

To what extent European Commission and National Regulatory Authorities (NRAs) will share powers under the lights of EU's 2006 review of the Electronic Communication Framework?

Dr. Turgut Ayhan Beydogan*
Kemal ILTER**

Summary

As a result of certain technological development and enhanced competition as well as keeping with the principle of 'better regulation needs a regular review to make sure that it keeps pace with technological and market developments', the EU Commission has reviewed 2002 framework which preliminarily aimed at putting in place an effective market-oriented strategy for spectrum management in Europe's internal market, regulating less, but more effectively, by phasing out ex-ante regulation on certain markets regulated today and streamlining the market review procedures to make it faster and less burdensome as well as consolidating the single market by ensuring that EU rules and remedies are applied consistently across all Member States. In addition to the 'economic' regulation, the reviewing has also aimed to seek ways of providing more protection to the users by laying down legal obligations in the areas of universal service, privacy, data protection and user rights as well as improving network security and repealing some outdated regulations. After and during the review process, discussions concentrated on extended Commission's powers, broadened veto right, authorisation of pan-European services, varying needs of national markets and establishing a single European regulator for the electronic communications market. In this paper, the changes, particularly from the perspective of sharing powers between NRAs and the Commission, are evaluated along with the comments of national governments.

1. Introduction

The European Union (EU) telecommunications sector which is seen as an essential public service¹ has historically been dominated by a strong public service monopoly tradition together with postal services². This structure has begun to change in the early 1980s, with privatisation and the introduction of limited competition in certain Member States (MSs). From the historical perspective, the first stage of common telecommunications policy of the Community was launched in the early 1980s aimed at moving the sector forward to establish common lines including development of the EU standards to lessen fragmentations caused by different national specifications. The second stage was started in 1987³ and climaxed in the liberalisation of all telecommunications services and networks by the end of 1997.

The 1990 Framework Directive established the principle of Open Network Provision⁴. It set a timetable for legislative action identifying the need for a series of harmonisation directives and recommendations. Together with the Licensing Directive, these measures constituted the

* Member of Board, Telecommunications Authority of Turkey

** Telecommunications Expert, Telecommunications Authority of Turkey

¹ Intven H. And McCarthy T., Telecommunications Regulation Handbook, Module 1, InfoDev, p.2

² Forrester I.S., Keegan S., "The Tension between Regulation and Competitive Market Forces In Europe", Tulane European and Civil Law Forum 2006. p.1

³ In 1987, the Commission issued the Green Paper, where it proposed to initiate a process of liberalisation in telecommunications sector. It allowed for only public voice telephony to be left under monopoly.

⁴ The basic principles of ONP are the opening and harmonization of conditions of access to the network infrastructure, for new service providers or for users-a goal complementary to market-opening and fundamental to the development of the services market.

so-called "1998 package" of legislation⁵. However, rapid technological development, convergence and the new challenges of the liberalised markets forced to make a new and coherent framework covering the whole range of electronic communications. As a result of consultations and negotiations, a new regulatory framework has been agreed in 2002 and begun to be applied from July 2003. In 2002 framework, instead of telecommunications, the notion of electronic communications (eCommunications)⁶ was introduced which is wider than the telecommunications since it covers broadcasting networks while content services remained outside of the scope. The new policy framework caters for new, dynamic and largely unpredictable markets with many more market players than earlier and a much more developed and detailed market environment.

Bearing in mind convergence and enhanced competition as well as keeping with the principle of 'better regulation needs a regular review to make sure that it keeps pace with technological and market developments'⁷, the Commission is aware of the fact it should review 2002 framework after certain time so as to remove discrepancies. Also, it is acknowledged that as a result of full liberalisation of eCommunications sector, excessive regulation would be more detrimental rather than beneficial for a further development and flourish of the services concerned.

Under these circumstances the Commission⁸, taking an open, forward-looking approach, has decided to examine the 2002 framework's principles and its implementation thoroughly with the help of expert studies⁹. The main aim is to remove any bottlenecks that are delaying the provision of faster, more innovative and competitive services. While there has not been any intention to change the fundamentals of the EU's telecom rules, the Commission has wanted to pay attention in some areas to make it even more effective, especially as markets and services continue to evolve. During this process Commission's Staff Working Document (SWD)¹⁰ and the Impact Assessment (IA)¹¹ has guided member states and interested sectors. The Commission has also taken advices of European Regulators Group¹² (ERG) into consideration¹³.

The review preliminarily aimed at putting in place an effective market-oriented strategy for spectrum management in Europe's internal market, regulating less, but more effectively, by

⁵ Andriessen J.H.E. and Roe A.R., Telematics and Work, Published by Hove in UK, 1994, p.46

⁶ The eCommunications sector accounts for around 44,5% of the whole ICT sector of EU which is valued at 649 billion in 2006 according to the Commission's 12th Implementation Report.

⁷ http://ec.europa.eu/information_society/policy/ecommm/tomorrow/index_en.htm

⁸ 29 June 2006 The Commission has adopted a Communication on the Review of the EU Regulatory Framework for electronic communications networks and services.COM(2006)334

http://ec.europa.eu/information_society/policy/ecommm/doc/info_centre/public_consult/review/com334_en.pdf

⁹http://ec.europa.eu/information_society/policy/ecommm/info_centre/documentation/studies_ext_consult/index_en.htm#2006

¹⁰ Staff Working Document (SWD), COM(2006) 334 Final, SEC(2006) 816, Brussels, 28.06.2006

http://ec.europa.eu/information_society/policy/ecommm/doc/info_centre/public_consult/review/staffworkingdocument_final.pdf

¹¹ Impact Assessment (IA), COM(2006) 334 Final, SEC(2006) 817, Brussels, 28.06.2006,

http://ec.europa.eu/information_society/policy/ecommm/doc/info_centre/public_consult/review/impactassessment_final.pdf

¹² The European Regulators Group for electronic communications networks and services has been set up by the Commission to provide a suitable mechanism for encouraging cooperation and coordination between NRAs and the Commission http://erg.eu.int/index_en.htm.

