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Dr_eco_4.qxd 17/03/2006 10:01 Page 75

Harmonisation without Centralisation

Two Years of Experience with the EU Regulatory Framework for Electronic Communications

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133. – Regulatory reform in Europe and the promotion of better regulation and good governance are at the core of the priorities of the successive EU Presidencies[1]. It aims to bring forward the Lisbon Strategy as amended in March 2005[2] and to progress with the better regulation package proposed by the Commission. This package aims among others at cutting excessive red tape and an annual simplification rolling programme because the European Commission has estimated that a 25 % reduction in the administrative burden in the EU Member States would lead to a 1-1,4 % increase in real Gross Domestic Product (GDP)

134. – The major difficulty in improving governance at EU level is that the responsibilities for economic regulation are usually spread between different levels and authorities[3]. Regulation at EU level coexists with regulation at the level of the Member States while sector specific regulation coexists with rules horizontally appli-

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* The opinions expressed are purely those of the authors and may not in any circumstances be regarded as stating a position of the European Commission. This paper states the law as of 1 January 2006, unless indicated otherwise. Thanks to T. Madiega for useful comments.

1. See for example *http://www.dti.gov.uk/ewt/eu_pres.htm*.

2. Communication from the Commission of 2 February 2005, Working Together for growth and jobs : A new start for the Lisbon Strategy, COM(2005) 24.

3. See Sapir [2004].

Dr_eco_4.qxd 17/03/2006 10:01 Page 76

cable to all sectors (such as competition law or consumer protection legislation). There are few examples of regulatory reforms which could strike a balance between these different sets of rules. A recent example which is worthwhile to study when envisaging regulatory reform in other sectors is the reformed 2003 Regulatory Framework for electronic communications[4]. This framework strikes a new and original balance of power between the European Commission and the National Regulatory Authorities (NRAs), between harmonisation and decentralisation as well as between sector-specific regulation and competition law.

135. – Our paper sets out how the reformed Framework for electronic communications is designed and how it works in practice. The first section lists the issues at stake in the electronic communications sector. The following three sections review in detail how the different roles of the Commission — legislating, implementing and monitoring — are put in practice. The last section gives a conclusion based on two years of experience. The main finding is that the framework works relatively well in practice with regard to the harmonisation objective and that it can possibly be extended to other sectors.

I. GOOD GOVERNANCE IN THE ELECTRONIC COMMUNICATIONS SECTOR[5]

136. – After nearly 20 years of EU liberalisation policy that aimed amongst others to develop a common market for telecommunications[6], Europe still does not have such

4. The 2003 Framework is mainly made 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 user's 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 Garzanit [2003].

5. The principles of good governance are described in the Communication from the Commission of 10 November 1999, The 1999 Communications Review. Towards a new framework for Electronic Communications infrastructure and associated services, COM(1999) 539, hereafter *Communication Review*, at 14-17.

6. Which was initiated by the Communication of the Commission of 30 June 1987, Towards a Dynamic European Economy : Green Paper on the Development of the Common Market for Telecommunications Services and Equipment, COM(87) 290.

Dr_eco_4.qxd 17/03/2006 10:01 Page 77

single market. There are few pan-European offers and even fewer pan-European groups[7] (except in the mobile sector with Vodafone and Orange). Different reasons may account for this fragmentation : the lack of pan-European demand, the history of the sector characterised by national monopolies which still counts today many public enterprises, and the continued existence of divergent national regulatory policies in each Member State[8].

137. – This is unfortunate as economic studies show that a more integrated market for services, in particular for Information and Communications Technology (ICT) services, would benefit the European growth[9]. On the other hand, it would be politically unfeasible and economically inefficient to regulate and monitor the whole ICT sector at the European level only. The economic theory of federalism shows that the optimal level of decision depends on a trade-off between, on the one hand, externalities and economies of scale, and on the other hand, the heterogeneity of preferences and needs, and that these factors evolve over time and depend on the impacts of economic integration[10]. In electronic communications, this theory may plead for a unified policy for mobile regulation[11], while allowing different policies for the regulation of broadband Internet access[12].

138. – The 2003 Framework establishes therefore an institutional design that aims to foster a common regulatory culture and lead to the optimal levels of government for each type of decision, and be politically acceptable for all parties involved.

Indeed, political acceptance is a key component of good governance.

139. – During the adoption of the 2003 regulatory framework, the European Parliament pleaded for a European Regulatory Authority as an essential component of the establishment of a common market for electronic communications. The Commission was against such Authority[13] because of an independent study finding no industry support for a new European body[14] and because of its long-standing ambivalence towards the creation of new institutions with which it may have to compete[15]. The

7. Until today, only two cross-country full merger have been implemented in the telecommunications sector : the mergers between Telia of Sweden and Sonera of Finland and between Telefónica and Cesky Telecom.

8. In addition, the regulation of the provision of electronic communications services was, in many Member States, burdensome, while procedures were only transparent to a limited extend, which affected legal certainty and dissuaded (in particular cross-border) investments. Moreover, the remit of sector-specific telecommunications regulation and of the application of competition law was not specified so that there were many overlaps between sector-specific regulators and competition authorities leading sometimes to inconsistent interventions and, in other cases, to negative conflicts of interest.

9. Copenhagen Economics [2005].

10. See Sapir [2004 : 184], drawing from Alesina *et al.* [2005], Tabellini [2003].

11. Hazlett [2003].

12. Brennan [2003].

13. 1999 *Communications Review*, p. 9.

