One Year with the Electronic Communications Regulatory Framework: a Report on the Results of the Article 7 Notification Procedure

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Introduction

More than one year has passed since the deadline for implementation of the New Regulatory Framework for Electronic Communications. Most of the "old" Member States have implemented the New Regulatory Framework in their national legislation.[2] However, the national regulatory authorities ("NRAs") are still in the process of completing market analyses, significant market power determinations and remedy decisions pursuant to Arts 15 and 16 of the Framework Directive. While this process is following its course, a good deal of experience has already been gained with the notification procedure between NRAs and the European Commission. This procedure is governed by Art.7 of the Framework Directive.[3] It constitutes one of the cornerstones in the functioning of the New Regulatory Framework (hereafter "Notification Procedure").

Specifically, Art.7 of the Framework Directive requires NRAs to notify to the Commission draft measures that (i) define relevant markets; (ii) designate certain operators and service providers as having significant market power ("SMP") on these markets; and (iii) impose regulatory requirements (remedies) on these SMP operators, where such remedies could affect trade between Member States. The Commission can veto market definitions that differ from those that have been pre-defined in its Recommendation on Relevant Markets,[4] as well as decisions designating SMP undertakings. The Commission has no veto right in regard to measures imposing remedies. However, access and interconnection remedies imposed by NRAs on SMP operators that are not listed in the Access Directive[5] are subject to Commission authorisation (Access Directive, Art.8(2)).[6] Through the Notification Procedure, a new body of case law is being developed that should contribute to more consistent application of regulatory remedies in the communications sector.

In addition to this case law, the basic EU legislative framework has been complemented by guidance documents produced by the European Regulators Group ("ERG"), in particular the ERG's Common Position on Remedies.[7]

The Notification Procedure

At the time of writing, only the UK regulator (Ofcom) and the Finnish regulator (Ficora) have managed to notify measures to the Commission for all relevant markets defined in the Commission's Recommendation, with the exception of the wholesale national market for international roaming (the subject of an ongoing Commission investigation) and—in the case of Ofcom—the market for broadcasting transmission services. The NRAs of Austria, France, Greece, Ireland, Hungary, the Netherlands, Portugal, Slovakia and Sweden have also notified measures under the Notification Procedure.[8]

The draft measures submitted for consultation generally contain full information on the NRA's analysis and reasoning. However, both final and draft measures are notified in the language of the notifying NRA. Only a summary form of the notification is translated into English. This summary form contains little information on the justification for a notified

1 *Wilmer Cutler Pickering Hale and Dorr LLP*, Brussels. This article has been updated with information available through December 8, 2004. The authors are grateful to Inge Bernaerts for comments provided on this article. Any errors are attributable to the authors only.

2 On April 20, 2004, the Commission referred Belgium, Greece and Luxembourg to the Court of Justice in view of their failure to implement the New Regulatory Framework by July 25, 2004. See Commission Press Release of April 21, 2004, IP/04/510. Other Member States have been reported for failing to adopt secondary legislation to implement the New Regulatory Framework—see Commission Communication, 10th Implementation Report 2004 (COM (2004)759 final, p.9).

3 Directive 2002/21, [2002] O.J. L108/33.

4 Commission Recommendation of February 11, 2003, [2003] O.J. L114/45 ("Recommendation on Relevant Markets"). The Recommendation on the Relevant Markets comes with an Explanatory Memorandum (see *europa.eu.int/information_society/topics/ecomm/doc/useful_information/library/recomm_guidelines/relevant_markets/en1_2003_497.pdf*)

5 Directive 2002/19, [2002] O.J. L108/7.

6 For a general overview of the working of the Notification Procedure under Art.7 of the Framework Directive, see R. Krüger and L. Di Mauro, "The Article 7 consultation mechanism: managing the consolidation of the internal market for electronic communications" (2003) *Competition Policy Newsletter*, No.3, 33–36; and C. Duvernoy and A. Desmedt, "The New Communications Regulatory Framework: A Central Oversight Role for the European Commission" (2004) *The European Antitrust Review* 60–63.

7 ERG Common Position on the approach to appropriate remedies in the new regulatory framework, April 1, 2004, ERG (03) 30rev1, available on the website of the ERG, *www.erg.eu.int*.

8 All notifications and comments of the Commission can be found on the online register of the Art.7 Task Force ("Commission Register") at *forum.europa.eu.int/Public/irc/infso/ecctf/home*.

measure. As a result, the comments that the Commission may have in the context of the Notification Procedure often constitute the main source of information on the notified measure. The Commission has stated that it will prepare comprehensive reports on substantive issues that have arisen under the Notification Procedure for ERG plenary meetings.[9] Publication of such reports will greatly facilitate the dissemination of knowledge about problems of more general interest that arise in the implementation of the New Regulatory Framework.