¹³ See EU web page for more information

http://ec.europa.eu/information_society/policy/ecommm/tomorrow/index_en.htm

phasing out *ex-ante* regulation on certain markets regulated today¹⁴ and streamlining the market review procedures to make it faster and less burdensome as well as consolidating the single market by ensuring that EU rules and remedies are applied consistently across all MSs. In addition to the ‘economic’ regulation, the reviewing has also aimed to seek ways of providing more protection to the users by laying down legal obligations in the areas of universal service, privacy, data protection and user rights as well as improving network security.

During and after the review process, criticisms concentrating on extended Commission’s powers, i.e. broadened veto right, authorisation of pan-European services, and many of the comments emphasised varying needs of national markets and the need for flexible measures rather than an ‘one-size-fits-all’ approach. Among them, some drew attention to the current drift to IP-networks for which they considered proposed changes incapable to respond to future developments, while some others criticised Commission proposals on the ground of Treaty principles, i.e. ‘proportionality’ and ‘subsidiary’.

In this paper, taking the Commission’s documents¹⁵ including SWD, IA, and Directives into consideration as main sources, the proposed changes, particularly from the perspective of sharing powers between NRAs and the Commission, are evaluated along with the so-called comments notably with those of ERG and national governments. Not delving so much into prospective far-reaching results, this study focuses on the very-conclusive effects of the Commission proposals, and assesses the core points arisen out of the discussions surrounding those proposals. Before starting analysing of the Commission’s proposals, it will be remarkable to comprehend current framework in order to shed more light on the justification of this very significant process.

2. NRAs in current framework

The existing regulatory framework for eCommunications provides a common set of rules consisting of five Directives for all communication services “that are transmitted electronically, whether wireless or fixed, data or voice, Internet-based or circuit switched, broadcast or personal”¹⁶. Its objectives are to encourage competition in the eCommunications markets, to improve the functioning of the internal market, and to protect the interests of European citizens. Competition is very important, but not an end in itself, as a means to promote innovation, investment, and consumer welfare. Moreover, current framework adopts a distinctive novel system whereby regulatory harmonization is reached through the means of well-monitored and encouraged consultation and co-operation procedures among NRAs and the Commission. Having a technology-neutral structure is another aspect of the

¹⁴ Commission proposes to remove *ex-ante* regulation from 11 of the 18 markets within the telecoms sector, including both retail (from operators to consumers) and wholesale (between telecoms operators) markets.

¹⁵ Since the Commission delayed the revealing of last version of the documents to October 2007, only draft version has been taken into consideration.

¹⁶ The Review 2006 of the EU’s regulatory framework for eCommunications: Frequently Asked Questions, p.1 <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/257&format=PDF&aged=1&language=EN&guiLanguage=fr>

framework which means that the framework will be applied equally to all networks and services is a very important issue for the current framework¹⁷.

According to the Commission, "NRAs are best placed to assess the specific conditions in their national markets, and the measures to address them."¹⁸ Thus NRAs enjoy a full and primary responsibility while implementing the framework to achieve the regulatory aims as set out in Article 8 of Framework Directive (FD). Furthermore, NRAs are required to contribute to the development of the EU internal market by removing obstacles, encouraging the establishment and development of trans-European networks, and to cooperate with other NRAs to provide harmonised implementation of the framework as well as to promote the interests of European citizens. Hence, in order to not hinder the enforcement of centralised regulatory approach, the Commission has clearly determined NRAs' tasks with regard to co-operation and consultation procedures among NRAs and the Commission itself.

Although the framework provides for a "light touch" regulatory approach to emerging markets in order to promote investment, this approach is applied to specific cases by the NRAs in close co-operation with the Commission¹⁹. However, the framework does not allow a specific operator or a specific technology to be exempt from regulation as long as there is a structural competition problem. The so-called "Article 7" procedure²⁰ obliges NRAs to notify to the Commission and other NRAs about their market assessments and proposed remedies. The Commission may comment on the draft measures, and in certain cases, exercise its veto power requiring their withdrawal. Hence, the current framework requires NRAs to undertake periodic analysis of identified product and service markets in the eCommunications sector²¹. The starting point for the NRA's market analysis is the Commission's Recommendation on relevant markets and the Guidelines²². NRAs have power to define markets appropriate to national circumstances, particularly relevant geographic markets within their territory, in accordance with the principles of competition law. As specified in Article 15.2 of the FD, which sets out market definition procedures, NRAs shall take the utmost account of the Recommendation and the Guidelines when applying a 3 steps approach involving distinguishing the markets, identifying operators having Significant Market Power²³ (SMP), and selecting and imposing specific remedies in order to compensate market failures²⁴.

¹⁷ Rawson S., Impact Of New Communications Framework On Service Providers, Computer and Telecommunications Law Review 2003, p.2

¹⁸ World Telecommunications Development Conference (Istanbul, Turkey, 18-27 March 2002) Document, INF-24 E, p.2, <http://www.itu.int/ITU-D/conferences/wtdc/2002/doc/info-docs/024E.doc>

¹⁹ For instance, in past years there was a difference between Ofcom and the Commission in defining relevant market whether to include 2G voice call termination services and 3G voice call termination services in the same product market. Case UK/2003/0040: wholesale mobile voice calls termination.

