



The European Consumers' Organisation

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2006 Review of the electronic Communication regulatory framework¹ –

BEUC Comments

¹ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the Review of the EU Regulatory Framework for electronic communications networks and services*, COM(2006) 334 final of 29th June 2006.

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Neytendasamtök Evrópu
Európai Fogyasztók Szervezete
Evropska potrošniška organizacija
Den Europeiske Forbrugerorganisasjonen

Euroopan Kuluttajaliitto
Europejska Organizacja Konsumentów
Ευρωπαϊκή Οργάνωση Καταναλωτών
Den Europæiske Forbrugerorganisation
Den Europeiska Konsumentorganisationen

BEUC, the European Consumers' Organisation, is the representative organisation of almost 40 independent national consumer organisations from countries of the EU, EEA, and other European Countries. BEUC has a long-standing interest in telecoms, given its importance for the consumer-citizen.

BEUC took an active part in the 1999 review of the Telecoms Framework¹, and commented lastly on the consultation on the EU Regulatory Framework², on the review of the scope of universal service obligations³ and to the public consultation on the Digital Divide forum report in September 2005⁴.

Draft legislative proposals to amend the regulatory framework are to be tabled by the European Commission around the end of 2006.

We welcome the opportunity to comment on this topic of crucial importance to EU consumers.

By and large, we fear that under the current Communication, there is too much blind faith in potential competition and in 'new' technologies, on top of the current lack of competition in a number of markets. Abuse of dominance has to be addressed before consumers suffer from it – the ex-post application of competition law is not enough. We are against the removal of retail fixed telephony markets from the list of markets subject to ex ante regulation.

We find it also premature to define universal service on the basis of the potential of Internet Protocol (IP) based services and the potential level of competition. As regards universal services, we are therefore against a separate definition for access to the infrastructure and the service. The transparency proposals in the Communication are weak, largely impractical and could actually lead to a decrease in transparency. More concrete and detailed provisions are needed, to boost transparency, comparability and consumers' ability to control their expenditure.

Obviously, in a number of areas, better implementation and effective independence of National Regulatory Authorities are needed, but regulators must have at their disposal the necessary regulatory tools, ex ante regulatory tools in particular, to promote competition and ensure that users' interests are not prejudiced.

1. THE PROCESS

The telecom regulatory framework adopted in 2002 aims to create competition in the market while recognising that liberalisation and competition will only bring benefits to consumers if accompanied by provisions on universal service and consumer protection (users' rights). The framework allows for the use of competition control and of ex-ante regulatory instruments (including price regulation) in certain telecommunications markets where competition has failed to materialise due to single or joint dominance and where consumers are especially vulnerable to anti-competitive behaviour.

This is the first review of the Framework. Following the present consultation, the Commission is to adopt a proposal by the end of 2006. Discussions in the Parliament and the Council are

¹ 'BEUC Comments on the 1999 Telecoms Review', BEUC/X/034/2000 of 15th February 2000 & 'BEUC Comments on the DG Information Society Working Documents in the framework of the 1999 Telecoms Review', BEUC/X/045/2000 of 19 May, 2000.

² 'Electronic Communications and Services – EU Regulatory Framework – BEUC's comments', BEUC/X/003/2006 of 7th February 2006

³ 'Electronic communications - Universal Service scope review - BEUC position', BEUC/X/027/2005 of 18 July, 2005

⁴ BEUC comments on the public consultation on the digital divide forum report: broadband access and public support in under-served areas BEUC X/037/2005 of 30 September 2005

expected to last for about two years. Any modifications/new proposals are therefore expected to come into force in 2009/10 and be in force until about 2015.

However, **any modification of the Recommendation on relevant markets, which is part of the current review, will come into force early next year already.** The Recommendation on relevant markets lists different telecommunications markets, where national regulators may apply ex-ante remedies to promote competition and ensure users rights. This includes for example price regulation or access regulation.

2. GENERAL COMMENTS

BEUC believes that the regulatory approach should be rebalanced to focus more on the demand side, to the benefit of consumers and should strengthen consumer rights.

Broadly speaking, the framework aims at promoting competition while recognizing the need for detailed Universal Service Obligations and consumer protection measures and specific regulatory powers of intervention in order to ensure that all consumers are able to have access to essential communications services. BEUC supports this overall approach.

