Policy Options for a Revised EU Access and Interconnection Regime

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Abstract: The formulation of a next generation regulatory model for access and interconnection by 2020 needs to respond to the many pressure points to which the existing regulatory framework for electronic communications has been subject since 2002. These factors range from the analytical elements of the system of market analysis and remedy selection, commercial and technological developments, the adoption of new policy orientations by the European Commission, and the institutional framework for decision-making. The Paper explores the value of maintaining fundamental elements of the present regulatory regime, while adopting a more "hybridized" approach which seeks to bridge the twin disciplines of regulation and competition law.

Key words: access regime, market definition, market analysis, remedies, commercial developments, technological developments, policy orientations, institutional issues, hybridized approach, proposals.

Given the review of the EU's Regulatory Framework for electronic communications networks and services due to commence in the summer of 2015 with a view to its full implementation by 2020 [1] and the very recent announcement of the European Commission

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1 See the Commission's website on current objectives for the Digital Single Market: http://ec.europa.eu/priorities/digital-single-market/index_en.htm and: https://ec.europa.eu/digital-agenda/en/our-goals/pillar-i-digital-single-market#OurActions.

of its 16-point plan to adopt its Single Market Strategy, [2] questions are being asked about the type of regulatory regime which should govern the whole range of access relationships.

At the forefront of those questions is the role which symmetric access regulation can or should play in the future, given that the fundamental policy driver under the existing Regulatory Framework is the imposition of asymmetric access-related remedies designed to address potential market failures arising from the existence of market power in the hands of one or more operators. That question, however, should not be answered in the abstract. Rather, we are best advised to proceed by asking ourselves which are the market, regulatory, policy and institutional failures we wish to address through an access regime that has been based on asymmetric regulation in the first place, in light of our overarching goal of simulating competition through the promotion of wholesale relationships. Through the simulation of such wholesale "market" conditions for access, according to conventional wisdom, competitive pressure at the retail level will deliver increased price competition and innovation for consumers. [3]

The empirical basis upon which this author wishes to proceed is to better understand whether or not the tangible competitive results achieved by the current Regulatory Framework since its inception in 2002 are sustainable under the current regulatory paradigm. Rather than subjecting the current access regime to an economic appraisal, however, as is being done elsewhere by noted economists in this publication, the author's task is to determine whether those results have been delivered by reference to seven key analytical pillars, which have shaped the Regulatory Framework over the years. In conducting a cost-benefit analysis as to whether those analytical pillars have been able to support the desired policy goals, the author seeks to determine whether the current regime's "fitness for purpose" has been called into question.

To this end, whereas an appropriate regulatory response for some might be to adopt greater reliance on symmetric regulation, the appropriate response for others might be to deregulate quite broadly. The likelihood is that our analysis of twelve years of building upon these analytical pillars of

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[2] Refer to Commission Press Release of 6 May 2015, IP/15/4919.

[3] Refer to, for example, Article 12 of Directive 2002/19/EC of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (*Access Directive*), *OJ* L 108, 24.4.2002, pp. 7-20.

the Regulatory Framework will not support either of these extreme responses, but is likely to yield a more nuanced, balanced approach.

■ Seven pillars of analysis

The key analytical pillars of the Regulatory Framework which will be examined below, are:

- the robustness of "relevant markets" definitions in an environment in which methods of service delivery are becoming increasingly more complex;
- the reliability of "market power" analysis in a sector whose newly emergent market actors are exercising influence which cannot be fully understood by sector-specific regulators in "real time";
- the viability of continuing to apply the so-called "three criteria" test as a screening mechanism for regulatory intervention;
- the practical impact of certain remedies being applied (or not applied) and the extent to which those remedies tend to shape market structure;
- the perceived impact of widespread changes in commercial offerings;
- the impact on market outcomes of policy orientations adopted since 2002, and their compatibility with the overall goals of the Regulatory Framework; and
- whether the institutional arrangements adopted in 2002 to govern the effective application of the Regulatory Framework continue their resilience to be able to achieve legal certainty. [4]

Relevant markets definition

The cornerstone of the Regulatory Framework is the idea that asymmetric access (and access supporting) regulation will be imposed only where a "relevant market" has been identified, comparable in most respects to what is understood to be a "market" in antitrust (competition law). [5] Given its role as the threshold issue which governs the imposition of asymmetric

[4] The benefits of legal certainty in this context should be seen through the lens of "effectiveness" in the application of EU law. See, in general, TRIDIMAS (2006), pp. 242-297 ff.

[5] Refer to discussion, pp. 3-8 of the Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation, 9.10.2014 C(2014) 7174 final (*Relevant Markets Recommendation*).

regulation, it is important to acknowledge that the process of market definition has been subject to pressures *inter alia* from a range of sources, including:

- The empirical test used for market definition has been the SSNIP test. However, the SSNIP test is notoriously prone to error as a result of the so-called "Cellophane Fallacy" [6] where the adoption of new technology is at issue and where *ex ante* regulation is in place. In the telecommunications context, the application of the SSNIP test is often little more than a "thought experiment" which is difficult to substantiate where new services have been launched (*e.g.*, broadband) or where regulation is already widespread. As we move to services being provided through Over-the-Top ("OTT") platforms, where users pay no price, the SSNIP test breaks down. [7]

- Partial and "one-way" substitutes have proliferated over the past few years in the form of Internet-based messaging and voice services such as Skype, WhatsApp, Messenger, Viber, Instagram, Snapchat, Tumblr and the other means of messaging provided by social media platforms such as Facebook and Twitter, [8] to name a few. In addition, there is no longer an issue that VOIP-based voice services are fully substitutable for traditional transmissions over a copper network. [9] In a jurisdiction such as Austria, [10] the usual divide between fixed and mobile, at least when it comes to broadband communications, can no longer be sustained.

- From a commercial point of view, the rapid growth of "triple play", "quadruple play" or "converged" service offerings has meant that there has been a constant blurring of the outer limits of traditional narrow market definitions at the retail level. [11] Retail market definitions are highly relevant for wholesale market access in those situations where there is a need for wholesale access to allow competitors to replicate a retail bundle, and if an indirect pricing constraint exists at the wholesale level. The intervention of

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6 See para. 19 of the Commission Notice on the definition of relevant market for the purposes of Community competition law, *OJ* C 372, 9.12.1997, pp. 5-13. See *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956).

7 An extra layer of complication lies in the application of the SSNIP test to "two-sided" markets, which characterise various OTT applications.

8 See the discussions Case M.7217 – *Facebook/WhatsApp* and Commission Decision of 7 October 2011 in Case M.6281 – *Microsoft / Skype*. See also the CERRE Study, "*Market Definition, Market Power and regulatory Interaction in Electronic Communications Markets*", esp. Ch.8.

9 See, for example, WIK-Consult (2013), p. 3.

10 See OECD Report, 2014, p. 25; more specifically, see Case AT-2009-0970.

11 See, for example, BEREC *(*2010).

certain National Regulatory Authorities such as the UK's Ofcom in "access to content" requests [12] has further complicated traditional access considerations.

