The Article 7 consultation mechanism: managing the consolidation of the internal market for electronic communications

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The new regulatory framework

Until a few years ago, a telecommunications operator in France would face not only a very different regulatory environment than its counterpart in the UK or Spain, but also a very different regulatory environment depending on which markets of the electronic communications industry it was operating in. After a number of years of talking about convergence, it seemed that the meaning behind the word was struggling to find its way through the legislative framework supporting the Single Market. However, following the conclusions of the special European Council of Lisbon of March 2000, and building on the results of the public consultation held in 1999, the Commission succeeded in proposing, in July 2000, a package of measures for a new regulatory framework for electronic communications networks and services.

On 7 March 2002, Council and Parliament adopted the new regulatory framework which entered into force on 25 July 2003. It consists of four Directives (1) and a number of accompanying measures (2) which replaced the many legislative measures on which regulatory intervention in the sector had been based in the past. With the publication of the last Recommendation on notifications and consultation (3), the so-called Procedural Recommendation, and the current inflow of draft measures from national regulatory authorities (‘NRAs’) as from early August 2003, the framework has indeed become operational. It is our view that it will prove to be pioneering as to the interaction of sector-specific regulation and antitrust in newly liberalised markets.

The new framework brings about significant changes both as regards the scope and role of regulation of the telecommunications industry in Europe and as regards the role played by competition policy. Its main objective is devising a simpler, more modern and more effective legislative framework for ex ante intervention. This framework explicitly recognises the increasingly important role of technological convergence and makes use of the most recent thinking in industrial economics and the economics of competition analysis. A first concept embodied in the framework is that the degree and the intensity of ex ante regulatory intervention must be proportional to the competition problem at hand: where markets are already, or are in the prospect of becoming, effectively competitive, existing regulatory measures will be withdrawn or be lighter. A second concept is that markets need to be analysed following competition analysis principles, from the very definition of the market (4), to the assessment of market power (5), to the identification of remedies to address the competition problems observed. A third concept can be described as the need to consider products and markets on the basis of their economic value rather than on their physical or technological or regulatory characteristics. This principle finds perhaps its most accomplished

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(4) Under the old framework, ex ante regulation was focused on certain markets which were not ‘markets’ within the meaning of competition law but rather ‘market areas’ based on specific policy considerations.

(5) Under the old framework, NRAs could impose regulatory obligations on undertakings which had at least 25% of the market, whereas under competition law equivalent obligations could be imposed on the same undertaking only if the latter was deemed to be in a dominant position.
expression in the concept of technological neutrality, based on which markets and products must not be defined according to their underlying technology, but rather according to their economic value to end users.

From a competition policy perspective, the new framework contains two main aspects which have a foreseeable impact on the future regulation of the telecommunications industry. The first aspect concerns the new definition of significant market power (‘SMP’), which is no longer based on the former, static criterion of 25% market share, but on the competition-law based notion of ‘dominance’. This has the effect of raising the existing threshold for ex-ante regulation, while at the same time creating the necessary conditions for legal certainty throughout the Community. In that regard, the Commission’s Guidelines on market analysis and the assessment of SMP (the ‘SMP Guidelines’) (2), published last July, provides further guidance and assistance to the NRAs and the industry as to how the new competition-law based provisions of the new regulatory framework should apply. The second key aspect of the new framework is that only those electronic communications markets in which competition law remedies may be considered insufficient to remedy persistent market failures will be regulated in the future. The Commission, as required by Article 15 of the Framework Directive, has adopted a Recommendation on relevant markets (3) which sets out a list of 18 markets the characteristics of which are such as to justify ex ante regulation and which proposes three main criteria for NRAs to apply when deciding whether to regulate or not a market. (4)

The Article 7 consultation mechanism

We can say that the new framework sets out to face an important and difficult challenge: reconciling the seemingly contradictory aims of harmonising the regulatory framework across the EU and therefore strengthening the Single Market on the one hand, while allowing for a much-needed degree of flexibility to reflect national circumstances on the other. In order to achieve this, the Framework Directive requires NRAs to carry out market analyses to establish the state of competition in relevant communications markets and identify any providers with SMP in these markets. Once an operator has been deemed as having SMP, NRAs have to identify which specific obligations are appropriate to impose on that operator. Obligations can vary according to the nature and the source of the competition problem, which, combined with the wealth of possible remedies to be used, allows for a high degree of tailoring to specific circumstances.

