

Changing the regulatory framework to keep pace with technical and market developments in the sector

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**I. Market Developments:
Implications of Industry
Consolidation and the
Existing EU Regulatory
Model**

I.1. Consolidation / Regulatory Response

- Do less market actors mean less competition?
- Does the SMP (dominance - individual or collective) test continue to be appropriate in such an environment?
- Would a “substantial lessening of competition” test be more appropriate?

I.2. Consolidation / Regulatory Response

➤ *Merger Regulation* as a precedent:

- Dealing with complex oligopolies.
- Lower legal standard than “dominance”.
- *Ex ante* approach.

➤ Dynamics of ECNs:

- Vertical integration.
- Interconnectivity.
- Network ‘layers’.
- General upstream/wholesale inputs going into broad range of retail / downstream outputs.

➤ Alternative Test:

- “Hampering” or “foreclosing”?
- Redefinition of lack of “effective competition”?
- Imposition of regulation to be seen as the equivalent trigger (in reverse) of entering into a merger?

I.3. Consolidation / Regulatory Response

➤ Should one expand the range of “single network” markets to capture bottlenecks beyond call termination? :

- Example of international roaming.
- Reflections on inter- and intra-modal competition.
- Effects of on-net / off-net price differentials.

➤ Dealing with the convergence of fixed and mobile communications and the lack of symmetry between fixed and mobile regulation:

- Access to mobile ‘resources’ is limited.
- Unfettered access of mobile operators to fixed line operations.
- Relevance of spectrum trading.

**II. Technical Developments:
Regulatory Treatment of New
Generation Networks and VOIP**

II.1. NGNs & VOIP

- Commissioner Reding will “*certainly be looking into the question of a regulatory moratorium for the creation of Next Generation Networks, even though [she] will continue to see a need for regulation in cases of market dominance, as otherwise we risk to stifle competition and innovation*” (i2010 Conference, London, 6/9/2005).
- NGNs enjoy no precise nor universal definition, but are all IP or packet-based integrated networks. Applications and services will be separated from the transport network and all forms of applications and services (voice, data and video) can be organised as packets and delivered on an integrated IP network.

II.2. NGNs & VOIP

➤ Policy implications arising from NGNs:

- PSTN operators, currently heavily regulated, seeking to transform entire networks based on IP to provide IP services hitherto not regulated or lightly regulated (*i.e.*, does ‘original sin’ extend to these?).
- Do NRAs maintain current regulatory regimes for individual platforms or not regulate at all?
- Challenge to traditional categories of wireline/wireless, Internet/broadcasting/telecommunications, as NGNs are further deployed.
- Unclear market outcomes mean that identifying new sources of market power is difficult.
- Traditional policy has focused on opening up incumbent PSTN networks to provide existing services, while NGN challenge is to create a competitive environment for new product and service development.

II.3. NGNs & VOIP

- Whether VOIP should be classified as an application, a public telephone service or a value-added capability.
- Disappearance of local/long distance/international calls distinction.
- Location independence for IP access.
- Need to allow different types of interconnection agreements for different service categories.
- Future definition of USO to expand beyond voice services?
- Need for mutual recognition between numbering, naming and addressing schemes.

- Evolution or revolution in regulatory implications of NGNs?
- VOIP and market definition implications.
- Continued risks of foreclosure.

III. Dealing with “emerging market” practices in a converging environment

III.1. Problematic Practices

➤ Predatory pricing:

- Cost-based.
- Relevance of intent.
- Relevance of profit recoupment.
- Focus on narrower range of services.

➤ Price squeeze:

- Difficulties created by targeted squeezes at segments rather than at markets.
- Importance of establishing a standard for review.
- Foreclosure implications for those seeking to climb the ladder of investment.

➤ Bundling:

- Voice/data/video
- Access/calls

III.2. Problematic Practices

➤ Vertical leveraging and the “sacrifice” principle:

- Raising rivals’ costs.
- Vertical price squeezes.
- Appropriateness of developing a “sacrifice” principle:

...a defendant is liable of anticompetitive behaviour if its conduct “involves a sacrifice of short-term profits or goodwill that makes sense only insofar as it helps the defendant maintain or obtain monopoly power” (US Government in Trinko Case).

- Whether foreclosure going beyond profit sacrifice can also be challenged.

III.3. Problematic Practices

- Dilemma of balancing pro-welfare benefits of cheaper services or bundled services with foreclosure concerns of non-integrated competitors.
- Collapsing network hierarchies and changes in the value chain.
- Striking the right balance between *ex ante* and *ex post* regimes.



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