- New economic literature is increasingly suggesting that the traditional analytical condition precedent of defining a market is no longer required, and that antitrust analysis is better directed at understanding anti-competitive effects, irrespective of where market boundaries are drawn. [13]

Thus, technology, commercial practices and new economic thinking are all casting doubts on the relative certainty and importance to be accorded to the process of market definition.

Market power analysis

Having identified a relevant market, it is necessary to proceed to the next analytical step, namely, that of determining whether any entity or entities are adjudged to hold Significant Market Power (equivalent to "dominance") or ("SMP") in such relevant markets. [14] A number of phenomena that have arisen over the past 12 years, however, suggest that the traditional exercise of measuring market power as the basis upon which asymmetric regulation is to be imposed, are prone to uncertainty. In this regard, a number of factors should be taken into consideration, including:

- The usual yardstick for measuring market power is the ability of a firm to exercise "power over price". Practice dictates, however, that the usual concerns about excessive pricing have not materialised at the retail level. Indeed, the commoditisation of many telecommunications services has meant that most retail prices are highly competitive, which accounts for the fact that the majority of competition case-law reflects low pricing through predatory or margin squeezing behaviour, leading to competitor

12 See *Sky Broadcasting Limited, Virgin Media, Inc, The Football Association Premier League Limited and British Telecommunications plc v Office of Communications*, [2012] CAT 20, Judgment of 8 August 2012, para. 404.

13. For example, in the context of mergers, refer to the discussion in COATE & FISCHER (2014), p. 422.

14 See Article 14(2) of the *Framework Directive* 2002/21/EC and the Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, *OJ* C 165, 11.07.2002, pp. 6-31, esp. para 34 (the "*SMP Guidelines*").

foreclosure. [15] It is thus arguable that the potential for most high prices lies only at the wholesale level for one-way access requests, as even interconnection charges are likely to decrease over time given the fact that increased concentration in the sector means that bargaining power among competitors becomes largely equalised. [16]

- A finding of collective dominance (collective SMP) has been, in all but the most straightforward of cases in very small EU Member States, virtually impossible to implement given the very high legal burden of proof required to establish that legal characterisation. [17] Consequently, it is only individual firms which are subject to asymmetric regulation. The alternative available legal test designed to address market failures beyond an individual firm is that used in the so-called "gap" cases under the EU Merger Regulation, [18] which applies in the context of the application of the "Substantial Lessening of Effective Competition" test under merger reviews, and is even more prone to legal uncertainty in an *ex ante* context.

- Technology has eroded the traditional assumption that certain legal and structural barriers are as pernicious as thought originally. For example, the increasing intelligence in mobile handsets directs end users to different providers, while mobile penetration rates in excess of 150% across many advanced jurisdictions in turn suggests that it is commonplace for end users to have two mobile subscriptions. In both cases, the conventional wisdom that an individual telephone number is an absolute "bottleneck" is therefore open to question. [19]

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15 For example, see Case *C-202/07 P, France Telecom v. Commission* [2009] ECR I-2369, Case C-295/12 P, *Telefónica and Telefónica de España v. Commission*, Judgment of 10 July 2014 [NYR] and Case C‑280/08 *P Deutsche Telekom v. Commission* [2010] ECR I‑9555.

16 Query also the impact on retail pricing in highly concentrated markets.

17 In the context of collective dominance in broadband, see the case in Malta under a market referral under Article 7 of the *Framework Directive* (Case Number MT/2007/563). However, more recently in Malta, the MCA concluded that no operator enjoyed single or collective SMP (See Case MT/2008/0803): https://www.mca.org.mt/sites/default/files/attachments/decisions/2013/final-decision-market-analysis-of-the-wholesale-broadband-access-market-market-5-060313.pdf (p. 16)

18 See, for example, Case M.3916 *T-Mobile/Tele.Ring*.

19 Examples include Google's new wireless MVNO technology, which allows end-users to choose service providers while roaming on data, allowing end-users to use instant messaging features, which do not require an individual telephone number. In addition, Apple phones are embedded with technology which automatically selects the "best" mobile operator when roaming: https://support.apple.com/en-us/HT201643.

- The proliferation of a raft of symmetric remedies, introduced in amendments to the *Access Directive* [20] and other EU instruments of secondary legislation [21] largely in the belief that the SMP approach to *ex ante* regulation was insufficient, has meant that wholesale market dynamics have changed dramatically over the years. For example, a number of NRAs have taken the view that symmetric deep physical fibre access is appropriate, while SMP-based regulation of fibre access would have a negative impact on investment incentives across the sector. [22]

- Measuring indirect pricing constraints created by platforms which are closed to wholesale network access (*e.g.*, cable TV networks) has proven to be a very difficult exercise in practice, yet the role of those networks on retail competition is indisputable. In the case of the Netherlands, for example, the regulated incumbent (ICPN) has less retail market share than the largest cable operator (Ziggo). [23]

- The proliferation of converged service offerings is very quickly changing the access dynamic, as greater variety and intensity in competition between converged offerings is not necessarily equated with a greater range of access options. [24]

- The meteoric growth of OTT operators providing communications alternatives which bypass traditional regulatory frameworks also provides a tangible source of countervailing bargaining power against the power of traditional network operators, which are obliged to deal with the most noteworthy of these OTT operators. [25]

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[20] See Directive 2009/140/EC of 25 November 2009 amending the 2002 Directives, *OJ* L 337, 18.12.2009, Articles 13a and 13b; see also Regulation (EU) No 531/2012, *OJ* L 172, 30.6.2012, Articles 1 and 3.

[21] Refer Directive 2014/61/EU of 15 May 2014; any "network operator" is under an obligation to meet all reasonable written requests for access to its physical infrastructure "*under fair and reasonable terms and conditions […]*". That obligation can only be overcome where objective reasons justify the failure of the network operator to grant access.

[22] Refer to BEREC Report of October 2011 on the implementation of the *NGA Recommendation* with regard to the situations in Spain, France, Portugal and Croatia.

[23] See, in particular, the discussions regarding the impact of cable TV networks on fixed incumbent PSTN operators in broadband access cases. See, for example, Case PT/2008/0850; and Case PT/2008/0851.

[24] Thus, end-users might well be experiencing better pricing and a broader range of innovative services, while at the same time the market might be being served by a smaller number of market actors.

[25] See discussion, pp. 13-15 of the 2014 Commission Recommendation on relevant product and service markets, *op. cit*. Refer to points 11 and 12 of the Commission's Digital Single Market Strategy statement of 6 April 2015, Commission Press Release IP/15/4919. Also refer to

The net effect of these developments is that appraisals of the existence of "market power" in well-defined product markets are increasingly complex and difficult to justify on the basis of the imposition of forward-looking regulatory obligations. This tends to undermine the certainty of forward-looking appraisals of market power.