14. Eurostrategies/Cullen International [1999].

15. Communication from the Commission of 11 December 2002 on the operating framework for the Regulatory Authorities Agencies, COM(2002).

Dr_eco_4.qxd 17/03/2006 10:01 Page 78

Member States were strongly opposed to a fully-fledged ERA as encroaching the powers of their own NRAs[16].

140.– At the end, the different branches of the European legislator agreed on a compromise approach, whereby all regulatory powers were devolved to the National Regulatory Authority that exists in each Member States[17] counterbalanced by the empowerment of the Commission to veto certain NRAs decisions[18] and by enhanced co-operation mechanisms between NRAs[19] to foster a common regulatory culture (in particular a compulsory mutual consultation, collaboration for regulation of trans-national market and resolution of trans-national dispute, and the creation of the European Regulators Group)[20].

141.– In the following sections we analyse in more detail how the Commission applies the three powers entrusted to it under article 211 EC[21] in the electronic communications sector. Under this provision, the Commission enjoys firstly an exclusive power to propose new EU laws, which enables it to control the EU regulatory agenda, secondly has a power to adopt the implementing rules and thirdly, the power to monitor compliance of national measures with EU law and to pursue any violation of EU law by the Member States (including their regulatory authorities).

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16. Such body would indeed have been entrusted with more far-reaching powers than the current co-ordination bodies at European level established on a pure inter-governmental basis which can ontly issue non-binding recommendations like the European Radiocommunications Office (ERO) which promotes the harmonisation of frequency usage or specialised agencies like European Telecommunications Standards Institute (ETSI), see : *http://etsi.org/*, or recently created European Network and Information Security Agency (ENISA), see Regulation 460/2004 of the European Parliament and of the Council of 10 March 2004 establishing the European Network and Information Agency, OJ [2004] L 77/1. See : *http://www.enisa.eu.int/*.

17. On the power of the NRAs, see Geradin and Petit [2004 : section 2] and Stevens and Valcke [2003].

18. The so-called article 7 review, named after the relevant provision of the Framework Directive. See *infra*. Note that during the negociation, the Council was also strongly opposed to the veto power of the Commission as upsetting the institutional balance of the Treaty and as enchroachning the powers of their NRAs : Statement of Reasons and Article 6 of the Common Position of the Council of 17 September 2001 on the Framework Directive, O.J. [2001] C 337/34. See also : Salterain Alonso [2002]

19. Both means would ensure European harmonisation as well as keeping regulation within reasonable limits, as it can be safely assumed that the Commission has less incentive to regulate than NRAs. The Commission would generally adopt a less regulatory stance than the NRA for several reasons. First, its existence does not depend on electronic communications regulation. Second, it takes the interests of all the Member States into account, hence internalise the externalities created by the regulation on firms active in one Member States but foreign to this State [Barros, 2004 : section 3]. Third, it usually takes more of a long-term view than the NRAs. In any case, experience shows that NRAs are not necessarily prone to de-regulation : Stern [2004], Larouche and de Visser [2005].

20. Respectively articles 7(2), 7(3), 16(5) and 21 of the Framework Directive. For a description of the ERG, see *infra*.

21. For a recent overview of the role of the Commission in the electronic communications sector, see Van Ginderacter [2004].

Dr_eco_4.qxd 17/03/2006 10:01 Page 79

II. THE USE OF THE LEGISLATIVE POWER OF COMMISSION

142. – The Commission made an extensive use of its legislative powers [22] to set the regulatory agenda in the sector since the beginning of the liberalisation programme in 1987 [23], up to the details of the obligations to be imposed on the operators of the sector (e.g. regarding accounting separation and cost accounting methodologies). However in the 2003 Framework, the Commission focuses more on procedures than on detailed substance.

143. – In addition, the Commission relies more and more on the Open Method of Coordination to build a European Information Society with its successive Actions Plans [24]. The method involves four steps [25] :

– fixing guidelines for the Union combined with specific timetables for achieving the goals that they set in the short, medium and long terms ;

– establishing, where appropriate, quantitative and qualitative indicators and benchmarks against the best in the world and tailored to the needs of different Member Sates and sectors as a means of comparing best practice ;

– translating these European guidelines into national and regional policies by setting specific targets and adopting measures, taking into account national and regional differences ;

– periodic monitoring, evaluation and peer review organised as mutual learning processes.

The influence of the Commission under this method is obviously weaker than in case of drafting detailed rules and recommendations.

Hence, the Commission seems less and less shaping the regulatory agenda in the sector to the benefit of more proactive Member States. An example is the regulatory review performed by the British NRA, Ofcom, which is setting policy approaches such as forbearance and equivalence on the EU agenda [26].

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22. The Commission was helped by the Court of Justice, which interpreted the EC Treaty as giving the Commission broad liberalisation powers : *France and Others/Commission (Terminal Equipment Directive case)* C-202/88 [1991] ECR I-1223 and in *Spain and Others/Commission (Service Directive case)* C-271, C-281 and C-289/90 [1992] ECR I-5833.

23. See Thatcher [1999].

24. Communication from the Council and Commission of 14 June 2000, eEurope 2002 : An information society for all ; Communication from the Commission of 28 May 2002, eEurope 2005 : An information society for all, COM(2002) 263 ; Communication from the Commission of 1 june 2005, i2010 : A European Information Society for growth and employment, COM(2005) 229.

25. Para 37 of the Presidency Conclusions of the Lisbon European Council, March 2000.

26. Ofcom Final Statements of 22 September 2005 on the Strategic Review of the Telecommunications and undertakings in lieu of a reference under the Enterprise Act 2002.