NRAs must, however, conduct a ‘national’ and a ‘Community’ consultation on the measures they intend to take. Pursuant to Article 7 of the Framework Directive, NRAs have to make their draft regulatory decisions accessible to other NRAs and the Commission for comments. In most cases, other NRAs and the Commission have a period of one month within which they may make comments to the NRA concerned. However, when a draft measure would affect trade between Member States and either (i) aims at defining a relevant market which differs from those defined in the Commission’s Recommendation on relevant markets or (ii) decides whether to designate or not an undertaking as having SMP, the Commission may within a further period of two more months require the NRA concerned to withdraw the notified draft measure mainly on grounds of incorrect application of the competition law principles enshrined in the new framework, such as ‘market definition’ and the assessment of single or collective dominance (the so-called ‘veto powers’ of the Commission).

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1 A operator is deemed to have SMP if it is in a dominant position within the meaning of Article 82 of the EC Treaty. Thus whether operators are faced with ex ante regulation or find themselves involved in ex post antitrust proceedings, they should have the legal certainty that issues such as ‘relevant market’ or ‘market power’ will have the same meaning irrespective of whether the proceedings in question are initiated by NRAs or national competition authorities (‘NCAs’). Ultimately, sector-specific regulation should lead to further de-regulation, limiting thus the scope of ex ante regulation to areas where competition law instruments cannot be effectively applied.


4 These criteria are in fact based on the following questions: (i) is the market subject to high and non-transitory barriers to entry (static criterion)?; (ii) does the market have characteristics such that it will tend towards effective competition (dynamic criterion)?; and (iii) is competition law sufficient to deal with perceived market failures?
The Article 7 Task Forces

The procedure described above implies the use of considerable resources and puts a heavy administrative burden on the Commission, given the strict deadlines provided for in the new framework for carrying out such assessments. To manage the Community consultation, the Commission has set up two Task Forces, one in the Competition DG and another one in the Information Society DG. The Task Forces carry out the duties which the Commission derives from the new framework. They review and analyse the draft regulatory measures (‘cases’) notified by NRAs under the Community consultation. They work very closely together and establish joint case teams in each case in order to meet the tight deadlines of the Article 7 consultation mechanism.

Seven months before the Commission received its first notification on 4 August 2003, the Task Forces had been brought into being. Since then, the Task Forces were mainly busy with (1) setting up the procedural environment for the Article 7 consultation mechanism to function and (2) preparing, holding and following up pre-notification meetings with NRAs. As to the latter, pre-notification meetings are crucial in preparing for the actual notifications of draft regulatory measures by NRAs, as they enable NRAs to present their positions and receive guidance from the Commission services on how to best proceed. The particular aim of such informal meetings is to identify those markets where the regulator intends to deviate from the Recommendation on relevant markets, and to preliminarily analyse the approach taken by the regulator when designating companies with SMP. Usually, several pre-notification meetings are necessary with one particular regulator, as individual meetings cover specific market areas. Until the end of September 2003, the Task Forces held more than 20 pre-notification meetings with 9 different NRAs.

In the notification phase of the Commission’s cooperation with an NRA, case files are opened following formal notifications. On a daily basis, the centralised Article 7 Greffe/Registry (with electronic archive function), which is administratively attached to the Information Society DG, must inform the Heads of the Task Forces of new notifications received. The Heads of the Task Forces must then assign case teams, composed of case leaders, case handlers and case secretaries. Regular internal management meetings ensure a proper review of case allocations and case handling.

Competition versus Regulation

As mentioned above, the Article 7 consultation mechanism has already started to receive notifications, and thus to manage the consolidation of the electronic communications markets across the EU. In fact, in August and September 2003, 16 notifications have been received, and all cases have been dealt with. The first ever case which the Commission reviewed (regarding the UK wholesale mobile market for access and call origination) was concluded by way of comments (according to Article 7(3)) sent to the UK regulator Oftel on 29 August 2003. (1) These comments did not question Oftel’s analysis. Instead, the Commission concurred with Oftel’s analysis that there was sufficient competition in the UK wholesale mobile market concerned, making existing sector-specific regulation redundant.

