

Primary law in the light of market analysis – experiences, best practice and recommendations

Workshop on carrying out relevant market analysis following new EC Recommendation
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Emily O'Reilly
Information Society and Media DG

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Outline

- EU Regulatory Framework
 - Key principles and objectives
- Market Analysis
 - Legal basis and instruments
 - Implementation
 - Experiences
- Innovation and Investment
- Conclusions



EU Regulatory Framework

Key Principles and Objectives



EU regulatory framework: Key principles and objectives

- Based on competition law principles
- *Ex-ante* regulation only where justified - where market not effectively competitive
- Technological neutrality – regulation of markets; not infrastructure



EU regulatory framework: Key principles and objectives

- Ensuring no distortion or restriction of competition
- Promoting efficient investment and innovation
- Ensuring maximum benefits for consumers in terms of choice, price and quality



Market Analysis

Legal Basis and Instruments



Market analysis: legal basis and instruments

- Framework Directive (FWD) 2002/21/EC - (e.g. Art 6, 7, 14, 15 & 16)
- Access Directive (AD) 2002/19/EC – (e.g. Art 8 to 13)
- Universal Service (USD) 2002/22/EC – (e.g. Art 16 to 19)
- Commission Recommendation on relevant markets
- Commission Guidelines on market analysis (SMP Guidelines)



Market Analysis

Implementation



Market analysis: tasks of national regulators

- Arts 15 and 16 FWD - national regulatory authorities (NRAs) required to:
 - carry out market definition and analyses (at least for the 7 “recommended” markets)
 - update at regular intervals and with Community and national consultation (including where appropriate with national competition authorities)
 - impose obligations on SMP operators



Market analysis: tasks of national regulators

- NRAs take utmost account of Commission's Recommendation and Guidelines
 - analysis based on competition law and economic principles
 - definitions appropriate to national circumstances (geography)
 - forward-looking approach and technological neutrality



Market analysis: identification of markets susceptible to *ex ante* regulation

- Starting point for regulation:
 - Art 15 FWD - Identify markets where persistent bottlenecks exist, sets scope of regulation
 - Recommendation on relevant markets - list of markets susceptible to *ex ante* regulation on the basis that they meet the 3-criteria test:

3-Criteria Test (cumulative test)				
high, non-transitory entry barriers	√	X	√	√
no tendency towards effective competition	√	√	X	√
competition law insufficient to address market failures	√	√	√	X
<i>susceptible to ex-ante regulation?</i>	√	X	X	X



Market analysis: 2007 Recommendation on relevant markets

- Starts with identifying wholesale markets; regulatory controls on retail services only where relevant wholesale measures fail to ensure effective competition

Retail level

1. Access to the public telephone network

Wholesale level

2. Call origination on fixed networks
3. Call termination on fixed networks
4. Wholesale (physical) network infrastructure access
5. Wholesale broadband access
6. Wholesale terminating segments of leased lines
7. Voice call termination on individual mobile networks



Market analysis: 2003 Recommendation on relevant markets

Retail level

- 1-6 Fixed access and calls markets
- 7 Retail leased lines

Wholesale level

- 8-10 Fixed interconnection markets
- 11 Local loop unbundling
- 12 Wholesale broadband access
- 13-14 Wholesale leased lines
- 15 Mobile call origination and access
- 16 Mobile termination
- 17 International roaming
- 18 Broadcasting transmission



Market analysis: transition from 2003 to 2007 Recommendation on relevant markets

- 2007 Rec (7 markets) shorter than 2003 Rec (18 markets)
 - wholesale regulation has been effective in bringing effective competition to markets, e.g. retail calls, mobile access and call origination, retail leased lines
- 2007 Rec appropriate starting point for regulators; however not an exhaustive list:
 - Possible to identify additional markets that differ from 2007 Rec, where they meet the 3-criteria test
 - In newly liberalised telecoms sectors may be appropriate to also regulate markets from 2003 Rec



Market analysis: transition from 2003 to 2007 Recommendation on relevant markets

Where NRA proposes to impose regulation on:		
Market in 2007 Rec	3-criteria presumed to be met; no need for NRA to apply test	Follow market analysis procedures
Market in 2003 Rec, but not in 2007 Rec	NRA should apply 3-criteria test	Follow market analysis procedures
Market not in 2003 or 2007 Rec	NRA should apply 3-criteria test	Follow market analysis procedures



Market analysis: significant market power (SMP) assessment

- Threshold for regulatory intervention
- Based on competition law principles (Art 14 FWD)
 - Old “ONP” threshold of 25% market share no longer relevant
 - SMP based on (antitrust) concept of dominance (Art 82 EC Treaty)
- NRAs take account of SMP Guidelines:
 - a forward-looking approach
 - market shares from undertakings (volume, value)
 - additional criteria (barriers to entry, economies of scale and scope, barriers to expansion, countervailing buying power...)
 - finding of SMP based on combination of criteria