²⁰ Framework Directive (2002/21/EC), OJ L108/33 Article 7(3-4),

²¹ See, particularly, Art.16 of the FD; and Commission Recommendation of February 11, 2003 on relevant product and service markets within the electronic communications sector.

²² Commission Guidelines on market analysis and the assessment of SMP under the Regulatory Framework for eCommunications, 2002/C165/03

http://ec.europa.eu/information_society/policy/ecomm/doc/article_7/guidelines.pdf

²³ See paragraph 70-85 of Guidelines for more information on criteria for assessing SMP

²⁴ De Streel A., The New Concept Of "Significant Market Power" In Electronic Communications: The Hybridisation Of The Sectoral Regulation By Competition Law European Competition Law Review 2003 p.3

As a result of their market analysis, NRAs may conclude that a relevant markets are not effectively competitive based on the identification of undertakings with SMP and than NRAs must impose appropriate regulatory obligations on such undertakings in accordance with the provisions of the relevant directives. However, the Commission has a right to refuse accepting of a notification when it considers that either the market definition or the finding of SMP is incompatible with Community law or could create a barrier to the single market²⁵. This is so-called “veto power” that the Commission enjoys, as a result of which a draft regulation of a NRA is rendered to be void. With regard to Article 7 procedure, the Commission highly asks NRAs to consult with other NRAs and all interested parties as well as itself to ensure a smooth running of a harmonised regulatory approach towards eCommunications. Therefore, the FD obviously refers to consultation mechanism for more effective implementation of the common regulatory regimes²⁶. Anyhow, the Commission has certainly confined NRAs’ power within a coordinated system of decisions for the sake of consolidating internal market²⁷. The range of NRAs’ competencies has been set up within a tight and well-monitored system of consultation. In order to reinforce its centralised regulation policy, the Commission even established ERG for the purpose of coordinating acts and decisions of NRAs throughout various MSs²⁸. Furthermore, Article 7(4) grants the Commission veto power over substantive NRA decisions that deem to create a barrier to the single market. Indeed such a wide-ranging comment and veto powers with regard to NRAs’ decision give the Commission a kind of supervisory role that will eventually lead to a coherent regulatory approach to eCommunications throughout the EU. Accordingly, such an unnatural reliance on the Commission gravely weakens the legal status and local reputation of NRAs as no longer being sole decision-makers²⁹.

Despite critics of ERG and some MSs concerning giving more power to central authority in application, the Commission seems to be determined to complete more consistent EU single market so as to attract investment and reap the benefits of the internal market. The Commission also believes that a more unified single market will offer EU suppliers a large home base for the development of innovative products, which is particularly important in areas like wireless communications where economies of scale count. Although ‘Article 7’ procedure has enhanced consistency in terms of market definitions and the assessment of SMP by NRAs, the Commission seems to be insistent on the need for greater consistency in the application of remedies. Under these circumstances EU has decided to review existing directives targeting reforming spectrum management, consolidating internal market, streamlining market analysis and improving security and consumer rights.

3. A New Spectrum Management

²⁵ Monti M., EU Commissioner for Competition Policy, “Competition and Regulation in the Telecom Industry. The way Forward”, European Competitive Telecommunications Association, Brussels, 2003, p.4

²⁶ Articles 6 and 7 of the FD

²⁷Queck R., “The future of National Telecommunications Authorities”, Info, Volume 2, Number 3, June 2000, p.253

²⁸ Commission Decision of 29 July 2002 established ERG, 2002/627/EC

²⁹Tarrant A., Accounting Separation: The Hole In The Heart Of The EU Telecommunications Regime European Competition Law Review 2003 p.5

Since most spectrums throughout the EU are already allocated to certain usage or users, any new allocation can only be made at the expense of existing users³⁰. The need to supply the increasing demands of sectors constitutes a challenge to any spectrum regulator³¹ which also raises the issue of efficient management of the whole spectrum at EU level. When these developments are taken into consideration, the current framework for eCommunications only establishes general principles for spectrum management which are difficult to implement in practice and do not ensure coherence at EU level, with the exception of the coordination of technical radio spectrum usage conditions pursuant to the Radio Spectrum Decision³² and equipment regulation under the R&TTE Directive³³.

Commission, pointing out above mentioned incoherencies as well as inefficiencies in regard to implementation of the current spectrum management rules at EU level, has proposed a number of changes in this area to achieve further coherence and coordination at EU level and ensure suitable mechanisms for spectrum management. Particularly when individual rights of usage is used for authorisation which is the more common practice across EU, a co-ordinated approach is deemed by Commission as a requirement not to lag behind technological progress throughout which the need for flexibility of usage is increased and risk of harmful interference is lessened.³⁴ The baseline approach of the Commission is to include the conditions for using spectrum in general authorisations for the provision of electronic communication services, with the objective to reduce hurdles to market entry as much as possible³⁵.

In its proposal the Commission has strongly stressed two main important points with regard to its new spectrum policy: technology neutrality and service neutrality. As indicated in the Communication on a forward-looking radio spectrum policy³⁶, the lack of flexibility in this issue creates obstructs for new technologies and leads to inefficient spectrum use as well as restricts innovation at the expense of the internal market. In addition to these issues, Commission emphasising both 'efficiency of spectrum use' and 'reducing administrative burdens' has proposed to gradually replace the national administrative model with a European-based coordination model.³⁷ To this end, Commission intends to establish a 'committee mechanism' whereby potentially tradable bands are identified jointly by MSs and Commission, so that 'spectrum tradability' under common conditions can be applied throughout EU.³⁸ However, establishment of such mechanism clearly means that the power of NRAs would be diminished against the Commission on the ground of spectrum management which has already been objected by some MSs.

