

# Electronic Communications Markets: The New European Regulatory Approach

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by

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## Question: WHICH RELEVANT MARKET?



## CONVERGENCE & UNBUNDLING IN COMMUNICATIONS (I)

- Policy study by order of Dutch Prime Minister, 1989
- A new approach to regulation of electronic communications and media markets, based on competition in
  - Converging horizontal markets**
  - Unbundled vertical markets**
- An academic bestseller, no more. . .
- But - principles revived 2002 in new EU regulatory framework!



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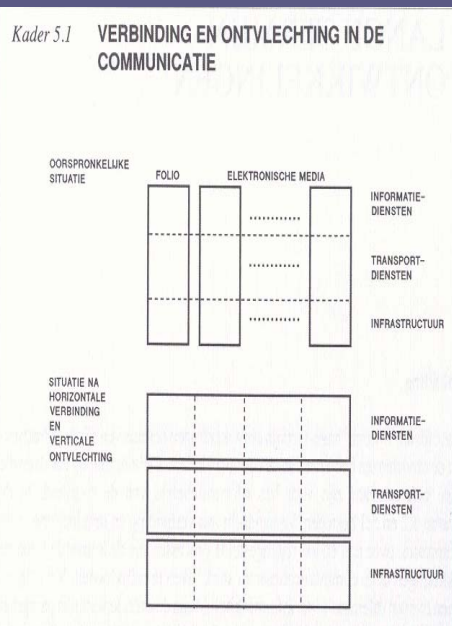
## CONVERGENCE & UNBUNDLING IN COMMUNICATIONS (II)

From **vertically integrated** business columns, e.g. markets for

- Print media
- Broadcast media, etc.

Towards **horizontal, unbundled** markets:

- Information services
- Transport services
- Provision of infrastructure

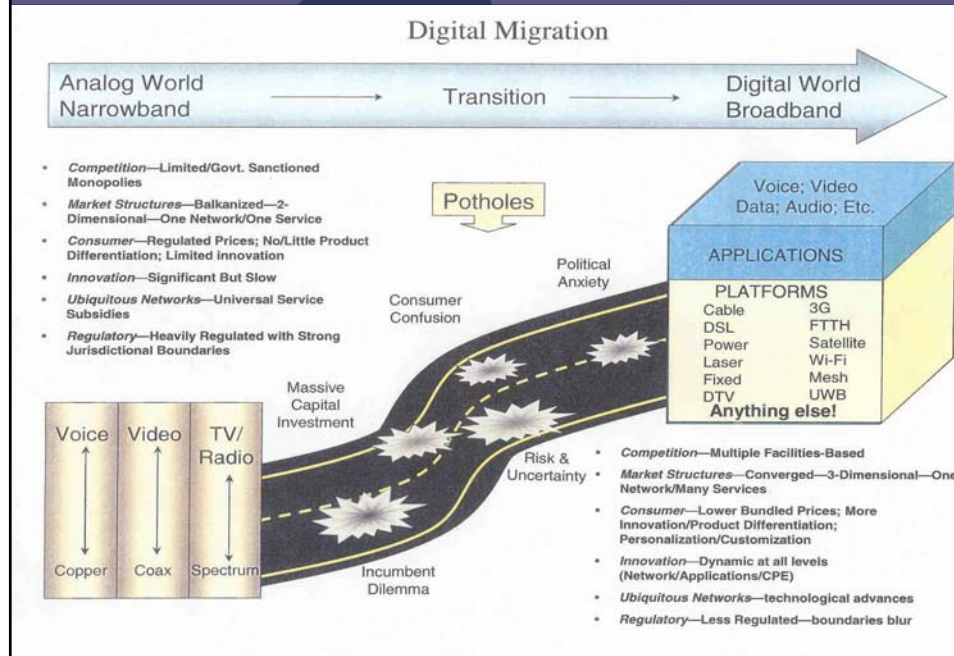


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## FCC'S VISION ON (DE-)REGULATION, anno 2003



## Basics of the New Regulatory Approach in EU:

- Still *ex-ante* regulation, but...
  - No longer technology-based: **Market-based & horizontal !**
- Analysis from **competition law** to be applied by NRAs to determine (**looking forward**)
  - relevant geographical markets
  - significant market power (SMP), if any
- (Only) where SMP is found, one or more *remedies* to be applied proportionately:
  1. Transparency
  2. Non-discrimination
  3. Accounting separation (wholesale and retail)
  4. Mandated (third-party) access
  5. Price control

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## Flexibility & Proportionality, *versus* Predictability & Harmonisation

- Dynamic markets call for proportionate and flexible regulation, but this must *also* be
  - predictable
  - harmonised in EU
- => New balance of (de-)centralized power:
  - ✓ Commission issues
    1. "Recommendation" on relevant markets (now 18)
    2. "Guidelines": Significant Market Power (SMP)
    3. (plans for) "Guidelines" on Remedies (with ERG)
  - ✓ NRAs do the analysis, subject to
  - ✓ Extensive consultation procedures

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## Each NRA to consult with: (a) Commission, with *veto* powers

<u>Subject</u>	<u>Commission Veto</u>
1. Market definition	yes
2. SMP designation	yes
3. Remedy (ex art.9-13, Access Dir.)	no

