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Chapter VIII

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8–001 Introduction—To the extent that electronic communications activities are subject to both sector-specific regulation (principally at the national level) and competition rules (at both the European Union and national levels), the issue arises as to the relationship and interaction between these different sets of rules. From a substantive perspective, the question is whether the two sets of rules have genuinely different purposes or whether they should converge into a single set of rules in light of recent changes in the markets concerned. From an institutional point of view, different authorities are often responsible for monitoring compliance with the two types of rules. This leads to a risk of unnecessary duplication of procedures and a waste of time and money for both the regulators and businesses concerned, if the activities of the different bodies involved are not appropriately coordinated. This chapter reviews the rather complex relationship between the application of sector-specific regulation and the competition rules, as well as between the regulatory authorities and the competition authorities. It looks at the differences in origin and objectives of the two sets of rules, and analyses, by reference to concrete examples, current trends of convergence between these rules at the European Union and Member State levels.

A. Competition law and sector-specific regulation have different origins, but sometimes complementary objectives

8–002 Competition law—EU competition law is of general application and is aimed at promoting consumer welfare by protecting effective competition and prohibiting firms from reducing competition through concentrations, agreements, concerted practices, exclusionary practices or the exploitation of market power.[1] The application of the competition rules is basically the result of a long, historic process of economic liberalisation. This process has led to the notion that economic freedom is a pre-existing fundamental right, which the State can only limit by way of general laws pursuing legitimate interests in a proportionate way. Therefore, rules protecting competition

[1] European Commission, Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings (February 9, 2009), O.J. 2009 C45/7 ("Article 82 Guidance"), para.4.

generally apply *ex post* to market conduct, with the exception of merger control, where *ex ante* control of proposed concentrations is proportionate, owing to the irreparable harm to competition that concentrations can cause. Because of their origin and their conceptual basis, the competition rules can be characterised as "low level" or "soft" regulation.

8–003 Sector-specific regulation: economic and non-economic—In contrast to the competition rules, sector-specific regulation implements certain defined policy goals including, but not only, the notion of effective competition.[2] It can, therefore, in one respect, be characterised as more interventionist than competition law. Indeed, in regulated markets, a more intensive degree of intervention may be generally desirable because of the specific characteristics of such markets. Typically, sector-specific regulation is applied in sectors of the economy that for many years were considered to be too politically or economically sensitive[3] to be opened to the free market and thus to competition. Electronic communications and broadcasting services were initially monopoly services, generally provided by the state itself under the regime of administrative law or through state-owned companies. Even after the electronic communications and broadcasting markets were liberalised, the prevailing view was that competition law alone would not guarantee either the seamless continuation of all welfare and public service elements connected to the former state-provided service or effective competition whilst former monopolists could exercise market power.[4]

8–004 ***Types of sector-specific regulation***—Two types of sector-specific regulation[5] may be distinguished, both of which originate from the fact that the electronic communications sector was formerly—and in some respects still is—an area of state administration: regulation aimed at protecting public interest objectives and economic regulation.

8–005 *Protection of public interest objectives*—Certain rules aim at protecting public interest objectives, such as the provision of a universal service at affordable prices,[6] the protection of consumers,[7] the protection of privacy,[8] public safety, the protection of the environment, the protection of media pluralism and diversity,[9] and the protection of minors.[10] These rules promote

[2] Art.8 of Directive 2002/21 of March 7, 2002 on a common regulatory framework for electronic communications networks and services, O.J. 2002 L108/33 ("Framework Directive"), as amended by Directive 2009/140 of November 25, 2009 amending Directives 2002/21, 2002/19 and 2002/20, O.J. 2009 L337/37 ("Better Regulation Directive"); see Ch.I, paras.1–018 *et seq.* and 1–058 *et seq.* On the lack of clarity of the objectives of the Regulatory Framework, see: Garnham, "Contradiction, Confusion and Hubris: A Critical Review of European Information Society Policy" (2005) ENCIP Paper; de Streel and Hocepied, "The ambiguities of the European electronic communications regulation", in Dommering and van Eijk (eds.), *The Round Table Expert Group on Telecommunications Law*, University of Amsterdam (2005), 139.

[3] In traditional (European) thinking, control over telecommunications meant control over a strategic infrastructure. The internet was only "privatised" once its military use was no longer prevalent: see Ch.III, para.3–001. Control over (electronic) media implied control over public opinion. Therefore, a regime of economic freedom of private operators was perceived as being inappropriate for these services, leading either to state provision or to state regulation.

[4] Arguments have been made that certain welfare goals are not being delivered by liberalisation (or at least not fast enough), and that they must be positively secured or stimulated at least temporarily through state regulation. Examples of such goals include the protection of the environment, ensuring sufficient availability of infrastructure resources at affordable prices and equal access for all members of society to certain services, but also effective competition itself.

[5] Prosser, *Law and the Regulators* (Oxford University Press, 1997).

[6] See Ch.I, para.1–061. On universal service, see generally, Ch.I, para.1–291 *et seq.*

[7] *ibid.* On end-users' rights and consumer protection, see generally, Ch.I, para.1–313 *et seq.*

[8] *ibid.* On data protection and privacy, see generally, Ch.I, para.1–361 *et seq.*

[9] See Ch.II, paras.2–001, 2–007 and 2–129.

[10] See Ch.III, paras.3–026, 3–032 and 3–108 *et seq.*

social justice and consumer or environmental interests that are non-economic in nature, *i.e.* typical general public interests. In that sense, because they pursue public policy objectives, these rules have little in common with competition rules (which are economic in nature), and are applied somewhat independently of competition law.[11]

8–006 ***Economic regulation***—Another type of sector-specific regulation involves *ex ante* regulation of matters such as network access and interconnection obligations and often involves the imposition of price and tariff controls.[12] Whilst these measures may be based on social policy objectives, these rules have an economic nature. They have been adopted on the assumption that market forces alone, even under the threat of an *ex post* application of the competition rules, would not suffice, at least not in the short term, to achieve a fully competitive market, given that at liberalisation incumbent operators had monopoly or at least very strong market positions. In this sense, sector-specific rules complement the competition rules.[13]

8–007 ***Sector-specific regulation: electronic communication and media***—Directives adopted at the EU level to harmonise national law must be implemented into Member States' laws, whilst sector-specific EU regulations are directly applicable in the Member States without the need for transposition into national law.[14] EU legislative measures therefore have a significant impact on the content of the regulation of the electronic communications and broadcasting sectors in the Member States. This impact, however, is more significant in the electronic communications sector than in the media sector, because of the greater level of EU-wide harmonisation achieved so far in the electronic communications sector. Operators which are active in the media sector often face additional national rules of the Member States which have not been harmonised at the EU level and are often very divergent. In a number of Member States, national sector-specific laws implementing directives in the electronic communications sector overlap to a certain extent with truly national media rules. This leads to the structure identified in Figure 8.1.

8–008 Competition law and sector-specific regulation apply cumulatively—Competition rules and sector-specific regulation accordingly represent different sets of rules which apply independently of each other, each with specific objectives and enforcement methods.[15] Operators must observe both competition rules and sector-specific regulation at both the EU and Member State levels. Indeed in Europe, competition law has a constitutional value and always applies in addition to sector-specific regulation. The fact that the conduct (including its tariffs) of a dominant operator

[11] Those public interests may often justify the exemption of an undertaking from the application of competition law rules. For example, Art.106(2) [ex 86(2)] declares that the competition rules are inapplicable to the extent that public undertakings and other undertakings with special or exclusive rights carry out services of general economic interest and the application of the competition rules would prevent them carrying out their entrusted tasks, whilst Art.21(4) of the Merger Control Regulation provides that the exclusive jurisdiction of the Commission to review concentrations with a Community dimension is without prejudice to the right of the Member States to take measures under national law to protect their legitimate interests, such as the plurality of the media: see Ch.VII, para.7–160.

