Implementation of the new european telecommunications regime

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Member states of the European Union, new and old, are now implementing the package of new regulatory arrangements for electronic communication services which was enacted in April 2002 and came into effect in July 2003. The processes involved are lengthy and require complex interactions between National Regulatory Agencies (NRAs) and the European Commission in Brussels. But enough experience has been gathered to make some preliminary judgements about the operation of the process. This note first gives a brief account of the new regime and then makes some comments about its operation in practice. These comments are based on an examination of the NRAs notifications to Brussels on individual markets, and on the author's experience in providing support to a number of NRA in implementing the procedures.

1. Outline of the new regime

The new regulatory framework for electronic communications was adopted in 2002. The main objectives of the new framework are to simplify the previous regimes, to apply them in a technologically neutral manner, and to encourage competition while guaranteeing user rights. Certainly, the previous regime has been streamlined, through a reduction from twenty key Community law measures to just five.[1]

At one level, the new régime is a major step down the transition path between regulated monopoly and normal competition, governed exclusively by generic competition law. As a result of the new regime, NRAs are no longer able to regulate the sector by issuing individual licences. Subject only to certain limited exceptions, Member States are required to establish a general authorisation regime. The conditions that may be imposed are heavily circumscribed. The new regime's provisions are applied across the range of 'electronic communications services', ignoring pre-convergence distinctions. It represents an ingenious attempt to corral the NRAs down the path of normalisation – allowing them, however, to proceed at their own speed (but within the uniform framework necessary for the internal market).

Since the end state is envisaged to be one governed by competition law, the European Commission proposes to move away from the rather arbitrary and piecemeal approach of the previous regulatory package towards something consistent with that law. However, competition law is to be applied (in certain markets) not only in a conventional responsive *ex post* fashion, but in a pre-emptive *ex ante* form. The new régime therefore relies on a special implementation of the standard competition triple of: market definition, identifying dominance, and formulating remedies to deal with (anticipated) competition law breaches. We examine these in turn.[2]

According to the underlying logic of the legislation, the Commission first establishes a list of markets where ex ante regulation is permissible, markets being defined according to normal competition law principles. These markets are then adapted and analysed by NRAs with the aim of identifying dominance (on a forward-looking basis). Where no dominance is found, ex ante obligations may not be imposed on any undertaking in the relevant market (ex post competition law would still apply). Where dominance is found, the choice of an appropriate remedy must be made from a specified list. The effect of the regime is to create a series of market-by-market 'sunset clauses' which reduce the level of ex ante regulation as the scope of effective competition expands.

1 *Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities [2002], OJ L 108/7 ("Access Directive");*
Directive 2002/20/EC on the authorisation of electronic communications networks and services [2002], OJ L 108/21 ("Authorisation Directive");
Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services [2002], OJ L 108/33 ("Framework Directive");
Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services [2002], OJ L 108/51 ("Universal Service Directive");
Decision No.676/2002/EC of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community ("Spectrum Decision").

2 *The first two of these processes are elaborated in respectively, Commission Recommendation 2003/311/EC 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 on a common regulatory framework for electronic communication networks and services. [2003]*
OJ C 114/45 ("Recommendation"); and Guidelines on Market Analysis and the assessment of SMP ("Guidelines On Market Analysis") [2002]
OJ C 165/6. Remedies are the subject of a Common Position on the approach to Appropriate remedies in the new regulatory framework [2004], ("the Remedies Paper") by the European Regulators Group, the college of NRAs created by the legislation to, inter alia, advise the Commission on the implementation of the procedures.

Market definition

In February 2003 the Commission issued a Recommendation on relevant markets, to identify those markets which, in the Commission's view, may warrant ex ante regulation. Unlike the previous regime, markets must be defined in accordance with the principles of competition law. NRAs may vary the markets subject to objection by the Commission. The Recommendation incorporates flexibility by allowing related 'technical services' to be aggregated within a market definition. Member States can also add or subtract markets, using specified (and quite complex) procedures.