The majority of measures notified so far concern the market analyses mandated by Arts 15 and 16 of the Framework Directive, including the possible designation of SMP operators and remedies imposed upon them. However, some notifications relate to other measures imposed under the New Regulatory Framework, notably measures adopted pursuant to Art.5 of the Access Directive. In this regard, for example, the Netherlands notified horizontal measures on access and interconnection that are not limited to SMP operators, *i.e.* a draft inter-operability decree obliging public network or service operators who control access to end-users to negotiate interconnection and other necessary measures to ensure end-to-end connectivity between end-users.[10] Other examples are decisions by NRAs as a result of access or interconnection disputes adopted pursuant to Art.5(4) of the Access Directive.[11]

The Commission has provided comments on most of the notified measures and, so far, has vetoed three NRA notifications. In one case concerning remedies notified by the Finnish NRA, the Commission disagreed with the remedies imposed but did not have the power to veto them. In fact, as discussed below,[12] the remedy was required by Finnish law rather than being imposed by Ficora (Finland's NRA). The Commission has therefore opened an infringement procedure before the Court of Justice under Art.226 EC Treaty concerning the provisions of Finnish law at issue.

In addition to the Commission's power to veto or comment on the NRA notifications, market operators affected by NRA decisions have the opportunity to appeal against such decisions in their own national jurisdictions.[13] A successful appeal against an NRA decision should trigger a new notification if the measure is changed.[14]

One recurring comment of the Commission during the Notification Procedure relates to the tendency of NRAs to conduct national consultations as prescribed by Art.6 of the Framework Directive at the same time as consultations with the Commission and other NRAs are being conducted.[15] While such parallel consultation may speed up the process of market analysis, it does not allow the Commission to adequately consider comments of interested parties in the framework of national consultations. Moreover, where the NRA substantially changes the measures it notified to the Commission as a result of national consultations, the Commission has made it clear that such measures must be notified again. For market players intervening in the consultation process, parallel consultations imply that possible (informal) comments should be addressed to the Commission at the same time as national authorities in order to make sure that the Commission is aware of such comments when reviewing the notified measure.[16]

Below, we review some of the substantive highlights emerging from the Notification Procedure to date concerning (i) relevant market analysis; (ii) SMP determination; and (iii) remedies.

Relevant Market Analysis

The Recommendation on Relevant Markets identified 18 markets susceptible of requiring *ex ante* regulation on the basis of (i) the presence of high and non-transitory barriers to entry; (ii) a market structure that does not tend towards effective competition within the relevant time horizon; and (iii) the inability of competition law alone to adequately address the market failures at issue. For those 18 markets, there is a presumption that *ex ante* regulation is warranted if there is an operator with SMP. The Commission has postponed the review of the Recommendation until the end of 2005 (originally scheduled for the end of June 2004).[17] This is sensible, since most NRAs are still in the middle of their initial market reviews. Some have not even begun, because implementation of the New Regulatory Framework has been delayed.

Experience so far shows that the analysis and possible regulation of 18 markets is a resource-intensive exercise for all parties that "comes with a not insignificant set-up cost".[18] Even if the definition of 18 markets should contribute to achieving less regulation at a finer level of granularity in the long term (under the prior framework only six "markets"

9 See ERG, Conclusions of the Ninth Plenary of the European Regulators Group, ERG (04) 25, p.3.

10 See Commission Comments, *Case NL/2003/0017*, SG (2003) D/233211. The notified draft decree is based on Art.5(1)(a) of the Access Directive which allows NRAs to impose measures to ensure end-to-end connectivity. The Commission highlighted that NRAs must use Art.5(1)(a) of the Access Directive "with caution" and discussed whether a general horizontal obligation imposed by way of decree (as opposed to an individual obligation imposed by an NRA) would be disproportionate. The Netherlands, however, highlighted that the measure—applicable on call services offered by mobile and fixed network and service operators—was in line with the objectives of the New Regulatory Framework since it would facilitate market entry (newcomers are certain that their end users will be interconnected with other operators' end users) and promote the interest of citizens to be able to communicate with any other end user in the Netherlands.

11 The Austrian regulator, for example, notified decisions adopted in the context of interconnection disputes between mobile operators following the introduction of mobile number portability. See, *e.g.* Commission Comments, Case AT/2004/0044, SG(2004) D/201834. The Commission noted that while the obligations imposed in the context of this particular dispute (relating to the mobile termination charges of Tele2, an MVNO in Austria) fall within the scope of the market analysis for mobile termination, the outcome in the dispute should not prejudge the outcome of the broader market analysis carried out in accordance with Arts 15 and 16 of the Framework Directive.

12 See text accompanying n.65, below.

13 The possibility of judicial review is also mandated by Art.4 of the Framework Directive.

14 In the United Kingdom, for example, Hutchinson 3G challenged the Ofcom determination that it had SMP on the wholesale call termination market (see Competition Appeal Tribunal, Case No.1047/3/3/04).

15 See, *e.g.* Commission Comments, Case UK/2003/0001, SG(2003) D231466.

16 During the Notification Procedure, third parties are explicitly invited to provide comments to the Commission whenever a "serious doubts" letter is issued to an NRA (see above at n.29). However, the time limit for providing such comments is very short: five working days following publication of the notice that a "serious doubts" letter has been issued.

