

# Agenda

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## The EU electronic communications framework: is it on track?

**Across Europe, around 450 detailed market reviews are taking place, as the national regulatory authorities (NRAs) assess competition and propose remedies in at least 18 different telecoms and electronic communications markets under the new EU regulatory framework. The European Commission has the power to veto the NRAs' decisions. This article looks at the NRAs' progress and the Commission's justification for the veto decisions it has taken so far**

The EU electronic communications regulatory framework, introduced in 2002 and comprising five Directives, aims to improve the functioning of the internal market through the harmonisation of national laws, and to ensure that independent NRAs not only exist, but are also equipped with appropriate powers. The analytical principles in the new regulatory framework have been aligned with EU competition law. The framework requires NRAs to conduct reviews of the effectiveness of competition in electronic communications markets, in order to identify where significant market power (SMP) exists and which ex ante regulatory remedies are appropriate and proportionate.

The concept of SMP has been aligned with the concept of dominance in competition law. This represents a higher threshold of intervention than under the previous regulatory regime, where it was a 25% market share in certain pre-defined markets. For each market reviewed, the NRAs have to characterise the state of competition as either effective or not. If competition is deemed ineffective, the NRAs must identify which firms hold positions of either joint or single firm dominance and they are obliged to introduce at least one ex ante regulatory measure.

Legal implementation has been slower than required. On April 14th 2005, the Commission launched legal proceedings against ten Member States in relation to defects in national laws and incorrect application of the EU rules.<sup>1</sup> These ten include several of the 14 Member States that had been reported as having fully transposed the framework into national legislation.<sup>2</sup> Member States have notified the Commission of the results of at least one of the market reviews. Only Austria, Portugal and the UK have completed and notified the majority of the market analyses.

### Has the Commission's market definition been followed?

In 2003, the Commission published a Recommendation identifying 18 relevant product markets that NRAs should review (see Table 1).<sup>3</sup> The issue explored here is to what extent NRAs have followed the Recommendation. NRAs may identify different markets for reasons related to national circumstances, provided they follow the principles and methodology for analysis set out by the Commission in its guideline documents. The sample of reviews examined in this article comprises those that have been notified to the Commission and on which the Commission has expressed an opinion.

In many cases, NRAs have adopted the market definitions identified in the Recommendation. However, there are some exceptions. The Irish and UK NRAs have reviewed certain markets that were not listed in the Recommendation. Various NRAs are also expected to identify some narrower markets than those contained in the Recommendation. For example, the UK regulator, Ofcom, proposed a number of narrower markets within fixed-line telephony. In its comments on Ofcom's analysis, the Commission considered that a broader market definition along the lines of the Recommendation was unlikely to lead to a different conclusion from the SMP analysis. Furthermore, it stated that 'a conclusion on the exact scope of the markets is not relevant in this specific context for the purposes of SMP assessment.'<sup>4</sup>

This view could be deemed pragmatic: if a different market definition does not affect the conclusion on SMP, why worry about the precise boundaries of the market? One reason to be concerned, however, is that the designation of SMP is not the end-point of the market

review process—the next stage is the implementation of appropriate ex ante regulatory measures. The fact that an operator holds SMP in, say, two narrower markets that together constitute a single market in the Recommendation does not mean that the appropriate remedy for that SMP is the same in each of the narrower markets. If the conditions of competition are similar in each of the narrower markets, the remedial action would also be similar. However, if the conditions of competition are sufficiently different in each of the narrower markets, the appropriate remedies may also differ. Defining narrower markets would therefore enable more effective targeting of the regulatory measures.

## How is SMP assessed?

Table 1 shows the findings of SMP for the reviews that had been notified to, and commented on by, the Commission as at April 14th 2005. There appears to be a consensus that there is ineffective competition in most of the markets identified in the Recommendation, and that SMP is held by an individual operator in each of the markets. However, the process is still at an early stage—the completed reviews represent only a minority of the total.

It is of note that none of these reviews has led to the conclusion that the SMP is held jointly. Joint dominance is notoriously difficult to prove, particularly since the Court of First Instance's decision in the *Airtours* case, which set out the standards of analysis that the Commission itself would have to reach in order to prove that joint dominance existed.<sup>5</sup> However, a number of draft reviews (which have not yet received final comments from the Commission) do propose findings of joint dominance. For example, in France, the *Autorité de régulation des télécommunications* (ART) has preliminarily concluded that the three mobile network operators in France (Orange France, SFR Cegetel and Bouygues Telecom) jointly hold market power in the market for access and call origination on mobile networks.<sup>6</sup> Likewise, Ofcom concluded that two operators—Crown Castle and ntl—jointly hold SMP in provision of terrestrial managed transmission services for the purpose of providing terrestrial broadcasting services within the UK.<sup>7</sup> However, these preliminary findings were withdrawn by Ofcom following discussions with the European Commission.<sup>8</sup>

## Which decisions have been vetoed and why?

As mentioned in the notes to Table 1, the Commission has to date vetoed three decisions. Two of these are decisions by the Finnish Communications Regulatory

Authority (Ficora), relating to fixed international services, and to mobile access and call origination. The third veto relates to the market for fixed transit services in Austria.