Dr_eco_4.qxd 17/03/2006 10:01 Page 80

III. THE USE OF THE IMPLEMENTATION POWERS OF THE COMMISSION

144.– The 2003 Framework, and in particular article 8 of the Framework Directive, sets out clear policy objectives that must be pursued by the NRAs. On that basis, the Commission endeavours to build a consensus among NRAs on a common regulatory vision, which is particularly important given the broad margin of discretion left to NRAs. To do so, the Commission relies on two main fora : the Communications Committee and the European Regulators Group.

145.– This leadership style of the Commission has been modelled by Barros [2004 : section 3]. Generally, he assumes that the Commission would take an average position among the different preferences of the NRAs, hence favouring less regulation than some NRAs and more regulation than others[27]. However in some circumstances, Barros shows that the Commission would prefer less regulation than any individual NRA. That is the case when the Commission internalises the negative effects of regulation on all European undertakings (being national of foreign to a specific Member State) whereas an individual NRA takes only into account the negative effects of regulation on national operators, ignoring the effects on foreign operators. In these cases, Barros shows that the « less regulation » effect would dominate the « averaging » effect.

A. The Communications Committee (CoCom)

146.– This first forum where the Commission promotes a common regulatory vision is the Communications Committee (CoCom). This is a standard comitolgy Committee set up by the Framework Directive[28]. It is composed of representatives of the Commission and the Member States (in particular from the Ministries and, for some contries, from the NRAs as well).

147.– On the one hand, the Committee has an informal role. It is a forum for discussion and exchange of best practices among Member States. For instance, the national transposition process and difficulties encountered by certain Member States have been discussed in the Committee and the Commission tried to foster a common interpretation of the provisions of the directives.

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27. For instance, the Commission supports the regulation of mobile termination rate (see Recommendation on relevant markets) whereas the German regulator opposes to it (see declaration of some BNetzA officials like Groebel [2003]).

28. Article 22 of the Framework Directive and Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, O.J. [1999] L 184/23. See the website of the CoCom at : *http://forum.europa.eu.int/Public/irc/infso/cocom1/home*.

Dr_eco_4.qxd 17/03/2006 10:01 Page 81

148. – On the other hand, the Committee has also the formal role. It assists (and controls) the Commission in implementing the directives. The CoCom must give its non-binding opinion under the so-called advisory procedure [29] before the Commission can adopt recommendations or veto NRA decision under the article 7 review. Until now, seven such Recommendations have been adopted after discussions in the CoCom that led to a consensus or quasi consensus on their content [30]. The CoCom may also give a binding opinion under the so-called regulatory procedure before the Commission can adopt decisions, hence the CoCom has the power to block by qualified majority vote the proposed Commission Decisions. Such binding decisions can only be adopted in numbering and standardisation issues and only one such binding decision was adopted by the Commission to date [31].

B. The European Regulators Group (ERG)

149. – The second forum where the Commission promotes a common regulatory culture is the European Regulators Group (ERG). This forum is much more original in the EU institutional landscape and has been set up by a Commission Decision. It is composed of representatives of the Commission and the NRAs of each Member State [32].

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29. According to the article 19 of the Framework Directive.

30. Commission Recommendation of 20 March 2003 on the harmonisation of the provision of public R-LAN access to public electronic communications networks and services in the Community, O.J. [2003] L 78/12 ; Commission Recommendation of 23 July 2003 on notifications, time limits and consultations provided for in article 7 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, O.J. [2003] L 190/13 ; Commission Recommendation of 25 July 2003 on the processing of caller location information in electronic communication networks for the purpose of location-enhanced emergency call services, O.J. [2003] L 189/49 ; Commission Recommendation of 21 January 2005 on the provision of leased lines in the European Union (Part 1 : Major supply conditions for wholesale leased lines), O.J. [2005] L 24/39 ; Commission Recommendation of 29 March 2005 on the provision of leased lines in the European Union (Part 2. Pricing aspects of wholesale leased line part circuits), O.J. [2005] L 83/52 ; Commission Recommendation of 6 April 2005 on broadband electronic communications through powerlines, O.J. [2005] L 93/42 ; Commission Recommendation of 19 September 2005 on accounting separation and cost accounting systems under the regulatory framework for electronic communications, O.J. [2005] L 266/64.

31. Commission Decision of 24 July 2003 on the minimum set of leased lines with harmonised characteristics and associated standards referred to in article 18 of the Universal Service Directive, O.J. [2003] L 186/43.

32. Recital 36 of the Framework Directive ; Commission Decision of 29 July 2002 establishing the European Regulators Group for Electronic Communications Networks and Services, OJ [2002] L 200/38, as modified by Commission Decision of 14 September 2004, OJ [2004] L 293/30. Note that since the amendment of the decision in 2004 only independent bodies are represented in the forum and ministries with NRA's competencies are no more entitled to participate, except at the invitation of the ERG for specific topics for which they are competent. See the website of ERG : *http://erg.eu.int*.

Dr_eco_4.qxd 17/03/2006 10:01 Page 82

150.– Although legally, the ERG plays only an informal role of providing an interface between its members and the Commission, it proved in practice to be a crucial harmonisation tool. The ERG developed a common vision on issues such that bitstream access regulation or the application of the Long Run Incremental Cost methodology [33]. The ERG has prepared the revision of the recommendation on accounting separation and proposed a wording on which the Commission based the proposal it submitted to the CoCom.

