

Primary law in the light of market analysis, experiences & recommendations from Austria

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System of implementation

Market definition

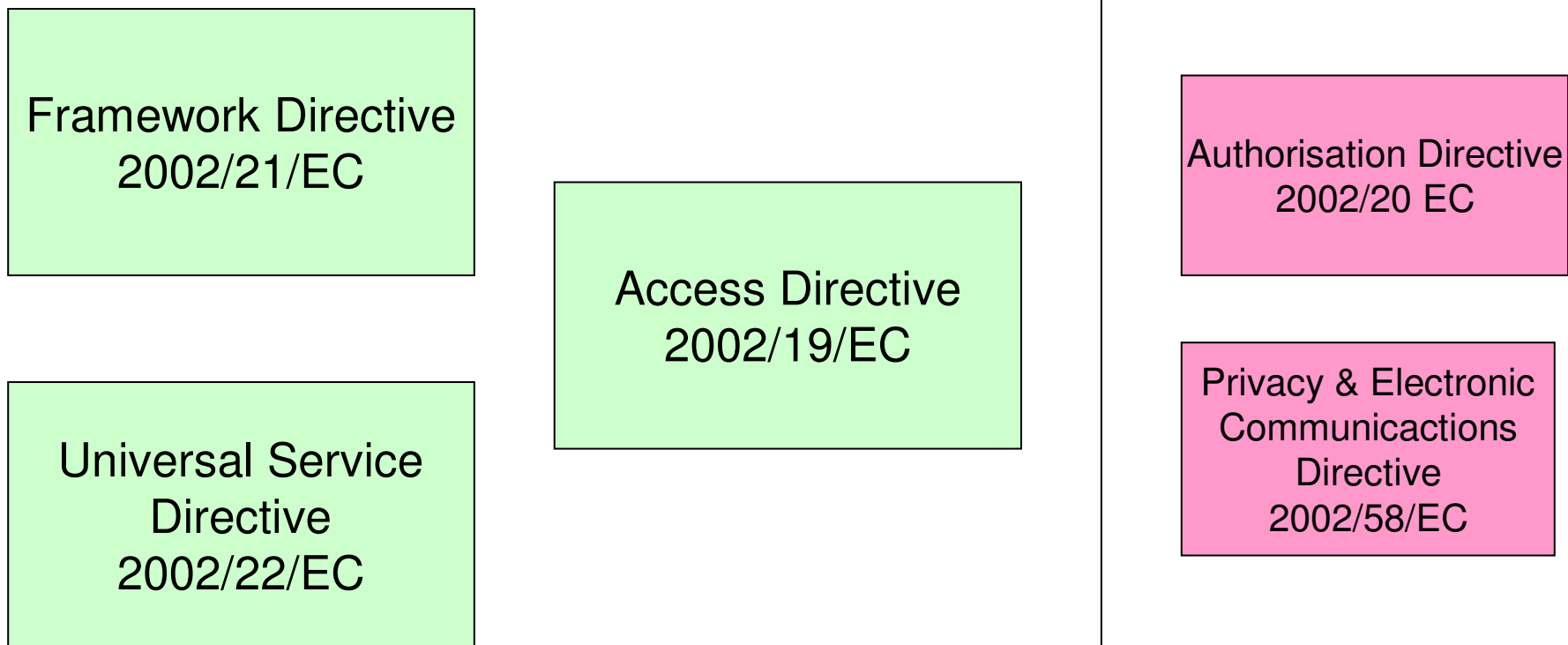
Market analysis

Specific obligations

Chapter 1 – „System of implementation“



What to implement? the European Framework



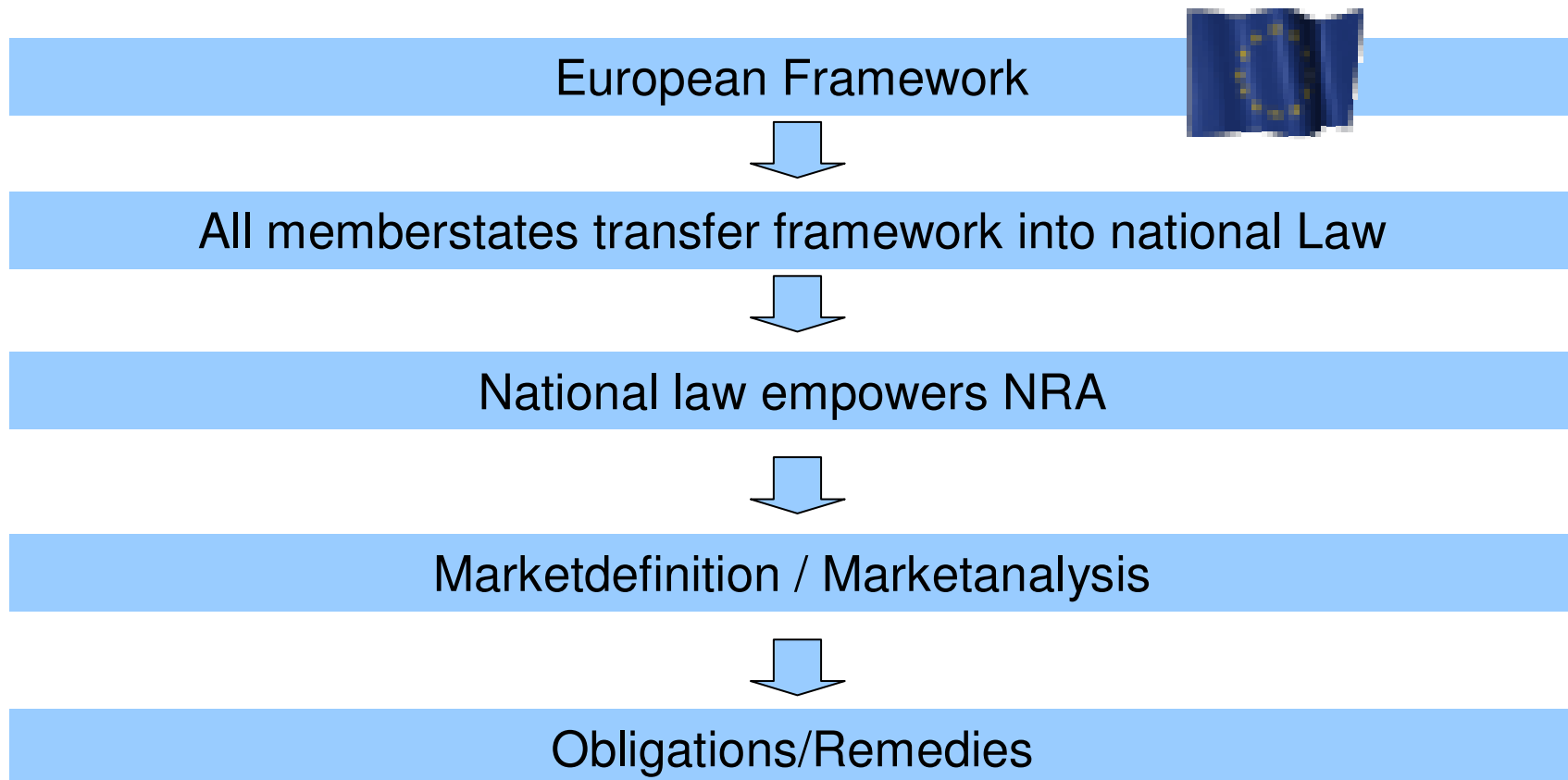


how to implement ?

- EU-Council decisions have validity in all member states and are issued either via guideline or directive
- guidelines have automatic validity in all member states
- telecoms framework is set out as a directive according Art 249 (Amsterdam), 288 (Lisbon) EC-treaty:
 - (a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods)
- legal obligation of a member state to transform it into national law
- additional side reglementations by ordinances or
- Bylaws