The benefits of competition may be elusive for certain groups of consumers and it must be ensured through adequate USO measures that these consumers also have access to communications services deemed to be essential for their everyday life. Consumer protection measures, i.e. the codification of users' rights must also be retained to allow all consumers to compare and contrast offers and to exert their ability to make an informed choice, but also to ensure a minimum level of quality of service and appropriate redress mechanisms for instance.

Consumers have the same rights in telecommunications markets as they have in any other market. They have the right to make an informed decision whether or not to purchase a certain service. The informed decision implies among other things clear and comprehensive information regarding the functions, quality, and risks of using a particular service and the exact price they need to pay for it *prior to purchasing the service*. They also have a right to a guaranteed quality of service. There are several horizontal pieces of European legislation on consumers' rights (For example the Unfair Commercial Practices Directive, the Unfair Contract Terms Directive). However, these are not implemented effectively in telecommunications markets.

Given the central role of communications in everyday life and the inherent threat of abuse of dominance in network industries we believe that regulators should have sufficient powers to intervene to protect the interests of the final consumer. We therefore agree that ex-ante regulation is necessary in certain markets. In fact, again due to the specific nature and history of network industries, it may not be unreasonable to change the direction of the analysis and start with a negative assumption regarding the level of competition of a particular market. This would imply a need for positive justification, i.e. proving that there is effective competition in a particular market before eliminating it from a list of markets subject to ex-ante regulation.

Implementation in general is a big issue, although it could also be the case that the framework itself needs to be improved and/or clarified to allow for better implementation results and to allow for consumers to reap a better deal. The tools and options provided by the framework have proved ineffective in dealing with a number of competition problems. For example even in the mobile sector, traditionally considered per se as more competitive, there has been no progress in addressing the problem of extortionate international roaming tariffs. High and non-reciprocal charges for the termination of calls from fixed to mobile nets and vice versa (high charges from fixed to mobile net, lower charges the other way round) still constitute a problem. As our German member organization, Verbraucherzentrale Bundesverband has pointed out to us, mobile net providers do not have an interest in reducing termination charges, because they need the income generated by these to subsidize

handsets so that these are cheap enough to attract customers (this raises also a number of issues in terms of price transparency for instance).

Implementation is again very poor in terms of consumer protection measures. Although the framework has provisions on information and transparency relating to tariffs or terms and conditions of contracts for example, this area remains a problem. Customer service (call centers) generates a lot of complaints and a significant number of consumers do not have access to efficient out-of-court dispute settlement mechanisms.

The problems relating to dispute settlements have for example been highlighted by the problem of hidden web-diallers in a number of Member States for example Slovenia or Spain, where the solution to this problem has not been consistent due to uncertainties surrounding the exact liabilities of the operators in terms of the fraudulent use of the network. In Slovenia, the Regulator has interpreted the liability of the operator narrowly, whereas in Spain the decision was more to the advantage of consumers affected as operators had to absorb the damages.

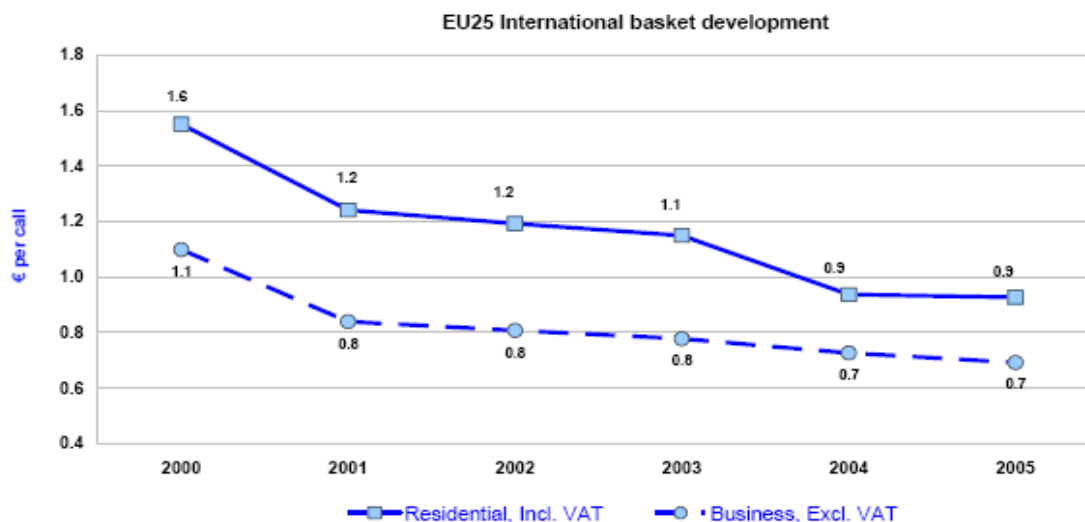
We appreciate the fact that a specific consultation will be dedicated to the all important issue of universal service, and will restrict ourselves in what follows to the issues covered in the Communication released end of June.