The Recommendation identifies three cumulative criteria for identifying those markets which are suitable for ex ante regulation: high and non-transitory barriers to entry, the expected persistence of such barriers to entry over a relevant time period, making the prospect of effective competition unlikely, and the inability of competition law adequately to address the particular issue. The second of these is simply a projection of the first (albeit difficult to apply in practice). The logic of the régime thus rests heavily on the combined operation of the first and third criteria.

Dominance

Pursuant to Article 16 of the Framework Directive, the regulatory framework only permits the imposition of ex ante regulation where one or more undertakings is found to have *Significant Market Power* (SMP), which is identical to the standard definition of dominance determined and repeated by the European Court of Justice, ensuring in principle a major step forward towards the convergence of approaches under regulation and competition law.

Remedies

Under the Directives, NRAs have the power to impose obligations on firms found to enjoy SMP in a relevant market. Essentially, for wholesale markets the remedies are contained in Articles 9-13 of the Access Directive, while for retail markets the remedies are contained in Articles 17-19 of the Universal Service Obligations Directive. The wholesale remedies are, in ascending order of rigour: transparency, non-discrimination, separate accounting, mandatory access, and cost-oriented pricing. NRAs must act within a framework of duties set out in Article 8 of the Framework Directive and the measures they take must be proportionate to the policy objectives identified. This can be construed as meaning that the intervention is appropriate, no more than is necessary, and, by implication, satisfies a cost-benefit test, in the sense that the expected benefits from the intervention exceed the expected costs.

2. Experience

Over one hundred notifications of individual market have now been made to the Commission by NRAs, so it is possible to draw some preliminary conclusions about how things are going. I devide this assessment into *process* and outcome components, the latter divided between *market analysis* and *remedies*.

Process

The first point to make is that the regime imposes very heavy burdens on NRAs. In the UK, which has completed the process, an Ofcom official estimated that the reviews took about 60 person years of work. NRAs in smaller countries, which have the advantages of precedents, can reduce this vastly, but even in some of these the volume of analysis undertaken and length of notifications have been enormous. In my opinion, notifications have often contained unnecessarily exhaustive proofs of the obvious, and consideration should be given in future to streamlining the process.

The European Commission Task Force which receives the notifications (comprising officials from DG Comp and DF InfoSoc) also runs the risks of being swamped by the number of notifications (18 from each of 25 member states plus a few extras). The Commission has one month to accept a notification, with comments, or retain it for a further two months' study internally and by other NRAs through the Communications Council. So far, only a handful of notifications have gone to the second stage, and the Commission has required the withdrawal of only one market analysis – of the wholesale market for mobile access and call original market in Finland, where the NRA made a finding of dominance an the part of the largest operator, based largely on its market share in excess of 60%. The NRA must now resubmit the analysis.

Many NRAs have prenotification meetings with the Commission at which work in progress is discussed. These are unquestionably helpful and (combined with previous Commission comment) have almost certainly helped to reduce the number of notifications going to the second stage. NRAs reasonably infer that if an argument or piece of analysis submitted by another NRA has 'got through', the same approach will work for it if the circumstances are sufficiently similar.

Although the Commission's legal basis for approving an NRA's choice of remedies is much weaker than its basis for approving market definitions and analyses, its responses to notifications have also included comments on proposed remedies.

Market analysis

Despite the lengthy period taken over the analysis, the 'surprise' value of many of the notifications to date if very low. Broadly, we knew that competition was slow to develop in fixed networks which, tend to be dominated by the historic monopolist. This applies particularly to the smaller member states. The exceptions are national and, especially, international retail calls (especially by business customers, where the data permit such a distinction) and wholesale transit or conveyance on 'thick' routes. The same applies to leased lines at low speeds which are tied to the generally monopolised public switched telephone network.

An area of emerging interest, especially in relation to fixed markets, is whether competitive conditions in a member state are sufficiently uniform to justify a geographic market definition which covers the whole country, or whether separate regions should be distinguis-

hed, served by differing numbers of operators. For example, origination might be competitive on thick (inter-urban) routes but not on other routes. NRAs are reluctant at present to make such distinctions, but they may be necessary in the future.

Some comments on other markets are given below.

