


Market Analyses under EU regulatory framework

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Outline

- Regulatory framework
 - Institutional aspects
 - Market analysis procedures
 - Experiences in different markets
 - Appeals
 - Looking ahead
 - Conclusions and recommendations
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Regulatory framework

- Why market analyses?
 - Central element of the EU regulatory framework
 - Basis for imposing, maintaining , amending or withdrawing regulatory obligations
 - Requirement under Article 16 Framework Directive
- Who is involved?
 - National Regulatory Authority (NRA)
 - National Competition Authority (NCA)
 - Market actors
 - Appeal bodies
 - EU context: European Commission, other NRAs
- How often?
 - EC proposed every 2 years

Institutional aspects

- NRA powers and competencies
 - Sufficient resources
 - Institutional independence from *industry* and *politics*
 - Powers to collect information and decide on market definitions, SMP and remedies
- Cooperation with National Competition Authority
- Transparency and consultation mechanisms
 - Publication of draft measures
 - Opportunity to comment within a reasonable period
- Effective appeal mechanisms
 - Independent and competent appeal bodies
 - Appeal process duration

Market analysis procedures

- Data collection
 - Is there an obligation to provide information to the NRA?
- Market definition
 - NRA powers or prescribed by law?
 - Product/service market
 - Geographic scope
- Competition assessment and operators with SMP
 - Competition law principles or fixed %?
- Imposition/amendment/withdrawal of regulatory obligations
 - NRA powers or predefined by law?

Recommendation on relevant markets

2003 Recommendation		2007 Recommendation		Comment
1	Fixed network access for residential customers	1	Fixed network access for residential and non-residential customers	Combines old markets 1&2
2	Fixed network access for non-residential customers			
3	Fixed national telephone services for residential customers	-	-	Deleted
4	Fixed international telephone services for residential customers	-	-	Deleted
5	Fixed national telephone services for non-residential customers	-	-	Deleted
6	Fixed international telephone services for non-residential customers	-	-	Deleted
7	Minimum set of leased lines (up to and including 2 Mbps)	-	-	Deleted

Recommendation on relevant markets

2003 Recommendation		2007 Recommendation		Comment
8	Wholesale fixed call origination	2	Wholesale fixed call origination	No change
9	Wholesale fixed call termination	3	Wholesale fixed call termination	No change
10	Wholesale fixed transit services		-	Deleted
11	Wholesale unbundled access to metallic loops and sub-loops	4	Wholesale infrastructure access	'Metallic' - removed
12	Wholesale broadband access	5	Wholesale broadband access	Virtual (BSA) access
13	Wholesale terminating segments of leased lines	6	Wholesale terminating segments of leased lines	Technology neutral
14	Wholesale trunk segments of leased lines		-	Deleted

Recommendation on relevant markets

2003 Recommendation		2007 Recommendation		Comment
15	Wholesale mobile access and call origination		-	Deleted
16	Wholesale mobile voice call termination	7	Wholesale mobile voice call termination	No change
17	Wholesale international roaming		-	Deleted
18	Wholesale broadcasting transmission services		-	Deleted

Additional markets

- NRA can define markets outside recommendation
 - ARCEP (FR): wholesale market for SMS termination
 - OPTA (NL): retail market for cable transmission of free-to-air radio and TV
- Proposed markets must pass three cumulative criteria test
 - High and non-transitory entry barriers
 - No tendency towards effective competition
 - Sufficiency of competition law and ex post regulation

Market definition

- Relevant product / service market
 - *‘comprises all those products or services that are sufficiently interchangeable or substitutable, not only in terms of their objective characteristics, by virtue of which they are particularly suitable for satisfying the constant needs of consumers, their prices or their intended use, but also in terms of the conditions of competition and/or the structure of supply and demand on the market in question’* – EC guidelines
 - Demand- and supply-side substitution
- Geographic market
 - *‘comprises an area in which the undertakings concerned are involved in the supply and demand of the relevant products or services, where the conditions of competition are similar or sufficiently homogeneous and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different’* – EC guidelines
 - Area covered by a network
 - Legal and other regulatory instruments
- ERG common position on geographic aspects – October 2008