The "three criteria" test

The definition of a relevant market must itself be subject to a threshold analysis of whether any given relevant market is worthy of regulatory intervention, which is achieved through the application of the so-called "three criteria" test. [26] In particular, the strength of each of the specified criteria has been eroded over time by reference to the following:

- *Criterion 1 (entry barriers):* At least in the mobile sector, it is difficult to reconcile the traditional concept of an insurmountable entry barrier when penetration rates significantly exceed 100% and where there is widespread use of multiple SIM-cards, while at the same time intelligent routing through handsets with ever-increasing functionality becomes commonplace. In addition, the plethora of OTT players means that the usual costs of market entry that have been borne in the past by traditional telecommunications operators are rapidly diminishing.

- *Criterion 2 (dynamic competition behind entry barriers):* The consideration of the second criterion – the extent of competition behind the entry barriers (criterion 1) has created an enforcement dilemma, insofar as NRAs are often guilty of having made a truncated "market analysis" (see above) in applying this threshold test. However, it is important that its function as a pre-condition to market analysis not be confused with the act of market analysis itself.

- *Criterion 3: (the effectiveness of competition rules):* Since the adoption of the Regulatory Framework in 2002, the adoption of regulatory-oriented merger control remedies in a series of cases and the increased use of

consultations proposed in non-EU jurisdictions such as India (March 2015, "Consultation Paper on Regulatory Framework for Over-the-top ('OTT') services").

26 See pp. 7-8 of Commission *Relevant Markets Recommendation*, *op. cit*.

"Article 9" settlements [27] has arguably shifted the traditional balance between *ex ante* and *ex post* behavioural intervention.

As a result of these technological and juridical developments, the coherence of the "three criteria" test as the sole benchmark for regulatory intervention in the imposition of asymmetric remedies is being increasingly called into question.

Remedy selection

The imposition of asymmetric access remedies is the culmination of the process under the Regulatory Framework by which operators with SMP are identified in relation to designated relevant markets. Upon identifying the range of potential market failures that might arise from the existence of SMP, remedies need to be crafted by NRAs which address those identified market failures. [28] Nevertheless, the process of remedy selection has raised serious concerns about the coherence of the Regulatory Framework under the "Article 7" review process. For example:

- The overarching policy goal of achieving greater harmonisation has been weakened by the fact that the identification of sub-national markets for fixed broadband services and the application of differential remedies designed to take into account the particular circumstances of certain operators SMP in particular relevant markets (*e.g.*, such as call termination). [29] While the results reflected in such measures may have produced the correct results on the facts, it is nevertheless still the case that they have done so at the expense of the Commission's goal of creating pan-European markets, resulting inevitably in greater geographic fragmentation.

- While the application of the principle of "technology neutrality" is a laudable one for the process of market definition, it is also the case that it has been adopted like a mantra over the years in the context of remedy enforcement. However, as the introduction of GSM technology to the EU has demonstrated in the past, the identification of a key technology for the

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[27] Article 9(1) of *Regulation 1/2003* (*OJ* L1/1 of 4.1.2003) provides the possibility that a competition law infringement can be brought to an end if commitments are offered which "meet the concerns" expressed by the Commission in its preliminary assessment.

[28] See Recitals 14 to 15 and Article 5 of the *Access Directive*, *op. cit.*

[29] For example, see BEREC Opinion, Phase II investigation pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC, Case: LV/2012/1296; see also Commission Decision concerning wholesale broadband access, UK/2007/0733, SG-Greffe (2008) D/200640.

industry has been a key driver in the development of the industry. Similarly, it is difficult to reconcile the adherence to such a policy if it will mean that, in an NGA environment, the net result might be that operators could deny access to competitors by simply choosing to deploy "closed" network architectures. [30]

- The widespread availability of converged or bundled service offerings will create increasing pressure on the application of formal *ex ante* screening mechanisms designed to determine whether a bundled offering is likely to generate a margin squeeze situation, especially in the face of elements of the package being regulated and others falling outside regulation. [31] Those problems escalate in their intensity when one of the elements of the bundle is content-based.

- The split between business and consumer customers, on the one hand, and that between national and pan-European markets, on the other, has been elusive to draw in practice, resulting in the progressive break-down over time of these categories. While different approaches might be justified from a policy perspective to target specific remedies to these customer segments, the process of market definition renders such a differentiation problematic. [32]

- It is clear that a number of regulators have had recourse wrongly to Article 5 of the *Access Directive* as the basis upon which they can justify access regulation by reference to the need to justify "end-to-end connectivity". [33] In doing so, they have circumvented the system of European Commission review established under the Article 7 review process set forth in the *Framework Directive*.

- The Article 7 review process has led to a number of unsatisfactory results, many of which focus on the particular costing formula adopted in each case by an NRA submitting its remedies for the Commission's assessment. Given the fact that the Commission effectively asserts its rights

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30 Refer to Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (NGA) (Text with EEA relevance) (2010/572/EU), *OJ* L 251/35 (the "NGA Recommendation"), and its draft 2008 predecessor.

31 See BEREC Report on the Discussion on the application of margin squeeze tests to bundles, of March 2009, para 25.

32 Thus, see for example, the Relevant Markets Recommendation, para 7.

33 Article 5 of the *Access Directive* is an exceptional form of intervention, and should not become a "back door" to regulating access. Poland has had recourse to this provision on a number of occasions and Belgium has also used Article 5 to prevent an operator form blocking access to VAS services and to require the operator to convey traffic to host networks of the VAS providers.

to prescribe mandated cost formulae through "soft law" instruments, [34] despite the fact that the *Arcor Ruling* [35] specifies that Member States have significant leeway in choosing a costing formula of their choice, and given the fact that the Commission has historically had no legal "veto" power over remedies proposed by NRAs (and supported by BEREC), the current Article 7 review process has increasingly lost its efficacy over the years.

Accordingly, there are many signs that the current process of remedy selection and enforcement leaves much to be desired if considered in light of achieving the parallel goals of harmonisation, efficiency, proportionality and enforceability.

Commercial and technological developments

Arguably the greatest disruptions that have occurred to the system of asymmetric regulation established under the Regulatory Framework since its inception in 2002 have been reflected in a range of important commercial developments. Some of these key developments include:

- An escalation in the growth of bypass possibilities to traditional transmission networks has been created through the introduction of new technologies and new means of communication via social networking mechanisms and software adaptations (see also discussion on market definition). Tension has arisen in those instances where traditional network operators have provided the supporting infrastructure for the services of OTTs, while at the same time alleging that they have not been adequately compensated for transmission.
- The inexorable growth in data communications vis-à-vis voice has occurred, as has the importance of bandwidth-hungry data applications as the proportion of the overall communications needs of a consumer. In parallel, the commoditisation of voice services has driven down prices for voice services. In parallel, the mobile sector has seen the significant erosion

34 For example, through the adoption of the Commission Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU, 7 May 2009 (2009/396/EC) *OJ* L 124/67 and, more recently, through the Commission Recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment, C(2013) 5761.