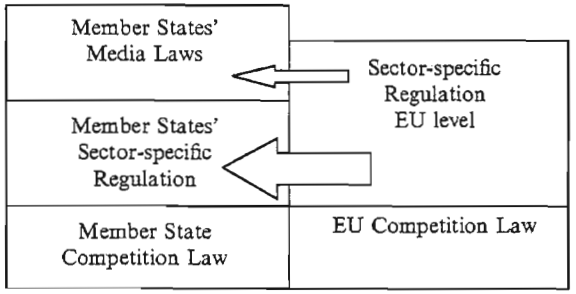
[12] See Ch.I, para.1–275 *et seq.* (at the wholesale level) and para.1–288 *et seq.* (at the retail level), above.

[13] Krüger and Di Mauro, "The Article 7 consultation mechanism: managing the consolidation of the internal market for electronic communications" (2003) 3 *Competition Policy Newsletter* 33; and Nihoul and Rodford, *EU Electronic Communications Law* (Oxford University Press, 2004), para.4.366 *et seq.*, who take the view that both sets of rules rely to a large extent on common principles and address identical problems with similar solutions. For an economic perspective, see Carlton and Picker, *Antitrust and Regulation*, NBER Working Paper 12 902 (2007).

[14] Art.288 of the Treaty on the Functioning of the European Union.

[15] Case T-271/03, *Deutsche Telekom v Commission* [2008] E.C.R. II-477, para.113; appeal pending in Case C-280/08, *Deutsche Telekom v Commission*, O.J. 2008 C323/31; see Ch.V, para.5–067.

Figure 8.1 Relationship between EU and Member State sector-specific regulation, media laws and competition law



has been approved by a national regulator does not immunise that operator from the application of competition law.[16] Hence, a competition authority, whether the Commission or a national competition authority, may find that a regulated operator has infringed competition law if the application of sector-specific regulation leaves it some freedom of action and it uses this freedom to abuse its dominant position. This is very different from the United States, where antitrust law has the same legal value as sector-specific regulation, and the application of the latter may pre-empt the application of the former.[17] The following sections analyse the impact of the adoption of a competition law approach to regulation in the Electronic Communications Regulatory Framework and highlight practical points of interaction between the competition rules and sector-specific regulation, as regards substance, enforcement and procedure.

B. The adoption of a competition law-based approach in the Regulatory Framework

8–009 Substantive issues—In 2002, the adoption of the Regulatory Framework brought about a new relationship between the EU's competition rules and sector-specific regulation, by aligning

[16] *ibid.*, para.107, in which the General Court stated that "the fact that the [Deutsche Telekom's] charges had to be approved by [the German regulator] does not absolve it from responsibility under Article [102]". See also Commission Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector, O.J. 1998 C265/2 ("Access Notice") para.22. Moreover, a Member State cannot provide that its national competition law, or EU competition law, will not apply to regulated sectors: see the infringement procedure brought by the Commission against Slovakia in respect of a Slovak law that limited the ability of the Slovak Competition Authority to apply competition law in the electronic communications, energy and postal sectors, Commission Press Release, *Antitrust: Commission welcomes full application of EU antitrust rules by Slovak Competition Authority*, IP/09/1182 (July 23, 2009).

[17] See the judgments of the United States Supreme Court in *Verizon v Trinko*, 540 U.S. 682 (2004); *Credit Suisse Securities LLC v Billing*, 551 U.S. 264 (2007); and *Pacific Bell Telephone et al. v Linkline Communications*, judgment of February 25, 2009. See also Geradin and Sidak, "European and American Approaches to Antitrust Remedies and the Institutional Design of Regulation in Telecommunications", in Cave, Majumdar and Vogelsang, *Handbook of Telecommunications Economics*, Vol.2 (Elsevier, 2005), 518; and Larouche, "Contrasting legal solutions and the comparability of US and EU experiences", in Leveque and Shelanski, *Antitrust and regulation in the EU and US: Legal and Economic Perspectives* (Edward Elgar, 2010).

the regulatory concept of "significant market power" (the basic substantive threshold for regulatory intervention in the electronic communications markets), with the competition law concept of "dominance" that is applied under Article 102.[18] However, the alignment of *ex ante* sector-specific regulation with competition law principles is not complete, because the SMP test has an additional requirement that the concept of dominance does not have: an operator can only have SMP if it has a dominant position *and* it is active on a market on which competition law cannot intervene efficiently, *i.e.* where the three criteria test is satisfied: there must be high and non-transitory entry barriers, no dynamics towards effective competition, and insufficiency of competition law remedies to adequately address the market failure.[19] This partial convergence of methodologies has several consequences, which are described below.

8–010 ***Market definition***—Market definition is key in making a finding of dominance on a given market and can in some cases pre-determine such a finding.[20] Under the competition rules, markets may be defined differently under the Merger Control Regulation (where they are defined according to a forward-looking analysis) and under Articles 101 or 102 (where they are defined according to a retrospective analysis).[21] In applying sector-specific regulatory rules under the EU Regulatory Framework, markets should be defined according to competition law methodologies and in a forward looking manner. Although market definition may differ under competition law and under sector-specific regulation,[22] the Commission has tended in practice to follow similar market definitions when applying sector-specific regulation[23] and under competition law.[24] There are, however, some cases in which markets have been defined differently under both legal instruments; for example, the market for wholesale internet access has been segmented into different regional areas for the purposes of sector-specific regulation,[25] although it has been found to be national for the purposes of competition law.[26]

8–011 ***Assessment of market power***—The Framework Directive defines an undertaking with SMP[27] as one which enjoys a "position equivalent to dominance" and uses exactly the same words

[18] See para.1–223, above. See de Streel, "The Integration of Competition Law Principles in the New European Regulatory Framework for Electronic Communications" (2003) 26 *World Competition* 489.

[19] Framework Directive, para.8–003, n.2, Art.15 and 2002 Framework Directive, para.8–003, n.2, recital 27; Commission Recommendation 2007/879 of December 17, 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, O.J. 2007 L344/65 ("Second Relevant Markets Recommendation"), Art.2; see para.4–017 *et seq.*, above.

[20] Commission Notice on the definition of the relevant market for the purposes of Community Competition law, O.J. 1997 C372/5 ("Market Definition Notice"). See generally, Chapter IV.

[21] See Ch.IV, para.4–002.

[22] Framework Directive, para.8–003, n.2, Art.15(1); Commission Guidelines of July 9, 2002 on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, O.J. 2002 C165/6 ("SMP Guidelines"), para.27.

[23] Second Relevant Markets Recommendation, para.8–009, n.19. See Ch.IV, para.4–024 *et seq.* and Appendix 2.

[24] See para.4–036 *et seq.*, above and Appendix 2.

[25] Case UK/2007/0733, *Wholesale broadband access in the UK*, Commission Comments of February 14, 2008 (discussed in Ch.IV, para.4–049).

[26] Case M.5532, *Carphone Warehouse/Tiscali UK*, Commission Decision of June 29, 2009, paras.52–53 (discussed in Ch.IV, para.4–052 and in Chapter VII, para.7–312 *et seq.*, above); see also Appendix 2, section 2(a).

[27] Framework Directive, para.8–003, n.2, Art.14, as developed by the SMP Guidelines, para.8–010, n.22, paras.70–106, and the Revised ERG Working Paper of September 2005 on the SMP concept for the new regulatory framework, ERG(03) 09rev3 ("Revised ERG Working Paper on SMP").

that the Court of Justice has used when defining "dominance" under Article 102.[28] However, the SMP Guidelines state that the designation of an undertaking as having SMP does not automatically imply that this undertaking is also dominant for the purposes of competition law.[29] As for market definition, the Commission, NCAs and NRAs have tended to follow similar analytical approaches and made similar assessments under sector-specific-regulation and under competition law.[30] In particular, the assessment of collective dominance (or coordinated effects) is similar. Annex II to the Framework Directive sets out a "checklist" that the Commission uses to determine whether markets have a structure that renders them conducive to coordinated effects.[31] The factors contained in that list are in line with the definition of collective dominance given by the European Courts in *Airtours*[32] and *Bertelsmann and Sony*.[33] However, the mere application of a "checklist" is not sufficient to determine the existence of collective dominance and coordinated effects.[34]

8–012 Institutional and procedural issues—The designs of the institutional architectures of the sector-specific regulation and competition law regimes were formerly very different, but they have converged over time.[35] On the one hand, the implementation of sector-specific regulation started by being fairly decentralised in Europe, as the NRAs were applying national laws that had not been fully harmonised at the EU level. Then, the 2002 Regulatory Framework increased the degree of centralisation of the regulatory regime, by granting important supervisory powers to the Commission over NRAs' decisions[36] and putting in place different mechanisms to ensure cooperation between the Commission and the NRAs.[37] Such mechanisms have been strengthened by the 2009 Regulatory Framework, with the creation of the Body of European Regulators for Electronic Communications ("BEREC") and the additional power for the Commission to supervise in greater detail (including recommending the non-adoption of) the remedies imposed by NRAs on undertakings with SMP.[38] On the other hand, the implementation of competition law started by being

[28] See, in particular, Case 27/76, *United Brands v Commission* [1978] E.C.R. 207; Article 82 Guidance, para.8–002, n.1, paras.9–18. See generally para.5–041 *et seq.*, above.