3. COMPETITION

The situation in the sector is mixed for consumers. Whilst some benefits can be reaped by consumers from increased competition, a number of problems remain in key markets.

For instance our UK member organisation Which? helped some consumers to switch mobile operators/packages and save 100-150pounds per year. They helped some families to get the best type of subscription for their home use of telecoms (internet, phone, TV), savings were within 100-200pounds⁵. A number of our member organisations are also giving advice to consumers and how to get a better deal.

The Commission itself has highlighted the decrease of the price of international landline calls in its 11th Implementation Report.



However, there are also a number of areas, where the lack of competition hurts consumers. For instance, roaming prices have remained consistently high and divorced from real costs,

⁵ 'Cf. for instance 'Kill Bills', Which ? February 2004, 'Mobile phone tariffs', Which?, December 2005

and we welcome the proposed regulation on roaming as it will allow consumers travelling abroad to reap tangible benefits. Regulating wholesale and retail markets, ensuring price transparency and monitoring developments in other mobile markets are crucial to deliver the objective of more competitive markets, to the benefit of citizens and the Internal Market⁶.

Line-rental prices are actually rising, reflecting the lack of competition in that market. According to Commission figures (Implementation report), only 8% of subscribers in the EU had any choice of line provider at the beginning of 2006.

➤ **Importance of competition for consumers**

It is important that consumers have a fair access to all nets (subject only to technical limitations, e.g. remote areas) at affordable prices.

Competition can help to deliver this outcome, but it is also important that competition does not only occur between different nets (DSL, cable, mobile) but also within the different nets. There may be differences between the quality (bandwidth, speed) and access (cable is mostly available in urban areas) between the different networks. Generally speaking landlines are arguably the most reliable technology both for voice telephony and for broadband, especially with the upgrade to Next Generation Networking (NGN)⁷. Unbundling the local loop is therefore necessary.

It can also be the case that one particular provider has activities in all the different network services, fixed, mobile, cable, and maybe dominant in one or more, which provides ample opportunities for leveraging of dominance across markets and products/services. It is therefore imperative that there is a good level of competition within each market/network.

Although local loop unbundling is an area that springs to mind in this respect, the question of competition within mobile markets should also be scrutinised. On the one hand similar pricing policies and terms and conditions of contracts (not to mention international roaming markets) at least raise the possibility that mobile markets are far from being competitive raising at least the possibility of joint dominance. On the other hand, developments in mobile broadband services/technologies, though at an early stage, may also be cause for concern. This is because there is a fear that consumers will only be afforded one technology to use mobile internet (WIMAX). This may lead to further restrictions in other markets, for example handsets and laptops.

Convergence in ICT markets is another big development, which may have a major impact for competition, posing both threats and opportunities. The level of competition in electronic communications markets, which connects all other markets (content, equipment), is paramount in determining whether convergence will turn into a threat or opportunity from a consumer point of view.

If competition breaks down in a converged ICT environment, it may not only result in overcharge and reduced access to innovative products in one particular market, but may have a negative impact on other markets and on non-economic sphere's of people's lives. For example, one of our main fears regarding the AOL/Time Warner merger in 2000 related to privacy issues and data protection.

⁶ 'Can a leopard change its spots? - Perhaps, but it certainly helps to have a gun ready... ', BEUC Press Release PR/16/2006 of 12th July 2007.

⁷ According to the International Telecommunications Union (ITU), 'Next Generation Network (NGN) is a packet-based network able to provide services including Telecommunication Services and able to make use of multiple broadband, QoS-enabled transport technologies and in which service-related functions are independent from underlying transport-related technologies. It offers unrestricted access by users to different service providers. It supports generalized mobility which will allow consistent and ubiquitous provision of services to users' cf. http://www.itu.int/ITU-T/studygroups/com13/ngn2004/working_definition.html

We feared that the merged entity would have had a far-reaching and sophisticated ability to collect information about consumer shopping and browsing habits and would have also been able to use and abuse personal data from subscription profiles. In the Sony/BMG merger, BEUC has voiced its concerns about the potential impact of the merger in the music downloading and portable music player market and interoperability. Combined with dominance in network services would greatly increase these threats.