35 See Case C-55/06 *Arcor AG & Co. KG* [2008] ECR I-2931, paras. 153-159.

of revenue streams from network externalities such as termination charges and international roaming charges. [36]

- The migration to new generations of technology by 2020 will occur in both the fixed line and mobile sectors, whether in the form of LTE and 5G technologies respectively. In addition, the advent of VOIP technology [37] has facilitated the integration of both the fixed and mobile networks.

- The possibility of pan-European market entry has been made available, whether by operators relying on IP Interconnect, the grant of MVNO status under the revised *Roaming Regulation*, [38] or the possible desire to roll out fibre in discrete urban areas (*e.g.*, as most recently announced by Google).

- Differences in the take-up of MVNO options and LLU across the respective mobile and fixed line sectors in the EU Member States has created very different patterns in the "ladder of investment" found across the different EU Member States.

- There has been a rapid growth in the popularity of network sharing arrangements, both to save costs in the deployment of Next Generation Networks and in order to minimise delays caused by approvals processes by local authorities. [39]

As a result of these developments, the communications sector of 2015 looks fundamentally different to that of the year 2002. These radical changes in the structure of competition at the level of the EU Member States in turn generate a different dynamic for the justification of access obligations.

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[36] The loss of these revenue streams has been particularly difficult for smaller mobile operators to absorb.

[37] Fixed-mobile convergence has been driven by the increased mobility and demand for multi-play offerings of consumers, allowing mobile phones greater connectivity, which has also facilitated the development of end-user usage of VOIP applications.

[38] See Recitals 25, 27 and 80 of Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union, *OJ* L 172, 30.6.2012, pp. 10-35.

[39] See, for example, OECD (2014), "Wireless Market Structures and Network Sharing", OECD Digital Economy Papers, No. 243, OECD Publishing. See, among others, Commission Decision of 1 March 2010 in Case COMP/M.5650 *T-Mobile / Orange UK*, para. 105; Commission Decision in Case No. COMP/M.6992. *Hutchison 3G UK / Telefonica Ireland*, 28 May 2014, paras. 760, 883 and paras. 920 to 924.

New policy orientations

The original working assumptions of the Regulatory Framework have also been subject to significant pressure as a result of changes in the Commission's thinking as regards fundamental policy orientations since 2002. For example:

- The latest wave of European Commission policy seeks to actively promote the creation of pan-European communications markets through the introduction of institutional arrangements which support such services. [40] Unfortunately, the programme – which was largely rejected by European Parliament [41] – seems to ignore the fact that consumption patterns on the demand side and national regulation (even if in furtherance of EU standards) create an environment where the vast majority of telecommunications "markets" are residually national in scope.

- The establishment of a Digital Agenda for 2020 established clear performance goals to be reached by the year 2020. [42] This setting of goals is arguably problematic in and of itself, given the fact that the sector is subject to relatively short business cycles compared to other sectors such as energy, coupled with the impact of disruptive technology and the uncertainties of predicting results in a sector driven by "market" conditions, in contrast to long-term State-sponsored planning for capacity management and investment. With the benefit of hindsight, it is clear that the goals of the Digital Agenda were overly ambitious, having been fuelled by supply-side optimism; the passage of time has tended to indicate that there is insufficient demand to drive the anticipated levels of penetration and fixed network deployment.

- The promotion of the goal of consolidation as an overriding industrial policy goal has been promoted at the highest levels of European policymaking, [43] based on the understanding that European firms should be able to build scale businesses, which can compete globally. This policy is being pursued in parallel with a policy of promoting investment in broadband infrastructure by incumbent operators as a trade-off with deregulatory

40 See http://europa.eu/rapid/press-release_IP-13-828_en.htm.

41 EurActive article: http://www.euractiv.com/infosociety/telecoms-reform-passes-parliamen-news-534230 See also: http://europa.eu/rapid/press-release_SPEECH-14-2182_en.htm.

42 See Commission website for the "Digital Agenda 202 Strategy".

43 See, for example, the *Financial Times* articles, "Lex in-depth: European telecoms", November 2014; and "Merkel backs EU telco consolidation", May 2014.

measures, [44] while at the same time pursuing a policy of "stabilising" access prices. [45] With respect, the idea that consolidation can proceed without sector-specific regulation [46] to act as a counterweight to competition concerns, while simultaneously raising the price of wholesale access inputs for competitors, is difficult to reconcile with the "virtuous circle" usually associated with greater competition driving higher investment. [47]

- As clearly explained in the article by SHORTALL & CAVE in this publication, actions taken by NRAs under the original version of the *NGA Recommendation* and its final form in 2010 have produced significantly different results in terms of network deployment and broadband availability. These mixed signals inevitably mean that there is no "one size fits all" of regulatory model that is best suited to deliver tangible benefits in terms of broadband deployment.

- The proliferation of MVNO requirements and spectrum divestitures as elements of remedy packages in mobile sector merger reviews, [48] when considered in contrast to the relative lack of MVNO remedies at national level under *ex ante* regulation and the allocation of spectrum at very high valuations under national auction procedures, distorts competitive market entry conditions for many new entrants, depending on the maturity of the relevant market at their time of entry.

- The various revisions of the *Roaming Regulation* [49] have progressively collapsed the market for international roaming across the EU, while at the same time have heralded the introduction of MVNOs on a pan-

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44 For example, it is generally understood that, in September 2014, EU Member States agreed to deregulate voice markets on the understanding that incumbent telecommunications operators would boost investment in broadband infrastructure.

45 See, for example, Commission Recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment, C (2013) 5761.

46 *Ex ante* regulation is much more likely to be effective in countering competition concerns generated by systemic issues in the sector than looser behavioural remedies imposed in the context of a merger review.

47 See *Financial Times* Article, "Competition chief sends tough message to EU telecoms", 8 March 2015.

48 See, for example, Case No. COMP/M.7018, *Telefónica Deutschland / E-Plus*, 2 July 2014; Case No. COMP/M.6992. *Hutchison 3G UK / Telefonica Ireland*, 28 May 2014 and; Case No COMP/M.6497 *Hutchison 3G Austria / Orange Austria*, 12 December 2012.

49 See Regulation (EC) No 717/2007 of 27 June, *OJ* L. 171/32; Regulation (EC) No 544/2009 oon roaming on public mobile telephone networks within the Community and the *Framework Directive op. cit*.; and Regulation (EU) No 531/2012, *OJ* L 172, 30.6.2012, pp. 10-35. Query whether the very existence of roaming differentials promoted pan-European investment for certain operators to internalise costs and develop a competitive advantage.

European basis which means that operations at scale are possible. When one takes into account the progressive downward spiral of mobile termination costs, the net result of these two developments is that the smallest mobile operators from each EU Member State, especially where those markets are mature, are left with little option other than to seek consolidation with a larger operator. This will have its own impact on the momentum for operators to achieve greater consolidation across European frontiers.