[29] SMP Guidelines, para.8–010, n.22, para.30.

[30] See, *e.g.*, Case M. 4748, *T-Mobile/Orange Netherlands*, Commission Decision of August 20, 2007, para.49, where the Commission took into account in its competition assessment the fact that the Dutch regulator found that no undertaking possessed SMP on the wholesale mobile market for access and call origination: see Ch.VII, para.7–412 *et seq.*

[31] Annex II is developed by SMP Guidelines, para.8–010, n.22, paras.86–106 and Revised ERG Working Paper on SMP, para.8–011, n.27, paras.24–41.

[32] Case T-342/99, *Airtours v Commission* [2002] E.C.R. II-2585.

[33] Case C-413/06P, *Bertelsmann and Sony v Commission*, [2008] E.C.R. I-4951. On collective dominance, generally see para.5–054 *et seq.*, above (under Art.102) and para.7–113 *et seq.*, above (under the Merger Control Regulation).

[34] See para.7–115 *et seq.*, above.

[35] See De Visser, *Network-based Governance in EC Law: The Example of EC Competition and EC Communications Law* (Hart, 2009).

[36] See para.8–013, below.

[37] Decision 2002/627 of July 29, 2002 establishing the European Regulators Group for Electronic Communications Networks and Services, O.J. 2002 L200/38, as amended by Decisions 2004/641 and 2007/804; see Ch.I, para.1–100 *et seq.*

[38] Framework Directive, Arts.7a and 19(3a) introduced by the Better Regulation Directive 2009/140, para.8–003, n.2 and Regulation 1211/2009 of November 25, 2009 establishing the Body of European Regulators for Electronic Communications and the Office, O.J. 2009 L337/1 ("BEREC Regulation"). On those new mechanisms, see Ch.I, para.1–102 *et seq.* (regarding the formation, role, tasks and organisation of BEREC) and para.1–116 *et seq.* (regarding the EU Consultation Procedure under Arts.7 and 7a of the Framework Directive).

fairly centralised, as the Commission was the main authority applying the EU's competition rules (and alone could apply Article 101(3)). Then, Regulation 1/2003[39] decentralised the application of competition policy in Europe by giving additional powers to national competition authorities and national courts to apply EU competition law (in particular Article 101(3)), while putting in place mechanisms to ensure cooperation between the Commission and the national competition authorities,[40] as well as between the Commission and the national courts.[41]

8–013 ***Supervisory powers of the Commission at the EU level for sector-specific regulation***—Under the system of sector-specific regulation, NRAs have a broad and far-reaching role in the regulation of the electronic communications sector. The EU Regulatory Framework strengthens the role of NRAs, but at the same time provides the Commission with additional powers to supervise and coordinate the activities of the NRAs in applying the harmonised rules.[42] Under the Framework Directive, the Commission may: (i) veto the way the NRAs define markets and assess market power (*i.e.* SMP/dominance);[43] (ii) make individual recommendations on the way NRAs determine and impose remedies on undertakings found to possess market power, requiring the NRA to withdraw or amend the proposed remedy (and including specific proposals to that end);[44] and (iii) adopt decisions to ensure a harmonised application of remedies.[45] The Commission has two other tools to control the NRAs' application of the sector-specific regulatory rules, arising from its powers in the Treaty on the Functioning of the European Union: (i) Article 258 empowers the Commission to bring infringement procedures against a Member State if its NRA does not apply correctly EU electronic communications law or competition law;[46] and (ii) more subtly, the Commission may indirectly control the NRAs by opening competition cases against regulated operators, provided sector-specific regulation has left such operators with a sufficient degree of freedom of action within the scope of the regulation imposed on them, so that they can behave in an anticompetitive manner, notwithstanding their regulatory obligations. Indeed, the Commission's decisions in *Deutsche Telekom*[47] and *Telefónica*,[48] both of which concerned incumbent operators with SMP that had been regulated by their respective national regulators, were an

[39] Regulation 1/2003 of December 16, 2002 on the implementation of the rules on competition laid down in Arts.81 and 82 of the Treaty, O.J. 2003 L1/1.

[40] *ibid.*, Arts.11–13 and Commission Notice of March 30, 2004 on cooperation within the Network of Competition Authorities, O.J. 2004 C101/43 ("NCA Cooperation Notice"); see Ch.V, para.5–198 *et seq.*

[41] *ibid.*, Art.15 and Commission Notice of March 30, 2004 on the cooperation between the Commission and the courts of the Member States in the application of Articles 81 and 82 EC, O.J. 2004 C101/54; see Ch.V, para.5–202.

[42] See Ch.I, para.1–116 *et seq.*

[43] Framework Directive, para.8–003, n.2, Arts.6 and 7.

[44] *ibid.*, Art.7a.

[45] *ibid.*, Art.19(3a).

[46] The Commission published a list of its infringement cases brought under Art.258 in the electronic communications sector, which is available at: *http://ec.europa.eu/information_society/policy/ecomm/implementation_enforcement/infringement/index_en.htm*. The Court of Justice has confirmed that an infringement procedure under Art.258 may be launched independently of the internal market procedures set out in the Framework Directive: Case C-424/07, *Commission v Germany*, judgment of December 3, 2009, not yet reported, para.36.

[47] Case 37.451, *Deutsche Telekom*, Commission Decision of May 21, 2003, O.J. 2003 L263/9, upheld in *Deutsche Telekom v Commission*, para.8–008, n.15, para.113; see Ch.V, para.5–067.

[48] Case 38.784, *Wanadoo España v Telefónica*, Commission Decision of July 4, 2007, O.J. 2008 C83/6; appeal pending in Case T-336/07, *Telefónica v Commission*, O.J. 2007 C269/55; see Ch.V, para.5–068.

indirect but obvious critique of the actions of those regulators, which the Commission clearly perceived as being inadequate to control those operators' market power.

8–014 ***Cooperation between NRAs and national competition authorities at the national level***—The structure of the supervision and regulation of electronic communications and media operators varies between the Member States. On the one hand, the enforcement of sector-specific regulation is mainly undertaken by the independent sector-specific regulators that have been established in all Member States.[49] On the other hand, the enforcement of competition laws is shared between the Commission, national competition authorities, national courts, and, in some Member States, national regulatory authorities.[50] The necessity and effectiveness of maintaining a wide range of different authorities has been raised, as has the issue of the allocation of responsibility among them.[51] In so far as the application of these different rules aims at objectives which are not completely identical[52] and therefore requires specific expertise, which it would not be advisable or easy to centralise in a single body, the maintenance of a system of separate sector-specific regulators and competition enforcement agencies is broadly considered to be the preferred option, provided that adequate cooperation mechanisms are put in place to ensure the coherent application of both competition law and sector-specific regulation.[53] However, as sector-specific regulation increasingly uses competition law concepts, and as markets become increasingly competitive (thereby reducing the need to apply sector-specific legislation), inter-institutional cooperation should be strengthened. One possibility would be to follow the example set by banking supervision in Germany, where the supervisors are employees of the German Central Bank and work under the

[49] With respect to the regulation of the electronic communications and media sectors, there is both a trend towards convergence in some Member States and a trend towards divergence in other Member States. For instance, in the United Kingdom and Italy, a single regulatory authority has responsibility for both telecommunications and broadcasting regulation. In a number of federal states (*e.g.* Belgium and Germany), media regulation is a regional or state matter and regulatory competence is thus shared between a number of different regional authorities: see also Ch.I, para.1–075.