Significant market power

- Competition law concept of dominance applied *ex ante*
 - Power to raise prices by a small but significant amount without incurring a significant loss of sales
- Market shares used as a proxy for market power
 - Below 25% unlikely single dominance
 - Over 40% presumption of single dominance
 - Other criteria
- Collective dominance
 - Difficult to prove
 - Wholesale mobile access and call origination

Regulatory obligations – retail

- Defined by Universal Service Directive
- Fixed retail access and call markets
 - Carrier selection and pre-selection (CS/CPS) triggered by SMP (Article 19)
 - Other regulatory obligations including retail price control are imposed only where CS/CPS and wholesale obligations are not sufficient (Article 17)
- Retail leased lines (Article 18)
 - Non-discrimination
 - Cost orientation
 - Transparency

Regulatory obligations – wholesale

- Defined by Access Directive
 - Transparency (Article 9)
 - Non-discrimination (Article 10)
 - Accounting separation (Article 11)
 - Access to, and use of, specific network facilities (Article 12)
 - Price control and cost accounting obligations (Article 13)
- ERG common position on remedies – May 2006
 - Why regulation?
 - Standard competition problems in electronic communications markets
 - Standard remedies available
 - Principles for selecting appropriate remedies

Retail fixed access markets

- Separate residential and non-residential markets – by most NRAs
- NRAs in CY, GR, IE and UK defined the markets based on the levels of access: PSTN or ISDN
- Alternative access, e.g. optical fibre and LANs, no effect on the SMP finding or the scope of regulation
- Veto of the proposal to include xDSL access services in PL
- All NRAs designated the incumbent operator as having SMP
- Commission commented on:
 - absence of effective ex ante price control in CZ, FI and DE
 - insufficient wholesale line rental (WLR) 'retail-minus' price control in LU
 - lack of cost orientation for CS/CPS interconnection services in DE
 - impact of wholesale remedies in addressing market failures at retail level in FR, HU, SI and ES

Retail fixed call markets

- Most NRAs designated the incumbent operator as having SMP
- Few countries found markets competitive, mostly international calls
- Commission observed *'a noticeable trend towards competition'*
 - Competitive pressure from mobile markets constraining incumbents
 - Reduced barriers to entry through CS/CPS and WLR
 - Increase in broadband connections and emergence of VoB service
- Recommendation to focus on effective wholesale regulation
 - Removed from 2007 Recommendation

Retail leased lines

- Minimum set of leased lines with harmonised characteristics up to and including 2 Mbps
 - AT, FR, NL PT and UK defined a broader market
 - MT and NL defined relevant markets for international leased lines
 - All NRAs except EE, FI, HU, NL, SI and ES imposed all remedies foreseen under Article 18 Universal Service Directive: non-discrimination, cost orientation ‘where appropriate’ and transparency
- Recommendation to focus on effective wholesale regulation
 - Removed from 2007 Recommendation

Wholesale terminating and trunk leased lines

- Market definition varies across Member States
 - Borders between two markets – network topology
 - Segmentation into high and low capacity leased lines in GR, LT, NL and UK
 - Inclusion of alternative interfaces such as Ethernet
- All NRAs designated the incumbent operator as having SMP in terminating segments market
- CY, EE, FR, GR, IT, LT, LU, MT, NO, PL, PT, ES also designated incumbent as having SMP in trunk segments market
 - Removed from 2007 Recommendation

Wholesale terminating and trunk leased lines

- European commission recommendation on lease lines part circuits prices (2005)

Capacity	Sum of the monthly price and 1/24 of the one-off connection price				One-off connection price
	Circuit length of up to 2 km	Circuit length of up to 5 km	Circuit length of up to 15 km	Circuit length of up to 50 km	
64 kbps	€ 61	€ 78	€ 82	€ 99	€ 542
2 Mbps	€ 186	€ 248	€ 333	€ 539	€ 1,112
34 Mbps	€ 892	€ 963	€ 1,597	€ 2,539	€ 2,831
155 Mbps	€ 1,206	€ 1,332	€ 1,991	€ 4,144	€ 3,144

Wholesale fixed call origination, termination and transit

- Most NRAs defined the market in line with the Commission recommendation
- All fixed incumbents were found to have SMP in origination
- No SMP in transit market in some countries
 - Removed from 2007 Recommendation
- Differences in Alternative Network Operators SMP assessment in fixed call termination
- All NRAs imposed full set of remedies on fixed incumbents, but variation in implementation of cost orientation obligation
- No consistency to approach to regulating ANOs' termination :
 - Strict reciprocity, Delayed Reciprocity, No price control at all