- Finally, there are political signs that the regime to be adopted in the EU as regards the process of Net Neutrality might be materially different to that adopted in the US, insofar as the broad prohibition of non-discrimination might be more flexible by allowing network operators to provide differential pricing for "specialised services". If that is the case, the possibility arises that EU policy will provide less impetus to network operators being assigned the role of "dumb pipes" in the "Information Society", [50] but as key promoters of innovation.

As is reflected in the above observations, the shifts in policy orientation under the Regulatory Framework mean that a different competitive dynamic is being created or supported by EU sector-specific regulation. Because of that changing competitive dynamic, it is arguable that the role and scope of access regulation might need to be fundamentally different in the near future.

Institutional issues

Last, but by no means least, it needs to be borne in mind that the institutional structure which underpins the workings of the Regulatory Framework has been subject to a serious degree of stress over the years, largely aggravated by the novel means by which the key institutional stakeholders in the regulatory debate (*i.e.*, the Commission, the NRAs and BEREC), coupled with the interests of regulated access providers and access seekers, co-exist under the institutional structures established since 2002. More particularly:

[50] See, for example, *Financial Times* article of 16 February 2010, "Google seeks peace with mobile critics". Refer also to ALEXIADIS & COCKCROFT, 2014. Most recently, Facebook has announced that there should be different prices for premium content: http://www.wired.co.uk/news/archive/2015-05/05/facebook-net-neutrality.

- The European Commission has found itself sitting at the apex of a decision-making triangle, where its powers are not subject to any form of effective judicial scrutiny in a large number of cases. By comparison, the decision-making onus falls disproportionately on the shoulders of the NRAs, for it is they that are subject to the vast majority of appeals under the institutional structure of review established under the *Framework Directive* under the "Article 7" procedure. [51] That disproportionate share of implementation responsibility under the Regulatory Framework has placed the NRAs in an invidious position *vis-à-vis* SMP-designated operators, especially since their decisions are subject to judicial review under local legal traditions, with the approach of national judges varying significantly with regard to the treatment of "soft law" pronouncements from EU institutions. [52] By contrast, given that the vast bulk of the Commission's work consists of delivering its comments on NRA proposals for remedies, it is not in fact even susceptible to challenge before the European Courts. [53] Questions of legal certainty are further compromised by the very vague standard of deference found in the expression "take the utmost account" used under the Regulatory Framework to explain how NRAs must react to Commission guidance and how the Commission should react to the proposals of BEREC (and *vice versa*). [54]

- There exists a significant disconnect between the standard of judicial review supposedly adopted by NRAs and those adopted by the General Court in the review of European Commission Decisions (even if the latter type of decision is small in absolute numbers). The Decisions of NRAs are reviewed "on the merits", [55] a significantly higher standard of review than that of "manifest error" [56] adopted by the General Court in its review of Commission Decisions.

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51 See Articles 4 and 7 of the *Framework Directive*, *op. cit.*, the two legal mechanisms in the EU Framework designed to ensure the accountability and independence of NRAs.

52 The expression "soft law" is attached to those legal instruments issued by EU institutions which are neither primary (*e.g.*, Treaties) nor secondary (*e.g.*, Directives) level legal instruments (*e.g.*, *Recommendations*, *Guidelines*, *etc.*). As such, they also provide flexibility so as to allow adaptation to changes in technology.

53 For example, see the case of the Court of First Instance in Case T-109/06 *Vodafone España and Vodafone Group v Commission* [2007] ECR I-0000.

54 See, for example, BEREC website: http://berec.europa.eu/eng/about_berec/what_is_berec/.

55 See Article 4(1) of the *Framework Directive (op. cit.)*.

56 For example, see Case T-340/03, *France Telecom SA vs. Commission*, [2007] ECR II-107, para.129.

- *Ex ante* decision-making under the Regulatory Framework is devolved at the level of initial decision-making, but then becomes highly centralised as the Commission's power of review is exercised. [57] This is in stark contrast to the institutional framework which applies to the application of *ex post* competition rules, which is highly decentralised and in relation to which cooperation is largely focused upon delineating clear jurisdictional competence for matters. [58] This tension in decision-making will arguably be exacerbated in the future, as there is an existing tendency for the fusion within the same regulatory body of both regulatory and competition functions, especially given the prevailing climate within which the European Commission is pursuing overtly industrial policy aims in parallel with competition law enforcement. [59]

- Existing powers have been added to the Regulatory Framework over the years through the passage of various legislative amendments, but there has been no inclination to enforce them in practice. In particular, existing powers exist for the Commission to declare that certain trans-national markets are worthy of market analysis, [60] while NRAs have the power to propose that regulatory intervention might trigger a functional or structural separation remedy in extreme circumstances where traditional access remedies are not working efficiently. [61] The failure to have recourse to these provisions must throw into question their utility, or at least their relevance under the current institutional regime.

- There is a tension created between the insistence under the Regulatory Framework that market entry should occur on non-discriminatory terms [62] and the fact that scarce assets can be subject to efficient auction procedures, [63] while at the same time the Commission's powers of merger review consistently facilitate market entry and, in doing so, depreciate the

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57 See *supra*, the discussions on Article 4, 7, 7a and 15-16 of the *Framework Directive (op. cit.).*

58 See Recital 33 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *OJ* L. 1/1. Also, see Articles 11, 15 and 31 of the same Regulation.

59 Most notably, as has occurred recently in the Netherlands and in Spain. In EU Member States such as the UK and Greece, OFCOM and the EETT exercise competition and regulatory powers in parallel in relation to the electronic communications sector.

60 Refer to Article 15(4) of the *Framework Directive (op. cit.).*

61 See Article 13a (1) of the *Access Directive (op. cit.)*.

62 See, for example, Articles 5 and 6 of the Directive 2002/20/EC (*Authorization Directive*).

63 See Recitals 23 and 32 and Article 7 of the *Authorization Directive (op. cit.)*.

value of scarce resources otherwise made available under bidding conditions. [64]

The combination of these factors suggests that the existing institutional arrangements are compromised in their ability to deliver the principal policy goals under the Regulatory Framework. It is suggested that any forward-looking approach needs to take these institutional shortcomings into account when formulating an access regime for the future.

■ Support for the introduction of a "hybridized" approach underpinning a future regulatory regime

Taking all of the elements discussed above into account, while at the same time bearing in mind that the EU's Regulatory Framework has both been the regulatory model embraced across most parts of the world and one which has delivered material competitive results, it is proposed that the time is now ripe to fine tune the existing Regulatory Framework for the year 2020 in a manner which responds to the many and varied commercial, regulatory, technological and institutional issues raised above.