17 See Commission Press Release, IP/04845.

18 See ERG Common Position on Remedies, p.24. Probably because the evaluation of their own markets is so resource-intensive, NRAs are providing very few comments on each other's draft decisions in the context of the Notification Procedure.

were regulated),[19] yearly reviews of these markets by the Commission may be an unrealistic ambition. On the other hand, an evaluation should take place where market circumstances have changed due to regulatory or industry developments that create a new situation in a given communications market. As former Commissioner Liikanen has commented in discussing whether all 18 markets should continue to be identified in the Recommendation, there may be a case for dropping wholesale mobile access and call origination from a revised Recommendation.[20]

Relevant Markets Identified by NRAs

While NRAs should at least undertake an analysis of the markets identified in the Recommendation on Relevant Markets,[21] they can also identify different markets that may require *ex ante* regulation in accordance with national circumstances (subject to the Commission's veto powers). In this regard, some NRAs are identifying even narrower or more specific markets than those defined by the Commission. This has in some cases led to the rollback of regulation. Ofcom, for example, has segmented retail fixed telephony markets according to the type of access line (analogue, ISDN2 and ISDN30); the type of network for which a call is destined (*e.g.* fixed to mobile calls) and the existence of an SMP operator at the wholesale level (*e.g.* for international calls).[22] On the basis of these narrower market definitions, the markets for international calls for business customers, for example, were viewed by Ofcom as no longer requiring regulation.

In other cases, NRAs are adopting market definitions that are broader than those in the Recommendation. In the area of broadband services, NRAs have generally agreed with the distinction in the Recommendation between wholesale unbundled access (market 11) and wholesale broadband access (market 12) in view of the lack of substitutability between these two types of access services at the wholesale level.[23] Ofcom, ComReg, FICORA and PTS (the Swedish regulator) have all taken the view that the market for wholesale broadband access includes both bitstream access and cable-based broadband access, thereby illustrating a "technology-neutral" approach to regulation.[24] The Commission anticipated this possibility when it noted in its Recommendation on Relevant Markets that "for now the wholesale broadband market is limited to bitstream services but defining the market in this way allows NRAs to take account of alternative infrastructures when and if they offer facilities equivalent to bitstream access".[25] On the other hand, the Commission criticised the lack of evidence put forward by these national regulators for the proposition that cable operators constrain prices of bitstream services. It referred to the absence of an *actual* supply of broadband access *via* cable networks, and added that "potential" constraints are mainly relevant for the SMP assessment rather than the market definition.[26] In the case of PTS, the Commission even invited the NRA to remove cable television networks from the relevant market in view of the high barriers to entry identified by PTS.[27] Further work on the technical substitutability of cable-based broadband access and bitstream access is expected by the ERG in the context of a review of the ERG's Common Position on bitstream access.[28]

More recently, an overly broad market definition has lead to a "serious doubts" letter[29] and ultimately a veto decision by the Commission.[30] In reaction to a notification by the Austrian NRA (TKK), the Commission expressed serious doubts concerning the inclusion of direct interconnection in the market for transit (market 10). The Commission questioned this inclusion in the transit market, taking the view that direct interconnection (*i.e.* interconnection between two operators without use of intermediate transit operators) cannot be considered as a demand-side substitute for transit services, in view of the high level of investment and advance planning required for the implementation of direct interconnection. The Commission also considered that the Austrian regulator could not automatically include self-provision in the relevant market where no evidence was provided that operators that had created new capacity through direct interconnection would also offer such capacity to third parties as transit services. The inclusion of newly-created direct interconnection would have reduced the market share of Telekom

19 *ibid.*

20 See Speech (SPEECH/04/232) of May 10, 2004 of Commissioner Erkki Liikanen. Based on the level of competition generally observed on this market at the retail level, the Explanatory Memorandum to the Recommendation on Relevant Markets anticipated that the access and call origination market would not be included in its future revision. See, however, the findings by the Finnish and Irish NRAs according to which some of the mobile operators on their territory hold SMP (see text accompanying note 66 below). The Finnish finding of SMP on the mobile access market was vetoed by the Commission; the Irish consultation is still pending.

21 NRAs are strictly speaking not obliged by the Recommendation on Relevant Markets to define—for the purpose of *ex ante* regulation—all markets mentioned in the Recommendation. However, failure to do so could be argued to constitute an infringement of the more general obligation imposed on NRAs to define relevant markets as appropriate taking utmost account of the Recommendation and to carry out the analysis of relevant markets pursuant to Arts 15(3) and 16(1) of the Framework Directive.

22 See Ofcom notifications on markets 1 to 6, at *forum.europa.eu.int/Public/irc/infso/ecctf/home*.

23 See, *e.g.* notifications of Ofcom and ComReg (the Irish NRA), in which the NRAs analysed this issue in some detail.

24 As required by Art.8(1), second paragraph, Framework Regulation. The requirement for technology-neutral regulation has also potentially broadened the definition of mobile communications markets (markets 15 to 17). In this regard, following a notification of Ofcom, the Commission mentioned that mobile voice or SMS services offered over a 3G network should be included with comparable services offered over 2G networks, as they appear to be a part of the same market. However, Ofcom indicated in its response that the sale (at the retail level) of 3G data services in packages with voice and SMS could lead to a different treatment of 3G-based services in terms of market definitions. It therefore left the question of 3G-based voice and SMS services open. Most recently, however, on the market for mobile voice call termination, the French regulator (ART) notified a market analysis to the Commission whereby it included both 2G- and 3G-based mobile voice termination in the same market. ART considered both 2G and 3G voice termination to be completely substitutable on that market.

