



Contents lists available at ScienceDirect

# Telecommunications Policy

URL: [www.elsevierbusinessandmanagement.com/locate/telpol](http://www.elsevierbusinessandmanagement.com/locate/telpol)

## Current and future European regulation of electronic communications: A critical assessment

Alexandre de StreeL

Faculty of Economics and CRID, University of Namur, Belgium

### ARTICLE INFO

#### Keywords:

Electronic communications  
European Union  
Economic regulation  
Competition law  
Institutional design

### ABSTRACT

The current European regulation for electronic communications has been applicable since 2003 and is currently under a review that should lead to new rules applicable by 2010. This paper aims to assess the implementation of the current regulation and the proposals for reform tabled by the European Commission. It is argued that those proposals go in the right direction but should go further. First, the regulatory framework should clearly state that the objectives of regulators are to maximise the long-term welfare of European citizens. Secondly, the main body of economic regulation—the so-called Significant Market Power regime—should be based on a strong test aiming to identify structural market problems that cannot be efficiently dealt with by competition law. Thirdly, possible remedies applicable by the regulators should include structural and technological components, provided that a strict cost benefit analysis is undertaken. Fourthly, the institutional design should be improved by better aligning the incentives of the National Regulatory Authorities with the dynamic nature of the markets, by improving the checks and balances (in particular those provided by national courts and European Commission), and by improving coordination amongst the institutions (the national regulators and the national Courts).

© 2008 Elsevier Ltd. All rights reserved.

The current European regulation for electronic communications, applicable since 2003,<sup>1</sup> is currently under review. In November 2007, the European Commission tabled proposals for reform. These are currently being negotiated between the Council of Ministers and the European Parliament.<sup>2</sup> Negotiations should be finalised in 2009 and the new regulatory framework should be applicable in the 27 Member States of the European Union by 2010. This paper aims to assess the

E-mail address: [alexandre.destreel@fundp.ac.be](mailto:alexandre.destreel@fundp.ac.be)

<sup>1</sup> The 2003 Framework mainly consists of four harmonisation directives and one liberalisation directive: 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; Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services (*Liberalisation Directive*), O.J. [2002] L 249/21. On those directives, see Garzaniti (2003).

<sup>2</sup> Proposal of the Commission of 13 November 2007 for a Directive amending Directives 2002/21/EC (framework), 2002/19/EC (access and interconnection), and 2002/20/EC (authorisation), COM(2007) 697; Proposal of the Commission of 13 November 2007 for a Directive amending Directive 2002/22/EC (universal service and users' rights), Directive 2002/58/EC (protection of privacy in the electronic communications sector) and Regulation 2006/2004 on consumer protection cooperation, COM(2007) 698; Proposal of the Commission of 13 November 2007 for a Regulation establishing the European Electronic Communications Market Authority, COM(2007) 699, available at: [http://ec.europa.eu/information\\_society/policy/ecommm/tomorrow/index\\_en.htm](http://ec.europa.eu/information_society/policy/ecommm/tomorrow/index_en.htm)

Steps	Market-based approach	Role of the Commission
<b>1. European screening</b>	[3 criteria test] <sup>16</sup> SSNIP test	Draft a Recommendation
<b>2. National screening</b>	[3 criteria test] SSNIP test	Possibility of Commission veto
<b>+ Emerging markets</b>	<i>No inappropriate regulation</i>	
<b>3. Market analysis</b>	No effective competition = SMP = dominant position	Possibility of Commission veto
<b>4. Remedies</b>	At least one Proportionate	Possibility of Commission comments

**Fig. 1.** The current SMP regime. *Note:* Brackets are used because the three criteria are not always applied in practice.

implementation of the 2003 regulatory framework and the reform proposals of the Commission. Section 1 deals with the current framework, explaining the different stages of the economic regulation, assessing its successes and failures and attempting to understand the reasons for the failures. On that basis, Section 2 assesses the Commission proposals focusing on the objectives of regulation, the scope of sector regulation (in particular compared to competition law), the choice of remedies, and the institutional design. Finally, Section 3 briefly concludes.

## 1. The implementation of the 2003 European regulatory framework

### 1.1. The four steps of European economic regulation

Economic regulation (i.e. which aims to ensure efficiency) is mainly composed of the Significant Market Power (SMP) regime.<sup>3</sup> This regime is aligned with competition law principles in order to ensure a progressive removal of obligations as competition develops in the different markets (market-by-market sunset clauses) and facilitate the transition towards the mere application of competition law when sector regulation is no longer necessary. Regulators are obliged to follow four steps before regulating an electronic communications operator, as explained in Fig. 1.

(1) The European Commission commences the process by identifying markets susceptible to ex-ante regulation in a Recommendation addressed to all the National Regulatory Authorities (NRAs) of the 27 Member States. In principle, the Commission selects only markets where antitrust remedies would be insufficient to redress competitive problems on the basis of a test based on three cumulative criteria: (i) high and non-transitory entry barriers of a structural, legal or regulatory nature; (ii) market structure which, behind the entry barriers, does not lean towards effective competition within the relevant time horizon; (iii) insufficiency of competition law alone to adequately address the market failure(s) concerned.<sup>4</sup> Then, the Commission delineates the product boundaries of the selected markets on the basis of the hypothetical monopolist test (HMT) or small but significant non-transitory increase in price (SSNIP) test used in antitrust policy.<sup>5</sup>

The first Recommendation of 2003<sup>6</sup> identified 18 national or infra-national markets (7 retail fixed markets as well as 11 wholesale fixed and mobile access and interconnection (termination) markets). The second Recommendation of 2007<sup>7</sup> reduced the number of markets to 7 (1 retail fixed market as well as 6 wholesale fixed and mobile access

<sup>3</sup> Next to the SMP regime, the second part of the economic regulation is the interconnection clause (Article 5(1) of the Access Directive), which provides that regulators may impose interconnect obligations on undertakings that control access to end-users (independently of any SMP designation) to ensure end-to-end connectivity. This regime has not been used very much to date because most interconnection issues have been dealt with under the SMP regime with the fixed and mobile termination markets.

<sup>4</sup> Recital 27 of the Framework Directive, as elaborated by Article 2 of Commission Recommendation 2007/879 of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC, OJ [2007] L 344/65, and by the ERG Report of June 2008 on Guidance on the application of the three criteria test, ERG(08) 21.

<sup>5</sup> Commission Notice on the definition of relevant market for the purposes of Community competition law, O.J. [1997] C 372/5. For the application of these principles to the electronic communications sector: Commission Guidelines of 9 July 2002 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*, para 33–69.

<sup>6</sup> Commission Recommendation 2003/311 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, OJ [2003] L 114/45.

<sup>7</sup> Commission Recommendation 2007/879 of 17 December 2007.

Download English Version:

<https://daneshyari.com/en/article/557458>

Download Persian Version:

<https://daneshyari.com/article/557458>

[Daneshyari.com](https://daneshyari.com)