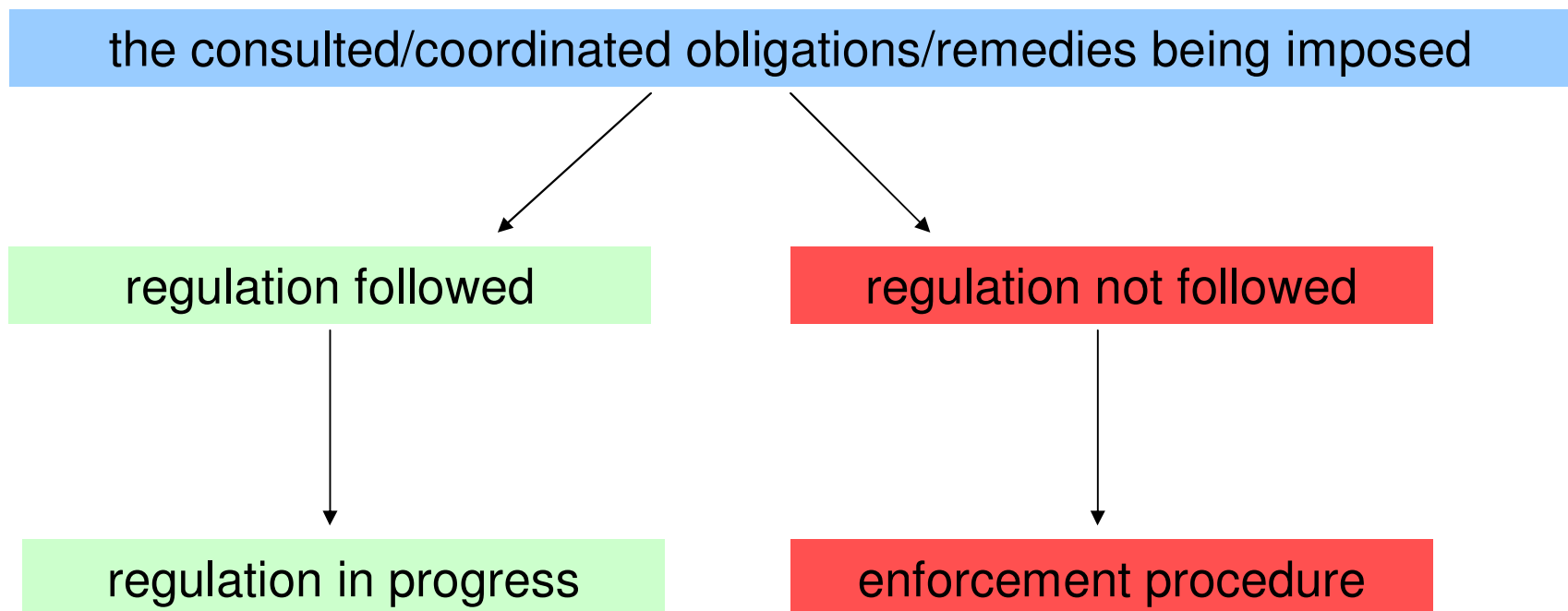


System of implementation 1



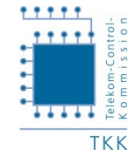
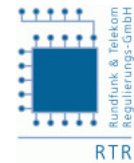
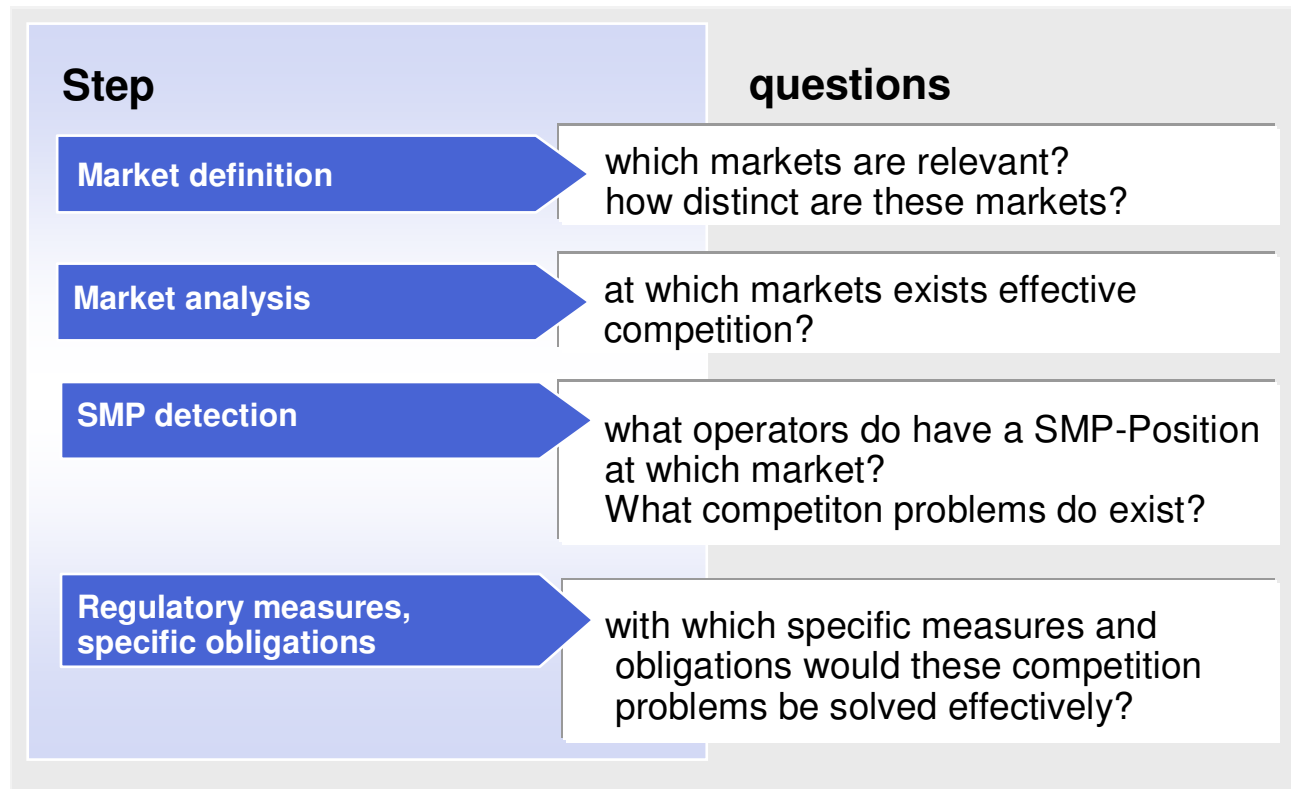


