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eCommunications: fast and effective remedies for delivering competitive markets in the EU

The current EU Framework Directive on electronic communications allows the Commission to oversee national regulatory measures in this market. The so-called "Article 7" procedure obliges national regulators to notify to the Commission their market assessments and proposed remedies. This procedure helps to ensure consistency in regulatory measures applied in all Member States, and so to improve the internal market. The Commission may in certain cases require a regulator to withdraw a proposed measure if it considers that the regulator's assessment of the market boundaries or of "significant market power" is flawed (a possibility known as the "Commission veto"). Thus far, out of a total of 410 notifications, this has happened in only a handful of cases. One reason for this is that the Commission and national regulators have worked closely together since 2002 and both understand the realities of the market place in each Member State. Even so, harmonisation of regulatory remedies remains a challenge under the current framework. Measures designed by different countries to tackle similar market failures have diverged throughout the EU. The present rules do not provide the Commission with adequate legal tools to ensure EU-wide consistency. Should this change?

Market Reviews

The 'Article 7' procedure has three main goals: (1) to promote consistent regulation across the EU on the basis of competition law principles; (2) to limit regulation to markets where there is a persistent market failure; and (3) to provide a

transparent regulatory procedure. The procedure requires national regulators to undertake market reviews and to notify their results to the Commission and other national regulators, together with their proposed remedies for correcting the identified market failures. Such market failures may range from excessive pricing to refusal to provide access to the network.

The Commission may "veto" a proposed regulatory measure if it considers that either the market definition or the finding of significant market power (SMP) is incompatible with Community law or could create a barrier to the internal market. The Commission may also make comments on the proposed corrective measures. Regulators are expected to take the utmost account of these comments.

After three years of market reviews, it has become clear that the Commission's role has helped to consolidate the internal market. However, it is also clear that the Commission's ability to comment on proposed remedies does not in itself suffice to safeguard the internal market.

Appropriate and consistent remedies

Remedies play a key role in shaping competitive market conditions, and protecting the interests of citizens. If the basic principles of regulation applied in one Member State do not apply in another, this hinders investment and thus the economic advantages for both enterprises and consumers. So for similar market failures, similar remedies should be imposed throughout the EU.

As of mid-June 2006, the Commission had commented on 230 of the 410 notifications received under the Article 7 procedure, and most of these comments related to the remedies proposed. For example, the Commission asked the German regulator to impose ex ante price control in the fixed calls market, to tackle the risk of excessive pricing.

In another example - that of the mobile termination market of the UK - the Commission considered that limiting regulation to 2G voice termination networks was not sufficient to tackle the competition problems in the termination market. And in Finland, the Commission had to point out that in several wholesale markets, the imposed cost-orientation

Consistent remedies are vital for shaping competitive conditions, protecting the interests of the citizens and for consolidating the internal market for eCommunications.

obligation needed to be accompanied by a proper cost accounting methodology, if the regulator was to be in a position to verify the price control remedy.

These examples demonstrate some of the shortcomings of measures proposed by the national regulators. They show that the remedies either solved only part of the competition problem identified, or were inadequate or likely to produce effective results too slowly.

Diverging regulatory measures in the Member States (for example, differences in cost orientation methodologies which implement a price control obligation) impact negatively on the internal market and hinder the creation of pan-European players. Greater consistency in the application of remedies in Member States would greatly improve consistency in the market conditions throughout the EU, which would in turn facilitate investment and innovation.

To speed up the consolidation of the internal market, the Commission proposes that its "veto" powers be extended to include proposed remedies. This would enable it to contribute more effectively to creating a harmonised European regulatory landscape whilst taking account of national circumstances.

Consistent and appropriate regulation is in the interest of all stakeholders. Asking a national regulator to withdraw its proposed measure is however a far-reaching measure and so should be used only as a last resort. Close co-operation between the regulators and the Commission prior to notification remains essential to avoid unnecessary delay in remedying market failures at national level in the short term and at European level in the long term. Based on lessons learnt

from earlier market analyses, the Commission can also provide guidance as to best practice in making remedies proportionate.

Following the review of the current regulatory framework, The Commission is suggesting that the Article 7 procedure be relaxed to a certain extent. As well as reducing the number of markets for regulation, there should be a simplified notification procedure for competitive markets, and for measures that do not differ substantially from those imposed previously. This would reduce the administrative burden and allow attention to be better focused on the real issues requiring attention.

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