Market analysis: SMP assessment and consequences

- Positive SMP test:
 - remedies imposed - Art 16(4) FWD
- Negative SMP test:
 - remove all existing regulatory obligations - Art 16(3) FWD
- Situation can change over time:
 - keep monitoring market developments



Market analysis: regulatory toolbox

- Remedies imposed shall be proportionate and based on the nature of the market problem identified - Art 8(4) AD
 - transparency
 - non-discrimination
 - accounting separation
 - access to, and use of, specific network elements and associated facilities
 - price control
 - cost accounting
 - other obligations with prior agreement from the Commission




Market analysis: implementation overview

Relevant Market Definition	Market assessment	Regulatory obligations
Commission Recom. on relevant markets (reviewed regularly)	Commission Guidelines on market power assessment	1) Transparency 2) Non-discrimination 3) Accounting Separation 4) Unbundled access and resale of facilities 5) Price control
3-Criteria Test	Notification of market analysis to Commission (transparency procedure)	<i>Any other obligation requires Commission approval</i>
Other markets defined by NRA and approved by Commission		



Market analysis: EU state of play

	Effective competition -no ex ante regulation	1	1st round-competition/regulation
	No effective competition - ex ante regulation	2	2nd round-competition/regulation
	Partial competition - partial ex ante regulation	3	3rd round-competition/regulation
W	withdrawal (totally or partially) not yet-renotified		
V	veto		

Country	NEW RECOMMENDATION							OLD RECOMMENDATION								
	Access to networks & services	Call termination	Call termination	Uplink rates	Downlink rates	Termination	Voicemail termination	Local calls for mobile	Interlocal calls for mobile	Local calls for fixed	Interlocal calls for fixed	Fixed	Termination	Termination	Access to networks & services	Termination
Austria	3	3	3	3	2	2	3	3	2	3	3	2	1	2	1	3
Belgium	1	1	1	1	1	1	1	2	1	2	1	1	1	1	1	W
Bulgaria		1	1				1									
Cyprus	1	1	1	2	2	1	2	1	1	1	1	1	1	1	2	1
Czech Republic	1	1	1	2	2	1	1	2	2	2	1	2	1	1	1	2
Denmark	1	1	1	2	2	1	1	1	1	1	1	1	1	1	1	1
Estonia	1	1	1	1	1	1	2	1	1	1	1	1	1	1	1	1
Finland	1	2	2	3	3	1	1	1	1	1	1	1	2	1	V	2
France	2	2	2	2	2	1	2	1	1	1	1	1	1	1	W	1
Germany	2	2	1	2	1	1	2	2	1	2	1	1	2	1	1	1
Greece	1	1	1	1	1	1	2	1	1	1	1	1	1	1	1	1
Hungary	2	2	2	2	2	2	3	2	2	2	2	2	2	2	2	1
Ireland	1	2	2	2	1	2	1	2	2	2	2	2	2	2	1	1
Italy	2	1	2	2	2	1	1	1	1	1	1	1	1	1	2	1
Latvia	1	1	2	1	1	1	1	1	1	1	1	1	1	1	1	1
Lithuania	1	1	2	1	1	1	1	2	1	2	1	1	1	1	1	1
Luxemburg	1	1	1	1	1	1	1	1	1	1	1	1	1	1		
Malta	1	1	1	1	1	1	2	2	2	2	2	1	1	1	1	1
Netherlands	2	2	3	2	2	2	1	2	2	2	2	2	2	2	1	2
Poland	1	1	2	1	1	1	2	1	1	1	1	1	2	1	1	1
Portugal	1	1	1	2	2	1	1	1	1	1	1	1	1	1		1
Romania			1				1									1
Slovakia	2	2	1	1	1	1	2	1	1	1	1	1	1	1	1	1
Slovenia	2	2	2	2	2	2	2	1	1	1	1	2	2	1	1	2
Spain	2	2	2	2	2	1	2	2	2	2	2	1	1	1	1	2
Sweden	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
United Kingdom	1	1	1	1	2	2	2	1	1	1	1	2	2	2	1	1



Market analysis: transition to EU regulatory framework

- Where existing regulation in place, maintain until market analysis carried out – Art 7 AD

Where NRA proposes to withdraw existing regulation from:

Any retail or wholesale market

NRA should apply 3-criteria test *or* full SMP assessment

Follow market analysis procedures



Market analysis: Article 7 process

- A consultation mechanism between Commission and NRAs under Art 7 FWD
- Aims:
 - To ensure **consistent regulation** across the EU;
 - To **limit regulation** to markets which will not become competitive without intervention;
 - To bring more **transparency** to the regulatory process.