³⁰ The alternative is for new services to be given "virgin" spectrum at increasingly higher frequencies, which can however substantially increase the cost of new systems

³¹ *Supra note 11, p. 14*

³² Decision No 676/2002/EC of the EP and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community, OJL108 of 24.4.2002, p.1.

³³ OJL91,07/04/1999

³⁴ *Supra note 10, pp.11-12.*

³⁵ *Supra note 10, p.12*

³⁶ COM(2005) 411. http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2005/com2005_0411en01.pdf

³⁷ *Ibid, p.13*

³⁸ *Supra note 10, p.14.*

4. Streamlining Market Analysis

As noted before, the existing framework gives the Commission power to oversee the national regulatory measures under the Article 7 of the FD. These procedures require NRAs to conduct a "national" and a "Community" consultation on the regulatory measures they intend to take - comprising definition and analysis of relevant markets and the proposed imposition or removal of regulation on undertakings providing eCommunications networks or services - prior to adoption. The Commission's Recommendation³⁹ on relevant markets and the Guidelines⁴⁰ on market analysis and assessment of SMP are very important during NRA's market analysis⁴¹. Under the current framework, NRAs must define their national e-Communications markets on the basis of competition law – starting from a list of 18 markets pre-established by the Commission Recommendation on Relevant Markets⁴² - and to assess whether the markets identified are characterised by the presence of at least one operator with SMP. If these markets are found not to be competitive, then they are subject to ex-ante regulation, in order to establish competition. The procedure also requires regulators to make draft measures “accessible to the Commission and to the national regulatory authorities in other MSs, together with the reasoning on which the measure is based”⁴³ in a form that would allow the measures to be assessed for their potential to create a barrier to the internal market or as to their compatibility with Community law. Therefore, criticising the current procedures of having burdensome NRAs has already asked the Commission to examine how to achieve the least burdensome and the most effective way of dealing with market analysis and notification procedure.

Sharing the same concerns with NRAs, the Commission accepted to simplify market analysis and notification procedures. In the light of experience with the Article 7 procedure, the Commission believes that the process could be streamlined while preserving the Commission's role in ensuring consistency of regulation within the internal market. Changes relating to streamlining market review processes aims to simplify ‘notification procedure’ under Article 7(3) of the FD⁴⁴ so as to reduce significantly the administrative burdens for NRAs, operators and Commission itself. So-called changes mainly envisage submission of a simplified notification form rather than a detailed consultation process. Modification of the current ‘market review’ rules via a single Regulation that would replace the current Recommendation⁴⁵ and certain parts of the FD is another measure proposed by Commission.⁴⁶ Commission considers such a single instrument as an opportunity to bring

³⁹ The Commission Recommendation of 11 February 2003 on relevant product and service markets within the eCommunications sector .

⁴⁰ *Supra note 22*

⁴¹ *Supra note 24, p.14*

⁴² OJ L114, 08.05.2003, p. 45.

⁴³ Article 7(3) of FD OJ L 108/33, 24.4.2002.

⁴⁴ According to that provision, in advance of adopting a measure that aims to define and/or analyse relevant markets and/or to impose remedies on SMP operators, NRAs are obliged to “make the draft measure accessible to the Commission and the NRAs of other MSs, together with the reasoning on which the measure is based” in a view to receive their comments and revise their respective draft measures where appropriate. *In relation to market definition and SMP assessments*, Commission has the (veto) power to take a decision requiring NRA concerned to withdraw the draft measure should it have integral market concerns within the scope of Article 7(4). See FD 2002/21/EC of the EP and of the Council, OJ L 108/33, 24.4.2002, Article 7(3-4),

⁴⁵ *Supra note 39*

⁴⁶ *Supra note 10, p.16*

together all the market definition rules so as to set a precise and legally binding timetable, defined triggers as well as deadlines, i.e. twelve months for starting and subsequently completing market reviews.⁴⁷

Another debate has been over the Commission's veto power. Although the Commission has issued relatively few 'veto' decisions, it has been found in some cases that NRAs do not carry out and re-notify a revised market review. Therefore the Commission believes that it will be useful if the proposed regulations include a requirement for regulators to re-notify their re-assessment and revision of the initial market reviews, within a specified time period, where the Commission has issued a 'veto' on the first notification. The duration of the national consultation would be a matter for the NRAs.

Almost all the given responses to the Commission proposals above are concentrating on increased burdens albeit with some simplifications. Given the fact that the only facility brought out by the proposal is limitation of the scope of the notification under Article 7 rather than removal of certain types of market review, both ERG and some MSs consider proposed simplification would have a marginal impact.⁴⁸ Their focused point is a baseline approach according to which Commission would reduce number of markets to be notified.