Fixed and mobile termination: in the Recommendation on relevant markets, these are defined as single operator markets, carrying the implication that each operator is a 100% monopolist. NRAs have so far accepted this approach, and it has led to the extension of the cost-based regulation currently found on fixed networks to termination on mobile networks too. As cost models are developed, several NRAs have proposed a 'glide path' of charges gradually reducing changes in a few years to a cost-based level. There is some question as to whether mobile networks of different sizes should have the same termination changes. In some cases, small, more vulnerable networks are allowed in the interim to set higher changes.

Mobile access and call origination: the Recommendation on relevant markets does not include retail markets for outgoing mobile services within the list of markets subject to ex ante regulation. However it does include the underlying wholesale market, despite the fact that, in the absence of national roaming, mobile virtual network operators (MVNOs) or wholesale airtime sales, there are no transactions on this market. Mobile operators do, however, supply themselves with such services, and this has formed a basis for discussion of whether there is single dominance on that market (as rejected by the Commission in the case of Finland – see above) or joint dominance exercised by two or more operators with similar market shares. Given the structure of mobile telephony in the EU, it is quite possible that one or more notifications of joint dominance may be made.

Wholesale international roaming: these are national markets (thus when a visitor from Hungary is in France, she cannot use a German networks to make and receive roamed calls), but with an international dimension: regulation in Hungary will, by definition, benefit visitors from other countries, not Hungarians. As a result, the European Regulators Group has put measures in place encouraging NRAs to co-operate with one another or conducting their market analyses. This process goes on simultaneously with a Commission competition investigation under Article 82 of the Treaty into the level of wholesale roaming charges set by two UK mobile operators.

Wholesale broadband access ('bitstream') and unbundled loops: these two markets are central to the competitive supply of DSL-based broadband services. While markets for local loops are likely to exhibit dominance, there is room for more debate about whether single (or possibly joint) dominance can be found in the market for bitstream in member states where there are developed cable networks and more than one operator which has installed broadband equipment in local exchanges.

Broadcast transmission services: NRAs have struggled to define and analyse this market, which might be taken to include some or all of a range of analogue and digital platforms relying on cable, DSL, satellite and terrestrial transmission. This market is likely to need review for future rounds of analysis.

Remedies

The ERG Remedies paper represents a laudable attempt by NRAs to provide guidance on remedies. But because they are not subject to notification of and approval by the Commission, it is harder to provide a synoptic view of the variety of remedies applied.

The challenge NRAs face in connection with choice of remedies is how best to use the flexibility available under the new, more narrowly defined anti-trust market and more focussed remedies. In my view, this is best achieved by adopting a zero-based approach – i.e. conjecturing how the market would operate without regulation. (This must in any case be done at the market analysis stage, where dominance is being tested for in a world without regulation.) Remedies to deal with problems can then be progressively added, and an estimate made of the incremental effect of each. The alternative is to start not from zero regulation, but from the *status quo,* and evaluate the effect of perturbations from that point. The problem here is that current remedies interact in various ways, and this approach may be too conservative in the sense that an NRA, not starting from a clean slate, might end up making no major change.

A second point, set out in the ERG remedies paper, is that it is extremely helpful if the NRA has a realistic understanding of how competition will develop over the period of the review and can gauge its interventions to help that process. This might involve opening up certain access points in the incumbents' networks, and withdrawing others where competitors have replicated the relevant assets. Unlike the case NRAs' market definitions and analysis, which can be evaluated at once on their own terms, the impact of remedies will be felt over a longer horizon. Nonetheless, an NRA can legitimately be criticised if it unthinkingly reproduces under the new regime all its current remedies.

3. Conclusion

The Commission is undertaking a review of the regime at the end of 2005, by which time its effect will be more evident. Tentatively, I would draw the following conclusions:

- the underlying logic of the new regime is sound, and fit for its long-terms deregulatory purpose;
- the process should be simplified except in the case of very difficult markets; this should go hand-in-hand with a reduction of the number of ex ante markets in the Recommendation; the result should be a speeding up of the process;
- so for the interactions between NRAs and the Commission have been effective and expeditious, but it remains to be seen if a faster flow of work can be dealt with;
- more thought can usefully be given to the design of remedies, with more systematic collection of effectiveness evidence, from member states.