In relation to the Finnish market for fixed-line international call services, the Commission concluded that Ficora's arguments that the incumbent, TeliaSonera, does not hold SMP (despite its market share of 55% of the residential market and around 50% of the non-residential market) were insufficiently substantiated. Adequate data on prices, market shares and economies of scale was absent from the argumentation. Somewhat curiously, Ficora had stated that TeliaSonera possesses some market power that affords it the possibility to restrict competition, but concluded that it did not hold SMP.

Another reason for the Commission's veto was that the analysis did not incorporate an assessment of whether the effectiveness of competition was based on the current regulatory obligations, and how it would be affected were those obligations to be removed. In this case, TeliaSonera is currently obliged to allow independent service providers to supply services over its network, but the effects of this obligation had not been assessed.

This criticism appears justified. The aim of the market reviews is to consider how the market is likely to develop in the next three years. Given that a conclusion of no SMP in the market would automatically remove the access obligation on TeliaSonera, it would seem essential that the economic incentives faced by the operators in the absence of forced actions would have to be assessed.

The Commission's second veto was on Ficora's conclusion that TeliaSonera held SMP in the market for wholesale access and call origination on mobile networks. According to the Commission, the analysis did not take proper account of the incentives that the rival mobile network operators (MNOs) would have to compete with TeliaSonera. First, providing independent service providers or virtual mobile network services with wholesale access and call origination services enables the MNOs to make better use of their existing capacity and to achieve economies of scale, enhancing the rivals' ability to compete with TeliaSonera. Second, the dynamics in the retail market—in particular the growing importance of virtual operators—in turn provide incentives for the MNOs to deliver wholesale services to the virtual operators. In part this is because the loss of the retail customers frees network capacity that can be sold at the wholesale level.

**Table 1 SMP assessments in the electronic communications markets (reviews notified to the Commission as at April 14th 2005)**

Recommended market	Countries that reviewed market	Finding
1. Access to the public telephone network at a fixed location for residential customers	Austria, Hungary, Portugal, Sweden, UK	SMP
2. Access to the public telephone network at a fixed location for non-residential customers	Austria, Hungary, Portugal, Sweden, UK	SMP
3. Publicly available local and/or national telephone services provided at a fixed location for residential customers	Austria, Hungary, Portugal, UK	SMP
4. Publicly available international telephone services provided at a fixed location for residential customers	Austria, Finland, <sup>1</sup> Hungary, Portugal, UK	No SMP in Austria and Finland; <sup>1</sup> SMP in other countries
5. Publicly available local and/or national telephone services provided at a fixed location for non-residential customers	Austria, Hungary, Portugal, UK	SMP
6. Publicly available international telephone services provided at a fixed location for non-residential customers	Austria, Hungary, Portugal, UK, Finland <sup>1</sup>	No SMP in Finland; <sup>1</sup> SMP in other countries
7. Leased lines	Ireland	SMP
8. Call origination on the public telephone network provided at a fixed location	Austria, Portugal, Slovakia, Sweden, UK, Denmark	SMP
9. Call termination on individual public telephone networks provided at a fixed location	Austria, Portugal, Slovakia, UK	SMP
10. Transit services in the fixed public telephone network	Austria, <sup>2</sup> Portugal, UK	No SMP in Austria <sup>2</sup> and Portugal; SMP in the UK
11. Wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services	Germany, Ireland, Portugal, Slovakia, Slovenia, Sweden, UK	SMP
12. Wholesale broadband access	Portugal, Sweden, UK	SMP
13. Wholesale terminating segments of leased lines	Austria, Ireland	SMP
14. Wholesale trunk segments of leased lines	Ireland	SMP
15. Access and call origination on public mobile telephone networks	Finland, <sup>3</sup> Hungary, UK	SMP in Finland, <sup>3</sup> and no SMP in Hungary and the UK
16. Voice call termination on individual mobile networks	Austria, France, Greece, Hungary, Ireland, Portugal, Slovakia, Sweden, UK	SMP
17. Wholesale national market for international roaming on public mobile networks	None	
18. Broadcasting transmission services to deliver broadcast content to end-users	Austria, Ireland, UK	Narrower product markets defined; SMP in several, but not all, of the narrower markets

Notes: <sup>1</sup> Decision vetoed by the Commission, see European Commission (2004), 'Case FI/2003/0024 and FI/2003/0027: Publicly Available Telephone Services Provided at a Fixed Location for Residential and Non-residential Customers. Comments Pursuant to Article 7(3) of Directive 2002/21/EC', C(2004)527 final, 20.2.2004.

<sup>2</sup> Decision vetoed by the Commission, see European Commission (2004), 'Case AT/2004/0090: Transit Services in the Publicly Available Telephone Services Provided at a Fixed Location for Residential and Non-residential Customers. Comments pursuant to Article 7(3) of Directive 2002/21/EC', C(2004)527 final, 20.08.2004.