Wholesale infrastructure access

- Most NRAs defined the market as covering copper loops only
- Most NRAs designated the incumbent operator as having SMP
- Remedies:
 - All NRAs imposed full set of remedies, but variation in implementation of cost orientation obligation
 - ‘Naked’ shared access
 - Migration procedures from bitstream access to LLU
 - Little attention to SLU so far, but will become increasingly important with deployment of FTTC / VDSL , often imposed along with provision of dark fibre and duct access for backhaul

Wholesale broadband access

- Market definition:
 - ‘Orthodox approach’– DSL only
 - But many NRAs included alternative broadband infrastructure (cable, FTTH, BFWA) based on substitutability at retail level and indirect pricing constraint exercised at wholesale level
 - MT – Cable included based on substitutability at wholesale level
 - UK -Geographic sub-markets depending on competition from LLU
- All NRAs designated the incumbent operator as having SMP
- Commission commented on the proposed remedies
 - the lack of effective ex ante price regulation in CZ, FI, DE, LU, SK
 - CZ, LT, LU, PL were invited to specify the level of access
 - DE and ES to apply access obligations to VDSL infrastructure
 - the lack of a stand alone bitstream access ('naked DSL') in DE and LU.

Wholesale mobile access and call origination

- Most NRAs found effectively competitive
 - *"... the level of competition generally observed in this market at the retail level indicates that ex-ante regulatory intervention at a wholesale level may not be warranted"*
 - No SMP in most countries, removed from 2007 Recommendation
 - Single SMP: in smaller countries CY, IS, NO, SI
 - Joint SMP: FR, PL (both withdrawn), IE, ES (both appealed), SI (recent proposal)
- Remedies
 - Meet reasonable requests for MVNO access
 - National roaming on cost oriented terms

Wholesale mobile call termination

- All NRAs defined the relevant market in accordance with the Commission recommendation, and all terminating MNOs have been designated as having SMP
- Price controls imposed by all NRAs, but the Commission finds a large spread in average MTRs, only partly justified by costs
- NRAs apply different price setting methodologies and time frames for 'glide paths'
 - MTRs set on basis of cost model vs. benchmarking
 - Glide paths for reductions in MTRs not lead to converged end prices
 - Asymmetry of MTRs for later 2G operators and 3G new entrants, but no consistency in approach between countries
 - Inclusion of 3G spectrum in cost model for setting MTRs – UK

International roaming

- NRAs that had notified this market by had found it effectively competitive
- The market is now regulated via an EC Regulation

Broadcasting transmission market

- Removed from the revised recommendation
 - Terrestrial platform
 - More countries found SMP in analogue transmission than digital
 - In countries where SMP in digital terrestrial transmission, often DTT networks launched before market analysis. Broadcasters locked into long-term contracts
- Not clear what is an access obligation in Market 18?
- Who is customer? Broadcaster purchasing a managed transmission service or alternative operator buying access to unbundled network elements?
- Cable platform
- Cable operators SMP in Germany, Malta and Netherlands

Appeals

- Little guidance on appeals (Article 4 Framework Directive)
 - Member States must provide an effective and independent appeal mechanism
 - Right of appeal for any user or operator affected by NRA decision
 - Appeal body must have appropriate expertise available to it
 - Merits of the case must be taken into account
 - NRA decision stands pending outcome of appeal unless the appeal body decides otherwise
 - If the appeal body is not a court, it must give written reasons for its decision, and its decision must be subject to review before a court

Appeals

- Problem in some Member States:
 - Take years to reach final outcome
 - Systematically suspend NRA decisions during the appeal process
 - Create incentive to use appeal process as a delaying tactic
- Few countries specify binding timeframes
 - Denmark: 3 months (not mandatory)
 - Ireland: 4 months (not mandatory)
 - Spain: 1 month (when CMT is first level appeal body)
 - Sweden: 6 months (recent amendment)
 - UK: 4 months (CAT referral to Competition Commission on price controls)

Appeals

- EC proposals:
 - NRA decisions should only be suspended where irreparable harm to the appellant can be shown
 - But does NOT address length of appeal proceedings

Thank you for your attention!

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