System of implementation 2





the new framework for electronic communication and services foresees a step-by-step procedure for competition regulation:





System of implementation

Market definition

Market analysis

Specific obligations

Chapter 2 – „Market definition“



how to do the market definition

- Market definition procedure
 - Commission adopts a recommendation on relevant product and service markets after public consultation with NRA's in accordance with Annex 1 to FD
 - justify the imposition of regulatory obligations
 - definition has to be done in accordance with competition law and
 - is subject to regular review
- European Commission publishes guidelines for market analysis
- NRA's shall take utmost account of recommendation, guidelines, define relevant market within their territory in accordance with principles of competition law
- the assignment of significant market power in accordance with competition law

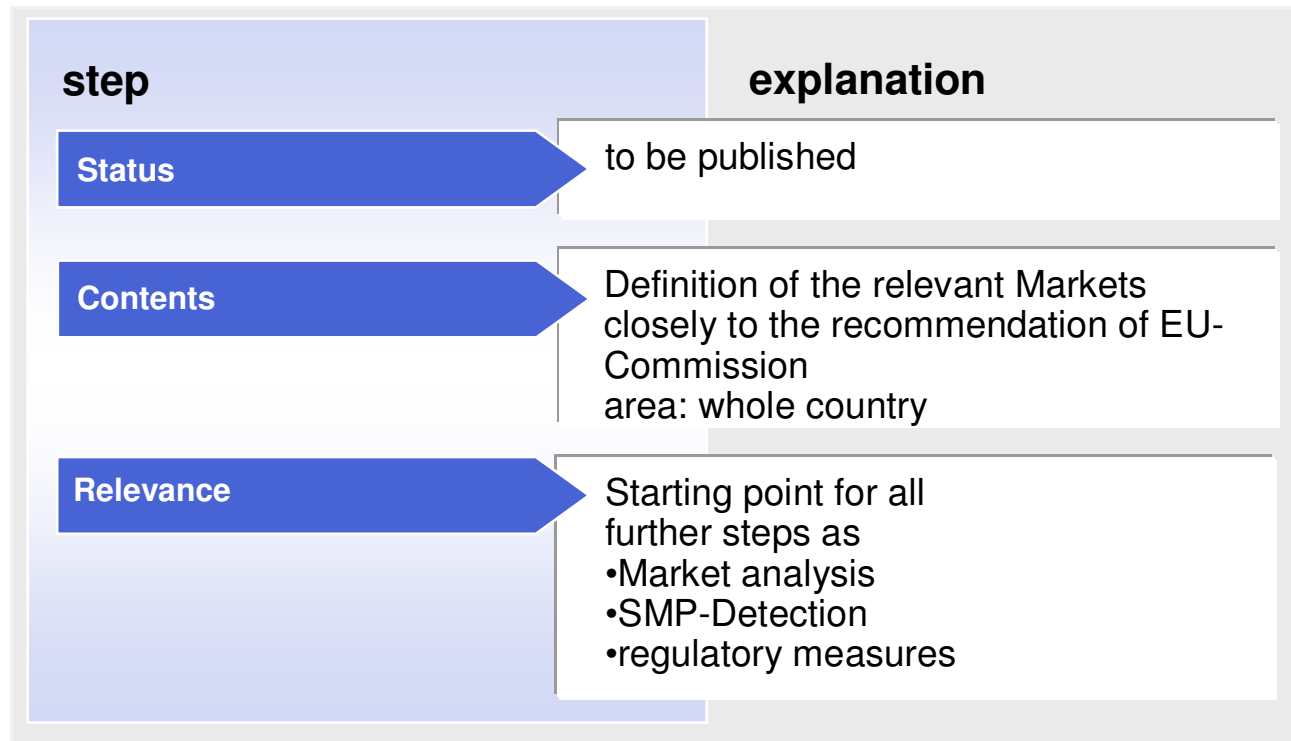


deviations and other results

- before defining markets that differ from those defined in the recommendation NRA shall follow Art 6/7 FD procedure (Consultation/Consolidation)
- after consultation with NRA Commission may adopt a decision identifying transnational markets



Key elements of market definition in national law



- § 1. Folgende nationale Märkte werden als sachlich relevant festgelegt:
1. Zugang von Privatkunden zum öffentlichen Telefonnetz an festen Standorten (Endkundenmarkt)
 2. Zugang von Nichtprivatkunden zum öffentlichen Telefonnetz an festen Standorten (Endkundenmarkt)
 3. Inlandsgespräche für Privatkunden über das öffentliche Telefonnetz an festen Standorten (Endkundenmarkt)
 4. Inlandsgespräche für Nichtprivatkunden über das öffentliche Telefonnetz an festen Standorten (Endkundenmarkt)
 5. Auslandsgespräche für Privatkunden über das öffentliche Telefonnetz an festen Standorten (Endkundenmarkt)
 6. Auslandsgespräche für Nichtprivatkunden über das öffentliche Telefonnetz an festen Standorten (Endkundenmarkt)
 7. Originierung im öffentlichen Telefonnetz an festen Standorten (Vorleistungsmarkt)
 8. Terminierung in individuellen öffentlichen Telefonnetzen an festen Standorten (Vorleistungsmarkt)
 9. Transitedienste im öffentlichen Festtelefonnetz (Vorleistungsmarkt)