[50] For example, in the United Kingdom, OFCOM, the regulator of both the telecommunications and broadcasting sectors, can apply the Competition Act 1998 to companies active in the telecommunications sector. This is also the case in Greece.

[51] International Competition Network, *Working Group on Telecommunications Services* (Report to the Fifth Annual Conference in Cape Town, 2006); OECD, *Relationship between Regulators and Competition Authorities*, (1999) DAFFE/CLP(99)8; UNCTAD, "Best practices for defining respective competences and settling of cases, which involve joint action by competition authorities and regulatory bodies" (2006) TD/B/COM.2/CLP/44/Rev2. See also: Barros and Hoernig, "Sectoral Regulators and the Competition Authority: Which Relationship is best?" (2004) CEPR Discussion Paper 4541; De Visser, para.8–012, n.35; Larouche, "Coordination of European and Member State Regulatory Policy: Horizontal, Vertical and Transversal Aspects", in Geradin, Munoz, Petit, *Regulatory Authorities in the EC: A New Paradigm for European Governance* (Edward Elgar, 2005), 164; and Petit, "The Proliferation of National Regulatory Authorities alongside Competition Authorities: A Source of Jurisdictional Confusion", in Geradin, Munoz and Petit (eds.), *Regulatory Authorities in the EC: A New Paradigm for European Governance* (Edward Elgar, 2005), 180.

[52] The principal aims of competition law are to maintain effective competition and alleviate the exclusion of competitors that are as efficient of the incumbent, whereas the main aim of sector-specific regulation is to promote the development of effective competition, possibly by supporting the entry of competitors that are, at least initially, possibly less efficient than the incumbent: see ERG Report of March 2009 on the discussion of the application of Margin Squeeze tests to bundles, ERG (09) 07 ("ERG Report on Margin Squeeze Test"), para.6.

[53] Framework Directive, para.8–003, n.2, Arts.3(4) and 16(1); SMP Guidelines, para.8–010, n.22, paras.135–137.

instructions of the financial regulatory authority; thus, in such a structure, the employees of an NRA would work under the instructions of the relevant national competition authority.[54]

C. Practical examples of the interaction between competition law and sector-specific regulation

8–015 **Introduction**—Sector-specific regulation and competition law complement each other to achieve the objectives of market liberalisation, the maintenance of effective competition and the protection of consumers' interests. This section examines some examples of circumstances in which sector-specific regulation and competition law have interacted and/or overlapped and where a coherent interpretation and application of the applicable rules is needed, at both the substantive and procedural levels.

8–016 **Substantive issues**—Competition law and sector-specific regulation interact in a number of substantive matters. On the one hand, competition law theory paved, in some cases, the way for the adoption of sector-specific regulation with concepts such as non-discrimination or price regulation obligations, whereas in other cases, regulatory issues have generated new competition law theories, such as margin squeezes and access to essential facilities. On the other hand, an *ex post* application of competition law has, in some cases, been used to change the structure of a market to achieve regulatory objectives, by correcting the inadequacy of sector-specific regulation (so-called "regulatory antitrust"), whereas, in other cases, the application of competition law has taken into account the state of regulation to avoid the imposition of additional competition-law based remedies.

8–017 ***Non-discrimination***—Under the competition rules, it is established that discrimination can amount to an abuse of a dominant position within the meaning of Article 102, unless there is an objective reason to justify the difference in treatment.[55] The Access Directive implements this principle in relation to access and interconnection pricing, by stating that NRAs can oblige operators to offer third parties access and interconnection on the same conditions "in equivalent circumstances" as they provide access and interconnection to their own businesses or those of affiliates.[56] The Access Directive therefore requires NRAs to ensure that organisations providing access and interconnection do not discriminate in favour of services of their own business units or those of subsidiaries or partners. The implementation of sector-specific regulation in the area of access and interconnection therefore results in the direct application of competition rules

[54] This proposal was made by Hellwig, "Competition Policy and Sector-specific Regulation for Network Industries", in Vives, *Competition Policy in the EU: Fifty Years on from the Treaty of Rome* (Oxford University Press, 2009), 203.

[55] See Ch.V, para.5–089. Commission Directive 2002/77 of September 16, 2002 on competition in the markets for electronic communications networks and services ("Liberalisation Directive"), O.J. 2002 L249/21, Art.3.

[56] Art.10 of Directive 2002/19 of March 7, 2002 on access to, and interconnection of, electronic communications networks and associated facilities, O.J. 2002 L108/7 ("Access Directive"), as amended by the Better Regulation Directive, para.8–003, n.2 ; see also ERG Revised Common Position of May 2006 on the approach to appropriate remedies in the new regulatory framework, ERG(06) 33, ("Revised ERG Common Position on Remedies"): see generally Ch.I, para.1–243 *et seq.* and, as regards non-discrimination obligations, para.1–251 *et seq.*

principles. NRAs must therefore ensure that they follow an approach that is consistent with that applied by competition authorities.

8–018 ***Price controls***—Under the competition rules, the tariffs of a dominant operator may not be excessive, *i.e.* substantially above costs.[57] The rules of the EU Regulatory Framework include a number of specific measures to permit the regulation of the prices of operators that have been designated as having SMP in the relevant market. In particular, the tariffs of operators that have been designated with SMP must be non-discriminatory, unbundled, cost-based and transparent.[58] Likewise, the Access Directive requires operators of digital conditional access services to offer their services to all broadcasters on a fair, reasonable and non-discriminatory basis.[59] In certain aspects (including cost-orientation and transparency), this pricing regulation is more specific, and may go somewhat further, than the requirements of competition law. However, in other aspects, these specific rules regulate matters that have traditionally fallen within the scope of the competition rule. In this respect, sector-specific rules refer specifically to the need for NRAs to interpret these concepts in light of the competition rules.

8–019 ***Price squeeze***—The Access Directive provides that wholesale charges should not be discriminatory and should be cost-oriented, which implies that operators may not charge an excessive wholesale charge and, given their retail prices, make entry on the retail markets unprofitable.[60] Under competition law, a dominant operator may not implement a combination of wholesale charges and retail tariffs that makes unprofitable the entry of a competitor that is at least as efficient as the dominant firm.[61] The Commission has found that both Deutsche Telekom[62] and Telefónica[63] infringed Article 102 by engaging in such practices.

8–020 ***Access to "essential facilities"***—NRAs have the primary responsibility for dealing with network access issues under the Regulatory Framework (*e.g.* access to the local loop).[64] A number of those problems could also be addressed by the application of the competition rules, and in particular the "essential facilities" doctrine applied under Article 102.[65] Therefore, the essential facilities doctrine has a role to play in the electronic communications sector. First, as indicated, NRAs are required to apply the principles of the competition rules, and their implementation of access regulation must be consistent with the principles established by the Commission and the

[57] Evans and Padilla, "Excessive Prices: Using Economics to Define Administrative Legal Rules" (2005) 1 *Journal of Competition Law and Economics* 97; and Motta and de Streel, "Excessive Pricing in Competition Law: Never say Never?", in Swedish Competition Authority (ed.), *The Pros and Cons of High Prices* (2007), 14; for application in the electronic communications sector, see Haag and Klotz, "Commission Practice concerning excessive pricing in Telecommunications" (1998) 2 *Competition Policy Newsletter* 35.

[58] See Ch.I, para.1–243 *et seq.*

[59] Access Directive, para.8–017, n.56, Art.6.

[60] *ibid.*, Arts.10 and 13. See Revised ERG Common Position on Remedies, para.8–017, n.56 and ERG Report on Margin Squeeze Tests, para.8–014, n.52.