This first case under the new consultation mechanism clearly showed that the new regulatory framework functions and that regulators take the opportunity to repeal ex ante regulation that is no longer needed. This in fact touches upon the question that may arise, at least for some observers, i.e. of how it is possible to couple the principles underpinning competition analysis with what has been traditionally regarded as their opposite, that is, the concept of sector-specific regulation. The involvement of both the Competition DG and the Information Society DG is perhaps the best representation of how both these sides are intertwined.

One of the reasons for this close collaboration is, of course, that the trend of technological convergence, which has been so much talked about in the last 15 years, has finally started to become a reality. However it would be wrong to reduce the new endeavour of the application of the Art. 7 consultation mechanism to something which is dictated by the evolution of technology alone. The reason for reconciling competition to sector-specific regulation is, more properly, that by now we are at a stage at which ex ante regulation in the electronic communications sector and the application of antitrust instruments are based on the same set of competition law concepts. In fact, the essential point about the new framework, and also about the Competition DG’s involvement in overseeing its application, is not the question of whether there is more or less regulation, but what type of regulation is needed.

In the past, regulation has sometimes been consid-
ered as a synonym for a fragmented and inconse-
quential set of norms, which might have eventu-
ally led to a situation where the development of
competition was held back rather than supported.
Regulatory frameworks in the telecommunica-
tions area, as well as in other traditionally regu-
lated industries, used to not only be very frag-
mented from one Member State to another, but
also to be totally different from each other. Today,
regulation is essentially economic regulation, and
economic regulation is based on the perspective
that intervention on the market is necessary and
beneficial only when it offers the solution to
certain sorts of market power, and in particular to
market failures which derive from formerly
monopolistic market structures.

The perceived antagonism between competition
and regulation is, therefore, only apparent, and it is
destined to disappear. In fact, competition has
already been shaping regulation: it is the latter
which has been adapting itself to suit the philos-
ophy and the approach of the former. Regulatory
policy cannot be seen anymore as independent of
competition policy: it must be seen as a part of a
broader set of tools of intervention in the economy
based on competition analysis principles. The
Article 7 Task Forces are perhaps the best expres-
sion of how competition instruments and regula-
tory tools are complementary, rather than substi-
tute, means. They deal with a common problem
and try to achieve a common aim. The problem is
always high levels of market power and the likeli-
hood of it being abused, and the aim is putting the
end user at the centre of any economic activity.
Only through a combination of both tools can we
ensure that market power does not distort and
hamper the development of competition in the
communications markets. This in turn allows end
users to drive and steer such development, as well
as to benefit the most of it.

Conclusions

Perhaps, an even more important achievement
than good regulation of the electronic communi-
cations sector is being met through the new
framework, and through the proper functioning of
the Article 7 consultation mechanism. Putting
aside how important the objective of good regula-
tion of this important sector is in itself, a greater
achievement might be accomplished if this type
of regulation became a model for other sectors. A
regulatory framework solidly grounded on
competition analysis principles could be the best
approach to ex ante regulation of any sector of the
economy still in need of regulatory intervention.
The term ‘sector-specific regulation’ is already
incorrect, and could become obsolete: because
the same set of tools, the same competition-based
philosophy and the same concerns may soon
govern regulatory intervention in all sectors
where some form of economic regulation can still
be useful.

In order for the EU to achieve this, and to be at the
forefront of regulatory developments worldwide,
it is imperative to rely on a network of inde-
pendent competition and regulatory authorities,
the powers and responsibilities of which have
already increased substantially, and which expe-
rience ever increasing degrees of collaboration
with each other. Power and responsibility must be
met with judgement and composure: NRAs,
NCAs and the Commission are partners and will
take firm action not only to consolidate competi-
tion, but also to achieve harmonisation. It is with
this type of results in mind that this new
endeavour, the Art. 7 consultation mechanism,
will strive to achieve, together with the Commis-
sion’s partners, harmonised and effective regulat-
ory and competition actions for European citi-
zens.