The intense debate over net neutrality in the US demonstrates for example how real the threat of leveraging dominance in electronic communications is. The Commission proposes to ensure net neutrality in Europe by giving NRAs the power to set minimum quality levels for network transmission levels in an NGN environment based on technical standards identified at the EU level and by making use of the existing power of NRAs to impose obligations on dominant operators as well as to ensure access and interconnection.

While we would welcome this, we would call on the Commission to ensure a sufficient level of consumer representation in setting the standards. Judging by the record of several NRAs in implementing the current framework, we are also somewhat concerned about the effective implementation of these standards. This goes back to institutional arrangements of improving implementation and is discussed later.

➤ **New and emerging markets**

One of the most controversial questions regarding the implementation of the framework is its application to new and emerging markets.

The Commission's proposal in this sense is very vague. Their approach is that one should not regulate until the market is proven to be uncompetitive.

However, it is important that dominance in these markets is addressed as soon as possible before consumers suffer from potential abuse. A case in point is the SMS market. It was considered at the time of the adoption of the recommendation (2002) that the SMS market was an emerging market and it was thus too early to include it in the list. Our French member, UFC Que Choisir for example had warned in 2003 already⁸ that SMS prices are similar across Europe and seem to be divorced from the underlying costs.

This has been recently confirmed by the French NRA and now the Commission is considering the inclusion of at least the market for wholesale SMS termination in the list of markets susceptible to ex-ante regulation⁹. Add the time needed for the market analyses and imposition of remedies, there is still some time for operators to overcharge consumers.

➤ **The need for ex-ante regulation**

By virtue of high and sometimes absolute barriers to entry (network effects, sunk costs) dominance in telecommunications networks is a very likely scenario. This is even more so if for decades, network operators have been granted by governments a further barrier in the form of exclusive rights. The Framework recognises the existence of these barriers and the consequent need for pro-active regulatory measures to help competition take hold.

In the current review Commission proposes to remove retail fixed telephony services (local, national and international calls) from the list of markets susceptible to ex-ante regulation (including price regulation).

⁸ 'Les SMS en France et en Europe – Etude du comportement des opérateurs', UFC Que Choisir, Novembre 2003.

⁹ 'Short Messages on mobile phones ("SMS"): Commission agrees with decision by French regulator to bring down wholesale prices', IP/06/1041 of 20th July 2006.

The Commission argues that carrier selection and pre-selection together with Voice-over Broadband (VoB) already provide efficient competitive restraints on incumbent operators. In cases where incumbents abuse their dominance in wholesale markets (for example through price squeeze) the ex-post application of competition law would suffice to address the problem.

We are sceptical about the claims of the competitive restraint of VoB at this stage, though we acknowledge its potential. Broadband penetration levels are very low in many Member States and problems with roll-out and obstacles to take-up are highly unlikely to disappear overnight.









Even if carrier selection and pre-selection obligations are transposed in most Member States by now, one should not interpret it as fully available to all consumers. The Commission mentions in their 11th Implementations Report problems with interconnection in some member States.

We are somewhat confused by the Commission's approach to historical and future developments. On the one hand, in connection with emerging markets, the Commission considers the lack of sound, historical evidence as a reason not to allow for even the possibility of regulation. This led them to refuse to add SMS – a widely used service at the time - in 2002 to the markets susceptible to ex-ante regulation on the basis that it was a *new* market. It is therefore somewhat puzzling why the Commission now seems to base their decision to take retail calls markets off the list on the *potential* of a very new market (VoB) and the recent (and not yet fully successful) implementation of Carrier Selection and Carrier Pre-Selection in many Member States. Blocking regulation in an area is a much more absolute and far-reaching measure than simply allowing for the *possibility* of regulation. Yet, the former decision seems to be subject to a much less strict standard when it comes to substantiation, effectively amounting to an educated guess at future developments.

BEUC is therefore extremely concerned about the removal of retail calls markets from the list of relevant markets. Besides the concerns above, we very much fear that incumbents could easily abuse their market power in these markets very effectively to get rid of competitors, also on other markets for example through predatory pricing, locked-in contracts, unfair bundling, etc. As explained above they would be able to leverage their market power in the retail calls market to foreclose competitors in other markets with a higher growth potential (broadband, digital TV etc). In the long run, consumers would lose. Some consumers may also lose in the short run through discriminatory pricing for example.