[61] Access Notice, para.8–008, n.16, paras.117–119; Art.102 Guidance, para.8–002, n.1, para.75 *et seq.*

[62] *Deutsche Telekom*, para.8–013, n.47; Amory and Verheyden, "Comments on the CFI's Recent Ruling in Deutsche Telekom v European Commission" (2008) *Global Competition Policy*; Genevaz, "Margin Squeeze after Deutsche Telekom" (2008) *Global Competition Policy*; and O'Donoghue, "Regulating the Regulated: Deutsche Telekom v European Commission" (2008) *Global Competition Policy*.

[63] *Telefónica*, para.8–013, n.48.

[64] *Deutsche Telekom*, para.8–013, n.47, para.167; Access Directive, para.8–017, n.56, Art.12. On NRAs' powers and duties, see Ch.I, para.1–074 *et seq.* and on access remedies that may be imposed on operators with SMP, see Ch.I, para.1–227 *et seq.*, above.

[65] Article 82 Guidance, para.8–002, n.1, para.75 *et seq.*; see Ch.V, para.5–095 *et seq.*

European Courts in relation to access to essential facilities under Article 102. Second, the scope of the application of the competition rules is broader than that of the sector-specific rules as competition law applies to all markets, whereas sector-specific economic regulation applies only to markets fulfilling the three-criteria test.[66] Third, in so far as the competition rules apply in parallel with sector-specific regulation, companies seeking access may have the possibility of relying on the "essential facilities" doctrine under competition law in the event of a deficient or unsatisfactory implementation of the sector-specific rules by NRAs.

8–021 ***Competition cases having regulatory objectives***—Competition law may be, and in practice has been, used as an instrument to liberalise electronic communications markets, either as an alternative or as a complement to sector-specific regulation. In particular, this has been the case when the Commission has made its approval of concentrations under the Merger Control Regulation or the exemption of a transaction reviewed under Article 101 conditional upon the implementation of specific conditions or undertakings given by the parties.[67] Often, these measures had a permanent impact on the structure of the market, which may pre-empt the need for the subsequent application of sector-specific regulation. Sometimes, these measures will include remedies that have then been adopted more generally under sector-specific regulation.

8–022 *Intervention under Article 101*—By the mid-1990s, the Commission had made the granting of individual exemptions under Article 101(3) for several joint ventures between national incumbents conditional on additional liberalisation measures. For instance, it allowed the *Atlas* joint venture between France Télécom and Deutsche Telekom only on the condition that the French and German governments licensed alternative operators in their markets, despite the lack (at that time) of EU legislation requiring them to do so.[68] Many other cases show that the Commission was following a truly regulatory strategy, which has gone sometimes beyond remedying the competition concerns in the individual case at hand; for instance, in *British Interactive Broadcasting*,[69] the Commission required the divestiture of BT's cable interests in order to favour the creation of competition in local network infrastructure in the United Kingdom.

8–023 *Intervention under the Merger Control Regulation*—In *Telia/Telenor*,[70] in order to approve the merger, the Commission required the parties to grant access to their local loop infrastructure to resolve competition issues raised by the merger; this remedy was subsequently superseded at a general level by sector-specific regulation with the adoption of the Local Loop Unbundling Regulation. However, in *Telia/Sonera*,[71] the Commission realised that local loop unbundling had not produced the desired results for competition in local loop infrastructure and

[66] See Ch.IV, para.4–017 *et seq.*

[67] Cave and Crowther, "Pre-emptive Competition Policy Meets Regulatory Antitrust" (2005) *European Competition Law Review* 481; Larouche, *Competition Law and Regulation in European Telecommunications* (Hart, 2000), 240.

[68] See, *e.g.*, Case 35.337, *Atlas*, O.J. 1996 L239/23 (and Case 35.617, *Phoenix/GlobalOne*, O.J. 1996 L239/57 (discussed in Ch.VII, para.7–599 *et seq.*); and Case 35.830, *Unisource*, O.J. 1997 L318/1 and Case 36.319, *Uniworld*, O.J. 1997 L318/24 (discussed in Ch.VII, para.7–612 *et seq.*). On the objectives of the Commission at the time, see the account of a senior official in charge of those cases: Ungerer, "Use of EC Competition Rules in the Liberalisation of the European Union's Telecommunications Sector" (May 6, 2001).

[69] Case 36.539, *British Interactive Broadcasting/Open*, O.J. 1999 L312/1 (discussed in Ch.VII, para.7–685 *et seq.*).

[70] Case M.1439, *Telia/Telenor*, Commission Decision of October 13, 1999 (discussed in Ch.VII, para.7–251 *et seq.*).

[71] Case M.2803, *Telia/Sonera*, Commission Decision of July 10, 2002, para.119 (discussed in Ch.VII, para.7–281 *et seq.*).

services using that infrastructure in Sweden and Finland and therefore made its approval of the merger conditional upon Telia and Sonera operating their fixed networks (including the local loop) and their retail services businesses using these networks through separate legal entities. The series of merger cases involving Vodafone in the early 2000s is also interesting in this respect. In *Vodafone Airtouch/Mannesmann*, [72] the Commission made its approval conditional upon non-discriminatory third party access by competitors to Vodafone's pan-European mobile network for a period of three years in order to protect competition in the emerging market for seamless pan-European mobile services. In both *Vodafone/Eircell*[73] and *Vodafone/Airtel*,[74] the Commission expressly referred to the commitments given in *Vodafone Airtouch/Mannesmann* and stated that the continued application of these commitments would remedy the competition concerns that arose in Vodafone's acquisition of Eircell and its acquisition of sole control of Airtel. This is a good example of a remedy in a merger case having equivalent effect to general sector-specific regulation. This approach has been criticised on several grounds, including that:[75] (i) it is not legitimate to use competition law for other purposes than its main objective, which is to ensure that concentrations and other transactions do not reduce the current level of competition on the markets; and (ii) it is short-cutting the lengthy and cumbersome legislative process that must be followed to adopt sector-specific legislation on these markets and the involvement of other institutions such as the Council and the Parliament in this process. However the approach has been implicitly endorsed to some extent by the General Court in the electricity sector, where the Commission has taken a similar approach.[76]

8–024 ***The competition assessment of concentrations in the light of the sector-specific regulatory framework***—In its assessment of the first strategic alliances and mergers in the electronic communications sector in the mid-1990s, the Commission took into account the efficiency (or lack thereof) of the national regulatory frameworks in preventing anti-competitive behaviour in imposing conditions to its exemption decisions authorising strategic alliances involving incumbent operators.[77]

8–025 *Imposition of competition remedies where sector-specific regulation is inadequate*—In 1999, in *Telia/Telenor*, the Commission found that the sector-specific regulatory regimes in place in Sweden and Norway at the time were inadequate to prevent anti-competitive conduct by the merged entity, which justified the imposition of remedies of a regulatory nature (*i.e.* local loop unbundling).[78] Later, in *Telia/Sonera*, the Commission appeared to take the view that both the *ex*

[72] Case M.1795, *Vodafone Airtouch/Mannesmann*, Commission Decision of April 12, 2000, para.59 and Annex (discussed in Ch.VII, para.7–325 *et seq.*).

[73] Case M.2305, *Vodafone/Eircell*, Commission Decision of March 1, 2001, para.20 (discussed in Ch.VII, para.7–347 *et seq.*).

[74] Case M.2469, *Vodafone/Airtel*, Commission Decision of June 26, 2001, para.19 (discussed in Ch.VII, para.7–353 *et seq.*).

[75] See Geradin and Sidak, para.8–008, n.17; Larouche, para.8–014, n.51, 353; Veljanovski, "EC Antitrust in the New Economy: Is European Commission's View of the Network Economy Right?" (2001) *European Competition Law Rev.* 115.

[76] Case T-87/05, *EDP-Energias de Portugal v Commission* [2005] E.C.R. II-3745, para.91.

[77] For example, in *Atlas*, para.8–022, n.68, and *Phoenix/GlobalOne*, para.8–022, n.68, the Commission imposed conditions on the parties to prevent undue discrimination and cross-subsidisation between the parent companies and the joint ventures (discussed in Ch.VII, para.7–599 *et seq.*). By contrast, in Case 34.857, *BT/MCI*, O.J. 1994 L223/36, the Commission found that the efficiency of the United Kingdom regulatory regime would have prevented any such risks of anti-competitive conduct (discussed in Ch.VII, para.7–591 *et seq.*).