5. Consolidating the Integral Market

The regulatory model in the current framework has two sides. On the one side, as a reflection of "subsidiary principle", it delegates NRAs to regulate markets on the grounds that they are closest to their markets and therefore placed to regulate them. On the other side, in order to avoid the fragmentation that such decentralisation could bring, it gives the Commission power to ensure consistency of NRAs' measures in certain well-defined areas. But in past years, market players have complained about differences in approach of NRAs in different countries, and point to the increased cost for business of handling more than 20 different regulatory approaches. Taking these problems into considerations, the Commission wanted to strengthen its role to achieve internal market objectives on the way of creating a single "European Information Space". Anyway, Commission proposed a number of realignments along with a more coherent and strengthened integral market on the following topics.⁴⁹

Firstly, drawing attention to its experience to date, Commission proposed to extend the veto powers under 'market review' procedure to include proposed remedies and as well as to strengthen 'consultation mechanism'⁵⁰ so as to consolidate integral market. According to the Commission's documents⁵¹ there has been relative consistency among MS's markets

⁴⁷ *Ibid*, p.16-17

⁴⁸ Response of ERG, pp.10, http://ec.europa.eu/information_society/policy/ecomms/doc/info_centre/public_consultation/review_2/comments/irg_erg_final271006.pdf; Reply of UK, pp.6, http://ec.europa.eu/information_society/policy/ecomms/doc/info_centre/public_consultation/review_2/comments/uk_response.pdf; Reply of Netherlands, pp.3, http://ec.europa.eu/information_society/policy/ecomms/doc/info_centre/public_consultation/review2/comments/nl_response_review_en_annex.pdf

⁴⁹ *Supra* note 10, p.17-24

⁵⁰ Article 7 consultation mechanism aims to promote consistent regulation across the EU on the basis of competition law principles and to limit regulation to markets where there is a persistent market failure as well as to provide a transparent regulatory process. *Supra* note 11, p.17

⁵¹ *Supra* note 10, p.17-18

analysis, particularly in the definition of SMP and the choice of appropriate remedies⁵² which are a key element in determining market conditions and creating competitive conditions for new entrants. Taking these concerns and past experiences into consideration, the Commission has proposed to extend its veto powers under the market review procedure to include proposed remedies so as to contribute to the development of the internal market and to a consistent approach to the way remedies are applied across Europe as well as to improve the competitive environment within the internal market. It is a fact that strengthening the Commission's role means to re-arrange "power sharing" between the Commission and NRAs or at least to transfer some responsibilities from NRAs to the Commission.

Secondly, there are different appeals mechanisms in different MSs whereby most of them may take different decisions for the same problems. According to the commission this is a real problem and should be tackled. Article 4 of FD requires that an effective appeal mechanism at the national level should be available for all parties which want to appeal against any NRA decision⁵³. Whereas, when courts routinely suspend an NRA decision pending the outcome of appeals, it creates an incentive for undertakings systematically to use the appeal process as a delaying tactic. In order to tackle the problem of routine suspension of regulatory decisions, the Commission proposed to amend Article 4 (appeal mechanism) via legal criteria based on European case-law. With this amendment, NRA decisions should be suspended only "where irreparable harm to the appellant can be shown"⁵⁴. There is no doubt that this proposal will enhance the power of NRAs and will pave the way NRAs to put all necessary regulation in application on time so as to hinder any uncompetitive behaviour.

Thirdly, the current regulations applied in the MSs for authorisation are complex since service providers still need to comply with essentially national procedures. Although the current regulatory framework establishes general authorisations as the norm, the applications display that most often individual rights of use are required at national level for using scarce resources⁵⁵.

In order to agree on the appropriate authorisation approach at the EU level, the Commission proposes to qualify services as having a pan-European scope or an internal market dimension and to define authorisations and selection methods as well as conditions attached to the rights of use for scarce resources where appropriate. To ensure the effectiveness, legal certainty and speed of the coordination procedures, a decision mechanism is needed. Thus, it is proposed to use a committee approach to achieve a consensus among MSs which would then be applied through a subsequent Commission Decision⁵⁶. Although the Commission claims that the practical implementation of the authorisation procedure would continue to be managed at national level after this arrangement, it is clear that an important power used so far by the NRAs would be devolved to the Commission.

⁵² Commission subdivides inconsistent remedies into three: (i) remedies that solved only part of the competition problem identified, (ii) remedies that appeared to be inadequate or (iii) remedies that might have produced effective results too late (*Ibid.*, pp.18).

⁵³ *Supra note 10, p.18*

⁵⁴ *Supra note 10, p.19*

⁵⁵ *Supra note 10, p.19*

⁵⁶ *Ibid, p.20*

Moreover, the current application of the Access Directive⁵⁷ provide powers for regulators to impose remedies, pending certain conditions, on operators (not necessary to be an SMP, this can be seen as an exception) so as to ensure adequate access and interconnection, and the interoperability of services⁵⁸. Therefore, the Commission proposed that NRAs should submit a request to the Commission for authorisation to impose an obligation on a non-SMP undertaking. Here again the Commission proposes to enable itself power to authorise MSs to impose obligations on non-SMP operators to certain ends,⁵⁹ in order to prevent the risk of over-regulation and fragmentation of the internal market through the imposition of inconsistent non-SMP obligations and it is obvious that this amendment will provide yet another power to the Commission at the expense of NRAs.

Furthermore currently, the numbering schemes change significantly across EU since NRAs are responsible for the management of national numbering plans and the assignment of numbers. As a result, the Commission claims that citizens are not able to access some services provided in different MSs using the same number, and tariffs for similar services can vary considerably. In this context, the Commission proposes to “enable itself to take -where appropriate- harmonisation measures to ensure a coherent and common approach supporting development of the internal market for certain services”⁶⁰. Even though the assignment of numbering resources would remain the sole responsibility of the MSs, it is proposed to broaden the scope of technical implementing measures that the Commission can adopt, assisted by a committee procedure, in the area of numbering management. Again in this issue, the Commission will enhance its power against NRAs.