 10. Mindestangebot an Mietleitungen mit bestimmten Mietleitungstypen bis einschließlich 2 Mbit/s (Endkundenmarkt)
 11. Trunk-Segmente von Mietleitungen (Vorleistungsmarkt)
 12. Terminierende Segmente von Mietleitungen (Vorleistungsmarkt)
 13. Einbindelter Zugang einschließlich gemeinsamer Zugang zu Drahlleitungen und Teilschritten davon für die Erbringung von Breitband- und Sprachdiensten (Vorleistungsmarkt)
 14. Zugang und Originierung in öffentlichen Mobiltelefonnetzen (Vorleistungsmarkt)
 15. Terminierung in individuellen öffentlichen Mobiltelefonnetzen (Vorleistungsmarkt)
 16. Nationaler Vorleistungsmarkt für internationales Roaming in öffentlichen Mobiltelefonnetzen (Vorleistungsmarkt)

Die Verordnung ist abrufbar unter www.rtr.at



EC market recommendation “old and new”

Markets									
18 markets as per 1st recommendation on relevant markets	Retail Fixed Voice	1	access network residential	connected	Access	1	Retail Fixed Voice		
		2	access network non-residential						
		3	national telephone residential	x	Origination	2		Wholesale Fixed Voice	
		4	international tel. residential	x					
		5	national tel. non-residential	x					
		6	international tel. non-residential	x					
	7	minimum set of leased lines	x	Termination			3		
	Retail leased lines	8	call origination fixed				Unbundling		4
	Wholesale Fixed Voice	9	termination on individual networks		Bitstream	5			
		10	transit fixed	x	Terminating Segments	6	Wholesale Leased lines		
		11	unbundled access						
	Wholesale ULL Broadband	12	broadband access		Termination	7	Wholesale Mobile		
		Wholesale Leased lines	13	terminating segments					
	Wholesale Mobile		14	trunk segments	x				
		15	access and call origination	x					
		16	call termination						
	Wholesale Radio/TV	17	International Roaming	x					
		18	Broadcasting	x					

7 markets as per 2nd recommendation of relevant markets



System of implementation

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Chapter 3 – „legal background of market analysis procedure“



Market analysis proceedings in national law

The regulatory body shall proceed

- ex officio
- taking into account the requirements of the European Union
- in regular course, but at latest all two years

conduct an analysis about the relevant markets identified and published in the bylaws of the national legal framework



what is the sense and target of this market analysis?

