European) and then agreed at the European level.

The initial application of the new directives indicates that these three suggestions have been taken on board, but insufficiently. Policy strategies should be clearer, better based on the self-restraint principle and better discussed in the various European fora. To achieve this, we submit that all forbearance mechanisms in place in the new directives should be fully exploited and that all co-operation settings put in place should be used loyally in a spirit of compromise by the various regulatory actors (Ministries, NRAs, National Courts, European Commission). Finally, there is a need to formulate in a SMART (Specific, Measurable, Achievable, Relevant, Timely) way "themes" or "indicators"[163] to compare the harshness as well as the effectiveness of the action of the NRAs. If possible, a Weighted Average measure of Regulation (WAR) may be designed. In addition, more dis-aggregated indicators may required to assess the assimilation of the objectives of the new framework by the NRAs of the new Member States. Annex II of this paper suggests a number of indicators, relating to the structure, conduct and performance of the industry, as well as the regulatory strategies that are followed.

La route de l'enfer est pavée de bonnes intentions. Surely, the new European regulation for electronic communications and the alignment of the SMP regime on antitrust methodologies is based on sound premises. It should deliver a more flexible, efficient and economic regulation. But it carries several dangers, like dis-harmonisation or increase in regulatory costs, which may lead the sector to the Hell such that the application of the new directives may end up like the much criticised application of the 1996 US Telecom Act, with pervasive (and perverse) regulation, and multiple legal challenges and heavy regulatory costs[164]. Let's hope that conscious of these dangers, NRAs, the Commission and the national judges will apply their new powers intelligently. Then, progress will be made on the way of the so promising *e*-Society!

[163] J. Cas, cited at note 81, p. 103 also calls for more dynamic indicators.

[164] On the US situation, see J.G. Sidak, "The Failure of Good Intentions: The WorldCom Fraud and the Collapse of American Telecommunications After Deregulation", *Yale Journal of Regulation* 20, 2003, 207: number of pages in the official compendium of the FCC decisions and proceedings has nearly tripled since the passage of the 1996 Telecom Act, while the membership in the Federal Communications Bar Association increased by 73% between 1995 and 1998 and has remained essentially at that level. See also A.E. Kahn, *Lessons from Deregulation: Telecommunications and Airlines after the Crunch*, AEI-Brookings Joint Centre for Regulatory Studies, 2003.

ANNEX 1: INDICATORS UNDER 1998 FRAMEWORK[165]

1. Institutional issues

National regulatory authorities (NRAs)

- Legal and functional independence of the NRA from network operators and service/equipment providers. (e.g. Is staff seconded from operators/equipment providers to the NRA? Is there a 'revolving door' between the NRA and the incumbent as regards staff?)

- Separation of the control and regulatory function where Member States retain ownership or significant control of the incumbent. (e.g.: structures in place ensuring that regulatory decisions are not influenced by ownership considerations, no officials from the bodies to which NRA tasks have been assigned participating directly or indirectly in the management of the incumbent, or vice versa).

- Sufficient powers devolved to NRAs relating principally to:
- licensing (in particular supervision of the licensing procedure and the amendment and withdrawal of licences);
- interconnection (in particular the power to supervise the reference interconnection offer (RIO) and the implementation of suitable cost accounting systems and to secure interconnection and resolve disputes);
- leased lines (in particular supervision of refusal, interruption or reduction of availability and ensuring application of the non-discrimination principle);
- universal service (in particular ensuring affordability and monitoring any financing scheme);
- and tariffs (in particular supervision of the application of the principle of cost-orientation for voice telephony and leased lines and the implementation of suitable cost accounting systems).

Further powers are devolved relating to numbering, frequencies and rights of way. An indication of the effective exercise of these powers is the number of decisions taken.
Further, in order to be able to exercise its powers the NRA must be sufficiently resourced. (sub-objectives: pro-activity of NRAs (powers of initiative), sufficient resources to enable it to act).

2. Market entry

Licensing
- Proportionality (e.g. procedures should be not too cumbersome). Only conditions listed in the Directive. No onerous conditions imposed under the guise of conditions permitted under the Licensing Directive, relating e.g. to network configuration (number of interconnection points). Fees should not deter market entry.
- Individual licences only in limited cases + compliance with time limits + grounds given in case of refusal.
- Publication of authorisation criteria giving the fullest possible information.

