

## **Abstract:**

The European Commission will present, in the first half of November 2007 concrete legislative proposals reviewing the EU regulatory framework for electronic telecommunication. The currently valid regulatory framework dates from 2003 and makes provision for an ex-ante regulation geared specially to the telecommunications sector. The aim of this regulation is to bring about competition on the telecommunications markets. As soon as this aim has been fulfilled, the ex-ante regulation should be revoked and solely the generally valid competition law should be applied.

In preparing its proposals, the Commission has published a communication about the review of the EU regulatory framework as well as a draft for a new market recommendation.

While the Commission comes to the conclusion that effective competition prevails on five end customer markets which therefore do not longer require ex-ante regulation, the draft recommendation and the Commission's communication do not solve some of the essential problems of the regulatory framework.

### **Deficits in terms of an ordo-liberal regulatory policy:**

In terms of ordo-liberal regulatory policy, it is of crucial importance that the EU regulatory framework always and only makes provision for a regulation when this is really necessary. This only applies in cases where a natural monopoly is combined with irreversible costs.

As is the case at the moment, the Commission wants to keep deciding on the need to regulate a market on the basis of a test that it has developed itself for this purpose. This "three-criteria test" is problematical for several reasons.

Firstly, it is only partly based on scientific criteria for regulation and hence also permits regulation when this is factually not necessary, but politically desired.

Secondly, the way the test is carried out is insufficient. An econometrically substantiated analysis which can withstand precise verification is necessary. This is currently not available.

Thirdly, the test refers to an "average EU market". This cannot sufficiently justify the ex-ante regulation of differing national telecommunication markets.

As the Commission wants to retain the "three-criteria test" in its current form, the ex-ante regulation of the telecommunications sector will continue to lack any adequate justification in terms of an ordo-liberal regulatory criteria. It is therefore doubtful whether the Commission can ensure that ex-ante regulation of the telecommunications sector will actually be revoked as soon as competition prevails.

### **Problematical institutional changes:**

In addition to the deficits in ordo-liberal regulatory policy terms, several of the institutional alterations to the EU regulatory framework proposed by the Commission are problematic. The Commission wants to

- simplify the procedure for regulation for the national regulatory authorities, which may result in consolidating the regulation;
- expand its veto rights by creating so-called "minimum standards";
- create a European regulatory authority or alternatively expand its competencies in telecommunications regulation.

The Commission can thus not dispel doubts as to whether it is not in fact aiming at reinforcing its own competencies instead of protecting the collective well-being of the European Union. In the end, the Commission's efforts mean that regulated companies themselves will have to demonstrate that there is no longer any need to regulate their activity. This must be rejected. It is for the regulator to show the need for the regulation he imposed, and not for the affected parties.

Additionally, the Commission's attempt to obtain a veto-right against concrete regulatory measures proposed by national regulatory authorities must be strictly rejected. This measure is not only unnecessary; it is also not compatible with the principle of subsidiarity and threatens to result in a size of regulation which is not acceptable by ordo-liberal regulatory criteria. In the interest of expanding its own influence, the Commission may use its extended veto rights to prevent the cutback of meanwhile superfluous ex-ante regulation.

The institutional alterations proposed by the Commission are not suitable for restricting regulation to the necessary minimum extent. In fact, the Commission appears to be trying above all to expand its own regulatory competence. In particular the Commission's right to veto the regulatory measures of the national regulatory authority may lead to centralisation and harmonisation of the regulations.

#### **Separation of infrastructure and services:**

The Commission's rejection of a property-rights related separation of telecommunication infrastructure and services is to be welcomed. This irreversible measure is not compatible with the provisional character of the regulatory framework and is disproportional, since competition can be warranted with far less profound measures.

Also the functional separation of infrastructure and services as proposed by Commissioner Reding must be rejected. Although this proposal does not entail a property-rights related separation, it does demand a strict separation between the management of a network and the management of retail customer business, for example by having separate staff not bound by instructions.

Both the Access Directive 2002/19/EC as well as competition law already ensure that competitors can use the infrastructure of a network operator with significant market power. Before considering a more severe intervention such as functional separation, it must be firstly be proven that these two instruments are not sufficient to bring about competition. Such proof is necessary particularly in Germany, which has seen a significant increase in the level of competition in the telecommunications sector in recent years.

Functional separation may also reduce the incentive for competitors to invest in establishing their own networks. As a result, infrastructure competition and thus the cut-back of functional separation would be postponed to the far distant future. Consequently, functional separation would not contribute towards the aim of the EU regulatory framework to create a competition market by means of provisional regulation.