1. identification if, one or more undertakings have significant market power (SMP) or if there exists effective competition on the relevant concerned

“equalling-theory”: if there exists no effective competition on the relevant market concerned, it means that at least one undertaking enjoys SMP

2. lifting , maintaining, changing or imposing of specific obligations, so called “remedies”



Result of Market analysis – identification of effective competition on the relevant market:

- Market analysis comes to the conclusion that there is „effective competition“ and therefore no undertaking enjoys „SMP“:
 - ➔ regulatory body may not impose specific measures!
 - ➔ the market analysis proceedings have to be concluded in relation to this market concerned by legal decision and this decision has to be published
- if this undertaking is still subject to imposed obligations on the market concerned
 - as a result of earlier market analysis proceedings or
 - former legal requirements had to impose specific measures by legal reasons for SMP-operators
- these specific obligations have to be lifted by formal decision
- the decision has to foresee a period of not longer than 6 months for the entry into force of the lifting (countryspecific)



Result of Market analysis – identification that no effective competition is existing on the relevant market:

- Market analysis comes to the conclusion that there is „no effective competition“ and therefore „one or more undertakings“ enjoy „SMP“:
 - ➔ regulatory body has to impose suitable specific obligations for this undertaking
- already existing specific obligations for this undertaking due
 - as a result of earlier market analysis procedures or
 - to former legal requirements had to impose specific measures by legal reasons for SMP-operators
- when the relevant market is concerned, such measures have to be adjusted, modified or newly imposed, taking into account the regulatory targets and guidelines in relation to the results of the market analysis proceedings



System of implementation

Market definition

Market analysis

Specific obligations

Chapter 4 – „specific obligations“



Regulatory toolbox – the legal framework

- Starting point: result of market analysis proceedings
- identification of one or more undertakings enjoying SMP has to have as a consequence the lifting, maintaining, changing or imposition of specific obligations – the so called „remedies“
- prescribed regulatory tools, but:
- Regulatory body (NRA) may „*under specific circumstances*“ impose also other (wholesale-) obligations on SMP operators in relation to access
 - application to European Commission
 - Decision of European Commission has to be the basis for the upcoming decision



Regulatory toolbox – the legal framework

- system changes: no obligations any longer that are „ex-lege“ connected and tied to the identification as a „*SMP-operator*“
- the imposed obligations have to be proportionate, fitting for the competition problem identified and to be justified
- already imposed obligations for SMP-operators have to be maintained until the lifting or new imposition of obligations
- prioritation of regulatory tools on „wholesale“-level (as well as Carrier[pre]selection) versus regulatory tools on „retail“-level (Art 17 USD)
- all obligations may only be imposed after national Consultation and european Coordination
- all regulatory tools are subject to Art 7 Notification process as well as publishing and coordination



Regulatory tools in the box – „wholesale“, 1st layer

- Obligation of transparency (Art 9 AD)
- Obligation of non-discrimination (Art 10 AD)
- Obligation of accounting separation (Art 11 AD)
- Obligation of access to, and use of, specific network facilities (Art 12 AD)
- Price control and cost accounting obligations (Art 13AD)



Regulatory tools in the box – „retail“, 2nd layer

- Regulatory measures in relation to services for endusers (Art 17 USD)
- Regulatory measures in relation to a specific set of leased lines (Art 12 AD)
- Carrier Selection and Carrier Preselection (Art 19 USD)



Category wholesale: Transparency

- in relation to interconnection and/or access
- making transparent specified information:
 - accounting information
 - technical specifications
 - network characteristics
 - terms and conditions for supply and use and prices
- publishing of reference interconnection offer (with non discrimination)
 - shall be sufficiently unbundled to ensure that undertakings are not required to pay for facilities which are not necessary for requested service
 - giving description of relevant offerings broken down to components to market needs
 - terms and conditions including prices
- publishing of reference unbundling offer (with specific access)
- NRA may specify the information, level of detail, request adaption