Finally, according to the Commission, current enforcement mechanisms of NRAs do not seem to be working effectively and need some adjustments. Current measures empowering the NRAs to impose fines on operators failing to comply with regulatory measures have proved insufficient to provide adequate incentives for compliance, to the detriment of both operators and consumers⁶¹. In order to create incentives for regulated players to comply with the regulatory framework, the Commission proposes to establish new rules for both the Authorisation Directive and the e-Privacy Directives⁶². The Commission proposed to empower NRAs to impose sanctions on undertakings found to have acted in breach of the authorisation conditions even when the undertakings rectify the breach afterwards, Moreover, enforcement provisions could be reinforced by granting NRAs the power to impose significant and dissuasive penalties. In regards to the implementation of the e-Privacy Directive, new rules could be established providing specific remedies involving an explicit

⁵⁷ Article 5 of Access Directive (2002/19/EC of the EP and the Council of 7 March 2002, OJ 24.4.2002, L 108/7,) regulates powers and responsibilities of the NRAs with regard to access and interconnection. Also see Recital 6 of the same directive.

⁵⁸ Gijrath S.J.H. “Interoperability Revisited: How Far Does The Duty To Negotiate Access And Interconnection Extend Computer”, Telecommunications Law Review, 2006 p.3

⁵⁹ Such ends are enshrined as (i) ensuring end-to-end connectivity; (ii) ensuring accessibility for end-users to digital radio and television broadcasting services specified by the MSs. Current form of that Article enables MSs an *autonomous* right to impose certain types of targeted obligations to all operators including non-SMP operators (See Art 5 of the Directive).

⁶⁰ *Ibid*, p.22

⁶¹ *Supra* note 10, p.22

⁶² EP and Council Directive (EC) 2002/58 concerning the processing of personal data and the protection of privacy in the eCommunications sector. OJL201/37andOJL08/51.

right of action against spammers, possibly on behalf of consumers⁶³. It is obvious that this proposal will provide a significant power for NRAs that really have serious problems in terms of efficient working enforcement mechanisms to secure consumer rights.

With regards to abovementioned proposals, both MSs and ERG do seem to be unconvinced to agree with increased veto power over remedies.⁶⁴ Their common reasoning is that NRAs are best placed to define and implement measures necessary to achieve the policy objectives of regulatory framework. In addition, reliance on ‘accountability’ as well as concerns surrounding ‘proportionality’ and ‘subsidiarity’ principles guided commentators in constituting their counter-arguments.⁶⁵ While a ‘revised national appeals mechanism’, ‘increased enforcement capabilities’, and ‘common requirements, i.e. concerning interoperability’ are supported almost unanimously; the rest of the abovementioned proposed changes, are generally viewed with a remarkable distance by MSs.

6. Strengthening Consumer Protection and User Rights

Responses to the review have displayed that along with technological change there is a need for comprehensive changes to the USD. The proposed changes which describes how the current provisions of the USD could be adapted to improve consumers and users rights, prepare universal service for the longer term and provide disabled users with greater access both to universal service and to other eCommunications services, are summarized below.

Underlining two main problems including difficulty of finding out best tariff for callers and difficulty of making price comparison for consumers, the Commission proposed several precautions for the sake of consumers. In order to improve the transparency and publication of information for end-users, the Commission proposes to give NRAs “extra” powers to require from operators better tariff transparency to ensure that consumers are fully informed of the price before they purchase the service and make price guides available where the market has not provided them⁶⁶. Additionally the Commission proposes to strengthen the obligation for network operators to pass caller location information to emergency authorities.⁶⁷ There is no doubt that this amendment will certainly make NRAs more powerful than before in terms of defending consumer rights.

The concept of “*Net Neutrality*”⁶⁸ and “*Net Freedoms*” are currently being debated in the world. In Europe the regulatory framework allows operators to offer different services to different customer groups, but does not allow those who are in a dominant position to discriminate between customers in similar circumstances. However, there is a risk that, in some situations, the quality of service could degrade to unacceptably low levels. Therefore, the Commission proposes to give NRAs the power to establish minimum quality levels for

⁶³ *Supra note 10, p.23*

⁶⁴ Single Member State seeing an advantage in extending Commission’s veto power is Sweden. http://ec.europa.eu/information_society/policy/ecomm/doc/info_centre/public_consult/review2-/comments/swedish_input_review.pdf

⁶⁵ Response of UK, p.9; Reply of Poland, pp.11, http://ec.europa.eu/information_society/policy/ecomm/doc/info_centre/public_consult/review_2/comments/poland_en_ministry.pdf; Response of ERG, pp.15-16

⁶⁶ *supra note 10, p..24-25*

⁶⁷ *Ibid, pp.24-25.*

⁶⁸ “*Net Neutrality*” relates to the ability of a network provider to offer different levels of quality-of-service for content travelling over its network.

network transmission services in an NGN environment based on technical standards identified at EU level. It is a fact that this new amendment will make NRAs more powerful in terms of enhancing service quality and securing network access.

7. Improving Security

The trend towards IP technology also means that networks are in general more open and vulnerable than in the past. The growth of spam, viruses, spyware and other forms of malware, which undermines users' confidence in electronic communications, is partly due to that openness, and partly due to the lack of appropriate security measures. A key policy proposal in this area is to extend and strengthen existing provisions on security and network integrity, currently found in the e-Privacy Directive and the USD, and at the same time bring them together within a specific chapter of the FD, thereby highlighting the importance of the subject in a competitive environment. Although the e-Privacy Directive⁶⁹ states that providers of a publicly available eCommunications service must take appropriate technical and organisational measures to safeguard the security of their services, the Commission, deeming this regulation insufficient, proposes to clarify what these 'appropriate technical and organisational measures' should be. Additionally, new requirements would be imposed on providers of eCommunications networks and services.