The preliminary conclusions of the author are that, in the absence of further fundamental changes occurring in the electronic communications sector, the need for symmetric (*i.e.*, more widespread) access regulation is unproven. Indeed, there is a case for arguing that less – albeit more targeted – asymmetric access regulation is required. As a counterweight, however, it is also the case that institutional changes need to be made to continue the promotion of flexibility in the regulatory regime, while at the same time being mindful of the need to satisfy two important existing institutional shortcomings in the form of: (1) the need for greater responsibility to be exercised by the Commission in its decision-making capacity, through a different cooperative decision-making mechanism which includes other institutional stakeholders such as BEREC and the NRAs; and (2) the need for *ex post* competition rules to operate in harmony with *ex ante* policies, rather than in parallel with one another. To this end, it is proposed that the

64 See, Case No COMP/M.5650 – *T-Mobile/ Orange*, 1 March 2010; Case M.6497, *Hutchison 3G Austria / Orange Austria*, 12 December 2012 and Case M.7018 *Telefonica Deutschland / E-Plus*, 2 July 2014 (subject to appeal before the General Court).

EU adopt a more "hybridized" approach, [65] which seeks to blend both *ex ante* and *ex post* disciplines into a coherent policy blend for the electronic communications sector.

The adoption of a "hybridized" approach to regulation in the electronic communications sector is not without precedent, both within and outside the EU. Indeed, elements in the logic of such an approach can be found in a range of varied legal instruments, including:

- The procedures adopted to pursue Sector Inquiries under *Regulation 1/2003*, [66] whereby market failures, along with their causes and likely solutions, can be identified in a timely, efficient fashion across a sector. [67] This can be achieved by bringing all stakeholders into the decision-making process, which currently culminates in recommendations for future conduct and, failing changes to such conduct, the initiation of antitrust investigations.

- The pursuit of *de facto* regulatory policies through the creation of a range of behavioural and governance-related remedies introduced by the Commission in the exercise of its powers under the EU *Merger Regulation*. [68] Indeed, EU merger practice, as seen in the *Newscorp / Telepiù* Case, [69] suggests that the implementation of merger remedies by a regulatory body might be the appropriate means by which to achieve optimum policy enforcement.

- The Market Investigation procedure which exists under the UK's *Enterprise Act 2002*, as recently amended by the UK *Enterprise and Reform Act 2013* (*Reform Act*), provides an equivalent regime to the EU's Sector Inquiry powers through "market inquiry" provisions which can be triggered where the circumstances suggest that a market is not performing effectively. [70]

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65 The expression is explored more generally by DUNNE (2014) pp. 225-269.

66 See Article 17 of *Regulation 1/2003 (op. cit.)*.

67 Sector Inquiries have been held in areas as varied as telecommunications (the local loop, leased lines, roaming), energy, financial services, pharmaceuticals and media.

68 Explored further in P. ALEXIADIS, "*Merger Control in Regulated Sectors: A Bridge Too Far*?" *Liber Amicorum for Ian Forrester*, QC (publication pending).

69 See Commission Decision, Case No COMP/M. 2876 - *Newscorp / Telepiù*, 2 April 2003, section D.1 and 11.9. The access remedies ultimately to be adopted in the *Orange / Jazztel* merger (Decision pending at the time of writing) are likely to be made subject to the regulatory requirements imposed by the merged regulatory/competition regulator; see Commission Press Release of 26 January 2015, IP/ 15/3680.

70 Under the UK *Enterprise Act*, the OFT was empowered to conduct market studies and to make a market investigation referral to the UK Commission if it had reasonable grounds for suspecting that competition was not working effectively in a particular market (See Sections

- The Access to Infrastructure Regulation provisions available under Part III A of Australia's *Competition and Consumer Act 2010*, [71] which subject networks deemed to qualify as essential facilities to a specific access regime overseen by the country's competition regulator, the Australian Competition & Consumer Commission ("ACCC"). Recent considerations for the amendment of these provisions have concluded that an ACCC declaration designed to ensure network access to third parties should only occur when the grant of access would be in the public interest. The March 2015 conclusions to that report concluded that the National Access Regime in place should be confined to those cases: "where the benefits arising from increased competition in dependent markets are likely to outweigh the costs of regulated third party access". [72]

- The prohibition in the United States of "unfair methods of competition", as found under Section 5 of the US *Federal Trade Commission Act*, provides a basis for intervention by the Federal Trade Commission ("FTC") (but not by private litigants), which is much broader in scope than the antitrust rules usually associated with the antitrust rules contained in the *Sherman Act*. As such, Section 5 has been used in the past to address oligopolistic behaviour, invitations to collude, and even unilateral behaviour falling short of any market share threshold or not falling within the acknowledged categories of "monopolisation" practices. As such, Section 5 actions brought by the FTC play an almost *ex ante* complementary role on the enforcement of antitrust provisions such as Sections 1 and 2 of the *Sherman Act*. [73]

All of the above regimes acknowledge that there exists a symbiotic relationship between the need for antitrust to address firm-specific conduct and the need to implement a flexible system of regulation which is proportionate and responsive to identified market failures. Each of the systems has adopted a different means of achieving results which are

131, 133-134 and 139 of the *Act*.) Under the new regime, the CMA (on *reasonable* grounds) is entitled to make a market investigation reference to its chair for the constitution of a market investigation reference group (Schedule 5 of the *Reform Act*).

71 The actual process for having an undertaking considered by the ACCC will depend on the circumstances, characteristics and complexity in each case. Telecommunications access matters are dealt with under Part XIC of the Act.

72 See also: http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report_online.pdf, pp. 74, 432-433. Refer also to the Access Inquiry Report 2013: http://www.pc.gov.au/inquiries/completed/access-regime/report.

73 For a discussion of the case-law and the controversy surrounding the application of Section 5 of the *Federal Trade Commission Act*, refer to DUNNE (2014).

compatible across the *ex ante* / *ex post* divide, while at the same time not undermining the integrity of either regime.

What follows below is an attempt to forge a hybridized regulatory system for a revamped EU Regulatory Framework, which maintains the core elements of the existing regime while at the same time responding to the necessary changes that have been driven by the experiences of the past twelve years.

■ Proposals for action

Based on the challenges faced by the existing Regulatory Framework (discussed in the 2nd Section) and the author's belief that a hybridized approach (see the 3rd Section) is best adapted to guide *ex ante* regulation in a 2020 access regime, set forth below is an attempt to strike a balance between the various policy drivers deemed to be most relevant to the electronic communications sector (a number of which are in conflict with one another). The key elements of the proposed "hybridized" approach set forth by the author are, *inter alia*:

(A) The maintenance of the essential elements of the existing asymmetric system of access regulation, although modified in five important respects, namely:

- First, a more flexible view of "markets", based on the goals ultimately desired to be achieved by access regulation and the extent to which partial and one-way substitutes are considered by consumers to be in competition with one another. The use of a system of "Sector Inquiry" to identify market failures will provide the analytical basis for the market boundaries identified, driven by identifiable market failure rather than solely by reference to formal demand and supply parameters. In this way, the justification for remedies for pan-European "markets" might be better explained in terms of tangible results for pan-European business offerings.