25 Recommendation on Relevant Markets, Explanatory Memorandum, p.24

26 See Commission Comments, Case IE/2004/0093, SG (2004) D/203756, Commission Comments, Case FI/2004/0062, and Commission Comments, Case UK/2003/0032, SG (2004) D/200485. It should be recalled that the Commission also rejected cable operators as a substitute for broadband services in the prize squeeze case against Deutsche Telecom (Commission Decision of May 21, 2003, Case COMP/C-1/37.451, 37.578 and 37.579, *Deutsche Telecom AG*, at §§87–88).

27 See Commission Comments, Case SE/2003/0083, SG (2004) 203617.

28 See ERG, Conclusions of the Ninth Plenary Meeting of the European Regulators Group, ERG (04) 25, p.2.

29 A "serious doubts" letter opens the second phase in the Notification Procedure during which the adoption of a notified measure is subject to a standstill period of two months. After the two-month period, the Commission must decide whether or not to veto the notified measure (Art.7(4) of the Framework Directive).

30 See Commission Decision of October 20, 2004 pursuant to Art.7(4) of Directive 2002/21, Case AT/2004/0090: transit services in the fixed public telephone network in Austria.

Austria on the transit market from 90 per cent to less than 45 per cent (calculations based on call minutes[31]), creating the predicate for TKK's conclusion that the market was effectively competitive with no SMP operator present.

The SMS termination market is an example of a market that the Commission did not include in its Recommendation. However, some NRAs are examining whether it may require *ex ante* regulation. Thus, on the basis of a consumer organisation complaint concerning SMS tariffs in France,[32] the French NRA (ART) decided to conduct a market consultation on the wholesale SMS termination market. Other regulators have also indicated that they may investigate the SMS market in light of competitive concerns.[33]

Relationship to the Commission's Market Definition in Competition Law Cases

As stated in the Recommendation on Relevant Markets, market definitions by NRAs in the context of the New Regulatory Framework do not prejudice the definition of narrower (or broader) markets in specific cases under competition law.[34] International roaming constitutes an example. The Commission provisionally concluded in its Statement of Objections sent to two UK mobile operators (Vodafone and O2) that—for the period of the investigation from 1997/1998 to September 2003—roaming on each individual operator's network constituted a separate market.[35]

This is a significantly narrower market than the corresponding market identified in the Recommendation on Relevant Markets. In the Recommendation, the Commission did not confine the market definition for wholesale international roaming services to the individual networks of the operators. Rather, it indicated that any mobile operator in a national territory could provide such a service to foreign mobile operators. The market for international wholesale roaming was in this sense different from the markets for mobile call termination where each operator was explicitly considered as the sole supplier of the service on its network and, hence, by definition an SMP operator in this "market".[36]

Whether or not the Commission's market definition concerning international wholesale roaming services will ultimately be maintained in the cases against O2 and Vodafone,[37] it is clear that in competition law enforcement, the Commission does not feel constrained by the market definitions contained in the Recommendation on Relevant Markets or, *a fortiori*, NRA market definition. In cases concerning alleged Art.81 or Art.82 infringements, the Commission will conduct a retrospective market analysis on the basis of the specific facts and circumstances at issue. Conversely, the NRA's analysis is forward-looking and not limited to a particular set of circumstances that arise in a given case.

SMP Determination

Under the New Regulatory Framework, NRAs must assess whether any of the entities active on a properly defined market are in a position of economic strength affording them the power to behave to an appreciable extent independently of competitors and ultimately consumers.[38] This is the classic test for dominance, taken over as the New Regulatory Framework definition of significant market power. The absence of SMP players means that regulation can be scaled back. A finding of SMP automatically entails the imposition of one or more *ex ante* regulatory remedies, since the enforcement of competition law alone will not change the structure of the market.[39]

For the purpose of determining SMP on the relevant market, NRAs must apply the SMP Guidelines issued by the Commission. In addition, the ERG has published a "Working Paper on the SMP Concept for the New Regulatory Framework" which explains in more operational terms the criteria NRAs should examine to determine whether an operator has SMP.[40] Certain NRAs have also adopted their own guiding principles for performing the market analyses mandated by the New Regulatory Framework.[41]

SMP Assessments in Fixed and Mobile Markets

Under the New Regulatory Framework, incumbent fixed operators are generally viewed as holding significant market power on fixed and broadband markets. On certain narrowly defined fixed communications market segments, however, Ofcom has decided to scale back regulation. As noted, it considers segments such as the retail market for international calling services for business customers as well as certain segments of the leased lines market to be competitive.[42]

The SMP test under the New Regulatory Framework has led to comparatively more significant changes in the assessment of the competitiveness of mobile markets.

In mobile termination, the application of the New Regulatory Framework has intensified regulation rather than reduced it. Contrary to the situation under the old regulatory framework, smaller operators are now also considered to have SMP for mobile call termination on their network. All NRAs that have so far notified measures with regard to this market take the position that each mobile operator (even the smallest operator) holds a monopoly on the market for call termination.[43] Of course, an SMP finding in this context is virtually automatic, given the definition of the relevant market as the market for the termination of calls on each individual mobile operator's own network.[44] Even the mobile

31 The calculation of market share on the basis of call minutes alone is somewhat surprising, as market shares for interconnection should preferably be calculated on the basis of revenue value according to earlier Commission statements in this respect (see, *e.g.* Commission Guidelines on SMP, §77).