The Commission is aware of the fact that there is no need to include a very detailed list of requirements in the Directive, and in any case the requirements are likely to change as threats evolve. For these reasons regulators must have flexible powers to implement the legal provisions in an appropriate and proportionate way. NRAs would therefore be given new powers to⁷⁰ require information, such as specific security policies including emergency plans of an operator; require audits to be conducted, and sanction companies not complying with these requests, e.g., by fining; and issue binding instructions to providers of electronic networks or services in order to implement any relevant Commission recommendations.

All the above presented measures demonstrated that NRAs will be placed in a new terrain whereby they enjoy much greater powers and responsibilities. However, in order to avoid distortions of the internal market that could result if individual regulators placed very different demands on market players in their countries, the Commission proposes to adopt some technical implementing measures itself in the form of Decisions, under a committee procedure, in areas covered by the proposed new legal provisions. Contrary to the former proposals the later one will mean to diminish the power of NRAs.

Moreover, despite the fact that e-Privacy Directive⁷¹ requires service providers to take appropriate technical and organisational measures to safeguard the security of their services, taking one more step the Commission believes that a requirement to notify security breaches should be put in the new framework since this requirement would create an incentive for providers to invest in security. It will be remarkable to cite that these proposals will grant an important power to the NRAs.

⁶⁹ Article 4 of the Directive 2002/58/EC of the EP and of the Council of 12 July 2002

⁷⁰ *Supra note 10, p.29*

⁷¹ Article 4 of the Directive 2002/58/EC

8. EECMA and NRAs

As briefly explained above the reform proposals covers changes to the USD⁷² and the Directive on privacy and electronic communications⁷³. In addition, a second reform proposal⁷⁴ covers changes to the other three directives. All these proposals are complemented by a third one which creates a European Electronic Communications Market Authority (EECMA)⁷⁵.

It is clear that one of the “historical” and economic targets of the EU is to create a single market covering all aspects of economic activities including eCommunications market. However, due to several reasons, the Union has not become successful in constituting such a harmonized eCommunications market so far mainly stemming from different application of different member states. Indeed, although the ERG has been working in close cooperation with MSs to eliminate these obstacles so far, it can be argued that achieving consensus in a body with representatives of 27 Member States is no easy task, and the ERG has no power to implement its agreements across the Union. To overcome these obstacles, the Commission is therefore, has proposed to establish a new independent Authority (called EECMA by Commission’s papers) which will work in close cooperation with NRAs and the Commission. The new entity will include a board of regulators comprising the heads of the NRAs of all MSs and will replace the ERG. It will mainly provide advices to the Commission, particularly in preparing regulatory decisions under the so-called ‘Article 7’ procedure, and to further the internal market by improving consistency in the application of EU rules. The EECMA would also take over the functions of the European Network Security Agency (ENISA)⁷⁶.

According to the Commission’s paper⁷⁷, the EECMA would complement at European level the regulatory tasks performed by NRAs so far. Firstly it is targeted to provide a framework for national regulators to cooperate. It is proposed to improve the handling of cross-border aspects of e-communications market regulation and network integrity. The Authority will provide procedures for cooperation between NRAs, in particular as regards the exchange of information, provision of advice and technical support. Secondly, to provide advices with regard to regulatory oversight of market definition and implementation of remedies. It is understood that the EECMA would have an advisory role vis-à-vis the Commission as regards market regulation issues and could issue non-binding guidelines to promote good practices among the NRAs. Thirdly, to help in definition of trans-national markets: the EECMA would provide for an efficient and proportional mechanism to respond to growing cross-border markets stemming from rising mobility and increased penetration of internet-

⁷² Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to eCommunications networks and services (OJ L 108, 24.4.2002).

⁷³ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the eCommunications sector (OJ L 201, 31.7.2002).

⁷⁴ COM(2007) 697.

⁷⁵ COM(2007) 699.

⁷⁶ Communication from the Commission to the European Parliament and the Council on the evaluation of the European Network and Information Security Agency (ENISA) - OM(2007) 285.

⁷⁷ COM(2007) 699 final Brussels, 13.11.2007

based services as well as convergence between fixed and mobile services. Moreover, it is envisaged that the EECMA would play an important role by providing advice on radio frequency harmonization including preparing analysis and reporting, the identification of the potential and means for development of new services, maintenance of a register of spectrum use across the EU, advice on common procedures for granting authorizations etc. Also, the EECMA will have a decision powers on numbering administration and advice on number portability which means that it would be charged with the administration and development of the European Telephony Numbering Space. With regard to network and information security, the EECMA will takeover the tasks of the existing European Network and Information Security Agency thereby it is expected that it will reinforce the coherence between obligations to ensure network integrity.

Under these circumstances, the EECMA, if agreed to by EU Member States, would be positioned as a new European regulatory body in electronic communications market having a supranational dimension. It is obvious that such a development would make significant changes in terms of the NRAs power not only against the Commission but also for their domestic markets. In other words, when the all proposals are examined, it is clear that NRAs will loose their power against the Commission. On the other hand they will have new strong tools when they are regulating their domestic markets since new framework aims at both improving independencies of NRAs and granting some extra powers particularly in term of network security and consumer rights. Although this kind of initiatives, creating a European regulatory authority for eCommunications, has been voiced several times by the Commission past years, its creation has been quite firmly resisted by Member States as well as there has never been significant industry support for a single regulator. Why? Basically, the member states fear the loss of influence over national markets and NRAs fear for losing their power or their own existence as well as the operators fears increased regulation.