There is no evidence that these markets are already fully competitive, on the contrary, the national market analyses completed thus far show they are not.

COMPETITION / REGULATION - FIRST ROUND		28 September 2006																								
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	Effective competition - no ex ante regulation		Velo
	No effective competition - ex ante regulation		Velo - measure corrected by a new notification
	Partial competition - partial ex ante regulation		Separated notification for remedies
	Withdrawal (totally or partially) not yet re-notified		Final measure adopted

Source: Commission, INFSO website

With bundling, convergence and fast technological development (NGN, mobile broadband), the analysis of competition in any given market will become more and more complex. The complexity of markets, the potential for leveraging and the emergence of new technologies increase the already significant challenge for the ex-post application of competition law. At the same time, due to the same factors, any delay in intervening in markets, where there is an abuse of market power, may affect consumers on a larger scale. As explained above, not only consumers may be hurt in other markets, the consumer detriment may also be non-economic, for example loss of privacy. At the same time, the complexity and rapid evolution of markets is also likely to increase the asymmetry of information between consumers and providers and is likely to lead to the deterioration of the (already small) buyer power of the individual consumer.

Ex-post competition law alone is not a guarantee to tackle competition problems in a timely manner. It is better to leave the door open to regulation, which might never be needed than to close the door to regulation, which might be necessary. We believe a rigid list of markets where regulatory intervention is possible to ensure a timely cessation or even prevention of abuse of market power to the detriment of consumers

Instead of decreasing the number of markets where ex-ante regulation is necessary, we would therefore propose more flexibility in terms of imposing ex-ante remedies given the many simultaneous and rapid developments in the market (NGN, convergence, bundling). Regulation should be possible in any market where consumers are at risk from the abuse of dominance, including not only single, but collective dominance.

Regulators should be fully empowered to address the issue of leverage. We feel the current proposal does not provide this much needed flexibility and may fail to provide the means for NRAs to intervene without undue delay if necessary to protect competition and ultimately consumers.

➤ **Separation of access and infrastructure**

The idea is modelled after existing regulatory obligations in the energy network. There has been progress on this in the UK, where BT's network operations are now in a separate company (Openreach). Whereas BEUC would support this measure in general as a means of increasing competition in the wholesale markets, which has in turn the potential to increase competition in retail markets as well.

We would not, however, support the further elaboration of this proposal in the area of universal service. i.e. reducing the scope of the universal service to access and not include services any more. During the past months the Commission has been floating the idea of including only access in the scope of the universal service, arguing that there is or at least would be enough competition in the market to provide the services.

Although falling short of making this proposal, the Commission seems to be 'preparing the ground' for it. Besides the separation of access from service in the Universal Service Directive, it is also proposed to remove the fixed retail calls markets from the list of markets susceptible to ex-ante provisions suggesting these markets are already competitive

As expressed in our response to the consultation on the review of the scope of the Universal Service in 2005, we would not support a major overhaul of the definition of universal service, i.e. an approach that separates infrastructure from service. Echoing our concerns relating to the removal of retails calls markets from the list of relevant markets we think it is premature to define universal service based on the *potential* of IP-based services and the *potential* level of competition in the market. Vulnerable consumers invariably do not reap as many benefits from competition and technological developments. Ideally competition and technological developments should deliver but a safety net – in this case the USO – should be in place regardless.

➤ **Spectrum management**

The Commission proposes to introduce more flexibility in spectrum use by making spectrum use technology- and service-neutral. Secondary spectrum trading is also envisaged with the aim to increase efficiency of use. We believe the issue of spectrum management should be examined in the light of convergence, and of the potential leverage of dominance.

4. UNIVERSAL SERVICE

The Commission decided not to tackle the Universal Service directive within the current review. Instead, a Green Paper on this will be issued in 2007. However, there are still some potentially controversial proposals in the current review as well.

➤ **Directories**

The Commission proposes to review public directories from the scope of the universal service obligations. They argue that universal directory services can be provided by the market.

BEUC has expressed its opposition to this in the relevant review in July 2005¹⁰ based on the negative experience with this in the UK.