32 See ART press release of July 29, 2004, available on the ART website *www.art-telecom.fr* (visited on August 7, 2004).

33 See, *e.g.* ComReg notification and PTS notification on voice call termination on individual mobile networks, available on the Commission Register website.

34 See, Commission Recommendation, Explanatory Memorandum, s.3.1, p.8.

35 See Commission Press Release, IP/04/994.

36 See Recommendation on Relevant Markets, Explanatory Memorandum, pp.32–34.

37 A Statement of Objections constitutes a provisional document containing preliminary findings of the Commission in the context of a competition law procedure. The findings are subject to change or withdrawal.

38 Art.14, Framework Directive.

39 See SMP Guidelines, [2002] O.J. C165/6 at §§113 and 114.

40 ERG (03) 09rev2.

41 See, *e.g.* Ofcom's market review guidelines: criteria for the assessment of significant market power (*www.oftel.gov.uk/publications/about_oftel/2002/smpg0802.htm*).

42 See Ofcom notifications available on the Commission Register website.

43 Notifications of NRAs in Austria, Finland, France, Greece, Hungary, Ireland, Sweden and the United Kingdom were filed at the time of writing. Only Finland and Germany opposed the single network termination market at the time of publication of the draft Commission Recommendation on Relevant Markets.

44 See, however, above at n.17 (Hutchinson 3G challenged Ofcom's determination that it holds SMP on the wholesale call termination market with the Competition Appeal Tribunal).

virtual network operator (MVNO) Djuice in Sweden was designated as an SMP operator on its termination market on the basis that it controls the termination of calls to its subscribers.[45]

Regulatory obligations on mobile access and origination have been scaled back in some countries because none of the operators on these markets were found to meet the SMP test (*e.g.* in the United Kingdom, Austria and Hungary).[46] This has been cited by the Commission as an example of successful deregulation under the New Regulatory Framework. More recently, however, the Irish NRA (ComReg) suggested in its consultations that both Vodafone and O2 are SMP operators with a collective dominant position on the Irish market for mobile access and origination.[47]

In Finland, the NRA concluded that TeliaSonera has SMP on the mobile access and origination market. The Commission sent a serious doubts letter in reaction to the Finnish notification and has recently vetoed the draft measure.[48] The Commission recognised that TeliaSonera holds more than a 60 per cent market share, as compared to 29 per cent and 10.5 per cent for the two other mobile operators with national coverage. However, it found that Ficora's notification was incompatible with Community law, as it did not meet one of the objectives of the New Regulatory Framework, namely, the promotion of competition.[49] The Commission highlighted a number of factors that Ficora failed to take into account when concluding that TeliaSonera held market power. Those factors should have been analysed on the basis of a forward-looking evaluation of the relevant market where the NRA must determine whether the market is "prospectively competitive".[50] Generally speaking, the Commission attached great importance to the competitive developments in Finland resulting from the presence of service providers ("SPs") and MVNOs on the market.

More specifically, the Commission first of all referred to the market dynamics in Finland. The market is moving from a fully vertically-integrated market with mobile network operators ("MNOs") holding 100 per cent of the retail market to a market where SPs and MVNOs are able to conclude network access agreements on a commercial basis (*i.e.* in the absence of a regulatory obligation for MNOs to provide access) and gain market share on the retail market at the expense of MNOs.[51] This showed, according to the Commission, that TeliaSonera is faced with competition at the retail level, not only from other MNOs but also from SPs or MVNOs that MNOs allow on their networks to optimise capacity utilisation. Secondly, the Commission referred to the lack of evidence concerning capacity constraints on the networks of MNOs competing with TeliaSonera. The suggestion is that these MNOs can attract more traffic on their networks through agreements with MVNOs and SPs and thus constrain the market power of TeliaSonera. Thirdly, the Commission found that there was insufficient proof of high switching costs for SPs or MVNOs when changing host network. Ficora, in its notification, had referred to an SP which switched network operator and as a result lost 25 per cent of its customers. In response, the Commission noted that at the time of the switch, mobile number portability was not yet implemented. Moreover, the Commission also emphasised that it received information from third parties that MNOs are currently providing incentives to SPs to switch operator by paying for switching costs.[52] Finally, the Commission also rejected elements such as network effects resulting from different prices for on-net and off-net calls, economies of scale and advantages provided by financial strength, for the finding that TeliaSonera had SMP on the mobile call origination market.[53] This decision demonstrates that in a prospective market analysis, high market shares alone (even a market share exceeding 60 per cent) will not necessarily suffice to demonstrate SMP.

The Requirement of a "Greenfield Approach" for SMP Assessment

Prior to the Finnish notification on mobile access and origination, the Commission vetoed another decision of Ficora concerning what it considered to be an incorrect SMP determination.[54] In that case, the Finnish NRA found that TeliaSonera did *not* have SMP on the relevant markets for international telephone services provided at a fixed location (both residential and business). Ficora determined that, despite the high market shares of TeliaSonera on the relevant markets (55 per cent and 50 per cent, respectively), it did not have SMP due to the presence of several alternative service providers, their ready availability for customers, and low barriers to entry.