[165] Communication from the Commission of 25 November 1998, Fourth Implementation Report, COM(1998) 594, pp. 14-29.

- Only discrimination between different kinds of operator when justified by objective criteria.

Numbering
- Ensure the availability of adequate numbers and numbering ranges for all publicly available telecoms services.
- Ensure that Numbering plans are under the control of the NRAs and that allocation is carried out in an objective, transparent, equitable, timely and non-discriminatory manner.
- Implementation of carrier selection, pre-selection with a call-by-call override facility and number portability

Frequencies
- Ensure full objectivity, transparency, and non-discrimination in the assignment of frequency ensured.
- Ensure that the number of licences requiring the assignment of frequency may is limited only on the basis of essential requirements and only where related to the lack of frequency and justified under the principle of proportionality.

Rights of way
- No discrimination with regard to the granting of rights of way.
- Where the granting of additional rights of way is not possible, Member States must ensure access to existing facilities at reasonable terms.

3. Economic Regulation of market activities

Interconnection / special access
- Intervention NRA in case of delays in negotiation interconnection.
- Publication of RIO + cost-orientation of interconnection charges of SMP operators.
- Suitable accounting system and accounting separation must in place to ensure that these pricing obligations are observed.

Tariffs / accounting systems
- Phase out as rapidly as possible all unjustified restrictions on tariff re-balancing.
- Ensure that Leased Lines tariffs are cost-oriented and transparent.
- Ensure that that the cost accounting systems adopted by operators are implemented in a transparent way and show the main categories under which costs are grouped, together with the rules used for the allocation of costs, in particular with regard to the fair attribution of joint and common costs.
- Legal separation in case of joint ownership of Cable and Telecoms networks.
- Accounting separation where operators have special and exclusive rights for the provision of services in other sectors, and where SMP operators provide interconnection services to other organisations.

Competition in the local loop
- Ensure the availability of LLU and shared use.
- Ensure publication RUO.
- Ensure cost orientation.

4. Social regulation of market activities

Universal service

- Definition in each MS of the affordable conditions according to which the universal service, as defined, is being offered.
- When the net cost of universal service obligations represents an unfair burden on the organisation providing universal service, and a financing scheme is set up ensure that it is based on objective, transparent, proportional and non-discriminatory and that the methodology of calculation of net cost sufficiently transparent.
- Ensure that further public service requirements, imposed are not financed from mandatory contributions by market players.

ANNEX II: PROPOSED LIST OF INDICATORS UNDER 2003 FRAMEWORK

A. INDUSTRY[166]

- Evolution of penetration rates (broadband, mobile, fixed)
- Evolution of retail prices
- Financial health of incumbents and new entrants: profitability, evolution of shares prices
- Wholesale price of main services (interconnection origination and termination, bitstream, shared access, full unbundling)
- Investment of incumbents and new entrants: in infrastructure and in market development (customer acquisition, promotion new products)
- Number of firms active on the market
- Products offered by the firms

B. REGULATION[167]

1. Institutional issues

- Independence of NRAs
- Resources of NRAs
- Powers of NRAs
- Transparency of NRAs
- Speed of process of NRAs
- Effectiveness of NRAs decisions
- Independence of appeal body
- Speed of process of appeal body
- Due process of appeal body
- Effectiveness of sanctions and scale of resources of appeal body

2. Market entry

- General authorisation: conditions imposed, administrative charges
- Rights of use of radio frequencies: attribution procedure, price, time, …
- Rights of use of numbers
- Rights of way

3. Economic Regulation of market activities

- Markets regulated
- SMP operators
- Remedies imposed (types of access, cost-orientation, ...)

4. Social regulation of market operations

[166] See also the indicators of the annual *Communications Outlook* of the OECD.

[167] Indicators were for example developed by Jones Day and SCP Network for the *ECTA Regulatory scorecard 2004*, May 2004, available at: <http://www.ectaportal.com/regulatory/2004scorecard.zip>.

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- Definition of universal service: content and price
- Designation
- Compensation and financing
- Additional national service: definition and financing

5. Compliance with European legislation

- Infringement procedures commenced by the Commission,
- Pending cases at the ECJ