Category wholesale: Non-discrimination

- in relation to interconnection and/or access
- Obligation shall ensure that operator in relation to other undertakings
 - applies equivalent conditions
 - in equivalent circumstances
 - providing equivalent services
 - provides services and information to others
 - under the same conditions
 - under the same quality
 - as it provides for its own services
 - or those of its subsidiaries or partners



Category wholesale: Accounting separation

- in relation to interconnection and/or access
- a vertically integrated company to make transparent its
 - wholesale prices and its internal transfer prices inter alia
 - to ensure either in case of non-discrimination or where necessary
 - to prevent unfair cross-subsidy
- NRA may specify format and accounting methodology
- to ensure compliance NRA shall have powers
 - to require accounting records
 - including data of revenues received from third parties
 - NRA may publish such information to contribute to open and competitive market
 - with respect to rules of commercial confidentiality



Category wholesale: Specific access

- to meet reasonable requests for access to, and use of, specific network elements and associated facilities operators may be required to
 - give access to specific network elements including unbundled access to local loop
 - negotiate in good faith
 - not withdraw already granted access
 - provide specified services on wholesale basis for resale
 - grant open access to technical interfaces for interoperability
 - provide co-location incl. Facility sharing, including duct, building or mast sharing
 - provide services needed for end to end interoperability or mobile roaming
 - provide access to operational support systems to ensure fair competition
 - to interconnect networks or network facilities
- NRA may attach conditions on fairness, reasonableness and timeliness



Category wholesale: Specific access - Limits

- obligations must be proportionate
- take into account following factors:
 - technical and economical viability of using or installing competing facilities
 - market development, nature and type of interconnection
 - feasibility of providing access in relation to capacity available
 - initial investment by facility owner, risks of making investment
 - need to safeguard competition in long term
 - intellectual property rights
 - provision of pan european services



Category wholesale: Price control

- Art 8 and where a market analysis indicates a lack of effective competition
- SMP Operator might to detriment of end-users
 - sustain prices at excessive high level
 - apply price squeeze
- Obligations for cost orientation of prices
- Cost accounting systems
- to be used for the provision of specific types of interconnection or access
- shall take into account investment made
- allow a reasonable rate of return on capital employed
- taking into account risks involved



Category retail: Services for end-users

- Regulatory measures in relation to services for end-users
 - Precondition: no effective competition at the relevant end-user market **and** regulatory tools category wholesale **as well as** Carrier(pre)selection are not sufficient
 - Instruments: e.g. price cap to endusers-prices, final control on individual enduser-tariffs in relation to cost-orientation or benchmarking at comparable markets
 - use of specific cost accounting systems (specificy format, accounting methodology)



Category retail: Minimum set of leased lines

- if NRA Result determines as result of market analysis that
 - the market for the provision of part or
 - all of the minimum set of leased lines is not effectively competitive
- NRA identifies undertakings with SMP in the provision of those specific elements of the minimum set of leased line services
 - in all its territory or
 - part of its territory
- NRA shall impose obligations regarding the provision of the minimum set of leased lines in relation of the standards published and the conditions for such provision set out in Annex VII to USD
- in case of effective competition NRA shall withdraw obligations in relation to this specific leased line market
- The minimum set of leased lines with harmonized standards shall be published and be adapted by the Commission according to technical developments



Category retail: Carrier selection/Preselection

- NRA shall ensure that undertakings notified as having SMP
 - for the provision of connection to and
 - use of the public telephone network at a fixed location
 - in accordance with market analysis and review thereofto enable their subscribers to access the services of any interconnected provider of publicly available telephone services:
 - on a call-by-call basis by dialling a carrier selection code **and**
 - by means of pre-selection, with a facility to override any pre-selected choice on a call-by-call basis by dialling a carrier selection code
- User requirements for these facilities to be implemented on other networks shall be assessed in accordance with market analysis procedure
- NRA shall ensure that pricing for access and interconnection is cost orientated and direct charges to subscribers do not hinder them to use it



Regulatory tools in the box – Conclusion

- the regulatory tools in the box of the EU-Framework are:
 - flexible and may be used in a differentiated way
 - have to be necessary, proportionate, suitable and be ultima-ratio
 - have to be suitable for the competition problems identified on the different relevant markets
 - imposition has to be justified, and published, consulted and coordinated
 - the use of regulatory tools at „retail“-level (2nd layer) shall **only be considered if** those impositions done at „wholesale“-level (1st layer) **and** the imposition of Carrier(pre)selection was not sufficient to achieve the necessary target