In addition to questioning whether there was sufficient factual support for Ficora's position, the Commission highlighted a fundamental conceptual flaw. Ficora relied on market analysis of a superficially competitive retail market that is, however, regulated at the wholesale level (*e.g.* obligations to allow carrier (pre-)selection, to interconnect, and to provide access). The Commission pointed out that Ficora should have recognised in its analysis that competition on this retail market exists on the basis of a regulated wholesale market. Without taking this fact into account, there would be a risk that Ficora would subsequently roll

45 See PTS notification as reported in the Commission's comments, Case SE/2004/0052, SG D/202306.

46 Under the former regulatory framework, mobile operators were sometimes subject to regulatory obligations such as non-discrimination or cost orientation as regards access. This was considered by some NRAs as interconnection or "special access". In the United Kingdom, for example, Vodafone and O2 were obliged to provide indirect access on the basis of retail minus pricing.

47 ComReg Consultation Paper, *Market Analysis—Wholesale Mobile Access and Call Origination,* Document No.04/05, January 27, 2004.

48 See Commission Comments, Case FI/2004/0082, SG (2004) D/203411 and Commission Decision of October 5, 2004, Case FI/2004/0082.

49 More specifically, the Commission found that the notified draft measure did not meet the objective referred to in Art.8(2)(b) of the Framework Directive, providing that NRAs shall ensure "that there is no distortion or restriction of competition in the electronic communications sector."

50 See Commission Decision of October 5, 2004, Case FI/2004/0082, §11.

51 *ibid.*, §16. The Commission referred to the presence of at least 10 SPs on the Finnish market that increased their market share to 10 per cent of all mobile subscribers by mid-2004.

52 *ibid.*, §27.

53 The Commission left the controversial issue of on-net and off-net pricing largely untouched as it mentioned that "such price differences might be addressed in [the analysis of] other markets". As to the advantages brought by economies of scale and scope, the Commission noted that the superior capacity utilisation by TeliaSonera (*i.e.* a larger amount of subscriber traffic on the network) constituted only an advantage in terms of lower *short-run* average cost. It pointed out that this advantage could be overcome by other MNOs that succeeded in attracting more customers onto existing capacity, for example by allowing or even stimulating access for SPs or MVNOs (see §§31-34).

54 Commission Decision of February 20, 2004 pursuant to Art.7(4) of Directive 2002/21, Case FI/2004/0024 and FI/2004/0027, C(2004)527 final.

back wholesale regulation, in view of existing retail competition. Thus, in assessing competition on relevant retail markets, NRAs must take account of the impact of obligations imposed at the wholesale level (the "greenfield" approach[55]).

Remedies

The remedies ultimately imposed on SMP operators constitute the operational output of the New Regulatory Framework and have direct impact on the marketplace. In this regard, work over the last year has given more concrete shape to what operators can expect. We discuss in turn (i) the adoption of the ERG Common Position on Remedies, (ii) the emergence of "new style" remedies as compared to remedies under the old regulatory framework, (iii) the Commission's reactions to the remedies notified to date, and (iv) the impact of competition law remedies.

ERG Common Position on Remedies

In April, the European Regulators Group agreed a 131-page Common Position on the approach to remedies in the New Regulatory Framework. It can be viewed as the third and last component of a new "predictable" communications regulatory regime, complementing the Commission's Recommendation on Relevant Markets and its SMP Guidelines.[56] The Common Position is intended to play an especially important role in maintaining a consistent approach to the imposition of remedies by NRAs. This is useful, as the Commission generally has no veto power over remedies, giving NRAs more discretion in this area. [57]

The document adopted by the ERG is comprehensive and detailed. The ERG recognises that NRAs will often have to base their *ex ante* remedies on expected behaviour of SMP undertakings. In this regard, the Common Position provides a guide to the incentives SMP undertakings have to engage in anti-competitive behaviour, and to the appropriate remedies to apply in a given situation. Where an NRA has determined that SMP exists, it is implicit that the competition rules will not suffice to address the competition problems at issue. The presumption is that a regulatory remedy will increase consumer welfare and so should be imposed.

The Common Position examines any practice of an SMP undertaking that either may eliminate competitors (exclusionary behaviour) or exploit consumers (*e.g.* excessive pricing). The Common Position distinguishes four general cases: vertical leveraging of SMP from a wholesale into a retail market; horizontal leveraging of SMP in one market into another (not vertically related) market, for example through bundling/tying practices; problems related to single market dominance (strengthening entry barriers or "classic monopoly behaviour" such as excessive pricing or inefficient service provision); and specific problems that arise in call termination markets. The ERG recognises, however, that practices such as price discrimination and tying can have desirable welfare effects under certain circumstances. The Common Position sets out a useful taxonomy that relates the strategic variables controlled by the SMP undertaking (*e.g.* information, time, pricing, quality, contractual terms, etc.) to the standard competition problems in communications markets (refusal to deal; bundling/tying; price discrimination; predation; strategic product design, etc.) and their possible exclusionary or exploitative effects (raising rivals' costs; margin squeeze; negative consumer welfare effects).