- Second, due consideration should be given to whether the criterion of intervention, currently established as the "dominance" or "SMP" standard, should be modified so as to reflect a direct connection between the access remedies to be employed and the goals they are designed to achieve by the grant of the access in question. To this end, a criterion such as an "unavoidable trading partner" might avoid many of the difficulties encountered in satisfying the legal hurdle of proving the existence of an

essential facility and the fact that technological change might undermine the concept of a "bottleneck" in its truest sense, [74] while not necessarily obviating the need for an access remedy in broader policy terms. It is felt that the use of the test used in "gap" cases under the Merger Regulation [75] is too nebulous and fact-specific to be reliable in an *ex ante* setting, where regulation is designed to address future market behaviour. [76]

- Third, the role to be played by the existing "three criteria" test can be dismantled. Insofar as a "Sector Inquiry" is performed at regular intervals (*e.g.*, every three years), the particular quirks identified by NRAs in their national environments can be addressed in the context of a Sector Inquiry within a broader institutional platform designed to achieve agreed results (see below). The Sector Inquiry could be driven by the European Commission, with BEREC and the NRAs performing an important advisory role.

- Fourth, consideration should be given to the use of a threshold for the imposition of asymmetric regulation, which is also the basis for the withdrawal of that regulation if no longer satisfied (*i.e.*, deregulation through the operation of an in-built "sunset clause"). Although the same thing arguably should occur under the current regime if an operator is deemed to no longer hold SMP, the reality is that NRAs are reluctant to remove access obligations if they continue to perceive that the market needs competitors on the market based on access relationships. By re-configuring the threshold for *ex ante* regulation in such a way as to take into account the need for an access alternative (*i.e.*, the "unavoidable trading partner" option), the rationale for *ex ante* regulation tends to evaporate. The inclusion of a clear "sunset clause" would also serve the purpose of providing objective, transparent criteria to investors of the limits of *ex ante* intervention, thereby avoiding the inevitable curse of "regulatory capture". [77]

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[74] In this regard, lessons can be learned from the "hybridized" Australian experience, where the "essential facilities" test has been imbued with a range of public policy considerations that render it more responsive to the realities of the electronic communications market.

[75] Which relies on the application of a "substantial lessening of competition" test. Specifically, see Article 2(3) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings *OJ* L 24/1.

[76] Of critical importance is the fact that, according to the Court of Justice Judgment in Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB*, [2011] E.C.R I-00527, mandated access under *ex ante* regulation will be deemed to be required also under an *ex post* analysis.

[77] Regulatory capture occurs where a sector-specific regulator feels compelled to re-shape the regulatory agenda in order to support a smaller operator in the market who has been induced to enter the market at a time when the regulatory regime was favourable to market entry.

- Fifth, the regulatory regime should be responsive to competition law "regulation" achieved through behavioural remedies specified in the context of merger reviews and also Article 9 settlements of actions brought under Articles 101 and 102 TFEU. As such, merger commitments would be monitored and enforced by NRAs, thereby obviating the traditional concern that a merger remedy should not require future monitoring by the Commission's Competition Services. It would seem disproportionate to be re-constructing access relationships so fundamentally under the Commission's various antitrust powers if the *ex ante* regime for electronic communications were not adapted to embrace the results of those antitrust interventions. In order to do so, however, there is every likelihood that the terms of the existing *Framework Directive* would need to be amended so that the jurisdictional reach of NRAs is extended to include such responsibilities. [78]

(B) In pursuing the asymmetric model in the modified manner outlined above, four major policy directions are proposed, the net effect of which is to restrict the scope of symmetric regulation being adopted. These policies are:

- First, the new regime, consistent with the policy of optimising deregulation possibilities, should encourage network-based competition in urban areas, while ensuring the availability of an access option in rural areas. [79] This overarching policy goal should in turn be better synchronised with EU State aids policy regarding the deployment of broadband networks. [80]

- Second, the revised Regulatory Framework should have the flexibility built into it that would allow it to deal with a new generation of actual and emerging market failure issues arising in upstream, downstream or related markets to traditional networks, thereby possibly broadening the scope of regulation while at the same time being mindful of the fact that *ex ante* regulation needs to be sharply focused on real market failures derived from access-related issues (and susceptible to being rolled back if circumstances

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[78] In the author's experience, most NRAs' responsibilities within the EU are expressly limited to those set forth in the existing *Framework Directive (op. cit.)*.

[79] In this regard, refer to SHORTALL & CAVE in this volume. Insofar as certain Member States such as France, Spain and Portugal have already implemented a symmetric approach for deep passive broadband access remedies, the view would be that there is no need for SMP-orientated (asymmetric) regulation.

[80] See, for example, Communication from the EU Commission, Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks (2013/C 25/01). See point 11 of the Commission's Digital Single Market strategy, 6 May 2015, Commission Press Release IP/15/4919.

so dictate). [81] In doing so, thought should be given to whether it is appropriate to extend the definition of an "electronic communications network" or an "electronic communications service" to capture such markets. [82] In addition, the scope of Article 5 of the *Access Directive* needs to be clarified, so that it is used more narrowly than has proven to be the case with some NRAs.

- Third, the need to ensure open network architecture for future access across both fixed and mobile networks should override any principle of "technology neutrality", with the net result being that any new network architecture deployed should be compatible with reasonable access demands from access seekers. Thus, even if it is deemed appropriate that access should not be mandated by *ex ante* asymmetric regulation, it is nevertheless important for NRAs and competition authorities alike to be able to mandate access when the circumstances justify its imposition at a later point in time.

- Fourth, the hybridized regime ultimately adopted at EU level should work in such a way as to not erode the value of scarce resources which are allocated and valued at Member State level. [83]

(C) A re-calibration of existing access and interconnection policies should be considered, insofar as clearer regulatory obligations should be less prone to legal uncertainty. For this reason, it would be proposed that:

- Insofar as an SMP-designated operator wishes to be relieved of an access or interconnection obligation, the onus will rest on its shoulders to prove to institutional stakeholders that the regulatory obligations are no longer necessary.

- With respect to call termination, the level of termination rates is currently so low compared to historical levels, that it can be argued strongly that legal certainty should prevail over the application of any given costing

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[81] To the extent that the EU's institutional stakeholders conclude that the regulation of certain types of OTTs is appropriate, proportionate and likely to lead to positive results in terms of technological efficiency and competitive outcomes, such an approach might be used to address market failures created in key parts of the Internet value chain: refer to Commission Press Release of 6 May 2015(IP/15/4919).

[82] Currently defined under Article 2(a) and 2(b) of the *Framework Directive* (*op. cit.)*.