The role of the Commission in consensus building can best be illustrated with its approach to foster a consistent approach on regulatory remedies. In 2002, the Commission appointed economic consultants to reflect on which competition problems could be expected in fixed, mobile and broadband markets and which could be the proportionate response of the NRAs [34]. A discussion between the Commission services, the NRAs and the consultants took place at the end of 2003 and the beginning of 2004. A steering group brought to the floor several fundamental issues that were further discussed by the heads of the NRAs at the ERG meetings, and then arrived at a wording that revealed the complexities of the underlying issues as well as the different approaches taken by NRAs. At the end, a common position was adopted by the ERG in April 2004 with the assistance of the relevant Commission services [35].

IV. THE USE OF THE MONITORING POWER OF THE COMMISSION

A. DIRECT *EX POST* MONITORING : INFRINGEMENT CASES AND YEARLY IMPLEMENTATION REPORTS

151.– The Commission further ensures a consistent regulation of the industry monitoring the implementation of EU framework by the Member States (and their NRAs). For the previous 1998 framework, this monitoring role was facilitated by the requirement [36] that Member States notify licensing procedures in draft form to the Commission in order to allow it to comment on possible violation of EU obligations. When such comments were not taken into account, the Commission opened formal proceedings. In practice, the Commission launched more 200 procedures, out

33. ERG Common Position of 2 April 2004 on Bitstream Access, ERG(03) 33rev1 ; ERG Consultation Document of July 2003 on a Proposed ERG common position on FL-LRIC modelling.

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

35. European Regulators Group Common Position of 1 April 2004 on the approach to appropriate remedies in the new regulatory framework, ERG (03) 30rev1.

36. In accordance with the Directive 96/19/EC.

Dr_eco_4.qxd 17/03/2006 10:01 Page 83

of which about ten percent were conducted to the end and decided by the Court of Justice. Interestingly, all but one of these cases related to legal national provisions infringing EU law, and no case opened against the action of a national regulator [37] was yet brought to the Court of Justice.

152. – With regard to the 2003 regulatory framework, the Commission opened in a first phase infringement procedures against Member States for delay in notification of the national transposition measures and several Member States have already been condemned by the Court of Justice [38]. In a second phase, the Commission opened several cases for incorrect transposition but the Court of Justice has not yet decided any case [39]. The judgments of the Court will, once available, provide legal certainty as to the interpretation to be given to the relevant provision of the directives which is important for directives that leave a wide margin of discretion to national legislators. Moreover, they may clarify the objectives of European law that the Court considers that Member States do not have correctly transposed and/or implemented. For instance, under the previous 1998 regulation, the Court specified that the lack of transparent rules as regards the granting of rights of way was tantamount to discrimination since the non-discrimination obligation had to be interpreted as aiming at the objective of market opening [40]. Infringement proceedings — next to requests for preliminary rulings by national jurisdictions — play therefore a key role to ensure a consistent regulation of the electronic communications sector in the EU.

153. – As noted in its Communication on the control of application of EU law [41], the Commission opens infringement procedures only as last resort and relies first on informal pressure mechanisms to ensure correct implementation of EU law. Thus, the Commission services provide interpretative guidance on particular provisions of the new directives in reply to specific questions coming from Ministries, NRAs or undertakings and associations with interests in the communications sector. The Commission services held bilateral discussions with several Member States on draft transposition laws where possible, responses have been made available on a collective basis within the framework of the CoCom. This approach fosters consistency of application across the Community by making other Member States aware of speci-

37. Geradin [2004 : 1550] notes that the ECJ has never so far had the opportunity to rule that a Member State infringed EC law because unlawful action by a NRA. However, nothing prevents that a Member State be held liable for an unlawful action of its NRA as the case-law makes a very broad interpretation of the categories of public undertakings that render a Member State liable of its actions : *Fratelli Costanzo/Milano* 103/88 [1989] ECR I-1839.

38. *Commission/Luxembourg* C-236/04 [2005] nyr, *Commission/Belgium* C-240/04 [2005] nyr, *Commission/Greece* C-299/04 [2005] nyr, *Commission/Luxembourg* C-394/04 [2005] nyr, *Commission/France* C-31/05 [2005] nyr.

39. IP/05/430 of 14 April 2005, IP/05/875 of 7 July 2005, IP/05/1269 of 13 October 2005, IP/05/1585 of 14 December 2005.

40. *Commission/Luxembourg (Rights of way)* C-97/01 [2003] ECR I-5797.

41. Communication from the Commission of 11 December 2002, Better monitoring of the application of Community law, COM(2002)725, adopted as a follow-up of the White Paper on the European Governance.

Dr_eco_4.qxd 17/03/2006 10:01 Page 84

fic issues of interpretation which were also relevant to their own situations and enables them to give their views on the issues concerned. In addition, the Commission pursues its policy started in 1996 of publishing at the end of each year reports on the state of implementation of EU law in all Member States [42].

B. INDIRECT *EX POST* MONITORING : ANTITRUST CASES

154. – In parallel to its direct ex post monitoring role, the Commission fosters a consistent regulation, and in particular coherence between antitrust and sector regulation, with its antitrust power. In the EU, antitrust law applies in parallel to national sector-specific rules to the Member States (and their NRAs) as well as to the telecom private and public operators [43]. With regard to Member States, article 10 EC, in conjunction with articles 81 and 82 EC, implies that NRAs may not enact measures which would be contrary to European competition rules [44]. Thus, if a NRA would violate antitrust rules — for example by imposing price controls that leads to a regulatory price squeeze the Commission could open an infringement procedure against that Member State under article 226 EC [45]. Similarly, compliance with national regulatory decisions does not absolve undertakings of their duty to abide by their obligations EC antitrust law [46].