The Common Position is sensitive both to the difficulty of dealing with competition problems in innovation-driven markets (where disruptive technologies can upset established market positions), as well as the importance of addressing potential practices in emerging markets adopted by incumbents that risk foreclosing the market (*e.g.* in broadband access). Remedies should be imposed at the wholesale level first, and only as a last resort at the retail level. The Common Position recognises that where NRAs conclude in the market definition and analysis phases that replication of the incumbent's infrastructure is feasible, they should shape remedies that create incentives for doing so over time, although they should not promote inefficient investment. Where infrastructure competition is unlikely, due to significant economies of scale or scope coupled with high entry barriers (markets tending toward natural monopolies, such as fixed access lines), NRAs should ensure sufficient access to wholesale inputs to maximise service competition in the interest of overall consumer welfare, including consumer choice. Last, remedies should be crafted to provide the regulated entity with incentives for compliance that outweigh the benefits of evasion.

New Remedies

Many of the remedies notified to the Commission are expressly foreseen in the Access Directive or in the Universal Service Directive. However, some NRAs are also notifying remedies that are not contained in the New Regulatory Framework but are contemplated by the ERG Common Position on Remedies. Noteworthy examples of "new style" remedies are some of the measures notified, for example, by Ofcom. In the market for asymmetric broadband origination, for example, Ofcom notified a requirement imposed upon BT to (i) provide migration (to other internet service providers) on reasonable terms and conditions or (ii) set a margin between the price of wholesale and intermediate broadband internet access that facilitates competition in the provision of intermediate access services.[58] Across several markets where BT was found to hold SMP, Ofcom further imposed the publication of quality-of-service standards (in the form of "Key Performer Indicators") to avoid discrimination in the provision of wholesale services to the retail arms of BT on the one hand and its (retail) competitors on the other hand.[59]

Commission Comments on Remedies

Although it does not generally have veto powers over remedies, the Commission has published comments on some

55 See L. Di Mauro and A. Inotai, "Market analysis under the New Regulatory Framework for electronic communications: context and principles behind the Commission's first veto decision", (2004) *Competition Policy Newsletter* 52–55.

56 The Independent Regulators Group has also published a guidance paper for the imposition of remedies on the mobile call termination market. See *Principles of Implementation and Best practices on the application of remedies in the mobile voice call termination market*, November 20, 2003, available on the IRG website (*http://irgis.anacom.pt/site/en/*).

57 The Commission has no veto power, unless the remedy imposed at the wholesale level is different from the remedies proposed in the Access Directive. In such a case, the Commission can authorise or prevent the NRA from taking such a measure (see Art.8(3), last paragraph, Access Directive). Remedies imposed at the retail level pursuant to Art.17, Universal Service Directive are not subject to the approval of the Commission.

58 See UK draft measures as described in the Commission Comments, Case UK/2004/0047, SG(2004) D/202211 and in Commission Comments, Case UK/2004/0065 SG(2004) D/202512.

59 See UK draft measures as described in the Commission Comments, Case UK/2004/0064.

of the remedies notified by NRAs so far. For example, the Commission criticised Ficora's decision concerning remedies imposed on SMP operators in various markets. Ficora imposed a cost-orientation obligation, but left the choice of the method of calculating cost-orientation to each SMP operator.[60] While the Access Directive does not specify a particular method for the assessment of cost-orientation, Art.13(2) states that NRAs:

> "must ensure that any cost recovery mechanism or pricing methodology that is mandated serves to promote efficiency and sustainable competition and maximize consumer benefits."

The ERG Common Position on Remedies also indicates that it is the role of the NRA to choose the most appropriate methodology in this regard, and not the SMP operator.[61]

The Commission has also criticised FICORA's decision to exempt several smaller operators found to have SMP on the fixed termination market from the obligations of cost-oriented pricing, use of cost-accounting procedures and accounting separation.[62] While the Commission did not contest that such remedies could be disproportionate in the particular circumstances of the Finnish markets at issue, it suggested that Ficora should at least envisage alternative remedies such as benchmarking the termination prices of these operators against those of larger operators that are under a cost-orientation obligation.

This reasoning seems to have influenced the Swedish NRA (PTS). PTS exempted smaller (alternative) mobile operators (Hi3G/3 and Djuice) found to have SMP on their mobile voice termination markets from the obligation to provide accounting separation and charge cost-oriented prices.[63] At the same time, however, it imposed an obligation on such alternative operators to charge "fair and reasonable prices". PTS noted that this meant that their termination rates would have to be, over time, around the pricing level of those operators subject to the obligation of cost-orientation. In this case, the Commission commented that PTS should monitor whether current assumptions concerning "fair and reasonable" pricing will remain valid over the period of the market review.[64]

Remedies Imposed by National Law

Remedies imposed by NRAs sometimes directly result from national legislation that NRAs are bound to respect in their countries. In this regard, it appears from the notification of Ficora on measures imposed in the mobile call termination market that the Finnish Communication Market Act (CMA) effectively limits the powers of Ficora as regards regulation of mobile termination. In accordance with this legislation, Ficora excluded traffic originating from the fixed network from the remedies it imposed on mobile operators in the market for mobile termination (including obligations in regard to interconnection, transparency, cost-orientation, non-discrimination, cost-accounting and accounting separation).