[78] *Telia/Telenor*, para.8–023, n.70.

post nature of regulation in Finland and Sweden and the EU's sector-specific regulatory regime (which required accounting separation, but not structural separation of undertakings with SMP and local loop unbundling) were (despite strengthening in the meantime) still inadequate to prevent anti-competitive conduct that could have arisen due to the vertical effects of the merger. The Commission therefore imposed conditions requiring the legal separation of the different fixed and mobile network and service businesses of the parties in Sweden and Finland, in addition to more "traditional" divestment conditions.[79] Similarly in *Newscorp/Telepiù*,[80] the Commission imposed substantial access and behavioural remedies (even though the Italian NRA had jurisdiction to apply sector-specific regulation), and relied on the Italian NRA to monitor their implementation.

8–026 *Competition remedies not required if sector-specific regulation is effective*—If sector-specific economic regulation is sufficient to prevent anti-competitive behaviour (or anti-competitive effects as a result of a merger), the Commission does not impose additional competition law remedies in order to approve a cooperation agreement or a concentration.[81] Thus, in authorising the 3G network sharing agreements in Germany and the United Kingdom between O2 and T-Mobile, the Commission took into account the extensive sector-specific regulation access remedy.[82] With the strengthening of sector-specific regulation, its alignment to competition law principles and the adoption of the Roaming Regulation,[83] the tendency to take into account regulation in the assessment of concentrations has increased significantly. It led to many mergers being cleared without any competition law remedies being imposed, particularly in respect of vertical foreclosure concerns, where effective regulation is one factor preventing the implementation of foreclosure strategies by the merging parties. For instance, in *Deutsche Telekom/OTE*, the Commission approved the merger by taking into account the regulation imposed by the Romanian regulator on RomTelecom, a subsidiary of OTE.[84] Similarly in *Vodafone/Tele2 Italy/Tele2 Spain*, the Commission approved the merger by taking into account the regulation of fixed and mobile termination rates by the Italian NRA.[85] In *T-Mobile/Orange Netherlands*, one of the reasons why the Commission approved the merger was the fact the mobile termination rates of the merging parties were regulated by the Dutch regulator, thereby limiting the merged entity's ability to foreclose rivals.[86]

[79] *Telia/Sonera*, para.8–023, n.71.

[80] Case M.2876, *Newscorp/Telepiù*, Commission Decision of April 2, 2003, para.259 (discussed in Ch.VII, para.7–528 *et seq.*).

[81] For an example of where the Commission took into account the effectiveness of sector-specific regulation in the United States to prevent anti-competitive foreclosure, see Case M.3752, *Verizon/MCI*, Commission Decision of October 7, 2005 (discussed in Ch.VII, para.7–287 *et seq.*).

[82] Case 38.370, *BTCellnet and BT3G/One to One (UK Network Sharing Agreement)* O.J. 2003 L200/59; and Case 38.369, *T-Mobile Deutschland and O2 Germany (German Network Sharing Agreement)* O.J. 2003 L75/32, partially annulled in Case T-328/03, *O2 Germany v Commission* [2006] E.C.R. II-1231: see Ch.V, paras.5–025 and 5–038.

[83] Regulation 717/2007 of the European Parliament and of the Council of June 27, 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21, O.J. 2007 L171/32 ("Roaming Regulation"), as amended by Regulation 544/2009 amending Regulation 717/and Directive 2002/21 on a common regulatory framework for electronic communications networks and services, O.J. 2009 L167/12; see Ch.I, para.1–348.

[84] Case M.5148, *Deutsche Telekom/OTE*, Commission Decision of October 2, 2008, paras.26, 89 and 115 (discussed in Ch.VII, para.7–300 *et seq.*).

[85] Case M.4947, *Vodafone/Tele2 Italy/Tele2 Spain*, Commission Decision of November 27, 2007, paras.22–23 (discussed in Ch.VII, para.7–295 *et seq.*).

[86] *T-Mobile/Orange Netherlands*, para.8–011, n.30.

8–027 Institutional and procedural issues—As well as the substantive interaction between competition law and sector-specific regulation, there are also a number of interactions between them at a procedural level.

8–028 ***The Commission acts mainly, but not exclusively, in cross-border cases***—The Commission has indicated that, in using its competition law powers and following the modernisation and decentralisation of the application of Articles 101 and 102 in May 2004 with the entry into force of Regulation 1/2003, it intends to intervene only when the alleged anti-competitive practice has effects on competition in more than three Member States or when the consistency in the application of European competition law requires its intervention. It will, otherwise, leave cases to be investigated by national competition authorities.[87] In the electronic communications sector, in order to avoid unnecessary parallel proceedings, the Commission has indicated that, once a matter is being considered by an NRA, the Commission will normally not pursue any investigation of a complaint under Articles 101 and/or 102 relating to the same matter.[88] However, if the matter can not be solved by the NRA, either at all or within six months, the Commission has stated that it would, in principle, begin an investigation of the case after consultation, and in cooperation, with the NRA concerned.[89]

8–029 ***Collection of evidence***—The competition authorities may, in applying competition law, rely on publicly available data collected by the national regulatory authorities or the competitive assessments of those authorities.[90] In particular, in order to establish evidence of pricing abuses (*e.g.* cross-subsidisation, excessive or predatory pricing) that may infringe Article 102, national competition authorities and the Commission may base their cost analysis on the sector-specific measures aimed at improving the transparency of the accounting practices of dominant operators, including the relevant method for calculating and allocating costs.[91] The implementation of sector-specific regulation thereby becomes a tool for improving the enforcement of the competition rules.

8–030 ***Fines***—An infringement of EU competition law can, and usually does, result in the imposition of substantial fines.[92] However, whilst notification of agreements to an NRA (where possible under national law) does not give immunity from fines under Articles 101 or 102, the Commission has indicated that it may not impose fines in relation to an agreement that it ultimately finds to be incompatible with Article 101, if the agreement in question has been notified to

[87] NCA Cooperation Notice, para.8–012, n.40, paras.14 and 54; see generally, Ch.V, para.5–198 *et seq.*

[88] See Access Notice, para.8–008, n.16, paras.26–32. For example, the Commission suspended its 1998 investigation of Deutsche Telekom's pricing practices in light of parallel proceedings before the German NRA: see Commission Press Release, *Commission terminates procedure against Deutsche Telekom's fees for preselection and number portability and transfers the case to national authorities*, IP/98/430 (May 15, 1998). The Commission did the same for cases regarding excessive accounting rates (see Commission Press Releases, *Commission decides to concentrate its investigation into international telephone prices on 7 cases*, IP/98/763 (August 13, 1998) and *Commission sees substantial progress in its investigation into international telephone prices*, IP/99/279 (April 29, 1999)) and excessive prices of short distance leased lines (see Commission Press Release, *Price decreases of up to 40% lead Commission to close telecom leased line inquiry*, IP/02/1852 (December 11, 2002)).

[89] See Access Notice, para.8–008, n.16, paras.26–32. For cases regarding excessive prices of international leased lines, see Commission Press Release IP/02/1852, *ibid.*

[90] *Carphone Warehouse/Tiscali UK*, para.8–010, n.26; and *T-Mobile/Orange Netherlands*, para.8–011, n.30, para.31. See also Case M.4591, *Weather Investments/Hellas Telecommunications*, Commission Decision of April 4, 2007, para.24.

[91] Case 66/86, *Ahmeed Saeed Flugreisen* [1989] E.C.R. 803, para.41.

[92] Regulation 1/2003, para.8–012, n.39, Art.23 and Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No.1/2003, O.J. 2006 C210/5: see Ch.V, para.5–193 *et seq.*

an NRA.[93] The Commission has also considered that the existence of sector-specific regulation may be a mitigating circumstance in case of an abuse of a dominant position prohibited by Article 102.[94]

D. Some considerations regarding the relationship between sector-specific regulation and the competition rules

8–031 The relationship between sector-specific regulation and the competition rules in the communications sector and other network industries has been extensively evidenced and commented on, especially in the light of convergence between both regimes brought about by the Regulatory Framework.[95]

8–032 Substantive issues—At the substantive level, several questions are raised. These include whether there is a need to preserve regulation to protect non-economic public interest objectives, as well as, whether there is a need to maintain an economic regulation to ensure effective competition separate from antitrust law and, if so, under what form?