In the framework of its antitrust powers, the Commission issued Guidelines setting its interpretation of articles 81 and 82 EC to particular problems in the electronic communications sector. These Guidelines informed the operators concerned and deterred them to behave anti-competitively, but also guided the NRAs (as well

42. Available at : *http://www.europa.eu.int/information_society/topics/ecomm/all_about/implementation_enforcement/index_en.htm*. The last one : Communication from the Commission of 2 December 2005, European Electronic Communications Regulation and Markets 2004, COM(2004) 759.

43. On the application of competition law to electronic communications, see : Arino [2004 : sections 2 and 3] ; de Streel [2004 : section 2] ; Garzaniti [2003 : chapters 7 and 8]. For a general overview of the relationship between NRAs and NCAs, see OECD [1999] and ICN [2004]. The application of antitrust in addition to sector regulation is different from the US where antitrust usually will not be applicable if sector regulation has been applied : *Verizon v. Trinko* 540 U.S. 682 (2004). See Larouche [2006].

44. See : Temple Lang [1998] and [2006], Wainwright and Bouquey [2004] and cases cited therein, like : *GIB/ATAB* 13/77 [1977] ECR 2115, para 31 ; *Leclerc* 229/83 [1985] ECR 1 ; *Van Eycke* 267/86 [1988] ECR 4769, para 16. In particular, the Court held that articles 10 and 81 EC are infringed where a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to article 81 EC, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere : *Ahmed Saeed* 66/86 [1989] ECR 1839.

45. However, note that the Commission has never so far launched an article 226 action on the basis of articles 10 and 82 against a Member State. Until now, such cases were brought to the ECJ through preliminary rulings and concerned article 81 cases [Geradin, 2004 : 1551].

46. Access Notice, para 22.

Dr_eco_4.qxd 17/03/2006 10:01 Page 85

as the NCAs) when applying antitrust concepts such as price squeeze and discrimination [47].

155. – In the past, the Commission also investigated competition problems in specific areas of the telecommunications sector and drew indirectly the attention of the NRA on these problems. In 1998, it investigated the high retail prices for fixed to mobile calls and the underlying excessive wholesale fixed and mobile termination charges [48], leading to intervention of several NRAs. In 1999, the Commission opened a formal sector enquiry [49] and investigated the conditions of provision of leased lines [50], of local loop unbundling [51] and of mobile international roaming [52]. For the future, Commissioner Kroes made clear before the European Parliament that sector enquiries will be used more [53].

156. – In merger cases, the Commission obtained extensive structural and behavioural remedies from the parties. For instance in *Telia/Telenor* [54], the Commission obtained from the parties a commitment to provide access to unbundled local loop that was not imposed in Sweden at the time of the merger. In *Telia/Sonera* [55], the Commission went further and imposed a legal separation between the operation of networks and services of their fixed and mobile activities in Sweden and in Finland. Such merger remedies have sometimes triggered regulatory changes extending powers of NRAs in order to enable them to impose additional obligations [56]. Similarly, the Commission can in prohibition decisions under article 82 EC set principles which will guide the intervention of NRAs in similar case. This was the case in the *Wana-*

47. Commission Guidelines on the application of EEC Competition rules in the Telecommunications sector, O.J. [1991] C 233/2 ; Commission Notice of 31 March 1998 on the application of competition rules to access agreements in the telecommunications sector, O.J. [1998] C 265/2, hereinafter *Access Notice* ; Communication from the Commission of 26 April 2000 on the Unbundled access to the local loop, O.J. [2000] C 272/55.

48. IP/98/141 of 9 February 1998.

49. See Choumelova and Delgado [2004]. The sector enquiries were adopted on the basis of article 12 Regulation 17/68, which has been carried forward and extended in article 17 of Regulation 1/2003.

50. IP/99/786 of 22 October 1999 ; Commission services Working Document of 8 September 2000 on the initial results of the leased lines sector inquiry ; IP/00/1043 of 22 September 2000 ; IP/02/1852 of 11 December 2002.

51. IP/00/765 of 12 July 2000. Report done by Squire-Sanders-Dempsey, Legal Study on Part II of the Local Loop Sectoral Inquiry, February 2002.

52. IP/00/111 of 4 February 2000 ; Commission services Working Document of 13 December 2000 on the initial findings of the sector inquiry into mobile roaming charges.

53. Kroes [2004 : 8]. See also the Communication from the Commission of 2 February 2005, Working Together for growth and jobs : A new start for the Lisbon Strategy, COM(2005) 24, at 8.

54. Commission Decision of 13 October 1999, *Telia/Telenor*, M. 1439, OJ [2001] L 40/1. Unbundling was imposed later in sector law by the Regulation 2887/2000/EC of the European Parliament and of the Council of 18 December 2000 on unbundling of the local loop, OJ [2000] L 336/4.

55. Commission Decision of 10 July 2002, *Telia/Sonera*, M. 2803.

56. See Arino [2004 : section 4], de Streel [2004a : section 2.3], Ungerer [2001].

Dr_eco_4.qxd 17/03/2006 10:01 Page 86

doo[57] decision, which established that the Internet subsidiary of France Telecom had applied abusive predatory retail ADSL prices.