The Commission considered that this exclusion of fixed-originated traffic was contrary to the objectives of the New Regulatory Framework. It found that (i) fixed telephony subscribers are excluded from the benefit of the remedies imposed on mobile call termination, (ii) the measures discriminate between fixed and mobile network operators, and (iii) the measures fail to remove an obstacle to the provision of fixed-to-mobile services in Finland. [65]

The Commission could not veto this notification, since it cannot intervene against Member State legislation in the context of the Notification Procedure. It did, however, emphasize to Ficora that under EU law, national regulators have a duty to disapply national legislation that contravenes a Community rule.[66] In addition, the Commission announced that it intends to bring an infringement procedure under Art.226 of the EC Treaty against Finland.[67]

Impact of Competition Law Cases on Remedies

As NRAs are grappling with the implementation of the New Regulatory Framework, the Commission took its first formal Art.82 prohibition decisions in regard to telecommunications services. In May 2003 the Commission fined Deutsche Telekom ("DT") €12.6 million for abusing its dominant position by charging unfair prices for access to the local loop.[68] Next, in July 2003 the Commission fined Wanadoo Interactive, the France Télécom subsidiary, €10.35 million for below-cost pricing of its ADSL internet access services.[69] The Commission further settled a second margin squeeze case against DT in March 2004, concerning the market for broadband access.[70]

The *DT* and *Wanadoo* cases are being appealed to the Court of First Instance. Pending the outcome of these appeals, they are nevertheless likely to establish important precedents for NRAs in dealing with issues such as below-cost pricing and price squeezing by SMP (*i.e.* dominant) operators.[71] More generally, through these cases the Commission has given a strong signal to national regulatory authorities that it will address perceived issues of market failure where it feels that the NRA has not done enough. Thus, the decisions provide further proof that the Commission is willing to use the sanctions at its disposal to enforce competition law on regulated markets.

Conclusions

The Commission's approach to implementation of the Notification Procedure under the New Regulatory Framework appears to be working well so far in practice. The discretion NRAs have in fashioning remedies under the New Framework could promote healthy competition among regulators to

60 See, *e.g.* Commission Comments, Cases FI/2003/0020, FI/2003/0021, FI/2003/0022, FI/2003/25 and FI/2003/0030, SG(2003) D/233788.
61 ERG Common Position, pp.82–83.
62 See Commission Comments, Case FI/2004/0029, SG(2003) D/233786.
63 See PTS measures as described in Commission Comments, Case SE/2004/0050, SG(2004) D/202305.
64 *ibid.*
65 Commission Comments, Case 2003/0031, SG(2003) D/233787.
66 See ECJ, Case C-198/01, judgment of September 9, 2003, *Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato* (not yet reported), §§ 48-49, as cited in the Commission Comments.
67 See n.65.
68 Commission Decision of May 21, 2003, Case COMP/C-1/37.451, 37.578 and 37.579, *Deutsche Telekom AG*, [2003] O.J. L263/9.
69 Commission Press Release IP/03/1025, July 16, 2004. See also, Klotz and Fehrenbach, "Two Commission decisions on price abuse in the telecommunications sector", *Commission Competition Policy Newsletter*, 2003/3.
70 Commission Press Release IP/04/281, March 1, 2004.
71 Some NRAs are working on the development of generic price or margin squeeze tests for the regulation of access to the local loop and broadband access on the basis of those precedents. See, *e.g.* BIPT consultation on Belgacom's reference offers (BRUO 2004 and BROBA 2004), at *www.bipt.be/bipt.htm*.

craft the most appropriate *ex ante* solutions. Such competition could lead to "best practices" that are recognised among NRAs and the Commission, and would facilitate a more consistent regulatory framework within the EU. Information exchange in the context of the Notification Procedure, for example through the publication of comprehensive Commission reports on the notifications, should further foster consistent regulation.

There is of course a delay in the completion of market reviews, in large measure due to the complexity and broad scope of the tasks assigned to the Commission, NRAs and market players. The delays in transposition of the New Regulatory Framework strain the smooth working of the Notification Procedure. However, the timing of implementation is not the only issue. When transposing the new rules into national law, Member States may be tempted to dictate outcomes that should be selected from among available choices after a market analysis by the NRA under the New Regulatory Framework. The lack of authority for the NRA in Finland to regulate mobile termination rates for fixed to mobile calls serves, to some degree, as an example. The Commission appears justified in reminding NRAs of their obligation to give priority to European rules over inconsistent national legislation.

On the substance, the New Framework has allowed NRAs to roll back regulation in some markets (*e.g.* mobile access and origination) and to impose more tailored remedies in others (*e.g.* benchmarking of mobile termination prices rather than cost-orientation for small operators). As the ERG's Common Position on Remedies indicates (and as foreshadowed in the Commission's *Deutsche Telekom* and *Wanadoo* decisions), the most difficult issue is how to regulate access markets that are unlikely to become competitive in the medium term. It will be interesting to review the real-world impact of remedies that are imposed on access markets against the backdrop of what has largely been an academic debate on the appropriate balance between incentives for network versus service competition.