### Reasons for veto: NRA acts contrary to art. 8 FD

- Promoting competition
- Internal market
- Interests of citizens

### Checks and Balances:

- CoCom to advise on any intended veto

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## Each NRA to consult with: (b) Nat. Competition Authority (NCA)

- NRA would be ill advised not to make maximum use of the NCA experience in
  - Definition of relevant markets
  - Determination of SMP
- Consultation does not give NCA veto rights:
  - EU Commission is the custodian of *European* competition law and is consulted too – see (a)
- So NRA to be in the *national* driving seat, in order not to topple the (complex!) tripod of
  - Market definition -> SMP -> remedy

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## Each NRA to consult with: (c) all other NRAs in EU – sheet 1

- Introduction of previous ONP-framework induced NRAs to organise themselves in IRG
  - Created in 1997, as a platform for
  - Exchanging experience and agreeing Principles of Implementation & Best Practice (PIBs) on, e.g.
    - Unbundling of Local Loop (ULL): notably SLAs
    - Long Run Incremental Cost (LRIC) allocation
    - Accounting separation
  - IRG commented extensively on 1999 Review
- Now more *formal* demands for co-operation!

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**Each NRA to consult with:  
(c) all other NRAs in EU – sheet 2**

- New Framework stipulates cooperation of NRAs to ensure *harmonisation* of internal market
- A logical complement to the new, broader powers of NRAs:
  - EU level playing field extended to more markets
  - Prescribed consultations on finding SMP on (18) markets and imposing proportionate remedies
- Procedures closely watched by industry!

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**European Regulators Group (ERG)**

**Set up “to advise and assist” Commission with consolidating the internal market**

- No decisions taken in a legal sense
- Platform for consistent application of EU regulatory framework in all Member States

**ERG members:**

- NRAs from EU-Member states (15),

**ERG observers:**

- NRAs from Accession countries (10) and EEA countries (3)

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## ERG Work Programme 2003 includes

- **Harmonisation of regulatory approaches, e.g., on**
  - Remedial obligations on SMP parties (studied jointly with European Commission)
  - Tariff principles for, e.g.,
    - Mobile Termination Access
    - International Roaming
- **See further:**  
[www.erg.eu.int/activities/workprog](http://www.erg.eu.int/activities/workprog)

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## Independent Regulators Group (IRG)

- IRG continues alongside ERG, at least initially (Strategy of “Act and See”)
- IRG Working Groups form ERG “engine room”
- Thanks to ERG, transparency of IRG work has increased:
  - Consultation procedures
  - Professional discussions with Commission Services
  - Speeches at Conventions (ETNO, ECTA, IOU, CEPT etc.)

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## Contacts with Interested Parties

- **ERG not to be seen as 'Brussels back room' =>**
  - Co-ordinated and co-operative external action
  - Consultation with interested organisations in Europe
    - Business Community
    - User organisations
    - Hearings in European Parliament
  - Significant market input in ERG Work Program 2003
  - ERG agreed transparency policy in January 2003
    - Public consultations and hearings on draft recommendations and PIBs
  - Secretary appointed by Commission in August 2003

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## Some Risks of the new EU procedures

- NRAs and Commission to deal with hundreds of notifications (SMP & Remedies) in the initial period
- Veto powers could be invoked inadvertently or misguidedly (industrial politics?)
  - Challenge for ERG members to defend pure economic analysis, in accordance with competition case law
- Late national Transposition of new Directives (deadline: 25 July 2003!) will reduce effectiveness of consultations

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## Challenges for harmonisation (1)

- **Late** transposition of Directives:
  - Different speeds across the EU lead to divergent regulation in the short term;
  - Timely transposition only by 7 member states: Denmark, Ireland, Italy, Austria, Finland, Sweden, UK
- **Divergent** national transpositions?
  - Instrument of Directives allows national 'flavours' of discretion
  - Commission is the 'watchdog', but...
  - ERG has to bridge any gaps!

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## Challenges for harmonisation (2)

- **Regulatory Competencies for Ministries:**
  - Effective regulations and harmonisation requires positions based on long-term professional considerations, not on short-term national political issues
- **Overloaded consultation procedures:**
  - Effective consultations may require more efficient consultation mechanism
- **National Court Rulings on regulatory action may diverge.**

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## Role of National Courts: Will their decisions be harmonised?

- **Harmonisation of**
  - Laws of member states (infractions procedures)
  - NRA enforcement of EU-based rules and regulation
- **European Court of Justice is last resort**
  - Cases take several years; competition does not wait.
- **How about national courts?**
- **National courts should at least be aware of:**
  - ECJ cases
  - Case law developing in EU member states

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## Networking by National Courts?

- **No less important for national courts to work on harmonised approaches than for NRAs**
- **In some member states, specialised Appeals Board or Court on telecom/competition law.**
- **Could EU facilitate networking by courts, say for**
  - exchange of information; seminars?
  - data bases on case law (including translation!)?
- **EU promise of Harmonisation will fail without co-operation on all 3 levels of the *Trias Politica*!**

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## KEY CONCLUSIONS

- **Challenges for competition & harmonisation**
  - Balancing regulatory predictability and ability to act upon changing market situations
  - Leveraging of market dominance into new areas
  - Harmonisation in jurisprudence
- **ERG should safeguard**
  - European level-playing field for effective competition (=> roll-back of regulation, where possible)
  - EU Competition law principles - not picking winners and losers (technology neutral; no industry politics)
  - And hence: the interests of the end-users

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