157. – When the NRA has the power to act and imposed remedies, antitrust decisions must assess the market situation, taking into account the national regulatory measures governing the relevant market and the efficiency of such measures (and indirectly identify possible shortcomings). In its decisions *allowing network sharing agreements* in Germany and the United Kingdom[58], the Commission took into account the existing regulatory obligations, while setting a number of principles which can be followed by the NRAs[59]. This approach is in line with the case-law as the Court of First Instance held in *European Night Services*[60] that the Commission should not impose conditions under antitrust rules that are already provided by sector regulation[61].

158. – On the other hand the Commission intervention can show the regulatory failures of NRAs. This was the case[62] when the Commission condemned Deutsche Telekom for abuse of dominant position relating to a pricing strategy which had been reviewed by the NRA concerned. This decision is criticised by several authors as creating legal uncertainties for the operators and encouraging multiple complaints. Larouche [2004 : 42] notes that Deutsche Telekom has been put under the obligation to petition the NRA to change its regulated tariffs in order to remove any price squeeze which may arise and that the special responsibility of dominant players has

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57. Commission Decision of 17 July 2003, *Wanadoo*, case 38.233, available at : *http://europa.eu.int/comm/competition/antitrust/cases/index/by_nr_76.html#i38_233*, under appel case T-340/03.

58. Decision of the Commission of 30 April 2003, *UK network sharing*, OJ [2003] L 200/59 and Decision of the Commission of 16 July 2003, *Network sharing Rahmenvertrag*, OJ [2004] L 75/32.

59. See also *NewsCorp/Telepiu*, where the Commission imposed remedies although the Italian NRA had jurisdiction to act, but then relied on the NRA to monitor their implementation : Commission Decision of 2 April 2003, *NewsCorp/Telepiu*, M. 2876, OJ [2004] L 110/73, para 259. In a similar merger in Spain *Sogecable/ViaDigital*, the Spanish Competition authority also imposed conditions to be monitored by the NRA : Agreement of the Council of Ministers of 29 November 2002.

60. *European Night Services/Commission* T-374/94, T-375/94, T-384/94, T-388/94 [1998] ECR II-3141, para 221. However, in *TetraLaval* C-12/03P, not yet reported, at para 75, the Court of Justice adopted a much more nuanced approach. It judged that, in assessing a merger, the Commission should not be required to consider the extent to which the incentives to engage in anti-competitive practices would be reduced, or even eliminated, owing to the illegality of the conduct in question, the likelihood of its detection, the action taken by the competent authorities, both at Community and national level, and the financial penalties which could ensue.

61. Thus the approach to decide an antitrust intervention is different to the approach to decide a regulatory intervention. In the former, the authority should take into account the regulation in place. In the latter, the authority should not take into account the regulation to alleviate the vicious circle of lifting regulation because the absence of competitive problems is merely due to the presence of the regulation itself : on this so-called greenfield approach, see Di Mauro and Inotai [2004].

62. Commission Decision of 21 May 2003, *Deutsche Telekom*, OJ [2003] L 263/9, appeal pending Case T-271/03. Note that the Commission opened several other cases against Deutsche Telekom for anti-competitive retail business tariffs (IP/96/543 of 25 June 1996 and IP/96/975 of 31 October 1996), excessive charges of carrier selection and number portability (IP/98/430 of 15 May 1998), and price squeeze between wholesale charge for lines sharing and retail DSL tariffs (IP/04/281 of 1 March 2004) that implied a critique of the RegTP's policy.

Dr_eco_4.qxd 17/03/2006 10:01 Page 87

been expanded quite far, so as to include a duty to second-guess regulatory decisions. Geradin [2004 : 1552] notes that the most effective way to proceed would have been to launch parallel actions under article 82 against the Deutsche Telekom and article 86(1) combined with 82 against Germany.

159. – In any case, the *Deutsche Telekom* decision shows that the Commission can control — *ex post* — the efficiency of NRA intervention and has thus an — *ex ante* — means to foster coherence of sector regulation with the principles of antitrust. Such indirect intervention can be expected even more in the current context where the Commission seeks creating a consensus among NRAs, since it may be counter-productive for such purpose to directly challenge NRAs decisions [63], in a hybrid decentralised system between steered network and partnership [64].

On the other hand, the Commission may refrain to intervene in cases where NRAs are competent on the basis that the case would not show sufficient Community interest. The Commission does not intend to be an appeal body against NRAs decisions. In addition, under the 2003 framework, in case of inappropriate intervention of an NRAs, the Commission will be able to signal the possible incompatibility with EU law during the article 7 procedure (confidentially) in the pre-notification meetings or (publicly) in the comments letter [65], as set out in the following section.

C. Direct ex ante monitoring : the Significant Market Power Regime

160. – Infringement procedures take about 2-3 years to be decided [66] which may be inadequately long for fast evolving markets, implying a very high cost for regulatory errors. Moreover, such procedures take place *ex post* and may need a policy change of the condemned Member State, implying further delays. Thus the 2003 framework, grants the Commission the power to review *ex ante* [67] and possibly veto most

63. Along the same lines : Geradin [2004 : 1552], Petit [2004 : 27].

64. Following the expression of Sapir [2004 : 187].

65. If the NRA maintains its plans, a subsequent infringement procedure would not hamper legal certainty as all actors would be informed *via* the article 7 comments letter of the doubts of the Commission regarding the NRAs' remedies.

66. See the Annual Repport 2004 of the Court of Justice, p. 174, available at : *http://curia.eu.int/en/instit/presentationfr/index.htm*.