9. Conclusion

Since creating a new regulatory body seems very difficult, it will be better to focus on other important reviewing subjects including spectrum management, improving consumer rights, security and integral market that will directly affect NRAs' power against the Commission. Putting EECMA aside, another important changes envisaged in the new framework that will influence NRAs power is a new spectrum management policy. The main targets of the Commission's new spectrum policy are to ensure that the use of spectrum is subject to general authorisations only, whenever possible, to introduce freedom to use any technology and service in a spectrum band (technology & service neutrality), to open selected bands to trading of rights of use (tradability), to establish transparent and participative procedures for allocation and in order to smoothly reach all these targets to improve coordination at EU level through a wider application of committee mechanisms⁷⁸. However, establishment of such coordination mechanism means that an important power of NRAs with regard to spectrum management⁷⁹ would be transferred to the Commission.

⁷⁸ Com (2005) 400 P.10

⁷⁹ One should remember that there are different spectrum management models in different MSs. While in some countries NRAs are responsible for the management, in others, ministries, different public institutions may have the responsibilities.

In addition to the spectrum management, the other main proposal is to decrease the burden of the regulatory procedures associated with the reviews of relevant markets including reducing notification requirements for Article 7 procedures, rationalising the market review procedures in a single instrument including timetables, introducing minimum standard for notifications and requiring re-notifications after vetoes. Although the Commission believes that the proposed reduction of the notification requirements and introduction of a simplified procedures concerning with the Article 7 procedure would dwindle the administrative burden for NRAs and for market players, Commission's proposals on streamlining market review, on the other hand, are generally considered as having an impact of increasing administrative burden rather than reducing them. The Commission's wide comment and veto powers create controversy as to the status and division of competencies between NRAs and the Commission. Such extensive role threatens to diminish NRAs authority at a time when what we most need from our regulators' leadership.

Strengthening the internal market is another important target of the reviewing of regulatory framework. The Commission strongly believes that enhancing its veto power to include proposed remedies will strengthen the effectiveness of the core regulatory provisions of the framework and will ensure that the internal market interests are fully reflected in the process. Even though the Commission points out that enhancing veto power is necessary to strengthen the internal market, it is a fact that this step is deemed by NRAs as another attempt to sharing their power.

Furthermore, in order to consolidate integral market, the Commission has suggested some other proposal involving making appeals mechanism more effective, common approach to authorisation of services with pan-European or internal market dimension, enhancing the Commission's role in numbering issues, improving enforcement mechanisms of the framework. It is clear that the Commission explicitly struggles to empower its position against NRAs on the grounds of consolidating integral market. Furthermore, such a strictly monitored mechanism of consultation puts under question the extent of discretionary powers that NRAs are indeed allowed to use in practice. One might propose that the role of the Commission to act as a guardian of the development of the internal market puts under jeopardy the autonomy of NRAs that they are eligible to under their domestic laws. Also, most of the MSs and ERG seem to be unconvinced to agree with increased veto power over remedies. In terms of consumer protection, the Commission aims at strengthening consumer rights by changing certain part of USD, granting extra powers to NRAs and facilitating accessibility of disabled consumers. It is a fact that this new amendment will make NRAs more powerful in terms of enhancing service quality.

Also, the Commission, aware of the importance of improving security of EU eCommunications, has proposed several changes in the current framework including obliging operators to take security measures, granting powers to NRAs to determine and monitor technical implementation, requiring notification of security breaches by network operators and ISPs and putting future-proof network integrity requirements. In this context, when creating more effective appeal mechanism, improving enforcement mechanisms and granting extra powers to NRAs for straggling against security problems and improving consumer

rights are taken into considerations, it can be argued that NRAs will gain a remarkable power in terms of their position against operators and certain public authorities.

In conclusion, to date the NRAs have tended to emphasise their independence, and have been reluctant to limit their freedom of action in pursuit of harmonised European-wide solutions. But now with this reviewing, it seems that the Commission will explicitly increase its powers at the expense of NRAs. Even taking further step, if the Commission is being successful to establish a US-like federal model-regulatory authority, so-called ECMA that will function like European Central Bank⁸⁰ that means NRAs would lost their powers against Commission.

Although there are a number of constitutional problems in setting up a regulatory agency of some sort on the EU level, or delegating rule-making power from existing institutions to such an institution⁸¹, the issue of establishing such an authority has always been and continues to be a strong wish. The ERA issue provides a “leitmotiv of the regulatory developments described so far and also echoes the old (albeit not always clearly expressed) double-bind situation in which Europe looks at the United States: always a dream and always a fear, always an attraction and always repulsion”⁸².

Last but not least, it is a clear-cut reality that the proposal from the Commission seeks to counter-balance the decentralisation of decision making with strong co-ordination mechanisms to ensure consistency of application of the rules, but on the other hand it is a fact that NRAs, being closest to their market than a centralised structure, assess the degree of competition on a given product market in their territory and decide what obligations to impose as well as evaluate which operators will be subject to those rules. So it should be for NRAs to tailor regulation to fit the circumstances of that market. Therefore, it will be beneficiary for new regulatory framework to be legislation after the approval of EP should set up a “sensitive” balance between NRAs’ responsibilities and the Commission’s power according to the principle of subsidiarity.

⁸⁰ See *Supra note 11, p.17 option 1*

⁸¹ Yataganas A., Delegation of Regulatory Authority in the European Union: The Relevance of the American Model of Independent Agencies, Harvard Jean Monnet Working Paper No. 03/01, <http://www.jeanmonnetprogram.org/papers.01/010301.rtf> 2001.

⁸² Director General Robert Verrue, The New Regulatory Framework for Electronic Communications, Remarks at the Roundtable on Multi-Media and Telecommunications on the Future of Spectrum Management.