<sup>3</sup> Decision vetoed by the Commission, see European Commission (2004), 'Case FI/2004/0082: Access and Call Origination on Public Mobile Telephone Networks in Finland. Comments Pursuant to Article 7(3) of Directive 2002/21/EC', C(2004)382 final, 5.10.2004.

Source: Communications and Information Resource Centre Administrator (<http://forum.europa.eu.int/Public/irc/info/ecctf/home>).

Proof of the Commission's argument that rivals can increase their competitiveness by giving access to virtual operators would require a detailed analysis of the relationships between network costs and volumes. However, the fact that the virtual operators have achieved rapid growth, on the basis of commercial agreements with MNOs other than TeliaSonera, suggests that the Commission's objections to Ficora's conclusions may well be justified.

The third vetoed decision related to transit services in Austria. These services concern traffic above the level of local exchanges, and are purchased by independent network operators in relation to calls terminating on Telekom Austria's network. The main issue was whether the transit services provided by a telephony operator to itself (ie, when it interconnects with Telekom Austria closer to the point of call termination and therefore does not require transit services from Telekom Austria) should be included in the relevant market or viewed as a source of potential competitive pressure on the incumbent. The Commission rejected the Austrian NRA's conclusions that these services should be included in the market for two reasons. First, the roll-out of network investment required by the independent network operators constrains the scope for demand-side substitution. Second, as the independent operators would only supply the transit services to themselves, not third parties, this is not a substitute wholesale service, but a potential constraint on the incumbent. The Commission therefore considered that this should be included in the analysis when assessing whether SMP exists, rather than at the market definition stage.

This is an important issue that arises in many wholesale markets in which vertically integrated companies operate. Theoretically, in an assessment of competition, the stage at which the option to self-supply (or other sources of supply-side substitution) is incorporated should not influence the conclusions. However, excluding self-supply from the market will lead to findings of higher market shares than would be the case were self-supply included, which may make findings of SMP more likely purely on structural grounds, without any difference in

the competitive impact of self-supply. It is therefore crucial, if NRAs follow the Commission's approach of excluding self-supply from the market, that the potential constraints provided by self-supply are properly assessed.

## Transparency for all

The implementation of the new regulatory framework is still at a relatively early stage. The sheer number of reviews to be undertaken in each of the 25 Member States requires considerable resources, and the NRAs will have to repeat the reviews in three years' time. Some duplication will no doubt be involved—for example, each NRA will have to examine in detail the specifics of call termination, before reaching the, now arguably ubiquitous, conclusion that each operator has SMP in relation to call termination on its own network.

The degree of consultation involved in the system generates a large amount of paperwork. However, this also leads to increased transparency and, to date, it appears that the system represents considerably more than a series of tick-boxes. In particular, the transparency generated by the Commission's publication of comments or veto decisions is significant.

While it is difficult at this stage to identify to what extent decisions by one NRA influence NRAs in other Member States, and hence what the impact on the single market might be, it certainly appears that the Commission is setting high standards for the NRAs to meet. NRAs will know from the decisions taken by the Commission that their draft measures will have to be based on sound argumentation, with the conclusions supported wherever possible by analysis of relevant market data.

Finally, a key benefit of the system is that the regime forces NRAs to assess systematically the conditions of competition in each of the markets that they propose to regulate. This should ensure that regulation is only applied where it is justified, and that when competition increases to such an extent that it becomes effective, regulatory measures will be withdrawn.

<sup>1</sup> European Commission (2005), 'EU Rules on Electronic Communications: Commission Launches Infringement Proceedings against Ten Member States', press notice IP/05/430, April 14th.

<sup>2</sup> European Commission (2004), 'European Electronic Communications Regulation and Markets 2004 (10th Report), COM(2004) 759 final.

<sup>3</sup> European Commission (2003), 'Commission Recommendation 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 Communication Networks and Services', 8.5.2003, L114/45, Annex.

<sup>4</sup> European Commission (2003), 'Cases UK/2003/0007 to 0010: UK Fixed Narrowband Retail Services Markets. Comments Pursuant to Article 7(3) of Directive 2002/21/EC', SG(2003) D/231951, 24.09.2003, p. 3.

<sup>5</sup> CFI (2002), *Airtours plc v Commission of the European Communities*, Case T-342/99, Judgment of the Court of First Instance (Fifth Chamber, extended composition) of June 6th.

<sup>6</sup> ART (2004), 'Market Analysis: Access and Call Origination on Mobile Networks', press release, December 17th. This decision sets out relatively strict criteria for finding joint dominance.

<sup>7</sup> Ofcom (2004), 'Broadcasting Transmission Services: A Review of the Market', November 11th.

<sup>8</sup> Ofcom (2005), 'Ofcom Update: Broadcasting Transmission Services', February 28th.

If you have any questions regarding the issues raised in this article, please contact the editor, Derek Holt: tel +44 (0) 1865 253 000 or email [d\\_holt@oxera.co.uk](mailto:d_holt@oxera.co.uk)

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