67. Note that the relationship between the *ex ante* and the *ex post* mechanisms may be complex. The fact that the Commission refrain from signalling any violation of European antitrust does not impede the Commission to take later an action against the Member State for infringement (under article 226 or 86 EC), nor to take an action against an operator for violation of articles 81 or 82 EC. Along these lines, Commission Decision of 29 April 2004, AT/2004/44, *Dispute settlement with regard to access and interconnection*. See similarly in a case dealing with the power of the Commission to notify to the Member States a clear and manifest infringement of Community provision in the field of public procurement, according to article 3 of directive 89/665 : *Commission/The Netherlands* C-359/93 [1995] I-157, para 13.

Dr_eco_4.qxd 17/03/2006 10:01 Page 88

of the NRAs decisions related to economic regulation, adopted under the Significant Market Power (SMP) regime [68].

161.– This regime [69] largely follows a three-steps sequence inspired by competition law [70]. In the *first step*, the Commission initiates the whole process by adopting a Recommendation selecting and delineating the electronic communications markets that are possibly subject to hard-core market power justifying regulation and that should be analysed by the NRAs [71]. Then, the NRAs select the markets susceptible to regulation and delineate the boundaries of these markets with an antitrust methodology taking utmost account of the Commission Guidelines [72]. In the *second step*, the NRAs analyse the defined market to determine if one or more operators enjoys significant market power, which is equivalent to the dominant position in antitrust. Finally in the *third step*, the NRAs impose on the operators designated as having SMP regulatory remedies (like compulsory access, transparency, non-discrimination, cost accounting, or price control) proportionate to specific objectives and submit their conclusions to public consultation.

162.– NRAs must notify to the Commission any draft decision that affects the trade between Member States [73] under the so-called article 7 procedure [74]. Upon notification, the Commission reviews the draft decision in two phases. During the first phase

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68. Note that the *ex ante* control goes beyond the SMP regime as other economic regulation NRAs' decisions should also be notified to the Commission (article 5 Access Directive).

69. For a description : Bavasso [2004], Cave [2004], Garzaniti [2003 : chapter 1], Krüger and Di Mauro [2003], Nihoul and Rodford [2004 : chapter 3], de Streel [2004].

70. The SMP regime does not totally follow the antitrust law as there is an additional preliminary and important step : the selection of markets susceptible of regulation.

71. 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 of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ [2003] L 114/45.

72. 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.

73. According Recital 38 of the Framework Directive, « Measures that could affect trade between Member States are measures that may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in a manner that might create a barrier to the single market. They comprise measures that have a significant impact on operators or users in other Member States… ». These criteria result from the case law related to competition policy and the Internal market : *Société technique minière* 56/65 [1966] ECR 235 at 249 ; *Commercial Solvents* 6/73, 7/73 [1974] ECR 223 para 30-35. See also the Commission Guidelines of 30 March 2004 on the effect on trade concept contained in article 81 and 82 of the Treaty, OJ [2004] C 101/81.

74. Article 7 of the Framework Directive. For a preliminary assessment of the procedure, see the Communication from the Commission of 6 February 2006 on Market Reviews under the EU Regulatory Framework : Consolidating the internal market for electronic communications, COM(2006) 28, herein Communication on Markets Reviews. See also de Streel [2005].

Dr_eco_4.qxd 17/03/2006 10:01 Page 89

of one month [75], it may comment on the compatibility with EU law on each of three aspects of the draft decision (market definition, SMP assessment and choice of remedies). In addition, when the Commission has serious doubts as to the compatibility of the two first aspects of the draft decision (i.e. market definition than differs from the Commission Recommendation on relevant markets, and designation — or non designation — of SMP), it may open a second phase review. During this second phase of two months, the Commission may, after having consulted the CoCom under the advisory procedure, veto market definition or SMP designation that would be contrary to EU law and in particular the antitrust approach.

163. – In order to simplify and expedite the examination of a notified draft measure, the Commission has adopted a procedural recommendation [76], which provides a standard format for notifications to be used by NRAs and clarifies the notification process and the calculation of the legal time limits. Finally, the Commission gives NRAs, who so request, an opportunity to discuss any draft measure they intend to adopt before formal notification (pre-notification meetings).

164. – This *ex ante* monitoring mechanism has been modelled by Barros [2004 : section 4]. He shows that the mechanism is efficient only if the cost for the Commission to force NRA to change decisions *ex post* would be so high that it makes sense to have an *ex ante* control, and that is probably the case in the electronic communications [77].

165. – To summarize, the Commission has two very powerful means to ensure a common regulatory approach thorough Europe. First, it defines upstream the « field » of regulatory activity by issuing its Recommendation on relevant markets. This means is very effective in practice as most NRAs follow the markets listed of the Recommendation. Divergences consisted in nearly all cases in further segmentations of the markets listed by the Commission [78]. For example, several Member States

75. When article 7(3) of the Framework Directive was drafted, it was though that the first phase control of the Commission would be run in parallel of the national public consultation, hence the time limit for the phase I was one month or more if the national consultation period is longer. However, when implemented, it was thought more appropriate to run the first phase control *after* the national consultation (see CoCom 04-49 of 30 June 2004), hence the time limit is one month only.

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

77. Thus Barros takes into account the cost of a policy change, which is higher when the control takes place *ex post* rather than *ex ante*. However, his model does not take into account the cost of regulatory errors. Such cost may be particularly large when *ex post* procedures are slow relatively to the rapid pace of market evolution and innovation may be very beneficial. For instance, Hausman [1997] valued the delay of the introduction of voice messaging services from late 1970s until 1988 at US$ 1.27 billion per year by 1994, and the delay of the introduction of mobile service at US$ 100 billion, large compared with the 1995 US global telecoms revenues of $180 billion per year.