Market Analysis

Experiences



Market analysis: experiences

- Market review and consultation processes have led to more consistent regulation
 - Important step towards the creation of an internal market for electronic communications
- Consultation process has created greater transparency in the regulatory process
- Regulation based on a thorough economic analysis and strictly limited to markets where there is persistent market failure
 - Better regulation



Market analysis: experiences

- Certain markets exhibit characteristics of enduring bottlenecks
 - For example, wholesale physical network infrastructure access
- However, a number of markets have already become effectively competitive allowing regulation to be rolled back
 - For example, retail calls, mobile access and call origination, trunk segments of leased lines, wholesale transit.



Market analysis: experiences

- The EU and national consultation mechanisms have brought sound economic analysis to the market review process
- The Commission has given guidance on key issues
- Recent guidance initiatives to bring more consistent regulation to NGA and termination rates



Innovation and Investment



Innovation and investment in the EU telecoms sector

- Efficient implementation of EU rules a key driver for competition and investment
 - Overall growth in revenue of the sector outpaces growth of the EU economy as a whole
 - In 2007 revenues of the EU telecoms sector reached almost €357 billion, or 2.9% of GDP
 - Investment in the EU telecoms sector is still on the rise

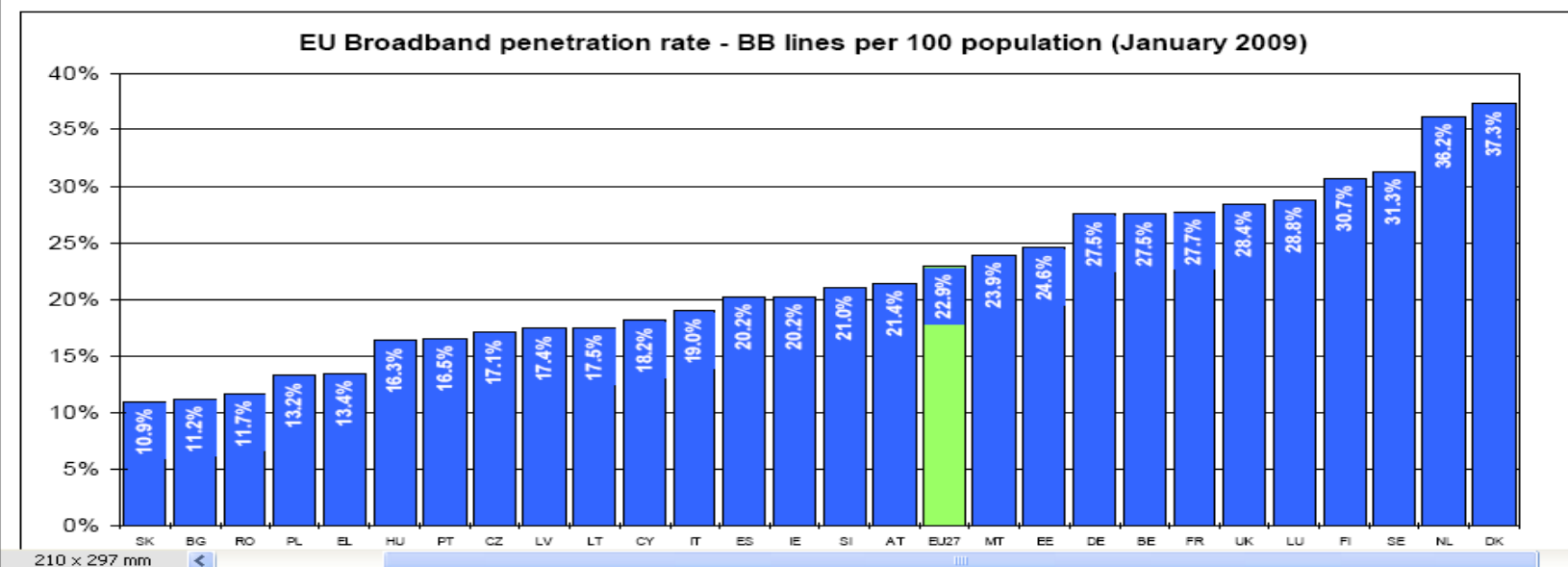
(Source: Commission's 14th Progress Report)



Innovation and investment in the EU telecoms sector

Broadband

Fixed broadband penetration continued to grow in 2008 with 14 million new lines added, bringing EU average fixed broadband penetration to 22.9%.



Source: Commission's 14th Progress Report

- EU countries remained world leaders in broadband penetration, currently ahead of the USA and the EU is catching up with Japan and Australia



Conclusions



Conclusions

- The regulatory framework, when applied fully and effectively, generally considered appropriate means of encouraging investment, innovation and market development
- Competing network infrastructures are essential for achieving sustainable competition in networks and services in the long term; competition drives efficient investment
- Regulatory framework has contributed to a great extent to enhancing consumer welfare
- Slow implementation of regulatory reform and poor implementation of the framework hold back investment





Thank you for your attention

emily.o'reilly@ec.europa.eu



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