➤ **Separation of access from infrastructure**

Cf. above

5. USERS RIGHTS

➤ **Transparency of information**

The Commission identified two problems relating to price transparency. On the one hand consumers are not able to find out about the exact charge of a call before making a call (as it is not obvious in many cases what charge applies for the called number, especially in the case of premium rate services or ported mobile numbers). The other problem relates to the inability of consumers to compare prices, especially in the case of complex tariff packages and service bundling.

The consultation paper, however, seems to be very much lacking in substance both in terms of analysing the problems and of regulatory options. For the first problem only a vague commitment to give more powers to NRAs and the possibility of technical implementation measures at the EU level are mentioned.

As regards tariff comparability, the Commission seems to believe that the mere obligation of service providers to make retail tariffs available to the public and not to hinder the use of this information by third parties (intermediaries) would suffice. The market would consequently provide these services (for example Internet websites). **In our view, however, this may bring a whole new set of transparency problems with regards to the affiliation and the fees of the intermediaries themselves.**

The Commission only envisages a mandate for the NRAs to provide comparable price information if the market failed to provide this. We believe this is not enough.

We believe that the obligations as regards the provision of tariff information should be much more specific. For example, some mobile operators offer a service whereby after every phone call a customer gets a message informing them how much that phone call cost. This could become a general requirement.

Ideally, especially given number portability, customers should know in advance how much the given phone call will cost them. This could be done by an automated announcement after dialling.

In terms of tariff information, Belgium has a 'best advice' requirement, whereby operators are obligated to recommend their best available tariff package every year based on the customer's consumption over the previous year. The Commission could consider including this a similar 'best advice' requirement as a binding provision.

➤ **Control of expenditure**

We asked in our submission to the Call for Input on the review of the framework early 2006 for the obligation of the operator to notify the consumer in case of out of the ordinary expenditure before the normal date of billing. Every consumer should have the choice to limit the amount he or she is willing to spend on a service in any given time period. This should not

¹⁰ BEUC/X/027/2005 of July 18 2005.

only be achieved through prepayment, but should also be available to users of subscription based mobile services and of landlines. This would imply that operators should have the obligation to alert consumers in case they exceed their limits or if abnormal calling pattern occurs.

In recent years, premium rate services have given rise to a lot of abusive practices. Hidden web-diallers have created problems for many consumers. For example, our Slovenian member organization has knowledge of monthly bills amounting to as much as EUR4000. Another problem is marketing premium-rate services to young people, in which case there is a separation between the user and the person paying the bill. We believe that the spread of abusive provision of premium rate services warrants the review of the relevant provisions as foreseen in Recital 17 of the Universal Service Directive. The `alerting` obligation of operators has to become a binding provision.

A critical question regarding users' rights is whether it is enough to rely on horizontal consumer protection legislation. This idea seems to be very popular with industry. The Commission does not propose to strengthen users' rights spectacularly in the current review. They only float the idea that perhaps in some area (fraudulent premium rate services) it may be a good idea to have some sort of guidelines at some stage in the future. This is clearly not enough.

➤ **Locked-in contracts and locked in technology**

Locked in contracts present a particular problem for competition in e-communications markets as they can serve as an effective means to block switching and hence deter entry. BEUC therefore believes that the current review should contain proposals on dealing with this issue.

Last, but not the least, technology lock-in could also be just as problematic. We hope that the inclusion of terminal equipment in the scope of the framework would enhance as opposed to reduce the level of interoperability. The consultation document is very unclear on this and we cannot judge in the absence of clear proposals the exact impact of this. We are somewhat concerned as the little explanation that is provided in the Staff Working Paper suggests that interoperability may actually be reduced thanks to the proposals. This would of course be a major cause for concern.

6. REGULATORY ENVIRONMENT/PROCEDURES

The success of the current framework depends to a large extent on NRAs. It is therefore important that NRAs are really independent and have the required legal mandate to carry out their mandated tasks (safeguard and promote competition through market analyses and the use of remedies if necessary and to ensure universal service and consumer protection). This is sadly not the case for all NRAs and there are huge differences among them. This reflects on the efficiency of the implementation and the benefits consumers enjoy.

The Commission has some proposals to deal with this, for example by securing the right of veto over proposed remedies and is thinking about issuing more concrete procedural/implementation measures for the market notification procedures.

Because of the sluggish, sometimes incoherent implementation of the framework by NRAs we would welcome any procedural reform that would speed up and improve implementation. In this respect, we also believe that the framework could greatly benefit from detailed implementation rules with clear procedural provisions and time-limits.

END