78. See Communication on Market Reviews.

Dr_eco_4.qxd 17/03/2006 10:01 Page 90

The *ex ante* Significant Market Power control

1a. Market Selection On the basis of 3 criteria	– Recommendation by the Commission. – Decision by the NRA (under Commission veto).
1b. Delineation (product and geographic dimensions) On the basis of the SSNIP test	– Product dimension : Recommendation by the Commission ; – Product and geographic dimensions : Decision by the NRA (under Commission veto)
2. SMP assessment Equivalent to dominant position	Decision by the NRA (under Commission veto).
3. Choice of remedies Transparency, non-discrimination, accounting separation, compulsory access, and cost-orientation	– In case of SMP operator ⇨ Imposition of the appropriate obligations, by the NRA (with Commission opinion) ; – In case of no SMP operator ⇨ Removal of any obligation, by the NRA (with Commission opinion)

distinguished within the market for broadcasting transmission services, markets for terrestrial and for satellite distribution.

166. – Second, the Commission reviews the NRAs' draft decisions, and has in four cases adopted veto decisions, while probably influencing many other NRA decisions by comments in pre-notifications meetings or during the first phase of the procedure.

167. – In addition, the Commission used the article 7 procedure to signal to NRAs infringement of European rules [79]. For example, in a comment letter, the Commission instructed the regulator to dis-apply national law supposedly violating the directives. This law restricted the regulation of mobile termination to mobile-to-mobile calls, thereby excluding the regulation of fixed-to-mobile calls contrary to the Access

79. For instance, the Commission reminded the Finnish NRA to impose the full set of obligations provided by the directives with regard to the minimum set of leased lines and not only those deemed to be the most appropriate (Commission Decision of 30 July 2004, FI/2004/79, referring to the obligations contained in Annex VII of the Universal Service Directive). Similarly, the Commission reminded the Austrian NRA that, according the new framework, mobile number portability should be imposed at the time of its application date (July 2003) and not later (Commission Decision of 26 June 2004, AT/2004/66-70, referring to article 30 of the Universal Service Directive).

Dr_eco_4.qxd 17/03/2006 10:01 Page 91

Directive [80]. Referring to the case law of the Court of Justice, the Commission reminded that NRA of its right not to apply this Finnish law although no infringement procedure against Finland had been opened at the time [81]. This decision has been criticised by some NRAs [82] as by-passing the normal infringement procedure provided in the Treaty and upsetting the balance between harmonisation and subsidiarity that lies at the heart of the 2003 framework.

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168. – The challenge of the European legislator in adopting the 2003 Regulatory Framework for electronic communications was to ensure an institutional design that could deliver a consistent and coherent regulation of the electronic communications operators throughout the whole European union, while increasing the power and the discretion of the NRAs to adapt to rapid market evolution. After two years of experience, it seems that the existing and new co-ordination mechanisms are delivering consistency and coherence [83]. The two key elements of this success are the powers of the Commission under article 7 of the Framework Directive (linked to use of competition law approaches in sectoral regulation) and the European Regulators Group.

169. – The harmonisation objective seems now better achieved than under the previous regulatory framework. In the absence of a central regulator comparable to the US Federal Communications Commission, divergent regulations of the provision of electronic communications services, which are by nature to a substantial extend cross-border, are not fully excluded. The Commission has not the power to prevent it. In particular, there is no possibly for the Commission to take a case from a NRA and decide it instead [84]. Moreover, the co-ordination between National Courts, who are reviewing the NRA decisions on appeal, is limited. There is only the standard preliminary ruling procedure at the European Court of Justice and other mechanisms

80. Commission Decision of 17 December 2003, FI/2003/31, citing para 48-49 of *Consorzio Industrie Fiammiferi*, C-198/01 [2003] I-8055.

81. Later on, the Commission opened an infringement procedure against Finland. This case is still pending.

82. See Conclusions of the 7th Plenary of the ERG, 30 January 2004, ERG(04) 11, p. 2.

83. See the Communication on Markets Reviews, at 9.

84. Similarly to what was achieved with the decentralisation of European competition law : article 11(6) of the Regulation 1/2003 and para 50-57 of the Commission Notice of 30 April 2004 on cooperation within the Network of Competition Authorities, OJ [2004] C 101/43.

Dr_eco_4.qxd 17/03/2006 10:01 Page 92

may have been provided (for instance the possibility of the Commission to intervene as *amicus curiae* in the national court proceedings) [85].

170.– The 2003 framework rightly acknowledges that the harmonisation objective can only be secured if a common regulatory culture emerges. The constructive cooperation of the NRAs in the ERG [86] shows that such common regulatory culture is emerging.

Only an extended impact assessment could show all the benefits of the 2003 framework. At this stage it is nevertheless already possible to quote it as an example of good governance at the EU level.

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85. Similarly to what was achieved with the decentralisation of European competition law : article 15 of the Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in article 81 and 82 of the Treaty, OJ [2003] L 1/1 ; Commission Notice of 30 March 2004 on the co-operation between the Commission and the courts of the EU Member States in the application of articles 81 and 82 EC, OJ [2004] L 101/54. This *amicus curiae* procedure may be heavy as it requires a decision of the Commission.

86. As required by article 10 EC.

Dr_eco_4.qxd 17/03/2006 10:01 Page 93

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