8–033 ***Maintenance of electronic communications and media regulation***—In so far as the electronic communications and broadcasting sectors are being liberalised and opened to competition, the question arises whether it is appropriate to maintain sector-specific regulation in addition to a case-by-case application of the competition rules, particularly in markets that are effectively competitive. The issue is particularly relevant in the context of convergence, where the electronic communications and broadcasting markets, which historically have been highly regulated, are converging with the information technology sector, which has been largely left unregulated. Moreover, regulation of electronic communication is more harmonised than regulation of broadcasting. This asymmetry in the degree of harmonisation is politically motivated, as Member States are reluctant to transfer powers to the EU in what they consider to be culturally and politically sensitive media markets.[96]

8–034 ***Maintenance of non-economic regulation***—Specific regulatory provisions need to be maintained in so far as they pursue public interest objectives (*e.g.* ensuring affordable pricing of, and universal access to, electronic communications services, the protection of the security of users, of minors, media pluralism and diversity, and environmental protection). As many of these questions are non-economic in nature, their protection cannot be fully achieved by application of

[93] Access Notice, para.8–008, n.16, para.37.

[94] *Deutsche Telekom*, para.8–008, n.15, para.212, upheld by the Court of First Instance in *Deutsche Telekom v Commission*, para.8–008, n.15, para.313 (see Ch.V, para.5–067), and *Telefónica*, para.8–013, n.48, paras.765–766 (see Ch.V, para.5–068). In both cases, the Commission reduced the fine by 10% for this reason.

[95] Bavasso, *Communications in EU Antitrust Law: Market Power and Public Interest* (Kluwer, 2003); and Carlton and Picker, para.8–006, n.13; de Streel, "Antitrust and Sector-Specific Regulation of Access in the European Union", in Dewenter and Haucap, *Access Pricing: Theory and Practice* (Elsevier, 2007), 328; Geradin and Kerf, *Controlling Market Power in Telecommunications: Antitrust vs Sector-Specific Regulation* (Oxford University Press, 2003); Larouche, "A closer look at some assumptions underlying EC regulation of electronic communications", (2002) *Journal of Network Industries*, 129; Nihoul and Rodford, para.8–006, n.13; Stoyanova, *Competition Problems in Liberalised Telecommunications: Regulatory Solutions to Promote Effective Competition* (Kluwer, 2008); and Temple Lang, "Competition Policy and Regulation: Differences, Overlaps, and Constraints", in Leveque and Shelanski, *Antitrust and Regulation in the EU and US: Legal and Economic Perspectives* (Edward Elgar, 2010).

[96] In some Member States (*e.g.* Germany and Belgium) such transfer would, under national constitutional law, require the consent of regional entities, which is highly unlikely to be obtained.

the competition rules or by the operation of market forces.[97] In this sense, there is not necessarily a dichotomy between the policies of the development and achievement of liberalised and competitive markets and securing public interest objectives, provided that sector-specific regulation is applied in a proportionate manner and does not unnecessarily distort competition.

8–035 ***Maintenance of transitional economic regulation until effective competition is established***—In the EU, as in many other jurisdictions that have liberalised their electronic communications sector, the peculiar structure of the market (*i.e.* an incumbent, dominant operator, high barriers to and high costs of entry, relatively low marginal or incremental costs, and network effects) has required the adoption of sector-specific regulation both to foster competition and to constrain the exercise of incumbent operators' market power that could both unfairly exploit customers and prevent effective competition from emerging. *Ex ante* regulatory rules are therefore required, at least in the short to medium term, to ensure efficient and timely access to networks or other facilities that would otherwise constitute "bottlenecks" for market entry, and to control tariffs for services that are not subject to effective competition. The application of the competition rules alone, because they essentially apply *ex post* after conduct has taken place, are not adequate to achieve these objectives. Sector-specific regulation provides at least a degree of legal certainty for new entrants and their investors, and provides for either the prevention, or a more timely resolution, of anti-competitive practices. Without specific *ex ante* rules, anti-competitive conduct could result in incumbents' positions becoming entrenched before any *ex post* application of the competition rules could be effective.

8–036 *Need of sector-specific regulation in the transitory phase*—The inadequacy of the use of only competition rules to regulate newly liberalised markets in the electronic communications sector is illustrated by the experience in New Zealand. There, reliance was placed upon competition rules with only a minimalist (*i.e.* "light-handed") application of sector-specific regulation,[98] but disputes over the terms of interconnection with the incumbent operator (Telecom New Zealand) led to considerable and seemingly endless competition litigation between the incumbent operator and new entrants.[99] New Zealand therefore had to introduce a degree of sector-specific regulation to cover network access and interconnection.[100]

8–037 *The future of sector-specific regulation*—As market structures evolve and become more competitive, as new entrants develop and the market power of incumbent operators is eroded, sector-specific regulation should be gradually phased out in favour of increased reliance on competition rules. This is foreseen by the Regulatory Framework.[101] However, it remains to be

[97] The extent to which the application of the competition rules alone can contribute to the achievement of specific public interest objectives is not easy to determine on an *ex ante* basis. For example, in the electronic communications sector, operators may have an economic incentive to provide at least some aspects of universal service, even if there is no regulatory obligation to do so, but there is no way of guaranteeing this. On universal service, see Ch.I, para.1–291 *et seq.*

[98] See Geradin and Kerf, para.8–031, n.95, Chapter 5. For a more nuanced view, see Howell, *From Competition to Regulation: New Zealand telecommunications sector performance 1987–2007* (2008) ISCR Paper. On the insufficiency of the competition rules in regulating the current electricity markets in Germany, see Hellwig, para.8–014, n.54.

[99] Blanchard, "Telecommunications regulation in New Zealand: light-handed regulation and the Privy Council judgment" (1995) 19 *Telecommunications Policy* 456.

[100] New Zealand Telecommunications Act 2001.

[101] Framework Directive, para.8–003, n.2, Art.16 and Better Regulation Directive, para.8–003, n.2, recital 5. Thus, several retail markets have been deregulated by several NRAs since the entry force of the Regulatory Framework: see Ch.IV, para.4–031.

seen whether the market structure of the electronic communications and media markets will ever reach a situation where the mere application of competition law alone will suffice to maximise customers' welfare. It may well happen that the structure of at least some markets will remain a "natural monopoly or oligopoly", justifying the maintenance of a permanent economic regulation. Indeed, the Commission's proposals for the maintenance of sector-specific regulation in the context of next generation access networks[102] is an indication that such regulation will not be removed in the short or medium term, for so long as incumbents continue to possess market power.

8–038 ***Need to ensure that economic regulation carries a systemic analysis***—If sector-specific economic regulation is to be maintained, it should take into account the "broad picture" and the relationship between the different markets that are being regulated.[103] With the alignment on competition law principles, there is a risk of losing sight of this broad picture, as a competition analysis is focused on a particular market and the firms that compete on it, without necessarily having to take into account all the relationships between the different markets in the sector. For example, when an NRA regulates fixed or mobile termination charges, it should take into account the effect of its intervention on all other prices (*e.g.* retail and wholesale access charges) that the regulated operator may change, under the so-called "waterbed" effect. Thus, a mobile operator which is obliged to lower its termination charges may, under certain market circumstances, decide to compensate for this loss of profit by raising its non-regulated tariffs for retail subscribers or by lowering its subsidies of mobile handsets to end-users.[104] Therefore, this possible consequence should be taken into account by NRAs when intervening in termination markets.