[83] In other words, the value of spectrum auctioned and allocated at Member State level should not be the subject of "fire sale" conditions as part of a merger remedy package, given that this devaluation of assets has a direct impact on other market actors and on Member State budgets. By the same token, a harmonised approach arguably opens the door for the adoption of a more harmonised approach to spectrum licensing.

formula. Accordingly, the cost of termination might legitimately be driven down to a nominal figure and rest at that figure for five years between now and 2020, with a view to being removed altogether at that point. In the alternative, thought should be given as to whether the called number on any given network continues to be a "bottleneck" in light of technological developments. Insofar as it continues to be such a bottleneck, the issue remains whether, in increasingly consolidated markets, the existence of countervailing bargaining power obviates the need for continued intervention. Failing that, a loosening of regulatory obligations could accompany those that willingly engage in "bill and keep" relationships. Moreover, given the widespread understanding that call termination constitutes a network-specific market (assuming the continued existence of a technological bottleneck), there is little reason to believe that competition rules could not address the abusive pricing practices of a monopoly provider (nor any constructive refusal to deal). [84]

- Similarly, with respect to international roaming within the EU, the temptation also exists to arrive at an average figure, which can be applied to all intra-EU traffic for a period of five years, thereafter to be removed altogether (*i.e.*, zero-price intra-EU roaming). [85] As in the case of call termination, given the current levels to which roaming rates have fallen, [86] the benefits of legal certainty appear clearly to outweigh the benefits of rigorous economic analysis.

- The existing IP Interconnect "best efforts" regime [87] could be retained until a possible new generation of data access issues arises within the context of the scheduled launch of 5G services in the year 2020 (relying on competition law in the interim to resolve disputes). However, consistent with the thinking deployed within the energy sector, [88] it is unlikely that regulators will not be fashioning their ideas about what constitutes "reasonable" interconnection terms in light of the common understanding that an interconnection package based on "Quality of Service" alone might not be consistent with an incentive to deploy new network facilities. Given the

84 Refer to the discussion of the "dependence theory", under Part D of the EU Commission Guidance on Article 82 [2009], (2009/C 45/02).

85 See Proposal for a Regulation concerning the European single market for electronic communications and to achieve a Connected Continent, Brussels, 14 November 2014.

86 See the Commission's website for the current roaming prices from the 1 July 2014: http://ec.europa.eu/digital-agenda/en/roaming-tariffs.

87 See Articles 5 to 8 and 12 of the *Access Directive*, *opt. cit*.

88 See, for example: Case COMP/39.316 - *Gaz de France*, Case COMP/39.315 – *ENI*, Case COMP/39.402 - *RWE*, Case COMP/39.316 - *GDF Suez* and Case COMP/39.317 - *E.ON Gas*.

increasing demand for IP Interconnect services, one imagines that a Commission priority for the provision of guidance will be in this area. [89]

- Given the fact that a range of Member States have already embarked upon a symmetric wholesale access approach, the goal of legal certainty might be best advanced by including a period of migration between that regime and that under the revised Regulatory Framework (*i.e.*, possibly beyond the 3-year review period).

(D) It is proposed that a "Sector Inquiry" be performed at EU level every 3 years in order to consider existing and emerging market failures, acting in cooperation with the NRAs and BEREC. The conduct of such an inquiry would be designed to provide a regular review of market conditions in a manner which creates greater legal certainty, while at the same time preserving the degree of flexibility that is required to allow the Regulatory Framework to adapt to technological and commercial changes. This would obviate the need for Member States to conduct their own individual market reviews at different times and under different conditions, while at the same time allowing them to play an active role in the decision-making process. Most importantly, this process would also be seen to confer greater legitimacy to access decision-making by virtue of earlier cooperation between the European Commission and BEREC, thereby also avoiding the unnecessary confrontationist situation created between the Commission and NRAs under the current procedure available under Article 7 of the *Framework Directive*. It also redresses in part the different enforcement traditions which apply across *ex post* and *ex ante* disciplines. To this end, the adoption of a more consensual approach between institutional stakeholders at a much earlier stage of the decision-making procedure would be designed to achieve the following:

- Result in binding decisions being adopted by the Commission, and directed at SMP-designated operators across the EU, thereby allowing for legal challenge upon appeal to the General Court for affected parties under a common standard of appeal across the EU. Implementation measures going beyond the scope of the subject matter to these decisions could be addressed in national courts. [90] This would remove much of the current enforcement imbalance that exists, whereby NRAs are subject to a

89 See, for example, ARCEP *Report to Parliament and the Government on Net Neutrality*, of September 2012.

90 Clearly, the issue which will be most hotly contested will be the details of access remedies.

disproportionate burden in defending their decisions adopted under the Regulatory Framework.

- Prepare guidance which can be instructive for both *ex ante* and *ex post* purposes in the treatment of potentially problematic commercial practices [91] and for the crafting of remedies. [92] Currently, BEREC has been preparing such position papers largely without the *imprimatur* of the Commission. Given the competition implications arising from such practices, the active participation of the Commission is seen by the author to be a necessary pre-condition to the building of a harmonised approach to issues arising in the electronic communications sector.

- To the extent that NRAs consider their roles diminished by such a realignment of responsibilities, any diminution in workload will be compensated by their increased role in the enforcement of remedies imposed on operators under decisions adopted pursuant to the Commission's powers of merger review and in giving effect to Article 9 settlements, while an enhanced role for NRAs in dispute settlements in the clarification of access duty obligations [93] is also likely to be beneficial. In the particular context of merger remedies designed to address concerns about retail price rises, it might even be envisaged that an NRA be responsible for monitoring that retail prices do not rise beyond a certain percentage range for a 5-year period. [94]

The year 2020 will be a critical year for the European electronic communications sector, both because it signals the scheduled launch of 5G technology and because it allows the EU to take stock of where it stands in terms of satisfying its much promoted 2020 Digital Agenda goals. It also heralds the time when policymakers should heed the signs that a mature Regulatory Framework, which has delivered much to European businesses and consumers since its adoption in 2002, is in need of a series of integrated changes to its analytical and institutional bases. Those changes should not

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91 In other words, predation, margin squeezing, new forms of raising rivals' cost behaviour in an Internet ecosystem, the evaluation of discriminatory practices in general and in net neutrality situations in particular, access to "must have" content, bundling and tying.

92 Including the scope for next generation functional separation, non-discrimination and transparency safeguards in the evolving Internet ecosystem, as well as the development of guidance for the conditions of IP Interconnect.

93 As is envisaged, for example, under Article 3 of the *Framework Directive*, *op. cit.*, and the requirements under Article 10 of Directive 2014/61/EU, *op. cit.*

94 Beyond that 5-year period, the obligation could be removed, pending the acceptance of a submission by the regulated party to the NRAs in question, acting in concert with the Commission.

be in the class of "running repairs", but should be designed to be forward-looking, robust and coherent to cater for an environment in which "the Internet of things" will prevail. The proposed regulatory model outlined above seeks to bring together disparate elements of an access regime designed to achieve those aims, while being mindful of how elusive the fulfillment of those aims might be.

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