8–039 ***Need to ensure that economic regulation preserves long-term interests***—The objective of any market liberalisation process must be the creation of long-term, sustainable and effective competition. Therefore, the economic consequences of the adoption of a specific model of sector-specific regulation must be closely monitored. If a preference is given to the (fast) development of service competition by way of imposing far-reaching access obligations on operators with SMP, combined with wholesale and retail price regulation, the long run effects of this policy choice may be negative, as competition in network infrastructure could be undermined (due to a lack of incentives for new entrants to invest in alternative infrastructure).[105] As a result, the possibility of creating sustainable long-term competition in the provision of infrastructure may be jeopardised, thereby leading to prolonged regulation and an obsolete network infrastructure that does not readily respond to the needs of service providers and customers. In this context, the application of sector-specific regulation must balance short-term and long-term policy considerations.[106] This

[102] See Ch.I, para.1–267 *et seq.*

[103] de Bijl *et al. Interconnected networks* (2005) 7 TILEC Discussion Paper; Hellwig, para.8–014, n.54, 20.

[104] Genakos and Valletti, "Testing the Waterbed Effect in Mobile Telephony" (2008) 6(2) CEIS Tor Vergata Research Paper.

[105] The relationship between regulation and investment in Europe has been studied in several papers, not always with the same conclusion: Friederiszick, Grajek and Röller, Analysing the relationship between regulation and investment in the telecom sector (ESMT Competition Analysis Paper, 2007); London Economics and PricewaterhouseCoopers, An Assessment of the Regulatory Framework for Electronic Communications—Growth and Investment in the EU e-Communications Sector (Report to the European Commission, 2006); Waverman, Meschi, Reillier and Dasgupta, Access Regulation and Infrastructure Investment in the Telecommunications Sector: an empirical investigation (Study for ETNO, 2007).

[106] Framework Directive, para.8–003, n.2, Art.8(5d) and Better Regulation Directive, recital 8. This balancing should also be undertaken under competition law, especially when imposing compulsory access under the essential facilities doctrine: Article 82 Guidance, para.8–002, n.1, para.75. See also Ch.V, para.5–095 *et seq.*

balancing is particularly relevant in the context of the deployment of next generation networks, where regulators should be cautious not to discourage operators from investing in rolling out new and very expensive new or upgraded networks.[107]

8–040 Institutional and procedural issues—To achieve an efficient internal market for electronic communications in Europe, a robust institutional design should be established. In particular, two main issues remain after the 2009 amendments to the Regulatory Framework: (i) is there a need for a European regulator, alongside or instead of the national regulatory authorities; and (ii) is there a need for more coordination between the national courts, which are increasingly important actors in regulating the electronic communications sector?

8–041 ***A European electronic communications agency?***—In the electronic communications sector, the creation of regulatory agencies at the national level, with varying degrees of independence and competence, has raised the issue of whether there can be effective and harmonised enforcement of the sector-specific rules across the EU, when the substantive rules have been harmonised.[108] Following earlier studies in 1997[109] and 1999,[110] a 2006 Commission study found that a majority of operators were opposed to a European regulator.[111] Despite this study, the Commission considered that the coordination mechanisms introduced in 2003 had proved to be insufficient to achieve a true internal market for electronic communications.[112] Hence, in its 2007 Review, the Commission proposed the creation a European Electronic Communications Market Authority, without defining precisely the competencies of this new agency, as well as an extension of the Commission's veto power to cover the remedies proposed by the NRAs. However, both proposals met fierce opposition from the NRAs, the Council of Ministers and the European Parliament, which considered

[107] See Commission draft Recommendation of June 12, 2009 on regulated access to Next Generation Access Networks (discussed in Ch.I, para.1–267 *et seq.*). See also, as regards emerging markets, Ch.IV, para.4–021 *et seq.*

[108] In so far as non-economic questions, such as culture, are essentially a matter for the Member States, and the Member States have divergent cultural policies, the creation of a single body at the EU level that would be responsible for enforcing content regulation is not presently a realistic option and is not likely to become one in the immediate future.

[109] NERA/Denton Hall, *Issues Associated with the Creation of a European Regulatory Authority for Telecommunications* (Study for the European Commission, 1997). This study found that, at that time, cooperation between NRAs, national competition authorities and the Commission was very limited and that the independence of certain NRAs was questionable. It also found that a majority of market participants supported some regulatory functions being performed by an authority acting at the European level, in particular as regards frequency management, numbering, licensing and interconnection. The study considered several options, including the creation of an independent European Telecommunications Authority.

[110] Eurostrategies and Cullen, *Possible Added Value of a European Regulatory Authority for Telecommunications* (Report for the European Commission, 1999). This study indicated that a majority of market participants in the European electronic communications sector were satisfied with the regulatory structure and did not favour the creation of a European regulatory agency. Therefore, in its 1999 Review, the Commission did not propose the creation of an EU-wide regulator, but proposed enhanced cooperation between NRAs and additional review powers for the Commission, most of which were subsequently incorporated into the 2002 Regulatory Framework.

[111] Hogan & Hartson and Analysys, *Preparing the next steps in the regulation of electronic communications: A contribution to the review of the electronic communications regulatory framework* (Study for the European Commission, 2006), 91.

[112] Commissioner Reding, "The Review 2006 of Telecom rules: Strengthening Competition and Completing the Internal Market", Speech June 27, 2006; European Evaluation Consortium, "Cost-Benefit Analysis of Options for Better Functioning of the Internal Market in Electronic Communications" (Study for the European Commission, 2007).

them to be unjustified and inconsistent with the principle of subsidiarity. The revised 2009 Regulatory Framework merely provides the Commission with a new power to adopt decisions on the harmonised application of remedies at the general level[113] and creates BEREC, which is not very different from the previous European Regulators Group.[114] It seems that enhanced cooperation between NRAs would be beneficial for European consumers and a European regulator would be justified for services that have a clear cross-border dimension.[115] The regulation of international roaming is a case in point, in which the Commission has taken the lead through legislative, rather than administrative or competition law, means.[116]

8–042 ***Coordination between national courts***—National courts are an increasingly important actor in the application of the Regulatory Framework, as an increasingly large number of NRAs' decisions are challenged before national courts. In addition, there is increasing private litigation between operators. While the Regulatory Framework provides for several coordination mechanisms among the NRAs and between the NRAs and the Commission, it does not provide for any specific means for coordination among national courts or between them and the Commission.[117] Although the EU has limited jurisdiction to harmonise the Member States' judicial systems, it would appear to be appropriate for the Commission to adopt a Recommendation on best practices regarding national appeal rules. Several studies have already identified those best practices: (i) the possibility of an appeal within the NRA should be excluded; (ii) the number of levels of appeal on the merits should be limited to one; (iii) the appeal body's review of NRAs' decisions should be of an administrative nature similar to the control of the General Court over Commission competition law decisions; (iv) the appeal should be heard promptly; and (v) the rules for locus standi should be sufficiently clear.[118]

[113] Framework Directive, para.8–003, n.2, Art.19(3a) as modified by the Better Regulation Directive, para.8–003, n.2.

[114] BEREC Regulation, para.8–012, n.38: see Ch.I, para.1–100 *et seq.*

[115] Richards, Tarrant and Steele, "The Extent of Competition in Serving Business Customers from Fixed Infrastructures", in *The Economic Benefits from Providing Businesses with Competitive Electronic Communications Services*, (2007, Study for BT, available at: *http://www.btplc.com/Thegroup/RegulatoryandPublicaffairs/Consultativeresponses/BTdiscussionpapers/Electronic/Economicbenefits.pdf*).

[116] Roaming Regulation, para.8–026, n.83; see also Ch.I, para.1–348 *et seq.*

[117] Framework Directive, para.8–003, n.2, Art.4(3) merely provides that the Member States shall collect information on the general subject matter of appeals, the number of requests for appeal, the duration of the appeal proceedings and the number of decisions to grant interim measures, and provide such information to the Commission and BEREC after a reasoned request from either. This coordination mechanism is very weak, especially compared to the coordination mechanisms put in place under competition law: Regulation 1/2003, para.8–012, n.39, Art.15 states that the Commission may provide advice to a national court *ex officio* or upon request from the court.

[118] Andenas and Zleptnig, "Effective Access and Procedure in Telecommunications Disputes in Europe" (2004) E.B.L.R. 477; Cullen International, *NRA appeal system under the 2003 EU electronic communications regulatory framework* (Study for PTS, 2006); Lasok, "Appeals under the New Regulatory Framework in the Electronic Communications Sector" (2005) 16 E.B.L.R. 787.